CIV/APN/431/2011

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

MALATALIANA MOROMOLI	**APPLICANT**
AND	
LOUIS KULEHILE RAMOKHITLI	**1ST RESPONDENT**
THE DIRECTOR TEACHING SERVICE DEPARTMENT	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

JUDGMENT

Coram : Hon. Majara J.

Date of hearing : 14th March 2012

Date of judgment : 22nd March 2012

Summary

Application for declarator of a document purporting to evince the existence of a customary marriage null and void – whether the decision of the families to author the said document post the death of one of the parties for purposes of accessing funds for her burial evinces the existence of a valid customary marriage – whether the 1st respondent discharged his onus of proof of the existence of a valid marriage between him and the deceased – requirements of a valid customary marriage not established – application successful.

[1] The present applicant approached this court for urgent relief to restrain the 2nd respondent from processing the gratuity of the late 'MAKARABO ADELICE MOROMOLI in the names of the 1st respondent as the latter had already claimed same on the basis that he is the husband of the deceased. The applicant was granted a Rule Nisi and having been served with the order, the respondent filed his opposing papers.

[2] The applicant however failed to have the rule extended on the return date and after its lapse, he filed a notice to apply for its revival on the 24th October 2011. On that day the respondents who *ex facie* the signed notice of set down had been served did not appear before the Court and the application for revival and extension of the Rule Nisi was moved unopposed. The Rule was revived and extended to the 12th March 2012 for hearing.

[3] On that date, I was not available due to circumstances beyond my control and the matter was re-set down for hearing on the 15th March, 2012. On the said date, Mr. Fosa who appeared on behalf of the applicant informed the Court that there was no appearance for the respondents who had also not been present on the 13th March. He however added that he had called Mr. Potomane, Counsel for the 1st respondent on his telephone to inform him about the new date of hearing but the latter did not seem interested to proceed with the matter. For the reason that there

was no appearance for the respondents on the three occasions, I came to the conclusion that the 1st respondent no longer wished to oppose the matter and allowed Counsel for the applicant to proceed.

[4] The case of the applicant is that he is the younger brother of Sehlajoe Albert Moromoli who was married to 'Makarabo Adelice Moromoli and that both of them had since passed away. Further that after his late brother predeceased the late 'Makarabo, it came to his notice that the latter was cohabiting with the 1st respondent. Upon her death, the family realized that she had made the 1st respondent her beneficiary for a life policy with Metropolitan.

[5] As the family could not afford to bury the deceased and Metropolitan did not recognize the 1st respondent as the beneficiary without some form of explanation, his family and that of the 1st respondent met on the 3rd May 2006 post the death of 'Makarabo and wrote a letter **MM4** purporting the two as married and signed it so that they could bury her with the policy funds on the 6th May 2006.

[6] Subsequently, the applicant's family came to learn that 'Makarabo's terminal benefits i.e. gratuity, were about to be released and they met and appointed the applicant as the heir. When he went to claim the gratuity from the 2nd respondent, the applicant was informed that the 1st respondent had already made a claim for same. He was further told that when the cheque was ready it would be handed over to the 1st respondent hence this application.

[7] It is the contention of the applicant that the 1st respondent was never married to 'Makarabo and that **MM4** was authored only for convenience as the 1st respondent was the beneficiary of the life policy. Further that the same document should be declared null and void for the reason that at the time it was authored, the late 'Makarabo had already passed away. It is also the contention of the applicant

that the 1st respondent is legally married to one Joyce Mcunu as evinced by the marriage certificate **MM9** attached to the replying affidavit and that he could therefore not be legally married to the late 'Makarabo.

[8] The applicant's averments are supported by one 'Makholu Nkhasi who is described as the Chieftainess of Matsoaing ha Nkhasi in so far as the authoring of MM4 goes. She adds that the document was never meant to be used as proof of anything else other than for securing the funds from Metropolitan. She adds that the 1st respondent and 'Makarabo were never married but were only staying together.

[9] In his opposing affidavit, the 1st respondent contends that MM4 is authentic proof of his marriage to the late 'Makarabo. He disputes that he lived in adultery with the deceased and adds that they lived together as husband and wife since 1998 and were married under Sesotho custom. To this end he makes reference to annexure KR3, KR4 and KR5 respectively as proof of his marriage to the deceased.

[10] The first document is a copy of a letter from the office of the District Administration to the 2nd respondent which presents the 1st respondent as the husband and beneficiary of the late 'Makarabo. It bears the date of the 30th September 2009. KR5 is a letter authored by the 1st respondent's family written to the chief and stating that the 1st respondent is the husband of the deceased whereas KR6 is a letter from the chief of Matsoaing to the Principal Chief of Leribe similarly presenting the 1st respondent as the husband of 'Makarabo. Further that the two families namely his and that of the applicant worked together at the funeral because he was married to 'Makarabo.

[11] The 1st respondent also denies that he was ever married to Joyce Mcunu and puts the applicant to the proof thereof. He adds that he should rightfully receive the terminal benefits of the deceased from the 2nd respondent because she was his wife. He is supported by one Nchapa Lebakae who asserts that he was present on the 3rd May 2006 when MM4 was authored by the two families. He adds that he has known of the marriage since 1998 when the 1st respondent and the applicant began to live together.

