

IN THE LESOTHO COURT OF APPEAL

In the Appeal of:

JENNIFER MEGAN BINNS

Appellant

v

ROGER BINNS

Respondent

HELD AT MASERU

CORAM:

MAISELS, P.

DENDY YOUNG, A.J.A.

SCHUTZ, A.J.A.

J U D G M E N T

DENDY YOUNG, A.J.A.

1. The Pleadings

By her amended declaration appellant ('the wife') claimed against the respondent ('husband') inter alia a decree of divorce on the ground of the husband's adultery alternatively an order for restitution of conjugal rights failing which a decree of divorce on the ground of the husband's desertion. There was also a prayer for an order condoning the wife's own adultery.

The husband was in default but was present in court whilst the wife was giving evidence. He did not attempt to intervene nor was he called as a witness by the wife.

The action/....

The action failed on three grounds

1. That it was not proved that the husband was domiciled within the jurisdiction of the court;
2. That the husband's alleged adultery had not been established;
3. That in the circumstances of the case the wife was not entitled to a restitution order;

The appeal is against those findings by the learned Judge a quo.

2. The Evidence

In a skeleton form the evidence is as follows:

The wife is a housewife living in Maseru, the husband is currently the director of the Outward Bound Association, Thaba Phatsoa in the district of Leribe in the Kingdom of Lesotho. Husband and wife are British subjects. They were married to each other in 1970 in England and there is one child of the marriage. In May 1971 the husband took employment with the Outward Bound Association in Kenya where he and the wife lived in a very isolated area. The marriage was not happy and in December 1972 the wife returned to her parents in England. In September 1973 the husband also returned to England and cohabitation was resumed there. In November 1975 the husband took up his present employment in Lesotho. The wife accompanied him. Soon the marriage was in difficulties again. Communication between husband and wife deteriorated. The husband did not talk to the wife and no longer wanted marital association with her. The husband spent very little time at home and was not interested in family life. By March 1979 the husband ceased communicating/....

communicating with the wife altogether. In April the husband withheld conjugal rights from the wife. On the 30th of May the wife went to Maseru to consult a priest in an effort to save the marriage. She returned home at about 10.30 p.m. She found the husband locked in a room with someone who escaped through the window. During the following few days the husband admitted an adulterous association with the female domestic servant. On June 13th the wife withdrew from cohabitation and left the matrimonial home. She returned to England. She came back to Lesotho on the 27th of August and took up residence with one Michael Taylor in Maseru and she has since been living with him as his wife. The wife and Taylor intend to marry as soon as the wife is free to do so. Taylor also provides a happy home for the child. According to the wife this relationship with Taylor had nothing to do with the breakdown of the marriage.

In her declaration as originally framed the wife put her case solely on constructive desertion and there was no allegation of adultery on the part of the husband. Nor did the wife disclose in her pleading that she had been living in adultery with Taylor. On the 27th of September 1979 the case was set down for trial on the 8th October 1979 on the undefended list. It seems that certain information came to the attention of the trial Judge. He informed the wife's attorney of the matter. By notice dated the 7th October 1979 a notice of amendment to the declaration was filed so as to

include an/.....

include an allegation of adultery on the part of the husband. That became the main ground for divorce. The amendment also prayed for the inclusion of an averment of adultery on the part of the wife and a prayer for condonation.

3. Domicile

The evidence of the wife on the issue of domicile was as follows:

Q: "Mrs Binns is your husband domiciled in Lesotho?"

A: He is My Lord.

Q: Could you perhaps develop that slightly. Could you tell this honourable Court how long in fact he has been working permanently here. Living here and what his intentions are about staying for a further period in future?

A. He has already signed two contracts to work at the Outward Bound Centre, he intends to renew his contract when this one expires and next year he hopes to apply for citizenship to enable him to stay for the rest of his life".

In his reasons for judgment the learned trial Judge says -

"At the trial, the only direct evidence that the defendant had abandoned his domicile of origin and acquired a domicile of choice in Lesotho was given by the plaintiff herself. My note of what she said on this important issue reads as follows:

'We came to Lesotho in November 1975 as my husband had taken a job with the Outward Bound Association at Leribe. He has signed contracts and he intends to renew when his present contract expires. Next year he intends to apply for citizenship to enable him to reside in Lesotho for the rest of his life'.

