C of A (CIV) No. 10 of 2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

'Malineo Moletsane	**Appellant**

and

'Mamosa Moletsane	**First Respondent**
Rampati Moletsane	**Second Respondent**
Betle Moletsane	**Third Respondent**
Clement Moletsane	**Fourth Respondent**

Held at Maseru on 12 October 2004

CORAM:
Ramodibedi, JA
Grosskopf, JA
Smalberger, JA

JUDGMENT

Summary

Husband and Wife – civil marriage preceding customary marriage – Effect thereof – polyandry –whether permitted in terms of the laws of Lesotho – void marriage.

Ramodibedi, JA

[1] Polygamy has once again reared its ugly head in this matter. It all started in 1992 when, in what has now sadly become an all

too familiar a story in this country, the late Thekiso Moletsane ("the deceased") purportedly married the Appellant by customary rites during the subsistence of his civil marriage to the First Respondent. As often happens in similar situations, the latter kept a low profile until the deceased's death on 28th March 2004 when she suddenly burst onto the scene. Accompanied by her two sons with the deceased namely the Second and Third Respondents as well as the youngest brother to the deceased namely the Fourth Respondent, the First Respondent went back to her marital home with the deceased where the latter had apparently had the indiscretion to house the Appellant. Not only that, the First Respondent took centre stage and demanded the right to bury her deceased husband. As may well be imagined, this evidently proved to be an impossible scenario and the Appellant was "forced" to vacate the house and seek accommodation elsewhere – perhaps a painful reminder of the hardships brought about by polygamy as this Court has repeatedly warned.

[2] Against this background the Appellant brought an application in the High Court (Teele AJ) for an order in the following terms:

> "That a rule nisi be issued calling upon respondents to show cause if any, why,
>
> 1. (a) dispensing with the modes of services as provided for in the Rule of court due to the urgency hereof.

(b) Applicant should not be the rightful person to burry (sic) the deceased THEKISO MOLETSANE in consultation with the family.

(c) Respondents should not be directed to lay their hands off and restrained from interfering with Applicant's use of property comprising the estate of the deceased, pending any decision as to the lawful heirs, and the division of the estate in accordance with the law.

(d) Respondents should not be directed to restore possession of a Toyota Raider twin cab Registration No: AD122 and Toyota 4 x 4 Registration No: AP214 to the applicant forthwith.

> (e) Respondents, more particularly 2nd and 3rd respondents, should not be restrained from collecting rental money from the deceased's rented premises and should not intimidate or compel the tenants to pay the rent to any person other than applicant.

(f) Respondents should not be ordered to restore possession of the house in which applicant lived with the deceased

forthwith until it has been handed to them lawfully.

(h) (sic) Applicant should not be declared a partner in the universal partnership conducted by her and the deceased since they lived together in a purported customary marriage.

(i) That the joint life between applicant and deceased be declared a putative marriage for the purposes of the children born of that union.

(j) Granting Applicant further/and or alternative relief.

(k) Costs in the event of opposition of this application.

2. Prayers 1. (a), (b), (d), (e), (f) and (g) (sic) to operate with immediate effect. And the affidavit of MALINEO MOLETSANE will be used in support of this application."

[3] It will be noted that the prayers set out above do not have prayer (g). It is common cause, however, that this prayer was subsequently included on 7 April 2004 in an unopposed application. The prayer calls upon the Respondents to show cause why:-

"(g) Respondents should not be restrained from intimidating or in any manner whatsoever harassing Applicant."

[4] On the extended return day Teele AJ presided over the matter. In a commendable approach, the learned Acting Judge *a quo* duly ordered *viva voce* evidence on two specific issues namely:

(a) "Whether there was any marriage between the Appellant and the deceased." If so,

(b) "Whether the Appellant entered into such marriage *bona fide* believing that there was no legal impediment to her getting married to the deceased."

[5] During the course of the proceedings, however, the Respondents conceded that there was in fact a customary marriage between the Appellant and the deceased. This concession was in my view properly made on the facts and the first issue set out in the preceding paragraph was accordingly determined in favour of the Appellant. What this then meant was that it became common cause between the parties that the Appellant got married to the

deceased by customary rites during the subsistence of the latter's civil marriage to the first Respondent.

[6] It is now well settled in our law that a civil marriage cannot subsist side by side with a customary marriage. A customary marriage following a pre-existing civil marriage as in this case is null and void *ab initio*. See for example decisions of this Court in *Mokhothu v Manyaapelo 1976 LLR 281, Makata v Makata 1980-84 LAC 198* (also reported in *1982-84 LLR 29), Leoma v Leoma and Another C of A (CIV) No. 29 of 2000* (unreported) and *Ntloana and Another v Rafiri C of A (CIV) No. 42 of 2000* (unreported).

> [7] In so far as the issue relating to whether or not the customary marriage in question was putative, the Appellant gave evidence as PW1. She did not call any witnesses (it must here be noted that her witness Sello Maleleka who gave evidence as PW2 was merely concerned with whether or not the customary marriage in question existed and not whether it was putative or not).
>
> [8] Now the gist of the Appellant's oral evidence was that in 1992 when she married the deceased by customary rites, she was unaware of the latter's prior

> civil marriage to the First Respondent. The deceased had, however, informed her that he had previously been so married but that the marriage in question had been dissolved by a decree of divorce.

