

IN THE HIGH COURT OF LESOTHO

In the matter of :

BLANDINA KOMANE Plaintiff

v

JOSEPH MOKHESENG KOMANE Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 28th day of June, 1983

This is an action in which the plaintiff wife Blandina Komane ^{seeks} a decree of Judicial Separation a mensa at thoro from her husband the defendant Joseph Komane, custody of the three children (they are and always have been with the plaintiff) forfeiture of the benefits of marriage, maintenance for herself in the sum of M50, the children in the sum of M30 each; and for further or alternative relief.

The trial took an unusually long time to conclude. The plaintiff swore that she married the defendant at the Roman Catholic church at Bethany in the district of Berea on the 23rd January 1974, lived and cohabited with him for many years during which three children, two girls and a boy were born, in December 1971, May 1974, and May 1977. It will be noticed that the first child was born before the marriage was allegedly celebrated in church and the plaintiff testified she had previously married the defendant by customary law after she had been seduced by him and lived with his parents at their home in Seeiso village but when a short while later, they were given a plot, moved to their own matrimonial home, in the same village, in 1973 and remained there until she was finally expelled by the defendant in 1982.

The defendant denied that he married the plaintiff either by customary law or by civil rites in church and denied that he is the father of the three children.

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The plaintiff produced the civil marriage certificate (Exhibit A) purportedly a copy of the certificate obtained at the ceremony which had been lost or mislaid or destroyed allegedly by the hand of defendant who had possession of it. She called four witnesses:

1. Ernest Johane (PW2) who testified that he attended the ceremony at the request of the defendant and knew the parties living as man and wife both before and after the church ceremony, at Seeiso, the defendant's parental village.

2. Ntai Komane(PW3) the defendant's elder brother who testified that the plaintiff and defendant married firstly by custom and lived together at his own parent's home, and then at their own plot at Seeiso. He knew that they went through a church marriage though he himself was not present at the time.

3. 'Majonathan Alice(PW4) the chieftainess of Ha Seeiso the home of the defendant's parents and the defendant's own home who testified that she knew them as man and wife. She was acting chieftainess in 1982 when her husband was away and the plaintiff came and complained that she and the children had been ejected by the defendant who wanted to bring another woman to her house. She said she "confronted" the plaintiff and defendant. The defendant complained that the plaintiff did not cook for him and acquired property which he did "not know about". The plaintiff remained at her (the chieftainess') home for about a month, during which time the chieftainess wrote to the defendant's employers, the L.M.P. Special Branch in Maseru, to come and intervene in the domestic dispute.

4. 'Mamoletsane Mophethe(PW5) the plaintiff's mother who confirmed the customary law marriage as well as the church marriage. She produced a bewys Exhibit C 1 dated 29th January 1979 which she claims is evidence of the defendant's parents settling some or all of the 'bohali' in addition to those paid for the seduction, and minutes of a meeting Exhibit C 2 at a chief's court, confirming payment of the 'bohali' cattle by the defendant's father on 17th March 1979. She swore she arranged for and was present at the church ceremony before Father Shea on 23rd January 1974.

The defendant was represented at the early stages of the trial by Mr. attorney Molyneaux who cross examined the plaintiff and three other witnesses but then withdrew.

The upshot was that the defendant conducted his own

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defence commencing from the evidence of the fifth and last witness who was plaintiff's mother.. He also made the submissions at the end of the trial.

Mr. Molyneaux cross examined the plaintiff and three of her witnesses closely and extensively. He produced and showed the plaintiff another copy of the marriage certificate procured by the defendant on 5th March 1983, Exhibit A2 which was in some respects at variance with the copy produced by her Exhibit A1. Mr. Molyneaux also put to the witnesses the defendant's version of the facts as he (defendant) will swear to them in due course. It was this: that the defendant did seduce or elope with plaintiff; that their respective parents wanted them to convert the seduction into a customary marriage (payment of more cattle - number to be agreed - in addition to the normal six payable for seduction) and that he (the defendant) refused; that his parents nevertheless accepted her and she lived in their home but then found for her another place in the village; that she had acknowledged in writing that the defendant was not the father of her children, Exhibit B; whether she would be surprised if Father Shea will say he never married them at the Catholic church at Bethany; that at the time of the alleged church ceremony on the 23rd January 1974 defendant had just arrived from the mines and had stayed at his parental home and then proceeded to undergo a course in agriculture at Matela on the 7th January 1974 and remained at the course throughout its duration until November.

