IN THE HIGH COURT OF LESOTHO

CIV/APN/534/2011

In the matter between:

'MAMOLETSANE MOLETSANE	**APPLICANT**
And	
FONANE STEPHEN MOLETSANE	**1ST RESPONDENT**
'MAKHOTSO MOTSEHI	**2ND RESPONDENT**
MOTJOKA LOCAL COURT PRESIDENT	**3RD RESPONDENT**
TEBA LTD BEREA	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 7, 8 March, 2013
Date of Judgment : 28 May,2013

Summary

Parties married under customary law – the jurisdiction of a Local Court to make an order for the custodianship of the child after its issuance of a decree of divorce – the competency of a Local Court to determine the best interest of the child - the termination of the marriage – its jurisdiction to make an order where the value of estate of the divorced parties exceeds its monetary ceiling whether a local court could while administering customary law interpret an opposite statute and apply it – the issue of the consistency of the central and Local Courts Proclamation with sec 12 (8) of The Constitution – The Sec 6 (b) of the High Court Act application for a divorce matter instituted in the Local Court to be removed to the High Court – application for the staying of the divorce proceedings pending finalization of the application – the effect of the ruling that the local court seized with the

divorce matter that it lacks territorial jurisdiction to hear it and that it be removed from its roll – the action re-instituted in another local court with competent jurisdiction – the granting of the divorce and the awarding of the custodianship of the child by the latter court – failure to plead the latest judicial decision – whether the court could take a judicial notice of the proceedings and the judgment after affording the Counsel an opportunity to address the question – Refusal of the Court to grant the leave and the stay of the local court proceedings.

CITED CASES

Fonane Moletsane v Mamoletsane Moletsane CC/85/2011, Robinson v Randfontein Estates 6m Co Ltd 1924 AD 173 @198, Basotho National Party v The Management Board, Lesotho Highlands Revenue Fund & 2 others CIV/APN/335/95 (unreported), Room Hire Co. v Jeppe Street Mansions 1949 (3) SA 1155 (T), Fonane Moletsane v Malefa Katile CC117/2011, Kaone Leoifo Bokailwe v Khamena and Another CA (CIV)48/07, AJ Shepherd (EDMS) Bpk v Sentam Versekeringsmaatskappy (126/84)[1984] ZACSA 128, Attorney-General of Lesotho v Mopa C. of A. (CIV) 3/2002, Makhetha V Makhetha 1974-5 LLR 153, Kholu v Shalaka JC 200/1966, Matsepe v Matsepe JC/90/1956, Likotsi v Likotsi JC/247/1996 (all courts), 'Mamakhasa Mphiri v Chesang Mphiri 1974-75 LLRp76.

STATUTES AND SUBSIDIARY LEGISLATION

High Court Act No 5 of 1978, Children Protection and Welfare Act No 7 of 2011, Legal Capacity of Married Persons Act No 60 of 2006,The Constitution Lesotho 1993,Central and Local Courts Proclamation No62/1938, The Range Management and Crazing Control Act No39 of 1980, The Range Management and Crazing Control Act No39 of 1980, Stock Theft Act 4 of 2000, The Criminal Procedure & Evidence Act No. 9 of 1981, High Court Act 1967, Subordinate Court Act 1988, laws of Lerotholi 1959, Central and Local Court Rules 1961.

BOOKS

Poulter S, Family Law and Litigation in Basotho Society,Oxford: Claredon Press 1976,Voet 5.1.49 Gane's Translation, vol 2

MAKARA A.J

[1] This is an application which originates from the divorce proceedings that were instituted by the 1st respondent against the applicant in the Motjoka Local Court. The applicant is seeking for an order interdicting the 1st respondent from

alienating the matrimonial properties consisting of moneys in a TEBA Bank Account, the incidental work related benefits and the specified motor vehicles.

She has incidentally, prayed for an order directing the 1st respondent to contribute towards her trial for divorce, custody of the minor child and for costs.

The applicant has further applied for leave in terms of **Sec 6 (b) of the High Court Act No 5 of 1978** to bring the divorce proceedings before this court and that there be a corresponding order for the staying of the divorce case pending before the Motjoka Local Court in **Fonane Moletsane v Mamoletsane Moletsane CC/85/2011** until the finalization of the application.

She has also in conclusion, prayed that the 1st respondent be directed to purchase and develop a site within the Berea Urban Area for her residency and for that of their minor daughter.

[2] The applicant has cited the 2nd respondent Makhotso Motšehi in the proceedings because of what she terms the special circumstances surrounding her in that she is the 1st respondent's lover and that as a result of their adulterous relationship; they have parented a baby boy named Seroti. She has lamented that the 1st respondent is busy maintaining Makhotso and Seroti while she is not doing so to her and to their child save for the latter's M500 maintenance per month.

[3] The 3rd respondent has been made a party to the proceedings in her official capacity as a Court President of the Motjoka Local Court which according to the applicant, is seized with a civil case in which the 1st respondent has instituted the divorce proceedings against her. It is precisely these proceedings which she is in terms of prayer 1 (g) of the notice of motion, seeking for an order for them to be stayed pending the finalization of the application before this court.

[4] The 4th respondent has simply been brought into the scene as an employer of the 1st respondent while the 5th respondent has been featured in his nominal capacity as a legal representative of the Government in civil cases.

[5] It is the only 1st respondent who filed his intention to oppose the application and then his answering papers.

[6] The applicant has elaborately canvassed the basis of her case in the founding affidavit particularly from paragraphs 4 to19. There are annexures which are intended to support and elucidate some of the averments.

[7] It would, this early, be appropriate to capture the history of the background of the two parties. It fortunately constitutes of factors which are of a common cause nature in this case. This begins with the fact that the applicant and the 1st respondent were married by customary rites in September 2004, they are blessed with a minor girl child named Maipato Moletsane, they

are related to each other as first cousins since their mothers are sisters and their respective homes are located in the same neighborhood, albeit in different villages.

[8] The parties' views are in harmony that in consequence of their customary marriage, they stayed at Carletonville in the Republic of South African (RSA). This was the place where the respondent was employed by the mining company as a shift boss. The position obtained irrespective of whether or not the couple lived in a house allocated to the respondent by his employer or was a rented one. He was at the time earning a R15, 000 salary per month while the wife was a house wife at the time. At present she is employed as a clerk at the post office in Pretoria where she is paid R4,000 per month.

[9] *Ex-facie* the papers before the court, there are basically no divergence of attitudes between the applicant and the 1st respondent that they at all material times had the matrimonial properties in consideration. The challenge would be to have them described accurately and on the ascertainment of their quantity. Should this court, in recognition of the subsequent developments in this case, find that there had been a decree of divorce which had terminated the marriage; the time of the acquisition of each property would be material since it may, by operation of law including customary law, fall within the community of property between the two or indicate otherwise.

[10] The parties present a common picture that their new marriage experienced a serious turmoil of relational challenges between them right from their residency in Carletonville. Their relationship was then throughout dominated by a diversity of accusations and counter accusations towards one another.

[11] A resume of the outstanding grievances which the applicant has registered before the court against the 1st respondent is that he was at all material times primarily dictatorial, inconsiderate and failing to demonstrate that he loved her as his wife.

[12] The applicant has, in a nutshell, illustrated the deficiencies which she attributes to the 1st respondent in the proceeding paragraph, by complaining in the papers before the court that immediately after their marriage, he directed her to resign from her work in Vereeniging in the RSA to become a house wife and that she complied, blamed her for being spendthrift and for squandering the money. She stated that sometime in 2006, the 1st respondent kicked her out of the house and that it was then that she left the matrimonial house with their baby girl.

[13] She presented to the court a picture that after her husband had forced her out of their matrimonial home, he subsequently lived in adultery with the 2nd respondent and that a boy child Seroti was born from that adulterous relationship.

