

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEONIA 'MAMOTHEPANE KHOTSENG Plaintiff

v

JOSEPH TS'IU KHOTSENG Defendant

J U D G M E N T

Delivered by the Honourable Sir Peter Allen
on the 1st day of May, 1987.

The plaintiff brought this action against the defendant, her husband, for a decree of divorce on the grounds of adultery or, in the alternative, on the grounds of desertion. There are no minor children of the marriage which took place on 9 June, 1970 at the District Administrator's Office in Maseru.

The plaintiff and her two witnesses testified and counsel for the defendant applied for dismissal of the plaintiff's claim without calling any defence evidence. The Court therefore now has to consider whether there was a prima facie case made out against the defendant. In other words was there such evidence before the Court upon which a reasonable man might (not should) give judgment against the defendant?

The plaintiff is a 56 years old housewife who has worked as a primary school teacher for the last 28 years. One would naturally expect that such a person would be of above-average intelligence with an ability to explain a point clearly and concisely. Unfortunately this plaintiff had none of those attributes

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and she made a most disappointing and unconvincing witness.

To start with I will consider her first ground of adultery. She said very little about this in her evidence-in-chief. Her brief testimony on this point was as follows:-

"He has committed adultery with more than one person but particularly with 'Mathabo. This was at 'Mathabo's house starting in January 1984 and continuously until now. He goes there from time to time. His adultery was not condoned by me."

That was all. Then in cross-examination she said:-

"I can't remember the actual dates of his adultery. There were so many times that I was sick of it. The defendant admitted some to the police. He used to come home late. He told me once that he was in love with 'Mathabo. I have never been to her house and found the defendant there. I passed by her house once and I saw some of the defendant's clothes drying on her washing line. It was in 1985, I think."

The plaintiff's witness, Majoele Khahlane (P.W.2), in her brief testimony said nothing relevant to this allegation of adultery. Her other witness, Tebelo Mphale (P.W.3), a former village chief, was equally unhelpful. He merely referred to it indirectly by saying, "I understand that they had a problem over another woman."

There are many authorities for the requirement that the plaintiff's declaration must contain sufficient specific

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allegations as to the time and place of the alleged adultery so as to enable the defendant to plead properly to them and prepare a defence. In para.6 of her Declaration the plaintiff stated that:-

"Defendant has from January to April, 1985 committed adultery with one 'Mathabo whose further particulars are unknown to plaintiff, which adultery plaintiff has not condoned."

The defendant denied adultery in his plea. The plaintiff's allegation contains no reference to any place where the alleged adultery was committed and no statement as to how many times it occurred. Furthermore, in her evidence-in-chief (above) the plaintiff alleged that the adultery commenced in January 1984, a full year before the date in her Declaration. She claimed that the defendant was living with 'Mathabo although she produced no evidence of this, such as an independent eye-witness. She could not testify to it herself because she said she did not go to 'Mathabo's home, nor did she give any reason for failing to try to confirm her suspicions by calling at that house. The most she could manage apparently was to walk past the house once and she claimed that she saw some of the defendant's clothes on the washing line. She did not state what clothes they were nor by what means she was able to identify them as the defendant's property. Her mere statement to this effect is no proof at all.

Adultery can be proved by circumstantial evidence, such as finding the defendant and his mistress in a compromising

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position, or evidence of their meeting together and acting in such a fashion that indicated to a reasonable person that the couple were indulging in a mutual passion. There was no such evidence here; indeed no evidence of them being seen together in any circumstances, innocent or otherwise. Even if the clothes on the washing line had been the defendant's (and there was absolutely no proof of this) there could have been a simple explanation for it that had no relevance to adultery. For instance some people do other people's laundry for them.

The plaintiff continually got her dates wrong, did not specify any place and, most certainly, she produced no evidence whatsoever of adultery. There was clearly no prima facie case made out against the defendant on the first ground of adultery.

The alternative ground for divorce was desertion, by which the plaintiff meant constructive desertion since she claimed that she left the matrimonial home at Lithoteng in Maseru District. In para.7 of her Declaration the plaintiff alleged the following unlawful acts as being reasons for her having to leave the matrimonial home:

- "(a) On several occasions he assaulted plaintiff without any just cause, in particular in June 1983, 23 December 1984, 16 March, 1985 and 5 April, 1985.
- (b) Has since 1977 to date neglected, failed and/or refused to maintain plaintiff while liable and able to do so.

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- (c) Has refused to have any sexual intercourse with plaintiff from December 1984 to date."

No evidence was given either by the plaintiff or her witnesses in support of allegations (b) and (c) above and there seems to have been no reason for their inclusion in the Declaration. They must be ignored.

This leaves only (a), the allegations of assault on four occasions. The first occasion was in June 1983 when the plaintiff testified that the defendant acted "offensively and belligerently" though she gave no details of what this amounted to. She said she went to Chief Mphale (P.W.3) who gave her a letter to the senior chief, but the defendant tore the letter up. the chief then intervened and the defendant apologised and they went back home together. There was no evidence of any assault and it is clear that there was no desertion or cause for it at that point.

