CIV/T/401/85

IN THE HIGH COURT OF LESOTHO

In the matter of :

MANASE LEETO TEKANE Plaintiff

V

PAULINA PUSELETSO TEKANE Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 8th day of November, 1989.

In this case Mr Leeto Tekane has sued the defendant Puseletso Tekane for divorce in terms of summons issued on the 10th June, 1985. He also claims the forfeiture of the benefits arising from the marriage, and the custody of the four minor children of the marriage. This prayer was later abandoned. He claims further the costs of suit and further or alternative relief.

The defendant opposes this summons and makes a counter-claim for divorce based on plaintiff's adultery with one Matseliso Makhonofane also known as 'Machitja Chitja. In the alternative she claims an order for restitution of conjugal rights, which if not restored then a decree of divorce on account of the plaintiff's desertion and in her prayers she asks for forfeiture of the benefits of the marriage and that she be given the sole custody of the minor children of the marriage plus costs of suit.

In the course of the pleadings she changed her stance and amended her counter-claim and said that she wanted the

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court to award her Judicial Separation and that she be awarded the custody of the children and she also claimed in the same amended counter-claim the forfeiture of the benefits of the marriage.

Her basis for changing her claim appears in the affidavit on page 8 para. 4.2 of the averments where she said!

> "I have given a considerable thought to the prayer for divorce over a long time. I have come to the conclusion that, I still love my husband and hope that he will eventually return home and reconcile at some future time. I am desirous of amending my summmons by substituting a prayer for divorce with a prayer for Judicial Separation."

I heard the evidence given by both parties. I also heard the submissions made by their respective counsel, and as properly put by counsel for the plaintiff, the whole matter appears to me to turn on credibility and inferences which may be drawn from the evidence. Thus the court is called upon to find if there are any reasonable inferences, that if the defendant did not commit adultery with Maqheane then somebody must have done so.

In the submissions made, I was told that the defendant said Bonang Maqheane was the friend of the parties' family, further that he continued visiting their marital home even after the plaintiff had gone away from the home. We are told that Maqheane stopped the visits in 1987 after the plaintiff said he didn't want to see him there. The point was made that the defendant admitted attending a family planning clinic to insert some contraceptive device to prevent pregnancy. This she said in her explanation was in accordance with the practice she adopted whenever she was suckling a baby. Asked why she persisted in this practice even a year and some fraction of a second year after her husband used to come and threaten her and say that he could do anything to her as she was still his wife. By this she understood that her husband would prevail on her to offer him sex against will.

It was submitted that the probabilities are that she

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took preventive measures against pregnancy in order to facilitate her enjoyment of sex with someone else, and the court was accordingly asked to reject her version that she adopted these measures as a safeguard in case her husband overpowered her in his demands for sex.

The basis for this submission for the rejection of the defendant's version was that, when asked whether anything had happened between December, 1985 and April, 1988, to indicate that the husband would come back to her, it appeared that the husband never had sex with her during that time. I was asked to regard as significant the fact that she amended her counter-claim during this intervening period, yet there hadn't been anything that had occurred to indicate that the husband would be reconciled with her.

I was asked to consider and give serious view of the fact that no indication or evidence was adduced that notwithstanding that the plaintiff was sleeping with Mrs Chitja, he still showed that he had interest in the defendant. I was also asked to consider therefore that hers was merely a made-up story about possibility of the husband demanding sex, moreso because her reasons for her demand for separation were quite different from the reasons she gave for changing her claim for divorce.

It appears that her reason for claiming Judicial Separation was to safeguard her custody of the children.

As stated earlier the plaintiff does not insist on custody of the children. With regard to property it was argued for the plaintiff that the court was seized with the matter mainly of divorce and that it couldn't be competent for it to decide on how to have property divided. If the court makes an order of divorce then it could competently make an order of forfeiture. I was told that the question of the division of the estate in the event that either separation or divorce is granted is the matter that concerns the liquidator and it was said that no order for division is called for, for it is not a matter for inquiry

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in this court and further that if in fact it could be a matter for such inquiry then it would be proper to bring it at a later stage, possibly through a liquidator.

Mr Matsau regretted the archaic nature of the law, and urged the court to perhaps on its own motion depart from the system of law as known to date. I find this very difficult to do. No doubt for making this submission he had in view the fact that in the present proceedings it appears that the marriage is just but an empty shell.

