

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MAMOSIUOA HLEHLISI

Applicant

and

FRANCIS MONYANE

Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 1st day of August, 1988

The applicant is applying for an order directing the respondent to hand over the minor child Teboho to the applicant to be brought up by her; directing that the custody of Teboho should be awarded to the applicant having regard to the interests of the minor child Teboho and directing the respondent to pay costs.

In her affidavit the applicant avers that she is the mother of the late Mosiuoa Hlehlisi who died in January, 1985. The respondent is the father of the late 'Malibuseng who married the late Mosiuoa by christian rites on the 28th April, 1984. (A copy of the marriage certificate is Exhibit A in these proceedings). Respondent's daughter 'Malibuseng died in December, 1984 leaving the child Teboho who was one year old at the time.

The applicant avers that her late son Mosiuoa is her eldest son and heir and as such he was head of the family. It follows that

after the death of Mosiuoa his son Teboho became the heir and shall be the head of the applicant's family when he reaches the age of majority. The respondent refuses to allow the applicant custody of Teboho claiming that he is illegitimate as his late daughter 'Malibuseng was not married. 'Malibuseng eloped with Mosiuoa and came to live with the applicant in October, 1982. The applicant avers that she immediately informed the respondent that her son had abducted his daughter. She also indicated that she wanted to proceed with the marriage. In March, 1983 when he daughter was already pregnant, she paid the first M300-00 which was counted towards marriage (she refers to "Annexure B" to her affidavit which reads as follows:

"It is on the 18th May, 1984 when I, Martin Monyane, receive from Mrs. Mamosiuoa Hlehlisi the bohali cattle, they are in cash amounting to eight hundred Maloti of which three hundred had been paid previously. I am :
Martin Monyane Witness: Mafelleng Monyane)

In his opposing affidavit the respondent denies that the christian marriage between the late 'Malibuseng and the late Mosiuoa which was solemnized on the 28th April, 1984 legitimated the child Teboho who was born in July, 1983. He avers that according to Sesotho custom a child born before its mother is married remains with his mother's family and is a member of its maternal family. The purported marriage was posthumous being payment for "bohali" in respect of the late 'Malibuseng. The "bohali" did not in any way affect Teboho for whom no cattle were paid as is required by Sesotho law and custom. The respondent denies that any cattle were paid for abduction of his daughter 'Malibuseng.

I came to the conclusion that there was a dispute of fact concerning the existence of Sesotho customary marriage and ordered that viva voce evidence be led.

In her evidence the applicant says that her late son Mosiuoa abducted the late 'Malibuseng in October, 1982. They came to her place and lived there as man and wife until she became pregnant in December, 1982. Teboho was born on the 1st August, 1983 at the respondent's place because when 'Malibuseng was seven months pregnant the applicant took her to her maiden home so that she could deliver her first child there in accordance with Sesotho custom. She says that after the child was born she went to respondent's place and bought some cloths for the child. The respondent accepted her and she remained there for three days.

In March, 1983 she paid M300 to the respondent as part of compensation for abduction, and they agreed that 'Malibuseng and Mosiuoa should go to St Paul Roman Catholic church to solemnize their marriage. The M300 she paid was taken as equal to one cow and a calf. In 1984 she paid M500 which was added to the M300 paid previously. After the solemnization of the marriage 'Malibuseng was brought to her (applicant's) home and lived there for four months before she came to Thamae's where she lived with her husband till she died. She (applicant) buried her corpse after the police relations department intervend and told the respondent that his daughter was legally married to Mosiuoa. The respondent was claiming the corpse of 'Malibuseng on the ground that she was not married.

Teboho was taken to the respondent's place by 'Malibuseng for purposes of weaning him and has remained with respondent's family. Before he died Mosiuoa attempted to fetch the child but the respondent refused to release him.

The applicant testified that she continued to pay "bohali" after the death of 'Malibuseng because the respondent insisted that

such payment should be made before he could release the child.

The respondent gave evidence and denied that he ever received any money from the applicant as "bohali" for her daughter or as compensation for her abduction. He denies any knowledge of "Annexure B" to applicant's affidavit and denies that he ever authorized his son Martin to accept the money. He also denies any knowledge of the christian marriage between her daughter and Mosiuoa. He says that his daughter was made pregnant by one Thabang Mofokeng of Bethlehem and Teboho's father is Thabang and not Mosiuoa. When 'Malibuseng was abducted by the applicant's son, Teboho was already born.

