CIV/APN/172/90

IN THE HIGH COURT OF LESOTHO

In the Application of :

LIAQUAT ANWARY — Applicant

V

GEETI AYUB SAIFEE — Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 30th day of July, 1990.

This matter came before me on 16th July 1990. The attorney who appeared on behalf of the applicant at the latter's attorney's request asked that an order be granted

(a) Authorising Mr. Jyoti N. Shah Advocate and Solicitor of 50 RNA House V.N. Road Fort Bombay - 400023 Maharashtra State Republic of India (to serve papers emanating from this Court following an application to sue the respondent by edict).

(b) Authorising further service on the respondent by Registered Post at her home address.

The papers disclosed that the parties married by religious rites in accordance with the Muslim Custom.

The applicant is domiciled in Lesotho and was born there. The respondent was born in India and presently resides there while the applicant resides in Lesotho. Because the parties feared that the Law of Lesotho does not recognise the Muslim religious marriage they contracted a civil marriage in 1987 in

/Lesotho

Lesotho. No children were born of the marriage.

It turned out that the respondent left for India in September 1988 to attend the applicant's sister's wedding. She never came back. Attempts at persuading her to be reconciled with her husband failed.

The parties decided to terminate their marriage by Muslim religious rites. This was effected on 10th April 1990 in Bombay.

Apprehensive that the civil marriage entered into in Lesotho still subsisted the applicant approached this Court as set out in his notice of motion.

This Court asked Mr. Hlaoli who was present before Court at Mr. Maqutu's request to address it on the question what the status of the parties was immediately prior to their civil marriage contracted in Lesotho. Mr. Hlaoli deferred this question to his instructor pleading that he himself had not been briefed on the point.

A few postponements thereafter Mr. Maqutu submitted written heads of arguments which addressed the significance of conflict of laws.

He submitted that formal validity of marriage depends solely upon Lex Loci Celebrationes. As stated in the 11th Edition of Private International Law by Cheshire and North

> "....whether any particular ceremony constitutes marriage depends solely upon the law of the country where the ceremony took place."

Relying on Berthiaume vs Dastous 1930 A.C. 79 at 83 Mr. Maqutu submitted that

> "Every marriage must be tried according to the country where it took place, and if it is good by that law, it is good all the world over, no matter whether the proceedings or ceremony which constituted marriage in the country of domicile of one or other of the spouses."

The upshort of this submission based as it is on the authority

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cited immediately above is that if the Muslim marriage was valid by the law of India the marriage was valid by the law of Lesotho. I am in grave doubts about the universality of this conclusion for the reason that the status of valid marriage in Lesotho is achieved by two recognised systems, namely the Sesotho Customary law marriage and the civil law marriage. See The Marriage Proclamation No. 7 of 1911 and later The Marriage Act No. 10 of 1974 particularly sections 18 and 29(1) of these respective enactments.

With respect to the question whether the Civil Marriage in the instant application was entered into I was referred to a judgment of this court in Molomo Majara vs 'Mamabela Majara and 3 Others CIV/APN/138/89 (unreported) wherein Ex parte Gordon and Gordon 1921 (WLD) 43 was quoted with approval for enunciating the proposition that because the parties were already married in Russia, the second South African Marriage was a nullity and should be expunged from the records of the Registrar of Marriages. This Court further endorsed the dictum of Hill J. in Thyne vs Thyne (1955) 2 ALL ER. 377 at 382 H to I that

> "If people went through a second ceremony it is their own look out. It could not be marriage because they had already been married."

Mr. Maqutu reconciled himself to the view that if we follow the case of Baindail vs Baindail (1946) 1 ALL ER approved by the Lesotho Court of Appeal in Makata vs Makata C of A (CIV) No. 8 of 1982 (unreported) then it becomes clear that the parties were no more bachelor and spinster therefore they could not enter into a marriage by civil rites for as pointed out by this Court in Majara above at page 35

> "I have come to the conclusion that in view of the fact that section 8 of the Marriage Proclamation 1911 prohibited the marriage of persons who were already married, but the late Chief Leshoboro Majara purported to marry by civil rites in 1939 when in fact he had already been customarily married a few days before to his wife 'Mamabela the 1st respondent, such purported civil marriage was in fact a nullity as it ran counter to the Proclamation referred

/to

to above."

Likewise in the instant case there is no doubt that the civil marriage entered into in Lesotho was a nullity if neither partly was widow or widower or divorcee or bachelor or spinster but man and wife from a previous marriage still subsisting at the time.

Appreciative of this position Mr. Maqutu sought leave to have the marriage in the instant application declared null and void.

Accordingly the application for dissolution of the marriage is refused.

The application to declare it null and void is, in the Court's discretion, granted. The marriage purportedly contracted in Lesotho subsequent to that contracted in India by Muslim rites is declared null and void.

J U D G E.
30th July, 1990.

For Applicant : Mr. Maqutu.