[14] It was also her case that her husband had suddenly after their marriage, refused her to wear the pants as a way of

imposing upon her his customary stereotypes and that he effectively sought to confine her movements within the premises of their residence.

[15] According to her, the 1st respondent had for five (5) years not been maintaining their child and that he had, instead, concentrated on supporting Seroti 'while enjoying the fruition of his adultery with Makhotso'. The Court takes strong exception to the use of the derogatory description of the stated relationship regardless of its truth or otherwise. The counsel should have edited such instructions.

[16] The 1st respondent preliminarily reacted to the applicant's founding affidavit by raising legal points *in limine.* These traversed arguments relating to the applicant's failure to disclose the material facts, failure to have foreseen existence of dispute of facts, lack of urgency in the application, the High Court's lack of jurisdiction in the matter and the irregularity of the proceedings before this court.

[17] The court dismissed the preliminary application premised upon the points *in limine*. It perceived them as a simple technique of over technicalizing the basically sufficiently presented facts and the issues for a judicial determination. The 1st respondent has, for instance, raised a point that the applicant has not disclosed that her family was not interested in their reconciliation and referred the court to the letter marked "FSM1" to demonstrate that. The court interpreted the letter otherwise. It has also been

found to be a border line case as to whether or not the matter ought to have been approached through an urgent application or by way of an ordinary notice of motion. It does not automatically follow that since the case was already pending before the Motjoka Local Court, the applicant couldn't launch an urgent application. It would depend upon the circumstances. It could for instance, have been intended to stop an irreparable harm which the proceedings could occasion.

[18] The question of jurisdiction can only in the circumstances of this case be decided with reference to the merits. The same would apply to the argument that the proceedings are irregular. In any event, it is incorrect that the applicant hadn't raised any objection to jurisdiction before the Motjoka Local Court. The fact is that the counsel for the applicant had raised that point and the court had specifically upheld it by directing the parties to the Mapoteng Local Court which it described as having the territorial jurisdiction over the case. The 1st respondent's counsel couldn't realize it that she could turn that move into being her advantage.

[19] It was ultimately ruled that the points raised *in limine* had no merit in law and have simply wasted the court's time and that that the merits would, in the circumstances of this case, have to be traversed *en route* to the justice between the parties. The ruling has relatively been inspired by the decision of Ramodibedi J (as then was) in **Basotho National Party v The Management Board, Lesotho Highlands Revenue Fund & 2 others CIV/APN/335/95 (unreported).**There the Learned Judge in addressing a *locus standi*

question ruled that in the circumstances of the case he was seized with, the merits would have to be explored so that in the process the points raised *in limine* could also be determined. Also in **Room Hire Co. v Jeppe Street Mansions 1949 (3) SA 1155 (T)** it was directed that:

> It is necessary to make a robust common sense approach to a dispute on a motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so.

[20] The salient features of the 1st respondent's answering affidavit appear to be founded upon a desire to portray the applicant as a dishonest deponent in that she either distorts the truth or withheld the material aspects. In this respect, he explained that she knew it from the time she was his girl friend that he wouldn't like his wife to wear trousers and denied restricting her movements or refusing her to speak with other people save that he took exception to her talking with her former boyfriend with whom they had a baby.

[21] He has in response accused the applicant for having committed the acts which shook the foundations of their marriage by drinking alcoholic drinks and yet he doesn't do so, slept outside, refused to spend money prudently, straight forwardly told him that she no longer loved him and that she finally left the matrimonial home on her own volition. He vehemently, denied that he ever forced her out of their home.

[22] The 1st respondent gives the impression that the applicant had actually disserted him in that after she had voluntarily *ngalaed* from the matrimonial home, she refused to sleep with him at the time she had returned there to ask him to provide her with money for the maintenance of the child.

[23] It is also the 1st respondent's reaction to the founding affidavit that the applicant had sometime during 2006, come to their matrimonial home in the company of her said boy friend and that they took away the bed room suite, the kitchen utensils, the microwave and the fridge.

[24] The predominance of the stated unhealthy domestic relations between the husband and his wife indeed shook the pillars of their marriage. This is true regardless of whether one or both of them were responsible for that and despite their accusations and counter accusations.

[25] The developments culminated in the filing of the maintenance application by the applicant against the 1st respondent in the Pretoria Magistrate Court per reference No 000106 M00382 dated 23rd November 2007. The document has been presented before the Court as Annexure "FSM2". He consented to the judgment and was ordered to maintain the child at the rate of M500 per month and to periodically buy clothing for her. The order was, subsequently, at the instance of the applicant and with the consent of the 1st respondent, varied in that in addition to the R500 maintenance, he was to pay the school fees of R300

per month and R70 for the transport of the child. This is exhibited in Annexure "FSM3".

[26] The marriage breaking down process reached its epoch when the 1st respondent instituted the divorce proceedings against the applicant under **CC.85/2011 Fonane Moletsane v Mamoletsane Moletsane** in the Motjoka Local Court. The applicant, who was the defendant in the court *a quo*, duly entered the appearance to defend and the matter was set down for hearing on the 16th December 2011 before the Late Court President N. Motanyane. It is important to note that the President stated that the counsel were having a problem with the case and ruled that the hearing should proceed since it had taken a long time without any progress and that the defendant who is now the applicant, had gone before the High Court whilst the case before her was pending.

[27] The record of the proceedings before the Motjoka Local Court reveals that the applicant was represented by Adv Lephuthing assisted by one Mr. K. Monate while Adv. Lephatsa appeared for the respondent. For clarity sake, the parties were respectively represented by the present counsel before the High Court save for the said Mr. Monate.

[28] A conjectural understanding which the court gathers from the presiding officer's second reason for her ruling is that she wanted the case before her to take precedence over the present application. The implication being that she considered the applicant's move of resorting to the High Court over the matter

related to the one with which she had long been seized, as simply a delaying tactic. She was, apparently, annoyed by that and felt that her case deserved to be given a preferential attention since it was brought before her court before the High Court one. Her thinking was in logic with *the first come first served common saying.*

[29] It is clear from the record of the proceedings before the Motjoka Local Court that the counsel for the applicant had resisted the hearing from proceeding. He protested that there was a case bearing the number CC28/08 which is said to be before the same court and which the respondent was substituting it with **Moletsane v Moletsane CC/85/11**; he then argued that the court didn't have a territorial jurisdiction over the matter. His basis was that the parties were domiciled within the jurisdiction of the Mapoteng Local Court. He warned that there was an urgent application filed in the High Court and, thus, a Local Court matter can not precede the one in the superior court.

[30] The applicant's counsel had from the beginning overwhelmed the President of the Motjoka Local Court with a series of legal technicalities. It transpires from her ruling that she could not appreciate their logic and significance. She instead, correctly or incorrectly, interpreted them as the technical means of undermining her court and a delay of the long pending case before her.

[31] It would appear from the record of the proceedings, before the Motjoka Court that the President found herself confronted with a situation in which whatever ruling she made, she would be more likely to be wrong. The legal points *in limine* which will be presented here below will, in the humble view of this court, be reflective of the merit in its observation of the attitude of the President.

[32] The chronology of the legal technicalities raised by the counsel for the applicant firstly started with the point that the court didn't have a jurisdiction in the matter. He, in that respect, reasoned that the Motjoka Court didn't have a territorial jurisdiction over the parties since they were both resident within the jurisdiction of the Mapoteng Local Court.

[33] The counsel secondly attacked the jurisdiction of a local court over the matter on the explanation that the divorce proceedings would incidentally occasion devolution of the parties' properties which had a high value that exceeded the fiscal powers of that court.

[34] The third leg of the applicant's counsel argument against the jurisdiction of a local court was that it wouldn't have the authority to decide on the custodianship of the child.

