

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

KEKETSO E. MOLAPO

Appellant

v

SALUKAZI MOLAPO

Respondent

HELD AT MASERU

Coram:

MAISELS, P.

VAN WINSEN, J.A.

GOLDIN, J.A.

J U D G M E N T

Van Winsen, J.A.

Appellant is the defendant in a case in which his wife, respondent on appeal, sued him for restitution of conjugal rights and certain consequential relief. Although appellant filed a plea containing a prayer asking for a dismissal of his wife's claim, he did not appear to oppose her claim at the trial of the action. The Court issued an order on the 7th day of March 1983 requiring appellant to return and restore conjugal rights to his wife on or before the 14th day of March 1983. Should he fail to do so and not show cause to the contrary before the High Court of Lesotho on the 22nd day of March 1983 such Court may grant an order of divorce against him with costs, as well as an order granting the custody of the minor children of the marriage to his wife and ordering appellant to pay maintenance for them at this rate of R25.00 per month for each child.

Rule of Court 42(3) requires an order for restitution of conjugal rights be served on the defendant personally, unless the Court otherwise directs. In the present case the Court a quo did not dispense with personal service of the order. The order was served on appellant's mother on the 16th of March 1983, i.e. two days after the date, viz, the 14th of March, on which appellant had been ordered to restore conjugal rights.

On the 22nd of March 1983 respondent filed an affidavit

/of

of non-return in which she makes, inter alia, the following allegations, viz, that :

- (a) Appellant was in Court on the 7th day of March 1983 and was present at the time she gave her evidence;
- (b) On Sunday the 20th day of March 1983 appellant came to respondent's house in the company of one Khethisa Molapo who informed respondent that he had been sent by his father to bring appellant to her in terms of the Court's order of restitution;
- (c) Appellant had never of his own will tendered to restore conjugal rights;
- (d) Respondent's belief is that appellant had no bona fide intention to restore conjugal rights; and that
- (e) Appellant had not restored to her on the return date or at any time thereafter.

The matter was twice postponed until it was heard on the 18th day of April 1983. Appellant filed no replying affidavit. The Court (Mofokeng J) granted a final decree of divorce on the 22nd of April 1983.

An appeal was lodged on behalf of appellant, the grounds on which it was based being stated in an annexure to the notice of appeal. The annexure contained the averment that the Court a quo had in granting a final decree of divorce committed a fatal irregularity. The irregularity was defined as follows :

The attorneys, for both parties, so it was alleged, had agreed on the day on which the restitution order had been granted that appellant would not restore conjugal rights to respondent until appellant had been served with the restitution order. Furthermore the attorneys were by agreement to ask the Court to rule upon whether or not there had been good service of the restitution order. In the event of the Court ruling that proper service had been made the Court was to be asked to allow appellant to file a replying affidavit to respondent's affidavit of non-return after which the Court would only then decide whether or not appellant had restored conjugal rights. It was alleged that the Court a quo had been asked to act in terms of the above agreement.

When the appeal came before this Court it appeared however from the heads of argument filed on behalf of respondent by her attorney that the latter claimed that the parties had never agreed as alleged above by appellant's

/attorney.

attorney. The latter in his heads of argument, however, persisted in the allegations contained in the annexure to her notice of appeal as set out above. When the appeal was called in this Court both attorneys maintained their contradictory stance as to whether or not such an agreement had been entered into.

In the absence of a resolution of this disagreement - which this Court could not undertake - it was apparent that the Court could not, without possible prejudice resulting to one or other or perhaps both of the parties, proceed further with the appeal. In view of the fact that the service of the restitution order granted in the High Court on the 7th of March 1983 was irregular in two respects, viz, that it was not personally served on appellant, and that it was served on a date subsequent to the date in which appellant had been ordered to restore conjugal rights to respondent, this Court, after conferring with the representatives of both parties, made the following order:

By agreement between the parties -

- (a) this matter is referred back to the High Court of Lesotho;
- (b) this Court fixes the following new dates for the service and return of the restitution order as follows :

Defendant is ordered to restore conjugal rights to the plaintiff on or before 31st of August 1983, failing which to show cause on the 19th of September 1983 in the High Court of Lesotho why that Court should not order -

- (a) a final decree of divorce and
 - (b) that the custody of the minor children be awarded to plaintiff, and
 - (c) that defendant pay as maintenance for each of the said children a sum of R25 per month.
- (c) Costs of the appeal proceedings be reserved for determination by the High Court.

L. De V. Van WINSEN
Judge of Appeal

I agree

I.A. MAISELS
President

I agree

B. GOLDIN

Delivered this 6th day of July, 1983. Judge of Appeal

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

KEKETSO E. MOLAPO

Appellant

v

SALUKAZI MOLAPO

Respondent

HELD AT MASERU

Coram:

MAISELS, P.

VAN WINSEN, J.A.

GOLDIN, J.A.

COURT ORDER

Van Winsen, J.A.

By agreement between the parties :

- (a) this matter is referred back to the High Court of Lesotho;
- (b) this Court fixes the following new dates for the service and return of the restitution order as follows :

Defendant is ordered to restore conjugal rights to the plaintiff on or before 31st of August 1983, failing which to show cause on the 19th of September 1983 in the High Court of Lesotho why that Court should not order

- (a) a final decree of divorce and
 - (b) that the custody of the minor children be awarded to plaintiff, and
 - (c) that defendant pay as maintenance for each of the said children a sum of M25 per month.
- (c) Costs of the appeal proceedings be reserved for determination by the High Court

L. De V. VAN WINSEN
Judge of Appeal

I agree

I.A. MAISELS
President

I agree

B. GOLDIN
Judge of Appeal

Delivered this 6th day of July 1983 at MASERU