C OF A (CIV) NO.2 OF 1993

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

IN THE MATTER BETWEEN:-

RAMOENO RAMAISA — 1ST APPELLANT
TSEBO MABOKANG (ALIAS RAMAISA) — 2ND APPELLANT

and

MAKATISO RAMAISA — RESPONDENT

CORAM:

Leon, J.A.
J.H. Steyn, J.A.
J. Browde, J.A.

JUDGMENT

LEON, J.A.

The first and second appellants were the first and second respondents in an application brought by the respondent against them and four other parties who have not appealed.

The respondent sought and obtained a rule nisi against the respondents the main object of which was to restrain the appellants from burying the corpse of one OPNIEL LEFU RAMAISA pending the return day. On the return day despite the opposition of the appellants the rule was confirmed subject to certain amendments and variations. In addition to the relief which was granted in relation to the burying of the corpse the Court a quo also confirmed paragraphs (g) (h) (i) and (j) of the rule nisi

which called upon the respondents to show cause why:-

"(g) The 4th Respondent shall not be interdicted and/or restrained from releasing or causing to be released to 2nd Respondent any money whatsoever, presently held by it in the accounts of the late OFNIEL LEFU RAMAISA pending the finalisation hereof;

(h) The 4th Respondent shall not be ordered to disclose to applicant all moneys presently held by it in the accounts of the late OPNIEL LEFU RAMAISA;

(i) The 1st and 2nd Respondents and/or their agents shall not be restrained from disposing of or in any manner, applicants property listed in paragraph 12 of annexure "B" hereto;

(j) The 2nd Respondent shall not be ordered to vacate applicants' house situate at Ha 'MATAU MAPOTENG in the district of Berea and be interdicted from entering same without applicants' consent. And also be ordered to hand over to applicant whatever property there may have been left in her possession by the late OFNIEL LEFU RAMAISA."

It will be convenient to refer to OFNIEL LEFU RAMAISA as the deceased. In her founding affidavit the respondent alleges that she married the deceased by civil rites the marriage being solemnized at St. Monicas Roman Catholic Church in Leribe on 12th August 1987. The marriage subsisted until the 25th December 1992 when the deceased was murdered. She annexes marked "A" a copy of what she says was the marriage certificate which appears at page 11 of the papers.

In that marriage certificate the names of the parties appear thus:

"OFSIEL LEFU RAMAISA
FRANCINA THALASSE KOMPI"

I pause to observe that the respondent's name in the papers is given as MAKATISO RAMAISA and she has signed her affidavit as such. The original of annexure "A" was seen by the learned Judge a quo who described it as being mutilated which necessitated masking tape being put on it with the result that some portion was missing. But he saw through the creased folds that banns of the marriage were announced. According to Annexure "A" both sets of parents had consented to the marriage.

At the time of the deceased's death the respondent averred that she sought refuge at her maiden home after the deceased had assaulted her when she complained of his infidelity. About two months before the deceased's death she was informed that the deceased had contracted another civil rites marriage with the second appellant. She and the deceased had built a new house at Mapoteng but that house was being occupied by the deceased's father (the first appellant) his wife and the second appellant.

The basis upon which the application was brought by the present respondent was that she had entered into a lawful marriage with the deceased and was therefore his widow when he died.

It is common cause that the second appellant and the deceased contracted a civil marriage on 29th August 1992. According to the

photo-copy of the marriage certificate the parties to the marriage are reflected as a bachelor and spinster. The photo-copy (annexure "MR1") reflects that both sets of parents consented to the marriage.

The question as to whether the deceased married the respondent (which is the central issue in this appeal) was strenuously disputed by the appellants on the affidavits as I shall show later. It was contended on behalf of the appellants that the application being one for final relief the court was entitled to assume the correctness of the averments by the applicant which were admitted or not challenged and the correctness of the version of the respondent. In view of the fact that the marriage in question was disputed it was contended that matter could not be decided on the papers. In response to the argument it was urged that the dispute was not a genuine one but if it was that the application should be referred for the hearing of oral evidence.

The court found that it was most improbable that the first appellant and his wife could not have known of the marriage between their son and the respondent. The learned Judge went on to say:-

> The fact however that they decided to tell obvious lies on a matter so notorious as the deceased's marriage to applicant makes it difficult to know where they would stop at. Thus the court is entitled to draw an adverse inference against their conduct, namely that they set their minds on misleading the court. For this reason I

am persuaded to accept the applicant's version that she and her deceased husband led a European mode of life."

