CIV/T/642/97
CIV/APN/481/97

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAKOTOKO MAJARA Plaintiff

and

THAKANE THELINGOANE Defendant

JUDGMENT

Delivered by Mr Justice S.N. Peete
On the 28th August, 1998

The case before me started first as civil application (CIV/APN/481/97) in which the Applicant-now plaintiff - sought an order interdicting and restraining the Respondent - now Defendant- from occupying the office of the Principal Chief of Ha Majara pending the determination of an action instituted by the Applicant/Plaintiff in this Honourable Court for a declarator that the Plaintiff is the person under entitled in law to succeed thereto. The thrust of the application was that the late Principal Chief Qhobela Majara died a bachelor leaving no legitimate male issue (heir) and that his cohabitation with the Respondent/Defendant was illicit and did not constitute a marriage; it was contended by

the Applicant/Plaintiff that since the purported customary marriage was null and void ab initio, he, the Applicant/Plaintiff being the younger brother to the late Principal Chief was under law entitled to succeed him in the office of Principal Chief (Chieftainship Act No.22 of 1968 - section 10).

In Lesotho, section 42 of the marriage Act of 1974 recognises the validity of marriages contracted in accordance with Sesotho law and custom and legitimacy of the children born therefrom for purposes of succession. It is clear therefore that the issue of legitimacy of an offspring depends upon the validity of its parents' marriage. Khosi Molapo vs Lepoqo Molapo - 1974-75 LLR 116; Qhobela vs Qhobela, H.C. 24/43). It is also clear that mere cohabitation as concubines does not constitute marriage under customary law.

The application was opposed by the Respondent/Defendant who filed a lengthy affidavit in which she sought to show that a valid customary marriage was concluded between the late Principal Chief and herself in accordance with Sesotho law and custom. She attached to her affidavit several annexures which will be referred to during the course of this judgment as and when it becomes necessary because Mr Sello for the Applicant and Mr Mohau for the Respondent ultimately agreed that this application and civil trial No 642 of 1997 be consolidated into a trial and that the affidavits in the application be taken as pleadings. The consolidation was accordingly granted and the matter proceeded as a trial. It was also agreed that in view of the Court of Appeal decision of Nko vs Nko - 1991-92 LLR 5, which ruled that matters of dispute over succession to chieftainship were justiciable in the Subordinate Courts, it was necessary that leave be granted to bring this action before the High Court. (See Section 6 of the High Court Act No.5 - 1978) and this leave was granted. The parties lastly agreed that the duty to begin rested on the plaintiff.

From the onset, I should make it clear that the crux of the matter in this trial is whether there existed a lawful customary marriage between the Principal Chief Qhobela Majara and the defendant when the former died in a tragic traffic accident on the 20th April, 1997.

The case for the plaintiff rested solely upon the sworn testimony of Maqhobela Leshoboro Majara, (P.W.1) who informed the court that she was natural mother of the late Principal Chief Qhobela Majara and of the Plaintiff Makotoko Majara (who did not choose to give evidence in this trial). She told the Court that when he died on the 20th April, 1997, the late Principal Chief had not yet married. It was common cause at the trial, that the late Principal Chief and defendant were living together at Maqhaka at the time of his death.

She went on to tell the court that her husband Chief Leshoboro Majara had passed away some time in 1987 and as a surviving parent she had never paid any bohali for the late Principal Chief's marriage to the defendant nor did she sent any persons to negotiate for the defendant's hand in marriage. Indeed her evidence was a total denial that any marriage ever existed between her late son and the defendant. She adhered to the contents of her affidavit made in support to the Applicant/Plaintiff's Replying affidavit in the application CIV/APN/481/97. In her affidavit she admits that she objected to the amorous relationship between her late son and the defendant from the very beginning. Her disapproval worsened when her late son Qhobela impregnated the defendant, admitted responsibility and expressed his intention to marry the defendant. It was common cause that the family of Thelingoane even successfully sued Maqhobela at Majara Local Court for seduction in 1993.

She admits however that as a result of the deceased's insistence she relented when a delegation was sent to ask for defendant's hand in marriage. (Para. 4.5 of Affidavit)

She admits that during August 1994 the deceased Qhobela Majara brought the defendant to Maqhaka and began to live with her. In her affidavit she denies having accepted the defendant by slaughtering a "koae" animal. She further denies delegating people on the 1st January
1995 to pay part of bohali, and that if ever such part payment was made she had not participated in sending the delegates to Thelingoane family. She further denies

participating in a ceremony at which the defendant's son was being accepted into the Majara family and was renamed "Molapo Qhobela Leshoboro Majara." She denies even writing the letter "MQM3" in which she is purported to be making arrangements for "confirmation" or blessing of Qhobela's marriage. She even denies the signature thereon to be hers. She admits signing "MQM6" in which she refers to defendant as the wife of the late principal chief; her only aim was to secure the insurance monies of which her late son was the holder.

