

IN THE HIGH COURT OF LESOTHO

In the Application of :

DAVID SEMMELINK

Applicant

and

'MASEBABATSO MAHLAHA

1st Respondent

'MATHABO MAHLAHA

2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 14th day of August, 1990.

The applicant herein initially instituted proceedings, against the first Respondent, for an order granting him, inter alia, custody of the minor child, 'Malitaba.

Subsequently an application for joinder was made by, and granted to, the second Respondent supported by her husband, Pascalis Mahlaha, a civil servant in the Government of Lesotho. The second Respondent also filed a counter-application in which she sought, against the applicant, an order declaring, inter alia, that the latter had no right to the custody of 'Malitaba and that he should contribute an amount of M400 per month towards the maintenance of the child.

Both the initial application and the counter-application were opposed and affidavits duly filed in support of the case for either party.

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In as far as it is relevant, the facts that emerge from the affidavits are briefly that the applicant, a Canadian citizen employed by the United States Agency of International Development stationed here in Maseru and the first Respondent, a Mosotho female of Ha Mabote on the outskirts of Maseru, lived together as man and wife for six (6) years. They were, however, not legally married to each other. As a result the first Respondent became pregnant and gave birth to a baby girl, 'Malitaba, who was, therefore, an illegitimate child.

According to the applicant, the first Respondent was excessively drinking intoxicating beverages which rendered further cohabitation with her dangerous insupportable, and intolerable. She was unable to look after the child, 'Malitaba, properly. The first Respondent denied, however, the allegations which the applicant made against her and averred that the applicant was, on the contrary, the one brewing Black Lable in the house in which they lived and drank it excessively.

It is common cause that in August, 1987 the parties parted with each other and the first Respondent took with her the minor child, 'Malitaba. According to the applicant, in early September 1987 the first Respondent brought back 'Malitaba and he had been living with the child until the first Respondent again took it away. He feared that the child would not be properly looked after by the first Respondent. He submitted, therefore, that it was in

the best interest of the child that its custody be awarded to him and hence the initial application which he instituted against the first Respondent.

The first Respondent conceded that in early September, 1987 she and 'Malitaba went to the house in which the applicant lived. They were going to collect a cake for the birthday of 'Malitaba and to afford the applicant an access to the child of whom he was the natural father. However, on arrival at the applicant's house the first Respondent found that he had eaten part of the cake. A dispute then arose between herself and the applicant. In the course of the dispute the applicant assaulted and kicked her out of his house. She had to run away leaving the child, 'Malitaba, behind. The first Respondent denied, therefore, the applicant's averment that after they had parted she brought the child back to him to live with.

According to her, the first Respondent later met 'Malitaba at school. The child was unhappy and complained that the applicant was sleeping with a certain woman by the name of Mphumi who was, in fact, her (first Respondent's) personal friend. In the contention of the first Respondent, the applicant is, therefore, immoral or unfit person who cannot safely live with her daughter. She has taken the child from the applicant who has no colour of right to its custody.

Assuming the correctness of the averment that no legal marriage ever existed between the applicant and the

first Respondent it seems to me reasonable to infer that their child, 'Malitaba, was born out of wedlock and, therefore, illegitimate. The salient question that immediately arises for the determination of the court is who of the two parents is entitled to the custody of the illegitimate child. The general rule was stated by De Wet, J in Docrat v. Bhayat 1932 T.P.D. 125 where at page 127 the learned judge had this to say on the issue:

"..... if an application were made in which both the mother and father claimed the custody of the child, the mother would undoubtedly have been entitled to succeed."

Later, on the same page, the learned judge categorically stated:

"I think the legal position here is that father is not entitled to the custody of the child."

On the authority of the decision in Docrat v. Bhayat, supra, there is not the slightest doubt in my mind that as the mother, the first Respondent is entitled to the custody of the illegitimate child, 'Malitaba.

As it has already been mentioned earlier, the second Respondent is supported in these proceedings by her husband, Pascalis Mahlaha. In support of her counter application the second Respondent has deposed to affidavits in which she avers, inter alia, that she is a dressmaker by profession and the senior wife of Pascalis Mahlaha to whom she is customarily married. The first

Respondent who was born on 22nd September, 1958 is their unmarried daughter. She confirms that whilst the applicant and first Respondent were living together as man and wife the latter fell pregnant and gave birth to the baby girl, 'Malitaba, who was, therefore, an illegitimate child.