The plaintiff agreed there was an elopement at first but denied that the defendant refused to convert the seduction into a marriage and asserted that he did; she denied that she had lived with his parents all the time but for 5 months only and then moved into a new joint home with the defendant; she agreed that he was then working on the mines but came home periodically, and insisted they lived together; that he fathered all three children; that whilst she did not see the original of Exhibit B the copy produced to her in cross examination bears her handwriting in the first line "Ha Mantsane Komane"; that this was her married name, she being the mother of Ntsane fathered by Komane (the defendant); that she never acknowledged the three children were not his, explaining that as she and defendant used to correspond, he must have procured this writing from one of her letters and himself filled in the text which bears his handwriting and signature; that she did go through a

civil marriage ceremony conducted by Father Shea on the 23rd January 1974, that the defendant and two witnesses were present. She was somewhat confused about the dates and who was actually present at this ceremony, about banns and the date the defendant had gone to attend his course at Matela, but asserted that it took place before he went there.

The defendant took the oath and called one witness. He denied all what had been said against him by the plaintiff and the witnesses. He produced a copy of a certificate from the Department of Agriculture Exhibit F that he attended and passed a course held between 7th January 1974 and November 1974, and copy of the regulations that governed the course which did not allow him to leave for home Exhibit G. His witness swore that defendant was present every day in Matela throughout the course. The defendant referred to the Laws of Lerotholi s.34(1) Part II (extract Exhibit H) which provides that a customary law marriage is valid not merely because the respective parents agreed on the amount of the 'bohali', for the couple must in addition have consented to be married and he did not consent. He produced two letters written by Father Shea who allegedly celebrated the civil ceremony in Bethany, one dated 28th April 1982 Exhibit D (in English) and another dated 4th May 1982 Exhibit E (in Sesotho) in the first of which Father Shea writes that no marriage was celebrated between Joseph Komane and Blantina Masireletse (maiden name of plaintiff) because she did not attend which advice was reiterated in the second letter addressed to the Father Chicione who was then the priest in Bethany.

One must perforce start with the proposition that the production of a certified copy of the register is prima facie evidence that a valid marriage had taken place and in, favorem matrimonii, that a formal defect will not necessarily always render the marriage null and void.

In view of this conflict the Court had no alternative but to require the attendance of Father Shea (whom the defendant did not wish to call) and to order that arrangements be made for the original register to be brought from Bethany Mission to Maseru. The Court heard the evidence of Father Shea and later proceeded with the parties, Mr. Moorosi, and staff, to inspect the original register which had been brought to the Catholic Church Secretariat at Maseru.

The father Shea (aged 62) in his examination in chief

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testified that he did marry the plaintiff and defendant at his Bethany church in 1974 and knew the parties especially the plaintiff and her parents very well. He had complied with the formalities. He thought the extracts Exhibits A1 and A2 were correct copies of the register. He could not quote the gazette which pronounced him as a marriage officer saying he has been one for some thirty five years since British District Commissioners were in this country and no one had questioned his credentials before but the church authorities would confirm that he was so appointed and so would the current District Coordinator. When asked about the two letters he gave the defendant (Exhibits D and E) he replied that he had left Bethany mission in 1975/76 and had been ill for some time. He was then transferred to Gesthmany mission. One day in 1982 out of the blue, that would be the 28th April 1982, the defendant came to him and said something to the effect that he was a bachelor and that someone was saying that he was married to Blandina Masireletse in 1974, and the defendant asserted he was not in fact so married. Father Shea explained that he must have celebrated over 1000 marriages and could not remember the faces of those whom he joined in union. He accepted, as a Christian, the word of the defendant that he was not married. Father Shea's evidence in chief was quite evidently based on knowledge gained subsequently to the dispute and before the case came up for trial. Unless he is a complete rogue, which he did not strike me to be, he must have celebrated a ceremony of some sort with the parties present.

The original register which the Court inspected and examined at the Catholic Secretariat was quite old but well preserved. It was of the ledger type with pages originally in blank, but when examined, was found full of marriage entries celebrated between various persons. It was not the type of register that automatically incorporated the requirements of the Marriage Proclamation 1911 and was incapable of providing copies unless the priest used three identical pages, or unless he had available, and separately, the form DC 154, for him to complete. I do not think Bethany church had this at the time in question. However in a few pages one of the priests in charge at the time appears to have reproduced, using a ruler or by making lines, the set pattern of the form DC 154 (See Exhibits A1 and A2) whilst in others the information was shorter. In the page Ref 2/74 the plaintiff and defendant's marriage was recorded, the date is given, the parties names were giveⁿ; their