I have no/....

I have no information as to the birth place and domicile of origin of the defendant. When the plaintiff gave birth to the child of the marriage at Johannesburg on the 23rd November 1976, the defendant registered the birth and gave his own country of origin as Britain. The political entity known as Great Britain includes a number of possible domiciles.

It later emerged in the course of the plaintiff's evidence that Lesotho is not the first overseas country in which she and her husband resided since their marriage. They lived in Kenya for some time where the husband worked at another Outward Bound Institution.

I may say at this point that it is not part of the function of a Judge to guide or assist litigants "in the presentation of their evidence, particularly when they are represented. The defendant was present in Court throughout the whole of the proceedings and was available, if called as a witness by the plaintiff, to support her contention that he had acquired a domicile of choice in this country. As he did not testify it might be assumed that he was not in a position to state under oath that he had in fact formed a settled intention to remain in this country".

Later in his reasons for judgement the learned Judge says -

"The plaintiff in this case said that she wants to be able to marry another man as soon as possible. She has therefore a powerful motive to protest that her husband has acquired a domicile of choice in this country, which if established, would confer jurisdiction upon this Court to grant her the relief which she greatly desires. As an interested party upon whom an onus rests to establish her husband's domicile the evidence of the plaintiff has to be carefully scrutinised. (See Williamson J.A. in Eilon v. Eilon supra at 714). Such a scrutiny involves a comparison of the alleged intention of the defendant with his actions past and present, his present circumstances and prospects, his ties both personal and financial with his domicile of origin and with Lesotho and all other matters which may indicate the defendant's intentions."

and after reciting a passage from Dicey's Conflict of Laws 8th Ed. page 96 he continued -

"In the instant case I have not been presented with independent evidence which supports the intentions of the defendant or from which any inferences can be drawn which would enable this Court to conclude that the plaintiff has discharged

the onus upon/....

the onus upon her of proving that her husband is domiciled in this country. That being the case I had no alternative but to dismiss the action on the basis that the Court has no jurisdiction to entertain it"

A person is domiciled in that country in which for legal purposes he is presumed to be present at all times. A person with full juristic capacity can freely choose where he wants to be domiciled but to give effect to that choice he must have actually taken up residence in the country chosen and (what is in issue here) must have formed the fixed intention of residing there permanently; that is, of abandoning an existing domicile and acquiring a new one; Eilon v. Eilon 1965(1) S.A. 703 (A) at 720 D.

The question here is whether the evidence carries the wife home. The wife being an interested party on a matter of the public status, her evidence had to be closely scrutinised. As was said by Williamson, J.A. in Eilon's case at page 714 G -

"As an interested party upon whom an onus rested to establish the respondent's domicile, her evidence had to be carefully scrutinised".

The learned Judge a quo has not rejected the wife's evidence nor has he impugned her credibility, so that her evidence can be taken as correct so far as it went.

A party's ipse dixit does not usually suffice on the issue of domicile. It would still be necessary to show at least that the probabilities supported his claim.

As a matter/.....

As a matter of probability the husband's domicile of origin is the British Isles. However he appears to have little anchorage there. There is no indication that he has any property or expectations there or any close family or any other connection calculated to tie him to his domicile of origin. His employment is apparently orientated away from the British Isles. That is what I assume employment in the Outward Bound Association implies. The husband has apparently permanent employment in Lesotho and I can see no reason why his attitude should not be that -

"this place is my home and I have no present intention of leaving it".

Eilon's case at p. 714B.

It would certainly have been wiser if the matter of domicile had been investigated more fully by the wife's counsel. However, in my view, the probabilities support the wife's evidence. It is true that, in the extract from her evidence recited earlier, there are two criticisms which can be advanced against that evidence: In the first place the matter of domicile was for the court not for the witness; but more important the source of the allegations of the husband's intentions in regard to remaining in Lesotho is not stated. Presumably the wife was giving the effect of statements by the husband to her; but this should have been made clear.

