

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) No.14/08

In the matter between:-

**'MANTŠEBO RAMOOTSI
TIISETSO RAMOOTSI
MOEKETSI RAMOOTSI
TONA RAMOOTSI
TAUNYANE RAMOOTSI**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT
FIFTH APPELLANT**

And

'MALINEO RAMOOTSI

RESPONDENT

CORAM : RAMODIBEDI, P
GROSSKOPF, JA
TEELE, AJA

HEARD : 8 OCTOBER 2009

DELIVERED : 23 OCTOBER 2009

SUMMARY

Customary law - Whether the absence of payment of bohali is fatal to the validity of a customary law marriage in all cases - Section 34 (1) of the Laws of Lerotholi - Appellants resisting respondent's claim on the ground that she was not legally married merely because bohali was not paid - Appeal dismissed.

JUDGMENT

RAMODIBEDI, P

[1] The question which primarily falls for determination in this appeal is a vexed one: is the absence of payment of bohali fatal to the validity of a customary law marriage in all cases? It is instructive to point out at the outset that this is the first occasion the Court of Appeal is asked to determine the question.

[2] The present respondent, as applicant, launched an application

against the appellants in the High Court for relief, inter alia:-

- (1) restraining and interdicting the respondents from interfering with her property rights. She also sought an interdict against them from threatening to kill her;
- (2) ordering the respondents to leave applicant's home pending the finalisation of the application;
- (3) ordering the second and third respondents to hand over the motor vehicles Toyota 4 x 4 registration numbers CTD 968 FS and Toyota Corolla registration numbers CE 710 to the Deputy Sheriff for handing over same to the applicant pending the finalisation of the application.

[3] Mofolo AJ granted the application as prayed. Hence this appeal.

[4] The relevant facts are hardly in dispute. At all material times since August 2003 Thabo, alias Katampa, Ramootsi ("the deceased") lived with the respondent as husband and wife purportedly in a customary law marriage. They produced a baby girl named Lineo Ramootsi. Crucially, this name was admittedly given to the girl by the deceased's family in accordance with Sesotho custom, something which on its own signifies the existence of a customary law marriage.

[5] In his lifetime the deceased amassed considerable property such as a house at Maputsoe in Leribe district. He also had two motor vehicles referred to in paragraph [2] above.

[6] On 18 July 2007, the deceased passed away. It appears from the record of proceedings that the appellants, no doubt with an

eye to the deceased's property as so often happens in this country, immediately adopted the attitude that the respondent had not been legally married to the deceased because bohali had not been paid. They seized the deceased's estate to the exclusion of the respondent. Hence the application by her referred to in paragraph [2] above.

[7] At the hearing of the matter Mofolo AJ heard oral evidence on the question whether or not the respondent had legally been married to the deceased in terms of customary law. After seeing and hearing the witnesses called on either side, the learned Acting Judge came to the conclusion that there was in fact a customary law marriage in existence. In this appeal the appellants seek to attack the correctness of that finding. Their main complaint is that bohali was not paid and that, therefore,

there was no customary law marriage established between the respondent and the deceased. It is thus necessary to examine the evidence in some detail.

[8] The respondent gave evidence as AWI. In outline, she testified that she and the deceased agreed to marry. And so they did. They first eloped in 2002. She was taken to the deceased's parental home where certain rituals were performed in recognition of a customary law marriage. These included the slaughtering of a sheep to welcome her into the Ramootsi family. She was made to wear certain clothes such as a long dress, signifying her acceptance into the family. She lived with the deceased as husband and wife until his death in 2007. When their child, Lineo, was born on 1 January 2005, she was sent to her maiden home in keeping with a customary law

marriage. Crucially, it is not disputed that she was accompanied by the second appellant.

[9] The respondent further testified that the deceased's mother, together with the second appellant, visited her and the baby girl at the respondent's maiden home. The deceased's mother actually administered the customary rites on the baby. These included the shaving of the baby's head. She also gave the baby the name of Lineo, something that is ordinarily only done where there is a marriage in existence. Furthermore, it is not disputed that she subsequently stayed with the respondent at Maputsoe in keeping with a customary law marriage.

[10] To crown it all, and this was not disputed, the respondent testified that after the deceased's death she was made to wear

a mourning cloth. It is once again not disputed that this is something that is done only by married women.

[11] On the question of bohali it was the respondent's evidence that the fifth appellant, who is the deceased's father, admitted at a meeting convened to discuss the issue of bohali payment that *"he knows he has a debt and he will come soon to come and pay down, he is not paying compensation, but he is giving everything to his son to hear everything because he didn't have anything."* There can be no doubt in my mind that the word "debt" was a reference to bohali. Indeed, the respondent testified that the fifth appellant undertook to pay bohali.