On being cross examined by Mr Mohau for the Defendant, she admitted that since August 1994 till the present the defendant was still staying at Maqhaka. At the onset, her attention was brought to "MQM6" - a letter addressed to District Secretary TY dated 2nd May, 1997. This letter reads-

> "District Secretary,
> TY.
>
> Sir,
>
> We the children of Majara hereby confirm and certify that 'M'e 'Mamolapo Majara is the wife of the late Chief Qhobela Majara. She is therefore the one responsible for policy nos. (1) 4125874466, and (2) 4134863141.
>
> Those acting as witnesses on behalf of the children of Majara are:-
>
> 1. Maqhobela Majara
> 2. Hlathe Majara
> 3. Mamello Majara
> 4. Tlokotsi Majara
> 5. Sekhobe Majara

6. Joel Majara

P.S. 'M'e 'Mamolapo Majara is presently still using a passport in her maiden names, we request that they be taken as correct. We are the abovementioned. The names are THAKANE THELINGOANE. This surname appears in the chief's policy forms".

She admits having signed her name on the letter; she however retorts by saying "we had reasons why we wrote this letter - we wanted money in the policy! And the only way to get the money was to make this false statement!" She admitted that she lied in order to gain an advantage.

Question: "Could you be lying now to gain an advantage?"

Answer: "That is not so."

Apparently money was needed for funeral of her late son.

She further admitted that after Qhobela's death, she asked an insurance representative to keep about M10,000.00 for Mabela - a girl who was born to defendant after Qhobela's death. She admits even having given the name "Mabela" to the baby girl; she however did not regard that giving the name "Mabela" to defendant's baby-girl had any significance upon the marital status of its mother. She did not regard the child Mabela as part of Majara family even though the child had been fathered by her late son Qhobela Majara.

Question: "Does it ever happen that the boy's family can give a name to a child born out of wedlock?"

Answer: "It does not happen. But it happened in this case because Thakane

(defendant) was in my family. She was staying with Qhobela. That is the only reason why I gave her the name ....I named her because her father had wished so. .... I was not recognising her."

She denied that she was venting her revenge on the defendant because her own marriage to the late Chief Leshoboro Majara had been challenged in the High Court case of Molomo Majara vs Mamabela Majara. Her attention was again brought to "MQM3" - dated 24th October, 1995 - a letter purportedly written to defendant's mother by 'Maqhobela Majara; it reads-

"'M'e 'Mampho Thelingoane,

I greet you, madam,

Madam,

My son Qhobela came to me indicating that he would like to have his marriage to his wife 'Mamolapo Majara confirmed. I therefore request you to kindly accept this request.

His request is that if this is acceptable to you it should be towards the end of December 1995 on a mutually acceptable date.

I thank you for your cooperation.

I,

'Maqhobela L. Majara"

She then explained that even though the handwriting on "MQM3" looked similar to that in MQM6, it was not her own handwriting. In fact she went on to say that the typed letter

must have been made by his late son Qhobela at his office in Maqhaka.

She was again referred to a letter ID "A" dated 26.5.97. it reads (fairly translated)

"'M'e 'Mampho,

We are well. How are you keeping. I beg leave to inform you that 'M'e 'Mamolapo got a baby girl on Thursday last week. Her name is Mabela Majara.

As far as removal of mourning cloth is concerned, I have arranged the removal to be on the 4/10/97; now 'M'e 'Mamolapo will arrive at your place on the 10/10/97 just to bid you farewell; I think I have explained that we remove mourning cloth here.
I thank you.

'Maqhobela Majara."

She admits having written this letter and explained that she was telling the defendant's mother that according to Koteli clan, the mourning cloth is removed not at the widow's maiden home but at her marital home. She could not explain why the defendant if not married, had to wear a mourning cloth for Qhobela's death and remove it at Maqhaka as a member of Koteli clan.

As far as the new marital name of 'Mamolapo Majara given to the defendant was concerned, she denied ever giving defendant that name. She remembers well the day on which the deceased Qhobela had slaughtered a cow for the "naming ceremony". She never associated herself or participated in the ceremony except to eat the food cooked for the feast. It was common cause that the boy "Kamohelo" was fathered by the late Qhobela and born out of wedlock in 1990. According to her the name Molapo was given to the boy (Kamohelo) by Qhobela on that day, and defendant came to be known as 'Mamolapo

henceforth.