[9] The Appellant was taken to task in cross-examination by the First Respondent's Counsel and indeed she was at pains to explain how she could believe that there had been a decree of divorce in the absence of a divorce order to that effect. This point, as it seems to me, carries significant weight when one has regard to the fact that the Appellant herself was, at the hearing of the matter, armed with a divorce order from her own marriage to one Daniel Mphutlane Thamae ("Mphutlane"). The divorce order is however dated 26 April 1993 long after the Appellant had already been married to the deceased on her own version. I shall deal with this aspect of the matter shortly. Suffice it to say at this point that the Appellant made a telling admission under cross-examination that she personally knew that for one to be divorced, there should be "a judgment from court of some sort." In my view, therefore, the fact that she did not insist on a divorce order as proof that the

deceased's marriage to the First Respondent had been legally terminated, is a factor that must adversely affect her own *bona fides*. This is the more so in view of the fact that, on her own version, she was being ridiculed as no more than deceased's concubine. She had been told by one of the deceased's family members namely the Fourth Respondent's wife at some stage that the First Respondent was the legal wife of the deceased.

[10] It shall suffice further to say that after seeing and hearing the Appellant, the learned Acting Judge made strong credibility findings against her and came to the conclusion that she was not *bona fide* in entering into a customary marriage with the deceased when she did and that accordingly she failed to establish that her marriage was putative. It requires to be stated then that the question that arises for determination by this Court is whether the learned Acting Judge *a quo* was correct in so doing. In this regard it is useful to note that in her first ground of appeal, the appellant expressly concedes "contradictions" in her evidence. On this

aspect the learned Acting Judge said this:

> "These unforced errors and contradictions did not inspire confidence in this court that the truth was being told."

I can find no fault with this approach. Indeed it is hardly necessary to repeat the age-old principle that the appellate court is very reluctant to upset the findings of the trial court (see Rex v Dhlumayo and Another 1948 (2) SA 677 A.D. at 705).

> [11] At the outset it must be said that, as matters turned out, it appears that the Appellant's problem was largely of her own making. This is so because it was conclusively established at the hearing before the learned Acting Judge that not only did she enter into the customary marriage in question in circumstances where she should have known about the pre-existing civil marriage between the deceased and the First Respondent in as much as she lived in the same village (admittedly only 200 meters apart) with the deceased but something more dramatic emerged. The Appellant was herself still validly married by civil rites to Mphutlane at the time of her subsequent customary marriage to the deceased.

[12] What is inexcusable for that matter is that the Appellant

failed to disclose this fact in her founding affidavit. Instead, she sought to mislead the court by deposing that she had "previously been married to Mphutlane with whom we divorced by order of this Honourable Court…" (Emphasis supplied). As indicated above, she only obtained a divorce order after she had already contracted the customary marriage in question. This being the case, I am satisfied that, apart from the fact that polyandry is not permitted in terms of the law of this country (see *Masupha v Masupha 1977 LLR 54)*, the learned Acting Judge was justified in concluding that the Appellant did not *bona fide* believe that there were no legal impediments to her customary marriage to the deceased. After all, not a word came from the Appellant, both in her papers and in her evidence, to say that she was not aware of the legal impediments relating to her own pre-existing civil marriage to Mphutlane. This, despite the fact that the Appellant bore the onus of proof on the issue.

[12] It was submitted on behalf of the Appellant that the legal

impediment relating to her pre-existing civil marriage to Mphutlane was "removed barely four months after living with the deceased." Reference was here made to the fact that the Appellant obtained a divorce on 26 April 1993. In my view this submission is disingeneous and falls to be rejected outright. The material time for judging the *bona fides* of the Appellant was at the time of her marriage to the deceased. The fact that she obtained a divorce from Mphutlane four months after her marriage to the deceased cannot assist her. It will for that matter be noted that the Appellant herself seems to recognize this when she says the following in paragraph 11.1 of her founding affidavit:

> "11.1 Even if my marital status my (sic) be in doubt as to its validity I have all the right to mourn the death of the deceased in the house where we lived for almost twelve years."

[13] It may be useful to observe that in commenting on exactly the same situation as the Appellant finds herself in, H.R. Hahlo: The South African Law of Husband and Wife: Fifth Edition, expresses

himself as follows on page 111 thereof:

> "If one of the spouses has entered into (sic) second marriage before his first marriage was annulled, the second marriage does not become validated as a result of the annulment of the first one. Having been null and void as bigamous when it was contracted, the second 'marriage' is non-existent and therefore incapable of validation."

I respectfully agree with this view to the extent that it refers to civil marriages (hence the use of the word "bigamous"). For the avoidance of doubt, it is necessary to add that in Lesotho exactly the same principle applies to a civil marriage preceding a customary marriage as in the instant case. The latter marriage is null and void *ab initio* and is therefore incapable of validation as a result of the annulment of the former. See for example, the cases cited in paragraph [6] above.

[14] In these circumstances the conclusion by the learned Acting Judge that the Appellant's customary marriage to the deceased was not putative cannot be faulted. The Appellant simply failed, in my

view, to discharge the onus of proving that her marriage to the deceased was putative, alternatively that at the time when she entered into the customary marriage in question, she did not *bona fide* believe that there were no legal impediments to such marriage particularly in view of her own pre-existing civil marriage to Mphutlane.

[15] In view of the conclusion at which I have arrived in this matter, it is strictly not necessary to deal with the other grounds of appeal. In fairness to Mr. Phoofolo for the Appellant, he conceded as much and rightly so in my view.

[16] It follows that the appeal cannot succeed and it is accordingly dismissed with costs.

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M.M. Ramodibedi
JUDGE OF APPEAL

I agree: _____

F.H. Grosskopf
JUDGE OF APPEAL

I agree: _____

J.W. Smalberger

JUDGE OF APPEAL

Delivered at Maseru on this 20th day of October 2004

For Appellant: Mr. E.H. Phoofolo
For Respondent: Miss Tau (Assisted by Miss Mohasi)