[12] The respondent's mother, Mojoa, gave evidence as AW2. She corroborated the respondent in material respects. She

confirmed that the fifth appellant undertook to “come for marriage preparation.” She further confirmed the customary rituals performed by the deceased’s family on the respondent as signifying the existence of a customary law marriage.

[13] The fifth appellant gave evidence. Basically, he seemed to deny almost everything that was put to him. In my view, he was so poor as a witness that he sought to deny even the contents of his own affidavit. He claimed no knowledge of the respondent. According to him, the deceased had only married a certain woman from Kolojane. He could not even remember her name.

[14] On the question of bohali the fifth appellant testified that he paid six head of cattle for “*abduction*” and that the respondent

and the deceased "*separated*" before he could pay "lobola." It may be observed that this is in itself an implied admission that there was an agreement to pay "lobola" or bohali in the first place. In any event, it is not seriously disputed that a date was even fixed by the parties for payment of bohali, namely, 31 August 2007. Regrettably, the deceased who was himself due to effect payment as agreed passed away before that date.

[15] It is important to note that the rest of the appellants did not testify. More importantly, they did not call any witnesses to rebut the respondent's evidence.

[16] As indicated earlier, after seeing and hearing the witnesses the learned Acting Judge believed the respondent's version that she had in fact been married to the deceased by customary rites

despite the absence of payment of bohali. It is true that a finding as to credibility is a matter which lies within the discretion of the trial court. An appellate court will not lightly disregard the credibility findings of a trial Judge who saw and heard the witnesses. Such a Judge is obviously in a better position than the appellate court to form an opinion as to credibility. The appellate court will generally only interfere where the trial court has misdirected itself. It has not been shown that there was such a misdirection in this case. Accordingly, the trial court's finding as to credibility in the matter must stand.

[17] The appellants have relied heavily on s34 (1) of the Laws of Lerotholi. That section reads as follows:-

"34. (1) A marriage by Basuto custom in Basutoland shall be deemed to be completed when:

(a) there is agreement between the parties to the marriage;

(b) there is agreement between the parents of the parties or between those who stand in loco parentis to the parties as to the marriage and as to the amount of bohali;

(c) there is payment of part or all of the bohali,...."

[18] This section has over the years been the subject of much controversy, not only in the High Court and the lower courts, but also amongst some writers and commentators. This is more so on the question of payment of bohali. Is bohali an indispensable requirement of a valid customary law marriage in all cases? In my judgment, a convenient starting point in answering this question is to recognise that s34 of the Laws of Lerotholi is not a codification of the customary law of Lesotho

as such. Nor is it a comprehensive statement of all the Sesotho customary law of marriage as Cotran CJ correctly observed, in my view, in **Ramaisa v Mphulenyane** 1977 LLR 138 (HC).

Viewed in this way, the question of payment of bohali must obviously depend on the intention of the girl's parents. Each case must be judged in the light of its own peculiar circumstances. This is so because some parents may insist on payment of bohali while others may not. In this regard I accept as correct the following statement by Patrick Duncan:

Sotho Laws and Customs at page 25:-

"Marriages take place with the payment of cattle or sometimes without, but it depends on the wishes of the parents of the girl..."

[19] Crucially, the Basotho have always recognised the reality that some people may lack the means to pay bohali when they coined the expression "*monyala ka peli o nyala oa hae,*" loosely translated, "*even two beasts are sufficient to constitute a marriage.*" In a poor country like Lesotho it is indeed not hard to imagine that a great many people do not have the means to pay bohali. It would, in my view, be a sad day if they were denied marriage merely because of their failure to raise bohali as such.

[20] It follows from the foregoing considerations that in this day and age I should be prepared to lay it down as being in accordance with common sense and logic that the absence of payment of bohali is not fatal to the validity of a customary law marriage in all cases. Put differently, bohali is not a *sine qua non* of the

validity of a customary law marriage in all cases. What I consider to be of fundamental importance is the agreement by the respective parties to create a validly binding customary law marriage regardless of bohali. In this regard, I agree with the approach of Maqutu J, as he then was, in **Tseli Moeti v Tanki**

Lefalatsa & Another 1999 - 2001 LLR 511 (HC) at 515 that he

was "not prepared to accept the bare assertion that there is no marriage merely because 'not a single bohali beast was paid'."

[21] In the light of these considerations, I am satisfied that the court a quo was fully justified on the facts in coming to the conclusion that there was in fact a customary law marriage in existence between the respondent and the deceased.

[22] In the result the appeal cannot succeed. It is accordingly dismissed with costs to be paid by the appellants jointly and severally, the one paying the others to be absolved.

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

F.H. GROSSKOPF
JUSTICE OF APPEAL

I agree:

M.E. TEELE
ACTING JUSTICE OF APPEAL

For Appellant : Adv. L.E. Molapo
For Respondent : Adv. M.J. Motšoari