I have had reference to C of A (CIV) 1 of 1978 the Court of Appeal decision in the case of Tsoanamatsie vs Tsoanamatsie (unreported) at page 3 where Maisels P. as he then was said:

> "The proceedings in the court below undoubtedly took an unsatisfactory turn, and the learned Judge probably irritated by the conduct of one or both of the legal representatives finally decided that whether the appellant wanted a divorce or not, she was going to have one. He accordingly granted her a divorce, despite as I have already said her statement that she did not want one. I am of the opinion that the learned Judge erred in this regard, and that there was no basis upon which a decree of divorce could under the circumstances be granted. It follows therefore, that the order granting a decree of divorce must be set aside."

If I may go back on the same page to give some idea of what was going on in that case, the learned Maisels P. said:

> "It is clear in law that it is open to a plaintiff and in this regard the appellant was at that stage the plaintiff who had decided not to proceed with the divorce, to apply that an action for divorce should be withdrawn, and indeed to apply for discharge of a Rule Nisi had such been granted. In such event the court has no alternative but comply with this request. In this connection, I refer to the case of Radomsky vs Radomsky 1961(3) S A R 613 at page 615"

In reply Mr Moiloa told the court that it was an error that in the amended counter-claim, the question of the children's maintenance was omitted and he explained that this was partly because there had been other proceedings

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in the form of an application CIV/APN/157/88 wherein an order was asked for maintenance pendente lite. He accordingly moved the court for an amendment and proposed that the amount reflected as claimed in CIV/APN/157/88 be awarded as an Order of this Court. He buttressed his application by showing that no prejudice to plaintiff would result, moreso because the plaintiff's financial position had been revealed in its entirity and that the financial position of the defendant too had been disclosed in evidence.

He submitted therefore that there would be no danger of possibility of defendant being taken by surprise about his obligation to pay maintenance in the amount stipulated in CIV/APN/157/88. In that CIV/APN/157/88, it appears that the defendant had sought for herself an amount of M200 per month maintenance, she had also claimed on behalf of the children maintenance at the rate of M150 per month per child. The amounts reflected were based, I am told, on the assumption that the plaintiff was earning at the time M1500 per month and further that this occurred at the time when the defendant was out of employment; as, following the events of 1987, she was no longer working for Mr Mafantiri. I was asked to take into account the fact that one of the children had just written Std 7 examinations. The two following her are in the primary school and their fees range between M20 and M25 per annum. The youngest is not yet school going.

It was submitted that a fair amount of evidence is available to enable the court to assess the amount of maintenance required, and that the court relying on the inter locutory application should be able to make a fair assessment of the requisite maintenance.

Very ably I was addressed on the main action, that certain issues, a good number of them in fact are common cause in this matter, namely that

(1) The parties were married on 26 March 1975 in community of property;

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(2) That four children were born, the first in November 1976, the second in November 1977, the third in November 1982, the fourth in December 1984.

It was also brought to the court's attention that the parties have a matrimonial home at Thabaneng some eight kilometres out of Mafeteng, further that it is common cause that they have an undeveloped site at Mafeteng urban area near the hospital; the fifth common cause is that the parties' elder sister Mrs Masello Ramalefane is the nearest relative to them in Mafeteng.

It was pointed out that no dispute as to the closeness of this lady to the parties ever since their marriage was raised. The sixth point is that around 1985, the plaintiff left the matrimonial home and went to live with ,Machitja Chitja. I need but refer a little to the evidence here namely the fact that the plaintiff seemed insenced to be said to be living with Mrs Chitja instead of Mrs 'Matebesi Tekane, but what appears in the plea to the counter-claim where an issue was made of the fact that Machitja Chitja is his concubine, it appears that he raised no objection whatsoever to the use of the name 'Machitja Chitja as against Matebesi Tekane. The seventh point which is common cause is that Mrs Chitja has three children by Mr Chitja and the plaintiff testified that he and mrs Chitja have procreated a fourth child. The plaintiff has been diverting his financial ability towards support of Mrs Chitja's children. The nineth point which is common cause is that the plaintiff purchases 50 kg mealie meal 50 kg bread flour for the defendant and the children and at times 20 litre paraffin for their use.

