

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/408/2008

In the matter between:-

KHOTSO MPASA

PLAINTIFF

AND

‘MATLEO RANOKA

1ST DEFENDANT

‘MAPUSELETSO MASAKALE

2ND DEFENDANT

REV. ERNEST MOLEFI MASIA

3RD DEFENDANT

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : 1st June, 2012
Date of Judgment : 14th February, 2013

Summary

Civil Procedure – Husband and wife – customary and civil law marriages – Civil law marriage contracted or entered into after death of first defendant’s customary law husband – Legality of such civil law marriage – None disclosure of a pre-existing customary law marriage entered into by one of the parties to it – Annulment of same at the instance of plaintiff.

ANNOTATIONS

CITED CASES: NONE

STATUTES: - **Laws of Lerotholi**

BOOKS: - **Family Law and Litigation in Basotho Society – by W.C. Maqutu**

- [1] The facts of this case have already been outlined in the judgment of this Court dated the 18th May 2011. Same are incorporated herein.
- [2] Suffice it to mention that what now follows are reasons for the granting of an application for annulment of the parties marriage. It should however be indicated that the third defendant has since passes on. Also of equal importance is the fact that Adv. Ts'enoli who had all along represented the defendants has since withdrawn as an attorney of record on behalf of the defendants.
- [3] Subsequently, the first respondent who has always been showing a keen interest in this case, and who has always been attending court was given time to brief another lawyer of her choice to represent her so that she can defend herself. This was on the 20th March 2012.
- [4] She failed to do so until on the 1st June 2012 when, having heard her as well as counsel for the plaintiff on the issue pertaining to a further postponement of the case at her instance was argued. Refer to court minute of that date and to the statement of plaintiff filed of record.
- [5] In a nutshell, among others, the first defendant has not been keen to brief another lawyer as advised by this court. She only made a half-hearted attempt to brief counsel from the Legal Aid.
- [6] Notably and in total disregard of the ruling of this Court to the effect that Church rules or orders cannot override the formal provisions of the law governing marriages, the first defendant insisted that she would not take any further steps and heed the court's directive for her to seek services of another lawyer because she and the plaintiff are answerable only to the

church elders of the International Holiness Church based in Silo in Johannesburg.

- [7] She was aware that the plaintiff was not prepared to go and meet the said Church elders following the judgment of this Court and that the plaintiff was adamant to have this case finalized by and before a Court of law.
- [8] In other words, the first defendant has done all in her power to frustrate the completion of the proceedings in this trial on the grounds that her marriage to the defendant is governed by the constitution or rules of that said church to which she and plaintiff are members.
- [9] Subsequently, this Court had no alternative but to proceed with the case to finality thereby annulling the marriage between the plaintiff and the first defendant because the first defendant elected not to abide by this Court's orders.
- [10] What now follows are reasons for this Court's decision to annul that marriage.
- [11] First and foremost, it is a matter of common cause that the first defendant as well as the second and third defendants did not ever disclose to the plaintiff that the first defendant had previously been married under customary law and that her first husband had since died. The first defendant, for all intents and purposes erroneously considered herself an unmarried lady or a spinster. This fact was discovered by the plaintiff sometime after their marriage. This issue has been canvassed extensively in the application for absolution from the instance. The court's ruling and reasons for same therein are equally incorporated in this judgment.

- [12] The issues pertaining to the status of married women in the family and under customary law have been discussed by a number of authoritative authors on this subject. One such writer is W.C.M. Maqutu in his book **Contemporary Family Law of Lesotho page 57** where reference has been made to the case of **Mothebesoane v. Mothebesoane 1978 LLR at page 384**, and other cases therein cited.
- [13] In a nutshell, a married woman, once married, she is married into the family and as such according to the Basotho custom, death does not dissolve a Basotho customary marriage. Of course in modern times, things are somewhat different, but as a rule of thumb, the position of a widowed Mosotho woman under custom is as discussed in the above book.
- [14] This explains why the father-in-law of the first defendant had indicated his intention to sue the plaintiff as well as the second defendant for damages after he had learned of the marriage between plaintiff and first defendant and payment of bohali money to the second defendant – who is the first defendant’s mother.
- [15] With this in mind, it follows therefore that the least the first defendant could have done was to disclose the fact of his previous marriage to the plaintiff and to the marriage officer before whom their marriage was solemnized.
- [16] Whether the first defendant withheld this fact from the plaintiff and the marriage officer deliberately or intentionally is not an issue. Fact of the matter is that, having been married before, she could not describe herself

as a spinster as she has done before the marriage officer. Refer to annexure “A” – page 12 of the paginated record. Any Mosotho woman or person in the position of the first and the other two defendants does not have to be knowledgeable in law to know that in Sesotho, a woman who has previously been married and whose husband as predeceased her is called or referred to as a widow (mohlolohali).

[17] The fact that the first defendant denies that she deliberately lied to plaintiff and the marriage officer when she said that she had not been previously married is inconsequential because ignorance of the law is no excuse. In any case, even her own mother; the second defendant assisted her to withhold this crucial fact to the plaintiff, so also did the third defendant thereby sealing the fate of the first defendant.

[18] Reliance by counsel on behalf of the first defendant, on the provisions of section 34 (1) of the laws of Lerotholi would hold water if and only if the bohali cattle which was paid by the Ranoka family when first defendant was married to Ranoka’s son, Ts’itso had been returned to that family. This has never been the case in the instant case. The first defendant still considered herself a daughter in law of the Ranoka’s. This probably explains why the first defendant has still retained the name(s) of her late husband’s family name. These unchallenged evidence that she remained in that Ranoka family at all material times and that when she moved to Morija where she was trading as a dress maker, she had sort permission to do so from her parents in law.

[19] It is not the first defendant’s case, as she has not so pleaded, that the Ranoka family had released her to remarry.

- [20] The argument advanced on behalf of the first defendant to the effect that to argue and or to allow the first defendant to remain married to the deceased husband is, to bring back the notion of a lebota marriage, is with respect, misplaced, for reasons that, firstly, such a marriage to a lebota has been expressly forbidden by law – vide section 34 (3) of the laws of Lerotholi. Secondly, such an argument misses the point that, having been married to the son of a particular family, who then predeceased his wife, a woman is from the very inception of such a marriage under Basotho customary marriage, considered married not only to her own husband, but into the husband’s family. The notion of a lebota has absolutely no place in this case whether or not it has been abolished.
- [21] The question of first defendant having been married to a lebota is and has never been an issue in the instant case. The real issue about which the plaintiff is complaining is that the defendants have withheld from him such a vital information about the previous marriage of first defendant to her late husband, Ts’itso Ranoka; and nothing else.
- [22] In the premises an argument advanced on behalf of the first defendant that she was emancipated after the death of her husband and was therefore free to remarry is, with respect, misplaced.
- [23] This Court has not been called upon to deliberate and or make any determination on the notion of emancipation of a widow whose husband has passed on after the parties had formally married under Sesotho custom. This Court therefore declines to be drawn into such a topic. The withholding and or none disclosure of the previous marriage of first defendant to someone is the crux of the plaintiff’s case.

[24] It is for the foregoing reasons that this Court granted the plaintiff's prayers as appear in the summons filed before this Court on the 23rd September 2008.

[25] I make no order as to costs.

M. Mahase

Judge

For Plaintiff: Adv. M.V. Khesuoe

For first Defendant: In person

For Second and third Defendant: No appearance.