

IN THE HIGH COURT OF LESOTHO

In the matter between:-

PUSELETSO COSSIE
(duly assisted by her husband)

Applicant

and

'NENA SEKHONYANA

Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 16th day of July, 1990

On the 26th April, 1990 the Court ordered that the matter should go to trial. On the 20th October, 1989 the applicant (now the plaintiff) obtained an order ex parte couched in the following terms:-

"1. A Rule Nisi do hereby issue returnable on the 6th day of November, 1989 at 9.30 a.m. p.m. calling upon the Respondent to show cause (if any) why:-

- (a) Respondent shall not be interdicted forthwith from assaulting Applicant and or in any manner threatening the life of Applicant pending the finalisation of this Application.

- (b) Respondent shall not be interdicted forthwith from visiting Applicant at her home at SEAPOINT and or at her place of work at SEMONKONG METHODIST HOSPITAL, SEMONKONG pending the finalisation of this application.
- (c) Respondent shall not be interdicted forthwith from forcibly removing LEPOQO from Applicant's custody pending the finalisation of this application.
- (d) Respondent shall not be ordered to return the girl PALESA to Applicant.
- (e) Respondent shall not be ordered to pay costs hereof.
- (f) Applicant shall not be given any further and or alternative relief.

2. That prayers 1 (a), (b) and (c) operate with immediate effect as interim order.

In her founding affidavit and her oral evidence in this Court the plaintiff deposed that she and the defendant got married to each other in 1978 and that their marriage was in accordance with Sesotho customary law. At the time of their marriage she already had two children fathered by two men and not by the defendant. The two children were: Palesa, a girl born on the 14th November, 1973 fathered by one Jerome Manyeli; and Lepoqo, a boy born on the 14th August, 1976 fathered by one Masopha Maama. There is one child born of their marriage with the defendant, namely: Nehemiah, a boy born on the 17th July, 1979.

The plaintiff deposed that in 1984 she divorced the defendant in accordance with Sesotho custom. She went to her maiden home with the defendant. She informed members of her family that she was divorcing the defendant on the ground that he frequently assaulted her for no apparent reason. Her family knew of these assaults and had no objection to her decision to divorce him. The defendant did not raise any objections. Members of her family who were present at the meeting were: Her brother Mahao Mahao and his wife, her other brother Molibatli and his wife. Her father was not there because he was in gaol and her mother was at work in Johannesburg.

Although the couple lived as man and wife from 1978 the first batch of bohali cattle was paid in 1982. After this first payment of bohali cattle she was not aware that in August, 1987 the defendant continued to pay bohali cattle as she had divorced him in 1984.

The defendant has been at her home at Sea-Point on several occasions, namely, on the 17th June, 1989; 9th July, 1989 and on the 11th September, 1989. On all those occasions the defendant demanded that the child, Lepogo be handed over to him. When she refused to do so he assaulted her.

After their so-called divorce in 1984 she married one Lerato Leonard Cossie by civil rites on the 16th March, 1988 at the District Coordinator's office in the district of Maseru.

/s/.....

The plaintiff has denied that the two children, Palesa and Lepoqo were legitimated by her marriage to the defendant.

Masopha Maama testified that he is the father of Lepoqo. He had intended to marry the plaintiff and even informed his parents of his intention. They at first agreed that he could do so but they later changed their minds and insisted that as a chief he had to marry a daughter of a chief. Before they changed their minds they had even come to Mahao's family and had given the child the names of Martin Lepoqo.

The defendant deposed that he first met the plaintiff in 1969 when she became his girlfriend. He was already married to his first two wives. He alleges that Palesa and Lepoqo are his children because he not only fathered them but they were legitimated by his subsequent marriage to the plaintiff. In 1982 when he paid the first batch of bohali cattle it was agreed that he was "marrying" the three children who were born before the marriage together with the plaintiff. That was the reason why he had to pay twenty-three head of cattle.

He denies that in 1984 he divorced the plaintiff in a family meeting. He never attended such a meeting. According to him their relations with the plaintiff were very cordial in 1984 and only became sour on the 17th March, 1984 when he found the plaintiff sleeping with a man. He fought with that man and stabbed him on the face with a knife. He later discovered that the man was one Cossie who has purportedly married his wife.

The defendant referred to a document which contains the marriage agreement between himself and the father of the plaintiff. It is Annexure "A" to the opposing affidavit and Exhibit "C" in the trial). According to this document it was agreed that "as for the three children of the daughter of Molise they belong (or go) to 'Nena only."

Molise Petrose Mahao is the father of the plaintiff. His evidence was to the effect that he gave the three children to her daughter. They were not being "married" with their mother. I think this old man was confused and appeared not to know what he was talking about.

Ralishoeshoe Leuta is the author of Exhibit "C" and confirms that the agreement by the parties was that the children born before the marriage were being "married" with their mother.

The legitimation of the pre-marital children at the subsequent marriage of their mother according to Sesotho customary law is stated by Patrick Duncan in his book: Sotho Laws and Customs at page 30 as follows:

"When a child is born to an unmarried woman, it belongs to her parents' family. If later she is married she and her husband may do two things about the child. They may choose to make no arrangements, in which case the child remains a member of its maternal grandfather's family. Or they may arrange for it to be 'married' along with its mother. Normally extra cattle are paid for the child, but it is not necessary for cattle to be transferred. It is

enough if the child is publicly associated with its mother in the marriage arrangements."

