CIV/APN/146/82

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAMABELA MOLAPO Applicant

v

MASUPHA MOLAPO Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 24th day of June 1983

On the 25th June 1982 an urgent ex-parte application was launched in the High Court in which the applicant sought the following relief :

"(a) Respondent shall not be restrained from ejecting Applicant from the seven roomed house and out-buildings at Upper Thamae Mejametalana Maseru or disposal of the property pending the finalisation of the problems of the property amassed by Applicant or both parties during the period they believed themselves married.

(b) Respondent shall not be interdicted from going to the seven roomed house and outbuildings at Upper Thamae Mejametalana until it has been awarded to him by order of a competent court.

(c) Respondent shall not be interdicted from going to the seven roomed house and outbuildings at Upper Thamae Mejametalana Maseru until the question of property that both or either party claims has been resolved.

(d) Respondent shall not be restrained from claiming the entire property that was bought, developed or accumulated by Applicant or both parties.

(e) Respondent shall not be directed to negotiate with Applicant on :

(i) The ways of letting Applicant have property that she bought;

/(ii).....

(ii) The ways of dividing any joint property that the parties have.

(f) A liquidator should not be appointed to deal with the matter of division of any property that is joint property in the event of the parties failing to reach an amicable settlement on ways of dividing joint property as directed by the court.

(g) Respondent shall not be directed to reap the six arable lands at Ha Nkokana, keep a record of the yield so that it can be divided in the near future.

(h) Respondent shall not be restrained from disposing or selling the Toyota Landcruiser registration No. A4510 and the Datsun Van registration No.C0650 which Applicant claims.

(i) Why Respondent shall not pay the costs of this application."

A rule nisi was granted to applicant on the 26th June 1982 with certain interim interdicts. Prayer 1(g) and (h) were granted in toto. In terms of prayers 1(a) an additional condition was imposed restraining the respondent from alienating the property subject matter of the dispute. Notice was served on the respondent in the normal way embodying the text of the application as amended including an additional amendment (i) for costs. The application was opposed in its entirety by the respondent who averred that applicant was entitled to nothing and counterclaimed for an order to eject her from the house in Thamae which was shared by both.

After a number of extended return dates and affidavits that ran to perhaps a hundred or so pages, the matter was set down for argument on the 8th of April 1983. At the end of the day the legal representatives of applicant and respondent submitted points of law for adjudication. These are framed as follows :

"(1) Applicant has definitely contributed either singly or jointly with Respondent to the property which formed the estate of the now void marriage.

(2) That even if Applicant has contributed by reason of the fact that her marriage is void ab initio she is not entitled to division of the property.

(3) Whether a woman married by custom while marriage is void ab initio because she knew or did not

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know of the previous civil or Christian marriage can ask for her property or a share in the property forming the estate of the "marriage"?

(4) Respondents view(and he insists on adjudication on this point) is that these proceedings should have been by way of action not application.

(5) Whether this void marriage, even if Applicatnt knew of the previous Christian marriage (a fact Applicant disputes) entitles Respondent to be the sole gainer from it by appropriating to himself the entire property amassed by the parties during the time they believed themselves married, on the grounds that the said marriage was immoral and contrary to Public Policy".

The application involved possible internal conflict of laws and I decided to seek the benefit of assessors advice. This was agreed to by the parties legal representatives. On the 5th May 1983 two assessors joined me Mr. P.S. Matete a retired Judicial Commissioner, and Mr. S. Mohapeloa, both having vast experience in Sotho Laws and Customs. Arguments were reiterated. The judgment is entirely my own although it is not written in disregard or oblivion of the advice I sought.

To answer the points of law posed it is necessary to give some details of the facts - mostly common cause :

1. The respondent Masupha Molapo was married by civil rites in community of property to Malepoqo Mojabeng Molapo at the St Rose Roman Catholic Church in Peka, Leribe district, on the 17th November 1957. They had four children from this marriage and they lived at their matrimonial home at Nkokana, Kolobere, in the district of Thaba Tseka for about twelve years. The respondent had civil service jobs and looked after his father's animals, lands, and other properties. His father is a chief and respondent was his second son. His civil service emoluments were not particularly high but as son of a chief he had some traditional wealth.

