

IN THE HIGH COURT OF LESOTHO

In the matter of :

THABO PETROSE MPHUTLANE

Plaintiff

v

ANNA 'MAMOLIBELI MPHUTLANE

Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 21st day of June, 1983

On 21st August 1981 Rooney J made absolute a rule nisi granting the plaintiff(husband) a decree of divorce on the grounds of malicious desertion by the defendant(wife).

The defendant however contested the plaintiff's claim to custody of the children: twins, a boy and a girl, born on the 23rd February 1974, so that today, they are nearly aged nine and a half years. The question of custody is now before me.

It is common cause that the children, from the age of nine months, did not live with their parents. They lived, and were brought up, by the plaintiff's mother. The parties marriage was a stormy one from inception but it did in fact last until the end of 1978, a period of over six and half years. The parties had a multiplicity of matrimonial homes, first with the plaintiff's mother, then close to the plaintiff's mother's home, and then at various rented accommodation. The crunch came when plaintiff discovered amongst his wife's possessions love letters from a certain Enock Sekobola. I have no doubt that that love was reciprocated, and this the defendant admits, though not quite committing adultery. For the purpose of custody I will assume

/that

that she was truthful in this, In any event a single act of adultery is not now-a-days a reason why a mother should be deprived of custody of her children.

The plaintiff had and still does have a job in the Republic of South Africa but pays what seems to be, especially of late, frequent visits to Lesotho. The defendant could not get along (and never did get along) with plaintiff's mother and one occasion their quarrels ended up in a fight in which the defendant assaulted the plaintiff's mother. She says that she was justified since plaintiff's mother started it all. The plaintiff was torn between his mother and his wife. The solution that presented itself to him was separating his wife from his mother but keeping the children with the latter. The plaintiff and defendant's six and half years together were spent without the children being under their roof. The defendant says she never accepted the enforced separation from her children and after her divorce she wants them back. The argument in the main is that the father himself sees them only spasmodically on visits because his work is outside the country, and leaving them with the mother, so Mr. Maqutu submits, cannot be a natural and permanent arrangement. The defendant denied that she did not care about the children, and says she is not allowed by plaintiff's mother to see them. Now she meets them secretly when walking to and from school.

There is no evidence that the children are in any way maladjusted or that their parents relationship have rendered them nervous wrecks as was the case in CIV/APN/25/82 dated 9th November 1982 - unreported. The mother of the plaintiff in the present case did not strike me as being in the same category as Mrs. Makoala in the case I referred to in which Mr. Maqutu himself appeared. I do agree however that from the exchange of letters between the plaintiff and his mother (a bunch of which were produced in evidence) the plaintiff's mother was urging her son to keep the children with her on the grounds that the defendant was "no good", did not have a regular abode, and was often changing jobs.

/Every

Every case must depend on its merits and I do not think it will be a useful exercise to compare this case with what happened in other cases, if the principle that must guide the Court, is the paramount interest of the children.

There are two major draw backs here against changing the status quo, certainty at this stage :-

1. The length of time the children had been with their grandmother, and
2. The fact that, as I am writing the Judgment today, the defendant is (a) out of work though hopes to get a job, and (b) she has only one room to accommodate two children now approaching puberty, though she says that if she is awarded custody, she will rent more spacious accommodation.

It is clear to me that the plaintiff and his mother are deliberately withholding any form of access to the defendant mother in typical Basotho fashion that the children have been begotten from the cattle paid to her parents for the bohali. This notion though acceptable to society, especially in rural communities, has been departed from frequently in this Court. I do not see in the behaviour of defendant throughout the years anything that justifies this extreme action.

I think the proper orders to make, subject to variation if circumstances change are :

1. Custody of the twins to remain with plaintiff.
2. The plaintiff to arrange for the children to be taken to defendant (or for her to go and collect them) on alternate Sundays from 9 a.m., and to have them dropped or collected at 5 p.m. of the same day.
3. This arrangement is to continue for the next three months during which time, if the defendant finds suitable more spacious accommodation (which the Social and Welfare Officer in the Ministry of Justice must certify to be appropriate) the children will spend the whole of every alternate weekends with the defendant from Friday 5 p.m. to Sunday 5 p.m. I hope there will be no problem since the parties involved live in Maseru.

I will make no order as to costs.

CHIEF JUSTICE
21st June 1983

For Plaintiff : Mr. Sello
For Defendant : Mr. Maqutu