C of A (CIV) No. 19 of 2003

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MACHELE LEOMA **APPELLANT**

and

MAKOPANO THERESIA LEOMA **RESPONDENT**

Held at Maseru on 26th March 2004

CORAM:
Ramodibedi, J.A.
Melunsky, J.A.
Kumleben, A.J.A.

Judgment

Ramodibedi, J.A.

[1] It is a matter of regret that polygamy in Lesotho continues to exacerbate the problem of conflict of laws in this country. Such conflict in turn arises from the fact that Lesotho has a dual legal system comprising Roman-Dutch Law on one hand and Customary Law on the other hand. Now, it is a fundamental truism that the practice of polygamy is a complete anathema to Roman-Dutch Law while on the other hand it is perfectly in order in terms of

Customary Law. This fundamental distinction is however not always apparent to the ordinary Mosotho in the street despite this Court's ruling in numerous decisions that a civil marriage cannot subsist side by side with a customary union. See for example Mokhothu v Manyaapelo 1976 LLR 281, Makata v Makata 1982-84 LLR 29 at 32 (also reported in 1980-84 LAC 198) and Makopano Theresia Leoma v Tšeliso Justinus Leoma and Machele Leoma C of A (CIV) No. 29 of 2000 (unreported).

[2] As is evident from the last case cited in the preceding paragraph, this matter has already been before this Court in case number C of A (CIV) No. 29 of 2000. In that case, this Court declared null and void the customary "marriages" of one Makhang Leoma, the mother of the first respondent Tšeliso Justinus Leoma in the Court below and the appellant's mother Matšepiso, concluded during the subsistence of the respondent's own civil marriage to the late Ephraim Ramotinyane Leoma ("the deceased"). The latter had lived with the three women in a polygamous union. The full terms of the order of this Court in so far as this appeal is concerned were as follows:

> (1) The application in CIV/APN/465/99 is granted and the customary marriages of Ramotinyane Ephraim Leoma to Mamotiki Khauli (alias Makhang Leoma) and Matšepiso Lekhooe are hereby declared null and void.
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> (2) The issue whether or not the Respondents' mothers knew of the nature of the pre-existing marriage and of the legal impediments it posed to the deceased's subsequent customary marriages to them and whether or not such marriages were, as a result thereof, rendered putative is remitted to the court *a quo* for investigation and determination by way of oral evidence.

[3] When the matter came before Guni J in the High Court, evidence was duly led on the narrow issue as directed by this Court. The sole witness was none other than Makhang Leoma whose evidence, in a nutshell, disclosed that she was only nineteen (19) years of age when she

was abducted by the deceased. She subsequently escaped but the respondent herself pursued her and brought her back to the deceased's homestead where a customary "marriage" was concluded between her and the deceased as his second wife. She remained completely unshaken in her evidence that she acted in good faith and that she was not aware of any legal impediments to her "marriage" with the deceased.

[4] Having seen and heard the witness Makhang Leoma, Guni J believed her evidence and came to the conclusion that the marriage between her and the deceased was putative. She accordingly declared it as such. This finding is fully justified on the evidence and I may add that its correctness has not been challenged.

[5] In so far as the alleged "marriage" between the deceased and Matšepiso was concerned, Guni J came to the following conclusion:

> As both MATSEPISO LEKHOOE and Ephraim Leoma are late. (sic) There is no evidence except Makhang's belief, that their bona fides were same. Her belief is not sufficient evidence that they were not, aware that there were legal impediments. There is no evidence from either. I cannot say similarly that their marriage was putative.

It is that finding that forms the subject matter of this appeal by the appellant who is the daughter of Matšepiso.

[6] It is pertinent to mention at this stage that the respondent has filed a "Notice of Intention not to oppose Appeal". That, however does not, as it seems to me, relieve this Court from determining the merits and demerits of the appeal.

[7] It will be observed that, while there is conclusive evidence that the marriage between the deceased and Makhang Leoma was putative, the case for the appellant stands on a completely different footing. As Guni J correctly points out in her judgment, the appellant's mother had sadly passed away when oral evidence was led in the court *a quo.* Evidently, it became an

insurmountable problem in the circumstances how the appellant was going to prove the issue as previously defined by this Court, namely whether or not her mother Matšepiso knew of the nature of the pre-existing civil marriage between the deceased and the respondent and the legal impediments it posed to Matšepiso's subsequent customary "marriage".

[8] In the light of this predicament, a valiant attempt was made to lead the required evidence from Makhang Leoma herself but to no avail. For example the following question was put to her by the appellant's attorney :

> Q: To your knowledge, did Matšepiso exhibit any knowledge or suspicion that her own marriage may not be valid in law?
>
> A: She seemed to have been well received.

It is, in my view, hardly surprising that the witness Makhang Leoma could not take the point any further in as much as the issue as defined by this Court clearly envisaged subjective knowledge on the part of Matšepiso herself. It is she who would be in the best position to tell the Court whether or not she knew the nature of the pre-existing civil marriage between the deceased and the respondent and of the legal impediments the marriage in question posed to her subsequent customary marriage. That in itself, as it seems to me, clearly entails proof of the state of mind of Matšepiso herself on the issue.

[9] It may be convenient at this stage to refer to the following ground of appeal filed on behalf of the appellant :

> ..... the learned Judge ought to have held that in the absence of evidence that Matšepiso knew that there were any impediments to her marriage brought about by the fact of Ephraim having previously married the respondent by civil rights, she would not hold that her marriage was not putative.

In my view, there are two short answers to the appellant's contention. Firstly, it was clearly not within the terms of the directive of this Court as fully reproduced above that anybody (let alone the respondent) should prove the negative as suggested in this ground of appeal. On the contrary, the onus was on those who alleged that there was a putative marriage between the deceased and Matšepiso to prove it on a balance of probabilities. This, in my view, the appellant has failed to discharge. In this regard it is instructive to note that there is no evidence as to the background and mode of living of Matšepiso. Nor is there evidence that (unlike Makhang Leoma) she was too young at the time of her "marriage" to the deceased to know the legal impediments created by the pre-existing civil marriage between him and the respondent. Secondly, in the absence of evidence to this effect, it cannot be assumed or inferred that a person entering into a customary union with the payment of bohali' would necessarily, or as a probability, be under the impression or would conclude that no previous civil marriage in the case of the other party existed. Consequently, the mere entering into a customary union with payment of bohali' does not justify the finding that Matšepiso did not know that there was a pre-existing civil marriage between the deceased and the respondent and that she did not know the legal impediments that marriage posed to her own customary union.

[10] In the light of the aforegoing considerations, I am unable to find any fault with the learned Judge *a quo*'s approach on the sketchy facts presented to her.

Accordingly the appeal is dismissed. There being no appearance for the respondent, there shall be no order as to costs.

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M.M. Ramodibedi

JUDGE OF APPEAL

I agree : _________________________

L. Melunsky

JUDGE OF APPEAL

I agree : ________________________

M. Kumleben

ACTING JUDGE OF APPEAL

Delivered at Maseru this 7th day of April 2004

For Appellant: Adv. K. Sello K.C.

For Respondent: No Appearance.