On the whole, however, there appears to be no reason to reject the evidence of domicile. The learned Judge has criticised the wife for not

calling the/....

calling the husband as the witness; but on the whole I think the onus of establishing domicile in Lesotho was discharged.

4. Adultery

In his reasons for judgment the learned Judge said:

"There was a suspicion of collusion which was not dispelled and the evidence adduced in support of the allegation that the defendant had committed adultery was not satisfactory".

Collusion implies that the husband and wife conspired to obtain divorce by means of false evidence or by the suppression of relevant facts. In such circumstances neither may obtain a divorce since this would be tantamount to obtain a divorce by consent. The suspicion of collusion is apparently based on the fact that the wife did not initially put her case on the ground of adultery. She explained in her evidence that she has taken this course because she wanted to protect the husband's reputation in town and it was not necessary to be vindictive.

Even assuming that the decision not to claim on adultery was taken in agreement with the husband it did not, in my view, amount to collusion. The wife could properly put her case on malicious desertion alone. It was for her to decide. Of course, if the evidence of adultery had played a role in her decision to withdraw desertion, the wife would be bound to disclose this fact in her evidence; otherwise she would be withholding the full reason

for the/....

for the break-up of the marriage. Her evidence would then not be the whole truth. But there was nothing to compel her to rely on adultery as a ground of divorce. The wife was not claiming a decree of divorce by false evidence or the suppression of relevant evidence, she was claiming a divorce on the grounds of malicious desertion and this was a matter of election by her. In my view there was no evidence of collusion.

On the issue of adultery the evidence was as follows:

"On the 30th May, 1979 I had an appointment in Maseru with a priest to ask his advice.

H.L. 30th of May, this year? - That is correct. I thought it would help to call to the priest and to discuss my problems with him to try and get some help from him and some advice. And because I'd been having trouble with my car I was late returning home. In fact I didn't reach home until 10.30 in the evening which is much later than I usually do when I've been out. And on reaching the house I found it to be in darkness but for a light in the spare bedroom. I went in search of my husband and I tried to open the door of the spare bedroom, but someone was behind the door holding it closed, and I couldn't open it. I heard scuffling from inside the bedroom and I heard the fly screen being raised.

P.C. Mrs Binns will you speak clearly so that the Judge can write these things down.

I heard scuffling inside the room then I heard the fly screen being raised and the window being opened. And I went, at that point, I went to the kitchen to make some coffee.

Did you try to open the door? - Yes I did but I was unable to. About ten minutes later my husband came to the kitchen in a state of disarray.

H.L. So you are speaking of this year? - Yes.

P.C. Yes? - And he admitted that he had been sleeping with our maid.

He admitted to you that he was sleeping with the maid? - Yes he did.

Where?/....

Where? Inside the spare bedroom.

In your matrimonial home? - Yes.

Did he admit further anything else about the duration of his discretion (sic) to sleep with the maid? - He told me during the next few days when further details came to light. He did tell me that the relationship had lasted since approximately February, or March of 1978.

That is the previous year? - That is the previous year.

Mrs Binns has this relationship by and between your husband and the maid continued after the 30th of May? - Yes. I believe it has.

How do you know that? - My husband admitted that he had still been seeing this young lady when I was in the U.K. with my parents on holiday.

H.L. Pardon. Mrs Binns what did he admit? - He admitted that he still had, on a couple of occasions had intercourse with her.

How did you get to know that? I mean had he admitted it to you in U.K. or?

P.C. My Lord the position is this: I want to disclose on. The Plaintiff she said she had already left the matrimonial home on the 13th of June.

H.L. Well we have not come to that, yet.

P.C. My Lord we have actually not to worry: What the witness says is that after 13th of June. After she had left matrimonial home. She is giving evidence to the effect that she know (sic) that the adultery continued, between her husband the defendant and the maid, She has mentioned that.

H.L. But she did not state in what way she knew. What is the source of this information? I am asking. I didn't get an answer.