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purported signature^{and the name} of the priest who solemnised it, namely, Father Shea. Any one can see it is the same signature as appears in the letter he gave to the defendant Exhibit D. The register had a hardcover upon which was written in bold and capital type the words "Marriages Secrets" "Private Marriages". In the page under reference someone added, in different ink and different handwriting of Father Shea, a few words showing the village from where the parties had come and their ages. The number of the marriage also seems to be in different ink. We have no evidence as to who inserted these and when. A photo copy of the cover and the relevant entry are Exhibits I and J. If we look at the certified copies, Exhibits A1 and A2, signed by the Father Chicione on the 7th and 5th March 1982 respectively we can at once see that that Father, with respect, must have invented something, or filled in something communicated to him by the person who requested the extract and fed him with the information, which the Father could not have obtained from the register.

Now it was put to the chieftainess of Ha Seeiso that Blandina acknowledged in Komane's presence at the confrontation she made that the three children were not fathered by him and that the document (Exhibit B) was executed in her presence and she affixed her stamp. The chieftainess denied this and gave the following explanation:

The plaintiff had complained to her after her expulsion from her home by the defendant. She understood he was employed in the Police Force. She accordingly wrote a letter, or caused a letter to be sent, to his superiors at Police Headquarters to come and help in resolving the dispute.

We know from the plaintiff and her mother that they in fact went to Police Headquarters to complain about the defendant to find out from his records what information he had given when recruited. What the headquarters officer in charge told the plaintiff and her mother is inadmissible in evidence for he was not called to testify. There is no doubt however that the defendant was questioned by his superiors.

The chieftainess testified that sometime after the confrontation, the defendant appeared at her administrative headquarters and pretended that he was coming on a mission he had been sent to investigate on the orders of his superiors in the Special Branch and wanted her to give him blank papers

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papers and her rubber stamp. Believing this she handed him the papers and her rubber stamp and that is how, may be, the defendant managed to stamp it on Exhibit B. Exhibit B by the way is written on part of a torn fullscap paper..

The defendant did not say (nor did he argue) that he went through a civil marriage but that the ceremony was invalid by reason of non compliance with the Marriage Proclamation 1911. He says that it did not place because if it did we would not have seen all these discrepancies. There was, on balance of probabilities, abundance of evidence of both a valid customary marriage after the seduction and a form of church marriage in January 1974. I cannot for one moment believe, having seen both parties and their witnesses in the box, that the plaintiff and her family, the defendants own family, and his friend the witness invited to the civil ceremony, with Father Shea aiding and abetting have all conspired against the defendant. On the contrary what I can discern is that the defendant is a man capable of inordinate deception and deviousness.. Neither he, nor his witness, struck me as persons who have any regard for the truth. Now the distance between the parties matrimonial home at Seeiso and Matela where the agricultural course was taking place has been described as from the High Court to the Leper Settlement, originally agreed on when his attorney was present at a distance of approximately 3/4 miles or 4.5 - 6 Km.. The defendant in evidence says it was 1000 Km, which was impossible considering the geographical length and breadth of Lesotho, and when this was pointed out, he replied it could have been 400 Km or 100 Km but the fact of the matter was that it was "far" and since there is a certificate Exhibit F that he attended the course from the 7th January 1974 to November 1974 and since the regulations of the course a copy of which he had produced (Exhibit G) did not allow him to go home, the register, the witnesses, everyone, is lying when they say he was at the church on 23rd January 1974. Further questions revealed however that this was an adult course, that the students were not confined to a hostel with lock and key and certainly no daily attendance register was produced certifying that on that day he was not absent. The witness he called was speaking of events that had taken place over nine years previously. Unless one had kept a full diary, very few could give, unless he kept notes or a diary would have been to effect that to the best of his recollection, the defendant was not absent from the course on any day.

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The only question, it seems to me, is whether the defendant and the plaintiff are validly/^{married}and they could only have been validly married if the requirements of the provisions of the Marriage Proclamation 1911 which was the statute applicable at the time the purported marriage was celebrated on 23rd January 1974, was complied with. (There is a new Marriage Act which came into force later in August of that year.) I will proceed to examine this.

Form DC 154 (Exhibits A1 and A2) is not a form provided for by way of schedule to the Proclamation. It was probably designed by some official, many years ago, in such a way as to embody the requirements of s.16. The printed certificate incidentally states that it is issued in terms of s.11 of the Proclamation. I take this as a printing error.

