CIV/T/660/86

IN THE HIGH COURT OF LESOTHO

In the matter of :

ROSALIA 'MALERATO MOERANE Plaintiff

V

NICODEMUS KOPANO MOERANE Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 9th day of August, 1989.

The above parties are wife and husband.

They were married on 2nd August 1969 by Christian rites in Community of property. The marriage was solemnised by the African Methodist Episcopal Church at Thaba-Khupa, Lesotho. A copy of the marriage Certificate was handed in and marked Ex."A" for the record.

Since 2nd September 1982 the parties have been living apart pursuant to a Court Order and pursuant to a Deed of Settlement that was in turn made Order of Court. See Exhibits "B" and "C".

It was part of the deed of settlement that plaintiff should deliver movable items of property consisting of furniture, specified pots and defendant's clothing to the defendant.

However the defendant was content to have only the clothes belonging to him delivered to him, and did not insist on the delivery of other items because he felt they would be needed by members of his family i.e. six children in all born between 1967 and 1982. The

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first of these siblings is the only girl 'Mampiti Moerane. The rest are boys.

It was a further part of the Deed of Settlement that the house at Mohalalitoe should remain with the plaintiff together with all other items not mentioned in paragraph 2 of the said Deed. The five minor children were also to remain in the custody of the plaintiff subject to the defendant's right of access to them at reasonable times. At the time of the drawing of the deed it appears the sixth child Bokang was not yet born for the Plaintiff's Declaration shows he was born the following month on 8th October 1982.

On papers and in evidence led before me the plaintiff sues the defendant for divorce on grounds of malicious desertion.

The basis of the plaintiff's claim for the suit is that whereas the Judicial Separation was intended to give the plaintiff a break from matrimonial tribulations, and afford the parties a cooling off period during which to weigh and consider the merits and demerits of reconciliation the defendant went twice to the plaintiff at the matrimonial home and viciously attacked her with the result that on one occasion she lost some of her teeth while some of those remaining were rendered lose to date, due to kicks effected from defendant's shod feet.

It is common cause that to date the defendant has been paying a total of M20 per month for the maintenance of those of the children who are not self-supporting. The eldest 'Mampiti is now married. To that extent the parties' family is relieved of the burden of feeding and maintaining her.

The plaintiff asked the court to order the defendant to pay maintenance at the rate of M100 per month per child i.e. a total of M500 per month. She does not know how much the defendant earns by way of

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monthly salary. She last knew that he was earning M150 per month before the order of Judicial Separation was granted. The defendant says he was then earning M85 and is now earning M170 per month.

The defendant testified that he would be prepared to increase the rate of maintenance to an extent that his means allow. It is so far not definite what his means allow. The plaintiff can scarcely be criticised for rejecting this offer because as she said

> "the defendant's means may perhaps allow no more than an increase of M5 which would not go far."

Although the plaintiff swore that the responsibility of paying the school fees for those of the children who are still at school fell exclusively on her, it appears from the receipts produced and issued in the name of the defendant that he has been paying, in 1988, a total of M279 being school fees for Lepekola a son attending at St Agnes High School.

The plaintiff though unsupported by any receipts on her part swore that she has been paying the child's fees at this school and that she usually gave the son the money to pay the fees each time he came looking for them, and never bothered to ask him to produce the receipts as she trusts him.

Asked how she reconciles this state of affairs with her denial that the defendant has also shouldered the responsibility of paying the school fees as illustrated by receipts issued in his own name she conjectured that this may be a trick played by her husband to take the fees handed over to the son and pay it to the school as if coming originally from his own pocket whereas the truth is that the money came from her. She bases this on the fact that the son has closer contact with the defendant as both live in T.Y.

The son has not been called to give evidence.

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Hence this aspect of the matter falls to be decided in favour of the defendant. Moreso because the defendant swore that he personally effects payments and receives the receipts himself, with the exception of one payment regarding which he asked some one else to take the money to the school to effect part payment of the school fees for Lepekola. The plaintiff, much as she trusts Lepekola never obtained a report from him to substantiate her suspicion.

The plaintiff is an employee of the Department of Food Management Unit (F M U) in Maseru. She earns a salary of M200 per month. Having denied that the defendant ever does anything beyond paying the judicial fee of M20 per month maintenance, towards the upkeep of the children conceded that the defendant did at one time buy shoes for one of the children during the period of the parties' separation.

Asked why in the face of a hypothetical question put to her that the past winter was particularly severe hence it seems inconceivable that a father could be so heartless as not to buy a shawl for any of his children to keep out the cold she said she was stopped from elaborating at one stage when she intended pointing at this deed as the sole and exceptional act ever done by the defendant during the period in question. Much as the general trend of the plaintiff's explanation for her failure may appear plausible it nonetheless fails to carry conviction because the hypothetical question put was direct and nothing could have prompted anybody to stop her answering that indeed the defendant met the child's needs in only that exceptional occasion.

The plaintiff said she does not trust that the defendant would keep his word even if he were to be taken at his word that if allowed to live with his wife he would not assault her at all. She says she knows the defendant's untrustworthiness to her cost. Indeed medical forms "D" "E" and "F" are on hand to

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substantiate her claim of the assaults suffered at the defendant's unprovoked attacks. Be it noted that an assault following one of the attacks was treated by two different doctors one of whom was a dentist.