The second occasion, according to the plaintiff's evidence-in-chief, was in December 1983 when she was chased out of the house by the defendant who was carrying an axe. She ran to take refuge with a neighbour called Majoele Khahlane (P.W.2), who testified only that in 1983 she saw the plaintiff followed at some distance by the defendant carrying an axe. She did not say what he was doing with the axe or how he was behaving or acting at the time. Majoele merely said that the defendant saw her (P.W.2) and changed direction and went away. The plaintiff then

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reported to the police at Maseru Charge Office, but they did nothing until next day when they called the defendant to the Charge Office and detained him until after Christmas. The plaintiff said she then asked them to release him so that they could go home and settle the matter, which they did. Once again this was not evidence of desertion. In addition, in her declaration and in cross-examination the plaintiff maintained that this incident happened in December 1984, not 1983. She could not explain the contradiction or inconsistency and tried to insist that both dates were correct.

The third occasion was in April 1984 she testified (though it was shown as 1985 in her Declaration). This time she said the defendant came home with a friend to whom she offered tea to drink. The defendant was drunk and he boasted that he was going to kill her because she was proud and pompous. She went outside for water and came back and found the defendant with a knife so she ran away and slept at her brother's house. Next morning she reported to Maseru Charge Office but the police could not find the defendant. She went to the chief whose men found the defendant after two days. She saw the defendant at the chief's place and she claimed in Court that the defendant then expelled her from their home and that she had not been back since. But that was in April 1984 whereas, in cross-examination, the plaintiff again contradicted herself and insisted that she was still living with the defendant in December 1984, i.e., eight months after that

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last related incident. She added that she left home in April 1985, a year later in fact. Again she was unable to reconcile these differences in dates in spite of persistent questioning. She insisted that she gave correct dates in both her evidence-in-chief as well as in cross-examination. This was unreconcilable and so completely lacking in credibility.

The plaintiff then referred to a fourth incident which she said occurred in May 1984. There was no mention of this in her Declaration. She said that the defendant came to her house in Thupa-Likaka where she was teaching. It was midnight and he knocked at the door and then kicked it open. There was no mention of any threats or weapons. The plaintiff merely stated that she called for help and ran away to the chief, who came to the house and asked what was the matter. The defendant explained that he had come to see his wife as they had been separated for a long time. He added that he wanted to kill her because she wanted to obtain a divorce and the chief warned him not to do so, and took the defendant to Thupa-Likaka police post. When she went to the police post next day and related this story the defendant replied that he was joking and was not serious about killing her. She said that the police took the defendant to court and charged him with maliciously damaging the door lock and that he was convicted and given a suspended sentence.

However, no attempt was made to prove any of this.

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Neither the chief nor a police officer was called to corroborate her testimony and no court record was produced to support the alleged conviction and sentence. If this incident actually occurred, it should have been proved and this could have been done quite easily. There was no reference to it in the plaintiff's Declaration and defence counsel indicated that it was not admitted by the defendant. Furthermore, on re-examination by her own counsel, the plaintiff changed the date of the incident to 1985.

This witness was totally unreliable on the subject of dates and I can see no good excuse for this. She is not an ignorant and uneducated peasant, but an educated teacher. Furthermore, she claimed that one of the subjects she teaches is history. This is a subject built around a knowledge and use of dates and it is difficult to see how anyone who is so muddled and confused, even about her own personal and important dates, could possibly teach such a subject with any degree of success.

Not only could she not reconcile the dates alleged in her Declaration with the dates she testified to in Court, but she even contradicted each of those dates in Court more than once in cross-examination and re-examination. No reasonable court could be expected to rely upon such persistently and inexplicably contradictory evidence.

Whatever those dates were intended to be, they were months, sometimes years, apart and, except for the last time, on whichever date that was supposed to be,

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she went back home and resumed cohabitation with him each time. There was no evidence of continual physical assault or dangerous behaviour by him so as to make her life intolerable. The testimony of the plaintiff indicated, if it was true, only isolated incidents which were far apart and could have been, and perhaps were, dealt with by the police or a chief. There was no evidence at all of any cuts, wounds or bruises. The plaintiff admitted that the defendant never actually assaulted her. There was nothing to show that the defendant's conduct indicated that he had formed a fixed intention to put an end to the marriage. Indeed the plaintiff herself testified that the defendant became upset and even threatening at the idea that she wanted to end the marriage by getting a divorce. There was no evidence that he tried to drive her away from their home. Without such evidence described above, the plaintiff cannot obtain a divorce on this ground. What evidence there was appeared to be little more than the normal wear and tear of a marriage with some isolated incidents.

The plaintiff was such an unconvincing and unreliable witness that it would be unsafe to believe any of what she said without some reasonable corroboration and there was none of any importance or relevance.

Consequently I am satisfied that the plaintiff failed to make out a prima facie case on the ground of constructive desertion. This being the case, she cannot succeed in her petition for divorce since she has failed on both grounds.

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Accordingly the plaintiff's claim is dismissed
and there will be entered in favour of the defendant judgment
of absolution from the instance with costs.

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P.A.P.J. ALLEN
JUDGE

1/5/87

For the Plaintiff : Mr. Hlaoli

For the Defendant : Mr. Monaphathi

Plaintiff and Defendant present
Judgment delivered

P.A.P.J. ALLEN
JUDGE

1/5/87