She was then referred to document "MQM1" - a controversial document in this case-

Translation

"Agreement of marriage between 'Mampho Thelingoane concerning her daughter Thakane Thelingoane who reside at Maqhaka and Chieftainess Maqhobela Majara regarding her son chief Qhobela Majara who resides at Maqhaka.

Five head of cattle have been paid over and amongst them is one live head of cattle.

Those present:

| Bride's side | Grooms side |
|---|---|
| 1. Thobeja Thelingoane | 1. Tsebiso Moroke |
| 2. Halerekoe Mojaki | 2. Tanki Majara |
| 3. Tseliso Thelingoane | 3 Mamello Majara |
| 4. 'Matli Rangope | 4. Ntjantja Lephehlo |
| 5. Tsietsi Thelingoane | |
| 6. Katleho Thelingoane | |
| 7. Tseliso Rangope | |
| 8. Joseph Mahloane | |

(It bears a stamp of Chief of Maqhaka P.O. Majara and is dated 1.1.1995)

In her evidence 'Maqhobela Majara dissociated herself completely from this letter claiming that the Majara delegation which included Mamello Majara could have been sent by Qhobela as Principal Chief. She says:

"Under oath, I say I was there when they were sent by Qhobela ... But I deny I send these people."

She told the court that even at the time she had all along been against the marriage of her son Qhobela to defendant whom Qhobela had already impregnated and that she had thought the M3000.00 Qhobela had raised was to settle the court order on seduction. It was only on the day in question that she learned the money was for the part-payment of bohali. (Para 4.6 of her affidavit "I did not delegate these people to go and negotiate marriage," she says.

When pressed further she admitted that she finally relented and agreed to the asking of the defendant's hand in marriage and moreso because a family meeting had already agreed. She says "I gave in to preserve peace and allow marriage to defendant"; but when she was asked directly whether Qhobela died a married man she denied; yet she says the defendant was accepted as a "ngoetsi" and a sheep was slaughtered. 'Maqhobela also agreed or consented when Defendant wore the mourning cloth for the late principal chief. I interpolate here to note that she even personally wrote a letter ID "A" dated 26.5.97 making arrangements for the removal of the mourning cloth; yet in one breath she says defendant had no right to wear the mourning cloth. Above all she gives baby girl who was born after Qhobela's death the family name of Mabela Majara. It could have been an easy thing for 'Maqhobela to do to invite defendant to go back to her maiden home and name her newly born child there.

The plaintiff then closed his case without himself testifying.

The defendant then called Mamello Majara, a 76 years old resident of Maqhaka and grandfather to both the deceased Qhobela and the plaintiff. His attention was brought to "MQM1" and he told the court he was in the delegation that had been sent to make a part-payment of bohali at the home of the defendant on the 1st January 1991 and was present

when the agreement document was made. He told the court that their intention on that day was to go and marry and had been sent by Maqhobela Majara herself. He proceed to narrate the history of the affair by explaining that during December 1993 he got a letter from Chief Qhobela Majara summoning him and Libenyane Majara to go to Maqhobela Majara at Lovely Rock. At Lovely Rock he found Maqhobela Majara, Qhobela Majara, Joel Majara, and Libenyane Majara. To those gathered Maqhobela said "I have called you so that I can send you to 'Mampho Thelingoane concerning her daughter Thakane. You are to go and ask for her hand in marriage." Everyone agreed and a date was selected for the bridal mission. On the 9th December 1993 their delegation proceeded to Thelingoanes and stated their mission. After a long discussion, the two families agreed upon the marriage between Qhobela Majara and defendant who also consented to the proposed marriage.

After a week or two, he says he got a letter from the defendant's uncle who was working at Sharpville in the Republic of South Africa who also consented to the marriage after voicing some complaints about the Majara family, apparently over the issue of impregnation of their daughter by Qhobela. He goes on to say that on the 1st January 1995 Maqhobela then directed them to take M3,000.00 and one cow as part-payment for defendant's bohali. At Thelingoanes they tabled what they had brought and after lengthy negotiations it was agreed that the M2,000.00 would make two cows and M1,000.00 would make two calves. He says that the part-payment presented that day was five head of cattle in all.

