CIV/APN/240/82

IN THE HIGH COURT OF LESOTHO

In the Application of :

LESIAMO MAPETLA Applicant

V

JOSEPHINE MAMOSA MAPETLA Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 13th day of December, 1982

The applicant launched an urgent application to this Court. It was heard, in chambers, by Rooney, J. It was for :

"1. An order that a Rule Nisi be issued calling upon Respondent to show cause why;

(a) Applicant shall not be awarded custody of the minor children Mosa and Mpoko pendente lite pending the final determination of CIV/T/367/82.

(b) Respondent shall not be restrained pendente lite from interfering with applicant's custody of the said children subject to reasonable access.

(c) Applicant shall not be awarded costs of this application in the event of Respondent opposing this application

2. That prayers 1(a) and (b) should operate with immediate effect as an interdict pending the finalisation of this application."

The learned judge granted an interim order as follows :

"It is ordered :

/That a

That a Rule Nisi be issued returnable on 18th October, 1982 calling upon Respondent to show cause why :

(a) Applicant shall not be awarded custody of the minor children Mosa and Mpoko pendente lite pending the final determination of CIV/T/367/82.

(b) Respondent shall not be restrained pendente lite from interfering with applicant's custody of the said children, dubject to reasonable access.

(c) Applicant shall not be awarded costs of this application in the event of Respondent opposing this application."

What the learned judge did not grant, and in my view, deliberately deleted, was the introduction of the customary concept into the situation which did not warrant it. In any event, there was no basis for it whatsoever in the founding affidavit.

In support of the application the applicant merely informed the court that he resided at Masianokeng; that the Respondent resided at Lerotholi Technical Institute. It was merely stated that the parties were married in January 1973 but under what system it is not stated. It is stated that there are two boys, Mosa and Mpoko horn of the marriage and that they were born on the 12th January 1975 and 4th August 1981, respecively

Applicant says he has instructed his attorneys to institute divorce proceedings against Respondent for the reasons stated in the attached declaration marked annexure "A". But annexure "A" in the papers before me is a coloured photograph of a person. Who that person is, it is not revealed nor am I informed as to where photograph was found or its history. He further alleges that he was forced out of the marital home at Lerotholi Technical Institute after Respondent threw boiling water over his head thus causing extensive burns He does not say when this took

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place. He left the Respondent in that home, together with the children. He alleges that she is incapable of looking after the said two children as she takes alcohol exessively and is a habitual drankard and leaves the home for weeks. On two successive days in September this year he went to the marital home at the Institute. He found neither the children nor the Respondent. He had brought them food and he left it in the house. He is therefore worried about the children and "consequently" he asks for their custody pendente lite.

The Respondent opposes the order and replies to the allegations made by the applicant against her simply as follows :

The applicant was in "no way forced to run away for his life" but left the "common home, as an alternative to Respondent's suggestions and pleadings that the parties better discuss their differences and iron out whatever were their respective grieviances." She says applicant does not come to the common home and "there has never been any danger to his life."

She says, about the incident of throwing water on his head, that the applicant was assaulting her with a poker as she was about to wash herself and she turned and "threw the water she was to wash herself in at the applicant; the water was not at all boiling. It is true that applicant was scalded as a result."

She states further that although she "does take alcohol drinks," she does not drink excessively neither is she a habitual drankard. On the contrary, she says, "applicant.... drinks excessively and behaves very disgracefully when drunk."

/She

She finally assets that there is no cause for the applicant's alleged worry about the children, as "they are very well looked after" by her. She challenges the applicant that he "cannot produce any truthful evidence to the contrary."

There has been no further reply from the applicant.

The position in applications of this nature, that is, to obtain an interdict pendente lite has been neatly put by Prof. Hahlo in his invaluable book: The South African Law of Husband and Wife (4th Ed. p. 526) as follows· "The applicant need not show that there is a balance of probabilities in his favour; it is sufficient if he establishes a prima facie case. (My underlining). As far as I am aware that is also the position here. No authority or authorities to the contrary were referred to me during a very lengthy and exhaustive argument by applicant's counsel.

The meaning of prima facie evidence, commonly used, is that said by STRATFORD, J.A. in Ex parte Minister of Justice: re R. v. Jacobson and Levy, 1931 A.D. 466 at 478:

> "Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus."

