

**IN THE HIGH COURT OF LESOTHO**

**CIV/APN/46/2011**

In the matter between:

**LIRA SEKANTSI**

**APPLICANT**

**And**

**‘MASEBONGILE P SEKANTSI (NEE MOOROSI) 1<sup>ST</sup> RESPONDENT**

**DISTRICT ADMINISTRATOR MASERU 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF DEEDS 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Coram** :Honourable Acting Justice E.F.M. Makara

**Dates of Hearing** : 21<sup>st</sup> March, 2013

**Date of Judgment** : 25<sup>th</sup> March,2013

**Summary**

*The first civil marriage concluded between the parties in the Republic of South Africa – their second civil marriage entered into in Lesotho – An application for the latter marriage to be declared null and void ab initio – A consideration of secs 29(1) and 42 of the Marriage Act No 10 of 1974 – The question of the parties qualification to conclude another civil marriage in the country – The interfacing of the Act with Private International Law – The court’s jurisdiction over the RSA concluded marriage and its ancillaries particularly in the protection of the best interests of the child.*

BOOKS

**Hahlo, The South African Law of Husband and Wife, 5<sup>th</sup> Ed., Juta & Co.Ltd, pg. 75**

CITED CASES

***L.Makata v T. Makata CIV/T/41/1981(Unreported)***  
***Limpho Lesoli v Vivian Lesoli CIV/APN/211/1984***  
***Braindail v Braindail 1946 (1) ALL ER***  
***Adam v Adam CIV/APN/327/1997***

STATUTES

**Marriage Act No.10 of 1974**  
**Children Protection and Welfare Act No.7 of 2011**

**MAKARA A.J**

[1] The applicant in this notice of motion proceedings has sought for an order declaring that a civil marriage which he and the 1<sup>st</sup> respondent have entered into at the District officer's office in Maseru in the Kingdom of Lesotho on the 23<sup>rd</sup> April 2010; was *null and void ab initio*.

[2] The 1<sup>st</sup> respondent filed her intention to oppose the application and, thereafter, filed her answering affidavit. The rest of the respondents who were cited in their respective official capacities did not take any counter measures.

[3] It has transpired from the papers before the court and from the verbal representations made by the counsel who featured for the parties respectively, that all the basic facts upon which the application is premised, were common cause. Their primary point of divergence is that, according to the 1<sup>st</sup> respondent, the aforesaid Lesotho marriage should not be held null and void. She maintains that instead the court should find it valid and

declare otherwise about the first civil marriage which the parties had earlier entered into on the 2<sup>nd</sup> September 2009 at Ladybrand in the Republic of South Africa (RSA).

**[4]** The salient facts which are not in dispute between the parties are that they are both citizens in the kingdom and are domiciled in the country – hence this court has a jurisdiction to hear the case and to consider the declaratory order prayed for by the applicant.

**[5]** It is also common cause that the applicant and the 1<sup>st</sup> respondent had on the said 2<sup>nd</sup> September 2009 concluded a civil marriage contract in community of property at Ladybrand in the RSA and that they subsequently on the 21<sup>st</sup> April 2010 entered into another civil rites marriage in the kingdom. The marriage certificates issued from both countries were duly annexed to the founding affidavit. The RSA certificate is marked Annexure MM1 while the Lesotho one bears Annexure MM2.

**[6]** The applicant has explained that they had concluded the second civil marriage in Lesotho because they believed in good faith that through they had already done so in the RSA, it remained imperative for them to be married in their country. It would have been besides the point to interrogate him as to why in the first place they had decided to be married in the RSA. There is however, no legal prohibition for the citizens not to enter into marriage in other countries.

[7] The 1<sup>st</sup> respondent interjected with a counter explanation that the applicant lacked the credentials to speak on her behalf regarding the intention for the second marriage. The impression being that she had a different reason from that though she didn't disclose it to the court.

[8] The court in the premises, determined that justice in this case turned on the question of law regarding the legal status of the marriage concluded in the country. This would be considered against the backdrop of the fact that the locally solemnized civil marriage had been preceded by the similar South African one.

[9] The counsel for the applicant referred the court to **sec 29 (1) of the Marriage Act No.10 of 1974** which she submitted that it presents a key guidance for resolving the issue. It provides:

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

[10] Adv. Chonela for the 1<sup>st</sup> respondent correctly in the court's view counter argued that the section doesn't have relevance to the present case. She made a sound distinction that the section doesn't apply since it addresses a situation where a person who is already married purports to enter into a civil marriage with another person during the subsistence of the first marriage. The Court fully, subscribes to her argument that the section is irrelevant to the point in consideration and upheld it.

[11] It deserves to be highlighted that **sec 29 (1)** would also disqualify a person who has earlier married another by customary rites from subsequently concluding as civil marriage contract with another person. This is because **sec 42 of the Marriage Act** recognizes a customary marriage. A leading case which illustrates this position of Law is **L Makata v T. Makata CIV/T/41/1981 (unreported)**.

[12] In the instant case, **the same persons** have concluded two civil marriages. The first one abroad and the second locally. The focus is, therefore, on whether or not the subsequent civil marriage would stand in law. The other way of considering it would be whether the RSA civil marriage and the Lesotho civil marriage which have both been entered into by the same couple could be allowed to both subsist.

[13] The 1<sup>st</sup> respondent counsel argued with vehemence that it is, actually, the South African concluded marriage which should be found to be *null and void ab initio*. Her basis for this contention was that the parties ought not to have entered into the civil marriage contract in the RSA yet they are both the citizens of Lesotho and are domiciled in this country. She then emphasized that the Lesotho marriage should prevail over in South African counterpart.