They then went back and reported to Maqhobela who had made some food and drink for them upon their return. He says the bohali agreement was written by one Tsebiso Moroke, a Thelingoane family friend. He told the court that he was disappointed by the fact that Maqhobela was now denying ever having sent them to go and pay the bohali. On being cross-examined by Mr Sello he agreed that MQM1 did not stipulate the amount of bohali but he regarded what had been written on MQM1 to be sufficient. He explained that in the

negotiation process, they had not come to the stage when agreement on the amount of bohali could be reached. It was only during the intensive cross-examination by Mr Sello that Mamello explained that at the meeting of the 1st January, 1995 it was understood or agreed that the amount of bohali would be twenty head of cattle or this was taken for granted or assumed. When pressed by Mr Sello he agreed that they had begun the marriage process and had not concluded the marriage. In paying the five head of cattle they were beginning the marriage process and he admitted that had Qhobela not died suddenly they would have continued the marriage process.

He agreed that there were two factions in the Majara family-one on the side of Qhobela and the defendant side and another on the side of Maqhobela. There is indeed bad blood between the two factions which has been simmering since the death of old chief Leshoboro Majara.

It was common cause that when the part payment of bohali was sent to the Thelingoane's on the 1st January, 1995, the defendant had already eloped and was staying with Qhobela at Maqhaka; it was not disputed that a "koae" sheep had been slaughtered as an indication of her acceptance as a new bride..

He denied that there existed a grand conspiracy to deceive and divide the public over the marital situation of Qhobela and the defendant. He stuck to his story that on the 1st January 1995 they were making a part payment of bohali and not paying a debt for seduction; in fact he did not know if any cattle had been paid for the seduction.

Mr Sello then brought to his notice the burial programme card which was used when Qhobela and Colonel Patrick "Sheriff" Majara were buried at Maqhaka. This card ID "B" reads -

"In 1990 the (deceased) was installed as the successor to the principal

chieftaincy of Majara. He got married to Mamolapo (Thakane) the daughter of Thelingoane on the same year (1990). The deceased was blessed with a son in this marriage. The deceased leaves his wife and a son ...."

He was asked whether this was calculated to deceive the public since it was clear that marriage process only began in 1995. This he denied and explained that he was not present when the programme was drafted and finally approved before it was printed.

He again reiterated that the Thelingoanes told them verbally that the scale (sekepele) would be 20 head of cattle and that having paid the five head of cattle, they parted ways upon the understanding that they would meet again.

Next called was Tseliso Rangope. He told the court that on the 1st January 1995 he was invited by Mampho Thelingoane, the defendant's mother to join the group that would welcome the delegation from Maqhaka.

At the short preliminary meeting for themselves whereat the purpose of the Majara mission was announced by Teboho Thobeja Thelingoane, they resolved that since the Majaras were coming to marry, twenty (20) head of cattle were to be paid. When the Maqhaka visitors arrived, Thobeja told them that twenty cattle were to be paid as bohali according to the Basotho custom. He says the visitors put down on the table M3,000 and pointed out a live cow. He says the Thelingoanes set the price or value of one cow at M1,500.00. The Majaras "prayed" and the price was brought down to M1,000.00 and the Majaras paid M2,000.00 thus making two cows and asked that the balance of M1,000.00 be taken as two calves. This was agreed to; and the resolutions were written down and two documents which were similar were made for the deliberations. One document was given to the Majaras and another remained with the Thelingoanes. It was during this meeting that the Majaras announced that they were taking the child also; the Thelingoanes also agreed.

During cross-examination by Mr Sello, he agreed that the main purpose of reducing the agreement to writing was that the document written should reach Maqhobela and so that it could come as evidence in case of a dispute. He said that in his own opinion the Basotho regard twenty head of cattle as the conventional scale for customary marriages and is taken for granted as an accepted practice. The Majaras had stated that they were marrying and not merely negotiating; there was no talk of "ho bea nkho selibeng" and that what was paid was a part-payment of bohali. It seems according to this witnesses the amount of bohali was agreed at twenty head of cattle and the negotiation, if any, would be on the monetary value of each cow if bohali was paid in money form. He says-

> "money would be converted into 20 cattle we had agreed upon i.e. we would have to agree on how much money per cow."

Lastly this witness stated that when Qhobela died in 1997, the defendant was caused to wear a mourning cloth in bereavement and that the said cloth was later removed by the Majara family when the mourning period was over. This concluded the Defendant's case who did not give evidence on her own account.

The crux of the matter in this case is whether when Qhobela Majara, died on the 20th April 1997, there existed between him and the defendant any lawful customary marriage or whether the two were cohabiting in an illicit concubinage.

It is clear that in the absence of a lawful marriage between a man and wife, cohabitation in concubinage, irrespective how long, does not constitute a marriage - Qhobela vs Qhobela - H.C. 24/93; Khosi Molapo vs Lepoqo Molapo 1974-75 LLR 116.