[35] The fourth legal point which is directly inter linked with the question of the devolution of the estate and the custodianship of the child, was that the local court wouldn't have the jurisdiction

to interpret the statutory enactments for reference in the determination of those ancillaries. He indicated those laws as the **Legal Capacity of Married Persons Act No 60 of 2006** and the **Children Protection and Welfare Act No 7 of 2011.** His position was that the Local Court was only mandated to interpret Customary Law and to apply it.

[36] The other Legal oriented concern which the counsel presented before the President was that it would be improper for her court to proceed with the divorce matter and leave the High Court to deal with the said ancillary matters. Thus, according to him, the court had to leave the whole case for the High Court; as he had already filed an urgent application there seeking *inter alia* for an order that the proceedings before that court be stayed pending the final determination of the **Sec 6 (b) of the High Court** based application. The section provides:

> No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court save-
> (a) By a Judge of the High Court acting on his own motion; Or
> (b) With the leave of a Judge upon application made to him in chambers, and after notice to the other party.

[37] The applicant had exploited **Sec 6 (b)** in her present application before the High Court. Her counsel had brought it to the attention of the President that the application was already scheduled for hearing before Hlajoane J and that its speedy hearing was simply being delayed by some logistical intricacies relating to the software system managed by the Roll Call office.

[38] The other preliminary point which Adv. Lephuthing for the applicant had raised was that the 1st respondent had earlier instituted CC28/08 before the Motjoka Court and that it is still pending before it. It never became clear who the parties were in that case and what could have been its relevance in the case before that court.

[39] Adv Lephatsa (Mrs) for the 1st respondent, retorted that the issue on CC28/08 was irrelevant since it was for the court to have guided a party who brought a case if he was duplicating it and that in any event, there had been no objection raised against the bringing of the case before the court.

[40] She counter argued that it is incorrect that the High Court cannot address the ancillary issues. Her position being that it has the authority to do so through the review or the appeal litigation avenues.

[41] Regarding the jurisdictional issue concerning the competency of the local court to interpret or apply **The Legal Capacity of the Married Persons Act,** Adv Lephatsa reacted that the enactment was irrelevant to the case before the court *a quo*.

[42] The counsel interestingly told the President that there was no urgency in the application before the High Court and explained that this was demonstrated by the respondent's failure to have timeously filed her replying affidavit.

[43] In conclusion, Adv. Lephatsa complained before the President that the applicant was simply protracting the matter and appealed to the court to proceed with the hearing as scheduled.

[44] The ruling which the President consequently made represents a feature of significance in the case before the Motjoka Local Court, transcended into the subsequent case before the Mapoteng Local Court and even into the **sec 6 (b)** based application which this court is seized with.

[45] The late President had in her wisdom decided to address only one point in her ruling. This was the question of the territorial jurisdiction of the Motjoka Local Court regard being had to the undisputed revelation that both parties lived within the territorial jurisdiction of the Mapoteng Local Court.

[46] It would seem that the President after having been showered with several legal technicalities which she might not have been familiar with and had not even been assisted with any reading material for guidance; tactfully took the safest route by deciding to confine her ruling on the question of the territorial jurisdiction of her court. She upheld the applicant's point that the Motjoka Local Court did not have a territorial jurisdiction over the case, directed that Mapoteng Local Court had the competency to hear the case and logically that the matter is removed from the roll of her court.

[47] The ruling presents a challenge for this court to determine its impact on **the prayer for an order staying the proceedings of the Motjoka Local Court pending the finalization of the application before this court.** This would have to be considered against the background that the applicant's counsel had initiated the point and successfully motivated the trial court to uphold it. He had raised the point well mindful for the prayer for stay.

[48] In the court's view, **the prayer for stay** was dependable upon the existence of the case between the parties in the Motjoka Local Court. This being **Fonane Moletsane v 'Mamoletsane Moletsane CC/85/11**. It stood as a bedrock for that specific prayer. Its removal from the roll of the Motjoka Local Court rendered it baseless.

[49] The ruling regardless of its merits or demerits remains a judgment. It was delivered by the court before which the territorial jurisdiction objection was raised. This was logically complemented with an order that the matter be removed from the roll of the Motjoka Local Court and by directing the parties to seek for justice at the Mapoteng Local Court since it commanded the said jurisdiction.

[50] If any one of the parties felt aggrieved by the ruling, such a party should have approached the Berea Magistrate Court for its review. This is because the issue would be a procedural one. Alternatively, an appeal could have been noted if there was a feeling that the decision had a final effect on the matter. The

tactical advantage of the latter move would be that the execution of the judgment would be automatically suspended.

[51] The end result is that the said successful objection by the applicant has demolished the foundation of the prayer for the stay of the proceedings with which the President of the Motjoka Local Court was seized. It has been overtaken by developments since there is not longer such a case in the roll of that court or pending before it. The applicant had succeeded to cut a branch of a tree upon which she was sitting and the force of gravity has naturally pulled her to the ground as far as the prayer for stay is concerned.

[52] The proceedings suddenly drifted towards a different dimension when the counsel for the 1st respondent referred the court to **Fonane Moletsane v Malefa Katile CC117/2011** (these being the latter's maiden names) in which the Mapoteng Local Court had already issued a decree of divorce between the parties and even awarded the custodianship of the child to the 1st respondent. She alerted the court that the judgment was delivered on the 26th July 2012.

[53] Adv. Lephuthing instantly interjected by vigorously objecting to any reference to the proceedings and the judgment of the Mapoteng Local Court. A ground for the objection was that those proceedings were irregularly instituted in that court since the present application was already pending before the High Court and that those proceedings had not been pleaded.

[54] The court ruled that there could be a merit in the argument that the 1st respondent had not made any averment about the Mapoteng proceedings in his papers before the court so that the applicant could have responded to it accordingly. This notwithstanding, the court expressed a view that it is inclined to take a *judicial notice* of the proceedings and the judgment of the Mapoteng Local Court. The paradox here is that the 1st respondent's counsel responded that she didn't have instructions to say anything further about the Mapoteng developments and yet she was the one who had mentioned the incidence and had represented the 1st respondent in that court.

[55] It was finally at the end of the counsel arguments, directed that the case be postponed to the 19th March, 2013 for them to prepare comprehensive arguments on the question of whether the court cannot simply take a judicial notice of the Mapoteng proceedings and its consequent judgment. The idea was to avoid possible prejudice to any side.

[56] On that appointed date, Adv. Lephuthing filed the heads of argument which were basically dedicated to persuading the court not to take judicial notice of the Mapoteng proceedings. The heads emphatically reiterated his earlier position that judicial notice cannot be taken because the 1st respondent has not pleaded the Mapoteng dimension of the proceedings. He also cautioned that reference to those proceedings was being done by the 1st respondent's counsel for sophistry reasons.

[57] The applicant has in her heads supported her position against any consideration of the Mapoteng proceedings and the judgment thereof, by referring to a plethora of decisions which clearly direct that the court must in determining justice, confine itself on the pleadings before it. The court's attention has in that list of the cases referred to, been firstly attracted to a decision by Ramodibedi JA in **Kaone Leoifo Bokailwe v Khamena and Another CA (CIV)48/07** that:

> It is trite that a case can only be decided by the court on the pleadings and the evidence before it. It is not for the court to make out a case for the litigants. Nor can this court properly decide the matter on the basis of what might or should have been pleaded but which was not pleaded.

[58] The second case which the court has elected to select is **Robinson v Randfontein Estates 6m Co Ltd 1924 AD 173 @198** wherein it was ruled that:

> The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to action the issues upon which reliance is to be placed.

[59] And, the third is **AJ Shepherd (EDMS) Bpk v Sentam Versekeringsmaatskappy (126/84)[1984] ZACSA 128** Here the same principle was expressed in these terms:

> In these circumstances I consider that the appellant must be restricted to the cause of action which he relied upon in the court *a quo*, just as if he had started in a pleading that that was his cause of action.