2. Whilst the above civil marriage was still subsisting the respondent Masupha went through a fully fledged customary law marriage with the applicant Mamabela in 1969. Three children were born from this customary law union between applicant and respondent: Mabela in November 1971, Matheallra in April 1973, and Sekoala in February 1980.

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3. The applicant Mamabela's relationship with the respondent started whilst he and his civil law wife Malepoqo Mojabeng were living under one roof at their home near Thaba Tseka and after the applicant came to live with them as a lodger. She had been posted as a nurse to that thown's medical clinic or hospital. The relationship developed into the customary marriage above referred to.

4. The applicant avers that she did not know at the time she went through the purported customary marriage that the respondent was married to Malepoqo Mojabeng by civil rites. She thought that he was living with her after a customary law marriage. Her own marriage by custom was not therefore an impediment. She admits however that she discovered later that it was a civil marriage. "Later" in the sense of time she does not disclose but she continued living with the respondent as husband and wife.

5. The respondent avers that the applicant knew the situation from inception by virtue of her living with the respondent and his wife in their matrimonial home for some time and that she was also warned by the respondent's father and others that the marriage with Malepoqo was by civil rites in church. The respondent is Roman Catholic and avers he did not wish to divorce his wife. The applicant he says first resisted and then acquiesced. She opted to go through the customary marriage with her eyes open because it was the only "marriage" that she could contract if a divorce from the civil law wife could not be had.

6. The civil law wife Malepoqo Mojabeng left the respondent with his "new wife" in her own matrimonial home and repaired elsewhere. If she had sued she would have been entitled to a decree of divorce on the ground of the respondent's adultery with an order of forfeiture of the benefits of the marriage. She also would have been entitled to get a declaration that the customary marriage of respondent with applicant was a nullity, but since the tables were turned and it was applicant who initiated the move the right has been superannuated. Malepoqo is therefore still the respondent's lawful wife, and as corollary to this she is ipso facto entitled to her community with regard to wealth and assets accumulated by the respondent to this day.

/Manyaapel

Manyaapelo v Mokhothu CIV/T/90/75 dated 1st April 1976, confirmed on appeal, both unreported but in the press (1976 LLR pp 55 and 281 respectively) is the culmination of a series of decisions that a customary marriage following upon a subsisting civil rites marriage is null and void ab initio. Though it was not clear before, it is now also clear (Makata v Makata (C. of A.(CIV) No. 8 of 1982 - unreported) that the converse, viz, a marriage by civil rites following upon a subsisting customary marriage, the former is also null and void ab initio.

7. Early in 1982 a declaration was sought from the High Court by the applicant that her customary law marriage in 1969 with the respondent was a nullity by reason of his subsisting civil rites marriage. The respondent first opposed the granting of such a declaration and then withdrew his opposition. A decree of nullity was granted to applicant, as also, by agreement, maintenance in the sum of M45 to each of the three children fathered by the respondent. The applicant did not lay claims to any property rights or to a "division" (CIV/APN/80/1982).

8. In the 13 years or so of this void customary marriage property was accumulated by the applicant and respondent apart from what he had with his wife Malepoqo. It should be emphasised that the applicant originally simply supplanted Malepoqo in the matrimonial homestead near Thaba Tseka.

9. That homestead in Thaba Tseka was supplemented by another home, said to be a 7 roomed house, at Thamae near Maseru. No doubt other items were acquired during this time. The construction of the house commenced in 1973 and completed in 1975. In this home lived the applicant and respondent (but only on and off since their respective professions took them elsewhere she at Thaba Tseka and he both in Thaba Tseka and Leribe) the applicant's children from the respondent, her child from a previous affair, and the respondent children from Malepoqo who had not attained their majority, under the charge, in the main, of a relative or a domestic servant. The crunch came after the pronouncement of the declaration of nullity. The respondent proceeded to the Thamae house and ordered the applicant out.

The contention of the applicant was that she is "entitled

to an order directing the respondent to negotiate on ways of letting her get back what she bought, ways of dividing any joint property that the parties have, and failing an amicable settlement, the appointment of a liquidator to deal with the division". His contention is that by her own hand she has ceased to have any status and all the property is his.

