IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/299/2017**

In the matter between:

LIKENGKENG MOKHOSI
('MALIMPHO MAKHETHA) **APPLICANT**

AND

TŠEPISO JOHANNA FRANSSISCA MATSIE	**1st RESPONDENT**
SEABATA STEVEN MAKHETHA	**2nd RESPONDENT**
REGISTRAR GENERAL	**3rd RESPONDENT**
ATTORNEY GENERAL	**4th RESPONDENT**

JUDGMENT

CORAM	**:**	**HON. J. T. M. MOILOA J.**
DATE OF HEARING	**:**	**15 OCTOBER 2018**
DATE OF JUDGMENT	**:**	**22 OCTOBER 2018**

ANNOTATIONS

Legislation

1. **High Court Rules of 1980**
2. **Oaths and Declarations Regulation 1964**
3. **Law of Marriage – 1996 Vol. 1, 336**
4. **Marriage Act of 1974**

Cases

1. **Matime and Others v Mothuthane 1985-89 LAC**
2. **Moremoholo v Moremoholo CIV/APN/135/10)**
3. **Moletsane v Moletsane C of A No. 10 of 2004**

[1] Applicant moved to court seeking the following orders:

1. That the marriage between Seabata Steven Makhetha and Tšepiso Johanna Franssisca Matsie entered into on the 07th January 2017 be declared *null* and *void ab initio.*

2. That there is no community of property between 1st and 2nd Respondent.

3. That the registration of the said marriage be cancelled and expunged from the record of marriages with the 3rd respondent.

4. Costs of suit in the event of opposition

5. Further and or alternative relief

[2] Applicant's case is that on 07 January 2017 First and Second Respondents purported to enter into a civil rites marriage during the subsistence of a valid customary marriage between Applicant and Second Respondent entered into in May 2014. Applicant is supported by her mother Matšoanelo Mokhosi as well as brother to Second Respondent Mara Makhetha, in their sworn affidavits. First and Second Respondents do not deny this vital averment. I therefore take it as an established fact that it is so.

[3] Only 1st Respondent filed an intention to oppose the application. However, instead of subsequently filing her answering affidavit First Respondent

elected to file notice in terms of **Rule 8(10)(c) of the High Court Rules of 1980.** It reads as follows:

> "*8(10) Any person opposing the grant of any order sought in the applicant's notice of motion shall:*
>
> *(a) Within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within live kilometres of the office of the Registrar at which he will accept notice and service of all documents.*
>
> *(b) Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include; and*
>
> *(c) If he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question."*

The Rule provides that any person opposing the grant of any order sought in the Applicant's notice of motion shall, if he intends to raise any question of law without any answering affidavit, deliver notice of his intention to do so. The points of law raised by First Respondent in that notice are that Applicant's papers do not disclose a cause of action or that there are no sufficient averments necessary to sustain a cause of action. First Respondent further says that there is no allegation that the facts deposed to are true, contrary to **Regulation 4(4) of the Oaths and Declarations Regulation 1964.** It reads as follows:

> *"(4)In administering an affirmation, the commissioner of oaths shall cause the deponent to raise his right hand and utter the words "I solely, sincerely and truly affirm and declare that the contents of this affidavit are true."*

Moreover, there is no allegation that at the time First and Second Respondents purported to marry, First Respondent was aware of the marriage between Applicant and Second Respondent.

[4] **Defective Affidavit**

First Respondent contends that the Application is defective on the grounds that there is no allegation that the facts deposed to are true. For this First Respondent relies on the provisions of the **Oaths and Declarations Regulations 1964.** And the truthfulness of their facts will be established on the said affidavit. Deponent missing the use of the word "true" does not necessarily render the affidavit defective. It does not follow that the facts in the affidavit are untrue and I accept the averments therein as true when from the context and other circumstances of the case the facts are in fact true. To do otherwise would be taking "form" too far removed from reality. They have not been challenged.

[5] First Respondent also relies among others on the decision in **Matime and Others v Moruthane 1985-89 LAC 198 at 199.** In that matter **Schultz P** was faced with the difficulty that the deponents did not say that they had personal knowledge (my underlining) of the facts deposed to. In *casu* First Respondent is complaining about it not being alleged that the facts are true and the two are distinguishable. Applicant does allege that she is deposing to facts within her personal knowledge. I am not prepared to declare the founding affidavit as defective.

[6] **No cause of action and/or necessary averments prior knowledge.**

First Respondent does not deny that at the time she purported to marry Second Respondent nor that the latter was already married and therefore incompetent to marry. Instead First Respondent's point is that Applicant does not challenge in the papers that First Respondent was aware of the

pre-existing customary marriage between the Applicant and Second Respondent. First Respondent having not challenged it, it remains an undisputed fact that Second Respondent was legally married to Applicant by 07 January 2017. Applicant has established a *prima facie* case. A *prima facie* case which First Respondent chose not to react and which in turn must be taken to be admitted by her.

[7] **Competency to marry**

Sinclair in his work. "The **Law of Marriage": 1996 Vol.1, 336** writes that a married person is incapable of contracting another civil marriage until his or her subsisting marriage has been dissolved. Our own **Marriage Act of 1974** echoes similar sentiments. **Section 29(1) of the Act** is clear that "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". In fact a subsisting customary marriage is an impediment to a subsequent civil marriage, except between the same parties. A customary law marriage may be lawfully followed by another customary law marriage. This is so because customary law by its nature does recognise multiple other customary law. But such is unknown under the received law. Under the received law regime no marriage under **Marriage Act 1974** is capable of being contracted if there is an existing valid marriage in existing between one of the parties and another person. (**Moremoholo v Moremoholo CIV/APN/135/10).** That is the position of the law.

[9] First Respondent does not allege *bona fides* on her part. Yet is she wished She considers it the duty of Applicant to have alleged in in her founding Affidavit. I do not see what precludes First Respondent from issuably

reacting and alleging her *bona fides.* In fact the burden of proof lies on First Respondent to allege her *bona fides*. Applicant has established factually the customary marriage between her and First Respondent. In **Moletsane v Moletsane C of A (CIV) No. 10 of 2004** the Court of Appeal was faced with the question of a party's *bona fides* at the time of entering into marriage with the deceased. In that case the Appellant had been found to have been mala fide. In *casu* it was for First Respondent to answer substantively and plead and aver that she was not aware that she was marrying a married man. In the circumstances the following orders are made:

1. The marriage between Seabata Steven Makhetha and Tšepiso Johanna Franssisca Matsie entered into on the 07th January, 2017 is declared to be null and void *ab initio.*

2. Prayer 2 falls off in the absence of a valid marriage.

3. Prayer 3 is declined. The court has not been furnished with such a registration.

4. There is no order as to costs

J. T. M. MOILOA
JUDGE

FOR APPLICANT: **ADV. L. D. MOLAPO**

FOR RESPONDENTS: **MR. NTESO**