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In the applicat

PAKI MOAKI

Applicant

VS

MOJABENG MOAKI	1st Respondent
RETSELISITSOE MOAKI	2nd Respondent
MATHEAME MOAKI	3rd Respondent
THESELE MOAKI	4th Respondent
PALLO MOAKI	5th Respondent
TAU-KOBONG MOAKI	6th Respondent
KEHANNE MOAKI	7th Respondent

J U D G M E N T

Delivered by the Honourable Acting Chief Justice Mr.  
Justice J.L. Kheola on the 1st day of October, 1986.

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On the 5th September, 1986 the applicant brought an application ex parte and sought an order in the following terms:

- "1. That a Rule Nisi be issued returnable on a date and time to be determined by the above Honourable Court calling upon the Respondents to show cause why:
  - (a) First Respondent should not be directed to vacate the premises known as Butha-Buthe Hotel and ~~Bottle~~ Store in the Butha-Buthe Reserve and go and stay at Matamong in the Butha-Buthe Reserve together with the minor children of the marriage who are the Fifth, Six and Seventh Respondents.
  - (b) Second, Third and Fourth Respondents should not be directed to vacate the premises known as Butha-Buthe Hotel together with any other premises belonging to applicant as they are all majors, save that Fourth Respondent can go and live with the First Respondent.

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- (c) Respondent should not be directed not to touch any property belonging to applicant including clothing save the property that Applicant allows them to use at Matamong in the Butha-Buthe Reserve.
- (d) Respondents should not be restrained from trading in any premises belonging to applicant wherever situated.
- (e) First Respondent should not be directed to accept maintenance of R1,050-00 that she claimed from applicant in March 1986 for herself, Fourth, Fifth, Sixth and Seventh Respondents.
- (f) First, Second and Third Respondents should not be directed to hand over the keys of any premises belonging to applicant that are in their possession.
- (g) First Respondent and the two other Respondents should not be directed to hand over the post office box keys which are in their possession.
- (h) Respondents should not be directed to hand over the following motor vehicle to applicant: a Van registration number B 1173, a four wheel drive van registration number B 0270 and ford truck registration number B 0180 International Truck Registration number B. 0316.
- (i) First Respondent should not pay costs of this application."

The Rule Nisi was issued and made returnable on the 15th September, 1986. After several extensions of the rule the matter was finally argued before me on the 1st October, 1986. The rule was confirmed but no order was made as to costs.

What follow are my reasons for the confirmation of the rule. In his founding affidavit the applicant deposed that the 1st respondent is his second wife, married to him under customary law. The rest of the respondents are his children by his marriage with the 1st respondent. All the respondents are living at Butha-Buthe Hotel in

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the Butha-Buthe township which is one of his businesses. On the 4th February, 1986 the 1st respondent assisted by the 2nd, 3rd and 4th respondents attacked him-while he was counting money in the Butha-Buthe Hotel. He tried to frighten them off with a gun which he fired, however, the 1st respondent caught him from behind while the 2nd respondent shot him twice. The bullets went through his body and hit the 1st respondent.

Because of the events of the 4th February, 1986 the family is divided and there is mutual suspicion and fear. Consequently they cannot live under one roof. On the 29th August, 1986 the Resident Magistrate of Butha-Buthe found him not guilty of shooting the 1st respondent but convicted him of attempted murder in respect of the 2nd respondent. He has appealed to the High Court against the conviction.

As a result of the events of the 4th February, 1986 he found it difficult, if not impossible, to live with the respondents at Butha-Buthe Hotel and is now living at Tsime where he has a bottle store run by his first wife. In the mean time the 1st respondent, assisted by the 2nd, 3rd and 4th respondents, is using his Liquor Licence and is trading at Butha-Buthe Hotel without his authority. The 2nd and 3rd respondents are using his clothing which he left behind when he went to Tsime.

The applicant deposed that at the moment he has an overdraft of M550,159.50 with Lesotho Bank and he has attached not only a bank statement showing the overdraft but also a letter from the manager of the Lesotho Bank showing that unless payment of the overdraft is made the matter shall be handed over to the bank's lawyers. The overdraft has not been attended to since the 4th February, 1986 when he went to live at Tsime.

