

IN THE HIGH COURT OF LESOTHO

In the matter of :

REV. PHINEAS L. PITSO

Plaintiff

V

LEFASO FOULO

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla

on the 2nd day of March, 1990.

In this action the plaintiff sues the defendant  
for :

- (a) Payment of M100,000 being damages suffered by the plaintiff as a result of wrongful and unlawful conduct of the defendant harbouring the plaintiff's wife.
- (b) Interest thereon at the rate of 22% a Tempora Morae.
- (c) Costs of suit, and
- (d) Further and/or alternative relief.

In his declaration the plaintiff has stated that on 7th June 1984, his wife Mrs 'Mamoeti Pitso having been induced by the defendant left the common home where she and her husband lived and went to stay with the defendant with whom she has to date been staying. He further complains that the defendant prevents the

/plaintiff

plaintiff from seeing the plaintiff's wife.

The plaintiff also states that the defendant was at all material times aware that the plaintiff's wife had left the plaintiff without the plaintiff's consent and against his will, yet despite being so aware as indeed the plaintiff even brought to the defendant's notice both orally and by letter dated 4th June 1986 that the plaintiff disapproves of the liaison existing between his wife and the defendant, the defendant took no heed of the plaintiff's admonitions.

It is as a result of loss of affection, companionship and consortium of his wife that the plaintiff claims that he has suffered damages in the sum of M100,000 occasioned by the defendant's wrongful conduct. The plaintiff maintains that this amount of money would suffice to compensate him for the losses he has outlined.

As shown in the defendant's request for further particulars the main thrust of the defendant's case centres on the plaintiff proving the allegation by the plaintiff that the defendant was aware that the plaintiff's wife had left the plaintiff.

The first witness for the plaintiff was P.W.1 Paulina 'Matsotleho Foulo who testified that the defendant is her husband. She and the defendant are not living together because on 22nd August 1986 a decree of Judicial Separation was granted following her plea to the High Court against the present defendant.

It turned out that P.W.1's action against the present defendant was based on the defendant's illicit liaison with the present plaintiff's wife.

P.W.1 stated that the relations between her and her husband started souring in 1977 when the plaintiff and his wife Mrs Pitso came to live in Semonkong in 1977.

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She later gave the year as 1985.

P.W.1 brought to the notice of the plaintiff and his fellow priests the unsavoury goings-on between the plaintiff's wife and the defendant. P.W.1 testified that after the plaintiff had read the letter written to him by P.W.1 and heard the accompanying oral complaint about the plaintiff's wife's conduct towards P.W.1's marriage the plaintiff cried. By reporting this incident to the plaintiff P.W.1 had hoped that the plaintiff would reprimand his wife. However because no change occurred even after the complaint to the plaintiff and his fellow priests P.W.1 took the matter up with her chief.

Meantime P.W.1 met the plaintiff and undertook to take him and one Rev. Morojele to the place where the plaintiff's wife was living with P.W.1's husband at Makhaleng. The trio went on board a vehicle belonging to the landlord who had rented his business premises to the defendant at Makhaleng.

On arrival at Makhaleng P.W.1 showed Rev. Morojele and the plaintiff a house in Mrs Linotsi Sehlabo's yard where P.W.1 once found the defendant and Mr Pitso's wife living virtually as husband and wife.

The defendant recognised these three people when they arrived at Makhaleng. P.W.1 did not greet him but the two priests did. When Mrs Sehlabo took the two priests to some place where they would put up for the night P.W.1 went to hide somewhere. It was when she had remained thus concealed that she saw the plaintiff's wife going on board the defendant's vehicle and leaving along with the defendant in the direction P.W.1 and her company had come along. The plaintiff's wife is said to have come out of the same house where she and the defendant were once observed to be living in by P.W.1.

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At about 6 am. the following day the defendant was seen by P.W.1 arriving alone in his vehicle. On his arrival a meeting was held chaired by Sera Sehlabo the chief's representative.

The plaintiff was given the floor. He briefly stated that he was looking for his wife and was told by P.W.1 where to find her. He further stated that he had seen the defendant spirit away his wife the previous day in the defendant's vehicle.

Thereupon the defendant asked the plaintiff if he saw him carrying his wife on his back. The defendant is said to have been very angry when he uttered these words including a series of swear words and abusive utterances such as the following:

"You Lehlohonolo you will suck your mother. It seems you never did enough sucking of her."

Referring to P.W.1 the defendant is said to have said to the plaintiff

"are you running around with this prostitute of a woman."

P.W.1 informed the court that when she and her company went past the defendant the latter took out a firearm from the back-rest of his vehicle's seat. Thereafter he drove past the vehicle in which P.W.1 and others were driving. Having overtaken P.W.1's vehicle the defendant stopped his vehicle at a stream lying ahead and lifted its bonnet making a show of tinkering at the engine.

