

CIV/T/421/91

IN THE HIGH COURT OF LESOTHO

In the matter between :

'MAMALULA MOHALE (born Mahomo) Plaintiff
and
KHAHLISO MOHALE Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 18th March, 1994

This is a claim by the Plaintiff, "Mamolula Mohale born Mahomo against the defendant Khahliso Mohale. In this civil summons filed on the 15th October 1991, the Plaintiff claims as follows:

- (a) A degree of divorce on the ground of defendant's adultery;
- (b) Forfeiture of benefits of the marriage;
- (c) Costs of suit;

(d) Further and or alternative relief.

I order that there shall be a decree of divorce in favour of the Plaintiff.

This claim was opposed. The Defendant has filed a plea in which he says, he and Plaintiff had never gone through any civil marriage or such ceremony purporting to be a marriage. On the contrary the two went through a religious ceremony to bless the long standing marriage by Sesotho law. I underline to bless. He goes further to say that on the contrary, in 1988 Plaintiff had long left the matrimonial home at Lithabaneng on her own volition, and it recently came to Defendant's knowledge that she had set a single home at Ha-Ts'osane without any mutual agreement between the parties. He goes further to say that Defendant having stated the true status of the marriage with the Plaintiff, it follows that the co-habitation with another woman, married under Sesotho law, is not adultery. Defendant says he intends to maintain his second marriage irrespective of the outcome of this action. That is how the plea stands.

The defence by the Defendant depends clearly on the proof by him of the existence of the customary marriage preceding the parties' marriage of the 18th May 1979. In the marriage certificate Defendant says he was a bachelor labourer. The District Administrator of Maseru conducted this civil marriage as against where a marriage would be solemnized by a priest or

in a church. In order to comply with our understanding of the word bless i.e. blessing being a requirement that the priests or the church would usually required their people to come before them when they have contracted a marriage by custom, such marriage having been looked at as a bit unbecoming. (See comments of Lehohla J in MOLOMO MARAR vs MAMABELA MAJARA & ORS - CIV/APN/138.89 (unreported))

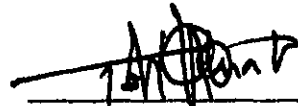
The plaintiff brought in the evidence of a single witness that is the Plaintiff herself. The plaintiff says that they stayed with the Defendant for a period of a month. During their stay there had not been any prior customary marriage. He parents had not been informed of their staying together with the Defendant Subsequent to that period of a month, as she does say, they then went to the District Administrator of Maseru where they contracted the civil marriage as I have said before.

The Plaintiff has given a long tale of her movement from one place to another; but what is underlined is that at about sometime as she says, the Defendant came to tell her that he had now contracted another marriage with one 'Mapoulo, where as a result of this marriage, he now as he said had a new wife in the person of that 'Mapoulo. In the pleadings, this has been admitted by the Defendant, and this has been interpreted by the Plaintiff as being a basis of her claim for a divorce based on that adultery. What is important is that since then the parties had been staying together, presumably the Defendant came into

this second marriage as a result of the problems that they may have had with the Plaintiff. It may also be true that, as at the time of the Defendant's engaging 'Mapoulo there was some kind of desertion going on. My view is that if that desertion was in existence, as soon as the Defendant now contracted an adulterous association, that desertion would be held to have ceased. It would mean that the Defendant has committed a marital offence.

What is very clear is that when the Plaintiff was in the witness box, any proof as to the existence of a customary marriage only amounted to a suggestion that an amount of R1,000.00 was paid. He says that constituted Bohali. There are no other circumstances described, which would entitle one to arrive at a conclusion that in fact there was a Sesotho customary marriage. I would as Mr. Mathafeng has done, have closed my case after the evidence of the first witness, on the basis that even at this stage there was no proof of customary marriage on a balance of probabilities. There is a suggestion when the Defendant is being asked by this Court that this R1,000.00 constituted two head of cattle. We do not have with us even a scrap of paper suggesting that this was the agreement or anything more. I have said that this has to be proved on a balance of probabilities. Nothing in cross examination of the Plaintiff was addressed or indicated to the Plaintiff to suggest what case he would have to meet in proof of Defendant's customary marriage. I am not persuaded that such a marriage has been proved. What it means therefore, is that, logically this situation of the

Defendant having lived with 'Mapoulo has now proved to be an adulterous situation. I am not persuaded that whatever the Defendant felt about his conduct necessarily mean that no adultery has been proved. In order to succeed indeed the Defendant had to prove the existence of a customary marriage. This, he has failed to do. I am convinced that the Plaintiff should succeed in her claim of divorce on the basis of the adultery of the defendant with this 'Mapoulo. I further order that there shall be an order of forfeiture of benefits of marriage in favour of the Defendant. I have already ordered that there be an Order of divorce. I also order that there be costs against the Defendant.



T. MONAPATHI
Acting Judge

For the Plaintiff : Mr. Mathafeng

For the Defendant : Mr. Mafantiri