The old customary marriage law of the land, i.e. before civil and church marriages became widespread, which did not take into account Christian ideologies, was polygamous. If the man had one wife few problems arose. If the man had more than one wife and if none ended up in divorce or dissolution the husband, both in his lifetime, and after his death, was governed by the law of "houses" each "house" getting a fair share the sesotho maxim being "malapa ha a jane", the heir having a commanding and dominant role. If, in those old days, there was a divorce or dissolution, the only proprietary question was the return or otherwise of 'bohali' cattle and fate of the children but there was no doubt at all about the fact that the wife had strictly speaking to go either to her parents home or her fathers people or sometimes mother's people if the parents were dead. It did not necessarily mean that she did go, for the husband was very often overruled by his own family, so that whilst cohabitation between them ceased, the wife was allowed by the husband's family to have a roof over her head, and also some land to cultivate, or some cattle unless she was the guilty and very guilty party. There was and there is not today such thing as "community of property" much less a "division" in the common law sense.

The modern tendency of custom, confirmed to me by my learned assessors, is that a long duration of relationship in marriage or even concubinage does not necessarily result in the wife or concubine being summarily thrown out. She has been frequently allowed to have, apart from what she brought with her, personal items such as clothes and cooking utensils and some heads of cattle, if go she must. The answer to the problem in Basotho society was one of fair play, enforced, if one may use such a term by persuasion directed on the man by his family, provided no great blame moral or otherwise attached to the woman. The law

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enforcing agency in the past was the family and now, if necessary, the sheriff. The authority for this proposition is Sofonia v Thebe JC 248/47 and comments by Duncan in Sotho Laws and Customs at p.42. But Duncan was writing in 1959, and since then, there has been a plethora of authority, that the old original law can be changed or departed from if the circumstances justify such a course. The cases are collected in Poulter "Family Law and Litigation in Basotho Society" pp 220-222. The case of Mothea v Mothea, 1974-75 LLR p.189 commenced in the local courts and ended up in the High Court. The question of property was dealth with but of course in the context of lay pleadings. An undivorced but abandoned customary law wife was held to be entitled to keep the home site she formerly shared with her husband who had married another woman by civil rites and wanted to move in and expel her.

The common law is that if a marriage is void ab initio because of the existence of a valid former marriage it produces none of the legal consequences of marriage, except that, the "marriage" could in certain circumstances be declared to have been "putative" in which event if there is evidence or a presumption that if one or both parties were bona fide when they celebrated that void second marriage, there exists a universal partnership and the Court will decree that their joint property be equally divided and the children declared legitimate. But this applies if the man and woman go through civil rites ceremonies and either or both bona fide believed they were free of any impediments. (See Hahlo 4th Ed 493-499). In the instant case the respondent knew that he cannot marry another woman by Christian rites since he already had one whom he did not divorce whilst the applicant may or may not have known of the civil rites marriage from inception, but knew later.

In Manyaapelo v Mokhothu, supra, Mokhothu (like the respondent here) had married a woman called Margaret by civil rites. Mokhothu knew that that marriage was not dissolved though divorce proceedings were contemplated, probably the preliminaries even commenced. Mokhothu "married" Manyaapelo (as the applicant did here) by custom. When that customary marriage broke down she sued for a declaration that the customary marriage was null and void and inter alia, sought orders from the Court for division

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of the "joint estate" on the grounds that it (i.e. the null and void customary marriage) constituted a universal partnership. The Court declared the marriage a nullity but declined to order a division. The reasoning is found at pp 4 and 5 of the Judgment. In addition there was a trial and the Court found on balance that the customary law wife knew of the impediment. The case was confirmed on appeal but it should be pointed out that there was no cross appeal by her against the refusal of the Court a quo to declare that there was a universal partnership. The "marriage" was shortlived and there was probably little joint estate to bother about. The Court of Appeal (per Smit JA) did not deal with the problem of property rights, so at that level, the matter is still open.

