

CIV/A/10/76

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

SIDWELL MOSHOESHOE

Appellant

v

ISHMAEL SEKESE

Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Chief Justice, Mr. Justice T.S.Cotran
on the 14th day of May, 1980

This is an appeal (pending for over five years) from the Judicial Commissioner who dismissed the appeal of Sidwell Moshoeshoe (the appellant and original defendant) since deceased, from the Judgment of the Matsieng Central Court in which it

- (a) declared that Sidwell's daughter Joana had validly married, by Sotho Law and Custom, Ishmael Sekese (the respondent and original plaintiff) and
- (b) dissolved that marriage on the grounds of its total breakdown, and
- (c) awarded the two children of the marriage to Ishmael.

Sidwell Moshoeshoe is now represented by his widow Malitlhong also known as Elizabeth.

The late Sidwell took the view that there was no marriage between his daughter Joana and Ishmael and hence the two children Eliza Nthabiseng and Paballo Emely (girls now aged 19 and 18 respectively) belong to him. The dispute started in 1968 when Joana, who had lived with Ishmael, left him. Ishmael then sued Sidwell in the local courts in an effort to retrieve his "wife" and two children. The girls were then still very young of course. The case, as usual, came before a multiplicity of Local and Central Courts, even the Judicial Commissioner, before reaching me. Most of the vicissitudes that befell it in the lower courts were procedural. The Matsieng Central Court finally took the bull by the horn and resolved the issues in favour of Ishmael in its Judgment of 16th November 1971, which was confirmed by the

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Judicial Commissioner on the 23rd January 1975 and I am now dealing with the appeal from that Judgment. Through many a ruse, or shall I say tenacity, Sidwell and his daughter Joana (who had physical custody of the girls) kept things going for twelve years. The appeal was at long last placed on the High Court roll on the 19th March 1980. Joana and her mother asked for an adjournment to enable them to brief a lawyer. This request was granted and the matter was to be argued on the 9th May 1980. The Court was informed on that day by Mr. Matlhare and Mr. Monapathi that Ishmael had just died. An application that he should be represented by his estate (heir) was granted by consent and the matter was further adjourned to the 13th May 1980. I dismissed the appeal with costs yesterday and said reasons will be filed later. These now follow .

There is no doubt, indeed it is now common cause, that the late Ishmael Sekese was the biological father of the two girls. He and Joana lived and cohabited for a number of years in the Republic of South Africa where Ishmael was working. The two girls were born there. Both parties are Basotho and are domiciled in Lesotho but the "marriage" itself was not celebrated in accordance with the ceremonials usually attendant upon a customary law marriage. The "marriage" between the parties was negotiated when the couple were in the Goldfields. There is nothing unusual about that in this day and age. According to Tefo Moleko (PW2) a church elder, Ishmael first saw Joana singing in a church Choir and fell in love with her. He told Moleko that she was the daughter of Sidwell Moshoeshoe of Matsieng in Lesotho and requested the witness, who hailed from the same area, to seek from her father, Joana's hand in marriage. It seems that Ishmael was impatient because four or five days later (apparently before the mission was accomplished) Moleko saw them together in one house living as man and wife and learnt that she was "abducted". There is nothing unusual about that either. Many hundreds of unions in Lesotho and elsewhere in Africa commence in this fashion. The initial "abduction" or elopment, if such it was, can be, and often is, converted into a proper valid marriage.

The essentials of a Sesotho customary marriage are (Laws of Lerotholi Part II s.34(1)) :

1. agreement between the man and the woman,
2. agreement between the parents of the parties or between those who stand in loco parentis to the parties,

3. agreement as to the amount of the 'bohali',
4. payment of part or the whole of the 'bohali'.