In an inquiry whether a customary marriage exists section 34 of the Laws of Lerotholi becomes relevant. A marriage by Sesotho custom is deemed to be completed when

"(a) there is an agreement between the parties to the marriage,

(b) there is agreement between the parents of the parties or between those who stands in loco parentis to the parties and to the amount of bohali.

(c) there is payment of part or all of the bohali; provided that if the man dies before the woman goes to his parents house, the bohali shall be returned and the marriage shall be null and void."

Starting with the last requirement it seems that for the marriage to come into existence it is important that the girl should be sent or taken to the home of her future husband - perhaps to consumate the marriage - see also Ramaisa vs Mphulenyane - 1977 LLR 138. In the present case when the part payment of bohali was made on the 1st January 1995, the defendant had already eloped and was living with Qhobela at Maqhaka. It has been noted by several writers that marriage by elopement is a common practice in Lesotho especially where the parents on either side were withholding consent to marriage (see Duncan - Sesotho Laws and Custom; S. Poulter, - Family Law and Litigation in the Basotho Society; W.C.M. Maqutu - Contemporary Family Law of Lesotho). In this case, from the beginning of the amorous affair, Maqhobela had voiced her disapproval because the defendant was "ill qualified", as she put it, for office of chieftainess. (Her affidavit - Para 4.5) It is a mystery why the defendant was said to be ill-qualified. The court was left to surmise - was it because defendant was a mere commoner in the Maqhaka village? Was it because she had become pregnant before her proposed marriage could be processed?

According to Justice W.C.M. Maqutu in his book referred to-

"(Bohali) is the most misunderstood and abused custom. The handing over of cattle to the bride's father by the bride-groom is one of the most ancient and durable customs amongst not only the Basotho, but other tribes in Southern Africa. Today, we do not know much

about this custom except that it is the most durable and emotionally charged custom." (p.99)

And it is true today that payment of bohali is the essential requirement for the validity of a customary marriage. In the older times, the Basotho used cattle for payment of debt or fines and in the beginning we are told that as little as three head of cattle was sufficient for bohali, but today the conventional scale stand at twenty head of cattle. Section 34 of the Laws of Lesotho says nothing about twenty head of cattle though; it merely states that there should be agreement between the parties as to the amount of bohali.

The thrust of Mr Sello's argument is that MQM1 shows that the parties did not agree or had not yet agreed as to the amount of bohali and therefore, he contends, there was no valid customary marriage because there was no agreement as to the amount of bohali. Maqutu J. in this book mentions only three essentials. He states at p.74 -

> "There are three essentials of a Basotho marriage that are recognised in section 34 of the Laws of Lerotholi Part II. These are:-
>
> (a) Agreement between parties to the marriage.
>
> (b) Agreement between parents or those representing parents.
>
> (c) Handling over part or all agreed bohali cattle for the marriage."

These are not all the essentials of the marriage as has been stated by Cotran C.J. in the case of Ramaisa vs Mphulenyane 1977 LLR 138. In that case Cotran C.J. without mentioning the other essentials merely contended himself to saying the parties must also live together. Cotran C.J. went further to make the following findings about the Laws of Lerotholi.

"(a) Section 34 is not a comprehensive statement of Sotho customary law of marriage.

(b) Section 34 (1) (a) (b) and (c) of the Laws of Lerotholi is one of those rules that have been framed to cater for, or to remedy, if you like, one mischief - seniority of houses in succession cases in which the betrothed eventually became a wife - but when sought to be applied to a completely different set of circumstances, created a multitude of others not contemplated or intended by their draftsman. (For example, a widower marrying for the second time requires no parental consent).

(c) I think a large part of difficulties encountered in these cases have arisen because attempts have been made to reduce some rules of custom, but not all others and in a haphazard fashion, by a body lacking experience in the art of legislative drafting, into ink and papers, with the result that the written words have assumed a quality of rigidity out of proportion to their true meaning and significance. This is understandable because most people regard printed word as inviolate and sacrosanct."

Duncan in his book Sotho Laws and Customs mentions only two sine qua non essentialsof a Sotho marriage as being laid down in the Laws of Lerotholi and they are (a) agreement between the man and woman and their families and (b) payment of part of bohali. (p.21)

Duncan also discusses the bohali issue (p.22-26) and states that before agreement between the two families is reached, much hard bargaining is usually done. But this bargaining usually relates not to the amount or numbers of the bohali cattle but how, if money is being paid for bohali, each cow should worth. In a recent case almost similar to the one before us, Monapathi J. has this to say -

> ".....I cannot see why in law I should find fault with the validity of the marriage merely because none of the Applicant's witnesses was astute enough to state most elegantly and with precision that it was agreed what the total bohali payment would be ....
>
> ... here I have believed that the parties agreed on bohali; that is why there was the part payment. It can only be presumed through common sense that there was a balance outstanding. It was however stated in any written statement"- Khojane vs Mokatsanyane - CIV/APN/206/95.