The defendant on her part claims that, this level of support is highly inadequate and that consequently she and the children are not properly maintained. It was submitted that the plaintiff sought to prove his case on two legs, first that there was an illicit love affair between the defendant and Mafantiri. I need at this stage interpose and point out that, neither on the pleadings nor in evidence before me has it been proved that there

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was adultery between Mafantiri and the defendant. The second point on which the claim for adultery is based is that the defendant and Bonang used to commit adultery.

One other point which would avail if properly pleaded and supported in evidence was an allegation that the defendant denied plaintiff marital priviledges.

Mr Moiloa submitted that in the amended summons this matter seems to have faded into oblivion and he properly pointed out that it didn't feature nor was it pursued in evidence.

The court was invited to consider the evidence on which the love affair with Mafantiri was based, and later to consider the evidence on which adultery with Maqheane was based.

The plaintiff said Mafantiri took particular care to see that the defendant was delivered at home when she knocked off from Mr. Mafantiri's shop where she used to work at Mafeteng.

The plaintiff also testified that this shop used to close very late. The plaintiff in evidence brought to the attention of the court a particular Sunday morning when Mr Mafantiri came to the parties' home, took defendant along with the plaintiff to his shop at Mafeteng so that the defendant could hand over the money to Mr Mafantiri from the shop. The plaintiff says on that occasion the defendant looked lovingly at Mr Mafantiri. He went further to explain that he thought the manner in which the defendant looked at Mr Mafantiri disclosed a suspicious relationship between Mr. Mafantiri and the defendant.

I was told, and this was common cause, that Mr Mafantiri was driving a van the three were seated in it. The defendant was sitting next to Mr Mafantiri and next to the defendant was the plaintiff. They were sitting in the same seat; that is, side by side.

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Regard being had to the evidence that the plaintiff led in this regard, namely as to this looking at Mr Mafantiri in a loving manner it would seem that in order to look at Mr Mafantiri anyhow, lovingly or otherwise, the defendant would necessarily look away from the plaintiff. Now I wonder how plaintiff is able to discern from the face of a person facing away from him that she was looking at Mr Mafantiri in any manner as against any other manner. Very properly therefore I find that the submission by Mr Moiloa on the point that there is no evidence to prove the allegation made by the plaintiff in this matter, is valid.

The plaintiff, I am told suggests that the court should conclude that the reason why Mr Mafantiri ensured that the defendant was delivered at home was that Mr Mafantiri was in love with defendant. Besides this assertion there is no evidence to support this suspicion. It was accordingly submitted that these suspicions were totally without foundation and that they only indicate an irrational mind that suspects even the most innocent things which concern the plaintiff's wife. I was asked to consider that Mr Mafantiri acting as he did by delivering the wife of the plaintiff from work where she had knocked off late, was reasonable.

I was told by the plaintiff that the deliveries were effected by either Mr Mafantiri himself or his wife or by the drivers. I do recall that in evidence when taxed about what really was wrong with Mr Mafantiri or his drivers taking the defendant to the plaintiff's home at night, he told me that by Mafantiri he meant the drivers themselves.

Well, in that regard I need hardly point out that Mafantiri is Mafantiri and his drivers are his drivers. The two are never one and the same.

With regard to the affair which is said to have existed between defendant and Maqheane, the following submissions were made; it was submitted by the defence

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counsel that the alleged adultery between Maqheane and the defendant is based on the evidence that one evening plaintiff and Maqheane were travelling from Welkom to Mafeteng. During the journey the plaintiff and Maqheane had a quarrel concerning the defendant, to the extent that they had to be separated as they were about to fight.

The plaintiff says Maqheane told him he was going to the defendant. I was invited to regard this as most unlikely because illicit lovers don't behave in that manner. I was asked also to consider that the fact that the plaintiff and Maqheane alighted at the same bus stop at Thabaneng has the effect of compounding the lack of credibility of the plaintiff's story, because how, it was asked, could Maqheane being aware that the plaintiff was no longer staying at Thabaneng but elsewhere, how then could he, seeing him alight at Thabaneng, make so bold as to head for the plaintiff's home, when the two had simulteneously dropped off at a place which suggested that they were both headed for the same place? The court asked the plaintiff if Maqheane was aware that the plaintiff was following him. He answered that he didn't form the impression that Maqheane was aware.

It was submitted on this score that clearly the answer that the plaintiff gave to the court was false, regard being had to the circumstances surrounding the matter, namely that Maqheane was going to the defendant. It was common knowledge, I was told, that the plaintiff was living at Motse-Mocha not Thabaneng which is defendant's home. Motse-Mocha is a good distance away, at least 8 kilometres apart from Thabaneng.

