

IN THE HIGH COURT OF LESOTHO

In the Application of :

MARY MOSELA KALACHE

Applicant.

v.

JAMES RAMABOTSE KALACHE

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 5th day of March, 1986

In this application the applicant is seeking an order in the following terms:-

1. "That a Rule Nisi do hereby issue calling upon the Respondent to show cause, if any, on a date to be determined by this Honourable Court, why the Respondent shall not be:-
 - (a) Directed not to sell, donate, mortgage, pledge, lease, dispose of or in anyway part with the assets of the joint estate pending the disposal of the divorce proceedings in CIV/T/603/84 otherwise than in the course of business.
 - (b) Directed to pay maintenance for the Applicant in the sum of M300.00 per month at the Registrar's office with effect from the date to be determined by this Honourable Court.
 - (c) Directed to pay to the Applicant a sum of M350.00 towards contribution to the Applicant's legal costs.
 - (d) Directed to pay the costs of this application.

2. Granting the Applicant such further and/or alternative relief as the Court may deem fit.
3. That Rule 1 (a) operate with immediate effect as a temporary interdict."

The Rule Nisi was granted on the 27th December, 1984 and made returnable on the 14th January, 1985. After several extensions of the rule oral evidence was heard on the 4th March, 1986 and judgment was given on the 5th March, 1986. On the 27th May, 1986 prayer 1(a) was disposed of and the oral evidence was concerned with maintenance and contribution towards applicant's legal costs.

In an application of this nature the applicant must show that she has a reasonable chance of success in the main action. In other words, she must show that she has a prima facie case against the husband. She must prove the wrongful act on the part of her husband which has forced her to institute the legal proceedings. With regard to maintenance she must show that she is in need of maintenance. In the case of Reid v. Reid, 1951 (1) S.A. 765 at pp. 769-70 Reynolds, J said:

"The position is however, quite different as to the limited right to a contribution. In order to get this she has to put before the Court in some degree proof of the wrongful action of the husband giving her the right to sue him. If she does that, she prima facie shows that by his wrongful act he has created the necessity for her to sue him so that she gets her legal rights."

It is common cause that in CIV/T/608/84 the applicant is suing the respondent for divorce and that that case is still pending before this Court. It is also common cause that the respondent has made a counterclaim for divorce. It was argued before me that because the applicant is no longer willing to prosecute her divorce action she is not entitled to maintenance pendente lite. I rejected this

submission on the simple ground that the divorce case is still pending before this Court because it has not been withdrawn. The respondent's counterclaim is also still pending before this Court. In terms of Rule 39 (2) of the High Court Rules 1980 either the plaintiff or the defendant may set the case down for trial if 30 days after the pleadings have been closed or on which the pre-trial conference has been held the plaintiff has taken no action to set down the case for trial.

The applicant testified that on the 7th October, 1984 the respondent expelled her from their marital home saying that he no longer loved her. On that same day the respondent was bringing another woman named Molahloane Ramolahloane into their marital home and has been living with that woman as man and wife. She admitted under cross-examination that she wrote a letter to respondent's uncle stating that the respondent must marry another woman. She claims that she was very angry when she wrote that letter as respondent and some members of his family had refused to give her permission to go and see her mother who was very ill at the time.

With regard to her husband's ability to pay maintenance the applicant stated that they have four rooms and one house rented by tenants. The rent for one room is R20 per month and R50 per month for the big house. They have a van which they hired out to people for transport of goods from the bus stop to various places around the town. The transport business brought an income of between R100 and R150 per month. They also have a brick-making firm which brings in an income of R900 per month. Their total income for a month is R1,180. She admitted that the respondent no longer receives a monthly salary as a teacher because he was dismissed from his teaching post on the ground of bigamy.

The respondent did not have any defence against the applicant's claim. He admitted that he is now living with Molahloane Ramolahloane as man and wife; that even if he were to be ordered to restore conjugal rights to the applicant he would be unable to do so. He has paid "bohali" to the parents of Molahloane Ramolahloane. He alleges that the applicant allowed him to marry another woman. He pointed out that the applicant has grossly exaggerated his income. The van is occasionally hired by certain people to transport their goods. The income from the brick business is not constant, it was only on one occasion that the income reached R900 per month. He puts the average income from this source as R60 per month.

I have thoroughly considered this matter and agree with the respondent that the applicant has exaggerated the couple's monthly income. I do not propose to base my award on the figures suggested by the applicant alone. I have to rely also on what the applicant claims to be the amount he can afford to pay. It will serve no purpose to award a large amount which the respondent cannot afford to pay. In many cases in which respondent husbands have been ordered to pay large amounts of money the maintenance case is immediately followed by contempt of court proceedings in which the respondent is threatened with imprisonment.

If the husband has a permanent employment and receives a regular monthly salary it is usually easy for the court to assess what maintenance can be paid by such husband without causing him hardships. In the instant case the only regular income is that from rent. I shall ignore the income from the van and take into account the average of R60 per month from the sale of bricks.

There was no dispute about the contribution towards the applicant's legal fees. It was common cause that the respondent had offered to the applicant two beasts from the joint estate to cover these legal costs. The applicant and her attorney were not very keen to accept animals but wanted cash. I cannot blame them for that attitude because animals are not only cumbersome to some people living in towns but cannot know in advance what the market price of a beast is going to be.

I come to the conclusion that the applicant has proved her case on a balance of probabilities. The application is granted in terms of prayers 1 (b) and (c) but prayer 1 (b) is not granted as prayed with regard to the sum prayed for in the Notice of Motion. The respondent is ordered to pay R100-00 per month at the Registrar's office as maintenance for the applicant. The money shall be paid on or before the last day of every month with effect from the 31st March, 1986.

J.L. KHEOLA
J U D G E .

28th May, 1986.

For Applicant - Mr. Pheko
For Respondent - Mr. Maqutu.