I turn now to set out the dispute on the papers relating to the alleged marriage between the deceased and the respondent. The second appellant challenges the validity of the marriage certificate. In elaboration of the challenge she makes the following points:

a) She found the copy of the marriage certificate faint;

b) The deceased was illiterate - The difference in the mark on annexure "A" and her marriage certificate is striking;

c) When the deceased asked her to marry him she was aware of the fact that the deceased had been living with the respondent. She asked the deceased whether they were married but the deceased informed her that she was his mistress;

d) The respondent was well aware of the deceased's relationship with the second appellant but raised no objections thereto.

In his affidavit the first appellant states that he first met the respondent in October 1992. She was introduced to him by his wife as the deceased's mistress. With regard to annexure "A" which reflects that the marriage took place with the parents' consent he denies that he or his wife ever consented to such a marriage or indeed was ever aware of it. His wife confirms the correctness of his allegations in her affidavit. As far as they are concerned the second appellant is their daughter in law.

The first appellant also states that even if the deceased and the respondent were married to each other the first appellant would be the heir. As there was no male issue the estate must devolve in accordance with custom as the deceased had not abandoned the customary way of life prior to his death. There is also a dispute on this point as the respondent alleged that she and the deceased led a European way of life. This was accepted by the court despite the dispute on the point.

On behalf of the appellants it is contended that the court erred in holding that the deceased was validly married to the respondent despite the existence of a dispute of fact on this point. In the alternative it is claimed that as the deceased and his family had not abandoned an African way of life and as there was no male issue the deceased's father (first appellant) became the head of the family. In these circumstances the widow could not act unilaterally.

With regard to the other relief granted by the court a quo it is contended that the learned Judge erred in granting any of that relief in view of the disputes of fact.

I have set out the facts in some detail in order to show that there was clearly a real dispute of fact on the papers with regard to the question as to whether the respondent ever contracted a lawful marriage with the deceased. This is not a case where it

could be held that the marriage certificate marked "A" speaks for itself. On the contrary, the first names of the bride appearing on the certificate are quite different from those of the respondent and there is no explanation therefor. Moreover it appears from that certificate that the parents' consented to the marriage but the deceased's parents have sworn that they did not.

Courts should not endeavour to settle disputes of fact on the affidavits, for the ascertainment of the true facts can only be decided by considerations not only of the probabilities of the case but also by the credibility of the witnesses giving evidence viva voce. Indeed it has been held that even where, on the affidavits, the probabilities are against one version the court must be satisfied that cross-examination will not disturb this balance before granting an order (see HILLEKE vs LEVY 1946 AD 214 at page 219 and the cases there cited). That case, like this, is a case where the court below had wrongly granted a final interdict on motion despite the existence of a dispute of facts on the papers.

Where such a dispute of fact arises the court has a discretion as to what course to follow which will depend, inter alia, on the attitude of the parties and the nature of the dispute.

In the present case the learned Judge was specifically asked to refer the matter to oral evidence and, as the dispute falls

within a narrow compass, that was the appropriate course to follow rather than to refer the matter to trial. The learned Judge was plainly wrong in confirming the rule.

The order must be set aside the consequence of that being that the rule will stand until the hearing of oral evidence. The appellant is entitled to the costs of appeal as the respondent supported the judgment. The costs in the court below must be reserved for consideration by the court hearing the oral evidence.

In my judgment the following order must be granted:

1. The appeal is upheld with costs

2. The order of the court a quo confirming the rule is set aside and in its place the following order is made:-

"The matter is referred for the hearing of oral evidence in terms of the High Court Rules on the following issues:-

i) whether the applicant ever contracted a lawful marriage with the deceased OPNIEL LEFU RAMAISA;

ii) whether the deceased owned any of the property referred to in paragraph 12 of annexure "B" which appears at page 14 of the papers and, if so, whether the respondents or either of them or their agents should be restrained from disposing of it;

iii) whether the house referred to in paragraph (j) of the rule is the applicant's house;

iv) whether the second respondent is in possession of any property of the deceased and, if so, whether she should hand over such property to the applicant;

b) the costs of all the proceedings in this court shall be reserved for consideration by the court hearing the oral evidence."

R.N. LEON
JUDGE OF APPEAL

J.H. Steyn
JUDGE OF APPEAL

J. Browde
JUDGE OF APPEAL

Delivered at Maseru on this 27th day of January 1994.