

IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

C OF A (CIV) 06/2018

In the matter between:

LITHOLE MOHASOA

APPELLANT

And

LINEO MATOASE

1ST RESPONDENT

THE ESTATE OF THE LATE MOLETE MATOASE

2ND RESPONDENT

THE EXECUTOR OF THE ESTATE OF

THE LATE MOLETE MATOASE

3RD RESPONDENT

MASTER OF THE HIGH COURT

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

CORAM:

DR K E MOSITO P

DR P MUSONDA AJA

N T MTSHIYA AJA

HEARD : 25 OCTOBER 2019

DELIVERED : 01 NOVEMBER 2019

SUMMARY

Family Law – customary marriage - contracted during subsistence of Common Law Marriage – Legal Position of Children of a putative marriage – By agreement of the parties – Matter referred to the Master to be dealt with according to the law.

Appeal succeeds – By consent of the parties, costs of the appeal and High Court litigation to be paid out of the estate.

JUDGMENT

DR K E MOSITO P

Introduction

[1] The first respondent approached the High Court for an order interdicting the 3rd and 4th respondents from executing the properties of the 2nd respondent pending finalisation of pending investigations into the validity of the first respondent's and the late Molete Matoane's marriage. She also sought an interdict against the appellant restraining her from holding herself out as the rightful widow of the late Molete Matoane. She further required the 4th respondent to be restrained from handling the matter as she lacked jurisdiction over the estate. Penultimately, she sought a declarator that a putative marriage existed between herself and the late Molete Matoane. She further asked the Court to direct that the properties acquired between herself and the late Molete Matoane be administered according to the principles of community of property. She anticipated that there might be a dispute of fact in the matter. She therefore asked for the matter to be referred to viva

voce evidence in that event. Lastly, she asked for costs and further and or alternative relief.

[2] The matter came before **Monapathi J** on 6 December 2017. The learned judge restrained the 4th respondent from handling the matter because she lacked jurisdiction over it. The learned judge also declared that a putative marriage existed between herself and the late Molete Matoase. Lastly, he directed that the properties acquired between herself and the late Molete Matoase be administered according to the principles of community of property.

[3] Dissatisfied with the outcome, the appellant approached this Court on appeal against the said judgment. She raised a total of six grounds of Appeal. For some reason, when the matter was called before this Court, the parties had softened somehow. They agreed that, regard being had to the applicable: (a) a putative marriage existed between herself and the late Molete Matoase. (b), The estate of late Molete Matoase be administered according to the principles of community of property which will accommodate both the appellant and the first respondent. (c), costs of this appeal and of the litigation in the Court *a quo* be paid out of the estate of the late Molete Matoase.

Factual matrix

[4] The facts as far as relevant to the resolution of this appeal are not complicated. They are that, in 1986, the first respondent entered into a customary law marriage with the late Molete Matoase. The first respondent deposes that, when she so entered

into the said marriage, the late Molete Matoase told her that he was a divorcee. They genuinely believed him. Seven years thereafter, they went to solemnise the marriage. Their marriage was blessed with two children. They lived together for thirty (30) years.

[5] During that period, lived together, raised their children and amassed property together. In the year 2016 (and this was after 30 years), then Molete Matoase passed on. During the preparation of his burial, the appellant arrived, a day before the burial. The appellant attended the funeral.

[6] After the funeral, the first respondent went to the office of the Master to report the estate so that it could be published in the Government Gazette. After the publication of the estate in the Government Gazette, the appellant claimed to be the lawful wife of the deceased. After a period of about two weeks, the appellant came with a marriage certificate. The marriage certificate was dated 1982. The first respondent insisted that an investigation be mounted into this issue to no avail. It was in consequence of these happenings that the first respondent approached the High Court for relief as outlined above.

The Issue

[7] In light of the above brief facts, the crisp issue to be decided *in casu* is whether the appellant was in fact divorced from the deceased when he purportedly entered into a customary marriage with the first respondent.

The law

[8] In our law, two civil marriages between a man and two women cannot co-exist. Any civil marriage purportedly entered into during the existence of a valid civil marriage is in law, null and void. It is a trite and hallowed principle of our law that he who alleges must prove. There is no proof, other than the first respondent's allegations and hearsay, that the deceased had divorced the appellant.

[9] Thus, when the learned Counsel came up with their suggestion, we agreed with the approach by the learned Counsel bearing in mind this Court's ruling in numerous decisions such as **Mokhothu v Manyapelo**.¹ **Makata v Makata** ²and '**Makopano Theresia Leoma v Tseliso Justinus Leoma and 'Machele Leoma**³ that the two marriages could not subsist side by side. We also bore in mind the decision in **Majara v Majara and Others; Lerato v Majara**.⁴

Evaluation of the appeal

[10] In this case, we bore it in mind that, a putative marriage is an apparent marriage which, because of some impediment or other,

¹ 1976 LLR 281.

² 1982-84 LLR 29 at 32 (also reported in 1980-84 LAC 198).

³ C of A (CIV) No. 29 of 2000.

⁴ (C OF A (CIV) 23 of 89

is invalid but which one or both of the parties, ignorant of the impediment, believed to be valid. It is now common cause before us that, the applicant's marriage to the deceased was a putative marriage. Thus, certain of the effects of a valid marriage attach to a putative marriage, they are: (a), on application the Court will declare the children of the putative marriage to be legitimate. It has been held that strictly speaking such order is not necessary as the children are after all legitimate. The order is therefore purely declaratory of that fact.⁵(b), If both parties were *bona fide* and they did not enter into an ante nuptial contract, it must be assumed that they intended to be married in community of property, and they must be treated accordingly. If only one of the parties was *bona fide*, community takes place if this is to the advantage of the innocent party, but not otherwise.

[11] It is only fair and equitable that the innocent “*spouse*” be not punished for the sins of her partner.

Disposition

[12] In light of the foregoing principles and with the consent of the parties, the judgment of the High Court is set aside and replaced with the following order:

- (a) A putative marriage existed between the first respondent and the late Molete Matoase.
- (b) The estate is to be handed over to the forth respondent and to be dealt with by her according to the law.

⁵ See *Prinsloo 1958 (3) SA 759 T*.

(c) Costs of this appeal and of the litigation in the Court *a quo* shall be paid out of the estate of the late Molete Matoase.

DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I Agree

DR P MUSONDA
ACTING JUSTICE OF APPEAL

I Agree

N T MTSHIYA
ACTING JUSTICE OF APPEAL

For Appellant: Adv L D Molapo

For 1st Respondent: Adv M Mohlabula