

IN THE HIGH COURT OF LESOTHO

In the matter between :

SALUKAZI MOLAPO

Plaintiff

V

KEKETSO EUGENE MOLAPO

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 22nd day of April, 1983.

This is a restitution action. I do not propose to deal with the merits of the case in anyway beyond saying that the defendant, according to the note made on the file by the Chief Justice, withdrew his opposition to the plaintiff's claim i.e. the action proceeded as undefended.

After hearing viva voce evidence from the plaintiff, the Chief Justice issued an order (rule nisi) calling upon the defendant to restore conjugal rights to the plaintiff on or before a fixed date, and failing compliance therewith, to show cause on another fixed date why a decree of divorce should not be granted on the grounds of the defendant's malicious desertion. The former date was fixed for the 14th day of March 1983 while the latter was fixed for 22nd day of March 1983. After the said order was made the matter was, thereafter, postponed on several occasions.

On the return day of a rule nisi in a divorce action all issues raised during the trial are res judicata except the ancilliary prayers not canvassed at the trial such as the question of custody, maintenance of the children etc. or in exceptional cases where the defendant alleges fraud or

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new information is brought to the notice of the Court.

(Chouler v Chouler, 1973(4) S.A. 218(W)).

In the present case before me the plaintiff has filed an affidavit of non-return in which it is alleged that the defendant came to the plaintiff's house with one Khethisa on "Sunday the 20th day of March 1983" and the said Khethisa informed the plaintiff that he had been "sent by his father to bring the defendant to her in terms of the Court Order." She further alleges that the defendant never "tendered on his own to restore conjugal rights." She therefore believes that his return is not genuine. He has therefore not complied with the Court's order.

The defendant has filed no affidavit.

At this stage of the proceedings the sole task of the Court is to determine whether or not its restitution order was properly served and whether or not defendant has complied with it. (Juszkiewicz v Juszkiewicz, 1945 T.P.D 48 at 52; De Young v De Young 1971(2) S.A. 90 (C); Benvenuti v Benvenuti, 1972(3) S.A. 587(W) at 588).

In the present case before me I have been specifically requested to determine or make a ruling as to whether there has been compliance with the Court's order of restitution.

The defendant has made a physical return which however is well outside the time pre-determined by the Court. Within that time limit set by the Court's order he is given ample opportunity to make up his mind. Moreover, the importance of the issue of a rule nisi in these cases is intended to afford the defendant a spatium poenitentiae in the hope of preserving the marriage and it can never be looked upon as a mere formality. In the case of Wessels v Wessels, 1950(3)

/S.A.

S.A. 852(0) Horwitz, J., emphasised (though in the Afrikaans language) that the order directs the defendant to return to the plaintiff and for the latter to receive the former. It is only when the defendant has not complied with the restitution order that he is to give reasons, on the return day, why he has not complied with the said order and why the normal consequences of the order shall not follow, namely the granting of the decree of divorce. The defendant has chosen not to tell the Court why he has returned to the plaintiff well out of time and not even informing his plaintiff-wife that he has come to restore conjugal rights albeit so late. It could not lie in his mouth to say that he came in compliance with the Court's Order.

I say so because the defendant was present in Court when the restitution order was granted. The importance of his presence lies herein that he heard the period mentioned within which he could save his marriage if he so wished even if his instructions were to await formal receipt of the Court's Order an aspect which as I mentioned earlier, is not contested. The plaintiff, of course, could on the return day decide that she does not wish the rule nisi to be made final. In that case the rule nisi would be discharged. This is what actually occurred in the case of Bereng v Bereng, 1978(2) LLR. 567 at 569).

If the defendant is serious about demonstrating his animus revertendi the onus surely is on him. (Manyokho v Manyokho, 1979(1) LLR. 638; Ackerman v. Ackerman, 1941 W.L.D. 39; Coetzee v Coetzee, 1945 W.L.D. 122). If the defendant wished to allege fraud or tell the Court of any other reason why he did not comply with the Court's order he should have done so. Again he has chosen not to.

/The defendant

The defendant has returned to the plaintiff after the date set by the Court for his return. It is not without significance that the words "on or before" are used before the date on which the restitution has to be complied with. These words are by no means uncommon in legal usage and they are understood to mean that the person directed to do or perform an act is under an obligation to do so "on the date fixed but has the option of discharging it at any earlier time selected by him." per Parker, J., in Re: Tewkesbury Gas Co. (1911)2 Ch. 279, 284; Dagger v Shepherp, (1946) K.B. 215, C.A. at 223). This return is thus not in compliance with the Court's order. The onus is surely on the defendant to show why the rule should not be confirmed. He has not done so. (Stone v Stone, 1957(3) S.A. 188(R)). Like the Rules of Court, its orders have to be strictly carried out. They cannot be varied by any other person. (Mokutlulu v Solicitor-General & Others, 1981(2) LLR. 405). They are not made as a mere matter of formality but to serve a practical purpose. They cannot, therefore, be ignored without serious consequences resulting therefrom.

The Court was not requested to concern itself with the question of the service of the restitution order and I shall therefore assume that the parties were perfectly satisfied with the mode of service employed.

In the premises plaintiff ought to be entitled to the confirmation of the rule and the plaintiff is hereby granted a decree of divorce with costs.

M. G. M. - 70 - K. - 1983
J U D G E

22nd April, 1983.

For the Plaintiff : Mr. Buys
For the Defendant : Mr. Sello