[12] In the replying affidavit, the applicant challenges all the documents that the 1st respondent seeks to rely on as proof of the marriage on the basis that they were all authored post the death of the late 'Makarabo and do not prove the existence of a valid marriage between the two. He adds that a funeral programme does not prove the existence of a marriage and that the 1st respondent has not produced any proof that the requirements of a customary marriage were ever fulfilled.

[13] Against this background, the issue for the determination of this Court is whether or not the 1st respondent was ever married to the late 'Makarabo and if not whether he should receive her terminal benefits from the 2nd respondent.

[14] I now proceed to determine the issue whether there was a valid marriage or not. It is a trite principle of law that certain requirements have to be met for the determination of the existence of this type of marriage. It is also generally accepted that **Section 34 (1) (a) Part II of the Laws of Lerotholi** is the first point of reference as it stipulates the requirements of a valid customary marriage. These are:-

(a) Agreement between the parties intending to marry;

(b) Agreement between the parents of the parties or between those who stand in *loco parentis* to the parties to the marriage and as to the amount of bohali;

(C) Payment of part or all of the bohali.

[15] Admittedly, the position has since been laid down that the above requirements are neither exhaustive nor are they a comprehensive statement of a Sesotho customary law marriage as far back as in the case of **Ramaisa v Mphulenyane** [1] per the judgment of the learned Cotran CJ and was quoted with approval by the learned Ramodibedi P in '**Mantsebo Ramootsi & Ors v Malineo Ramootsi** [2] quoted to this Court.

[16] In other words, over and above the stated requirements, there are other elements that can be regarded as evidencing the intention of the two sides that there should be a marriage. I entirely agree with these sentiments as I stated in the case of **Manthabeleng Makaka v Makoetla Makaka & 3 Others** [3]**.**

[17] In the light of the above sentiments I turn to deal with the facts of the present application. The applicant challenges the existence of a valid customary marriage and the 1st respondent contends that there was such a marriage. While the latter has attached several documents as proof of same, he has however not said anything about the above requirements and whether or not they have been met. In my opinion placing reliance on documentation which without exception, was authored post the death of the late 'Makarabo and which as is stands without any further proof, is not adequate to establish the existence of a marriage.

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[1] **1977 LLR 138**
[2] **C of A (CIV) No. 14/08**
[3] **CIV/APN/471/2007 p 8 (unreported)**

[18] This poses a serious problem for the 1st respondent because the burden of proof shifted on to him the minute the validity of his marriage was challenged. Nowhere in his papers does he say how and when the marriage was concluded safe to aver that he started to live with the deceased in 1998. Nor does he state when the agreement, if any , between him and the deceased was reached, when the two families agreed on the amount of bohali and what amount if any was paid.

[19] Further, there is also no document bearing the chief's stamp evincing the marriage at the time it purportedly took place or at least, during the lifetime of the deceased as is standard practice in this jurisdiction. The deponent to the 1st respondent's supporting affidavit does not assist him in this regard either. He also only states that he first got to know of the marriage when the parties started living together.

[20] Over and above these, there is no mention of any of the other incidental rites of a customary union ever having been performed at any stage, including but not limited to the slaughtering of a acceptance goat, the giving of the family name to the deceased or any other ceremony evincing that the two were indeed married by Sesotho custom.

[21] The mere fact that the parties were undisputedly living together for a lengthy period of time does not suffice to satisfy the requirements of a customary law marriage. In this regard, I find the remarks of this Court in the case of **Sechaba Mokhothu v 'Malebusa Motloha & 3 Ors** [4] applicable wherein the learned Lehohla J stated as follows:-

> *"He invited the Court to view the length of the stay together by these parties as strengthening the existence of marriage between them. But*

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[4] **CIV/APN/222/93 (unreported) p 6**

such a view would, if entertained, undermine the fundamental principle with regard to such matters that "not cohabitation but consent constitutes marriage"."

[22] In the present case, the arrangement that the two families made for purposes of the burial of the deceased also does not on its own constitute proof that there was a marriage between the parties. At best, it was as the applicant contended, a matter of convenience to enable the 1st respondent to receive the insurance benefit so that the deceased could be buried.

[23] Further, the fact that the deceased stated in annexure KR4, that the 1st respondent is her husband, does not automatically make him to be so in the absence of proof of the existence of the legal requirements of a customary marriage. The same applies with respect to MM4, KR5 and indeed the rest of the documents because none of them proves that those requirements were met and if so how.

[24] Lastly, the applicant's assertions that the 1st respondent was married to Joyce and attached the marriage certificate as proof have not been gainsaid, safe for the 1st respondent to make a bare denial of same. I therefore cannot overlook this weighty evidence. Instead, it is my view that it strengthens the case of the applicant that what the 1st respondent and the deceased were doing was simple cohabitation as he could not enter into another marriage while he was still validly married to the said Joyce.

[25] It is for all the foregoing reasons that I find that the applicant has made out his case for the relief sought and accordingly grant him prayers 1(b), (c), (d), (e), (f) and (g) as they are stated in the notice of motion.

N. MAJARA
JUDGE

For applicant : Mr. Fosa

For respondent : No appearance