

CIV/APN/131/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

PAUL PELELE LETSOELA

Applicant

and

CHIEF OF KOLOJANE

1st Respondent

CHIEF OF KUENENG AND MAPOTENG

2nd Respondent

JUDGMENT

Delivered by the Honourable Chief Justice,
Mr. Justice J.L. Kheola on the 12th day of February, 1996

This is an application for rescission of the judgment of this court granted on the 20th August, 1992 in which the applicant's main application was dismissed with costs.

In his founding affidavit the applicant alleges that on the 20th August, 1992 when the default judgment was granted against him he was actually waiting for his counsel outside the courtroom. At the same time he complains that he was ready to argue his own case personally, "had it been put to him that the matter would proceed in the then unexplained absence of his own lawyer." He says that he did not default.

It is interesting to note that the applicant decided to wait outside the courtroom at 9.30 a.m. when the court started its work. He saw when the respondents' attorney went into the courtroom but decided not to talk to him. At 9.30 a.m. his case

was called. He was not in court and his counsel was also not in court. The respondents' attorney addressed the court after electing to proceed in the absence of the applicant's counsel who had failed to warn the respondents' attorney of his problems. The court cannot postpone a case simply because the party and his counsel have decided not to come to court and have not sent any message that they will be late.

In his supporting affidavit Mr. Seotsanyana, counsel for the applicant, does not say why he did not call by phone the office of the Registrar of the High Court and to explain to him that he would be late because he had misplaced his file and that he was still looking for it.

In an application for rescission of a default judgment the applicant must show three things, namely -

- (a) The applicant must give a reasonable explanation of his default;
- (b) The application must be **bona fide** and not made with the intention of merely delaying the plaintiff's claim;
- (c) the applicant must show that he has a **bona fide** defence to the plaintiff's claim, it being sufficient if he sets out averments which, if established at the trial, would entitle him to the relief asked for, he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour. (See **Grant v. Plumbers (Pty) Ltd.** 1949 (2) S.A. 470).

In the present case the applicant has failed to give a reasonable explanation why he was not in court when his case was

called by the Registrar. He saw when the respondents' attorney went into the courtroom but made no attempt to talk to him.

His counsel also acted in an unreasonable way by not calling the Registrar by phone to indicate that he would be late. He had mislaid the file apparently in his office where a telephone is at his disposal.

It seems to me that the application is not bona fide and it is made with the intention of merely delaying the applicant's execution of the judgment of the 20th August, 1992. It has taken the applicant about three years to have this application set down for hearing. It is certainly not true that during the last three years he could not get a date from the Registrar for the hearing of this very short matter. The truth of the matter is that the application is not made bona fide. He is merely playing delaying tactics.

The last question is whether the applicant has a bona fide defence. In this respect I refer to my judgment in the main application dated the 20th August, 1992. The reasons for judgment were actually given on the 25th November, 1992.

In that judgment I found that there was a valid Sesotho Law marriage between the late Chief Moifo Letsoela and one 'Maletsoela Papali Letsoela. They have a son, Letsoela, who was born on the 30th July, 1978. He is obviously the heir to the estate of his late father. As he is still a minor somebody must

act as chief of that area.

Mr. Pheko, attorney for the applicant, submitted that there was a dispute of fact concerning the marriage of 'Maletsoela Papali Letsoela. In Peterson v. Cuthbert & Company Limited, 1945 A.D. 420 it was pointed out that "In every case the court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence."

In Hilleke v Levy, 1946 A.D. 214 at p.219 Greenberg, J.A. said:

"...in any particular case, however, the attitude taken up by one of the parties in regard to whether **viva voce** evidence should be heard, may be an element to be taken into consideration on the question whether such evidence might disturb the balance of probabilities as appearing from the affidavits. (Tomkin (Pty.) Ltd. v. Bauer (1931, T.P.D. 292); Prinsloo v. Shaw".

In his replying affidavit and the supporting affidavits in the main application, there appears to be no real dispute of fact. What the deponents are saying is that the late Chief Moifo Letsoela lived with several women during his lifetime and used to refer to such women as "his wives" and yet there was no valid marriage between him and them. They include 'Maletsoela amongst such women. What is clear to me is that the deponents are saying because they have no personal knowledge of such a marriage it never existed. Their lack of knowledge cannot create a genuine or real dispute of marriage.

There is the evidence of 'Mamoifo Letsoela who is the mother of the late Chief Moifo Letsoela. According to her, eleven head of cattle were paid for "bohali". The father of 'Maletsoela has confirmed that he received eleven head of cattle for the "bohali" of his daughter. 'Maletsoela herself also confirms this.

We have the evidence of the people who have actual knowledge of the payment of the "bohali" as against those who say because they have no knowledge of the payment no Sesotho law marriage exists. Their lack of knowledge is not evidence. In any case when a polygamist marries his second wife and subsequent wives his parents and relatives need not be involved because he alone is responsible for the payment of the "bohali" cattle. His parents are not liable for such payment. I, therefore, see no reason why the late Chief Moifo was expected to inform all his relatives what he was doing. However his mother was involved in the transaction.

I have come to the conclusion that there is no real dispute of fact that would require to be resolved by oral evidence.

Section 29 (1) of the Marriage Act No. 10 of 1974 provides -

"No person may marry who has previously been married to any other person still living unless such previous marriage has been dissolved or annulled by the sentence of a competent court of law."

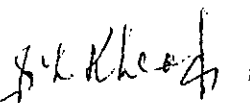
Section 42 of the same Act provides -

"This Act shall apply to all marriages solemnized in Lesotho save and except marriages contracted in accordance with Sesotho law and custom, and nothing herein contained shall be taken as in any manner affecting or casting doubts upon the validity of any such last-mentioned marriages contracted before or after the coming into operation of this Act."

The marriage between the late Chief Moifo Letsoela and 'Maletsoela Papali Letsoela was contracted in accordance with Sesotho law and custom. Therefore section 29 (1) does not apply to it. It seems to me that the subsequent solemnization of a civil marriage could not invalidate the valid marriage contracted under the Sesotho law and custom. The subsequent civil marriage is null and void.

Mr. Pheko submitted that there is no evidence that the six head of cattle were for "bohali" or for abduction. At this stage that is immaterial because eleven head of cattle have been paid. If six head of cattle are deducted from eleven, we have a balance of five head of cattle which were obviously for "bohali."

In the result the application for rescission of judgment is dismissed with costs.


J.L. Kheola
CHIEF JUSTICE

12th February, 1996