

IN THE HIGH COURT OF LESOTHO

In the matter between .

NTSOAKI PHAKOE                      Plaintiff

v

SALE PHAKOE                      Defendant

J U D G M E N T

Delivered by the Hon Acting Judge Mr Justice  
J. Unterhalter on the 1st day of December 1982

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This is an action in which the Plaintiff claims an order for the restitution of conjugal rights and failing compliance therewith a decree of divorce, division of the joint estate, custody of the minor child, maintenance for the minor child at R100. per month, and costs of suit. Alternatively she claims a decree of divorce on the grounds of the Defendant's adultery, with the same ancillary relief.

It is common cause that the parties were married to each other by civil rites at Maseru District Administrative Office on the 16th January 1980 and that the marriage still subsists; that the parties are domiciled within the jurisdiction of this Court; and that there is one child born of the marriage, a boy on the 13th October 1980.

The Plaintiff's declaration in effect alleges a constructive desertion. There are allegations of assaults by the Defendant upon the Plaintiff, of the Defendant having committed adultery, of the Defendant having acted thus with the intention thereby of terminating the

/marriage,

marriage, and that by reason of these facts the Plaintiff left the common home of the parties. Save for admitting a minor assault upon her in June 1980 the Defendant denies the Plaintiff's allegations.

The Plaintiff in her evidence told of quarrels between the parties and an assault upon her in June 1980, saying that Defendant lashed her over the shoulders with a belt until it broke. She said that this caused marks on her body and she also indicated a black line to the Court, upon her left cheek. She also referred to a second assault upon her by her husband saying that this took place on the 1st September 1980 when he again beat her up at the time when she was eight months pregnant. She says that after this she went to the home of her parents in accordance with the ngala custom. In cross-examination she said that she had also returned to the home of her parents in accordance with that custom after the attack upon her in June 1980.

In her evidence in chief she says that on the 27th July 1981 her husband tried to stab her with a knife.

In regard to the allegation of adultery she said that she used to find her husband together with a woman 'Mamichael Makume and they would laugh at her and humiliate her. She says that this woman had a child and that child has similar features to the child born to the Plaintiff of her marriage with the Defendant. There is no evidence of sexual intercourse between the defendant and Mamichael Makume nor of opportunities for such intercourse and I should say at once that it cannot be held on the evidence adduced in this case that adultery was committed by the Defendant.

The Plaintiff says that the Defendant is not maintaining her nor the child of the marriage

In his evidence the Defendant stated that he wished his wife to return to him. He said that the first quarrel with the Plaintiff arose from her request that she go to the home of her parents to have her first child.

/He was

He was not in favour of this because he did not want his home to be unattended while he was away to work. He suggested that the Plaintiff's mother come to Plaintiff to assist her, but the Plaintiff objected to this. According to him she said that he was dreaming; he regarded this as an insult and as she continued to insult him he lashed her with a belt on her shoulders. She went to work the next day but did not return in the evening. He then sought her out at her work on the following day when she informed him that she had ngalaed and said that their parents should meet to discuss the matter. He said that occurred and that the Plaintiff was reprimanded. She returned to the common home and another incident occurred when they quarrelled about her not having prepared food for him. He says that she held his jacket about his neck and that he pushed her back on to the bed and slept on another bed in the room. His version had not been put to the Plaintiff when she was cross-examined by the Defendant's counsel.

He says that he reported the incident to his parents but a family meeting was not held because his father was ill and his mother was nursing the father. He says further that, accompanied by one Libe Ntlama, he visited the Plaintiff at her work and his companion said to the Plaintiff that if there had been a quarrel she should return to the common home. Again this was not put to the Plaintiff in her cross-examination. He describes a meeting with parents of the Plaintiff which took place in the absence of the Plaintiff and at which meeting the Plaintiff's father said that the Plaintiff would return to the common home of the parties after her maternity leave had been completed. The Plaintiff had said in cross-examination that as this was a matter between herself and her husband and she had not been present she did not know of this and her father had not told her of it. She admitted going to the home of the parents of the Defendant but she said that she did this when she brought the child there to show him to them, and in so doing she was not returning to the Defendant nor was she intending to return to the Defendant.

/The Defendant

The Defendant said that he was not working and gave as reason for this his fear that in his absence his house being unattended would be broken into. He admitted that he was not maintaining the child, and when asked why he did not make payments to the parents if he could not pay money directly to the Plaintiff, he said in effect that the Plaintiff's father had rejected him and therefore he could do nothing in regard to the payment of maintenance. When he worked Defendant earned M400 a month.

He had claimed against his wife in the Ralejoe Local Court in respect of desertion and a certified copy of a judgment together with a certified translation were presented to the Court as Exhibit 'C'. The case was dismissed and it was said that the matter should be discussed by the parents before being brought to the Court. The Defendant was also charged in that Court with using abusive language towards the Plaintiff. He was found guilty and sentenced to pay M30 or to undergo three months imprisonment but this conviction and sentence were set aside on appeal to Matsieng Central Court.

