

CIV/APN/465/99

CIV/APN/520/99

IN THE HIGH COURT OF LESOTHO

In the matter between:-

THERESIA 'MAKOPANO LEOMA

APPLICANT

and

'MAKHANG LEOMA

RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 8th day of August 2000

There are two applications before me. The parties in these applications appear different. The issues which this court must determine in both applications are the same and or are very closely related. In CIV/APN/465 of 1999, the applicant therein is THERESIA 'MAKOPANO LEOMA, the widow of the late RAMOTINYANE EPHRAIM LEOMA. The Respondent in that application is 'MAKHANG LEOMA described further as 'MAMOTIKI KHAULI an adult mosotho female residing at MATSOKU in the LERIBE District. The applicant in this matter seeks a Declaratory order that the customary marriages of

RAMOTINYANE EPHRAIM LEOMA to both 'MAKHANG alias 'MAMOTIKI KHAULI - respondent herein and 'MATSEPISO LEKHOOE - now deceased and not a party in these proceedings, are null and void.

The children, born of the said customary marriages between the late RAMOTINYANE EPHRAIM LEOMA and 'MAKHANG LEOMA (alias 'MAMOTIKI KHAULI) and 'MATSEPISO LEKHOOE, having an interest which may be affected by a decision in CIV/APN/465 of 1999 filed another CIV/APN/520 of 1999, with expressed fears, that should the applicant succeed to obtain that declaratory order, that the customary marriages of RAMOTINYANE EPHRAIM LEOMA and their mothers 'MAKHANG LEOMA and 'MATSEPISO Leoma, are null and void, the question of their legitimacy will arise even though they are not parties in that application.

The proper procedure - described in HIGH COURT RULES, Legal Notice No 9 of 1980 [8 (5)] should have been followed. The children born of the alleged customary marriages between their parents, should have joined as respondents in CIV/APN/465 of 1999 instead of making a separate and new application. The portion of The HIGH COURT RULES, which gives, parties such as these applicants in CIV/APN/520/99, authority to intervene reads as follows:-

“8 (5) Any person having an interest which may be affected by a decision on an application being brought **ex-parte**, may deliver notice of an application by him for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which he desires to be heard, whereupon the Registrar shall set down such application for hearing at the same time as the **ex-parte** application.”

It can be readily seen from the perusal of the two applications, that the prayers therein have the effect of contradicting or cancelling each other. For example, in the first application CIV/APN/465/99 the applicant therein seeks a declaratory order, that the customary marriages of RAMOTINYANE EPHRAIM LEOMA to ‘MAKHANG LEOMA alias ‘MAMOTIKI KHAULI and ‘MATSEPISO LEOMA born LEKHOOE, are null and void. The applicants in CIV/APN/520/99 seek, similarly a declaratory order, that those very same customary marriages contracted between RAMOTINYANE EPHRAIM LEOMA and the two ladies, namely ‘MAKHANG LEOMA born ‘MAMOTIKI KHAULI and ‘MATSEPISO LEOMA born LEKHOOE, are valid alternatively, are putative and the children born therefrom on that account are legitimate. It was for these reasons that it was found convenient to join the two applications and to have them argued as one. Therefore there will be one judgment for these two applications.

For the sake of clarity and convenience, the parties will be referred to as applicant in CIV/APN/465/99. All the applicants in CIV/APN/520/99 will be now referred to as 2nd and 3rd respondent respectively, joining respondent in CIV/APN/465/99 who become 1st Respondent.

Let us examine the facts, on which each party relies, for the prayers made. The applicant's case, is that she entered into marriage by civil rites with the late RMOTINYANE EPHRAIM LEOMA on 9th July 1952. She has attached the copy of their marriage certificate which shows that they were married at the Roman Catholic Church Mission of Pontmain in the District of Leribe. Sometime in 1968 her husband entered into a customary union with the 1st respondent. She alleges that she was opposed to that marriage but was unable to say or do anything and was forced by her late husband to acquiesce to the situation. 1st respondent was given the name MAKHANG LEOMA by the family. Sometime in 1977 her late husband again entered into yet another customary union with another woman namely MALIPHAPANG LEKHOOE who was too accepted by the family and applicant was forced to afford her rights of a legally married wife of her deceased husband.

In her Founding affidavit the applicant avers that she has been informed and verily

believes the same to be true that the common law does not allow bigamy

On behalf of the respondents the concession accepting the legal position as stated by applicant, has been made and properly so by Mr. Sello, the respondents' attorney. The respondents' case is therefore that the purported customary law marriages between the late RAMOTINYANE EPHRAIM LEOMA and the 1st respondent and the mother of 3rd respondent, the late MALIPHAPANG LEKHOOE, are putative. According to the respondents, the applicant was not just acquiescing to the situation. She is alleged to have actually played an active part in the creation or bringing about of the two alleged customary law marriages between her late husband and the two ladies in question. The 1st respondent has alleged that she was only nineteen (19) years old in 1968, when RAMOTINYANE EPHRAIM LEOMA abducted her. He took her to his matrimonial home at MATSOKU in the LERIBE district where he resided with this applicant. He presented her to the applicant who welcomed and received her as the junior wife to their husband. The applicant herself administered and accorded to the 1st respondent all Sesotho customary and traditional rituals appropriate for the admission into the family, as a junior wife of their husband. The consent of the senior wife, where the husband is desirous of taking another wife, is very material. This fact the applicant herein, must have been very much aware of. That is why

she alleges that she was acting in the manner which indicated to the parties and the world at large, that she has consented, because she was forced by her husband. Although the applicant claims she was forced to acquiesce to the situation, she does not explain, the nature, the manner and the extent of the force used upon her by her husband. Further difficulties are raised by the applicant's admissions of the allegations of actually playing an active part, made against her by the 1st respondent.

