

IN THE HIGH COURT OF LESOTHO

In the Application of :

THABO ORIEL MOHAPI

Applicant

v

MATHEWS MONNE

1st Respondent

MOSHE MONNE

2nd Respondent

MOKHELE TSIU

3rd Respondent

RAMOSAKENG TSIU

4th Respondent

MATHIBELA SEIPOBI

5th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on  
the 9th day of May, 1994

On 19th April, 1994 this Court made the following order:

"(1) The rule prayed for by the applicant in the main application is discharged with costs.

(2) The transfer of the land contrary to provisions of the Land Act is declared a nullity".

It should be clear then following the 2nd order above that the lease document issued pursuant to the unlawful transfer should be cancelled by the Registrar of Deeds and Commissioner of Lands who are 2nd and 3rd respondents in the counter-application wherein the 5 respondents above were applicants ranking in that application in order of their appearance in the above one.

The following are reasons for the above orders:

The Court felt it appropriate to deal with the merits of the entire case instead of dealing piece-meal first with points raised in limine by Mr. B. Tsotsi before proceeding to the merits.

The applicant avers that Lefa Mary Mohapi was married to him according to customary law. This is denied by the respondents in the main application.

It is however common cause that Lefa Mary Mohapi had formerly married Khampepe by civil rites and the two subsequently divorced. It is common cause that Mary is now dead.

However before her death it appears she had been living together with the applicant for 37 years. The applicant's Counsel submits that if no marriage existed between the applicant and the late Mary then the question of cohabitation could serve as a basis from which to infer the existence of marriage by custom between the two. But WHARTONS-LAW-LEXICON Ninth Edition 1892 at 167 specifically says

"Consent, and not cohabitation, constitutes.....marriage.....: consensus, non concubitus, facit..... matrimonium..."

In terms of the Laws of Lerotholi Part II Section 34 there are

three essentials for the existence of Basotho customary marriage.

These are :

- (a) Agreement between parties to the marriage.
- (b) Agreement between parents or those representing parents,
- (c) Handing over of part or all agreed 'bohali' cattle for the marriage.

In the instant case the third essential is totally lacking.

In a supporting affidavit to the counter-application Moshe Monne, who avers in paragraph 2 that he is the head of the Monne family where the late Maria Lefa Monne was born states as follows in paragraph 4:

"As family we have no knowledge of a customary or any form of marriage between the Late Mary Lefa Monne and Thabo Oriel Mohapi and further state that if any form of marriage had taken place between Oriel and Mary I could have been informed and/or consulted particularly because a customary marriage involves the parents of the spouses".

The applicant's witness 'Makhotso Mphahama' in a supporting affidavit gives credence to Moshe's version in that having asserted that Mary divorced Khampepe and lived with the applicant as man and wife she avers further that "I am not aware that any 'lobola' was paid by the applicant". Se paragraph 4.

'Makhotso makes a vain attempt to dispute that Moshe is the

head of the Monne family and seeks to avoid this direct assertion by Moshe by trying to confine Moshe's headship to Moshe's family and thereby implies that Moshe's headship does not extend to the family of Mary's parents.

Ad Para 4 Oriel the applicant in paragraph 3(c) tries to wriggle out of a rather awkward situation by saying of Mary:-

"Her late mother 'Mampheng Monne agreed to the marriage between Mary and me and she said it was not necessary for me to seek the permission of the Monnes for the marriage and to pay 'bohali' to the Monnes because they had not refunded the 'bohali' paid to them by her divorced husband..."

Apart from the fact that the proposition raised in this averment defies the third requirement for the existence of a Basotho Customary marriage, it is in the nature of hearsay unsupported by any evidence to give credence to what Mary's mother is alleged to have said.

It is a fundamental feature of the law that marriage is a notorious fact. The fact that the parties lived together for a long time does not turn such living together into a marriage. The head of the Monne family and his witnesses aver that they have no knowledge of any form of marriage having existed between Oriel and Mary. The applicant's own witness indicates that she is doubtful whether 'Lobola' was paid. In any event the applicant says that none was paid. The same witness i.e. 'Makhotso testifying in

support of the applicant avers and suggests that of all the Monnes Tsiu Monne the grandson of Mofo whose son Matsepe the father of Tsiu died, would have a better claim than the 2nd respondent to manage and inherit the estate of the late Mary Lefa Mohapi. Granting that 'Makhotsa is here expressing her opinion about her preference of Tsiu over Moshe her side of the battle ground has neither joined the said Tsiu nor submitted an affidavit by him in support of this important proposition.

