

CIV/APN/109/89
CIV/APN/111/89
CIV/APN/116/89

IN THE HIGH COURT OF LESOTHO

In the matters between:-

'MAMOSIAKO ATHALIA MODISE

Applicant

and

PHILLEMOK MOKALAKE MODISE

Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 16th day of June, 1989

These three applications deal with the same matter regarding the suspension of a husband's marital powers. He has also counterclaimed and asked that the wife should be ordered to restore to him certain property which belongs to the joint estate.

In CIV/APN/109/89 the wife sought and obtained ex parte an order in the following terms:-

- (a) The Respondent shall not be restrained from alienating, dealing with, disposing of, transferring and encumbering in any manner whatsoever any movable or immovable property wheresoever it may be situated forming part of the joint estate of the Applicant, pending an action instituted by the Applicant against the Respondent and one Itumeleng Gertrude Mokhothu in the High Court of Lesotho CIV/T/180/89.

- (b) The respondent shall not be restrained either personally or through his agents from demanding that the Applicant should hand over to the Respondent Leases, Certificates of title or letters of Allocation in respect of the immovable property, forming part of the joint estate; pending finalisation of the abovementioned CIV/T/180/89.
- (c) The Respondent shall not be directed to pay the costs of this application.
- (d) The Applicant may not be granted such further and/or alternative relief that the Honourable Court may deem fit.

2. That prayers 1 (a) and (b) operate as interim relieves with immediate effect."

In CIV/APN/111/89 the husband anticipated the return day in CIV/APN/109/89 and at the same time brought a counter-application on urgent basis in which he sought and obtained ex parte an order against his wife, Lesotho Bank and Lesotho Building Finance Corporation in the following terms:

- "1. Dispensing with periods of notice required by the Rules on the grounds of urgency of this application.
- 2. (a) Directing First respondent forthwith to release to applicant all such personal belongings and clothing as are required by applicant and applicant's second wife Itumeleng Modise, which are in respondent's matrimonial home.
- (b) Directing First respondent forthwith to release to the applicant the two Form C certificate of title to immovable property at Ha Tsosane village, and the Land Act Lease in respect of one residential site at Ha Tsosane, Maseru Urban Area.
- (c) Directing First respondent to contribute to the costs of this application.

- (d) Directing respondent to restore to applicant a sum of M35,000 (Thirty Five Thousand Maloti) now held in respondent's savings account with the second respondent.
- (e) Directing Third respondent to release to the applicant all sums of money deposited in an unknown account number in the Third respondent's bank by first respondent.
- (f) Granting applicant such further and/or alternative relief as this Honourable Court may deem fit."

In CIV/APN/116/89 the husband sought and obtained ex parte an order against the wife and Lesotho Bank in the following terms:

- "1. (a) The second respondent should not be ordered to freeze the first respondent's savings and/or current accounts, which accounts numbers the applicant does not know, and which accounts are held by the above named respondent, pending the determination of the issues in CIV/APN/109/89 and CIV/APN/111/89 hereof.
 - (b) The first respondent shall not be ordered forthwith to cease withdrawals from the said banking accounts.
 - (c) The first respondent should not be ordered to pay the costs of this application.
2. Prayers 1 (a) and (b) above should operate as interim relieves with immediate effect."

On the extended return day all the three applications were argued at the same time. In CIV/APN/109/89 the respondent/husband consented to the granting of prayer 1(a) provided that the words "dealing with" were deleted from the final order. The applicant/wife agreed to the granting of the final order without those words.

In CIV/APN/111/89 the parties consented that the order 2. (a) be confirmed. The parties agreed that order 2. (e) be discharged in the sense that the applicant/husband shall leave the respondent/wife to operate the accounts on condition that the husband must have access to them.

For convenience I shall refer to the parties as husband and wife. The material facts in all these applications are not in dispute. The parties were married by civil rites in community of property in Maseru on the 18th February, 1963. Three children were born of the said marriage and they are presently all majors though the last one, John is still attending school. The first-born, Mosiako, is married and has his home at Ha Tsosane in the district of Maseru. The unnumbered residential site on which Mosiako has built his house was allocated to his father and he has a Form C for it. The last two children are still living with their mother on the parties' marital home at Ha Tsosane. The husband has a lease for the site where the marital house is situated.