The learned Judge goes on to say-

> "Indeed the Sesotho Version of the Laws of Lerotholi in Section 34 seems to suggest that there must be agreement about the total bohali that ought to be paid. This cannot always be so for the following reasons: Firstly there is a view that the question of twenty head of cattle is matter of law and common acceptance that it can and must always be presumed" (pages 11-13).

The learned Judge proceeds to state that "the scale" does not refer to "the twenty head of cattle" but to the assessment of the value of each individual animal judging from the first one which set the standard in value or the highest value or ceiling, all other nineteen remaining being judged on that scale or a sliding scale."

I agree wholeheartedly with the learned Judge. In my view besides other factors which I will allude to which show and confirm the existence of a customary marriage, the absence of a written statement to the effect that the parties agreed as to the amount of bohali does not per se mean that there was no such an agreement or mutual understanding. Though this aspect was testified to belatedly, as Mr Sello suggested, the court has no reason to

reject such evidence, belated as it was, because the very fact that a part-payment was made on the 1st January 1995 indicates that the true intention of the parties was to pay bohali. It would be quite a different case if no part payment had been made when Qhobela died. In such a case I would not hesitate to state that no marriage existed. Furthermore I am of the view that the lack of agreement in the written form as to the amount of bohali, at worst can only render the customary marriage merely viodable, if one can venture to use the term, and not void ab initio, as Mr Sello sought to submit. Lack of this requirement is not fatal to the marriage because the parties can at the end of their negotiations determine finally the amount of bohali without annulling it; we know that the bride's family have a right under customary law to sue for the balance of any outstanding bohali and that where the parties have not agreed specifically, the court is entitled to assume even without taking any judicial notice of the practice that the normal amount of bohali in Lesotho to-day is twenty head of cattle.

If however an essential element like the agreement between the parties or of their parents, is lacking, this being a sine qua non would be fatal to the union. What the court has to look at in my view is the true intention of the parties; it would be unfair and contrary to public policy to declare that a customary marriage does not exist merely because there is no specific written statement regarding the amount of bohali despite the existence of other indicators which show that a customary marriage indeed existed.

Sticking to his guns Mr Sello pleaded the parol evidence rule and submitted that in this case the marriage agreement was based on a written document "MQM1" which was deficient in that it lacked the agreement on the amount of bohali; and that this rendered the marriage void ab initio and that any belated verbal testimony to the effect that on the 1st January 1995 the parties mutually agreed that the amount of bohali was twenty head of cattle should not be admitted. The general rule against the admission of parol evidence was stated by Watermeyer J.A. in Union Government vs Vivanini Ferro-Concrete Pipes (Pty) Ltd 1941 A.D. 43 at 47 to be:

> "That when a contract has been reduced to writing, the writing is, in general, regarded as an exclusive memorial of the transaction and in a suit between the parties, no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added or varied by parol evidence".

"Parol" means "given orally" or "oral declaration". (See also Van Ziegler vs Superior Furniture Manufactures (Pty) Ltd 1962 (3) SA 403; 1969 SALJ 96; 1971 Annual Survey 423; Johnston vs Leal 1980 (3) SA 927; Trust Bank of Africa Ltd vs Cotton - 1976 (4) SA 325.)

In Lesotho, a marriage or bohali agreement is essentially an oral agreement between the two parties and no conclusive effect attaches to a note or memorandum drawn up merely for the purpose of providing evidence of what is an essentially an oral agreement. Such agreement can be explained away by other oral evidence (Hoffman- SA Law of Evidence (1983) p.231. The "MQM1" is nothing else but a memorandum of what transpired on the 1st January 1995 and it cannot be taken to embody an exclusive memorial of the marriage agreement between the Majaras and the Thelingoanes.

In Johnston vs Leal - 1980 (3) SA 927 Corbett J.A. stated as follows:-

> "Where a written contract is not intended by the parties to be the exclusive memorial of the whole of their agreement but merely to record a portion of the agreed transaction leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion; it does not preclude proof of the additional or supplemental oral agreement".

