CIV/APN/98/83

IN THE HIGH COURT OF LESOTHO

In the Matter between

PASEKA 'MOTA — Applicant

and

DAVID MASUPHA — 1st Respondent
P. LEHLOENYA (N.O.) — 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 5th day of September, 1983.

On 17th May, 1983, the applicant filed with this Court a notice of motion in which he moved this Court for an order in the following terms :

"(a) Declaring as null and void the "marriage" that was purported to be entered into on 19th September, 1980 between my daughter SEABANE 'MOTA and one DAVID MASUPHA (hereinafter referred to as 1st Respondent).

(b) Daclaring as null and void the purported act by P. Lehloenya (N.O.) (hereinafter referred to as 2nd Respondent) of solemnising the marriage between SEABANE and 1st Respondent.

(c) Compelling 1st Respondent to maintain the minor child a boy allegedly known as Seeiso born in 1982 at M90 per month.

(d) Directing 1st Respondent to pay the costs of this application and the second Respondent only in the event of his opposing it."

It may be convenient to set out the history of this matter. It would appear that applicant's daughter,

2/ Seabane 'Mota .....

Seabane 'Mota was born on 16th February, 1961. In 1979 she and 1st Respondent wanted to get married. As a minor she required applicant's consent to enter into a valid marriage. Her attempts to obtain applicant's consent were unsuccessful. In an attempt to get married by civil rites, she and 1st respondent then approached 2nd respondent who was a District Co-ordinator in Maseru district and as such a marriage officer. Seabane admittedly deceived 2nd respondent that she was of age. On the basis of that deceipt, 2nd respondent solemnized the marriage on 19th September, 1980 and immediately thereafter telephoned the applicant, who was also employed in Maseru, confirming that he had just solemnized the marriage between Seabane and 1st Respondent. Applicant expressed his surprise at the news and pointed out to 2nd Respondent that his daughter was under age. She could not, therefore, have entered into a valid marriage without his written consent. Thereupon 2nd Respondent decided to withhold the marriage certificate from the parties to the marriage.

Faced with that predicament, on 12th November, 1980, Seabane filed with the High Court CIV/APN/212/80 in which she sought an order couched in the following terms:

> "(a) that the High Court should exercise its powers as upper guardian of all minors to protect me the Applicant from being abused of a parental power by the Respondent.
>
> (b) The High Court authorising the Applicant to marry or compelling my father the Respondent to allow me to marry.
>
> (c) Such further or alternative relief as this Honourable court may find appropriate.

3/ (d) ....

(d) Directing the Respondent to pay costs of this application."

On 15th December, 1980, applicant intimated his intention to oppose that application and accordingly filed opposing affidavit. Then nothing was heard of that application until the 17th May, 1983 when Seabane filed with the Registrar of this Court notice of withdrawal which was duly served on her father on the same date. On receipt of the notice of withdrawal, Seabane's father immediately filed the present application in which he prayed for an order of this Court against the 1st and 2nd Respondents as aforesaid.

In his founding affidavit, the applicant averred, inter alia, that at the time 2nd Respondent solemnized the purported marriage between Seabane and 1st Respondent, the former was under age. He, as the father and guardian of Seabane, had not granted her consent to enter into a marriage which he considered to be not in her interest. She could not, therefore, have concluded a valid marriage contract. Wherefore, he prayed this Court for an order in terms of the prayers set out in his notice of motion.

Only the 1st Respondent opposed the application. He averred, in his opposing affidavit, that after he had been in love with Seabane, they decided to get married to each other. However, applicant refused to receive 'bohali' from his parents. He and Seabane were, therefore, left with no alternative but to get married by civil rites.

At the time of the marriage he was 21 years of age and Seabane had assured him that she too was 21 years old. He, therefore, entered into marriage with Seabane bona fide.

4/ .....

When later on he learned that at the time of marriage,Seabane was in fact still a minor, they decided to institute CIV/APN/212/80 in which they were asking the High Court as the upper guardian of all minors to grant consent for Seabane to marry or compel applicant to grant his consent. The application was not pursued because soon after it had been postponed, Seabane became of age.

Applicant had failed to exercise his rights as a guardian to have the marriage declared null and void between 1980 and 1981 when he was still Seabane's guardian and he could not do anything about it after Seabane had become of age. The marriage was then their affair and applicant had no locus standi to institute these proceedings. 1st Respondent, therefore, prayed that this application be dismissed with costs.

No replying affidavit was filed.

It is common cause that when on 19th September, 1980, 2nd Respondent solemnized the marriage between 1st Respondent and Seabane,the latter was still a minor. Whether or not the Applicant had refused to accept the 'Bohali' from 1st Respondent's parents does not, in my opinion, affect the validity of 1st Respondent's marriage with Seabane who was admittedly a minor at the time of the marriage. What is of material importance is that at the time of the solemnization of the marriage, Seabane was still a minor and the validity of her marriage was therefore, to be governed by the provisions of the Marriage Act No. 10 of 1974 of which S.25(1) reads in part:

"25(1) No marriage officer shall solemnize a marriage between

5/ parties of .....

> parties of whom one or both are minors unless the consent of the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing: ....."

(my underlining)

I have underlined the word shall in the above quoted section to indicate that in my view, by the use of that term, the legislature clearly intended the requirement of a written consent to be mandatory for a valid marriage where either or both of the parties to the marriage is a minor. The absence of such consent renders the marriage void ab initio and not merely voidable. It is no marriage at all right from the beginning. As Hahlo puts it in his invaluable work, The South African Law of Husband and Wife (14th Ed) at p. 487:

> "The nullity of a void marriage is absolute. It may be relied upon by either of the parties, even after the death of the other, or by any interested third person, even after death of both of them."

As we have seen, applicant deposed that as soon as he was notified that CIV/APN/212/80 had been withdrawn, he filed the present application. Indeed, the notice of withdrawal in CIV/APN/212/80 is dated 17th May, 1980 which is the same date as the date on which this application was filed with the Registrar of this Court. In Wells v. Dean Willcocks 1924 C.P.D. 89 at p. 92 Gardiner, J. is reported as having said :

> "no lapse of time would operate as a ratification. The so-called marriage

is absolutely void, it is no marriage at all."

On the authority of this decision, I have grave doubts whether, even if there were delays in instituting these proceedings, any such delays would have the effect of changing the status quo. If a marriage which is null and void ab initio is no marriage at all, it seems to me sensible to say such a marriage cannot be ratified even by any delays in instituting court proceedings to have it declared so. To hold the contrary would tend to obscure the distinction between a void and voidable marriage.

Therefore, 1st Respondent's suggestion that *because applicant did not exercise his rights to have* the marriage declared null and void between 1980 and 1981 when Seabane was still a minor, there was nothing he could do after she had reached the age of majority, seems to me untenable.

In the light of all that has been said, it is obvious that I take the view that 1st Respondent and Seabane were never and are not legally married to each other and I so declare. The significance of this declaration is merely to enable the marriage register to be corrected. Costs are awarded to the Applicant. I make no order as regards the minor child's maintenance. It requires evidence which may be led before the magistrate courts.

B.K. MOLAL
JUDGE

5th September, 1983.

For Applicant : Mr. 'Mota (in person)
For Respondent: Mr. Maqutu.