It is clear in this case that two persons from Joana's immediate family were present and available in Germiston Republic of South Africa at the time, viz, Meshack Moshoeshoe, her brother then said to be aged about 18, (but I think he was near 20 - see Exhibit R referred to infra) and Elizabeth Moshoeshoe, her mother. Both were aware of the arrangement to lawfully unite the lovers in marriage. I have no doubt that on the evidence Sidwell himself knew of it and approved it either before it took place or shortly afterwards. Ishmael produced not less than fifteen documents that included, inter alia, correspondence between him Sidwell Elizabeth and Joana. I need only refer to a few. Exhibit A is the baptismal certificate of Eliza Nthabiseng Sekese (their first daughter) giving the names of the parents as Ishmael and Joana Sekese. Exhibit B is an acknowledgement by Meshack Moshoeshoe that the 'bohali' for Joana was to be "eight heads of cattle formed with cash £80" of which "3 heads of cattle in cash were received" leaving a balance of "5 heads of cattle in £50 cash". Exhibit C is a letter addressed by (or on behalf of) Sidwell to Ishmael acknowledging the receipt of £30 and reminding him of the balance of the debt which by inference, must be the balance of the 'bohali'. Exhibit D is also from Sidwell to Ishmael, apparently when things began to go wrong between him and Joana in which Sidwell urged conciliation. In this letter Sidwell refers to his daughter as Ishmael's "wife". Exhibit F is a letter from Elizabeth to her daughter Joana in which, inter alia, she gives greetings to the father of Nthabiseng. The "father" is of course Ishmael. Exhibit G also is a letter from Elizabeth in the same vein. Exhibit J is the text of two letters one from Joana (presumably from Lesotho) and the other from her father Sidwell, the former asking Ishmael for money for various purposes and the latter asking him for a loan of £3 on account of a mishap that befell his crops. Exhibit K(2) is an international certificate of revaccination of "Eliza Sekese" aged 3. Eliza or Nthabiseng is, as earlier stated, Joana and Ishmael's first daughter.

Joana denied she was married though, after a time, admitted living with Ishmael, but the trial Court rejected her testimony that she was merely a concubine. It was contended that Meshack was a minor and could not bind his father. It could also have been argued, I suppose, that Joana's mother Elizabeth was a minor as well. Strictly speaking they were but the

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circumstances were unusual as the learned Judicial Commissioner pointed out. In any event it was impossible to accept, after all these letters and documents, that Sidwell was kept out of the picture. It is significant to note that Sidwell, her mother Elizabeth, and her brother Meshack, gave no evidence. Joana did, however produce a permit, Exhibit R, issued by the "Non European Affairs Department" in the Republic of South Africa but this was in the name of her mother Elizabeth Moshoeshoe. It is a "residential certificate" valid for one month (presumably renewable) to stand No. 238 at Phooko. In that certificate the names of the household are listed (which names included Joana and Meshack) to which the christian names of the two girls (Eliza and Paballo) were inserted. She also produced two abridged birth certificates, Exhibits N and O, from the same Department apparently, which show that the name Moshoeshoe was given to Eliza and Paballo. But as the learned President of the trial Court pointed out the certificate Exhibit R was originally granted in 1959 before the marriage of Joana and Ishmael. The children's names were added later. No great reliance or significance can be placed on such certificates by reason of the fact that the racial laws of the Republic are such as to invite its non European inhabitants to say anything (or to put anything on a piece of paper) either to safeguard the family entity, or to prevent the expulsion of one of its members back to the "home lands" or to facilitate the obtaining of a pass, or generally to overcome the innumerable obstacles put in their way. Neither the President of the trial Court nor the Judicial Commissioner were impressed with these "certificates". Nor am I. Joana's and her father were unable to negative the prima facie existence of a marriage. Their brazen attempts to bastardise the children must accordingly fail.

I confirm the Judgment of Judicial Commissioner and the trial court that there was a valid marriage, that it should be dissolved, and that the two girls belong to the father Ishmael.

The girls are, and have been, at least since 1968, with their mother Joana. They are however now grown up women. I make no order as to physical custody as opposed to, if I may use the word without disrespect, "ownership" Ishmael Sekese had at no time suggested that the mother was unfit to hold them. Their customary legal guardian would be Ishmael's heir now that he is dead. Their mother still have a lot of say. Although,

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typically, the parties and the witnesses do not mention it, this long drawn battle, I rather suspect, is about the destination of the 'bohali' when the girls get married. I fear that Joana has only limited rights, i.e. the 'seotla' beast, one in respect of each girl, even though she may have, since her separation from her husband, fed, clothed, and educated them. (Duncan: Sotho Laws and Custom, p.8; Poulter Family Law and Litigation in Basotho Society p. 238, both quoting Teleki v. Teleki which went up to the High Court (No. 38/1951). The latter also cites Letsepe v. Lekitla JC 47/1961). I am afraid it looks as if in some respects Lesotho is still a man's world.

The appeal, as I earlier indicated, was dismissed.

The appellant's estate will pay costs of this appeal and costs in the Courts below to the respondent's estate.

CHIEF JUSTICE
14th May, 1980

For Appellant: Mr. Matlhare

For Respondent: Adv. Monapathi