CIV/APN/301/00

IN THE HIGH COURT OF LESOTHO

In the matter between :

JOSEPH TSOTANG RAKEPA **APPLICANT**

and

HILDA MEISIE MOLISE **RESPONDENT**

For the Applicant : Mr K Mosito

For the Respondent : Mrs Thabane

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi on the 2nd day of May 2001

This was an application for the following orders:

1. Declaring the purported marriage entered into between the applicant and respondent null and void *ab initio*.
2. Directing the respondent's children or the children born out of the purported marriage between applicant and respondent to stop levelling threats both verbal and physical at the applicant and also to

refrain from destroying property of the applicant.

3. Declaring the children born out of the purported marriage between applicant and respondent illegitimate and as such have no right whatsoever to the enjoyment of applicant's property.
4. Directing respondent to pay costs of this suit in the event of opposition.
5. Granting applicant such further and/or alternative relief.

The prayer 2 above was withdrawn before argument. I need not go into the reasons for that. The Respondent had filed her opposing affidavit. Applicant had in turn filed his replying affidavit. It will be observed from paragraph 16 of the opposing affidavit that there were the following prayers:

" 16

WHEREFORE Respondent prays that applicant's claims be dismissed, and a declaratory order be granted in my favour:

1. Declaring the union to be a putative marriage and the children born thereof legitimate;
2. Directing that the union be given the status of a universal partnership, and directing a division of the estate as a joint estate. Directing Applicant to transfer to me, the Residential property which was our matrimonial home; and directing the sheriff in the event of Applicant failing to transfer the said property to me within a time to be fixed by this Honourable court, to execute, in my name, such documents and to perform all such other acts as may be necessary to effect transfer of the said property into my name.
3. Awarding custody and control of the minor children to myself.
4. Compelling Applicant to pay maintenance for the minor children at the rate of M250 per month per child.

5. That Applicant make a contribution of M800.00 towards Respondent's costs in this application.
6. Further or alternative relief."

I was asked by Mr Thabane for the Respondent to have "prayer" 2 withdrawn. There were various reasons. One of them was that the facts such as contributions into the estate were such that besides being insufficiently developed *in casu*, they could not fairly be dealt with except by way of *viva voce* evidence. The prayer 3 was not pursued for the reason that the Applicant did not intend to contest it. Perhaps I would only need to comment about prayers 4 and 5 despite that as Mr. Mosito said they ought to have come by way of a formal counter-application. I felt that the first prayer would be consistent with an order or declaration which I would normally allow or decline in the circumstances such as those of the present application.

In this application for a declaration it was common cause that Applicant married Respondent on the 24th day of March 1982 while the latter was already and civilly married. The two certificates were annexed on pages 6 and 7 of the proceedings to attest to the marriage of Respondent to Richard Seabane on the 7th June, 1980 and the marriage of the Respondent to the Applicant on the 24th March 1982. Four children have been born of the latter marriage, the eldest of whom is twenty years of age and the youngest fourteen years of age. The Applicant said that these children are adulterous, illegitimate and cannot be putative.

The Applicant says that he had been advised and verily believes it to be true and correct that since his marriage (with Respondent which was a civil marriage) could not legally co-exist with that of the said Seabane. Thus the second marriage was a nullity. Applicant correctly submitted that section 29(1) of the Marriage Act

1974 provides that a marriage such as that one between the parties was a nullity *ab initio*. I was referred to the case of **Makata v Makata** 1982-1984 LLR 29 for the position. I agreed with respect.

Mr. Mosito had originally asserted that the declaration sought by the Respondent that the marriage be declared a putative one was made from the bar alternatively that there was technically speaking no counter application in terms of rule 8(1) High Court Rules. Technically speaking that could have been correct. But I did not accept that despite that there ought to be no joinder of issue on the matter. It took the view that it would follow naturally from a finding on nullity and on the question of legitimacy or otherwise of the children born of the disputed marriage. I did not think that mere fault in form should prevent argument on the matter. Indeed Counsel argued strongly on the aspect.

There are three requirements for a putative marriage held to be in existence. First, there must be a formal ceremony. Second the parties must be *bona fide* in entering the union in that it must either be a result of a mistake as to the nature or ignorance of the existence of the previous marriage. Thirdly, the parties must consider that the marriage they are entering is a lawful one and without any legal impediment. It should be a question of fact that the parties have considered their relationship to be a lawful one.

I was referred in argument to paragraph 4(c) of Applicant's founding affidavit. Therein he averred that he did not know of the marriage between Respondent and Seabane. However in paragraph 5 of the answering affidavit Respondent denied that and went on to explain that in fact Applicant had not *bona fide* when she entered into the marriage. In the replying affidavit, the Applicant does not deny these Respondent's averments. This meant that he admitted them.