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He has had serious problems with the 1st, 2nd and 3rd respondents. The cause of the problem was that the business premises, i.e. Butha-Buthe Hotel, were used as their residence. Second and Third Respondents had to leave home because they were over 21 years of age and were also taking money from the business. Since the said attack of the 4th February, 1986, they have come back to Butha-Buthe Hotel without his permission. He has now resolved to remove the 1st respondent from Butha-Buthe Hotel to Matamong where he has a house with six rooms; there is plenty of furniture from the hotel with which he could furnish the rooms.

He is offering M1,050 per month as ~~maintenance~~ for the 1st respondent and the minor children excluding the 2nd and 3rd respondents who are now majors and have to fend for themselves.

In her ~~opposing~~ affidavit the 1st respondent deposed that the place in Matamong where the applicant wants her to go and live with the minor children is not a residential house but that it is in fact rented flats occupied by tenants. The vacant ones are not in a habitable condition. She feels that the applicant has failed to provide suitable alternative accommodation as shown in CIV/APN/186/86, and that the place known as Butha-Buthe Hotel is her only home.

She alleges that since the 4th February, 1986 the applicant has not been supporting her and the minor children. She is operating the bottle store at Butha-Buthe Hotel in order to maintain herself and the minor children. She denies that she is the second wife of the applicant because when she married him it was never disclosed to her or to her parents that the applicant had a wife. She refers to the other woman as a concubine of the applicant.

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It was submitted on behalf of the respondents that the present proceedings are res judicata inasmuch as in C.C. 10/86 of Butha-Buthe magistrate court and in CIV/APN/186/86, the applicant sued the same parties and the subject matter of the dispute was the same. This submission must be rejected outright. In C.C. 10/86 the 1st respondent was not a party. In CIV/APN/186/86 the parties and the subject matter of the dispute are the same as in the present application. The previous application was dismissed on the ground that the applicant had failed to provide a suitable alternative accommodation for his wife and children when he sought an order ejecting them from the hotel which had been their only home. This means that if in the present proceedings the applicant is providing a suitable alternative accommodation the question of res judicata does not arise. The judgment was not a final one.

It is common cause that prior to the 4th February, 1986 the applicant and the 1st respondent together with the minor children had been living at Butha-Buthe Hotel as their only home because the applicant has not built any residential homes for his two wives. Because of the events of the 4th February, 1986 the applicant says that he is unable to run Butha-Buthe Hotel because he cannot live there under the existing atmosphere as the respondents and he, hurl accusations at each other and they all feel unsafe in the presence of each other.

I do not think that it is necessary at this stage for me to decide who was guilty for the events of the 4th February, 1986. The fact is that the family fought and the applicant and the 1st respondent sustained injuries. The other fact is that at the moment the animosity among the parties makes it impossible for them to live together under

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the same roof. Thirdly, the applicant's overdraft at Lesotho Bank is standing at more than half a million maloti and it is not being reduced because the applicant is not running Butha-Buthe Hotel. It seems to me that unless the applicant is put back into the position of running the business the whole family is facing a financial disaster which may lead to sequestration.

I do not agree with the 1st respondent that the applicant ejects her from the hotel so that she and the children may live in poverty. He is actually offering her M1,050 per month as maintenance and suitable accommodation. The 1st respondent asked the Court to go and see the rooms offered as the alternative accommodation to satisfy itself that they are not in a habitable condition. I did not find it necessary to inspect the rooms because, in her own affidavit the 1st respondent said some of the rooms still had tenants; this means that they are in a habitable condition. The applicant offered all the furniture being used by the 1st respondent at the hotel.

I came to the conclusion that the rooms (6 in number) offered to the 1st respondent are a suitable alternative accommodation.

The applicant has proved that he is a polygamist and that the 1st respondent is his second wife. He handed in two certificates of declaration of marriage by native custom of the Republic of South Africa which show that he married his first wife Evelina in 1936 and the 1st respondent in 1961. The 1st respondent cannot be telling the truth that for so many years she was not aware that the applicant had another wife. She had been living with that other woman at Butha-Buthe Hotel for a very long time.

