

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAMATHEALIRA MONA RATHI (born Sennane) Plaintiff

and

SEKHEFU MONA RATHI Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 7th day of July, 1989.

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The plaintiff and the defendant were married in community of property on the 24th December, 1978. On the 21st November, 1988 a final decree of divorce was granted on the ground of defendant's malicious desertion. The defendant had withdrawn his plea on 14th November, 1988 and he had agreed that the plaintiff should proceed with the divorce on the ground of malicious desertion.

On the 21st November, 1988 when the divorce was granted, the parties agreed that pendente lite the plaintiff should have the custody of their daughter and that the defendant should have the custody of their son. The parties agreed that the custody of the minor children, forfeiture by the defendant of the benefits arising from the marriage and contribution by the defendant towards the defendant's legal costs should be left over for determination by the Court at a later stage.

On the 5th May, 1989 the parties gave evidence on the matters left over for determination at a later stage. The plaintiff testified that at the moment she is living at her maiden home with her daughter who has been in her custody since she left the marital home in October, 1988. The son, Mathealira, has been living with the defendant's parents and her access to him has been made very difficult by the defendant's parents because they hate her. Whenever she went to the home of her former in laws they refused to tell her the whereabouts of her son. She expressed fear that her son is not being cared for properly by his grandparents.

They have a house with five rooms. It is well furnished. She works at the Lesotho Bank and obtained a loan from the bank to build the matrimonial house. At the moment she is still repaying the loan but the defendant is making no contribution towards the repayment of that loan. She also pays the annual insurance premium. The rates have not been paid for several years and the outstanding amount is M243-44. She had asked the defendant to pay the rates but it seems that he has not been paying them.

The plaintiff stated that as far as the furniture is concerned the defendant contributed nothing except in the purchase of the bedroom suite. They have three motor vehicles with Reg. Nos. A 4101, A 4565 and AB 780. The first vehicle was bought for them by the defendant's father. The second one was bought by the defendant alone. The third one was bought by her.

She asks that the defendant be ordered to contribute an amount of M800 towards her legal costs and M200 per month per child as their maintenance.

The plaintiff admitted that when she went to see the children at the home of the defendant's parents their daughter used to come to her outside the yard but their son was afraid to come to her on the ground that his grandparents would scold him. She denied that on the 30th November, 1988 she went to the home of the defendant's parents and insulted the defendant's mother. She denies that there was a skirmish between her and the defendant's parents and their domestic servant. She admitted that while she was living with the children at her maiden home their son left on his own and went to Seapoint to live with his grandparents. The reason why he left was that he did not want to be reprimanded when he did wrong things.

The defendant testified that when the plaintiff left in October, 1988 she left the children at the parties' marital home. At that time they had a domestic servant who took care of the children. He alleges that the plaintiff came back and by threats forced the domestic servant to leave. He then took the children to his parents at Sea-Point. They stayed there until December, 1988 when their daughter went to live with the plaintiff at her maiden home. He says that his son is now living with him at the marital home because he has a new domestic servant. The children still visit each other and they go to the same school.

He indirectly repays the loan for the house because he gives all his salary to the plaintiff at the end of the month. It was by agreement that the loan should be in the name of the plaintiff because as an employee of the Lesotho Bank she was entitled to a very low interest of 3% instead of the prime rate of interest. He alleges that the entire furniture in their house was bought by him.

The law seems to be very clear that a spouse should not be allowed to benefit financially from a marriage which he has wrecked, the plaintiff in an action for divorce on the grounds of adultery or malicious desertion may claim as against the defendant the forfeiture of all financial benefits, past and future, which the latter has derived or is to derive from the marriage, whether by way of community of property or under an antenuptial contract. See The South African Law of Husband and Wife by Hahlo, 4th edition, at page 430.

It is also our law that an order for forfeiture of benefits will not be made unless it is claimed by the plaintiff, but if it is claimed, the court has no discretion to withhold the order. See Opperman v. Opperman, 1962 (1) S.A. 456 (S.W.A.).

It is common cause that the divorce in the present case was based on malicious desertion; the Court has no discretion to withhold an order of forfeiture. Mr. Matsau attempted to make a distinction between malicious desertion and constructive desertion but failed to refer to any authority. I am not aware of any authority that constructive desertion is not malicious. I am of the opinion that it (constructive desertion) is even more malicious because the defendant usually assaults the plaintiff for no reasonable cause and makes life for her very difficult forcing her to leave the matrimonial home. In the present case the defendant did exactly that and forced the plaintiff to leave the marital home. She is an innocent party who must not be made to suffer much more than she has already suffered.

I, therefore, have no alternative but to order forfeiture by the defendant of the benefit arising from the marriage.

In Opperman v. Opperman (supra) it was held that although in divorce actions the Court has no discretion to withhold an order for the forfeiture of the benefits arising from a marriage in community if that is claimed by the innocent spouse, it still has a discretion to decide whether or not it should itself determine the value of the joint estate and define the portion that the guilty party will have to forfeit.

