

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAMOPEI SEMATLANE (born Mokhele)

Applicant

AND

JOHN NKOTE SEMATLANE

Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 19th day of April, 1989

This is an application for leave in terms of section 6 (b) of the High Court Act No.5 of 1978 to institute divorce proceedings against the respondent in this Court. The respondent is opposing this application on a number of grounds.

It is common cause that the applicant and the respondent were married to each other by Sesotho customary law marriage. There are three minor children born out of that marriage. In her founding affidavit the applicant refers to this form of a marriage as a Sesotho customary union. I think this is a mistake. In Lesotho a marriage contracted under the Sesotho customary law is a marriage like any marriage contracted under civil or christian rites

(See section 4 of the Marriage Act No. 10 of 1974). The confusion is caused by the fact that in the Republic of South Africa a marriage entered into under the customs of the black people of that country, is not regarded as a marriage but a customary union which has a lower status than a marriage under civil rites.

The main reason for this application is that the applicant intends to apply for custody of the three minor children of their marriage to be awarded to her. It was submitted that if the Local Court were to decide over these divorce proceedings, it would have difficulty in awarding her custody of the minor children whose welfare and well-being in the custody of the respondent are grossly neglected. It was submitted on behalf of the applicant that if the respondent decided not to claim the return of the "bohali" cattle, then the Local Court would award the custody of the minor children to the respondent.

It is not correct that in every case where the husband claims the return of the "bohali" cattle he automatically loses the custody of the children. The whole thing depends on who is at fault and the welfare of the children. If there is proof that any one of the parties is not a fit and proper person to be given custody of the children, the Central and Local Courts do not award such a parent the custody of the minor children. (See Kubu v. Kubu, J.C. 26/65; Makhooane v. Makhooane J.C. 43/1955 all these cases are quoted by Poulter: Family Law and Litigation in Basotho Society at page 217).

The second ground which was introduced for the first time in the replying affidavit is that the applicant intends to apply not only for the custody of the three minor children of their marriage, but also for their maintenance by the respondent. It was submitted that the Central and Local Courts have no powers to order the respondent to maintain the children where custody has been awarded to his wife. According to customary law where the children go with their mother on a divorce the father's obligation to support and maintain them comes to an end and this responsibility is transferred to the head of the mother's family.

I find the customary law concerning the welfare and maintenance of the children to be very unsatisfactory because it does not regard their maintenance and welfare as the dominant factor to be considered. And to make things even worse the return of "bohali" cattle seems to be a determining factor as to whom the custody of the children must be given. It seems that in most cases where the father claims the return of the cattle for "bohali", he automatically loses the custody of the children. His duty to support them comes to an end unless legal proceedings are brought against him under the Deserted Wives and Children Proclamation No. 60 of 1959, in which case proof must be made that the children are destitute. The question still remains whether after the children have gone to the head of the wife's family and the duty to support has been transferred to the wife's head of the family, it can be said that the father is still a person legally liable to maintain them.

I am of the opinion that in an application like the present one the applicant must show that special circumstances exist which justify the removing of his case from the Central and Local courts to the High Court. As the upper guardian of all minor children this Court is in a far better position than a Local Court to safeguard the interests and welfare of minor children in a divorce case.

As I have already stated I find the question of the custody and maintenance of minor children in divorce proceedings in a Local Court to be very unsatisfactory. A lot of emphasis is given to things which do not really safeguard the interests of the children. It seems that in some cases the wife's father or head of the family may be bound to return the cattle for "bohali" and at the same time be burdened with the support/maintenance of the children who have been awarded to her daughter.

The applicant is trying to avoid all these difficulties. In this Court she will be in a position to pray for divorce, custody and maintenance of the minor children. If she proves that the respondent is not a fit and proper person to be given the custody of the children, she will be given their custody and at the same time obtain a maintenance order for them.

I have come to the conclusion that the applicant has shown that special circumstances exist which entitle her to bring her case to this Court.

It was submitted on behalf of the respondent that the removal of this case from its lawful jurisdiction amounts to forum shopping. I do not agree with this submission because by enacting section 6 of the High Court Act 1978, the legislature intended that under certain circumstances some cases shall have to be taken from the subordinate courts to the High Court. It is doubtful whether this decision will open flood gates for many similar cases to be brought to this Court. The first prohibiting factor to bring such case to the High Court is the cost. The second is that access to the High Court for people who live in remote villages is not easy. Local courts are usually within walking distance from most villages.

In the result the application is granted with costs.

J.L.KHEOLA
JUDGE

19th April, 1989.

For the Applicant - Mr. Sello
For the Respondent - Mr. Maqutu.