P.C. Could you tell his Lordship: How did you come to know that your husband had been sleeping with the maid after 13th of June. Did he admit it to you or did you find out from another source or how did you come to know of his adultery? - He admitted it to me.

Mrs Binns between the 30th of May and the 13th June: Became aware that your husband had been having an affair with the maid after the 13th of June. Did you discover at your matrimonial home any other signs of the adulterous relationship between your husband and this person. Did you see in anything that was disturbed, in the bedroom, on the floor something like that? - There were clothes in the spare bedroom which didn't belong to me.

Were they women's clothes? - Yes they were.

What else/....

What else? What else did you find in the house indicating that there had been such situation?
- The bed in the spare bedroom was disturbed.

In what way was it disturbed Mrs Binns? - As though someone had been sleeping in it".

In Gates v. Gates, 1939 A.D. 150 at 155 Watermeyer J.A. said:

"It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the "clearest" evidence or "clear and satisfactory" evidence or "clear and convincing" evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirements is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal".

On that approach I am satisfied that the allegation of adultery was proved. The evidence given by the wife was circumstantial and it is difficult to see what additional evidence was available to her.

5. Condonation of the wife's adultery

In South Africa Rule 18(8) of the Uniform Rules of the Supreme Court requires that where a party suing for divorce has been guilty of adultery he must give particulars in his summons and pray for condonation. In Lesotho (so I am informed by counsel) there is no comparable rule and as presently advised I cannot see that the allegation is essential. Provided the full facts are presented to the Court at the trial I cannot see the need for advanced publicity of the facts of the plaintiff's own adultery. In the absence of the Rule of court the Roman-Dutch Law is as stated by Hoexter J.A. in Daniels v. Daniels 1958(1) S.A. 513 (AD) at 532 A-C:

"Our common law/....

"Our common law is not static, and over the last hundred years this practice of requiring disclosure on the part of a plaintiff developed as the result of regarding the granting or refusal of a divorce as matters which take into account not only the rights, inter se, of the spouse, but also questions of public policy. The rights of the spouse, inter se, must be determined in accordance with the pleadings, and it is clear that in the Roman-Dutch law as well as in our modern law, compensation has to be pleaded. (See Voet, 16.2.2, van der Keessel, Dictata ad G. 3.40.7, and Mohamed v. Nagdee, 1952(1) S.A. 410 (A.D.) at p.416). In undefended cases, therefore, if the plaintiff has pleaded and proved either adultery or malicious desertion on the part of the defendant, the fact that he has disclosed adultery on his own part is not treated as a defence by the defendant, who is in default, but as a matter relevant to the question whether the plaintiff himself may not have caused the break-up of the marriage and whether it would be in the public interest to grant or to refuse a divorce".

However it seems unnecessary to come to a final decision on this point. For assuming condonation is required, I would have hesitation in granting it for the following reasons:

- (i) The marriage had broken down irretrievably and both husband and wife desire that it be terminated;
- (ii) The break-up of the marriage was not due to the wife's adultery;
- (iii) The husband himself was apparently still carrying on an adulterous association with the maid;
- (iv) The wife had not been promiscuous but had lived with a man who was contributing to her support and that of the child and whom she intends to marry as soon as possible.

The wife's claims to custody and for maintenance of the child were not contested by the husband and the evidence supports the relief claimed.

6. The appeal should be allowed and an order issued on the following terms:

- (i) An Order/....

- (i) An Order condoning plaintiff's adultery with one Michael Taylor;
- (ii) A decree of divorce;
- (iii) Custody of the minor child born of the marriage, Sian Elizabeth Megan Binns to the plaintiff;
- (iv) Maintenance for the said minor child of the marriage in the sum of R25.00 per month until she becomes self-supporting or marries.

There is no prayer for the costs of the appeal and no order is made.

Signed J.R. DENDY YOUNG
Acting Judge of Appeal

I agree Signed I.A. MAISELS
President

I agree Signed W.P. SCHUTZ
Acting Judge of Appeal

Delivered on the 10th day of January 1980 at MASERU.

For Appellant: Mr Harley
For Respondent: In person