It is also well-known in the Basotho society that a widow in this case Mary's mother cannot conclude important matters like the marriage of her daughter without consulting the family head. In this instance Moshe Monne was not consulted when the "marriage" between Mary and Oriel was concluded and dispensation as to the vital requirement of the marriage given.

When a married woman divorces she reverts to her maiden family. The handing over of cattle is so fundamental to customary marriage that at p.73 of his Comparative Family Law 1st Ed. W.C.M. Magutu (now Acting Judge) says :

"The handing over of cattle to the girl's father by the boy's father is called marriage. If there is a balance of cattle (bohali) that is outstanding, the bride's father will say to the groom's father, marry my daughter. If cattle are too few or if no cattle have changed hands, colloquially speaking it is said the husband's father has not married the bride. Therefore in the mind of the Basotho the exchange of cattle and marriage are closely linked".

I agree with this submission by the learned Author.

I was however referred selectively, no doubt, to a subsequent paragraph by applicant's counsel and set out in his heads of argument as follows :

"Yet the exchange of cattle between the parents of the parties is not the core of the Basotho customary marriage. Everything revolves on the agreement but that agreement must deal with the question of cattle, 'bohali'. Sometimes parties might agree that no cattle should change hands. So long as this has been agreed everything is in order".

Regarding this rather bizarre proposition I can only say that there is great significance to the fact that the author, and much less the applicant's counsel, submits no authority on which it is based. I have no difficulty in disagreeing with it standing as it does, starkly contradictory to the proposition appearing in the paragraph immediately preceding it. Furthermore it also contradicts requirement three in the Laws of Lerotholi referred to earlier.

It is indeed rather peculiar that in paragraph 11 the applicant should in earnest say

".....By agreement between us, and for the sake of convenience she(Mary) officially retained the surname Khampepe throughout our married life".

This may very well have been a factor that kept the respondents from knowing what designs the applicant had towards the late Mary.

In their counter claim the respondents required of the applicant Oriel Mohapi to show cause why

- (a) Registrar of Deeds shall not be joined in these proceedings;
- (b) Commissioner of Lands shall not be joined in these proceedings;
- (c) Lease No. 13283-404 and 13283-4-5 shall not be cancelled;
- (d) Respondents shall not be ordered to pay costs of this application on attorney and client scale.

In motivating this counter application Moshe Monne at paragraphs 5 and 6 of his affidavit avers as follows:

"I state that Lease No. 13283-404 and No. 13283-405 are a result of a title deed No. 8381 registered at Law Office on 9th September 1969 in favour of the late Mary Lefa Monne who knew at the time that she was not married to Thabo Oriel Mohapi; the copy of the title deed is in the hands of the Commissioner of Lands.

Both Lease No. 13283-404 and Lease No. 13283-405 were issued in favour of Thabo Oriel Mohapi fraudulently or by mistake as a result of a misleading letter by the Late Mary Lefa Monne hereto annexed and marked "MM1" and the letter of Thabo Oriel Mohapi hereto annexed and marked "MM2" fair translation of which is also marked "MM3".

In paragraph 7 Moshe avers

"I have been advised and verily believe that when the title deed was in the name of the late Mary the lease documents also have to come out in those names not in the name of a person who did not hold the title deed which gave rise to the lease".

In paragraph 8 he says,

"I have been advised and I verily believe that both Lease No. 13283-404 and Lease No. 13283-405 which are a product

of title deed No. 8381 registered in favour of the Late Mary but are in the name of Thabo Oriel Mohapi ought to be cancelled as vesting any title to Oriel Mohapi".

In paragraph 9 he states,

"I with the members of Monne family entered the sites of late Mary Lefa Monne in the full knowledge that the plot belongs to her and she is our responsibility to bury her which we did, we were only surprised when Thabo Oriel Mohapi claimed the premises belonged to him".

In paragraph 10 he says

"I am now aware after perusing the file of the Commissioner of Lands that contrary to the Law the late Mary Lefa Monne and Oriel Mohapi misled the Commissioner of Lands, who sought no proof, that they were man and wife".

In paragraph 11 he says

"I and the other respondents herein have decided to move a counter application so that when this Honourable Court determines the lawfulness or otherwise over entry of the premises which we know belong to our ward, a question of validity of Leases No. 13283-404 and No. 13283-405 should also be determined".