In Theko v Theko (CIV/T/249/82 and CIV/APN/169/82 dated 31st August 1982 - unreported) the roles of the parties were reversed. The facts were perhaps similar to Mothea v Mothea, supra. Theko husband had firstly married a woman by custom. Whilst that customary marriage was subsisting, he married another woman by civil rites in community of property. Mr. Maqutu on her behalf sought a declaration that that civil marriage was null and void ab initio. I refused to accept his proposition, but held, on the facts, that the plaintiff lady in the civil marriage had entered into it by means of misrepresentation and the marriage was voidable at her instance. The marriage was rescinded on this ground and it was on this ground that I ordered that the property benefits which she had contributed to the voidable contract be recovered and the parties should, as regards property, revert to the status quo ante. The "marriage" was also short lived.

My view that the kind of marriage in Theko's supra was voidable not void was tested in the Court of Appeal in Makata v Makata, supra, where the facts were similar. It was there held that the civil rite marriage was void ab initio, not merely voidable at the instance of the aggrieved party. Makata v Makata per Goldin JA) did not however deal with the property rights of the parties consequent upon such a declaration but Mr. Maqutu asks me to adopt the ratio (of restoring the parties to their original position as to property) of the decision in Theko's

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and to jettison the decision in Manyaapelo v Mokhothu which had the same facts as the case before me. I have not been persuaded that I ought to change my mind simply because this "marriage" was of longer duration and more materially successful than Manyaapelo's case supra.

My answers in a nutshell to the relevant questions put for adjudication before me are as follows :

Clause 2: No, the applicant is not entitled to a division of the joint property acquired by the parties as if they were civilly married in community of property because the type of relationship the parties entered into does not produce the same consequences as a civil marriage. At common law the status of the parties was one of concubinage and if he or she hands over to the other party, an article, an income, a salary, or property etc. either of the parties may upon the break up of that relationship, if no agreement is reached, sue for the return of the article, income, salary or property etc.. The solution to the problem depends upon the intention of the parties, express or implied, at the time or the times of the giving and the taking. It is a matter of evidence and onus of proof and the right to sue has nothing to do with "division" of a "joint estate".

If I am wrong, and if it is open to the Court to declare a void customary law marriage "putative" and if the determining factor for the application of the principle is knowledge before or at the time of the celebration of the customary ceremony, there is a dispute that can be resolved only after hearing evidence viva voce; This is a matter of onus and proof on balance of probabilities. If the answer(given by the Court) is that she did not know, a further question arises on whether her subsequent knowledge makes a difference to the principles to be adopted when ordering a division, i.e. can a division be decreed in respect of property acquired after that knowledge.

Clause 3: Yes, the applicant is entitled by customary law to a share under certain conditions and this irrespective of whether she knew she was doing wrong before, at, or after, that customary ceremony.

Clause 4: Yes, the respondent has by and large a sound

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point but the application was justified if the applicant entertained (as she did) reasonable fear that she and her children were about to be molested and forcibly evicted or her separate property summarily confiscated. The applicant however should have sought the rule nisi as an interim measure pending the issue of a summons setting out her claims against respondent and the determination of the dispute, and conversely the respondent should not have attempted to assert his rights, real or imagined, without resort to a Court order.

Clause 5: The relationship entered into between the applicant and respondent was illegal and void. It is not uncommon in Lesotho. Morality and Public Policy are not static and change with the times. There is no need to adjudicate on this point because the aggrieved party has a remedy certainly under customary law possibly under the common law on some ground other than the concept of "division" in the law relating to marriage.

The difficulties and suggested solutions in these conflict situations have been discussed by Poulter with reference to both Lesotho and South African cases in a small book entitled "Dualism in Lesotho" especially at pp 23-34, 40-45, 64-70, and 72-76. In some countries a mistress is now allowed to share her paramour's property with his lawful wife. This I think has come about by legislation, or may be by liberal judicial interpretation of legislation rather by development of the common law.

I have attempted to answer the points raised and will extend the rule for six weeks for the parties to make up their minds what to do and I will also reserve the question of costs.

CHIEF JUSTICE
24th June, 1983

For Applicant : Mr. Maqutu
For Respondent: Adv. G.N. Mofolo