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The issue before me is straightforward inasmuch as it does not concern the inheritance or the division of the estate of a polygamist after his death. The issue concerns the marital power of man married under customary law. The position of women married under customary law is described by Duncan in his book *Sotho Laws and Customs* at page 5 in the following words:-

"Traditionally the position of women throughout their lives is that of a minor. Before they married they are the children of their fathers; after their marriage they are the children of their husbands."

Another exposition of the law regarding the status and rights of women married by customary law was made by Lansdown, J. in the case of Bereng Griffith v. 'Mantsebo Seeiso Griffith, 1926-1953 H.C.T.L.R. 50 at p. 54 where he said:

"Under the early Basuto social system, which was wholly polygamist, the husband was the head of the family, with some limited authority over him by his father if still living; each of his wives had a House of her own with cattle assigned to it, and the property of one House could not be used for the purposes of another; the first wife held a position of seniority in relation to the junior wives which entitled her to the respect of the latter. When the husband died, the property of each House devolved upon the eldest son of that House, but the widow and her children were entitled to maintenance out of it. Under such a domestic system there was little room for the exercise of any authority by a wife or widow. Nevertheless, she was not without her rights in respect of her treatment by her husband or his father who might be in a position of some authority as head of the kraal or village, or in respect of the property of her House; nor was she deprived of remedy, for she appears to have had access to the court of the Chief, although usually she would have sought such access through the medium of some male representative."

In the present case the applicant is the head of his two houses but has unwisely not assigned any property to any of his houses. The

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wives have been living together at Butha-Buthe Hotel and the 1st respondent has failed to prove that the hotel was assigned to her house. The mere fact that she has been helping the applicant in the running of the hotel and the bottle store does not mean that the property was assigned to her house. Although the applicant is alleged to own a number of businesses it seems that Butha-Buthe Hotel is the main one which generates a lot of money. Ever since the applicant ran away from the hotel the overdraft at Lesotho Bank has not been reduced. The 1st respondent is still trading at the hotel but she is not prepared to pay the overdraft. She claims that the money she gets from the business is for her maintenance and the minor children. She is not aware that unless the overdraft is paid she may lose the hotel and some other businesses if sequestration proceedings are instituted.

As head of the family the applicant has the right to decide where his <sup>in</sup>wives may live. The marital home is chosen by the applicant and doing so he may not oppress his wife. If he does so the wife has a remedy and may even go to a court of law if the family fails to resolve the dispute. The two wives of the applicant have no residential houses <sup>and</sup> continue to live within the business premises at the hotel <sup>at</sup> Tsimbe bottle store. It is clear that the business properties which the applicant owns fall under unallocated property and the applicant is free to use it as he sees fit. By deciding that the 1st respondent should go and live at Matamong and offering a reasonable amount of maintenance, I do not think that the applicant is acting unreasonably nor in any way oppressing the 1st respondent. She cannot expect to live in luxury when the applicant's business empire is experiencing some financial difficulties.

Reference was also made by Mr. Maqutu, counsel for the applicant, to Hahlo, Husband and Wife 4th edition at page 108 where the learned author says:-

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"The husband has a decisive say in all matters concerning the common life of spouses. By virtue of this power, which cannot be excluded by antenuptial contract, he determines inter alia where the spouses are to live, provided that the wife is not obliged to follow him if he acts unreasonably.

Although the learned author was referring to a marriage under civil rites, it seems to me that even in a marriage under customary law the position is the same, if not worse. Under customary law the husband can remove and return the site of the home and arable lands to the chief. (Duncan, Sotho Laws and Customs, p. 7).

The applicant has proved on a balance of probabilities that living under the same roof with his second wife and her children who have reached the age of majority, has become impossible and dangerous to all of them. As head of the family and the administrator of the estate he has decided to provide alternative accommodation, which appears to me to be suitable. The Sesotho maxim; "malapa ha a jane" has no application in the present case because Butha-Buthe Hotel and bottle store have not been allocated to the second wife. The hotel and other businesses are unallocated property under the administration of the applicant.

For the reasons stated above I confirmed the rule and made no order as to costs.

J. L. KHEOLA  
ACTING CHIEF JUSTICE.

6th November, 1986.

For Applicant - Mr. Maqutu  
For Respondents - Mr. Kolisang.