CIV/T/727/86

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ADOLPHINA 'MALEEMISA RAMOTHELLO — Plaintiff

and

WILSON TICHERE RAMOTHELLO — Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 30th day of June, 1989.

In this action the plaintiff claims forfeiture of benefits arising before and/or from the marriage which was declared null and void on the 29th September, 1986.

It is common cause that in 1980 the plaintiff and the defendant entered into and concluded a customary law marriage and subsequently the parties entered into a civil marriage on the 30th April, 1983 which marriage was declared null and void ab initio by this Court on the 29th September, 1986 under CIV/T/333/85. The ground for annulment was that at the time the parties purported to enter into a civil marriage the defendant was still married under customary law to his first wife and the said marriage was still in subsistence.

/2.....

In a pre-trial conference held by the attorneys of the parties on the 16th June, 1987 certain points of law were set out for determination by this Court. Those points were stated as follows:

(a) Proprietary consequences of a customary marriage;

(b) Is there a universal partnership in a void marriage where parties lived as husband and wife and worked together?

(c) Effect of a nullification of a civil marriage on the existing customary marriage;

(d) Ownership of the property in paragraph 7 of the plaintiff's declaration.

In answer to (a) above I think that the law was correctly stated by Lansdown, J. in Bereng Griffith v. 'Mantsebo Seeiso Griffith 1926-53 H.C.T.L.R. 50 at 54 where he said:

> "Under the early Basotho 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 purpose 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."

This principle is summed up in the maxim 'malapa ha a jane" (houses do not "eat" one another). The maxim simply means that once the husband has allocated certain property to each of his houses, that property shall remain the property of that house. Each house comprised the wife and her children together with the husband. Such property shall be used for the purposes of that house.

/3.....

This principle is again stated in section 12(4) of Part I of the Laws of Lerotholi which provides as follows:

> "Where property has been allocated to any particular house and the wife in that house predeceases her husband, the property allocated shall remain with particular house to be inherited upon the death of the father by the eldest son of that house and to be shared by him . . in accordance with Basotho Law and Custom with his junior brothers in his own house."

A house may acquire property in various ways such as "bohali" cattle for the girls born in that particular house, property acquired by a working husband and allocated to that house, property acquired by the wife through her own labour and property acquired by boys born in that house before they get married.

In the present case all the property in question was acquired by the plaintiff through her profession as a herbalist. It is common cause that at the time the property was acquired the plaintiff and defendant were legally married to each other by customary law. The legal position is that the defendant, who is a polygamist, cannot take the property of the plaintiff's house and use it for the purposes of his first house. The cattle and scotch-cart were acquired through the labour of the plaintiff and cannot be transferred to another house without her consent. They must be retained in her house for the use and purposes of her house. At the moment the property of the plaintiff's house is being used for the purposes of the first house while the plaintiff is suffering hardships.

I do not propose to deal with the legal position of the marital property regime of divorce in which the parties are married according to Sesotho customary law. That situation does not seem to arise in the

present case because I am of the opinion that the customary law marriage between the parties was not affected by the annulment of the civil marriage. This brings me to point of law (c) posed by the parties.

In the case of a void marriage the parties are not necessarily domiciled in the same country and the decree is merely declaratory of, and does not alter, the existing status of the parties. The object of the decree, however, is to place on record by means of judgment in rem the fact that the marriage entered into by the parties was void ab initio and gave rise to no legal consequences - vide Halsbury (Hailsham Ed., Vol. 10, para.36) See Ex Parte Oxton, 1948(1) S.A. 1011 at p. 1015).

The status of the parties before they purported to enter into a civil marriage was that they were validly married to each other by customary law rites. The purported civil marriage never affected their status because it was void ab initio. It was a nullity right from the beginning and as such had no legal consequences of a marriage. The position would be different if the decree was one of divorce. The customary law marriage that preceded a civil marriage comes to an end at the same time with the civil marriage on divorce because when the parties entered into the civil marriage the customary law marriage is fused into the former. In the present case the customary law marriage could not be fused into a non-existing marriage and it remained in subsistence independent of the void marriage.

I come to the conclusion that the annulment of a civil marriage has practically no effect on a customary marriage which

was existing when the parties entered into the void marriage.

I shall now deal with point (c) above whether there is universal partnership in a void marriage where parties lived together as man and wife and worked together. If both parties were bona fide and they did not enter into an ante-nuptial contract excluding community of property before their "marriage" was solemnized, it must be presumed that they intended to enter into a universal partnership. Accordingly if they have lived together as husband and wife for some length of time, the court may decree that their combined property is to be shared equally between them or their heirs, as the case may be. See Hahlo - The South African Law of Husband and Wife, Fourth Edition p. 497; Mograbi v. Mograbi, 1921 A.D. 274 at p. 275.

In the present case both parties seem to have been ignorant of the fact that because the defendant was still lawfully married to another woman at the time they purported to enter into a marriage, they could not enter itno a valid civil marriage. It may reasonably be concluded that they were both bona fide. I am of the opinion that the parties entered into a universal partnership because their "marriage" was in community of property. In Mograbi v. Mograbi (supra) at page 275 Innes, C.J. said:

> "It is now argued that there was no such partnership established, because there was no proof of an intention to constitute community of property. But such community is one of the results of marriage, unless definitely excluded. And when parties marry it is presumed that they intend community. No further evidence of such intention is needed in the present case. Then it is contended that the onus of proving that the plaintiff earned half of the accumulations has not been discharged. But the Court found that she did earn as much as the defendant and there is evidence to justify that finding."