By virtue of there being no legal marriage between the applicant and the first Respondent, the latter and a fortiori her illegitimate child, 'Malitaba, belongs to the family of Mahlaha. As the applicant and the first Respondent are no longer living together, the second Respondent has resumed custody of the latter together with her illegitimate child, 'Malitaba. She submits, however, that the applicant must be ordered to pay an amount of M400 per month as maintenance fee for the minor child.

Although he concedes that no legal marriage exists between himself and the first Respondent and 'Malitaba is, therefore, the illegitimate child of the latter, the applicant denies that the child belongs to the family of Mahlaha. According to him the child belongs to its mother, the first Respondent and, in the circumstances of this case, he, as the natural father thereof, is entitled to its custody. The applicant further contends that the second Respondent has no right to claim as maintenance fee for ^{the} minor child, 'Malitaba, the amount of M400 which is, in any event excessive.

Having decided that the first Respondent is entitled to the custody of the minor child, 'Malitaba, it stands to reason that the second Respondent is entitled to the relief she is seeking in her counter-application viz.

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the declaration that the applicant has, in law, no right to the custody of the child.

It now remains to be decided whether or not as the upper guardian of all minor children this court can, the circumstances of this case award the applicant the custody of 'Malitaba. The applicant and the first Respondent have accused each other of excessively drinking intoxicating beverages on account of which each claims that the other is incapable of looking after the child, 'Malitaba, properly. These counter accusations cannot, however, be resolved on affidavit papers.

It is not really disputed that the applicant, who is a University Graduate, is gainfully employed in Lesotho whilst the first Respondent is not. By reason of his employment the applicant has, perhaps, better means than the first Respondent to bring up the child, 'Malitaba. It must, however, be remembered that the first Respondent is herself unmarried daughter of the second Respondent and her husband, Pascalis Mahlaha, who are working as a professional dressmaker and a civil servant in the Government of Lesotho, respectively. It can safely be assumed, therefore, that they also have the means to look after the first Respondent and her illegitimate child properly.

As the first Respondent's illegitimate child there can be no doubt that 'Malitaba is a Mosotho. It is in her best interest, therefore, that she is brought up

7/ in the


in the culture of Basotho people. Is the applicant a proper person to do this? In his own averments the applicant is a Canadian citizen who is resident in Lesotho on account of his employment. He cannot, even by any stretch of imagination, claim full knowledge of the Basotho culture. That being so, it must be accepted that, on the well known principle of nemo dat quod non habet, the applicant cannot impart to the child, 'Malitaba, the Basotho culture which he himself does not know. It is perhaps convenient to mention at this juncture that in his affidavits the applicant avers that following his separation with the first Respondent he is now legally married to another woman who is a mosotho viz. Mphumi. It seems to me unlikely that the applicant's wife can look after 'Malitaba better than the first Respondent who is the child's own mother.

By and large, it seems to me that the balance of convenience does not favour the applicant and it will not be in the best interest of 'Malitaba that this court, as the upper guardian of all minor children, award her custody to the applicant.

As regards the question of maintenance, it is significant that the affidavits do not disclose the earnings of the applicant, the second Respondent and her husband, Pascalis Mahlaha, all of whom are admittedly working. There is, therefore, no way this court can fairly assess the amount of contribution that the applicant has to make towards the maintenance of the minor child, 'Malitaba.

In the result, I come to the conclusion that the applicant's initial application ought not to succeed. I would accordingly dismiss it with costs and allow the second Respondent's counter-application save that, for the reasons already given, no order of maintenance is made against the applicant. However, should the minor child, 'Malitaba, require support from the applicant, who is admittedly her natural father, the question of her maintenance can always be brought before the magistrate court which has jurisdiction in the matter.

As the second Respondent has partly succeeded and partly failed in the counter-application the order that I make is that each party shall bear its own costs of the counter-application.



B.K. MOLAI
JUDGE.

14th August, 1990.

For the Applicant : Mr. Maqutu.

For the Respondent : Mr. Pheko.