"In this sense," as Hoffman in South African Law of Evidence (2nd Ed) p. 428, observes: "prima facie evidence is capable of being supplemented by inferences drawn from the opposing party's failure to reply." This is how this phrase has been used in this Court for many years. And finally as he says, at page 429 :

/"The principles

> "The principles of prima facie evidence apply to civil and criminal cases alike. But they do not mean that in some cases a party may obtain a verdict without producing the ordinary degree of proof. The requisite standard must always be satisfied, but in considering whether the onus has been discharged, the court is entitled in appropriate cases to take a party's failure to adduce evidence into account. It is therefore impossible to say what will constitute prima facie evidence. The evidence adduced by the party bearing the onus and the inference which can properly be drawn from the silence of the opponent are two variables which must always add up to the answer: proof beyond reasonable doubt, or on a preponderance of probability, as the case may be. The greater the significance which can be attached to failure to give an explanation, the less the evidence which the onus-bearing party will be required to produce. But such evidence must always be sufficient to call for an answer. A party's failure to give an explanation, or the giving of a false explanation, is not an item of evidence in itself and does not justify an inference which could not reasonably be drawn from the other evidence." (My underlining).

The affidavits before me are the only evidence on which to decide this important question of the custody of minor children, who cannot say anything for themselves. The Court is their upper guardian and must look anxiously after their interests. In the cases of this Court, such as Lebelo v Lebelo and Another, 1976 L.L.R. 206 at 209 (shortly to be published) it was held that :

> "In motion proceedings of this nature the affidavits constitute not only the evidence but also the pleadings and therefore must contain all that would be necessary in a trial."

(See also Pule v Pule, CIV/APN/289/82 dated 29th November, 1982). Applicant's affidavit contain an annexure "A" as alleged. This annexure is supposed to be a copy of the declaration informing me why the parties have instituted (or at least one of them) a divorce action. Instead, the annexure "A", to the present papers, is a different document, namely, a colour photograph. If this photograph was intended to be evidence then there must be indentity of the photograph

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as to whose it is, whether is a true likeness of him. At the moment it is just pinned to the founding affidavit and whether it is that of the Respondent's lover or that of the applicant, we are not told. The inclusion of this photograph, in the manner described, is most irregular and thus inadmissible as a piece of evidence.

Reading the founding affidavit of the applicant, it is so brief as to be almost of no assistance to the court. It is, in the main, vague. Seriously speaking, even if the Respondent had not filed an opposing affidavit this Court would not have been persuaded to granting the interim order. The position is now compounded now that the Respondent has filed the replying affidavit such as she has done. If this were a trial and a dismissal of the action had been applied for even before the Respondent led any evidence, I would have granted it without hesitation. (See Masupha v Masupha CIV/T/31/77 dated 26th May 1978 (unreported) at pp. 20-21). The principles in that case are applicable here with slight modification, since the element of "in whose favour of probabilities" should not be applied here.

In this application there is a serious problem The Respondent is vehemently denying the allegations levelled against her by the applicant The position is that there is a conflict of fact which the applicant, ought, as a reasonable man, to have forseen. He should have been a little more detailed and given the court supportive evidence. This is precisely why Respondent is challenging him that he cannot produce "truthful evidence to the contrary." Indeed, applicant has failed to do just that. He has not denied that she threw hot water at him because he was assaulting her with a poker It is a new matter, in my

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humble view, that applicant assaulted the Respondent, and with a poker at that. Be that as it may, there is this impasse. In the face of this conflict, this Court is honestly still expected to deal with the question of custody of the children as requested? If the matter is referred to trial, which in my view would be fair, that has already been prayed for in the main action. So that solution does not help.

In the final analysis of the evidence before Court, the question to be decided is: has the applicant, discharged the onus resting on him in this matter. Looking back at what we understand by the phrase prima facie evidence this Court can confidently say that the applicant has not discharged that onus.

I called for the declaration in the CIV/T/367/82. It is with a deep sense of shock that I have to mention that the applicant has not raised any new matter at all which could have necessitated the making of this application. This demonstrates, once more, the lack of good faith which is so singularly lacking in this application.

The Rule Nisi issued on 21st September 1982 is hereby discharged. The applicant is to pay the costs, if any, incurred by the Respondent

J U D G E.

13th December, 1982.

For the Applicant · Mr. Gwentshe

For the Respondent · Mr. Moorosi