

IN THE HIGH COURT OF LESOTHO

In the Matter of :

MARY 'MAMOTHIBI THEKO Plaintiff

v

MARAKABEI THEKO Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice  
T.S. Cotran on the 20th day of November 1984

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The delay in delivering Judgment in this case is very much regretted. On the 28th day of March 1984 attorney for Plaintiff/Judgment Creditor/Applicant, Mr. Maqutu, had set down the application for hearing on the 25th October 1984 and duly gave notice to the attorney for the Defendant/Judgment Debtor/Respondent, Mr. Sello. The attorneys, however, managed to get from the Registrar an earlier date and argument was heard before me on the 14th June 1984. Judgment was reserved.

When I came to write the Judgment a few days later I found that a number of documents referred to by the parties were not annexed to the papers and I passed the file to the Registrar instructing him to write to attorneys to produce the documents required. Both attorneys substantially complied, Mr. Sello on the 26th June 1984 and Mr. Maqutu on the 29th June 1984.

The Registrar put the letters in his file but did not indicate their receipt in the Judge's file, until the case appeared on the roll for the 25th October 1984, the original set down date. It is important that when a Judge reserves

/Judgment

Judgment and nothing is heard from him after a month that a reminder is sent to the Registrar asking him to draw the attention of the Judge to a Judgment expected. The file of a case reserved for Judgment can be taken away from the Judge's tray for some reason or the other and not returned. The file was returned to my desk, through good fortune, together with others that had been placed on the roll for the week beginning 22nd October 1984.

On the 31st August 1982 in CIV/T/249/82 the marriage between the plaintiff/applicant and the defendant/respondent, purportedly to be one in community of property, was rescinded on the ground of fraud and the Court ordered that the parties be restored, as far as property was concerned, to the status quo ante. In her action the plaintiff/applicant claimed that she made over to the defendant/respondent substantial property moveable and immovable. The "marriage" appeared to have been short lived and the Court did not expect great difficulty that the parties themselves would agree to an account that would have brought their financial relationship to an end.

This was not to be and Mr. Buys, an attorney of this Court, was appointed "liquidator". His mandate was circumscribed by Mofokeng J in an order made on the 6th December 1982 as follows:

- "1. the liquidator to see that defendant restores to plaintiff any property moveable or immovable that plaintiff made over to defendant
2. the liquidator to see that plaintiff restores to defendant any property moveable or immovable that defendant made over to plaintiff
3. to refer disputes or matters not capable of easy determination to the Court for finalization.

The "liquidator" interviewed the parties and their attorneys. He conducted an examination of the accounts and the books, such

/as they

as they were, and submitted a provisional report to Mr. Maqutu and to the Court via the Registrar. This is dated the 7th September 1983. It reads as follows:

"Dear Sir

RE: LIQUIDATION - ESTATE - THEKO

With reference to the above mentioned matter, we herewith submit our Provisional Report, which we trust you will find in order. Kindly be advised that it is required immediately from Mr. Theko to forward all assets and fees found to be the property of Mrs. Theko.

Kindly note that should this not be effected within seven days your liquidator will take the necessary steps to collect same.

Mr. Maqutu is specifically required to arrange for a meeting with the writer hereof and Mrs. Theko's previous husband.

A further report will be filed as soon as the investigations have been concluded.

Yours faithfully,

(Sgd.) S.C. Buys  
E.G. Cooper & Sons"

Mr. Maqutu moved the Court on the 10th October 1983 seeking orders to make the recommendations of the liquidator an order of Court and to give him directions "about matters in which he is in doubt".

The liquidator reported favourably on plaintiff/applicant but adversely on the defendant/respondent. The liquidator found that plaintiff/applicant has established that she was entitled to:

- (a) M10,600 which she gave to defendant/respondent after mortgaging her house to the bank;
- (b) interest on her loan from the bank;
- (c) the sum of M273.35 she paid for a deep freeze from Fraser's which the defendant refused to surrender;
- (d) a Datsun vehicle which she gave to defendant/respondent.

/He

He also recommended that 50% of the value of stock in trade of a shop operated by the parties before the break up should go to plaintiff/applicant.

The application was resisted by the defendant/respondent except to the extent of the items he was prepared to acknowledge were the plaintiff/applicant property. These were the kitchen utensils, clothing, a Hi Fi set, a hammermill and, reluctantly, a dog and were duly returned before Mr. Maqutu moved the Court. The defendant/respondent concedes that he did not submit a claim against the plaintiff/applicant but this was because she had nothing in his possession belonging to her. He did not dispute that the plaintiff/applicant had obtained a loan from the bank on the security of her property but the sum she gave him was M3,837.34 of which he repaid to the bank M1,300. He adds that he should be liable only for the difference between these two amounts "if at all" because the principal amount he obtained from her was "utilised" for their "mutual benefit" and she could not in any event have the M3,837.34 as well as 50% of the value of the stock in trade of the shop because that tantamounts to a division not restitution. He avers that part of the loan went to purchase stock for her own shop which she still runs. He denies that the plaintiff/applicant paid M273.35 for the freezer. He says he bought the Datsun and tractor from her before marriage and paid her the purchase price as per a written agreement of sale. The cow was his. The maximum the defendant/respondent was prepared to be generous with is the sum of M3,837.34.

The Court, it should be remembered, did not order division of the joint estate. Restitution, however, is something akin to it because what was behind the order was that plaintiff/applicant should get back all she put in. No immovable property was given away but there are disputes on:

/(a) whether

- (a) whether she gave defendant/respondent the balance of the loan of M10,600 she obtained from the bank on mortgaging her property,
- (b) whether she is entitled to get from defendant/respondent the interest she is paying on the loan;
- (c) whether or not the sum of M273.35 was paid by plaintiff/applicant to Fraser's,
- (d) whether she is entitled to get back the Datsun vehicle, the tractor, and the black and white cow and its calf.

The liquidator decided in favour of the plaintiff/applicant on all the above claims save the tractor and the black and white cow and the calf on which he sought directions.

It is difficult for me to see on what basis Mr. Maqutu wants the Court to summarily "confirm" the "liquidator's" findings and to hear viva voce only on the rest. Mr. Buys was not strictly speaking a liquidator. He was really employed to make an account if he could of property advanced for a "marriage" that never was. His terms of reference did not include making decisions over disputes. He was not a liquidator of a universal partnership. There is no alternative to hearing viva voce evidence from the parties about the matters in dispute. I so direct. The liquidator may be called as a witness by the applicant to give evidence in support of his report. In the meantime I confirm Mr. Buys findings in so far as defendant/respondent admits them and I also order that the sum of M3,837.34 with interest at 11% from 31.8.1982 until settlement be paid by the defendant/respondent a sum which he admits receiving.

The costs of this application will be determined at the conclusion of the viva voce evidence on the matters in dispute between the parties. Will the Registrar please fix an early date.

CHIEF JUSTICE  
20th November 1984

For Plaintiff/Applicant : Mr. Maqutu  
For Defendant/Respondent: Mr. Sello