The parties have another unnumbered plot at Ha Tsosane at Naleli where rooms have been built for hire. There is yet another unnumbered plot at Ha Tsosane where a two-roomed house has been built. That house is earmarked for their second-born son.

It is common cause that the lease and the Form Cs for the four plots mentioned above are in the custody of the wife at the marital home.

It is also common cause that at the moment the husband is living with a certain woman called Itumeleng Gertrude Mokhotu at a plot not far from the marital home of the parties. In January, this

year the husband purported to enter into a customary law marriage with the said Itumeleng. He paid M1,080-00 to the parents of the said Itumeleng as "bohali". In 1978 he acquired a plot at Naleli Ha Tsosane and during 1987 he built a house there. Certain improvements were made to the house in 1989. This is the house in which he is now living with Itumeleng. The wife estimates the value of the house to be about M150,000. The husband is not in a position to deny or to admit that estimate. It is common cause that the house was built with funds from the joint estate.

The wife denies that the husband went to live in that house with Itumeleng through her permission. She also denies that she drank heavily and flirted with men.

It is common cause that at one time the husband pledged the matrimonial home as security to Lesotho Bank for a loan or overdraft facilities to the sum of M50,000-00. He did not inform his wife and he says that he ^{was} not under any obligation to inform her. The loan was repaid in 1987 and the husband authorised the Lesotho Bank to release the lease to his wife.

There is a dispute of fact as to the time the husband moved out of the matrimonial home and went to live with Itumeleng. The wife says that it was in 1983 but the husband says that he started living with her in 1987. He states that from 1983 he merely visited Itumeleng at her place. I am of the opinion that the dispute cannot affect the outcome of the case in favour of any party on the main issues.

The husband admits that he floated a private company known as Modise International (PTY)LTD. He denies that he floated it with Itumeleng as a director, she was the secretary of the company and only became a director when other directors resigned.

It is also common cause that on the 24th May, 1988 when the husband was in detention in London he sent a letter and/or power of attorney which authorised the General Manager of Lesotho Bank to release to his wife the amount of over M150,000-00 from his company's account and to use the same for the benefit of the joint estate (see Annexure "M.A.M.4" to the founding affidavit in CIV/APN/109/89). The wife deposes that she used the money to build five big double rooms for hire and paid for their son's air trip to London to attend his father's court cases. She also built a house for their second son. She deposes that when the money was released to her Lesotho Bank opened an account in her own name in which the money was deposited. It is the balance in that account which the husband wants to be restored to him.

At a family meeting held on the 29th April, 1989 the husband demanded that she must release the money in her account to him together with the Form Cs and the lease. She refused to do so.

On the 21st March, 1988 the husband made a will in which he bequeathed to Itumeleng Mokhothu the residential site at Naleli ha Tsosane. He bequeathed the rest of and residence of his estate, both movable and immovable, to his wife. (See Annexure "M.A.M.3" to the wife's founding affidavit).

The law was clearly stated by Ramsbottom, J., in Mundy v. Mundy, 1946 W.L.D. 280 at p. 283 where is said:

"Although pending action, the husband is in possession of assets, an undivided half of which belongs to the wife, and although on division of the joint estate a divided half will be awarded to her, until that occurs the husband is lawfully in possession of the assets and is lawfully entitled to deal with them in his administration of the joint estate. I do not know how he can be restrained from doing that which in law he has the right to do. If an unlawful dealing with the assets is reasonably apprehended, i.e., if there is a reasonable apprehension that he will dispose of the assets so as to defeat his wife's rights, he will be restrained from doing so, but it follows, I think, that a reasonable apprehension of unlawful dealing must be shown,"

In Pretorius v. Pretorius and another, 1948 (1) S.A. 250 it was held that before a wife, married in community, can attack the exercise by her husband of his powers in dealing with the joint estate, or her share in it, she would at least have to show, viewing the matter subjectively, that the circumstances rendered it probable that the husband had her rights in mind when he entered into the impugned transaction and that he appreciated that it would prejudice those rights; and, viewing the matter objectively, she would at least have to show that the transaction was in all the circumstances an unreasonable one for the husband to enter into.

