

IN THE HIGH COURT OF LESOTHO

In the matter of :

MARY MAMOTHIBI THEKO

Plaintiff

v

MARAKABEI THEKO

Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S.
Cotran on the 31st day of August 1982

In this action the plaintiff Mary M. Theko is seeking the annulment of her marriage by civil rites in community of property to the defendant Marakabei Theko which took place at the L.A.O's office (the District Administrator) on the 15th July 1981 in Maseru on the ground that unknown to her the defendant has been previously married by Sotho custom (which marriage still subsisted) and thus the civil marriage is void, alternatively a decree of divorce on the ground of defendant's adultery with his customary law wife. There are no children of the marriage.

The defendant entered an appearance to defend and filed a Plea. If I understand him correctly he says in paragraph 2 (ad para 3 of the Declaration) that the plaintiff knew of his customary law marriage at the time that they entered into the civil rites ceremony on 15th July 1981 and in paragraph 5 (ad para 6 of the Declaration) he says that he has no objection to the Court declaring the marriage null and void or alternatively granting a decree of divorce (on the ground of adultery) but otherwise he "prays that the plaintiff's claim (i.e. other claims) be dismissed with costs". This last, rather vague plea, relate to "division of the estate" and forfeiture of the "benefits arising from the marriage".

Mr. Maqutu for the plaintiff made an application to strike out para 2 of the Plea on the grounds that it is

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"completely self contradictory and unintelligible" and that having regard to the "Plea in general" the said paragraph is "scandalous and vexatious". At the hearing date on 16th August 1982 Mr. Matsau for the defendant said he does not oppose the action anymore and Mr. Maqutu said he will abandon his application to strike out. Mr. Matsau took no further part in the proceedings although he remained in Court. The result of these manoeuvres was that the plaintiff went into the box for formal evidence. Her story was that she was a divorcee aged 35 with some substance. When the defendant (a chief aged 40) proposed marriage to her she asked him if he was married by Sotho Law and Custom and he replied that he was not so married but had once abducted or eloped with a girl whom he intended eventually to marry by custom but discovered two months later that she had already been pregnant by another man and abandoned his original idea of converting the abduction or elopement into a customary law marriage (by paying 'bohali' to her parents) an occurrence which is quite common in Lesotho. The plaintiff testifies that she checked on the defendant's story and found out that the girl whom he abducted or eloped with was called Tiekello, that he had not married her by custom, and that the girl later befriended a European and married him.

After the civil ceremony of 15th July 1981 the plaintiff parted with some of her property to the defendant. She did not give details of the property. She discovered to her dismay not long afterwards (in November 1981) that he was cohabiting with a lady called Pauline Makotoke Theko who, after further enquiries, turned out to be the defendant's lawful customary law wife by whom he had two children. The defendant's answer to the marriage officer that he was a "bachelor" was true in so far as he had no "wife" by the statutory marriage law of the land but not true as far as the customary marriage law of the land. He says in his Plea he had been married by custom since 1975. The plaintiff sought legal advice and took action expeditiously.

Now Mr. Maqutu submitted that the plaintiff is entitled to have the Court declare the second civil rites marriage null and void ab initio on the ground that the first customary marriage was a valid marriage recognised as such

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by s. 42 of the Marriage Act 1974 (Vol. XIX Laws of Lesotho p 33 at p 43) and to throw out an obiter dicta in the judgment of the Court of Appeal dated 12th December 1976 in Mokhothu v Manyapelo C. of A No.1 of 1976 - unreported but in the press) approving a passage in Nkambula v. Linda (1951 1 SA 377 (AD)) that it was possible for a man to enter into a civil marriage during the subsistence of a customary law marriage because in South Africa such an association is regarded as a "native union" whereas in Lesotho it is a marriage in the full sense of the word (Masupha v Masupha CIV/A/14/76 dated 15th February 1977 - unreported).