It seems to me that although the defendant did nothing with the firearm his mind was bent on making sure that the plaintiff and his company had seen it. The purpose for this can be none other than to inspire them with fear.

P.W.1 and the two priests laid a charge against the defendant when they arrived at Roma Police Station.

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In his evidence P.W.2 the plaintiff said that he first knew the defendant in 1977 when the latter's vehicle was commissioned by the Church to convey the plaintiff's baggage to Phororong where the plaintiff was to assume his duties as a priest.

Ex."C" is a Marriage Certificate showing that the plaintiff and his wife were married by Christian rites in 1965. The plaintiff told the court that his marriage was happy from 1965 to 1983. Since 7th June 1984 he and his wife have not been living together.

In 1983 the plaintiff met P.W.1 who gave him a letter saying that the defendant had a love affair with the plaintiff's wife. This letter has since been burnt by the plaintiff's wife after reading it and threatening to pick up a quarrel with the defendant's wife wherever they would meet.

This letter had been copied to the chief and the Semonkong Police. The chief duly called the plaintiff and the plaintiff's wife as well as the defendant and the defendant's wife. The defendant did not come. The meeting was scheduled for the next day but both the defendant and his wife failed to turn up. However the chief ordered the plaintiff's wife never to go back to the defendant.

The plaintiff's wife was much hurt that he had given the information to her. She threatened to harm the defendant's wife. The plaintiff reported the matter to Church authorities. Consequently he was transferred from Semonkong or Phororong to T.Y. which is near to his parents' and his wife's parents' respective homes. The reason for this, it is stated, was to ensure that the respective parents should watch over the conduct of the plaintiff and his wife.

The plaintiff came to T.Y. in February 1984. He

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came with some of the children leaving his wife who said she was not a priest but a teacher. She thus remained with some of the children of the marriage without the plaintiff's consent. However after some pressure by the school management the plaintiff's wife joined him at T.Y. in March 1984.

The plaintiff said that he was hurt when his wife remained behind for he felt that his congregation at T.Y. would regard the matter as unorthodox and abnormal.

After staying together for two months the plaintiff's wife disappeared. It was as late as 24th January 1985 that the plaintiff learnt from P.W.1 that she had found his wife at Makhalleng at the house where P.W.1's husband lives.

The following day the plaintiff left in the company of Rev. Morojele and the defendant's wife for Makhalleng with a view to bringing the plaintiff's wife back to him. The party appealed to the chief to help but because of the lateness of the hour the chief undertook to hear them out the following day. The plaintiff and Rev. Morojele were uneasy about the place where they were accommodated at Makhalleng because of its proximity to the place where the defendant and the plaintiff's wife were living together.

They decided to go and see the chief about alternative accommodation for the night. The chief came back with them to the store. Before reaching it they saw the defendant conveying the plaintiff's wife in a van driven from the premises. The plaintiff recognised his wife and accordingly informed the chief. The chief and the priests tried to stop the defendant; but he didn't.

The following day a meeting was held and the plaintiff asked the defendant to give him his wife. Thereupon the defendant said

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"Do I go about carrying your wife on my back. This prostitute (meaning his own wife P.W.1) goes to you at T.Y. saying I have taken your wife. I will send you back to your mother to suck her for I can see you got weaned prematurely."

The defendant is said to have been very angry when uttering these words.

The plaintiff asked the chief to make him a letter of introduction to higher authorities. The chief obliged.

Then the defendant went to his vehicle and took out something which the plaintiff later recognised to be a pistol.

The plaintiff and his party went on board the public transport. They were followed by the defendant's van which stopped behind the public transport which had stopped to enable Rev. Morojele to climb down to get a rubber stamp to have the letter duly rubber-stamped at the chief's office.

The defendant went past near where the plaintiff was standing and headed for the place where Rev. Morojele was to get the letter rubber-stamped. When the bus carrying the plaintiff and his party resumed the journey the defendant came following in his van and at some stage overtook the bus only to stop at some distance ahead and open the bonnet of the van and keep peering underneath it.

The plaintiff's attempts at resolving the differences between him and his wife were finally thwarted as stated above. To date he and she are not living together.

The plaintiff complains that the defendant did not request his wife from him when she got employed by the defendant. He also stated that the defendant was not truthful in denying that he and the plaintiff's wife live together as man and wife.

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The plaintiff confirmed that in terms of CIV/T/667/88 'Mamoeti Pitso vs Lehlohonolo Pitso the plaintiff was his wife praying for condonation of her adultery and decree of divorce on grounds of the then defendant's adultery. Although the plaintiff's wife prayed for condonation of her adultery she did not say with whom she had committed that adultery. But evidence shows that at the time she was living with the defendant Lefaso Foulo. The plaintiff denied that he had done anything to cause his wife to be estranged from him.

Under cross-examination the plaintiff conceded that he had earlier instituted an action number CIV/T/717/88 against his wife and the defendant from whom he had claimed M15,000.

