IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.30/13

In the matter between

'MAMOLETSANE MOLETSANE **APPELLANT**

And

FONANE STEPHEN MOLETSANE **RESPONDENT**

CORAM: HOWIE JA
FARLAM JA
THRING JA

HEARD: 9 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

SUMMARY

Application to the High Court for divorce proceedings in a Local Court to be stayed pending the grant of leave under s 6 of Act 5 of 1978 for the institution of such proceedings in the High Court – before determination of the application, divorce granted in a Local Court – relief sought in High Court refused.

JUDGMENT

HOWIE JA

[1] The parties contracted a customary marriage in 2004 and a child was born of the union. Their relationship deteriorated and in October 2011 the respondent instituted divorce proceedings in the Motjoka Local Court.

[2] The appellant did not engage in those proceedings but adopted the attitude that the Motjoka Local Court did not have jurisdiction in respect of the parties because they were people of Mapoteng, not Motjoka. What she did do was to apply in November 2011 on notice of motion to the High Court for the following relief (I summarise):

1. An interdict restraining the respondent from alienating matrimonial assets.

2. Maintenance for herself.

3. Custody of the child.

4. A contribution towards her costs of pursuing divorce proceedings in the High Court.

5. An order staying the divorce proceedings in the Motjoka Local Court pending finalisation of the High Court application.

6. Leave in terms of s 6 of the High Court Act, 5 of 1978 to institute divorce proceedings in the High Court.

7. An order directing the respondent to buy a building site and have a home for the appellant and the child erected.

8. Costs.

[3] Founding, opposing and replying affidavits were duly filed but before the application was adjudicated upon a number of significant events occurred. First, the Motjoka Local Court held that it did not have jurisdiction. Second, the respondent brought fresh divorce proceedings in the Mapoteng Local Court. Third, the respondent was granted an order, by default, on 26 July 2012 in terms of which

the parties were divorced and the custody of the child was assigned to both parties.

[4] The High Court application came before Makara AJ in March 2013 and he made an order in May 2013 dismissing the application. Hence this appeal.

[5] The many issues that were debated before the learned Judge were carefully considered by him in a thoughtful and detailed judgment.

[6] The fundamental issue concerned the submission for the appellant that the Mapoteng divorce order could not be taken into account and had to be ignored. The Judge held, after rejecting the arguments by the appellant's counsel in this regard, that it was a fact of which he could, and did, take judicial notice.

[7] Counsel for the appellant persisted in this Court in contending that the fact of the Mapoteng Local Court's divorce order had to be disregarded. I disagree. We are not concerned with the reasoning in the Local Court's judgment but the simple fact that a divorce order was granted. That fact was, relevantly and correctly in view of the issues before the High Court, brought to its attention. It was

not referred to in the affidavits because they had all been drawn and filed by late November 2011. But it was a highly material fact for the Judge to know in dealing with the case before him. To ignore the order and to deal with the application on the assumption that the marriage still subsisted would have involved a meaningless pretence, a serious waste of time and costs and the risk of concurrent orders leading to conflicting consequences. And it was a fact which was not in dispute.

[8] The main ground advanced for the requested disregard of the divorce order was that the Mapoteng proceedings were irregular seeing that the High Court application was already pending. Counsel intimated that the appellant opposed the Mapoteng proceedings but conceded that she had not raised a plea of lis pendens nor had she taken the Mapoteng order on appeal or review. It was also argued that the Mapoteng proceedings were not referred to in the application papers. I have already said why that was so and why its absence was of no importance. The Judge was fully justified in taking the divorce order into account.

[9] The parties having been divorced and the custody of the child having been dealt with, the question was asked of the appellant's counsel whether he could ask for the relief summarised above as items 2, 3, 4 and 7. He conceded, correctly in my view, that he

could not. And for obvious reasons there was no longer any basis for the relief referred to in items 5 and 6.

[10] As regards the interdictory relief sought as item 1, there are many material factual conflicts on the papers. Once this relief cannot be granted as relief pending divorce proceedings it must be seen as relief in final form. That being so, the approach to the case must be one according to which the respondent's factual allegations prevail. On that approach there is no warrant for the interdict sought.

[11] It follows that the Judge correctly dismissed the application and that the same fate must befall the appeal.

[12] As to costs, the Judge thought that because the matter involved a family dispute no order for costs was warranted. However, counsel for the respondent sought an order for appeal costs. The appellant had been given very full and considered reasons why her application failed. Though aggrieved, her chances of a successful appeal ought to have impressed themselves as slim at best yet she went on regardless. I consider that the respondent should have the appeal costs.

[13] The appeal is dismissed with costs.

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C.T. HOWIE

JUSTICE OF APPEAL

I agree

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I.G. FARLAM

JUSTICE OF APPEAL

I agree

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W.G.G. THRING

JUSTICE OF APPEAL

For the Appellant: C.J. Lephuthing and K. Monate

For the Respondents: L.M.A. Lephatsa and M.G. Tau-Thabane