The facts in the cases cited by Mr. Magutu were somewhat different from this case before me but the legal position in Lesotho is that a man first married by custom whether to one or more wives, may subsequently marry a different woman by civil rites, but cannot marry yet another woman afterwards by custom whilst his civil rites marriage still subsists (Mokhothu's case supra and see Poulter Legal Dualism in Lesotho p 42 et seq and cases cited). Section 42 of the Marriage Act simply says that the civil rites marriage (to a different woman) shall not effect the validity of the previous customary marriage or marriages. The section does not invalidate the civil rites marriage nor does it "extinguish" (as Jacobs CJ put it in Zola v Zola 1971-1973 LLR 286) the previous customary law marriage - see also Tsosane v Tsosane 1971-1973 LLR 1, contra the Appellate Division's decision in Nkambula's case supra) from which it follows that a husband previously married by custom can not only validly contract a civil rites marriage but does not commit adultery if he sleeps with his customary law wife subsequently to his civil rites ceremony. The civil law wife cannot get a decree of annulment or a decree of divorce on these grounds under the present law.

Mr. Magutu's submissions must accordingly fail: I think he knew he was fighting a losing battle. He wanted me to depart not only from my own judgments, but also from those of my colleagues, past and present, in the High Court, and more importantly, from the judgments of the Court of Appeal by which I am bound. When it comes to legal process involving family law the Basotho, and they include their lawyers, are capable of contriving more permutations to a problem to achieve the desired goal than are available to a

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punter filling the football pools. I say this not in a derogatory sense but in admiration of their genius.

At the hearing however I saw nothing that prevents the plaintiff from getting an order of rescission under the law of contract of her civil rites marriage of 15th July 1981 and I asked Mr. Maqutu if he would formally apply to amend the Declaration and seek alternative relief if the Court, after giving the matter more thought, comes to the conclusion that it may be available. The plaint filed by him did not include such a prayer. He said he would.

The only possible ground is that the defendant induced the plaintiff to go with him into a civil marriage in community of property (exclusion of community is rare in Lesotho) as a result of which she parted with some of her property to him, which marriage (with its consequences) she would not have entered into had she been aware, or been made aware, of the true facts.

Now the defendant abandoned the defence that the plaintiff was aware of his customary law marriage status. The plaintiff's sworn testimony therefore stands uncontroverted and uncontradicted. It is supported to some extent by the defendant's answer before the marriage officer as it appears in the certificate Exhibit A. Of course the Court must be on its guard against collusion between the parties but it does not seem to me there was any collusion here. The plaintiff was entitled to accept the defendant's representation and no gross negligence or recklessness on her part has emerged. There were no factors that ought to have reasonably put her to an enquiry and she deliberately failed to pursue the matter so as not to discover them. I see no estoppel. The defendant did not merely conceal or suppress a material fact, but made a positive statement consequent to a solemn enquiry which was to his knowledge false. The question which I now propose to analyse is whether the Courts in Lesotho will be justified to rescind a contract of marriage at the instance of the party who acted to its detriment on the fraudulent misrepresentation of the other party.

I do not think I ought to be influenced by decisions

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of the courts in other jurisdictions but the position in South Africa and in England, at any rate prior to the recent reforms in the matrimonial laws of these countries, is said to have been in accord with an "old cynical adage attributed to the French jurist Loysard that 'en marriage, il trompe qui peut (in marriage, let anyone who can, deceive)" quoted in Hahlo's Husband and Wife 4th Ed 1975 at p 83, which precluded the courts from granting a decree of nullity to the party aggrieved on the ground of fraud or misrepresentation except in well defined instances (Hahlo, supra, p 83 and p 485 et seq., and Rayden on Divorce 9th Ed 1966 p 77) but with respect the rationale of the rule comes from Christian Church laws. The ecclesiastical or Cannon Courts originally exercised jurisdiction in family matters and it was those courts that elevated the contract of marriage into something more superior and therefore different from an ordinary contract - which of course it is, or was. When the civil law Judges took over this jurisdiction they simply followed suit. The rules thus got firmly entrenched into the common law of South Africa England and elsewhere and reflected the moral and social standards of a large part of humanity of the period. Legislatures began to intervene to ameliorate the situation not because they were innovators and the Judges were timid but because change was needed to reflect the norms and mores of a different generation including those who sit in judgment. Some Judges felt that their hands were tied by Stare Decisis; a few were prepared to jettison the concept if need be, admittedly not always successfully but on occasions very much so, and most lamented their own lack of power to change but who nevertheless recommended change and were satisfied to leave the matter to the law makers.