It was submitted by counsel for the Defendant that as the Plaintiff had returned after the assault in June 1980 that incident could not be relied on for establishing an element in the alleged desertion. This is correct but the incident must nevertheless be considered in surveying the total scene. It is clear that there is a most unhappy state of affairs between the parties. And the crisp question is whether by his actions the Defendant intended to terminate the marriage.

In regard to the principles that apply to a case of constructive desertion the following was said in Froneman v. Froneman, 1972(4) S.A. 197 T.P.D. at .198(F):

"The law, as I understand it, is this: No conduct, however reprehensible, will constitute constructive desertion unless the necessary animus is present. The animus may take the form of dolus directus in the sense of a positive intention to put an end to cohabitation; or it may take the form of dolus eventualis in the sense of a knowledge

/by the

by the defendant that the probable or possible effect of his conduct would be a termination of cohabitation, coupled with a wilful disregard of that probability or possibility. The animus may be proved by direct or indirect evidence of the defendant's state of mind; it may, in a proper case, be inferred from the circumstances including the nature of the defendant's unlawful conduct. But, unless the animus is established by inference or otherwise, there can, in my judgment, be no finding of constructive desertion. That statement of the law is, I think, in accordance with what was laid down by the Appellate Division in Belfort v. Belfort, 1961(1) S.A. 257 A.D., and in the earlier authorities which were approved in that case."

I infer that the Defendant behaved as he did with the intention of terminating the marriage. I draw that inference because the defendant must have known that after he assaulted the Plaintiff in June 1980, and she left him, there was a probability that if he assaulted her again she would leave him again. Moreover, he must have known that if he attacked her during the eighth month of her pregnancy this would force her to leave him to protect both herself and the unborn child. I find that he did attack her in September of 1980, the probability being that she would not have left him had he not attacked her. He admits to some kind of physical encounter between the two of them but I attach no weight to it as it was not put to the Plaintiff when she was cross-examined. If one behaves in the way the Plaintiff has described that the Defendant did behave then he was wilfully disregarding the possibility that she would terminate cohabitation with him. This in my view proves the animus as referred to in the case cited above.

A submission was made to the effect that the Plaintiff had in fact returned to the Defendant when she visited the Defendant's parents with the child. I find this an unconvincing submission more especially in the light of the explicit denial by the Plaintiff that she intended to return to the Defendant. The lodging of the charge for the use of abusive language does not suggest a reconciliation, the failure of Defendant's parents to attend a conference with the parents of the Plaintiff does not suggest reconciliation, and the failure of the

/Defendant to

Defendant to maintain his child also caused me to doubt the sincerity of the Defendant's desire that the Plaintiff return to him. I bear in mind that the Defendant brought proceedings in the Ralejoe Local Court for an order that his wife return to him, but there is nothing to show he followed the injunction of the Court to have the parents discuss the matter. If his father was ill on the occasion when the meeting was arranged with the parents of the Plaintiff it has not been explained why a second meeting was not arranged thereafter.

Submissions were made in regard to a custom that it was said was to the effect that a visit to the parents of the Defendant was equivalent to a return by the Plaintiff to the Defendant, but in the light of the finding that I have made it is unnecessary to consider this aspect. The Plaintiff is clear that she did not return and I accept her evidence as to this

I was not impressed by the evidence of Libe Ntlama. He was asked by me to recall the number of occasions that he concerned himself with the affairs of the Plaintiff and the Defendant and he was definite as to these being only those that he had described in his evidence. When I questioned him as to whether he had accompanied the Defendant to the place of work of the Plaintiff to ask her to return to the Defendant, it was only then that he acknowledged that this had taken place. It is significant that he did not give this evidence in chief and that he did not add it when I gave him the opportunity to do so. The evidence therefore by Defendant on this aspect cannot be accepted, more especially as it was not put to the Plaintiff in her cross-examination.

Counsel for the Plaintiff stated that he would not request an order for maintenance in the sum of M100 but asked that it be granted in the sum of M50. This is reasonable in relation to what Defendant can earn.

/In my view

In my view as the child is only about two years old the proper custodian should be the mother, who appears to be a responsible person.

The Defendant is ordered to restore conjugal rights to the Plaintiff on or before 13th December, 1982 and failing compliance therewith to show cause on 7th February 1983 why a decree of divorce should not be granted, why there should not be division of the joint estate, why the Plaintiff should not be granted custody of the minor child of the marriage, why the Defendant should not be ordered to pay maintenance for the child in the sum of M50 per month, and why the Defendant should not pay the costs of suit.



J. UNTERHALTER

ACTING JUDGE.

1st December, 1982.

For the Plaintiff : Mr. M. Gwentshe

For the Defendant : Mr. T. Monaphathi.