

IN THE HIGH COURT OF LESOTHO

In the matter between:-

—
MASEUTLOALI MAKHETHA

Applicant

and

MAKHETHA SAMUEL MAKHETHA

1st Respondent

MATSELISO AUGUSTINA MAKHETHA

2nd Respondent

REGISTRAR GENERAL

3rd Respondent

ATTORNEY GENERAL

4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 19th day of November, 1990

This is an application for an order in the following
terms:-

1. Declaring the marriage between Makhetha Samuel Makhetha and Matseliso Augustina Makhetha entered into and solemnized on the 23rd January, 1990 null and void ab initio and of no legal force and effect.

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2. Restraining and interdicting first and second respondents herein from expelling and/or preventing applicant from occupying her house situate at Site No. 847 Mafeteng Urban Area;
3. Restraining first and second respondents from assaulting and/or threatening applicant in any manner whatsoever without due process of law;
4. Directing and ordering second respondent to vacate applicant's house situate at Site No. 847 Mafeteng Urban Area;
5. Dispensing with the forms and service on account of urgency;
6. Costs of suit against first and second respondents and against third and fourth respondents in the event of their opposition.

On the 18th October, 1990 when the matter was to be argued before me it became common cause that there were serious disputes of fact which the applicant could not have foreseen when she launched this application. I decided to hear viva voce evidence on the following disputed matters:

- (a) Has there been a divorce between the applicant and the 1st respondent?
- (b) Did the applicant participate or contribute in any way in the building of the house at Mafeteng?

(c) Any ancillary matters.

Rapeane Ralebona testified that he is a headman at Kolo and that the applicant and 1st respondent are his subjects. He denied that couple ever divorced each other in his presence. He denied that after the divorce he detailed his messengers to escort the applicant and to hand her over to her parents. The applicant still lives at Kolo where the couple own a house in which the applicant lives with her son. Rapeane Ralebona says that he does not know that the 1st respondent sold the house at Kolo to their son. When he was shown a letter allegedly written by him concerning the sale of the house, he said he knew nothing about it. In any case he does not know how to read and write. It was suggested to him that the letter was written by his daughter-in-law named 'Mamotla per his instruction. He denied this and said that all his official and private letters are written by one Tseko Rapeane who is his secretary. He denied that the 1st respondent has removed from Kolo.

The applicant deposed that she got married to the 1st respondent by customary rites and that the marriage still subsists. She denies that there was ever any divorce between herself and the 1st respondent. She denies that she was ever taken to her paternal uncle one Tsepane after the alleged divorce. No "bohali" cattle were ever returned by her parents to the parents of the 1st respondent following the alleged divorce. She and the 1st respondent still own a house and some arable lands at Kolo. The house at Kolo was never sold to their son.

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Regarding the building of their house at Mafeteng township, the applicant deposed that the 1st respondent told her that he was going to apply for a site in the Mafeteng township. He later took her to Mafeteng and showed her the site which is near the Government Hospital. Subsequently the 1st respondent gave her some money and asked her to look for a builder to build a house at their new site. Because she did not know any builders she came to her daughter, Matiisetso Sello, who resides here in Maseru and asked her to look for a builder. She gave her the money, she does not know how much money but it was a lot of money. 'Matiisetso found a builder. After the building of the house had commenced she visited the site in question on several occasions and the 1st respondent gave her additional sums of money on several occasions before the house was completed. At the relevant time the 1st respondent was working in Kimberley and it is common cause that he is still working there now.

After the completion of the building of the house the couple decided to rent it out to tenants. The 1st respondent used to come to Lesotho to collect rentals until at the beginning of this year when they decided to terminate the lease and they occupied the house. In winter this year she went to their Kolo home to harvest their fields. She remained there until she had finished harvesting and then returned to Mafeteng. The 1st respondent expelled her and said that she must go back to Kolo because he had married another woman. She saw that other woman who was the 2nd respondent. She also took part in her expulsion. The applicant deposed that she does not know that the 1st respondent married one 'Makhoale Makhetha in 1976.

