CIV/APN/135/93

IN THE HIGH COURT OF LESOTHO

In the Application of:

ADELINA KHAMPANE (born Ntsapi) ..... Applicant

and

FRANCIS KHAMPANE ..... Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 28th day of October, 1994.

On 23rd March, 1993, the applicant herein filed, with the Registrar of the High Court, a notice of motion in which she moved the court for an order framed in the following terms:

> "(a) Setting aside a contract of marriage entered into between the Applicant and the Respondent on 3rd day of April, 1986;
>
> (b) Cancelling the certificate of marriage signed by the Applicant and the Respondent on the 3rd day of April, 1986;
>
> (c) Awarding the costs to the Applicant;
>
> (d) Further and/or alternative relief."

The application was opposed by the Respondent. The

founding and the answering affidavits were filed on behalf of the Applicant and the Respondent, respectively. No replying affidavit was, however, filed by the Applicant.

In her founding affidavit, the Applicant avered that on 2nd April, 1986 she was 17 years of age when she eloped with the Respondent who was 19 years of age. In his answering affiavit, the Respondent denied that he ever eloped with the Applicant as alleged. According to him, the Applicant came to his home on 29th March, 1986 after her grandmother with whom she lived, had allegedly expelled her from home on the ground that he (Respondent) had made her pregnant.

The question whether or not the Applicant and the Respondent had, on 2nd April, 1986, eloped is clearly disputed and cannot, therefore, be resolved on affidavit papers.

It was, however, common cause from affidavits that, on 3rd April, 1986, the Applicant and the Respondent got married to each other by christian rites. The marriage was solemnized at St. Theresa Roman Catholic church, in the district of Berea. A copy of the marriage certificate (Annexure "A" to the founding affidavit) was attached as proof thereof. One child, a boy called Lebohang, was born of the marriage. The Respondent and the Applicant lived

together as husband and wife until 1988 when the latter left the matrimonial home and returned to her maiden home.

The Applicant further averred that, following her elopment with the Respondent, four (4) herd of cattle were paid by the latter's family as part payment of compensation in accordance with Sesotho Law and Custom. That was denied by the Respondent according to whom, after the civil marriage had been solemnized in church, his family paid six (6) herd of cattle (in the form of 4 beasts and M400) as "bohali" towards his marriage to the Applicant and not compensation, as alleged by the latter. Again, the question whether or not the Respondent's family paid four or six herd of cattle as compensation or bohali cannot be decided on the conflicting statements contained in the affidavits.

In the contention of the Applicant, the purported civil marriage between herself and the Respondent was a nullity for one or more of the following reasons: She contracted the marriage under duress; at the time she entered into the marriage contract, she was under age; her parents had not given their consent to the marriage contract and the civil marriage was contracted "on top" (whatever that means) of a customary law marriage which was the result of elopment.

The Applicant's contention was denied by the Respondent according to whom on 29th March, 1986 the Applicant freely came to live with him as husband and wife at his home. She and her grandmother, with whom she lived, had given their consent to the marriage, as evidenced by a copy of the marriage certificate - Annexure "A" to the founding affidavit. The Respondent denied, therefore, that the civil marriage between himself and the Applicant was a nullity on the grounds of duress and lack of consent.

It is obvious from the affidavits and, indeed, the notice of motion that the relief sought by the Applicant, in the instant case, is a declaration that the civil marriage between herself and the Respondent is a nullity. Applicant has, therefore, instituted matrimonial proceedings affecting her status and that of the Respondent. The salient question that arises is whether or not the Applicant could properly institute, as she did, matrimonial proceedings by way of application on motion. At page 509 of the South Affican Law of Husband and Wife (4th ED). by H.R. Hahlo, the learned author has this to say on the issue:

> "As a rule, matrimonial proceedings affecting status should be brought by way of action. Matrimonial proceedings include actions for divorce, restitution of conjugal rights, nullity of marriage and judicial separation."

See also P.H. 1944(2) P.1 where De Wet, A.J. made the

following pronouncement in relation to nullity suits:

> "Nullity suits being important matters affecting status, must not be brought by way of application on motion, but must be by way of action."

It was argued that nullity proceedings involved only a question of law. They could be properly brought by way of application on motion and disposed of on affidavit evidence. I am unable to agree with this argument. Assuming the correctness of the legal position that nullity proceedings are matrimonial proceedings, it seems to me that they must, on the authority of the above cited passages from the South African Law of Husband and Wife and P.H. 1944(2) P.1 by H.R. Hahlo and De Wet, A.J. respectively, be instituted by way of an action and disposed of on viva voce evidence adduced in court. It is only in exceptional circumstances that the court may allow a party to give evidence on affidavit e.g. where the party is resident outside the jurisdiction of the court and the costs of securing his/her attendance is inhibitive (Storr v. Storr 1950(3) S.A. 331, Ex Parte Ma Cleod 1963 (3) S.A. 731).

In the present case, the parties have not been granted leave to give evidence on affidavits for they are resident within the jurisdiction of the court and the cost of securing their attandance cannot, even by any stretch of inaguation, be regarded as inhibitive. That being so, it

must be accepted that the answer to the question I have earlier posted, viz. whether or not the Applicant could properly institute, as she did, matrimonial proceedings by way of application on motion is in the negative.

From the foregoing, it is obvious that the view that I take is that this application ought not to succeed and it is accordingly struck off with costs.

B.K. MOLAI

JUDGE

28th October, 1993.

For Applicant: Mr. Hlaoli,

For Respondent: Mr. Mathafeng.