

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOKENA SEOAHOLIMO Appellant

and

LIAU FOULO Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 16th day of August, 1990.

The appellant (hereinafter referred to as Plaintiff) sued the Respondent (hereinafter referred to as Defendant) for the return of eight (8) cattle which the former had allegedly paid as bohali for the marriage of the latter's sister, 'Mamahali.

The case was heard by the Semonkong Local court which gave judgment in favour of the Plaintiff. The Defendant was unhappy with the judgment against which he appealed to the Central Court of Matsieng. The Central Court dismissed the appeal and the Defendant lodged a further appeal to the Judicial Commissioner's court which upheld the appeal. The Plaintiff has now appealed to the High Court, against the decision of the court of the Judicial Commissioner, on a number of grounds which may, however, be summed up in that the decision was bad in law.

The case has been the subject of many decisions before the courts of law and the facts surrounding it are by now quite clear.

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In his pleadings before the court of the first instance, Plaintiff stated that he was suing Defendant for the return of eight cattle which he had paid as bohali; alternatively M200 for each of seven of the eight cattle and M100 for the eighth one. In reply to Plaintiff's pleadings Defendant denied knowledge of the eight cattle claimed and alleged that Plaintiff had paid six cattle as compensation for the abduction and only one cattle for the bohali of 'Mamahali.

Only the Plaintiff and the Defendant gave evidence before the court of the first instance. Neither of them called witnesses to testify on their behalf.

It was common cause that in 1965 Plaintiff abducted defendant's sister, 'Mamahali, and lived with her for a few months as his second wife. He paid altogether seven cattle of which six were for compensation and the seventh one for bohali. In 1966 'Mamahali was taken back to her maiden home by the defendant's family and had since not returned to the matrimonial home. However, in 1980 Plaintiff was sued, before the Semonkong Local Court, by the Defendant, presumably because the latter's father was no longer alive, for payment of fifteen (15) cattle as bohali of 'Mamahali. The case was CC 149/80 in which judgment was given in favour of the Defendant.

Pursuant to the judgment in CC.149/80 of Semonkong Local Court, a writ of execution was issued against the Plaintiff who then paid four (4) herd of cattle, two (2) donkeys and an amount of M100 in satisfaction of the

judgement. Notwithstanding payment of bohali as
aforementioned Defendant's sister, 'Mamahali, was not
returned to the Plaintiff at their matrimonial home.
Plaintiff then instituted, against 'Mamahali, court
proceedings, CC.133/82, in which he claimed her return
to the matrimonial home. The case was heard by the
Semonkong Local Court.

According to the judgment of the court in
CC.133/82 'Mamahali testified that she no longer loved the
Plaintiff and was, therefore, not prepared to return to
the matrimonial home. The court declined to compel her
to return to the matrimonial home and live with the man
she no longer wanted as a husband. It was then that
Plaintiff instituted, before the Semonkong Local Court,
a divorce action under CC.114/84, claiming, against
'Mamahali, a dissolution of their marriage on the
ground that the latter had refused to return to the
matrimonial home i.e. she had deserted him. The case
apparently proceeded uncontested and the parties agreed
that Plaintiff be awarded the relief he had asked for
viz. divorce, and that the minor children of the marriage
should remain with the mother, 'Mamahali. The agreement
concluded by the parties was duly made an order of the
court.

It is significant that in dissolving the customary
marriage between Plaintiff and 'Mamahali, as it did, the
local court did not comply with the provisions of sub-
section (5) of Section 34 of Part II of the Laws of
Lerotholi. The subsection reads, in part:

4/ "(5)

"(5) A court granting dissolution of such a marriage shall make an order regarding the retention or return of bohali cattle"

(my underlining)

By the use of the word "shall" in the above cited subsection (5) of Section 34 of Part II of the Laws of Lerotholi, the provisions thereof are, in my opinion, imperative and the local court ought to have made the order therein contemplated. It did not.