Under cross-examination applicant deposed that she has lived harmoniously with the 1st respondent. She denied that in 1963 she was impregnated by another man and that as a result of that pregnancy a friction developed between her and the 1st respondent. She denied that she first set her foot in that house at Mafeteng in August, 1989 when she attended the funeral of their son who had passed away. She avers that when their son died she was actually living with the 1st respondent at their Mafeteng house where she had come to live permanently in the autumn of this year. She does not know that in 1976 the 1st respondent married the 2nd respondent by customary rites and that the said marriage was solemnized at the office of the District Secretary, Maseru on the 23rd January, 1990. The four sheep which were slaughtered when their son had died belonged to the 1st respondent and a bewys for them was issued by the headman Rapeane Ralebona because the 1st respondent is his subject.

Alina Matiisetso Sello is the daughter of the applicant. She testified that in 1975 she was living at her maiden home at Kolo because she had her first child. As far as she was aware her parents were still married to each other and she never heard of any divorce. She returned to her marital home in 1976. During her stay at her maiden home the 1st respondent was working in Kimberley but regularly visited them at Kolo.

In 1980 the applicant came to her home here in Maseru and gave her a plan for a house which she (applicant) wanted to build in Mafeteng township. She asked her to look for a building

contractor. She found one Thabiso Sekeloane who said he would charge M7,000-00 for labour only. The building materials were to be supplied by the 1st respondent. In fact at that time the 1st respondent had already bought bricks, corrugated iron sheets and frames. She denied that the 2nd respondent contributed anything towards the building of the house. The first sum of money given to her by the applicant was M2,000-00. She confirmed that after the completion of the house it was rented by some tenants until this year when she found the applicant and the 1st respondent living in the house. It was in April this year. She denied that the house was built by one Motsetse. The contract was between herself and Thabiso Sekeloane but she did not know the names of his employees who actually did the building.

P.W.4 Thabiso Sekeloane is the manager and owner of D.S. Construction. He knows the applicant and her daughter Alina Sello. In 1980 he had some business dealing with them in that he built a house for them. He does not know the respondents. He testified that in 1980 he was approached by Alina Sello and he agreed to build a house for her at a price of M7,000. The building materials were to be supplied by Alina and the M7,000 was for labour only. The money was paid by Sello by instalments. When the house was completed he handed it over to Alina Sello. He did not personally do the building of the house but gave a sub-contract to one Motsetse who was a bricklayer. However, he visited the building site about three times per week to satisfy himself that work was going on smoothly and according to the plan. On several occasions when he visited the building site he found Alina and the applicant there. They supplied him with the building materials but he did not know how they were related to each other.

Under cross-examination P.W.4 denied that the contract to build the house was between the 1st respondent and one Sekeloane.

The 1st respondent testified that the applicant was his wife but he divorced her according to customary procedure in 1976. In the early 1960's he worked in Kimberley in the Republic of South Africa and lived with the applicant there. In 1963 she suffered from tuberculosis and was admitted at Kimberley Hospital. While she was a patient there she was impregnated by another man. As a result of that pregnancy she escaped from the hospital and came to her marital home at ha Lekeba. The pregnancy was prematurely terminated and when he asked the applicant and her mother about this, they both said they were to blame for the termination of the pregnancy. He told them that he no longer loved the applicant. He did not divorce the applicant there and then but he went back to his place of work.

In 1976 he divorced the applicant in accordance with the Sesotho custom of "tlamela" whereby he packed all her goods/ personal belongings and took her to her maiden home and gave her back to her parents together with all her children. He alleges that P.W.1 was present when he divorced the applicant but we have already heard the evidence of P.W.1 that he knows nothing about that so called divorce. The 1st respondent testified that during the period between 1964 and 1976 he never lived with the applicant at their home at ha Lekeba. He rented a house at Mafeteng and stayed there whenever he was on leave. To show that he no longer loved the applicant he married another woman 'Makhoale Makhetha

in 1970. Since 1964 he never lived with the applicant and never had any dealings with her.

