CIV/APN/174/83

IN THE HIGH COURT OF LESOTHO

In the Application of

'MATOKA TSEPE Applicant

v

DAVID TSEPE Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice B.K. Molai
on the 27th day of February, 1986.

I have already disposed of this application and the following are my reasons for the decision that I made.

On 16th August, 1983, the applicant herein filed with the Registrar of this Court a notice of motion in which she moved the Court for an order framed in the following terms

(a) That an order of maintenance granted by this Court on 21st June, 1982 in CIV/T/392/81 be varied by increasing the monthly instalments from M20 to M50.00.

(b) That Respondent pay costs of this application in the event of his opposing it.

(c) Alternative relief."

On 20th September, 1983, the Respondent intimated his intention to oppose the application. Affidavits were filed from either side.

In as far as it was material, the facts that emerged from the affidavits were briefly that the parties got married to each other by civil rites on 8th December, 1980. The marriage was, however, dissolved by an order of this Court dated 21st June, 1982 when custody of the only

minor child of the marriage was awarded to the Applicant and the Respondent ordered to maintain it at the rate of "M20 per month until a further order of this Court, with effect from 1st day of July, 1982." The rate of maintenance was fixed by agreement of the parties in consideration of the fact that Respondent was a student at Leloaleng Technical School and the least that he could afford to pay for the maintenance of the minor child of the marriage was M20 per month.

According to Applicant, the circumstances had then changed to warrant her to seek an order for the variation of the rate of maintenance as prayed in terms of prayer (a) of the notice of motion in that Respondent had completed his studies and was employed as a qualified motor mechanic. He was, therefore, able to pay adequately for the support of his minor child at the rate of M50 a month. That was, however, denied by the Respondent who deposed that he had not as yet qualified as a motor mechanic and had only taken a temporary employment with the Lesotho National Bus Corporation to find the necessary funds so that he could return to Leloaleng Technical School for the completion of his studies. He was, therefore, still unable to pay more than the agreed M20 as maintenance for the child.

The question of whether the Respondent had completed his studies at Leloaleng Technical School and was therefore, a qualified motor mechanic could not be determined on the papers before me. It was only the word of the Applicant as against that of the Respondent. A little effort to inquire from Leloaleng Technical School could have enlightened the court on this matter. This was, however, not done.

It was also not enough for the Applicant to contend herself with the averment that the Respondent was employed and therefore, able to pay an amount of M50 as monthly maintenance for the child. The Court had to be given an idea of the extend to which Respondent's income had been enhenced by reason of his employment so as to justify his ability to pay the amount. That, in my view, could have been easily done by filing an affidavit or proof of some kind from the Respondent's employers. This was again not done.

3/ This onus .....

The onus of proof that the circumstances had changed to warrant her to bring this application to court rested squarely on the shoulders of the Applicant on the well known principle that he who avers bears the onus of proof. I was not convinced that, in the present case, the applicant had satisfactorily discharged that onus.

It may be mentioned here that when the court sat to hear arguments in this matter, Mr. Maqutu who represented the Respondent verbally moved application to amend Respondent's answering affidavit by an addition that the minor child was not fathered by the Respondent, a fact which he said had surfaced recently after the pleadings had been closed. Mr. Moorosi for the Applicant told the Court that he would not bother to oppose Respondent's application to amend his answering affidavit but would dispute the allegation that the Respondent had not fathered the minor child of the marriage. In my view an application of this nature should have been made on notice served upon the other party in good time to enable her to reply. However, as the application to amend the answering affidavit was not opposed, I was prepared to grant it by agreement of the parties. I was then called upon to decide the question of the paternity of the minor child of the marriage. That was a physical impossibility. There was no way I could do it in the absence of any evidence whatsoever.

For the above reasons, I dismissed the application with costs save that the question of paternity was to go for trial and in that regard the parties were allowed to file the necessary papers to complete the pleadings before viva voce evidence could be led on a date to be arranged with the Registrar

B.K. MOLAI,
JUDGE.
27th February, 1986.

For Applicant Mr. Moorosi
For Respondent Mr. Maqutu.