Respondent's wife, Mafelleng, gave a very different story from her husband's. Her version is that her daughter was abducted by Mosiuoa in October, 1982. An amount of M300 was paid by the applicant as compensation for abduction and the respondent received that amount personally. Later an amount of M500 was paid by the applicant and was received by her and her son Martin. When the respondent came home that evening he approved what they had done and instructed her to keep the money in her savings account. She says that some time in 1983 the applicant brought her daughter to her maiden home and informed her that she was seven months pregnant. After the child was born the applicant brought some money with which some cloths were bought for the child.

I do not propose to analyse the evidence in any detail because it is very clear that the respondent told the court a pack of lies. He is contradicted by his own wife on all material points in this case. He says his daughter was impregnated by Thabang Mofokeng but his wife denies this. He says that he never received

any money from the applicant but his wife denies this. He gives the impression that he wrote "Annexure B1" to the applicant's replying affidavit under duress but the contents of that document are true as confirmed by the applicant and the respondent's wife. To show that the respondent is a hopeless liar, at one time while he was giving evidence he was asked where his wife was. He said his wife at home in Butha Buthe which is about 150 miles from Maseru. When his wife was pointed out in court, he said she must have arrived while he was already in the witness box. His wife later refuted this and said she had actually come to court together with the respondent and had lunch together. I am not prepared to accept his evidence as the truth.

The evidence of the applicant and the wife of the respondent, which I have accepted as the truth, shows that the late Mosiuoa abducted the late 'Malibuseng and took her to the home of the applicant who immediately sent a message to the respondent that his daughter had been abducted by her son and that she wanted to proceed with marriage and not to pay compensation for abduction. It seems to me that the respondent accepted this proposal of proceeding with marriage because he took no steps to have his daughter returned to him with six beasts as compensation for abduction.

When 'Malibuseng was seven months pregnant the applicant took her to her maiden home to bear her first child. The respondent accepted her and the applicant remained there for three days. It is common cause that the first M300 was paid as compensation for abduction and was paid in March, 1983. At that time Teboho was not yet born. He was born in July or at the beginning of August, 1983.

The second payment of M500 was made on the 18th May, 1984 and it was clearly stated in "Annexure B" that it was for "bohali". At that time 'Malibuseng and Mosiuoa were still alive.

Now the question which has to be decided is whether when Mosiuoa and 'Malibuseng died there was a valid Sesotho customary marriage which had been concluded by their parents. Section 34 (1) of the Laws of Lerotholi (1959 edition) reads as follows:

"A marriage by Basuto custom in Basutoland shall be deemed to be completed when:-

- (a) there is agreement between the parties to the marriage;
- (b) there is agreement between the parents of the parties or between those who stand in loco parentis to the parties as to the marriage and as to the amount of the bohali;
- (c) there is payment of part or all of the bohali: Provided that if the man dies before the woman goes to his parents' house the bohali shall be returned and the marriage shall be null and void."

In the present case there was an agreement between the parties to the marriage because 'Malibuseng agreed to elope with Mosiuoa and remained at the home of the applicant for a reasonable time as her daughter in law.

I am of the opinion that there was agreement between the parents because when the applicant sent a message that respondent's daughter had been abducted by her son, and that she wanted to proceed with marriage, the respondent agreed to this proposal by conduct. If he had not agreed he would have demanded the return of his daughter with six cattle as compensation for abduction. By keeping silent and not taking any action against the applicant, the respondent must be taken to have agreed by conduct.

It can be argued that there was no agreement about the amount of "bohali". The amount of "bohali" has almost become standard. In almost all marriages, except those involving daughters of chiefs,

the amount is twenty head of cattle. In any case, there is no evidence that no agreement was reached as to the amount of "bohali". "Annexure B" shows that the payment was for "bohali" and it must be assumed that there was agreement as to the total amount because the applicant could not start paying for what he did not know.

The second document is "Annexure B1" in which the respondent admits in no uncertain terms that the respondent had finished paying six cattle as compensation for abduction and that in addition to that applicant had paid M400 which was taken as equal to two cattle for "bohali". His argument is that the cattle were paid after the death of his daughter. In law that does not matter as long as agreement about marriage was reached before the death of the woman. Section 34 (2) the Laws of Lerotholi provides that if the woman dies before all "bohali" is paid any balance of the "bohali" which remains unpaid shall none the less be payable.