Regarding his marriage to the 2nd respondent the 1st respondent deposed that he married her by customary rites. He paid M1,200 as bohali and that was counted as six (6) head of cattle. The marriage contract was between himself on the one side and Ananias (2nd respondent's father) and her grandmother Mamokoena on the other side. Under cross-examination the 1st respondent said the contract was between himself and the mother of the 2nd respondent one 'Mamonaheng Makhetha. He has no proof that he paid M1,200 as bohali for the marriage of the 2nd respondent.

Regarding the house at Mafeteng the 1st respondent testified that he applied for the site in 1976 and that it was allocated to him in 1977. At that time he had already divorced the applicant and she had nothing to do with the site and the building of the house on that site. He started building that house with the assistance of the 2nd respondent who contributed the sum of M12,000. He employed one Daniel Sekeloane to build the house. He had asked her daughter Alina Sello to find a builder for him and she introduced Sekeloane to him. He paid Sekeloane the sum of M7,000 for labour only because he provided all the building materials. The person who actually did the building was one Motsetse. After the completion of the house he leased it until January this year when he and 2nd respondent took occupation of house. The 2nd respondent was able to make the contribution towards the building of the house because she was working for

Mr. Mda, a practising attorney of this Court. She had worked for him for seventeen years and her salary was M300 per month.

It is significant that in her evidence the 2nd respondent says that she worked for Mr. Mda for only four years and that her salary was M50 to M70 and finally M100 during that period.

Under cross-examination the respondent admitted that he did not have any medical proof that the applicant got pregnant in 1964. He relied on her own confession that she was pregnant. However, it was not put to her in cross-examination that she had confessed. He admitted that nothing was said about the cattle for bohali when he purportedly divorced the applicant. He deposed that Thabiso Sekeloane who gave evidence before this Court is not Sekeloane with whom he entered ^{into} the contract to build his house.

The 2nd respondent confirmed that she married the 1st respondent in 1976. The marriage was in accordance with Sesotho customary law. She was in the house with her father, her mother, her grandmother, the 1st respondent and Tseliso Mahase when the negotiations about the payment of her bohali were going on. An amount of M1,200 was paid.

She confirmed that her contribution towards the building of the house was M12,000 which came from her salary and from the rent she collected from the flats of her parents. The person

built the house was one Sekeloane Sekeloane. She paid him and not Thabiso Sekeloane.

Mamonaheng Makhetha testified that the 2nd respondent is her daughter and that the 1st respondent married her in 1976 by customary rites. According to her the marriage contract was between her husband and her mother-in-law on the one side and the 1st respondent on the other side. She claims that the contract was between herself and the 1st respondent because her husband and her mother-in-law are late. In any case she was present during the negotiations for bohali and the sum of M1,200 was paid by the 1st respondent.

The first issue to be decided by this Court is whether there was a divorce between the applicant and the 1st respondent in 1975. Headman Rapeane Ralebona before whom the divorce is alleged to have taken place has already denied this. The impression I had of Headman Rapeane Ralebona was that he was an honest witness who apparently had no grudge against the 1st respondent who is still his subject. He denied categorically that the 1st respondent had removed from his village. The 1st respondent has not called any of his relatives who were present when the allegedly divorced the applicant before his headman. I am sure that he could not have been alone because even their own son Seutloali must have been a major then.

In any case, I am of the opinion that the law was settled in the case of Notsoene v. Harding and others 1954 H.C.T.L.R. 1 at p. 14 where Huggard, C.J. said:

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

The above statement finds some support. from section 34 (4) of the Laws of Lerotholi which reads as follows:-

"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."

I am of the opinion that whatever the position was regarding extrajudicial divorce in olden times, the custom has changed; and there can be no divorce without an order of Court. In the instant case the 1st respondent has failed to prove that he extrajudicially divorced the applicant. Consequently, the civil marriage the 1st and 2nd respondents purported to enter into in January, 1990 is null and void ab initio because the customary law marriage between the 1st respondent and the applicant was still in subsistence. Section 29 of the Marriage Act No.10 of 1974 provides that no person may marry who has previously been married to any other person still living unless such previous marriage has been dissolved or annulled by the sentence of a competent court of law. This section again reinforces the proposition that there can be no divorce without an order of a competent court of law.

