CIV/T/260/99

IN THE HIGH COURT OF LESOTHO

In the matter of :

MOLEFI LIBE MASUPHA **Plaintiff**

v

MAAMA MATELA MASUPHA **Defendant**

JUDGMENT

Delivered by the Hon. Mr Justice M.L. Lehohla on the 13th day of October, 2000

The plaintiff has instituted proceedings against the defendant who was later joined in this suit by the 2nd defendant 'Malereko Mojela Masupha following a successful application for joinder before this Court.

The plaintiff claims and seeks against the defendants a declaratory order that there was never any valid marriage between 1st defendant's mother and father.

He seeks also costs of suit and further or alternative relief.

It is important from the outset to sketch the broad parameters of this case in order to avoid getting bogged down in fine details which however strenuously argued cannot prevail against such parameters.

Thus then I find it fitting to indicate that at the close of the plaintiff's case this Court refused to entertain an application for absolution from the instance made on behalf and for the benefit of the defendants. The Court having indicated that on the evidence before it there was a strong case made on behalf of the plaintiff requiring the defence side to answer. But in exercise of their right and no doubt through the advice of their counsel the defendants decided to close their case without finding it necessary to answer the *prima facie* case established on behalf of the plaintiff.

It is thus important to note that unlike in a criminal case where the existence of a *prima facie* case against the accused does not necessarily always result in a conviction even where the accused has decided not to give evidence in his defence, in a civil case once a *prima facie* case has been established it cannot be dispelled by the defendant's silence. The rationale being that one of the most important factors

to take into account when refusing an application for absolution is that there may be something that would strengthen the case for the plaintiff emanating from the defence side even if the court was wrong in finding that the plaintiff at the close of his case had established a *prima facie* case. But in a criminal case a *prima facie* case has to exist at the conclusion of the Crown case before the accused can be called upon to answer. The importance of this principle is amply illustrated by the fact that even if, when called upon to answer where no case existed to require him to do so, he confesses to the crime charged he would still be entitled to his acquittal because the crown would have *ex hypothesi* have failed to discharge the onus cast on it at the stage when its evidence did not measure up to the standard required in a criminal case.

Turning now to the facts of the instant case the plaintiff has made it clear that the purpose of his search for the relief outlined in his papers is that this would affect the matter in another form between him and the 1st defendant.

The 1st defendant has pleaded at paragraph 2 that his mother was married by custom and as such was legally married.

As indicated earlier an application for joinder of the 1st defendant's mother was made and granted.

The 2nd defendant duly pleaded - see her plea dated 02-02-2000. At paragraph 2 thereof she says she was married by custom and as such was legally married and that '**bohali**' cattle were paid.

Immediately when an assertion of this nature is made, in other words the preliminary point is that when a party goes beyond making a denial of an assertion by his/her opponent and makes a positive assertion for the existence of a certain state of affairs then he or she bears the onus to prove it. The maxim is that he who asserts must prove. Needless to state notwithstanding the wisdom entailed in the above proposition the Court waited in vain for proof of payment of '**bohali**' cattle for the marriage of 1st defendant's mother. The 2nd defendant shied away from giving evidence which would subject her to cross-examination in regard to the crucial question before Court of her marriage to the 1st defendant's father.

In this regard both defendants decided not to enlighten the court regarding the allegations in their pleadings. Thus the plaintiff's version which is at variance with

what has been pleaded by the defendants without benefit of the important searchlight of cross-examination. Of importance in this regard is that the evidence proffered on behalf of the plaintiff remains uncontradicted in the sense that even if the defendants' is just a denial the Court would nonetheless still expect them to go into the box, but unfortunately the Court has not been favoured with proof of the positive averment made in their pleading. Accordingly it is only logical that the Court should make an adverse finding against them in this regard, and because their silence pertains to a matter of crucial importance to their own case, it is inevitable that such a finding would have a telling effect on the outcome of their case.

The Court has heard the evidence adduced on behalf of the plaintiff. In its essential aspects that evidence was such that the Court was really not surprised when the defendants' counsel decided not to call evidence.

The court listened carefully to PW2 Mr Mahone Souru Masupha an elderly man way into his eighties in age having been born in 1913. He was not contradicted in his evidence that in age he is the most senior of the Masupha family based in its dual stations of Lekokoaneng and Sefikeng.

According to his testimony he is about the same age as the late Chief Mojela. He and Chief Mojela married around more or less the same time.

It is important to note that by virtue of PW2's relationship with Chief Mojela, PW2 would have known if the deceased had married a 3rd wife. His unswerving and unwavering answer was that he had no such knowledge when asked if the deceased had taken a 3rd wife. The legal position based, no doubt on logic and common sense, is that if a party would have known a certain state of affairs if it took place; but does not, such a state of affairs did not take place, because an integral part of this statement is that had such an event taken place such party would have known it. Nohow could he have not known it. The fact that he does not know it, following from the kind of relationship he had with the supposed participant in the event, means it did not take place.