In paragraph 12 he says

"I wish to indicate that not only did Thabo Oriel Mohapi and the late Mary Monne, ask the Commissioner of Lands to issue the leases in the name of Thabo Mohapi but the Commission of Lands was also asked to subdivide that plot into a commercial and a residential piece, they being No. 13283-404 and No. 13283-405".

There is evidence indicating that whereas the applicant in the main application knew that the respondents challenged his right, in the sense that his right is based on alleged transfer, he concealed this from the Court.



Although the applicant says he holds title to plots 13283-404 and 13283-405, he nonetheless has concealed from the Court how he came to acquire title to the said plots.

It is significant that, thanks to the diligence of the respondents especially Moshe Monne, the applicant was not the original allottee of the above plots. The original allottee was the late Mary who having died unmarried to the applicant and having borne no children to her previous husband and to the man with whom she lived before her death, by law left her assets to be dealt with by her maiden family i.e. the Monne family as she was their ward.

Section 16 of the Deeds Registry Act states that

"Every deed or agreement transferring rights in or to immovable property shall be registered in the deeds registry."

But leases 23283-404 and 13283-405 are not a result of a transfer. The Title Deed No. 8381 was in the name of Lefa Mary Monne yet the leases 13283-404 and 13283-405 relating to the original Title Deed No. 8381 came out in the names of Oriel Thabo Mohapi.

The respondents were not aware of this. See "MM1" where Mary Lefa Monne wrote a letter on 11th December 1982 to the Commissioner of Lands applying for a lease in respect of Title Deed No. 8381, and further requesting that the said lease be

"in favour of my husband Thabo Mohapi to whom (sic) we are married according to Sesotho Law and Custom".

Respondents' Counsel submitted that this was a letter which was used to mislead the Commissioner of Lands into issuing a lease. The third paragraph thereof is the basis for the issuance of that lease. This indeed was wrong in that it flouts the provisions of Section 16 of the Deeds Registry Act 12 of 1967 controlling titles to land in urban areas. This Act requires that

- (1) a transfer has to be registered in the Deeds Registry;
- (2) the transfer has to be sanctioned by the Minister of the Interior (now Home Affairs).

It appears then that this lease was not obtained properly.

The Court is satisfied that the respondents are legitimately interested in this matter as the late Mary was their lawful ward.

Section 28 of the Land Act 1979 provides that :

"Titles to land in urban areas, other than land predominantly used for agricultural purposes, lawfully held by any person on the date of commencement of this Act shall be deemed to be converted into leases".

Section 29(1) says -

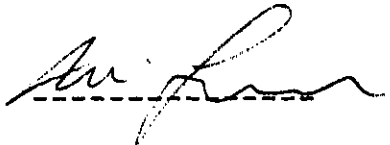
"Whenever a person to who section 28(1) or (3) applies is desirous of granting or creating any interest in the land held by him or whenever section 30 or 31 applies to that person he shall apply to the Commissioner for the issue of a lease and shall produce with his application:-

- (a) evidence that he is qualified to hold land under section 6;
- (b)
- and (c) any one of the following documents:-
  - (i) a registered certificate of title issued by the Registrar of Deeds under the Deeds Registry Act 1967,
  - (ii) a registered deed of transfer or a certified copy thereof if the registered deed is lost".

An argument was raised on behalf of the applicant, and this was founded on the applicant's averments, that she was entitled to dispose of what is or was hers as she pleased. True enough. But in my view if the law stipulates the manner and procedures in which a certain item of property is to be disposed of, and either deliberately or through inadvertence she fails to follow those procedures, then surely there is no way it can be considered that such property has properly passed. This is what seems to have happened in the instant case where the affairs of the late Mary seem to have been dogged by secrecy which rendered them all suspect. Her so called marriage to the applicant was something known to her mother who even dispensed with certain requirements which in law she was not entitled to. Next there was this attempt to dispose of land to the applicant without the knowledge of the respondents who looked upon the property as Mary's thus upon her death they had legitimate interest in such property only to find that in her eagerness to pass that property to the applicant the

late Mary faulted by hastily and fraudulently trying to cut corners.

For the above reasons the rule in the main application was discharged and the application was dismissed while the counter application was upheld save that the costs awarded are on party and party basis.

A handwritten signature in cursive script, appearing to read 'Mr. Hlaoli', written over a horizontal dashed line.

J U D G E

9th May, 1994

For Applicant : Mr. Tsotsi

For Respondents: Mr. Hlaoli