CIV/APN/86/2013

IN THE HIGH COURT OF LESOTHO

In the matter between:

ZAINAB MOOSA	**1st Applicant**
MOOSA CASH & CARRY (PTY) LTD	**2nd Applicant**
BUILDING WORLD (PTY) LTD	**3rd Applicant**
OSM MOOSA TRUST	**4th Applicant**

And

LESOTHO REVENUE AUTHORITY	**Respondent**

JUDGMENT

Coram: **Hon. Hlajoane J**

Date of Hearing: **19th August, 2013.**

Date of Judgment: **13th September, 2013.**

Summary

Property having been attached and inventoried following a distress order by LRA – The Court to determine if Islamic marriage is by

Community of Property or Ante Nuptial – No proof that marriage is by Ante Nuptial contract – The Court deciding that a Bill can never be considered as law. Application dismissed with costs on Attorney and client scale.

Annotations

Statutes

1. **Income Tax Act No.9 of 1993**
2. **Legal Capacity of Married Persons Act No. 60 of 2006**

Books

Cases

1. **Schlesinger v Commissioner for Inland Revenue 1964 (3) S.A 389**
2. **Lesotho National Olympic Committee v Morolong (2000 – 2004) LAC 450**

[1] The Lesotho Revenue Authority (LRA) had on the 26th February, 2013 issued a distress order against **Selkol 1983 (Pty) Ltd and Osman Sally Mahommed Moosa** referred to in the papers field of record as OSM Moosa. The distress order was issued in accordance with **section 147 of the Income Tax Act**[1]**.**

[1] Income Tax Act No.9 of 1993

[2] It is common cause that OSM Moosa is the husband to the first Applicant. The distress order was issued because OSM Moosa owed LRA huge sums of money for tax running into millions of maluti. As a result some property from the parties' matrimonial home was attached and was to be later removed and auctioned to recover the money owed by OSM Moosa for tax.

[3] It has been the Applicants' case that some of the property attached belong to the 2nd, 3rd and 4th Applicants and the Respondent has conceded that for the 2nd, 3rd and 4th Applicants' property to have been attached that was by mistake.

[4] What now remains would be the property that was attached and removed from the residence at Lower Thetsane on the strength of the distress order directed at OSM Moosa and the inventoried property from the same place belonging to OSM Moosa.

[5] The first Applicant has prayed this Court to release the property as shown in 4 above to her because though she and OSM have been legally married but they married by Islamic rites which marriage has been by Ante Nuptial contract.

[6] The Court has thus been asked to determine two issues. First whether the property that has been attached belongs to both husband and wife. Also whether their marriage was out of Community of Property or in Community of Property.

[7] The Respondent has argued that the marriage between first Applicant and OSM Moosa is not based on Ante Nuptial contract according to the consent that was issued for the first Applicant and OSM Moosa, Annexure "TJI" to the answering affidavit. The document at page 67 of the record was issued to husband and wife at the time they both wanted to dispose of their matrimonial property to OSM Moosa Trust. The document has clearly indicated that their marriage is in Community of Property. It bears the Land Administration Authority date stamp of 26th July, 2012.

[8] The first Applicant has in response argued that the Commissioner of Lands or whoever endorsed and/or issued the consent, made his own presumption to have said marriage was in Community of Property without having made any enquiry.

[9] My looking at the consent Annexure "TJI" would seem that it was a document where the two, OSM Moosa and his wife the first Applicant had approached the Lands Office to dispose of their

property to the Trust. It was or rather must have been the couple who supplied the information to the officer who prepared the document.

[10] Instead the couple is now requesting the Court to subpoena the Commissioner of Lands to come and give clarity on the correctness or otherwise of the consent document. Sadly, it is not for this Court to assist either of the parties to build up their cases least the Court be judged as having descended into the arena.

[11] The first Applicant has attached their marriage certificate to his founding papers, Annexure "ZMI" page 13 of the record. The certificate shows that they were married on the 7th July, 1979 in accordance with Islamic law. There is no indication on the marriage certificate that it is out of community.