[60] The court identified the classical postulation by Voet on the subject to provide significant guidance.[1] The author has explained the duties of a Judge in these terms:

> But things can no how be done by him without being call upon which spring their own origin from the litigants. Thus account should not be taken in giving judgments of exceptions not raised nor of witnesses not produce.
>
> It follows from this that judge cannot make good matters of fact if they are not stated by the parties, unless they are quite notorious from the documents which have been put in by way of proof of the proceeding. That is to prevent his appearing by making good doubtful matters of fact to fill the role not a judge as if advocate, and to defend as counsel rather to judge.

[61] The ruling on the question of the court taking judicial notice of the proceedings at the Mapoteng Local Court or on the issue of it considering same, proceeded from the legislative scenario that local courts represents the lower most level in the hierarchical structure of the country's judiciary. This owes its genesis from **sec 118 of the Constitution**.[2] These courts are specifically created by the Central and the Local Courts **Proclamation No62/1938** to translate into action **sec 118 (1)(c) of the Constitution.** The latter section specifically contemplates *inter alia* the legislative establishment of the Central and Local Courts as the integral part of the subordinate courts.

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[1] Voet 5.1.49 Gane's Translation Vol.2 at 60

[2] Sec 118(1)(a) creates the Court of Appeal;
Sec118 (1) (b) creates the High Court
Sec 118(1) (c) creates the Subordinate Courts and Court Martial
Sec 118 (1)(d) creates such tribunals exercising a judicial function as may be established by Parliament

[62] **Sec 9 of The Central and Local Courts Proclamation** has assigned these courts the power to administer justice on the basis of the Basotho Customary Law or any law which they could from time to time be entrusted with the authority to do so. It is trite that they have historically been so entrusted by a warrant to administer justice upon actions based on the specified statutory enactments or subsidiary legislation. This could be illustrated by reference to the reality that the local courts exercise jurisdiction to try cases involving the offences under **The Range Management and Crazing Control Act No39 of 1980** and the regulations thereof. The Central Courts have in the resent past been given the jurisdiction through the Minister's issuance of a warrant to preside over the offences under the **Stock Theft Act 4 of 2000**. These courts frequently utilize **The Criminal Procedure & Evidence Act No. 9 of 1981** where the Basotho Courts (Practice and Procedure Rules) [3]are silent or unclear about the procedure to be followed. They have this dispensation under **Rule 11 of the Central and Local Court Rules 1961**.

[63] It would have to be highlighted that the judiciary is a constitutional institution comprising of different levels of courts which exercise the jurisdictional powers entrusted upon each court by law. The institution is designed in such a way that it generally operates as a system hence the notion *judicial system.* Ideally, each court should at all material times know about the developments in each court. It is *inter alia* for that reason that the electronic justice system is being progressively installed to

[3] Legal Notice No.21 of 1961

cover all the courts. This will render the developments in each court easily ascertainable through the instrumentality of judicial notice.

The court accordingly, takes a judicial notice of the Mapoteng Central Court proceedings and its decision. These are not *per se* indispensably matters for the pleadings since they represent some of the judicial developments within the greater judicial environment whose authenticity and accuracy can be easily ascertainable.

[64] The High Court has in the present hearing been informed about the proceedings and the judgment of the Mapoteng Local Court which indicates that the application has been overtaken by the developments. It would be illogical and unrealistic for the court to just proceed with the hearing without bothering to ascertain the truth about that information. Such a pretentious approach could unnecessarily cause confusion, uncertainty, embarrassment and finally land the administration of justice into disrepute. The idea that the court cannot recognize the judgment of another court if not pleaded, would be to stretch the requirement for the facts to be pleaded to the extend where justice would be unrealistically technically undermined and the judiciary rendered a fragmented and disorganized institution in which the right hand ignores what the left hand is doing. In the instant case, this court has simply elected to take a judicial notice of the proceedings and the judgment of the Mapoteng local court because that is easily ascertainable.

[65] It was for the reasons stated above, ruled that the record of the said proceedings be brought before the court for their ascertainment and to consider their relevance to the application before the court. This became imperative especially when the information about the Mapoteng proceedings and its judgment came from an officer of this court.

[66] It should suffice to indicate that the proceedings at the Mapoteng Local Court were a result of the stated ruling by the court of first instance. The 1st respondent had in response re instituted the divorce action in the subsequent court which had the jurisdiction over the matter.

[67] The first lines of the record of the proceedings at the Mapoteng Local Court reveal that the Court President had on the 26th may 2012, noted that both parties were being represented by their lawyers though the applicant and her counsel were, nevertheless, not in attendance before the court and yet they knew that the hearing of the case was scheduled for that day and that the time was 10:55 a.m. She then directed the 1st respondent to state his *mohlaka*[4] and, thereafter to prove his claim.

[68] A synopsis of the 1st respondent's testimony before second local court was materially a reiteration of the averments which he

[4] This is an oppenning address wich each party should make to indicate that he has a legally sound claim for its hearing by the court. The procedure is provided for under Rule of The Basotho Court (Practice Rules) under L/N No 21 / 1961.

has made in his answering affidavit concerning all the developments which resulted in the breaking down of their marriage, the applicant's application for maintenance against him in Pretoria and, finally, about her unilateral leaving of their matrimonial home at Carletonville with their child.

It should be mentioned that he specifically told the court that the applicant had told him face to face that she no longer loved him, that it was by a mistake that he fathered their child and got married to him. He lastly lamented that she had refused to sleep with him at the time she had come to the matrimonial home to get money for the maintenance of the child from him and that she later returned there to take away their household properties with the assistance of her boyfriend with whom they had a child.

[69] The record reveals further that Adv. Lephatsa for the 1st respondent had in her addresses to the court submitted that the marriage between the parties was null and *void ab initio* since they were closely related to each other in that their mothers were sisters. She maintained that the marriage relationship between the two has become irreparably harmed and attributed that to the applicant on the basis of the reasons already narrated.

[70] The counsel supported the 1st respondent's prayer for the decree of divorce to be issued for the termination of the marriage between the parties and for the custodianship of the child to be awarded to the 1st respondent.

[71] It should, perhaps, be stated that according to the record, the 1st respondent's counsel had disclosed it to the court that the applicant has lodged an application before the High Court. She had, however, advised the Court President that the application was on a different matter. The applicant or her lawyer could have seized the opportunity to place the court into a proper perspective regarding the relationship between the case in the High Court and the one before the concerned local court.

[72] At the end of the hearing, the President granted the prayer for the decree of divorce between the parties and ordered that their baby girl Maipato should continue staying with the applicant's brother. It would appear that she regarded that to be in the best interest of the child at the material time.

[73] The Court is of the view that after the ruling on jurisdiction by the Motjoka Local Court, it would have been procedurally strategic for the applicant to have rushed to the Magistrate Court of the district of Berea to have the order which removed the case between the parties from its roll to be reviewed and set aside. If the relief sought for would have been granted, it would mean that the case still exists in that court's roll of cases and, therefore, render the prayer for the stay of the proceedings related to it practically meaningful. This is being theorized about, well conscientious of the fact that it was the applicant who had enlightened the President that her court didn't have a territorial competency over the case. The order for the case to be removed from the roll of the court *hitherto* still stands and the Motjoka Court has become *functus officio* in the matter.

[74] In the alternative, it would have been procedurally appropriate for the applicant to have firstly applied for the amendment of the application and the prayer for the staying of the proceedings to specifically address the Mapoteng challenge. The amended version of the prayer for stay would be directed at the proceedings before the Mapoteng Local Court.

[75] After the amendment of the papers in the envisaged manner, it would have been prudent for the applicant to have featured before the Mapoteng Local Court on the day on which the matter was sat down for hearing. This would have afforded her and or her counsel the opportunity to re canvass the legal points *in limine* which had been raised in the Motjoka Court save for the issue of territorial jurisdiction. She could also have taken the chance to have presented any other form of defence.