The same view is held by Poulter in his authoritative work: Family Law and Litigation in Basotho Society, at page 182 where the learned author states:

"Pre-marital children are clearly illegitimate at their birth, even if their parents were already engaged at that time. However, they may be legitimated by the subsequent marriage of their parents or even of their mother to another man."

According to Poulter the legitimation of the pre-marital children may take place even where their mother is being married to another man who did not father them. I have serious doubts about this because Basotho were very reluctant to accept a child fathered by a stranger to be a member of their family. This is the reason why when a man died leaving a widow the family appointed one of the younger brothers of the deceased man or any other member of the family under "kenela" system whereby the further children would be fathered by a member of that lineage rather than a complete stranger. The general view seems to be that the pre-marital children may be legitimated by subsequent marriage of their mother irrespective of whether or not she is being married by the man who fathered them. The crucial point seems to be the agreement that the children are being "married" with their mother. No extra cattle need be paid but in most cases extra cattle are usually paid.

In the instant case the evidence which I have believed is that the children Lepoqo and Palesa were fathered by other men and not the defendant. Masopha Maama and the plaintiff impressed me as being honest and truthful witnesses on this point. The defendant was not at all an impressive witness on this point. He says that he was told by the plaintiff that he was the father of the two children. However, he does not even know how Lepoqo got that name. Be that as it may, I think the defendant has proved on a balance of probabilities that he "married" the three children along with their mother.

Exhibit "C" clearly indicates that the agreement covered or had something to do with the children. The words "As for the three children of the daughter of Molise they belong (or go) to 'Nena only," were not inadvertently entered into the agreement but were deliberately inserted to show or prove that the children were being "married" along with their mother by agreement. . No extra cattle were paid for them.

I entirely reject the suggestion that Exhibit "C" is not a genuine document. The author of that document gave evidence in this Court and told the Court that he recorded the agreement of the parties accurately. I believed this witness. His evidence is confirmed by Mahao Clement Mahao in his affidavit that the three children were "married" along with their mother. Accordingly the defendant is the legal guardian and custodian of the children. In order to deprive him of the custody of his children good grounds must be shown. (See September v. Karriem, 1959 (3) S.A. 687 - headnote).

The next issue is whether or not in 1984 there was a divorce between the plaintiff and the defendant. The plaintiff has not called a single witness from the members of her family to prove that a family meeting was ever held at which a divorce was agreed upon. She does not say what the decision was on the status of the children and the return of the bohali cattle. In any case I do not agree with the suggestion that there can be a divorce without a pronouncement by a court of law. Section 34 (4) and (5) of the Laws of Lerotholi provide as follows:

"(4) Dissolution of marriage contracted in accordance with the provisions of sub-rule (1) of this rule may be granted by Native Courts on the application of either party on the grounds of the wilful desertion of the other party, or to the wife for the persistent cruelty or neglect of her husband or other cause recognized under Basuto Law and Custom.

(5) A Court granting dissolution of such a marriage shall make an order regarding the retention or return of bohali cattle, and to whom the children if any, shall belong, as may seem just in accordance with the circumstances in which the dissolution is granted."

The above subsections do not exclude the possibility of a divorce out of court but nowadays that is no longer the case. In Motsoene v. Harding 1954 H.C.T.L.R.1 Huggard, C.J. after hearing the evidence of witnesses declared:

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"Chief Molise states that there can be no legal divorce without an order of court, and I am satisfied that this is correct."

A contrary viewpoint is, however, implicit in the judgment of de Beer, J. barely six years later in Sempe v. Tsepo H.C. 8/1946.

In Motsoene v. Harding-supra - the learned Chief Justice heard the evidence of people he regarded as experts because of their age, standing and experience. It will serve no good purpose that everytime a case on this subject comes to court a fresh inquiry should be made to establish what the customary law is. The decision in Motsoene v. Harding-supra - is a precedent which is binding on this Court unless it can be shown that it was wrongly decided. I am of the opinion that it was correctly decided; and it is supported by section 34(4) and (5) of the Laws of Lerotholi.

I therefore come to the conclusion that the plaintiff has failed to prove that he legally divorced the defendant. It follows that her marriage to the defendant still subsists and that her purported marriage to Cossie is null and void.

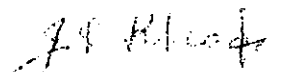
The position is that the plaintiff is still legally married to the defendant and that the defendant is entitled to the custody of Palesa and Lepoqo unless it can be shown at any time that he is not a fit and proper person to have the custody of those children. The plaintiff has failed to prove that point

because her main contention was that the two children were not legitimated by her marriage to the defendant. As I have stated above there was legitimation by her marriage to the defendant and the children were publicly associated with their mother in the marriage agreement because there were four people on the side of the plaintiff's family and a representative of the chief. There were four people on the side of the defendant's family. Exhibit "C" was stamped with the chief's date stamp.

As far as assaults are concerned the defendant has not strongly denied them. He admits that in rixa he slapped her in the face during their altercations.

For the reasons stated above the Court makes the following orders:

- (a) The defendant/respondent is interdicted from assaulting the plaintiff/applicant or in any manner threatening her life.
- (b) The defendant/respondent shall continue to have the custody of Palesa and Lepoqo.
- (c) The plaintiff/applicant shall be allowed reasonable access to Palesa and Lepoqo.
- (d) There is no order as to costs.


G.L. KHEOLA
JUDGE

16th July, 1990.

For the Plaintiff - Mr. Mohau
For the Defendant - Mr. Peete.