/6.....

I shall now deal with the evidence led in the present case in order to decide what contribution each party made in the purchase of the property now claimed by the plaintiff.

Plaintiff testified that at the time she "married" the defendant she was already qualified as a herbalist. Her practice as a herbalist thrived extremely well and lots of people came to her for treatment. It was during her cohabitation with the defendant that she bought the property she is now claiming from the defendant. The defendant brought nothing into the "marriage". She told the Court that the defendant used to draw water and was only good in bed (sexually)..

Lekena Ramothello testified that the defendant is his brother. He knew that defendant had no cattle before he married the plaintiff. He had no scotch-cart. However, as soon as he started living with the plaintiff he (witness) noticed a sudden change in the lifestyle of the defendant. He bought cattle as well as a scotch-cart. When defendant went to live with the plaintiff he deserted his first wife and when he was asked why he deserted his wife he said the plaintiff was a rich woman and was a herbalist. Lekena told the Court that the defendant was never a herbalist and no crowds of people visited him at his house but large numbers of people used to visit the plaintiff for treatment of their ills.

Chief Enock Moliboea is the chief of Khanyane. He testified that the plaintiff and the defendant are his subjects and that before the parties got married to each other the defendant did not have any wealth in the form of cattle or a scotch-cart nor was he a herbalist. It was only in 1985 or 1986 that the defendant applied for a herbalist licence.

The defendant testified that before he married the plaintiff he was already a herbalist. He continued to practise jointly with the plaintiff as herbalist. He alleges that he bought the cattle and the scotch-cart with his own money or the money coming from their joint labour. He also had two knitting machines with which he knitted jersyes and sold them.

Mokako Molapo confirmed the evidence of the defendant that he was a traditional doctor because while they were in the mines in the Republic of South Africa the defendant cured one man who was suffering from a venerial disease. On another occasion he used herbs (upella) to expel evil spirits (thokolosi) from the home of a certain priest. He admits the defendant became rich only after he married the plaintiff.

There is overwhelming evidence that the plaintiff was and still is a very popular herbalist who is visited by a large number of people coming from as far as the Republic of South Africa. It has also been proved convincingly that the defendant was not a herbalist while he was living with the plaintiff as husband and wife. His own chief knew that he was a poor man before he married the plaintiff. Only two occasions have been referred to when he used herbs to cure people and that does not mean that he was a herbalist with any sort of practice known to the general public.

I am satisfied that the defendant was not a herbalist and that whatever he contributed during his cohabitation with the plaintiff was not even enough for his own maintenance. He contributed nothing towards the purchase of the property which forms the subject matter of the present dispute. There is evidence by his own brother that the defendant said he wanted to marry the plaintiff because she

was a rich woman. Having lived with the plaintiff for only a few years he has deserted her and taken away all the animals and a scotch-cart and is presently using them in his first house. Even if he had contributed some money or his labour or skill towards the purchase of the property mentioned above, such property must belong to the house of the plaintiff according to Sesotho customary law.

One of the essential elements of a universal partnership is each partner must show that he contributed part of that estate (Mograbi v. Mograbi (supra) at page 275). I am of the opinion that the defendant has failed to prove that he made any contribution in the form of money or his labour or skill towards the purchase of the aforesaid property.

With regard to the sum of M6 000 I am of the opinion that there is not enough evidence that the plaintiff had that large amount of money in her house. It is the word of the plaintiff against that of the defendant. The same applies to the blankets. As far as the horse is concerned there is evidence that it got lost.

Although I have come to the conclusion that the customary marriage between the plaintiff and the defendant still subsists after the annulment of the civil marriage, I am of the opinion that the parties' marital property regime should flow from their universal partnership and not from the customary marriage because when they entered into a civil "marriage" what they had in mind was community of property. In the event of such a "marriage" being declared null and void ab initio a universal partnership is presumed.

In Manyaapelo v. Manyaapelo, 1976 L.L.R. 55 at p. 62 Cotran, C.J. said:

> "The difficulty I find in Mr. Sello's argument is that the void putative marriage Hahlo speaks about and the precedents cited relate to one purportedly entered into by civil ceremony in community of property. The position here is that whether or not there was bona fide, the consequences of the customary marriage would never result in community of property and hence there cannot be universal partnership."

In the present case we are dealing with a void civil putative marriage and not a customary marriage. It follows that there was universal partnership.

For the foregoing reasons, the Court grants an order:

(a) Declaring that the four (4) cattle and a calf together with a scotch-cart claimed by the plaintiff which are in the possession of the defendant must be restored to the plaintiff forthwith;

(b) The defendant must pay costs of suit.

J.L. KHEOLA
JUDGE

30th June, 1989.
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For the Plaintiff - Mr. N. Mphalane
For the Defendant - Mr. W.C. Maqutu.