[76] The court feels that the applicant had undermined the *decorum* of the Mapoteng Local Court by not attending the hearing without any reason having been advanced for that. The view lends credence from the court minute that she and her counsel had not attended the hearing despite the fact that they knew about the hearing date. In any event, it would have been courteous and ethical for the 1st respondent's counsel to have appeared before that court on that appointed day and time.

[77] Now the judgment turns towards directly traversing the merits of the application before the court. In that task, the grounds for the interventions sought for, would, in a re-

summarized version, be referred to for the sake of coherence and in an endeavor to have them projected in a clear perspective.

[78] A foundation of the urgent application before the court is the applicant's statement that she is detrimentally being prejudiced by the fact that she is the defendant at the Motjoka Local Court in a matter of divorce and that given the nature of their joint estate, custody of their minor child and the issues of maintenance; proceeding with the matter under the circumstances, will *pro tanto* lead to a miscarriage of justice as the local court has no discretion in matters of devolution of property incidental to granting of divorce.

[79] It is on the basis of the above foundational position that the applicant is seeking for an order in terms of which the respondent is interdicted from alienating the matrimonial properties which have been inventoried in the application. These consists of moneys in the TEBA Account No Z079882 including work related benefits and two Toyota vehicles bearing registration numbers BB60 PMGP and HFH174NW respectively.

[80] Her other prayers are that the 1st respondent be directed to contribute towards her maintenance at the rate of M4000 per month; contribute towards her costs of trial for divorce in the amount of M8000 and that he be ordered to buy a site within the Berea urban area and develop it as a residential home for herself and her daughter.

[81] The court has, in its analysis of the application and its prayers, determined that in the context of its surrounding material facts, prayers 1 (g) and 3 are more significant and determinative on the fate of almost the rest of the prayers.

[82] The significance of the two identified prayers is attributable to the fact that they logically and directly synchronize with the already mentioned foundational grounds. These prayers being that this court should issue an interdict order against the 1st respondent and for an order staying the divorce proceedings before the Motjoka Local Court and directing that the divorce action in consideration, be instituted in the High Court. She complemented those main prayers with those in which she is asking for the specific incidental directives against him.

[83] It, therefore, transpires to be imperative that prayers 1 (g) and 3 should be successively addressed. The approach will provide a precise prompt decision for the rest of the prayers.

[84] The applicant's prayer for the staying of the divorce case in **CC85/2011** pending the final determination of the application; has already been relatively addressed. In revisiting the subject, it has to be over emphasized that the prayer has long been overtaken by the ruling of the Motjoka Local Court that it had no territorial jurisdiction to hear the matter and subsequently removed it from its roll of cases.

[85] The applicant's objection over the territorial competency of the court to preside over the matter effectively suggested that it had, in its totality, been brought before an unqualified judicial forum. The President recognized a merit in the objection raised since it became common cause that the parties didn't reside within the boundaries of her court and accordingly pronounced that Mapoteng Local Court would have the jurisdiction. For the avoidance of any doubt about the position of the case in the registry books of the Motjoka Local Court, she, unequivocally, ordered that the matter be removed from those books.

[86] A technical significance of a removal of a case from the court records or from its roll of cases is that such a matter metaphysically ceases to exist in the court concerned. This notwithstanding, an application could, on persuasive reasons, be made for its reinstatement. In this case, however, it is imperceptible in law that there could be such a decision since it is a fact that the parties didn't reside within its jurisdiction.

[87] The applicant should, if aggrieved by the ruling, have alternatively instituted review proceedings in the Magistrate Court or appealed against the ruling in the Central Court. These were the available procedural avenues especially when *ex facie* the historical record of the case, the High Court hadn't made any *interim order* on the divorce matter which was, at the material time, pending before the Motjoka Court. Thus, its ruling *hitherto* remains a judgment of a court on a legal issue raised from the

bar by the applicant about its competency to hear the case and that court has become *functus officio* in the case.

[88] Advocate Lephuthing sought to persuade the court to recognize the proceedings and the decisions made at the two local courts particularly by the Motjoka Local Court as a nullity. The basis of his assertion is that those proceedings and the decisions thereof, happened after the application in consideration had already been instituted in this court. He, afterwards, maintained that all that was transacted in those courts amounted to the undermining of the *decorum* of the High Court and its case management system. In conclusion, he maintained that the only way in which the court would assert its authority to protect its integrity and its case management order, would be to regard the said proceedings as a nullity.

[89] The Court fully recognizes the importance of maintaining its dignity and its cases hearing schedules. This notwithstanding, the applicant ought to have resorted to the review or to the appeal procedures to have the impugned proceedings and their decisions set aside. The ruling by the court of the first instance had already signaled a possibility for the action to be resuscitated at Mapoteng. The worse and the last possible, though undesirable drastic measure, would have been the filing of the contempt proceeding against whomsoever would be undermining the authority of the court.

[90] The Mapoteng proceedings culminated in the default judgment entered in favour of the 1st respondent by the granting of the decree of divorce between the parties and by incidentally awarding him the custodianship of their minor girl child. Until now, there are no appeal or review proceedings which set aside the judgment. It must, resultantly, be recognized as such and be given effect to even by this court.

[91] The irony with the Mapoteng proceedings is that the 1st respondent hadn't referred to them in his papers and yet that would have strengthened his case. His counsel had brought them to the attention of the court during the addresses. The applicant on the other hand, had likewise, not mentioned them in her papers and yet she knew about them. The parties owed a duty to the court to make material disclosures of the relevant information especially when both represented by the counsel.

[92] The ultimate reality is that both the ruling of the Motjoka Local Court and the judgment of the Mapoteng Local Court remain standing regardless of their merits or demerits. The High Court cannot, irrespective of its superior position over those local courts, uphold its *decorum* by simply declaring the ruling and the judgment to be a nullity and yet the applicant hadn't utilized the clearly prescribed procedures to have them set aside. It should, throughout, be remembered that the applicant's counsel was the one who had successfully objected to the territorial jurisdiction of the Motjoka Local Court and that as a result the divorce action was removed from its roll of cases on a note that the Mapoteng

Local Court was the one which had jurisdiction over it. He cannot, therefore, still think from the premise that there is still such a case at the Motjoka Local Court and that this court should make an order that it be stayed pending the finalization of this application.

[93] The Court consequently, holds that the ruling by the first local court has rendered the divorce action non existent within its systems. Thus, prayer 1 (g) is regarded as being academic and is not granted.

[94] The applicant has, pursuant to **Sec 6 (b) of the High Court Act No5 of 1978,** applied in prayer 3 that the divorce action between herself and the 1st respondent be proceeded with in the High Court.

[95] The prayer must be comprehended to be seeking for an indulgence. The basis of this statement is that the principal position under **Sec 6 of the High Court Act** is that no civil cause or action within the jurisdiction of subordinate court[5] shall be instituted in or removed into the High Court. **Sec 6 (b)** provides for a dispensation route in that such civil cause or action could with leave of a judge upon application made to him in chambers, be instituted in the High Court.

[96] It is for the purpose of this application, recognized that **Sec 6 (b)** would apply even in respect of cases in connection with a

[5] Subordinate Courts means the Magistrate Court while subordinate courts means all the courts under the High Court.

marriage contracted in accordance with the **Basotho Laws and Customs**. This could be so notwithstanding the fact that **Sec.8 (1)(b) of the Central and Local Courts Proclamation No. 62 of 1938 ,** has conferred jurisdiction upon those courts to hear such matters. **Section 34 (4) of the Laws of Lerotholi**[6] specifically empowers the same courts to dissolve a marriage on grounds of willful desertion of the other party or to the wife for the persistent cruelty or negligence of her husband or other cause recognized under Basotho Law and customs.