On this basis it was submitted that it was improbable that Maqheane would not have realised that the plaintiff was following him. A further point of absurdity in the plaintiff's evidence was highlighted as follows:

Maqheane got into the house. The plaintiff had been following him. The plaintiff stopped at the bedroom window,

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For some strange reason the curtain to that window had not been closed so that the plaintiff was able to see what was going on inside. This however is contrary to what evidence given earlier by the same plaintiff namely that, he was able to see what was going on inside because the curtain was slightly ajar. This differed anyway from what plaintiff had earlier told the court that he was able to see what was going on because the curtain was transparent, but presently he told me that the curtain could not be seen through but that he was only able to see through it because it was slightly ajar.

It was further pointed out that it is absurd indeed that the plaintiff could have watched for no less than thirty minutes the goings - on in the bedroom without reacting one way or the other. He said he saw Maqheane remove his shirt and remaining with vest and hobbling into the bed. Maqheane, it is said, did not remove his trousers and counsel for the defence asked the court to cast doubt on this aspect of the matter regard being had to the fact that Maqheane is portrayed as having come for no other reason than sex with the defendant.

It was submitted that the plaintiff did not tell the court what he observed throughout the thirty minutes that he remained watching; and indeed if anything happened I am certain that the plaintiff would have seized on it and told the court about it without any hesitation whatsoever. Accordingly it was submitted by the defence that this was nothing else but a concortion. In trying to explain why he couldn't feel that his honour had been injured by a man sleeping with his wife in his full view he said he didn't care for the defendant, he had no interest in defendant. Now, asked why then did he follow the man whom he knew was headed for defendant, he said that he wanted to grab some evidence about the defendant's infedility.

But now what followed, it was submitted, tended to negate the attitude of a person who does not care, for he went to peep at the defendant's window yet his whole purpose

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was to go and find evidence. There was available evidence which we are told consisted of people just a few metres away from the house of the defendant but he did not avail himself of their evidence. He went instead to report the matter to the chief's place. He found that the chief was asleep and that the chief was suffering from the type of disease which would not be commensurate with his health if he was aroused from it. Therefore he consequently communicated his complaint to the chieftainess who advised him to go to the Mafeteng Police. That necessitated his walking some 8 km.

Counsel for the defence asked the court to observe that according to the declaration, this was in mid-June and that that month as known in this country is very cold indeed especially at night. His endeavour to present his plea to the Police was thwarted by the fact that the police gave him no help, whereupon he went to Mrs Chitja's home at Motse-Mocha where he awoke a youngman of 20 years called Kolisang to travel along with him to Thabaneng where they sat on a hill-top overlooking the defendant's house throughout that balance of the night.

It was during this time or at the end of this time that the plaintiff said he saw Maqheane move away from the plaintiff's home in the morning no attempt having been made by the plaintiff to wake up the neighbours to come and witness the disgraceful thing that his wife and Maqheane must have been engaged in during that night. I have no hesitation in accepting the submission that this indeed is a very hollow and clear example of untrue evidence.

Adultery of necessity consists in a sexual act. Just sleeping side by side with a female who happens to be the plaintiff's wife is not adultery. It is indeed common that by its nature, adultery is not performed openly. It is for this reason that proof of its commission is a matter for inferences. Now in this instance we are told that the plaintiff was watching when his wife was sleeping with

Maqheane and it would seem that, that was a direct evidence but which falls short of what was actually happening. In that regard therefore I find that there couldn't have been any adultery between the plaintiff and the so-called Maqheane.

Surrounding circumstances regarding, for instance, the part played by the Chieftainess Sempe have not been invoked yet she is still alive and she hasn't been asked to come and testify in order to give support to the plaintiff's story. No reason has been given why Kolisang whose sole purpose to accompany the plaintiff to plaintiff's home that night was to witness this strange thing which was happening has not been called. The defendant in her response to these charges told the court that she never committed any adultery with Bonang Maqheane and that the incidents referred to by the plaintiff never occurred. She told me that she sleeps with the children in the bedroom when the plaintiff is away.