[14] The counsel for the 1<sup>st</sup> respondent sought to caution the court that if the South African concluded marriage would be

regarded as the valid one, it will not anchor the best interest of their child since the family properties are in Lesotho.

[15] She further maintained that the validity of the locally contracted marriage is reinforced by the fact that the parties had followed all the requisite formalities. In this respect, she made reference to the **South African Law of Husband and Wife by Hahlo**<sup>1</sup> where the author has written that a failure by persons who enter into a marriage to follow the requisite formalities would render such a marriage invalid. She then stated that in this case there would be nothing voidable since there had been a compliance with the necessary formalities.

[16] The court had interjected the flow of the argument by the 1<sup>st</sup> respondent's counsel by stressing it to her that she was drifting away from the real issue for the determination by the court. This being whether the subsequently contracted civil marriage was valid in law and yet the persons who had concluded it had earlier concluded the same marriage in the RSA.

[17] The applicant's counsel skillfully turned the argument that the parties had complied with the marriage formalities in Lesotho into being a weapon for her side. She counter argued that the undisputed fact that the couple had firstly entered into a civil marriage in the RSA is indicative that they didn't follow the marriage formalities in Lesotho. She illustrated this by explaining it to the court that at the time the parties concluded

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<sup>1</sup> Hahlo, The South African Law of Husband And Wife, 5th Ed, Juta & Co Ltd pg 75

the second civil marriage in the country, they were a bachelor and a spinster and that they, therefore, lacked the qualifications to go through the civil marriage processes as though they weren't married to one another. On that basis, she submitted that the parties had not complied with a procedural requirement that a person, who concludes a civil marriage contract with another, must not be a party to a subsisting marriage.

[18] It was further argued with reference to the question of compliance with the essential marriage formalities that the applicant and the 1<sup>st</sup> respondent must have misrepresented their status to the Marriage Officer in Lesotho. And that otherwise, he wouldn't have officiated over the event. This according to her indicates that the parties had followed an irregular procedure. She in support of her proposition of the law drew to the attention of the court the case of **Limpho Lesoli v Vivian Lesoli CIV/APN/211/84** (unreported). In this case the plaintiff had initially married customarily and had, thereafter concluded a civil marriage with another person. The court held that plaintiff had at the time he entered the civil marriage, lacked the credentials to do so because **sec 42 of the Marriage Act No 10 of 1974** recognizes customary marriage. This, therefore, had incapacitated him to have concluded a civil marriage with another person since he was not a bachelor at the material time.

[19] The issue in consideration interfaces the **Private International Law with the Marriage Act**. The former law obliges the states to recognize the private rights or the status which a person has

acquired in another state provided that such right is in accordance with its laws.

**[20]** The marriage status and its corresponding rights and obligations represent some of the private realities which if acquired abroad, would oblige the other states to relatively recognize and give effect to.

**[21]** In the present case, the court is obliged to recognize the fact that the South African concluded civil marriage between the parties is a valid marriage. This marriage made the parties to graduate from the status of a bachelor and a spinster respectively and became husband and wife. The status assigned them responsibilities over their children if they would in future be blessed with them.

**[22]** An old case of **Braindail v Braindail 1946 (1) All ER** would **relatively** in the absence of a precise precedence bearing similar facts illustrates a situation where, a court in England recognized a marriage which the man had entered into in India. Lord Greene M R had in this case recognized the fact that the man had back in India concluded a Hindu law marriage with another woman. The Judge then in recognition of that fact held that the man was not eligible to enter into a valid civil marriage since he was not a bachelor any more.

**[23]** The stated private international position and the cases referred to in this judgment lead the court to a conclusion that



the civil marriage which the parties entered into in Lesotho is *null and void ab initio*. The obvious reason is that the parties have concluded it after they had previously entered into a similar marriage at Ladybrand in the Republic of South Africa while the latter is still in existence.

**[24]** The end result is that the applicant and the 1<sup>st</sup> respondent remain married to each other by virtue of the valid and the existing civil marriage contract which they had concluded before a marriage officer in Ladybrand in the Republic of South Africa on the 2<sup>nd</sup> September 2009. For over-emphasis sake and for the avoidance of any reasonable doubt, this court recognizes the validity and the existence of that marriage. Thus, this court has a jurisdiction to preside over any future issues relating to it especially when the parties are the citizens of Lesotho, are domiciled here and have their properties within the jurisdiction.

**[25]** The 1<sup>st</sup> respondent's concern that the civil marriage entered into in the Republic would not facilitate for the protection of the best interest of the child is foundationless. The High Court shall ever remain the upper guardian of the best interest of the children within its jurisdiction irrespective of the country where their parent's marriages were concluded or their respective backgrounds. This applies even to the children who are born outside the marriage. The authority of the court to so intervene was demonstrated in **Adam v Adam CIV/APN/327/1997**.

[26] The Children's upper guardian status which common law has assigned to the High Court has been reinforced by **sec 4 of the Children Protection and Welfare Act No.7 of 2011**. It *inter alia* provides that this court shall in all cases involving children take into full account the best interests of the child. The enactment subsequently provides for machinery which the court could use for the purpose of obtaining a holistic picture about a child so that it would, ultimately, make a decision which would be in harmony with the contemplated ideal.

[27] In the premises, the application is granted in terms of prayer 1 and there is no order on costs.

[28] The court has appreciated the counsel commitment to have the case heard expeditiously and timeously concluded. They for the sake of that dedicatedly recorded the judgment as it was being dictated.

**E.F.M. MAKARA  
ACTING JUDGE**

For the Applicant : Adv. N.S. Molapo

For the 1<sup>st</sup> Respondent : Adv. M.R. Chonela