[97] The scheme of the Law presented by **the High Court Act, the Proclamation and the Laws of Lerotholi** is that the applicant would have to advance sound and legally supported reasons to be accorded the indulgence provided under **Sec 6 (b).** Otherwise, the court may run the risk of technically usurping the judicial powers of the subordinate courts, gradually render them effectively inoperative and ultimately subvert their constitutional creation under **Sec 118 (1) (c) of the Constitution.** This brings about a challenge for the determination as to whether the applicant has brought sufficient reasons for the divorce action in question to be instituted in the High Court. In that endeavor, the court will, for the time being ignore the decision of the Mapoteng Local Court. This will present an opportunity for the interrogation of each ground advanced in support of the prayer for the **Sec 6 (b)** desired leave.

[6] The Laws were inacted by Paramount Chief Lerotholi per the 1959 edition of his book on same. It inexhaustively contains the Basotho Laws and customs.

[98] It would appear that the major reason for the applicant to seek for the **Sec 6(b)** leave, is that the hearing of the divorce matter in the local court would violate her fair hearing rights under **Sec 12 (8) of the Constitution.** She also blames the provisions of the Proclamation for having the effect of occasioning the infringement of her rights. The Court rejects this argument for its inconsonance with the reality on the ground. The basic fact is that the legislative establishment of the Central and the Local Courts is contemplated under **Sec 118 of the Constitution.**

[99] The Central and the Local Courts have right from their inception been dedicated to dispense justice in accordance with the Basotho Laws and Customs. A majority of the Basotho has confidence in their administration of justice since those courts, more than any other court in the Kingdom, command a reputation of dispensing in form and content, the nature of justice which is to a larger extend, inscribed in their hearts and minds.

[100] The adherence of the Central and the Local Courts to the fair trial procedures has been attested to by Prof. S Poulter in these terms:

> The practice and procedure of the courts is regulated in accordance with Sesotho Law and Custom supplemented by the provisions of the Basotho Courts (Practice and Procedure) Rules, 1961. **These Rules are designed *inter alia* to ensure that the principles of natural justice are observed and that every party obtains a fair hearing[7] (emphasis added)**

[7] Poulter S Family Law & Litigation in Basotho Society Oxford: Clarendon Press 1976 p43.

[101] The fair trial procedures in the said courts are reinforced by the legislatively provided review and appeal systems. The combination of the adversarial and the inquisitorial systems in the hearing of cases, turns to cultivate the due process virtues from each of them.

[102] The High Court should jealously protect the jurisdictional powers entrusted upon the subordinate courts. In so doing, it would be attaching recognition to their constitutional creation and to their respective parental enactments. These courts command a high social service character through their country wide geographical locations and the lower costs for litigation in those courts. Thus, the **Sec 6 (b)** application for a case within the jurisdiction of a subordinate court to be instituted or removed to the High Court must be strictly censured to ensure that the reasons advanced, render it imperative that the indulgence sought for, should succeed. Otherwise, the High Court would unnecessarily over burden itself with the cases which should be heard in the lower courts and thereby sky rocket its backlog statistics while simultaneously burdening the citizens with the high litigation fees and costs in the High Court.

[103] It is an incorrect proposition of the law by the applicant that the local courts deal exclusively with customary law and that in that task, they do not consider the apposite statutory enactments and impliedly that they wouldn't competently interpret them. She has specifically averred that the Local Court would not be able to apply **The Legal Capacity of**

Married Persons Act 2006 and that this would prejudice her. The suggestion here is that the Local Court would disregard the enactment and deliver a judgment which would be purely based upon the customary law principles. Her reservation about that is that the approach would favour the 1st respondent.

Another interesting dimension in her averments is that the local courts are not statutory courts and that they should not encroach into the territories of the statutory courts. This is all wrong. The Central and the Local Courts are the creatures of **The Central and Local Court Proclamation 1938** which is itself a statute. The thinking ignores the fact that these courts are further empowered under **Sec 9 of The Proclamation** to also administer justice on the basis of the provisions of **any law** which they are authorized to administer. It was in recognition of this fact that the Court of Appeal, in **Attorney-General of Lesotho v Mopa C. of A. (CIV) 3/2002** stated that:

> Central and Local Courts are, it is apparent, thus vested with an extensive jurisdiction and wide powers in both criminal and civil matters.

[104] Though the statutory foundation of the central and the local courts is to administer justice primarily on the basis of customary law, it doesn't mean that they do not interface that with the relevant statutes or that they do not have a jurisdiction to interpret legislation while executing their Customary Law mandate. To start with, they naturally interpret the Proclamation itself. These courts administer justice within the environment of

the statutory enactments. Some of those laws qualify customary law itself since custom is not a static phenomenon.

[105] The applicant has also justified her application for the required leave on the reasoning that the Proclamation does not give the local courts the jurisdiction to make an order concerning the custodianship of a minor child since according to her, that is a prerogative of the High Court. The immediate answer to this statement is provided for under **Sec 34 (5) of the Laws of Lerotholi** which runs as follows:

> A court granting dissolution of such marriage shall make an order regarding the retention or return of *bohali* cattle and **to whom the children, if any, shall belong as may seem just in accordance with the circumstances in which the dissolution is granted. (Emphasis added)**

Sec 34(5) flows from **Sec 34 (4) of the Laws of Lerotholi** which has empowered the Basotho Courts to hear the divorce matters of the people who have contracted a customary marriage.

[106] The phraseology of **Sec 34 (5)** is such that the court is mandatorily enjoined to make an order as to whom the children should belong. This is precisely what the Mapoteng Local Court had done after granting the dissolution of the parties' marriage. It appears readable from the words beginning with *shall* that the intention is for a Basotho Court be it the Central or the Local Court **to serve the best interest of the child.** The circumstances which caused the dissolution would be taken into account and so the question of the welfare, the future and the safety of the child concerned.

[107] The applicant should have considered **Sec 4 (1) and (2) of the Children Protection and Welfare Act No 11 of 2011** before being assertive that the local court has no mandate over the protection of the best interest of the child. **Sec 4(1)** directs that all **actions** concerning a child shall take full account of his best interests. **Sec 4 (2)** complements **Sec 4 (1)** by stating it in mandatory terms that the best interest of a child shall be the primary consideration of *inter alia* **all the courts.** The divorce **action** before the Motjoka Local Court and subsequently before the Mapoteng Local Court incidentally concerned the child. It was consequently, by operation **Sec 34 (5) of the laws of Lerotholi,** mandatorily incumbent upon the court which granted the decree of divorce, to make an order about the custodianship of the child. It was the duty of the counsel to have referred the court to the provision of **Sec 4 of the CPW Act.** A local court is embraced in the words **all courts.**

[108] The applicant's statement that a local court has no jurisdiction to award the custodianship of the child and that it cannot take care of the best interest of the child, resultantly also falls apart.

[109] In the understanding of the court, the applicant is technically mistaken by basing her application for leave on the explanation that the Local and Central Court Rules do not accommodate a counter claim procedure. The fact is that this procedure could be accommodated under **Rule 11 of the Local and Central Court Rules.**

[110] The rule makes the Rules of these courts extra ordinarily dynamic and responsive to which ever procedural challenges which could be encountered. It is intended to ascertain that the procedural rights of the parties are observed so that the court would ultimately dispense justice between the parties.

[111] The rule is basically, a contingency route. It is reserved for application in situations where the Rules are silent on the procedure to be taken in the circumstances presented before the court. In that event, the presiding court president is empowered to adopt the procedure of other courts provided that he would explain that procedure to the parties and ascertain himself that they understand it and appreciate its significance in the litigation process.