In the present case the joint estate consists of a five-roomed house with furniture and three motor vehicles. I have not determined the value of the joint estate so as to define the portion which the defendant will forfeit. However, the property has been described in such detail that I am of the opinion that I can define what portion the defendant shall forfeit. I think the defendant must forfeit the house, all furniture and the motor vehicle which the plaintiff bought with her own money.

I now wish to deal with the question of custody of Mathealira who is still in the custody of the defendant. With regard to the custody of the girl, the defendant has agreed that her custody be awarded to the plaintiff.

It is trite law that in deciding to which spouse the custody of a minor child shall be awarded on divorce or judicial separation our Court have 'grown away from rules directed towards penalizing the guilty spouse and towards a recognition of predominance of the interests of the child.' (Fletcher v. Fletcher, 1948 (1) S.A. 130

(A.D.) at p. 144). However, the Court went further to point out that in deciding which party should have the custody of the children on divorce the first consideration is what is best in the interests of the children; the fact that the one spouse is the innocent spouse cannot altogether be ignored. The question of innocence comes into account only when it is not clearly established what is best for the children; but the fact that that party is also the father is irrelevant. (Milstein v. Milstein, 1943 T.P.D. 227).

In Dunsterville v. Dunsterville, 1946 N.P.D. 594 at p. 596 Broome, J. said:

"If the children's welfare-using that word in its widest sense and not confining it to mere physical well-being - will be equally safeguarded with either parent, then considerations of guilt or innocence and of natural guardianship will tip the scale, but otherwise I do not think they carry any weight, though the question of guilt or innocence may have a bearing upon the question of welfare."

The difficulty that I am facing in the present case is that there is practically no evidence that any of the spouses is not a fit and proper person to take proper care of the children in his or her custody at the moment. The boy, Mathealira has been in the custody of the defendant for a fairly long time and seems to be quite happy to stay with his father. He left the plaintiff on his own to go and live with his father. The plaintiff testified that Mathealira left her because he is a child who does not want to be reprimanded or to be restrained from doing things regarded by her as being bad. But there is no evidence that the defendant is a weak disciplinarian who will allow the boy to do whatever bad things he wants to do. I am of the opinion that the fact that he has never run away from the defendant is an indication that he likes to live with him.

The question of accommodation of the children must also be given special attention. It will serve no good purpose to give custody to a parent who has no house or means of renting a reasonably good house. The parties' matrimonial home in the present case has been given to the plaintiff and this means that the defendant and Mathealira must leave that house and rent a house or go and live with the defendant's parents. The defendant's salary is M1 550-00 gross and may afford a rent of about M200 per month. Alternatively he may go and live with his parents for some time before he gets a suitable house. From the little that was said about the defendant's parents during the trial, I had the impression that they are a well to do family with reasonable accommodation. They have lived with their grandson for some time and it seems that he was happy with them. I should not be understood to mean that this Court can make an order that Mathealira should go and live with his grandparents, about whom the Court knows almost nothing, and to allow the defendant to live away from him. I mean that if there is enough and suitable accommodation at the home of the parents of the defendant he may live there with his son. But the Court cannot allow the defendant to leave Mathealira in the care of his parents while he is living elsewhere. As soon as that happens the plaintiff shall have a right to complain and to have the order varied.

I am aware that separating children from one another is rather unusual but it is sometimes done when the uprooting of a child from the environment it is used to may cause more harm than good. I have already said that Mathealira does not seem to like to live with his mother and even ran away from her. He is now ten(10)

years old and seems to be attached more to his father than to his mother. In Kennedy v. Kennedy, 1929 E.D.L. 257 children were separated and given to the two parents. In the present case the two children go to the same school where they meet every day.

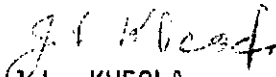
The maintenance of the girl, Nomazondo whose custody will be given to the plaintiff, creates some problems as well. The salary of the plaintiff is just over M1 200. She is going to continue to repay the loan for the house. It was not made clear what the monthly instalment is. On the other hand the defendant may have to rent a house if he is not accommodated at his parent's home. Each spouse shall have to continue to pay a housekeeper because they are working. Taking all these factors into account I am of the opinion that the defendant can afford M100 per month.

For the foregoing reasons I make the following order:

- (a) The defendant shall forfeit the house, all furniture and the motor vehicle which was bought by the plaintiff with her own money (Reg. AB 780);
- (b) Custody of Nomazondo is given to the plaintiff;
- (c) Custody of Mathealira is given to the defendant;
- (d) The defendant shall pay M100 per month as maintenance of Nomazondo; the money shall be paid on or before the last day of every month with effect from the 31st July, 1989;



- (e) The defendant shall contribute an amount of M700-00 towards the legal costs of the plaintiff;

  
J.L. KHEOLA  
JUDGE

7th July, 1989.

For the Plaintiff - Mr. Mafisa  
For the Defendant - Mr. Matsau.