I have no doubt concerning the demeanour of the witnesses who gave evidence before me that hers was a superior form of evidence to that of the plaintiff. The plaintiff was given to evasiveness and lack of candour. The court was invited to make an adverse finding against the defendant for she went to the Family Planning Clinic and had the contraceptive divice which she inserted into her procreative organs. If ever there was some weakness in her evidence, this would tend to constitute it's weakest part, but her explanation as to why she went for this treatment seems to commend itself to my favour because she said she took this precaution against pregnancy in case plaintiff came home and forced her to have sex with her.

She regarded herself as the plaintiff's wife and she showed that on previous occassions she had resorted to this means of taking precautions against pregnancy because it so happened that the second child came at embarrassingly too short an interval after the first. Regard being had to the manner in which she held her husband .. in

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utter awe it would seem not unreasonable that she felt that should the husband enforce his marital privileges she would not resist him without sustaining injury or harm to herself. Credence is given to her version because it is hard to imagine that if the husband appeared and demanded his privileges as the defendant feared she wouldn't have had any time to go and look for contraceptives from the clinic. The heat of the moment would not allow that sort of delay.

The tenor of the evidence has clearly shown that the plaintiff was a kind of a bully, hence clearly if the defendant felt she was going to come off worse if the plaintiff demanded sex and she resisted him, hers would be to succumb. But to provide for all eventualities it would be wise if she kept contraceptives at the ready.

I had occasion to read the second edition of the South African Law of Husband and Wife by Hahlo at page 323 where it is said:

> "The purpose of making a decree relating to the property rights of spouses is to establish a modus vivendi while the spouses live apart and not to punish the guilty spouse. Consequently, no decree for forfeiture of past benefits is competent. It is not within the court's discretion to order that, as a penalty for his misconduct, the guilty spouse shall loose the financial benefits which he has derived from the marriage in the past. See Skiart vs Skiart 1924 page 45 N.L.R. at 104."

However, Mr Moiloa in support of the proposition that it is within the court's discretion acting judicially to decide and apply an order of forfeiture even where only Judicial Separation and not divorce is sought by the innocent spouse, referred me to a footnote in Hahlo at the same page 323 wherein a passage appears reading:

> "But See Brower Brakia, 2.29.17, who says that separation, though it does not dissolve the marriage is a species of divorce and that consequently benefits which would be lost in a case of a full divorce should also be forfeited in the case of a separation. This proposition seems to have support from Voet 24.1.18 and Van den Berg and other ancient writers."

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However, Mr Matsau relying on page 419 of the same edition of Hahlo referred me to a passage which comes after the one saying:

> "In old law the court could go further than ordering forfeiture of the benefits which the defendant had actually derived from the marriage. It could in its discretion order that the defendant should forfeit the whole or part of his own estate or of his own contributions to the joint estate. This rule is obsolete in morden law."

Be it remembered that in a counter-claim the parties reverse positions.

The passage I was referred to by Mr Matsau says:

> "Save in conjunction with a decree of divorce or Judicial Separation an order of forfeiture of benefits cannot be granted during the lifetime of the spouses. This means it is only with regard to divorce and Judicial Separation that an order of forfeiture of benefits can be granted during the lifetime of the spouses. But it seems to me that with regard to Judicial Separation the order or forfeiture should affect the future and not the past," because to use the words of the learned writer, that is Hahlo, at footnote 20 at page 419": It will be remembered that in conjunction with a decree of separation forfeiture of future but not past benefits maybe ordered. See 323-4 loc. cit.
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> It would seem therefore that the exercise of the Court's discretion is restricted to an award of future benefits only where the innocent spouse claims only Judicial Separation instead of divorce, even though the basis of his claim for the remedy he or she seeks is as good for the divorce as it is for the lesser remedy of Judicial Separation that he or she seeks."

I find that there is merit in Mr Matsau's submission that the order regarding the manner in which the joint estate is to be gone about should be a subject of further and different proceedings.

The same view should avail in respect of the question of the rate of maintanance because by mistake no application was made as to the rate of the requisite maintanance of the defendant and the spouses' children. But

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because the children cannot be suffered to be without maintanance in the meantime I would order that they be supplied with two pockets of 50 kg wheat flour and two pockets of 50 kg mealie meal plus M100 to the defendant for the household necessaries per month pending the institution of proper proceedings for maintanance.

The plaintiff's claim for divorce is dismissed with costs and the defendant's counter-claim as amended is upheld. Her prayer for forfeiture of the benefits to the extent that it affects the past is refused.

J U D G E.

8th November, 1989.

For Plaintiff : Mr. Matsau
For Defendant : Mr. Moiloa