In order to decide whether or not the parties intended the document to embody the whole

agreement, the court is entitled to examine all the circumstances surrounding the transaction, including the negotiations between the parties (Capital Building Society vs De Jager 1963 (3) SA 381 (T); National Board (Pretoria) (Pty) Ltd vs Estate Swanepoel - 1975 (3) SA 16; Veenstra vs Collins - 1938 TPD 458 at 461 where verbal "additional consideration" was discussed by Schreiner J.). The Court should also consider whether the oral evidence sought to be led contradicts the terms of the written document or would be just an additional consideration supplementing that provided in the main written contract. As early as 1845 Lord Lyndhurst LC in Clifford vs Turrell - (1845) 14 LJ Ch 390 at 397 said-

> "The settled rule of law is, that you may prove a further consideration which is consistent with the consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it".

Whilst the above restatement of the law on parol evidence is good, I respectfully wish to hold that it cannot be applied easily in customary law because the negotiation of a contract of customary marriage and the coming into existence of such a marriage is a long drawn process which involves several formalities and procedures. These cannot in all be reduced to writing without running the risk of being unrealistic. The Laws of Lerotholi did not even envisage the reduction to writing of a bohali or marriage agreement. I am of the view that the parol evidence rule cannot and should not be allowed to operate in this case because to permit its operation would have the effect of defeating the true intention of the parties. It is not in dispute that the Majaras and Thelingoanes intended their children to enter into a customary marriage and that on the 1st January 1998 the first part-payment of five head of cattle was made. That they did not reduce to writing their agreement on the amount of bohali on that day is not, in my view, fatal nor inimical to their intention because when giving evidence before this court they explained-though belatedly - to the court that they mutually understood that the conventional scale of twenty head of cattle

would apply. I have no cause to disbelieve them in this regard because the Majaras in fact made a part-payment towards the bohali. Poulter in his book also mentions twenty head of cattle as a popularly accepted ideal scale.

He states:-

> "There is no rule of law that the 'conventional scale' described above must be agreed upon. The courts have constantly declared that there is no fixed scale of bohali (Lekhanya vs Mongalo J.C. 179/1963; Nyooko vs Bolepo J.C. 271/1963). The amount depends entirely on what is settled as a result of negotiations ..... nevertheless the conventional scale has become so familiar that is likely that many people do regard it has having achieved a greater level of legal recognition. Furthermore in certain types of cases, the courts seem almost to have elevated it into a legal norm because of the difficulty of proving on agreement on any other amount" -" p.95.

In this case I am of the view that it can safely be assumed in favour of the conventional scale. It is also clear that many issues were left in abeyance for later negotiations, for example whether the pre-marital child should go with its mother and indeed the ultimate amount of bohali.

Whilst the conventional scale of 20 head of cattle may be implied, in most bohali agreements, the option to determine and place the monetary equivalent per animal has been held to be the prerogative of the girl's family (Mokhojana vs Mokoma J.C. 112/1966) and indeed after lengthy negotiations the monetary equivalent may come well below the market value.

It is my view that whereas a part-payment of bohali is very essential to the existence of a customary marriage, the lack of agreement as to the amount of bohali cannot by itself

invalidate the "marriage". It is not a sine qua non. We have the sesotho maxims -

(i) "Khomo tse peli leha li le tharo li ka nyala mosali" (two or three head of cattle may marry a woman)

(ii) "Monyala ka peli o nyala oa hae" (Whoever pays two head does marry)

In fact in Qhobela vs Qhobela H.C. 24/1943 Huggard C.J. declared-

> "I am advised that it is sufficient if only one head of cattle is paid, so long, of course, as there is an obligation to pay the balance; but after the bohali or part of the bohali is paid them marriage is completed."

If of course Qhobela had died before part-payment of bohali was made, no customary marriage would be deemed to exist despite their cohabitation after their elopement. Simply put, cohabitation without bohali does not create a marriage.

In this case Qhobela eloped with the defendant perhaps for two reasons - (a) he had already fathered her child, (b) that despite his love for defendant, his family was divided or prevaricating over his proposed marriage to the defendant and wished to force their hand..

The circumstances of this case also indicate that the defendant's father had passed away a while ago and that the uncle Makhoathi Thelingoane who worked in South Africa was in loco parentis and had given his consent to the proposed marriage in his letter dated 13.12.1993; the same letter says nothing about the bohali cattle or the amount thereof. The acceptance of part-payment of bohali on the 1st January 1998 by the Thelingoanes can only be interpreted to mean that they were willing that the marriage should take place; and one can venture further to even say that there is a presumption of fact that the

conventional scale was the one agreed upon unless the contrary is proved. The courts will and should operate on the basis of this scale where no express agreement on the amount of bohali has been reached. The conduct of the parties can only be interpreted by this court as being in favour of the formation and existence of a customary marriage. If there was a sudden change of mind after the death of Qhobela Majara, it is not the business of this court to countenance.