Needless to say a number of other witnesses testified that by virtue of their relationship with Chief Mojela they would have known if he had married a 3rd wife but they didn't.

PW4 Mathe Masupha born in 1917 and married into the Masupha family

indicated that the late Mankata who was married by Mojela intimated to her that there was no marriage between 2nd defendant and the late Mojela. This may be in the nature of hearsay but the conduct of the defendant's supporters towards her egged by the testimony they knew she was going to give regarding whether or not there was marriage between Mojela and the 2nd defendant is most telling. She indicated that they made threats to her and applied other forms of pressure to suborn her as a witness who was prepared for nothing else but to tell the truth. Indeed she repeatedly invoked the name of the Lord in a frantic fashion to make her stand plain to the Court and her tormentors.

A point of some cogency which acts as an important factor in exposing the emptiness of the defendants' defence is the family meeting which took place after Mojela's death and where it was to be decided who would be successor. The facts there speak for themselves.

In parenthesis one has to take cognizance of the fact that the 1968 Chieftainship Act 22 section 11 makes it a prerequisite, even if the successor is known, for the family to nominate him so that the Minister can recommend to the King that he be made successor.

Returning to the matter under consideration; the existence of this meeting is not denied; nor is it denied that both defendants were present. It is not denied also that the senior wife of Mojela Chieftainess 'Mankata declared herself the rightful successor. There is no denial that her statement remained unchallenged by either of the defendants.

Evidence shows that there was a faction wanting to promote the cause of the 1st defendant. Mathe's husband Api didn't contest 'Mankata's statement.

Further evidence shows that there being nobody to contest 'Mankata's claim she continued being Chief of Sefikeng acting continuously on behalf of her husband. She didn't bother to show that she was now Chief in her own right. But of importance is that the 1st defendant never challenged her. Yet the law is so clear that if indeed he had a right as a successor nothing would have stopped him asserting his right during the very life-time of 'Mankata but because "where there is no male issue the widow succeeds" it would not be wrong to infer that the 1st defendant took good counsel of prudence not to dash in where the angels fear.

The evidence before Court remains uncontradicted that it was only after

'Mankata's death that the 1st defendant wanted to assert that he had a right to succeed. But where there is a right no counter conditions can prevail, real or perceived for the right overcomes all.

Thus in my view it is obvious why the 1st defendant temporised and failed to assert his purported right. He only came out of the woodwork because 'Mankata was no longer there. Thus now it becomes convenient for him to pursue the question of existence of the marriage where 'Mankata had alleged none at all existed.

The plaintiff's witnesses were surprised by the 1st defendant's claim that his mother was married to Chief Mojela when they in fact knew that this was not the case. Further that she was housed in one of the run down hovels used by the homeless and vagabonds.

These witnesses were very impressive and cross-examination enhanced the impression I formed of them that theirs was a statement of truth before this Court. They indicated, and I felt that they had nothing against the 1st defendant and that they therefore were not biased in any way.

Papers which were bandied about purportedly bearing the plaintiff's signature were the only factor which placed him under the necessity to come into the box to refute the signature which he did with success.

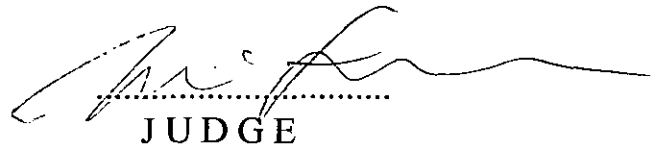
The Court was told that Api the husband of Mathe did strange things in his attempt to compel witnesses for the plaintiff to perjure themselves all because he had fallen out with 'Mankata for the stand she took regarding the question of who would succeed Chief Mojela; a factor closely related to whether there was marriage between the mother of 1st defendant and Chief Mojela.

The defence didn't bother to have the papers for all they were worth handed in by person/s qualified to do so.

Indeed each time an attempt was made to hand them in by other means than proper, *Mr Sello* rightly made it clear they were not being admitted. This had left the defence with the option to hand them formally if deemed necessary so that cross-examination could ensue. But the upshot of the matter is that exercising their discretion it seems the defence thought better of following that option. In the result even those papers form no part of this proceeding.

I have no hesitation in making a finding that the plaintiff has discharged the onus placed on him for the relief sought. The *prima facie* case established at the application for the absolution phase thus becomes conclusive.

Judgment is thus entered for the plaintiff as prayed in terms of prayers (a) and (b) in the summons.



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JUDGE
13TH OCTOBER,2000

For Plaintiff : Mr Sello
For Defendants : Mr Panyane