In Pickles v. Pickles, 1947 (3) S.A. 175 it was held that a wife married in community of property is entitled to an interdict against her husband where a reasonable apprehension is shown that pending an action for divorce on the ground of adultery the husband will make donations to the woman cited as co-respondent. Donations from the joint estate by a husband to a woman with whom he is living in adultery is vis-a-vis the wife, at least after the institution

of an action for divorce by her, a wrongful dealing by him with the joint assets and prima facie amounts to a fraud on the wife.

In the present case the wife has proved that before she instituted the divorce action under CIV/T/180/89 the husband had been living in adultery with Itumeleng. In 1989 he purported to marry Itumeleng by Sesotho customary law rites. On the 21st March, 1988 the husband made a will in which he bequeathed one of the plots belonging to the joint estate. It was submitted on behalf of the husband that the provisions of the will shall operate only when the husband dies and that at the moment the plot remains part of the joint estate. It was submitted further that the husband may even rescind the will before his death. It is correct that the will does not operate with immediate effect but the question is whether the wife's apprehension that the husband is likely to dispose of the assets unlawfully, is unfounded or reasonable. It seems to me that the wife's apprehension is reasonable because the husband has already started to make donations to the woman with whom he is living in adultery. The will may not have immediate effect but it is a legally binding document which may be put into effect when its maker dies. That will affect assets of the joint estate to a very large extent because the value of the house on the plot is estimated at M150,000.

The husband has stated that he wants to institute proceedings to nullify his marriage to his wife on the ground that at the time they purported to enter into their marriage the wife was still validly married to another man. He is presently living in adultery with Itumeleng. He wants this Court to order that an amount of M35,000-00 which is in the wife's savings account with Lesotho Bank be released

to him. Money changes hands very easily and quickly. What will stop the husband from disposing of it as soon as it is released to him? His attitude towards the wife is very clear. He regards her as not his lawful wife because she cheated him into marrying her while she was still lawfully married to another man. Furthermore the wife has already instituted a divorce action. Her prospects of success seem to be very high because the husband has admitted that he is living in adultery with another woman although he claims that his wife consented to or condoned the adultery.

I am of the opinion that the assets of the joint estate should be protected as far as possible from unlawful disposition by the husband. I am not saying that the wife should be given a free hand to dispose of the assets of the joint estate pendent lite. She must also be restrained from disposing of those assets which are in her possession.

In the result I make the following order:

- (a) The respondent/husband is restrained from alienating, disposing, transferring and encumbering in any manner whatsoever any movable or immovable property wherever it may be situated forming part of the joint estate of the respondent/husband and the applicant/wife, pending the finalisation of an action instituted by the applicant/wife against the respondent/husband and Itumeleng Gertrude Mokhothu in the High Court of Lesotho under CIV/T/180/89.

- (b) The applicant/wife is ordered to surrender to the Registrar of the High Court of Lesotho for safe keeping all leases, certificates of title or letters of allocation in respect of the immovable property forming part of the joint estate pending the finalisation of the abovementioned CIV/T/180/89.
- (c) The applicant/ wife shall forthwith release to the respondent/husband all such personal belongings and clothing as are required by the respondent/husband which are in the parties matrimonial home.
- (d) Lesotho Bank is ordered to freeze the savings and/or current accounts of the applicant/wife ('Mamosiako Athalia Modise) which accounts numbers the respondent/husband (Phillemon Makalake Modise) does not know, which are held by applicant/wife, pending the finalisation of CIV/T/180/89.
- (e) The applicant/wife is ordered to cease forthwith withdrawals from the said banking accounts.
- (f) The applicant/wife is allowed to operate the accounts she has with the Lesotho Building Finance Corporation but the respondent/husband shall have access to them.
- (g) The applicant/wife shall continue to collect rentals for the couples immovable property and to use the money for the benefit of the joint estate.
- (h) Each party shall bear its own costs in all the three applications.

J.L. KHEOLA

JUDGE

16th June, 1989.

For the Applicant - Mr. M.T. Matsau
For the Respondent - Mr. H. Phoofolo