IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MAPHOKA MAKARA (born MAKOSHOLO) Applicant

and

MOTSOAKAPA MAKARA Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 19th day of November, 1990

This is an application for an order in the following terms:-

"1. That rule nisi do hereby issue calling upon Respondent to show cause, if any, why:-

(a) Respondent shall not be interdicted forthwith from taking the children and causing them to live out of Lesotho pending the determination of CIV/T/191/90;

(b) Respondent shall not be directed to release to Applicant forthwith Applicant's personal belongings and clothes pending the determination of CIV/T/191/90;

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(c) The custody of the minor children shall not be granted to Applicant pending the determination of CIV/T/191/90;

(d) Respondent shall not be ordered to maintain Applicant and the children in the sum of M200-00 per month for Applicant and M100-00 per child per month pending the determination of CIV/T/191/90;

(e) Respondent shall not be directed to pay contribution in the sum of M600-00 towards Applicant's legal fees;

(f) Respondent shall not be directed to pay the costs hereof.

2. That prayers 1 (a) and (b) operates with immediate effect as a temporary interdict."

To-day is the extended return day of the rule nisi that was granted on the 8th June, 1990.

It is common cause that the applicant and the respondent were married by civil rites · in community of property on the 5th January, 1980 at Mafeteng and that the marriage still subsists. There are two minor children born of the marriage presently in the custody of the respondent. They are: Ntsilane, a girl born on the 19th May, 1980 and Liphophi, a girl born on the 21st June, 1982.

It is common cause that there are judicial separation proceedings pending in this Court instituted by the applicant

and divorce proceedings instituted by the respondent. On the 13th April, 1990 the respondent caught the applicant red-handed at their marital home with another man at night. At about 8.00 p.m. on the 14th May, 1990 the respondent expelled the applicant from their marital home and took her to her brother's home at the Agric College, Maseru. However, the respondent's version is that because the applicant continued associating and consorting with her paramour even after they were caught inflagrante delicto in his house, he decided to take her to her maiden elders for proper counselling.

In her founding affidavit the applicant deposes that when the respondent expelled her he did not allow her to take all her personal belongings and clothes. She was also forced to leave the minor children with the respondent. The respondent has on about two occasions told her that he cannot release her personal belongings and clothes because all the property she acquired during the subsistence of the marriage belongs to him because they are married in community of property. The respondent denies this allegation and deposes that the applicant took all her personal belongings and clothes when she left. Nonetheless, at the hearing of this application Mr. Mahlakeng, attorney for the respondent, admitted that two parcels were left behind. It is not clear whether those parcels were subsequently handed over to the applicant.

The applicant deposes that she has been reliably informed and verily believes that the respondent is about to take their minor children out of Lesotho to live with her sister who stays

in the Republic of South Africa with the sole purpose of denying her their custory in the light of the proceedings in CIV/T/191/90. The applicant has denied this allegation. In her replying affidavit the applicant alleges that since the launching of this application she has been to her children's school at Katlehong Primary School and she found out that the registration of her children for the next term had been cancelled by the respondent because he wanted to take the children to the Republic of South Africa to attend school there. This is hearsay evidence. I am of the view that when this application was launched as an urgent matter the applicant was entitled to rely on hearsay evidence. But when she prepared her replying affidavit the matter was no longer urgent because she had an interdict in her favour. She had the chance to go to her children's school to verify that the children were about to be taken out of this country. She has not obtained any supporting affidavit from the Principal of the school concerned from whom she apparently got the information about the cancellation of her children's registration.

If it is true that the children's registration was cancelled by the respondent the person who did the cancellation would probably be in a position to tell the Court the reason why the respondent was cancelling the registration. I am unable to decide this point on affidavits.

The applicant deposes that the interests of her children will be better protected by her as their mother and not by respondent's sister. In answer to this allegation the respondent alleges that the applicant is not a fit and proper person to be

awarded the custody of their children. He alleges that she is a person of loose morals as evidenced by the incident of the 13th April, 1990. He alleges that any further or continued exposure of his children to such behaviour would cripple their moral upbringing. He deposes further that applicant's illicit affair with her current paramour is not the first of its kind. She will pay more attention to her illicit love affairs to the detriment of the wellbeing, moral and educational needs of their children. I think these wild allegations that the applicant has had other lovers before the present incident ought to have been more specific by giving names of such lovers. In any case I do not think that at this stage it is necessary to decide whether or not the applicant is a fit and proper person to be awarded the custody of the minor children.