In his turn the defendant stated under cross-examination that he was not happy to be living separately from his wife. Meantime he conceded that it did not seem that he had done much to attempt ways of getting reconciled with his wife during these seven years of leaving separate lives, save that he wrote a letter to one of his parents to this end, but was adviced to also approach his parents-in-law but the proposed meeting never took place.

The defendant doubts whether the plaintiff loves him any longer. In fact he said he never approached the plaintiff during the period between 1982 to 1989 in an attempt to seek ways of bringing their marriage back on track.

As for the defendant's evidence in chief with particular regard to the alleged assaults on plaintiff, one couldn't help feeling that he had much to hide. He tended to ramble on irrelevancies even when repeatedly asked by his counsel to come to the point. It seems to me that he preferred hedging round the focal point. In any event he at first denied ever assaulting the plaintiff but was hard put to it to say if he knew of any rumour to the effect that his wife was attacked by someone else in respect of the assault charges she has now laid against him in the Subordinate Court.

In his evidence in chief the defendant gave a version that is very difficult to believe. Having expressed a particularly hazy recollection of a fight that ever took place between him and the plaintiff he said, after saying that he knew of no day that he and the plaintiff quarrelled, when he came to inquire about the son Tsepo who had been taken to hospital on some complaint, the plaintiff told him that the son was at the mortuary. Thereupon the defendant made to go to

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the mortuary but the wife locked the door and told him there was something she wanted to tell him about. The wife told him between him and her one was going to die. She took a knife from a drawer; so did he. No use of the knives was made as the quarrel was confined to an exchange of words only.

The two thought better of holding the knives and accordingly dropped them. An undicisive fisticuffs fight ensued. The plaintiff had hit him first. This he said took place in 1987.

Besides this he hazily remembers a quarrel which led to a real fight in 1983. As usual the defendant hedged a wall of irrelevance round the main issue. I will cut off the irrelevancies and relate this witness's testimony concerning the cause and the result of the fight.

He said he had occasion to come to the matrimonial home after he had been to his sister's feast at Upper Thamae.

He found his wife selling beer at the house. The wife saw her customers' off during the night. The defendant went to bed with the youngest child.

The plaintiff came back with her friends at about 12:00 midnight and caused a noise that aroused the child from his sleep. The defendant drew this act of irresponsibility to the plaintiff's attention. She in turn told him that she didn't care and let him know to his face that even the blankets he was sleeping in were not his but hers.

Needless to say none of the things that the defendant charges the plaintiff with was put to her.

I am justified therefore in regarding them as an afterthought and production of a mind that busily manufactures evidence as the trial proceeds.

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In argument Mr. Moorosi for the plaintiff conceded that it is not part of our law that a marriage that has irretrievably broken down serves per se as a ground for divorce.

He however emphasised that the question of assaults serves as an indication that defendant does not seriously mean to be reconciled with the plaintiff. His is merely to seek means of frustrating her search for relief because as things stand he doesn't seem to suffer any inconvenience occasioned by the Judicial Separation. In fact the plaintiff's fear is that the defendant regards himself as above the law in that during one of the assaults he demanded conjugal rites from her forcefully and told her that the separation order did not apply to him.

Mr. Moorosi argued that these assaults coupled with the defendant's manifest intent constitute desertion.

In answer Mr. Molete for the defendant argued that the plaintiff is not entitled to the relief sought. He buttressed this arguments by submitting that the prayers for custody and forfeiture of the marital benefits were granted at the end of the Judicial Separation proceedings trial.

It was argued for defendant that the 1987 assault cannot be considered because apart from being denied it is alleged to have occurred after summons was issued.

This would tend therefore to leave us with a single occasion of the assault that took place in 1983 or 1984.

The plaintiff's story was branded improbable in that each time the alleged assaults took place the defendant is said to have come and said he wanted to disfigure or destroy the plaintiff's features, then assaulted her and left.

I was invited to look favourably at the defendant's story that the fight that ever occurred came about because

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there had been drinking followed by some squabble. It was thus asked of me to regard this as a more probable explanation. Much as the high advocacy contained in it is undeniable, but the importance of this valuable submission has unfortunately not been matched by the quality of the evidence led.

I agree that desertion must be based on proof of intent to bring marriage to an end.

It was argued that there couldn't have been an occasion to justify the argument that intent to bring marriage to an end was proved because the parties were living separately following a Court Order. It was further argued that an assault in order to warrant the view that there was intent to terminate the marriage must have carried with it some degree of persistence. I am not aware of any authority for this view, with respect.

It was further argued that arguments advanced for the plaintiff are good for founding a claim for Judicial Separation, but that she has that already.

I am inclined to the view that having listened to the evidence and considered both parties who gave it, the plaintiff was by far a much better witness than the defendant. She was forthright and on the whole giving evidence that had a ring of truth to it. The defendant was evasive and inventive.

In my view an intent to bring a marriage to an end need not be expressed. It is enough that it is implied from a party's conduct.

The order sought was that defendant should restore conjugal rights on or before a convenient date failing which to show cause why the divorce should not be granted. I am aware that the parties are presently living apart due to the fact that the Judicial Separation order is still in force. But because the defendant also said he is eager to live together with the plaintiff again as man and wife it would seem at least technically that

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the Judicial Separation order elapsed during the proceedings in the trial.

Consequently the defendant is ordered to restore conjugal rights on or before 21st August 1989 failing which to show cause on 4th September 1989 why the decree nisi shall not be made absolute.

J U D G E.

9th August, 1989.

For Plaintiff : Mr. Moorosi
For Defendant : Mr. Molete.