The defendant pointed out in argument that ss 8, 13 and 16(1)(2) and (3) of the Proclamation have been contravened because the entries in the original register do not comply with the requirement of the Proclamation since :

- (a) the ages and residence were not put by the priest but by someone else,
- (b) the priest omitted to put the status of the parties i.e. whether widower, bachelor, widow or spinster,
- (c) the priest omitted to state whether the marriage was celebrated after banns or a special licence,
- (d) the register is silent on whether the marriage was by consent of the parties themselves or their parents,
- (e) no evidence of a duplicate having been sent to the Registrar of Marriages,
- (f) that Father Shea has not, when giving evidence, produced the gazette or other authority appointing him as marriage officer.
- (g) that the certified copies (A1 and A2) of the original register do not bear a 25 cent stamp as required by the Proclamation and were inadmissible in evidence by virtue of s.15 of the Stamp Duties Proclamation No.16 of 1907, so the Court acted illegally by admitting them in the first place,
- (h) the copies, Exhibits A1 and A2, though certified as copies of the original register are at variance with each other as well in that
 - (i) the "consent" in Exhibit A1 is stated to be "their own" whilst the consent in A2 is "their parents",
 - (ii) the residence of the spouse in A1 is put as Ha Moratha Ha Fola, but in A2 it is only Ha Moratha.
 - (iii) in both certified copies the priest

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certifying the marriage was unable to say if there were banns or a special licence since he left that space with a dash,

- (iv) that while in Exhibit A1 it is stated the certificate was a copy of the "original marriage register" in Exhibit A2 it stated it was a copy of the "original Marriage Religious".
- (v) the heading of the register speaks of "Marriage Secrets" and "Private Marriages" and this proves that the marriage did not take place.

Some of the arguments raised by the defendant are sound but some are not.

(a) There is a presumption that Father Shea was ^{appointed} properly Marriage officer (Ex-Parte Azar 1932 OPD 107, Ex-Parte L 1947(3) SA 50)

(b) The Stamp Duty Proclamation of 1907 has been repealed by the Stamp Duty Order 1972 which, like its predecessor, gives the Court power (s.13(b)) on payment of a penalty to revenue, to allow the party guilty of the omission to have it stamped and produced.

In this instance the Court did not notice this omission, the defendant's attorney did not object timeously or indeed at all when Exhibit A1 was produced, and he himself on behalf of defendant also produced another certificate Exhibit A2 which was also not stamped. Since the decision of the Court is based on the entry in the original register the effect of non stamping will make no difference.

I am unable to see something as sinister in the original register as the defendant wants me to believe. Tampering in the entry I could see but a conclusion that a fictitious ceremony was inserted therein I do not. The marriage however must be declared null and void and it follows that Judicial Separation a mensa et thoro cannot be granted.

That, however, is not the end of the matter, for as I said I reject the defendant's evidence that he was absent from the ceremony. It is clear that the plaintiff bona fide thought herself to be validly married by the church under the Proclamation, and is entitled at common ^{law} for a declaration that the marriage was putative, that a universal partnership exists, and that the children are in any event, legitimate. I also

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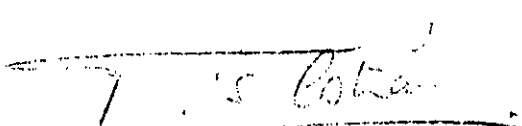
believe that they validly married by custom before.

The plaintiff seeks "further and alternative relief". Although the matter did not form part of the pleadings all the points at issue have been canvassed and covered by this trial and the Court has been able to reach decisions on the facts. It would be an exercise in futility to absolve the defendant from the instance today, but on fresh pleadings tomorrow to grant the plaintiff the relief to which she is entitled at common law ^{and} by customary law, and in any event by the Statute providing for maintenance of children. (Deserted Wives and Children Proclamation No. 60 of 1959.

In a nutshell:

1. The church marriage, though null and void for non compliance with the formalities, the plaintiff had entered into it in good faith and the marriage is putative.
2. I declare she is entitled to the division of the joint property on the basis of a universal partnership.
3. The children are declared legitimate and fathered by defendant.
4. In addition (based on a salary of M157 nett) the defendant will pay M20 per month maintenance to each of the children through the Registrar or the office for Legal Aid with effect from 1st August 1983. The plaintiff, according to the authorities, is not entitled to maintenance since she gets part of the joint property. The defendant will also pay the costs.

May I just warn the defendant that if he goes through a civil ceremony of marriage with another woman that that marriage will be null and void unless he first divorces the plaintiff to whom he is married by custom if he is able to. (Makata v Makata (C. of A (CIV) No. 8 of 1982 - unreported). If he fancies another woman, and marry her he must, it can be done only by customary law.


CHIEF JUSTICE
28th June, 1983

For Plaintiff : Adv. Moorosi

For Defendant : In Person