[112] The local courts frequently use the rule to supplement a number of the deficiencies in their rules. They more often adopt the Subordinate Court Rules.[8] In criminal cases, they adopt the **Criminal Procedure and Evidence Act**.[9] The applicant could have simply applied to the court to invoke Rule 11 for the purpose of the accommodation of her counter-claim. Alternatively, she could have instituted a separate action with different prayers. A counter claim is in any event, a direct response to the action already before court and relies upon

[8] The Subordinate Court Rules 1996 introduced under Legal Notice NO. 32 of 1996

[9] The Criminal Procedure and Evidence Act No.9 of 1981 through a statute is adopted by the local and central courts as a procedural tool for their guidance in their administration of criminal Justice despite the fact that sec is clear that the operational provisions in the Act are not applicable in those courts

materially the same facts before court. It may have a similar or a different claim against the plaintiff in convention. The Rule would allow the procedure in a manner which would be analogous to the accommodation of the interdict proceedings in **Makhetha V Makhetha 1974-5 LLR 153.** Here, the procedure for the interdict relief was sanctioned despite the absence of a rule which expressly empowers a Local Court to grant an interdict relief pending a finalization of a case before it. The argument that a counter claim cannot be allowed in the local court therefore collapses.

[113] The applicant maintains that the divorce matter should be proceeded with in the High Court since **The Central and Local Court Proclamation 62 of 1938** under which the local courts are created, is inconsistent with the constitution. There would, however, be a need to specify a provision which is said to be unconstitutional and not the Proclamation in its entirety. The court finds that this is a constitutional issue which should be brought before a Constitutional Court for its determination. It can not, therefore, succeed as a basis for the leave sought for.

[114] Her averment that the Local Court in which the 1st respondent has brought the divorce action does not have a territorial jurisdiction to accommodate her claim for maintenance is correct. This does not mean that whilst that is so, the High Court would automatically assume the jurisdiction over the maintenance claim in consideration. The High Court can hear it provided that it has granted leave for the divorce action to be

proceeded with before it. A claim for maintenance *per se* would, otherwise, be a matter for the Magistrate Court.

[115] In paragraph 8 of her founding affidavit, the applicant has stated that the nature of their property far exceeds the jurisdiction of a local court and that apart from that, a local court does not have a jurisdiction on the devolution of matrimonial property after divorce. The averment is contradicted by a research based statement by Patrick Duncan[10] and by its subsequent endorsement by Thompson JC in **Kholu v Shalaka JC 200/1966.**[11] The statement revealed:

> From enquiries I have made I understand that it is possible for a woman to be awarded part of the joint estate on divorce, and that each case should be decided on its merits.

[116] In **Matsepe v Matsepe JC/90/1956**[12] where both parties were at fault, there was a general division of the joint estate. In **Likotsi v Likotsi JC/247/1996 (all courts)** [13] the court awarded all the joint estate to the wife since she was found to be in no way responsible for the breaking down of the marriage. '*All courts*' indicates local and central courts inclusive of the Judicial Commissioners Court.

[117] The Judicial Commissioner's Court being the appellate division of the central and the local courts primarily applies customary law in its decision. The above cited decisions demonstrate that Customary Law has been developing since the

[10] S Paulter Family Law and Litigation in Basotho Society Oxford Clarendon Press 1976 p221
[11] Ibid p221
[12] Ibidp221
[13] Ibidp221

last fifty years. It should, understandably, be experiencing more impetus for it to be relatively in rhythm with the dictates of the recent re emergence of a democratic constitutional order which seeks to promote *equality, freedom and human dignity*.

[118] **The legal capacity of Married Persons Act 2006,** is one legislative endeavor among several others which strives towards the achievement of those ideals. The central and the local courts are vertically obliged by the constitution to operate within the framework of such statutory enactments. The fact that ever since the promulgation of the legal capacity of the **Married Persons Act,** the local courts stopped questioning the *locus standi* of married women to institute the proceedings in those courts, has a telling effect on how they are not immune from the statutory imperatives.

[119] The authority of the local courts in determining the devolution of the parties joint estate after they have, pursuant to **sec 34 (4) of the laws of Lerotholi,** issued the decree of divorce is not dependable upon the fiscal value of the estate in comparison to the jurisdiction of these courts. A house regardless of its value is simply regarded as a house; the same would apply to any other property involved. This doesn't suggest that the devolution itself be unmindful of a need to do so fairly, such that, justice would be seen to have been done to both parties. The parties would be free to bring the evidence which could assist the court to appreciate the monetary value of the assets in the estate to facilitate for the fairness in its devolution; albeit, subject to the

proportionality of each party's contribution to the demise of the institution.

[120] If the value of the estate was taken into account to determine whether it didn't exceed the Ten Thousand Maloti (M10,000) jurisdiction of the local courts, there would hardly ever be any divorce action instituted in these courts. The reality would be that the majority of the ordinary Basotho who are customarily married, would be disqualified from filing the divorce action in the local courts. This is because a very high statistics of the Basotho who are engaged in that regime of marriage, have properties which value wise, would exceed the jurisdiction of the local court by far. The end result would be that the ordinary Basotho would be forced to institute the divorce matters in the High Court and, thereby, phenomenally increase the statistics of cases in the divorce roll including their ancillary issues.

[121] The court had invited the applicant's counsel to provide it with the authority which would support his proposition of the law that there is a correlation between the value of the estate and the jurisdiction of the court. It would appear that he inadvertently didn't find it since he never brought one. There being no legal basis for dispensation sought on this ground, it accordingly becomes part of the statistics of those which have already failed likewise.

[122] The last of the long list of the **Sec 6 (b)** based grounds for the divorce action to be brought into the High Court is,

according to the applicant, that the parties had abandoned the tribal mode of life in favour of the modern life and that clinging to the Basotho customs would, for the divorce purpose, serve no justifiable purpose under the obtaining circumstances. This appears under paragraph 10 of her founding affidavit.

[123] She had, however, previously under paragraph 4.4 of her founding affidavit deposed that while she and the 1st respondent were living in Carletonville, they developed differing attitudes towards life in that he retained his traditional beliefs as he kept her indoors and refused her to wear jeans or pants.

[124] It therefore, remains unconvincing that the parties had abandoned the Basotho way of life. The manner in which they got married which had commenced by way of an elopement and the nature of their marriage is not indicative of people who had abandoned the Basotho mode of life. It is also unconvincing that they could have abandoned that mode of life within roughly nine (9) months of their marriage. The ground appears to be simply raised for the convenience of the application and it is equally found to be lacking in merit.

[125] It is worthwhile to mention that the counsel for the applicant has in support of the **Sec 6 (b)** relief, relied *inter alia* upon the decision of Cotran J(as then was) in **'Mamakhasa Mphiri v Chesang Mphiri 1974-75 LLRp76.** The learned Judge had in that case granted the leave for the divorce action between the parties who had contracted a customary law marriage to come to the

High Court.

[126] The basis for the granting of the **Sec 6 (b)** dispensation in **Mphiri v Mphiri (supra),** was that the applicant was also claiming the custodianship of the children and that if the divorce matter was heard in the local court, she would be deprived of the right to be represented by counsel. This reasoning, however, plausible at the material time, has been overtaken by developments following the decision in **Attorney General of Lesotho vs Tebelo Mopa C of A (Civ) 3/2002 CIV/APN** in which the Court of Appeal declared that **Sec 20 of the Proclamation** was inconsistent with **Sec 12 (8) of the Constitution.** [14] The section excluded lawyers from representing parties in civil cases before the central and the local courts. The understanding of the Learned Judge was that the exclusion of lawyers from featuring for the parties in those courts compromised their fair trial rights.

[127] It is trite that the decision has opened the doors for lawyers to appear in the central and local courts. Thus, the reason upon which the **Sec 6 (b) leave**, was granted in **Mphiri v Mphiri(supra),** has been relegated to history since the decision in **Attorney General v Tebello Mopa(supra).**

[128] On a rather different note, the applicant has asked this court to interdict the 1st respondent from alienating the

[14] Sec 12 (8) of the Constitution provides *inter alia* that the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority and the case shall be given **a fair hearing** within reasonable time.

properties which fall within their estate. She has in support of that expressed her fear that the 1st respondent would use their estate to benefit himself and his girl friend Makhotso.