As already quoted Mr Justice W.C.M. Maqutu in his book at p. 74 (supra) states that there are three recognised essentials of a Basotho marriage and 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 case of Ramaisa vs Mpulenyane 1977 LLR 138 Cotran C.J. also mentioned that the parties must live together and I am of the view that in the case before this court all essential requirements of a valid customary marriage exist despite the fact that when Qhobela died the exact amount of bohali had not yet been agreed upon between the Majaras and the Thelingoanes. The evidence of Maqhobela Majara, was a sad catalogue of vehement denials of the events that took place. She did not deny that the payment of five head of cattle were for bohali and nor was it for other purposes like seduction (tsenyo) or abduction (chobeliso). Indeed the Thelingoanes had compromised and foregone their claim for seduction and abduction.

Maqhobela Majara did not deny that a "koae" animal was slaughtered when Qhobela took defendant to Maqhaka to live with and cohabit her. Maqhobela indeed accepted the defendant henceforth as the wife of her son Qhobela and referred to her as "Mamolapo Majara" - see Letter MQM3, MQM6, and ID "A". Most significant was the fact that she

admitted that she could tell untruths in order to gain an advantage. Even after Qhobela had died and was buried she saw it fit to name the newly born girl Mabela Majara. If there was no customary marriage then existing she could not have given her the said name without violating her true intentions.

Whether or not there was an agreement on the amount of bohali seems to have been a pertinent dispute of fact which could not have been decided upon the affidavits and the oral evidence before this Court supplemented what was missing in the bohali agreement or memorandum.

In motion proceedings affidavits are usually brief and may be tailored to fit the remedy sought. Indeed in his founding affidavit the Applicant Makototoko Majara (CIV/APN/481/97) does not explicitly state that Qhobela died a bachelor because the bohali memorandum MQM1 did not stipulate the amount of bohali whereas this fact seems to be his main ground for seeking to invalidate the marriage. What is abundantly clear is that Maqhobela in her affidavit states that she did not accept the defendant as Qhobela's wife because, she says, the defendant "was ill-qualified" for the office of chieftainship.

The dispute of fact referred to above was in my view resolved when witnesses gave oral evidence. Maqhobela could not competently testify as to what transpired on the 1st January 1998 at the Thelingoanes when the part-payment was made. Mamello Majara and Tseliso Rangope attended this meeting and they have testified that it was mutually understood that the conventional scale would apply. The issue of the agreement as to amount of bohali was not canvassed at all in the application papers but was only raised during cross-examination of Mamello Majara who was the first witness called by the Plaintiff. Whilst the court has to be cautious when considering their belated explanation that the conventional scale of twenty head of cattle was agreed upon by both parties on the 1st January 1998, I am convinced that the conduct of the parties subsequent thereto of both

the Majaras and Thelingoanes indicate that their true intention was to form and did form a customary marriage; in particular the conduct of Maqhobela, though initially disapproving towards the union, indicates that she ultimately relented and accepted the defendant as Qhobela's wife - despite her private reservations which should not and ought not to influence this court. The customary marriage is not being attacked on the ground of lack of parental consent, because outwardly the Majara family seems to have blessed the marriage negotiations. The court is sadly aware of the fact that there seems to be hostile factions in the Majara family which have divided the family into hostile camps. I would recommend obiter that proper intervention be timeously made after these proceedings to bring the hostile factions together and in particular that the status of the child Molapo be ascertained by the family in order to obviate any future litigation. This court has not come to any definite decision regarding the legitimacy or otherwise of this child because unlike under common law where the subsequent marriage of the natural/biological parents legitimises a pre-marital child, under customary law it seems it is the payment of bohali that determines legitimacy and that it is also necessary that there should be other formalities which may even include paying additional cattle "marrying" the said child along with its mother.(See Motsoene vs Peete J.C 78A/1951; Poulter, page 181-3). There has been insufficient evidence in this regard and counsel on both sides decided not to belabour the issue.

In conclusion, and for the above reasons I hold that when Qhobela Leshoboro Majara died on the 20th April, 1997 there existed a lawful customary marriage between him and the defendant. The Plaintiff has failed to show on a balance of probabilities that a customary marriage did not exist between the two instead it is the defendant who procured abundant proof of existence of such marriage. The claim of the Plaintiff is therefore dismissed.