I have already found that there was an agreement of marriage between the applicant and the respondent before the daughter of the respondent died. And it follows that the applicant was entitled to pay "bohali" even after the death of the daughter of the respondent. In any case, I am of the opinion that the question of whether there was a valid Sesotho customary marriage or not is academic inasmuch as the parties in question entered into a valid christian marriage on the 28th April, 1984 and that marriage legitimated the child Teboho. As put by De Beer, J.P., in Ex Parte J, 1951 (1) S.A.665 at p. 672.

"On due consideration I am of the opinion that an adulterine child is legitimated by the subsequent marriage of his parents. The same conclusion can, however, be arrived at on what are probably surer grounds."

The concept of legitimation by subsequent marriage applies not only to adulterine children but to ordinary illegitimate children. In the South African Law of Husband and Wife, 5th edition, Mahlo puts it as follows at page 148:

"Premarital children of the spouses are legitimated by the marriage of their parents and fall henceforth under the guardianship of the husband. The Wife continues to be the guardian of her illegitimate children by another man."

I have come to the conclusion that even if the Sesotho customary marriage took place after the birth of Teboho, the subsequent christian marriage of his parents legitimated him.

It was submitted that the marriage is null and void because the late 'Malibuseng was a minor when she purported to enter into a christian marriage without the consent of her parents. The marriage officer clearly states that there was parents' consent. I tend to agree with him. The wife of the respondent testified that the priest excommunicated her after the abduction of her daughter and suggested that she must serve a certain punishment or pay something for her excommunication (tefelo) and then after that she must bring the children, i.e. her daughter and applicant's son, so that their marriage could be solemnized. She agreed to this and served her punishment and eventually the marriage was solemnized. The respondent has proved himself to be a liar who is not prepared to accept anything that led to the marriage of his daughter. I believe the marriage officer that both parents gave their consent.

The question of custody is rather difficult because both parents are dead and the dispute is between the grandfather and the grandmother of Teboho. If the father of Teboho was still alive he

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would automatically be the one who is entitled to the custody of his legitimate child unless he was found to be a person unfit to care properly for the child. Upon his death the applicant would be the next in line entitled to the custody of the child.

Unfortunately, the late Mosiuoa failed to get custody of the child till he died; but that does not in any way affect the right of the applicant to claim custody of her legitimate grandson. She has inherited the estate of her late son and ought to inherit the right of custody of Teboho which her son had. The only qualification to the above statement is that the Court as the upper guardian of the minor children must always take into consideration the best interests of the minor child when deciding the question of custody.

In the present case the child Teboho is about 5 years old and has lived with the respondent's family ever since he was born and regards himself as a member of that family. It was argued on behalf of the respondent that awarding custody of the child to the applicant would amount to uprooting him and that would not be in public interest. I agree that there would be an element of uprooting him but he is still very young and can easily forget what has happened.

This child, Teboho, is the minor heir of the estate of the applicant. When he becomes a major he will be the head of the applicant's family and as such he must know his rights and obligations as heir at an early age. He must know the customs of his family because amongst Basotho families there are some minor customs which are not of general application. As future head of applicant's family the child must be trained and must know all members of Hlehlisi's family. The long term interests of the child shall be served by his joining his father's family at an early age.

The child has no rights at the home of the respondent. If he is treated as an illegitimate child he will have no rights to inherit anything when his grandfather and grandmother die. According to Sesotho customary law an illegitimate child who remains with her mother's family when she marries, has the lowest status in her mother's family. As I have indicated above he cannot inherit anything when his grandfather dies, I doubt if even when his unmarried mother dies he can claim any right of inheritance. During rituals at which members of the family follow each other according to seniority, an illegitimate child is usually the last in the line. This can be very unpleasant when he is already an adult because even very small children of her mother's family will come before him. This humiliating situation will continue throughout his lifetime.

I am of the opinion that the respondent should not be allowed to bastardise this child simply because he is not prepared to tell the truth. He is already an old man who may die any time but he is not aware that when he dies he shall leave his grandson in a very unsatisfactory status in the family. I am also of the opinion that the best interests of the child shall be met by changing his status at this early age. He has probably not even started attending school or if ^{he} has he is still in Standard I.

The applicant says that she is in good health and has no other grandsons living with her at the moment. She has lands to plough and sufficient housing in which Teboho will grow. It has never been suggested that the applicant is not a fit and proper person to care for the child and to maintain him adequately.

In the result the application is granted as prayed in the Notice of Motion with costs to the applicant.

J.L. KHEOLA
JUDGE

1st August, 1988.

For Applicant - Mr. W.C.M. Maqutu

For Respondent - Mr. Teele.

On 1st August, 1988 No appearances: Judgment delivered.

J.L. KHEOLA
JUDGE

1st August, 1988.