Even after ceremonies of welcome and acceptance into the LEOMA family, the 1st respondent at the first opportunity that arose, she escaped from the family. She claims that she had no affection for the man who had abducted her. She ran to Mokhotlong district. There she sought and was given refuge by the Catholic nuns at their convent in the town of Mokhotlong. This applicant herself followed after 1st respondent together with their husband's elder brother, one MOKAKO. The applicant reported herself at the Local Police Station on arrival at Mokhotlong town,. They enlisted the assistance of the police officers they found thereat. With the help of the police officer, they sent for the 1st respondent at the convent with the special request that they need to talk to her. They asked her to come to the police station where they were. There, they talked to her in the presence of the police officers. In that discussion this applicant managed to persuade the 1st

respondent to return to their husband at their matrimonial home, MATSOKU from hence she had escaped.

By acting as she did this applicant claims she was forced by her husband. At that time, there seems to have been no indication made to the 1st respondent or anyone else that this applicant was acting under duress of some kind. She gave the 1st respondent and the whole world a definite impression that she regarded 1st respondent as married to their husband in accordance with Sesotho custom and tradition. This the applicant does not deny. There is no way, to-day that this applicant can turn around and undo those impressions and beliefs that she had accepted the alleged customary marriages. She cannot make customary marriage exist where the law does not permit one. She is estopped from now taking an action which is likely to prejudice the interests of the parties who were prevented from taking steps that could have rectified their position, had she not misled them into believing that there was a marriage between them and her husband. If there was no marriage created despite their efforts and good intentions to create one, there is no marriage to declare null and void. On that ground alone this application must fail.

The allegation that the applicant was forced to acquiesce in the situation of acting

as if she has accepted the existence of subsequent customary law marriages between her husband and the two ladies in question, does not take the applicant's case any further. She has failed to explain the nature and the extent of the alleged force. She continued to commit acts which left no doubt in anyone's mind that she has accepted the 1st respondent as the junior wife of their husband. In 1989 after her late husband's death this applicant, as the customary law heiress to the estate of her deceased husband, administered and distributed the property of the deceased. As shown in Annexure ML1 - attached to the Answering affidavit, by 1st respondent, this applicant demonstrated that she has always regarded and accepted 1st respondent as the lawful wife of their late husband, by voluntarily, of her own free will [because at this stage her husband who allegedly forced her was dead] gave the 1st respondent her share of the deceased's estate. All these facts, which this applicant does not deny, are relevant in the determination of a putative marriage. LETHOKO SECHELE vs LEHLOHONOLO SECHELE C of A (CIV) No.6 of 1988.

The facts relevant to proving the putative customary marriage, are limited to the events such as the abduction of the 1st respondent by the late RAMOTINYANE EPHRAIM LEOMA. The payment of lobola to the 1st respondent's family. The carrying out of the traditional ceremonies and rituals by the applicant, evidencing

her consent. The manner in which the parties acted, was the indication of their state of mind, during the performance of those rituals which were intended to establish or to create customary marriage relationship. Over the years from 1968 the applicant's treatment, of the 1st respondent and the children she bore during their cohabitation with the late RAMOTINYANE EPHRAIM LEOMA, demonstrated without a doubt that she had accepted that there is a customary marriage relationship between the 1st respondent and their husband. There is no evidence to the effect that the parties [i.e. RAMOTINYANE EPHRAIM LEOMA and the 1st respondent] had any knowledge that they were committing bigamy. For all intents and purposes, in their minds, they were married and were referred to by their family and everyone, as husband and wife. **EX-PARTE SOOBIAH and OTHERS: IN RE ESTATE PILLAY 1948 (1) SA 873**

The 1st respondent has averred in her Answering affidavit, that all the children she bore in that marriage between her and RAMOTINYANE EPHRAIM LEOMA, were in fact, baptised in the Catholic church at the instance of the applicant. This she does not deny. Applicant does not deny that 2nd respondent was brought up by her and her late husband as their own son at MAPUTSOE while his mother - 1st respondent remained in MATSOKU running their business there.

It is the finding of this court that there was a putative marriage between the late RAMOTINYANE EPHRAIM LEOMA and the 1st respondent and the mother of 3rd respondent. The children of those marriages are therefore legitimate on that account. The evidence, which is not contradicted, shows clearly that for all intents and purposes all the children born during the subsistence of the purported customary law marriages between the late RAMOTINYANE EPHRAIM LEOMA and the two ladies in question, were in fact treated by the parties as legitimate children. There was not even a hint of any knowledge on their part, of any likelihood of their being illegitimate. I therefore feel obliged in the circumstances to declare them legitimate children of the putative marriage.

A M THOKA v T R HOOHLO 1978 LLR, 325 at 334.

Since two applications had been consolidated and argued as one, the dismissal of the application has the effect of the success of the counter application. This being a family dispute the order of costs in my opinion would not be appropriate. Particularly as it appears from the papers filed of record that the applicant has, from the beginning of these episodes of subsequent marriages by her late husband, continuously been, compromising her own interests. She has further shared the deceased estate as an indication of selfless even where she was entitled to keep the whole estate to herself. Her act of giving is twice blessed according to the

Shakespearian sentiments expressed by the most renowned advocate of selfless attributes, - Portia in THE Merchant of Venice. It blesseth him that gives, it blesseth that takes. Applicant blessed those she gave the property and they must appreciate it. She must be also blessed by so giving. That is why I feel the order of costs against her, is not suitable. The order of costs might disturb the equilibrium achieved by the applicant's own distribution of the deceased estate. It is therefore ordered that each party bears its costs.



K. J. GUNI
JUDGE

8th August 2000

For Applicant : Mr. Makhene

For Respondents : Mr. Sello