It was averred by the Applicant that he was informed by Seabane in the presence of Thabo one Mapetla who was acting chief of Qoaling around March 2000 that Respondent was still his wife and that they were never divorced. Applicant said that since the relationship with the Seabane was not good he had been unable to solicit his affidavit in support thereof. This is understandable in that Seabane must have taken that the Applicant has illicitly taken away his wife. He referred to the supporting affidavit of Thabo Mapetla which was annexed. This included a letter from the said Thabo Mapetla confirming that he intervened in the dispute between Applicant and Seabane over the Respondent. This evidence became overwhelming. I did not see why Respondent sought to deny this.

Respondent denied that Applicant had had no knowledge of her marriage to Seabane. She told the Court the circumstances that led the Applicant to know or must have known of this marriage to Seabane. It was that the Applicant was present at the wedding ceremony. That furthermore Applicant and Respondent started this affair during the married life of Seabane and Respondent. Applicant used to be a friend of the said Seabane and used to visit him at their matrimonial home. Respondent was introduced to the Applicant by the said Seabane. And that further Respondent used to confide in the Applicant about their marital problems until the breakdown of the marriage. On all probabilities this marriage was entered by the parties with their eyes open as I did irresistibly concluded. There would be no question therefore of the parties not knowing of a pre-existing marriage (which was by civil rites) and its legal consequences. See **Makopano Theresia Leoma v Tšeliso Justinus Leoma and Another C of A (CIV) No. 29 of 2000, Ramodibedi JA, 12th April 2001.**

Respondent made much of her ignorance of the legal consequences of her second marriage. With that she wanted to persuade this Court that the marriage

was entered in good faith. I struggled unsuccessfully to find where any good faith would be found. The argument by Mrs Thabane to that end was to this effect and obviously premised on the existence of a customary marriage which had neither been pleaded nor proved. It was submitted that the true status of the law regarding the distinction between a Sesotho, a civil and a Christian marriage was still not easily ascertainable to an ordinary Mosotho person. Reference was made to this discussion by Maqutu J who was author of **Contemporary Family Law In Lesotho (NUL Publishing House** 1992) at page 22 where he said:

> "Many Basotho to this day are and not aware that when they enter a Christian marriage they abandon Customary Law regime for a foreign Roman Dutch Law marital regime with different proprietary consequences."

And then the argument went on to say that these consequences in the above statement were not explained to the parties either before or at the time of the conclusion of the marriage. This Court further observed that Respondent used an argument concerning same parties entering into customary marriage and civil marriage or vice versa. And not where a party (such as Respondent) had entered into marriage with two different people. I did not see the value of the quotation from the **South African Law of Husband and Wife** by H R Hahlo (Juta 1975) at page 494 where is in seek of support for having entered the marriage in good faith merely because the Respondent said "she was ignorant of the legal consequences of such a marriage i.e. that it could be anything but valid." The quotation was as follows:

> "A mistake of law will be sufficient, provided it was reasonable, for example, because the law on the point was doubtful, or difficult to ascertain."

Respondent said she laboured under a mistaken belief that she was concluding a Sesotho marriage blessed in church with no other consequences than to secure her

rightful place as member of that church. Without prior reference to an agreement over bohali and such other requirements of a Sesotho customary marriage I thought the Respondent was being not only unrealistic but was taking a long short in promoting this line of argument. Indeed she persisted. It was indeed beyond argument, as I concluded that the marriage was a nullity *ab anitio* and that this argument was therefore misplaced.

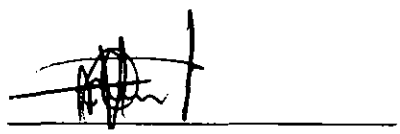
In my opinion the test of whether a marriage was putative or not was not whether it was of a long duration or a short one. The Respondent said from year 1982 to year 2000 the parties lived together as husband and wife and begot children together and amassed property together. And that this was a clear indication of their intention to be bound together in marriage. That may be so but the question was whether the marriage therefore became a putative one. Respondent said that it was this intention which manifested itself in the parties living together and behaving as a married couple that should be considered when deciding that the marriage although null and void should be declared putative. I did not agree. The marriage has to muster all the three tests which I have referred to earlier in this judgment. If not there cannot be a putative marriage.

Next was this question of declaring the four children born of this bad marriage putative as against their being said merely to be illegitimate and adulterine. I found this a great problem. Both parties were not *bona fide* at the time of their marriage. "The Court has no power to declare the legitimacy to be operative from any date other than from the date of the birth of the child". See **Vather v Seedat 1974(3) SA 389(N)**

Where the marriage was not a putative one the children cannot be held to be legitimate. See **Bam v Bhabha 1947(4) SA 798 AD 809**. I thought all the

Plaintiff's prayers should succeed. I awarded no costs to either party.

In the nature of the Applicant's claim and flowing from my comments that a proper- counter application should have been filed. I observed that other issues other than the issue of the alleged putative marriage and legitimacy of children could have been effectively dealt with if proper argument and pleadings were filed. I would have been able to deal with the questions of property custody, maintenance and contribution towards costs. I have to reserve my comments about whether the Respondent is still entitled to come to Court and make those claims. All I say is that the issued have not been dealt with herein.



T. Monapathi
Judge

2nd May 2001