Lastly, the applicant deposes that the children and she are in need of maintenance by the respondent pendente lite in the sum of M100 per child per month and M200 per month for herself. It is not disputed that the respondent is able to provide for their maintenance and to contribute towards applicant's legal fees.

Although there are some disputes of fact, I am of the opinion that the matter can be decided on the facts admitted by the parties and on the law regarding those admitted facts. It is common cause that on the 13th April, 1990 the applicant was caught red-handed by the respondent at their marital home with another man. I understand this to mean that she was caught under compromising circumstances which sugested that she had just

committed adultery with that man or was about to do so. The applicant is therefore guilty of a very serious misconduct which goes to the root of their marriage.

In Du Plooy v. Du Plooy, 1953 (3) S.A. 848 the headnote reads as follows:-

> "In an application for a contribution towards the costs of a matrimonial action, custody of a minor child and maintenance pendente lite, what the applicant has to lay before the Court are facts whereon she, should such facts be proved, would succeed in the main action. Should it appear from the respondent's refutation of such facts that she cannot succeed in the main action, or that the possibility that she will succeed is so small that the hearing of the main action would not be justified, then she fails to discharge the onus and has no claim to a contribution towards costs nor to an order pendente lite in regard to maintenance or the custody of the minor child. Should she succeed in discharging the onus on her, the deciding factor, as regards her claim for the custody of the minor child pending the main action, is what will be in the best interests of the child."

The same point was expressed by Schreiner, J. in Butterworth v. Butterworth, 1943 W.L.D. 127 at p. 131 in the following words:-

> "The weight of authority seems to me to be in favour of the view that it is necessary for the applicant to show that she has a reasonable, and not a merely bare or remote, chance of success, but that such proof is sufficient even if there is a substantial balance of probability against her."

In the instant case the trial court in the main actions of judicial separation and divorce is likely to find that the applicant is guilty of adultery and that her main action for judicial separation is not likely to succeed because she has admitted that she was caught red-handed with another man at night in her marital home. It seems to me that the applicant has failed to make out a prima facie case.

As far as the custody of the minor children pendente lite is concerned there is another factor that weighs in favour of the respondent. He has not done anything wrong which entitles this Court as the upper guardian of minor children to deprive him of his children's custody. In Calitz v. Calitz 1939 A.D. 56 at p. 64 Tindall, J.A. said:

> "The non-existence of the common home, brought about as it has been by the wife's unlawful desertion is not a factor which a Court of law can allow to operate in her favour on the question of the custody of the child. As the learned Judge found that she had no just ground for leaving her husband, her duty is to return to him and look after her child under his roof.
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> That being the position, it is clear that the Court was not entitled to deprive the husband of the custody. The learned Judge held that he was a fit and proper person to have the custody. The father had done nothing which entitled the Court in the exercise of its powers as upper guardian to hold that he had forfeited his right to the custody of the child. The fact that the child, being of tender years, would be better looked after by the mother did not, under the circumstances, justify the order made."

It seems to me that the respondent cannot be blamed for the expulsion of the applicant because she was guilty of a very serious misconduct. I do not mean that he was entitled to take the law into his own hands. Staying with a wife who has com...

adultery may make cohabitation intolerable and impossible. The respondent does not seem to have used any physical force in the expulsion of the applicant from the marital home.

For the reasons given above I am of the view that the question of maintenance pendente lite and contribution towards applicant's legal fees must also fail. Furthermore the applicant is not in need of support. She earns a salary of M700 per month and that is enough for her maintenance. I think it is also enough for her legal fees.

In the result orders (a), (c), (d), (e) and (f) of the rule nisi are discharged. Order (b) is confirmed to the extent that the two parcels which were left behind should be released to the applicant if they have not yet been released to her. The applicant shall pay four-fifths (4/5) of the respondent's costs.

J.L. KHEOLA
JUDGE

19th November, 1990.

For Applicant - Mr. Pheko
For Respondent - Mr. Mahlakeng.