

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/T/76/18**

In the matter between

**MOTINYELO MABALEKA**

**PLAINTIFF**

**And**

**MATHABO LENAKE (a.k.a MATHABO MABALEKA)**

**DEFENDANT**

**JUDGEMENT**

**Coram:** Banyane AJ

**Date of Hearing:** 16/03/2020

**Date of Judgement:** 08/06/2020

**Summary**

*Marriage-impediments of - a married person is incapable of contracting another marriage during the subsistence of the other marriage - both parties purportedly entered into a civil rights marriage while both were still legally married to other persons though estranged - order declaring marriage null and void ab initio - since a void marriage gives rise to no legal consequence of a marriage, each party retains property acquired by them.*

## **Annotations**

### **Cited Cases**

Makata v Makata 1980-84 LAC 198

Ex parte Oxton 1948(1) SA 1011 at 1014

### **Statutes**

The Marriage Act of 1974

High Court Rules 1980

## **Introduction**

**[1]** In this action the plaintiff is seeking annulment of his marriage by civil rites in community of property to the defendant, which took place at the Maseru District Administrator's office on the 09<sup>th</sup> November 2006. The annulment is sought on the ground that at the time of solemnization of their marriage both of them were legally married to their estranged partners and their respective marriages still subsisted and thus the impugned civil marriage is void. No children were born of this marriage.

**[2]** The defendant entered an appearance to defend and filed a plea. In her plea she claims that she had no knowledge of the plaintiff's prior marriage at the time they entered into the civil marriage; and that she married the defendant because her husband had already passed on.

**[3]** On the date appointed for hearing of the matter, the defendant nor her legal representative appeared before Court despite notice of set down dated the 13<sup>th</sup> January 2020, served on the defendant's legal representative on the 14<sup>th</sup> January 2020. The matter then proceeded in terms of Rule 41(1) of the High Court Rules.

### **Plaintiff's evidence**

**[4]** The plaintiff testified that when he married the defendant in 2006, his customary law marriage to his first wife 'Matsepang Mabaleka, and the defendant's to Jampaka Lenake were still subsisting.

**[5]** He testified further that in the year 2001, that is, prior to the solemnization of their marriage, he acquired a piece of land (now identified as plot number 13312-893) with a one roomed structure on it. He acquired it through an agreement of sale with one Mamatlakala Qhoai, the wife to one of his colleagues at the Mine in Rustenburg where he worked. He solely paid the purchase price of M 12 000. This plot was later registered in the names of both parties during issuance of leases under the systematic regularisation project undertaken by the Land Administration Authority (LAA) in 2013 because he was told that both their names as married partners should be recorded in the lease document.

**[6]** He testified that from 2001 until 2006 when he moved in, the house was rented out. He built an additional room to the existing structure in 2006. After construction of the additional room, an intimate relationship with the defendant commenced and they subsequently married. He told the Court that the defendant was not gainfully employed so she became entirely dependent on him together with her children from her marriage with Jampeke, throughout the period of their cohabitation.

**[7]** He told the Court further that he earned a good salary because he held a position of team leader in the mine that he worked for. He further developed the plot by building four rooms for rental, and built four additional rooms to extend the main house with the money he received as terminal benefits.

**[8]** He testified further that the defendant made no financial contribution whatsoever throughout the various stages of construction. Further that his

children with Mats'epang and the defendant's children lived with them on the plot. However, the constant fights between them over this property worsened so much that they even had to seek police intervention. This situation forced him to leave with his children and find alternative accommodation, leaving behind the defendant and her children on the plot. This left five years ago.

## **Issues**

**[9]** The issues that arise for determination are therefore;

- a) Whether each one of the parties were still legally married to their estranged partners at the time they purported to enter into impugned civil marriage
- b) Whether the developed piece of land registered in the names of both parties was acquired solely by the plaintiff.

## **The Law**

**[10]** One of the impediments of marriage is that; a married person is prohibited or incapable of contracting another marriage until his subsisting marriage has been dissolved. Section 29(1) of the *Marriage Act of 1974* in this regards provides;

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

**[11]** In ***Makata v Makata 1980-84 LAC 198*** the Court of Appeal decided that the plain meaning and effect of section 29 is that, a person married by Customary Law cannot marry under the Act during the subsistence of the earlier marriage/s. To put it another way, the fact that one of the parties to a marriage was already lawfully married to someone else at the date of the impugned marriage is a ground that renders a marriage null and void

ab initio liable for a decree of nullity. This means the marriage never subsisted at all.

**[12]** As regards the incidents of marriage, a void marriage, being a nullity from the beginning, gives rise to no legal consequences of a marriage. In other words, incidents of marriage do not attach to such a marriage. ***ex parte Oxtan 1948(1) SA 1011 at 1014***

### **Application of the Law to the facts**

**[13]** Both parties seem to have been ignorant of the fact that because both were still lawfully married to other persons at the time they purported to enter into a civil marriage, they could not validly contract this marriage in respect of which the plaintiff seeks a decree of annulment. Although the defendant initially contested the nullity of the marriage in her plea, in the pre-trial conference minutes, it appears that she no longer insisted on her objection to the granting of an order declaring the marriage null and void.

**[14]** As regards the property, in particular, plot number 13312-893, and the contribution each party made in the purchase and development of same; the defendant's claim as contained in her plea is that she bought the site and developed it using compensation in the form of death benefits of her late husband. The plaintiff testified that he acquired the plot prior to her marriage to the defendant.

**[15]** Indeed as reflected in the marriage certificate, the plaintiff was already working in the mines at the time the parties purportedly entered into the marriage, and the defendant unemployed as reflected.

**[16]** In the absence of evidence to gainsay the plaintiff's evidence to the effect that he singlehandedly acquired this plot and developed it and that the defendant, being unemployed made no financial contribution in its

acquisition and development, I am convinced that the plaintiff had sufficient income to purchase the plot and develop it. By reason that their purported marriage was nullity and no legal consequences accrue from their union, the defendant has no valid claim to this property.

### **Order**

**[17]** In the result, the following order is made;

- a) The purported civil rites marriage entered into by plaintiff and defendant in November 2006 is declared null and void ab initio and of no legal force and effect.
- b) Each party shall retain whatsoever property they acquired before and during the purported marriage; in particular, the developed piece of land identified as plot number 13312-893, situated at Joele, Maseru urban area remains the property of the plaintiff together with all developments on it.
- c) No order of costs

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**P.BANYANE  
ACTING JUDGE**

For Plaintiff: Advocate Phafane K.C

For Defendant: No appearance