With regard to the Sesotho customary marriage between, the 1st and 2nd respondents there are so many contradictions in their evidence that I am inclined to accept Mr. Phafane's submission that these contradictions are indicative of the fact that it is manufactured evidence. I do not wish to make any finding on the Sesotho customary marriage between the 1st and 2nd respondents because that has no bearing on the building of the house in Mafeteng township near the hospital. All I can say is that the contradictions are so many that no court of law can believe their evidence.

As to the building of the house she called one Thabiso Sekeloane who is the manager and owner of D.S. Construction which built the house. He dealt with the applicant and her daughter Alina Sello throughout the building of the house. He never had anything to do with the 1st and 2nd respondents as far as the building of the house is concerned. He was paid by Alina Sello and she and the applicant provided him with all the building materials.

On the other hand the 1st and 2nd respondents claim that the house was jointly built by them and that the 2nd respondent contributed a sum of M12,000. 1st respondent alleges that he dealt with one Sekeloane Sekeloane or Daniel Sekeloane. He personally paid Sekeloane Sekeloane or Daniel Sekeloane. He used to meet him at Maseru Industrial Area and knows very well where his offices are situated. He does not know Thabiso Sekeloane who gave evidence in this Court and has never had

any dealings with him. It is very strange that the 1st respondent is unwilling and has actually declined to call DANIEL Sekeloane when the Court suggested that to him. In Elgin Fireclays Limited v. Webb, 1947 (4) S.A. 744 (A.D.) at pp. 749-50 Watermeyer, C.J. said:

"Counsel for the applicant relied upon the fact that the herd was not called to give evidence, and from respondent's omission to call him as a witness, asked the Court to draw the inference that his evidence was in some way unfavourable to the respondent. With regard to this request, it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. See Wigmore (secs. 285 and 286).) But the inference is only a proper one if the evidence is available and if it would elucidate the facts."

There is no doubt in my mind that the person with whom the 1st respondent allegedly dealt in the building of the house could give evidence that would elucidate the facts. Even if a witness is thought to be biased or hostile it is always wise to call him and ask the Court to declare him as a hostile witness with a hope that under cross-examination the witness may be forced to make some concessions favourable to the case of the party who has called him.

I am satisfied that the 1st respondent built the house for the applicant and leased it to tenants until the end of last year. The trouble started early this year when he decided to take occupation of the house. He had apparently developed very strong relationship with the 2nd respondent and wanted to come and live with her in the house. He was under the wrong impression that by going through a civil marriage with the 2nd respondent he would deprive the applicant of the immovable property they acquired jointly during the subsistence of their marriage.

It is most improbable that the 1st respondent would ask applicant's daughter Alina Sello to secure a builder for him and to give money to the applicant to pay the builder when he knew very well that he was building the house for the 2nd respondent. I totally reject the evidence of the 1st and 2nd respondents that the latter contributed M12,000 towards the building of the house. They have contradicted each other about the disappearance of the records showing how much the second respondent contributed. The 1st respondent said that his daughter Alina Sello broke into the house at Mafeteng and disappeared with the said records together with a blanket. The 2nd respondent denies this allegation and deposes that the house that was broken into was the one at Phahameng. One or both of them must be telling a lie because the 1st respondent was positive that the windows of his house at Mafeteng were broken and that his daughter stole not only the said records but also a blanket.

The 1st respondent testified that the 2nd respondent was able to amass the large amount of M12,000 from her salary of M300 per month paid to her by her employer Mr. Mda. He said that she worked for Mr. Mda for a period of seventeen (17) years. The 2nd respondent's version is that she worked for Mr. Mda for only four (4) years and that during that period her salary ranged from M50, then to M70 and finally to M100 per month. She said that she amassed her fortune from the rent for her parents' flats. Again one or both of them are lying on the point.

For the reasons stated above I come to the conclusion that the applicant has proved her case on a balance of probabilities and the application is granted as prayed in terms of prayers 1, 2, 3, 4 and with costs against the 1st and 2nd respondents.

J.L. KHEOLA
JUDGE

19th November, 1990.

For the Applicant - Mr. Phafane

For 1st and 2nd Respondents - Mr. Pitso.