[129] The applicant has also stated it in her affidavit that she is skeptical about the competency of the local court to protect the estate from falling into the hands of Makhotso. According to her, the local court may be compromised by the fact that it administers the regime of the law which countenances polygamy. The impression which she creates is that High Court wouldn't embrace polygamy. This is a misconception since that mode of marriage is allowed in **Sec 4 of The Marriage Act**. In any event, judges have, in their judicial oath of office, undertaken to also administer justice in accordance with the Basotho customs. She has, in essence, expressed her lack of confidence in the local court's ability to maintain fair trial procedures since customary law is, by its very nature, conservative and biased against women.

[130] Regarding the mentioned prayer for interdict, it should be highlighted that it is inter linked with the finalization of the divorce action or the application itself.

[131] The countervailing fact in relation to her idea that the divorce action is still pending, is that the Mapoteng Local Court has certainly made a decision in the matter. There has, correspondingly, never, been and *rule nisi* issued in this application. It is only now in this judgment that the application

itself is being finalized. I have not specifically been informed why the interim order was not issued and yet the application was brought before the court on the 1st November 2011 on urgent basis. The proceedings in the Motjoka Local Court or any other Local Court would only be stayed by the order of the High Court or that of any other competent court. The Local Court would, in the absence of any such directive, enjoy the liberty to proceed with the case. It would not suffice just to inform the Local Court that an application having a bearing on the subject matter has been filed in the High Court.

[132] It has clearly transpired from the regimes of laws and the cases referred to in the judgment, that the applicant has a procedural right to institute a case for the devolution of the estate in the court which granted the divorce. It is clear from the judgment of the Mapoteng Local Court that it never made an order pertaining to the devolution of the estate. The devolution dimension will not be *res judicata* and the court concerned will also not be *functus officio* in that respect.

[133] The prayer for interdict in relation to the matter which is intrinsically within the jurisdiction of the Local Court introduces another jurisdictional issue. This is on the strength of the judgment in **Ezekias Makhetha v 'Matau Philip Makhetha (supra)** The relevant facts in this case were that the applicant had successfully obtained judgments in his favour concerning a long dispute over the fields which were the subject matter for contestation between the parties. The respondent ignored the

judgment and proceeded on to plough them. The applicant in response, brought an application before the High Court asking for an order interdicting the respondent from continuing using the fields contrary to the judgment of the Local and the Central Court.

[134] Mapetla CJ (as then was) dismissed the application. His reasoning was that both the Local and the Central Courts and the Subordinate Court[15] **have jurisdiction to grant interdicts of the kind sought in the application.**[16] He, however, stated that the court could only entertain the application if the **Sec 6** leave of the then **High Court Act 1967** had been obtained.

[135] The late Chief Justice further rejected the applicant's argument that the Local Court didn't have a jurisdiction in issuing the interdict because the value of the land in question was beyond the jurisdiction of that court. He stated that the applicant was not a sworn property evaluator so as to ascertain it to the court that his valuation was correct.

[136] In conclusion, the Chief Justice explained that the local and the central courts have from time immemorial almost habitually issued interdicts without any challenge; and warned that in any event, the Magistrate Court has a jurisdiction to issue an interdict order. The applicant could, therefore, bring an application for the interdict he is seeking for in the subordinate

[15]Subordinate Court means The Magistrate Court while subordinate court means all the courts under the High Court eg The Magistrate Court and the Central and the Local Courts see the distinction made by Cotran CJ in Mphiri v Mphiri (supra) at p1.

[16]The Subordinate Court has a power to issue an interdict under sec 18 (1) of The Subordinate Act 1988.

courts.

[137] In the present application, whilst the court appreciates the professional significance of a property evaluator to ascertain the property value, it however, reasons on a different level regarding the property value and the jurisdiction of the Local Court. The Court has, on this point, stated that customary law is not much concerned about the property value *per se*. This notwithstanding, the concentration is on the fair devolution of the estate regard being had to each party's blameworthiness in the breaking down of the marriage. This is well illustrated in **Matsepe v Matsepe** *(supra)* where there was an equal division of the joint properties because they were equally responsible for the collapsing of the marriage. The same was the case in **Likotsi v Likotsi** *(supra)* where the wife was awarded the whole estate because she hadn't at all been responsible for the divorce.

[138] It should be emphatically warned that if the fiscal value of the estate belonging to the parties who have contracted a customary marriage would determine the jurisdiction of the local courts, it would be a negligible number of Basotho whom those courts would hear their divorce matters. The reality is that the homestead of an average rural Mosotho and its humble furniture, agricultural implements, blankets, sticks, a dog, a cat, a donkey, the harvest for the year etc, would exceed the financial jurisdiction of the local court. Here reference is not made to the rural family which has livestock such as cattle, a flock of sheep and a horse in addition.

[139] In the premises the court finds as follows:-

1. The application has from its genesis and throughout its existence before it, been fatally devastated and over taken by the standing ruling in the Motjoka Local Court and subsequently, by the more determinative judgment of the Mapoteng Local Court;

2. The applicant has misconceived the legal significance of the said ruling and judgment and the fact that there was no appeal or review proceedings instituted against them and that, as such, they remain standing;

3. The applicant committed a fatal mistake by having not amended her application so that it could cover the Mapoteng Local Court after she had been served with the divorce summons from that court. She didn't also appeal to the mercy of the court by appraising it about the application and its intention for the staying of the proceedings before the Local Court pending its final determination by the High Court;

4. The applicant has failed to provide the court with the satisfactory legal basis for it to grant the leave required under **Sec 6 (b),** so that she could institute the divorce action and its ancillaries in the High Court;

5. The Local Court and or the Subordinate Court (as the case may be) possesses the jurisdiction and the competency to hear the rest of the claims connected with the divorce matter in consideration, as it has already been indicated with reference to legislation, customary law and the case law;

6. The divorce action in **Fonane Moletsane v 'Mamoletsane Moletsane CC 85/11** (who are the parties in the application) has, as a result of the ruling by the Motjoka Local Court that it be removed from its civil cases register book; ceased to exist before it unless procedurally reinstated by the court itself or through an appeal or a review. It can not, therefore, be stayed since staying of a case indicates its existence before the Court;

7. The application for the 1st respondent to be interdicted from alienating the moneys in the TEBA Account No 20798802, could be instituted in the Subordinate Court in terms of **Sec 18(1) of the Subordinate Court Act 1988.** The reason being that TEBA being a company can not be sued in the Local Court. The same move against the alienation of other properties would be appropriate for the Mapoteng Local Court since that would apply to some of the ancillaries incidental to its divorce order. A Magistrate Court could competently deal with such a matter. The applicant has already rightly prior to the divorce decree, obtained the maintenance order issued by the Pretoria Magistrate Court directing the 1st respondent to support their minor baby girl. She didn't have to bring those proceedings before the High Court. Similarly, she could bring a claim for her maintenance to the

Magistrate Court.

8. The logical end result is that the application is dismissed. The relationship between the parties justifies the decision that each party should bear its own costs.

[140] The developments in this case could, perhaps, present a challenge for the Court of Appeal decision in **Attorney-General v Mopa C. of A. (CIV) 3/2002** to be revisited for the ascertainment of the parameters of the right to a legal representation in civil matters before the Basotho Courts. The Court is, without making a decision on the issue, of the proclivity that the judgment limits the right to complex cases for the counsel to simplify them for the Presiding President. The thinking should be dedicated on maintaining the user friendly nature of the procedures in those courts and their expediency in the administration of justice.

[141] Perhaps, also, the decision occasions another challenge for the Chief Justice to issue the Rules which would regulate the procedural conduct of the lawyers in those courts and the postponement of cases so that their traditional stature, our valued heritage of the system and their manner of administering justice are jealously protected.

E.F.M. MAKARA
ACTING JUDGE

For the Applicant : Adv. C.J. Lephuthing
For the Respondent : Adv. L.M.A. Lephatsa