[12] In an effort of trying to convince the Court that Islamic marriages are by nature out of community, there is a document attached to heads of argument for Applicants styled Muslim Marriages Bill not an Act. The Respondent has been denied the opportunity to challenge that document. The explanatory note clearly shows that comments and inputs were invited. Again in law a Bill can never

be considered as law. No indication as to how and when the Bill is going to be promulgated.

[13] Respondent's counsel submitted that at Common Law each aspect of foreign law is a factual question and any evidence on that aspect must emanate from someone with the necessary expertise, **Schlesinger vs Commissioner for Inland Revenue**[2]**,** first Applicant has provided nothing to show that their marriage was out of Community of Property.

[14] In an effort of trying to convince the Court that the marriage was out of community a document at page 109 of the record with letter Head "Lesotho Islamic Centre" has been attached to the replying papers. It purports to have been written by the Priest at the Centre to confirm that marriage certificate attached is based on Islamic Rights and is out of Community of Property. A Priest can never be the law maker. The document is even a photocopy and has no date stamp. It can never therefore be considered authentic.

[15] As if that was not enough, page 110 of the record is another attachment to the replying papers. It is a document from what is termed Muslim Judicial Council (SA) Social Development

[2] Schlesinger vs Commissioner for Inland Revenue 1964 (3) S.A. 389

Department. The document has explained the status of Muslim marriage and at the bottom of the document it ends with the words "Hence the Islamic marriage is based on the Ante Nuptial contract without the Accrual system" and it is signed for MJC (SA) Social Development Department, and is dated the 11th March, 2013. There is no law that supports that. Such attachments in the absence of affidavits from people who made them are hearsay and therefore inadmissible.

[16] It has already been shown that Annexure "TJI" clearly stipulated that first Applicant and OSM Moosa are married in Community of Property. Respondent's counsel has referred to **The Legal Capacity of Married Persons Act**[3] which makes it a legal requirement for spouses married in Community of Property to agree on the disposal of the joint estate, hence why OSM Moosa and his wife, the first Applicant had to agree in transferring their leased property to OSM Trust.

[17] As correctly stated by the Respondent's counsel in motion proceedings one must make out his case in the founding affidavit as the Court will be confined to resolving dispute on issues raised therein. The documents trying to explain the type of marriage

[3] The Legal Capacity of Married Persons Act No.60 of 2006

entered into between OSM Moosa and the first Applicant were only attached to the heads of arguments, but unfortunately Applicants must stand or fall by facts contained in the founding affidavit not in the heads, **Lesotho National Olympic Committee v Morolong[4].**

[18] The first Applicant has filed a confirmatory affidavit to say the household property in their matrimonial home belongs to her alone. She has however failed to explain to this Court as to how she managed to accumulate such property without telling us of her means of livelihood. The attachment "ZM10" page 53 of the record is hearsay in the absence of an affidavit from the maker.

[19] On the point of the rule having lapsed on the 6th June 2013, looking at the Court's file it would seem that in fact the return date was the 7th of March, 2013. On that date counsel who was before Court only postponed the matter to the 18th March 2013 without extending the rule. The rule has not been revived and extended till the 19th August, 2013 when the matter was argued before this Court.

[4] Lesotho National Olympic Committee vs Morolong (2000 – 2004) LAC 450 at 457

[20] True enough the rule has lapsed but the Application itself remained with no rule still operating.

[21] In the result therefore the Court finds that the marriage between the first Applicant and OSM Moosa is in Community of Property and not out of community. So that the property they own is in community and not individually owned. The first Applicant has thus failed to make out a case for the relief sought, and the Application is dismissed with costs against the first Applicant on Attorney and client's scale.

[22] The Court has awarded costs on a higher scale because this matter has been dragging since March this years as parties were reportedly negotiating settlement but it would seem that was when first Applicant was only buying time to gather the documents he eventually attached which were not supported by any affidavits. She has not been candid with the Court but ended up asking the Court to build the case for her by calling a witness to clarify to the Court on her behalf.

A. M. HLAJOANE
JUDGE

For Applicants: Mr Hlalele

For Respondent: Mr Mofilikoane