Sir Francis Jeune defines fraud in marriage in Moss v Moss (1897) p 263 at 268-9 as follows:

"When in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces consent, but is limited to such fraud as procures the appearance without the reality of consent",

I confess I find difficulty in understanding what he meant exactly but what is certain is that he was speaking in the context of monogamous marriage laws of a different society; similarly Hahlo, supra, p 83 when he says that in South Africa fraud in

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connection with previous marital status will not vitiate the marriage. The fact of the matter however is that a false statement on current status of a party in a proposed monogamous marriage renders the subsequent marriage (if it takes place) totally void ipso jure. Furthermore the party giving the false statement (and indeed the other party if aware of its falsity) is liable to be charged with bigamy.

But here in Lesotho we have two kind of marriages both legally recognised. The law does not appear to require a man already married by custom (as it does in Botswana for example) to disclose this fact to the marriage officer when he goes through a register office ceremony but it seems to me the woman who specifically asks this question of the man and gets a false statement, which by the nature of things may be difficult to prove or disprove, coupled with a true statement the truth of which is easy to establish from the lead given by her proposed partner, with the object of inducing her to believe that the former statement is true because the latter statement is true, thus putting her off the scent so to speak, whereupon she consents to the marriage, is the kind of fraud that "procures the appearance without the reality of consent" within the definition of Sir Francis in Moss, supra.

I have not been able to trace an appeal case in Lesotho in which the Court upheld a contract of marriage and refused relief when fraudulent misrepresentation was proved and the innocent party had not condoned affirmed or ratified the contract by deed or conduct or was guilty of serious omission, or allowed time to elapse, or a third party had intervened and acquired an interest. In the premises I feel that the High Court of Lesotho is at large. In my opinion in a contract of marriage the remedy of rescission is available. The contract in this case is voidable not void. (Chitty on Contracts 24th Ed. Vol. I para 392 et seq and Wessels Law of Contract 2nd Ed paras 3152-3162).

I would like to add that I am not striking new ground or introducing a novelty. In a number of American jurisdictions, a marriage, like any other contract, will be set aside on the ground of fraud if it is clear that, but for the misrepresentation, the deceived party would not have entered into it (Hahlo, supra, p 83 footnote 50). There is

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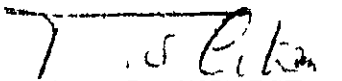
support for this attitude by Prof. Poulter, an authority on customary law, in his little book Dualism in Lesotho already referred to. He writes at p 44:

"Pending legislative reform to put the law on a more logical basis the present position can perhaps be justified in those cases where the second wife is aware of the prior customary marriage on the footing that there is no violation of the expectations of all the parties concerned. However, where the second wife erroneously believes that her husband's commitment to her involves monogamy she must surely be provided with a remedy. For her to obtain divorce on the ground of adultery is hardly appropriate in the context of the prior marriage and a nullity decree would seem to furnish the most apt solution. Probably, therefore, the courts should be prepared to grant an annulment to a wife who enters into a civil marriage on the mistaken assumption that her husband is single when in fact he is not. Such a mistake is surely sufficiently fundamental to amount to an operative error qualitatis rendering the marriage voidable at the instance of the aggrieved wife".

It is not intended by this Judgment to open the flood gates to disgruntled or capricious or frustrated wives. I would confine relief to the aggrieved party only to the extent that the fraud proved goes into the root of the contract and the evidence adduced comes within the ambit of the civil law principles of rescission. Restoration of status here is possible as is an order for accounts to be taken and a balance struck. The further question as to whether if restitution in integrum is not possible the court will grant cancellation and damages will have to wait another day.

In the result an order rescinding the marriage will be granted to the plaintiff and I direct that an account be taken to establish what property, moveable or immoveable, she made over to the defendant. This he must restore, and of course vice versa if she had in any way derived any benefit from her short lived married life. The defendant will pay the plaintiff's costs.

Will the Registrar please send a copy of this Judgment to the Registrar of marriages to expunge the entry of this marriage from the register and a copy to defendant's former attorneys.


CHIEF JUSTICE
31st August, 1982

For Plaintiff: Mr. Maqutu

For Defendant: Mr. Matsau (Mohaleroe Sello & Co.)