Be that as it may, it was further common cause that following the dissolution of his marriage with 'Mamahali Plaintiff instituted against the Defendant the present proceedings for the relief aforementioned. In the contention of the Plaintiff, following his abduction of 'Mamahali he paid to the Defendant or his family a total of fourteen (14) cattle of which six (6) were for compensation and eight (8) for bohali. This contention was, however, disputed by the Defendant according to whom Plaintiff had, on two occasions, seduced 'Mamahali. He subsequently abducted her and paid the first seven cattle. Six of the cattle were admittedly for compensation following the abduction of 'Mamahali. Defendant conceded that he and the Plaintiff had reached an agreement on the question of the marriage between the latter and Mamahali. The seventh cattle paid by the Plaintiff was, therefore, towards her bohali.

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However, Plaintiff had never paid any compensation for the two seductions of 'Mamahali. The seven (7) cattle that he admittedly paid as a result of the writ of execution issued in pursuance of the judgment in CC.149/80 were, therefore, for compensation following the two seductions of 'Mamahali.

I must, however, point out that in his plea Defendant never raised the question of seduction. It was, in my view, raised as an after thought and, therefore, an irrelevant issue that the court of first instance could not properly consider. I am fortified in this view by the fact that even in CC.149/80 Defendant sued Plaintiff for payment of fifteen (15) cattle as bohali and not compensation for the seduction of 'Mamahali.

By and large, I am satisfied that the local court was correct in finding, as it did, that apart from the six cattle he had paid as compensation following the abduction of 'Mamahali, Plaintiff did pay a total of eight cattle which were towards her bohali. In denying knowledge of the eight cattle that Plaintiff had alleged to have paid as bohali of 'Mamahali, Defendant was, therefore, not being honest with the court. That being so, there is no doubt in my mind that Plaintiff and Defendant's sister, 'Mamahali, customarily got married to each other and eight bohali cattle were paid by the former.

It is not really disputed that the marriage was dissolved by a competent court which did not,

6/ however,

however, comply with the provisions of section 34(5) of the Laws of Lerotholi. In his judgment the learned Judicial Commissioner turned down Plaintiff's claim viz. an order for the return of the eight bohali cattle, on the ground that there was no evidence indicating that the marriage was dissolved on account of any matrimonial wrong committed by the Defendant's sister, 'Mamahali.

I am unable to agree. There was evidence that notwithstanding the fact that bohali cattle were being paid, 'Mamahali went to her maiden home, remained there and never returned to Plaintiff at their matrimonial home. Indeed, there was evidence that when he sued her and claimed her return to the matrimonial home, 'Mamahali categorically told the court that she no longer loved the Plaintiff. She was, therefore, not prepared to return to the matrimonial home and live with the Plaintiff as his wife.

Assuming the correctness of this evidence, there is not the slightest doubt in my mind that the decision of the learned Judicial Commissioner was based on a misunderstanding of the evidence that was adduced before, and accepted by, the court of the first instance. It was, for that reason, bad in law.

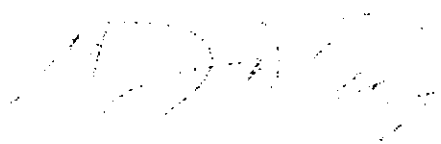
As it has already been pointed out earlier, in dissolving the marriage, the Local Court ought to have settled the question of retention or return of the eight bohali cattle, in accordance with the mandatory provisions

section 34(5) of Part II of the Laws of Lerotholi.

It did not. The result was that following the dissolution of the marriage, the Defendant was retaining the bohali cattle, his sister, 'Mamahali, and custody of the minor children of the marriage.

Regard being had to the fact that the marriage was dissolved solely on the matrimonial wrong committed by the Defendant's sister, 'Mamahali, it seems to me that, in all fairness, the Plaintiff was entitled to succeed in his claim viz. the return of the eight bohali cattle.

In the premises, I would allow the appeal with costs.



B.K. MOLAI
JUDGE

16th August, 1990.

For Appellant : Miss Tau

For Respondent : Mr. Maqutu.