The plaintiff said that he withdrew the claim for M15,000 because it was too little when compared with the M100,000 which he said he claimed later.

But strangely the claim for a lesser amount was made in summons issued on 18th November 1986 while that for a greater amount was issued on 15th August 1986.

The question put by the defendant's counsel is logical that

"on maturer reflection the plaintiff settled for a lesser amount of M15,000 - ?

To which the plaintiff replied

"I had thought so previously because of the confusion that I had that time."

The evidence of P.W.3 Rev. James C. Morojele is important in the sense that it provides a background to the problems that beset the plaintiff's marriage. He testified that it appeared to him that the plaintiff's wife was responsible for the disharmony that bedevilled the marriage. P.W.3 through his mission as a marriage counsellor learnt that the defendant was the man who fouled the harmonious marital relationship that otherwise

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existed between the plaintiff and his wife before the plaintiff and his wife went to Phororong.

In the correspondence filed before court it appears that the plaintiff at some stage wrote to the Executive Committee of the church thanking the Committee for harrowing him from the servitude to drunkenness. P.W.3 said that the rehabilitation Centre to which the plaintiff was sent did not receive him as an inmate for rehabilitation but as a trainee whose acquired training would later be utilised in the out-posts where he was to go at Phororong which is in the mountains.

With respect I cannot see how a trainee would write a letter thanking the Executive Committee for sending him without his consent to a place which freed him from drunkenness if in fact he was not a slave to the bonds of that habit. Questions put to P.W.3 on behalf of the defendant suggest that the plaintiff was in dire need of rehabilitation. His letter at the end of the rehabilitation spell corroborates the defendant's counsel's contention.

After an application for absolution from the instance was turned down the defendant gave evidence. He testified that he knew the plaintiff's wife. He said she is his employee at his business at Ha Simione. She started working there in January, 1985. She stayed in rented quarters. These quarters did not belong to the defendant. Although he too was living in rented quarters he did not live together with the plaintiff's wife.

The defendant said that he heard that the plaintiff, P.W.1 and P.W.3 went to Ha Simione but he saw only the plaintiff.

When he came there the plaintiff just greeted the defendant and left saying nothing. He never asked where his wife was. He denies that the plaintiff ever visited his business premises at Ha Simione.

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He denied ever meeting or knowing the plaintiff's wife between June 1984 and January 1985. He said he didn't know why the plaintiff's wife left her husband. He said he never prevented her going to her husband after her taking employment with him in January 1985.

He conceded that 'Mamoeti stays in a place which is so close to where he is staying as to be regarded as the same place. He denied that he prevented the plaintiff from seeing his wife. He denied that he is harbouring the plaintiff's wife. He said that he never saw a letter in June 1986 saying that plaintiff did not want his wife working for the defendant.

Under cross examination the defendant said he transferred only the plaintiff's personal effects to Semonkong in the year he can't remember. At that time he had been approached by the church to convey those things. That is why he knew neither the plaintiff nor his wife.

Asked if this was not in 1977 he said the year was not in issue. He was insistent that he loaded and off-loaded the plaintiff's goods in his absence.

Confronted with the question that evidence was led and not denied that he delivered the plaintiff's family on transfer to Semonkong he said that such evidence was not true even though witnesses who gave it were not challenged in that regard.

Asked by court if he heard such evidence being led he said no. He however conceded that when something untruthful about him is said he becomes alert.

When told by counsel for the plaintiff that the allegation was not denied because it was true he said he was denying it at the stage he was giving his evidence on his own behalf.

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The cross-examination proceeded as follows:-

"You heard the plaintiff say he secured you to transfer his luggage and family - ?

I heard him say I should come and collect his goods from Maseru and by then he was already at Semonkong.

He further said you took both his family and his luggage to Semonkong - ?

I never heard him say he hired me to fetch his family.

Court:-

Did you hear him say so ?

No.

Why didn't you hear him - ?

He was not saying what I did. I was not interested in what I never did.

C.C - If somebody lies about you you ignore it. But did your counsel challenge the veracity of the witnesses's version that you delivered the plaintiff's baggage and family -?

I did not hear him.

I put it to you it was not denied under cross-examination because it was true that you conveyed his baggage and family to Semonkong - ?

That's your opinion. Not mine.

You are avoiding this question for you wish to establish that you did not know Pitso and his family from as far back as 1977 - ?

That's your statement; not mine.

You said before that you were employed by the Church and not by Pitso but immediately afterwards you said you met Pitso at Semonkong who said you should go and fetch his baggage. Which is which - ?

He said the church had asked him to look for transport.

What year did he approach you to ask you to fetch

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his baggage - ?

1943.

So you began to know him way back in 1943 - ?

It was in 1983.

Not 1943 - ?

No.

It is a fact that he was transferred in 1977 -?

I am not the one who transfers priests."

The plaintiff's witnesses described the defendant as a man of bad temper who was off-hand and ready to fight. I am satisfied by his brashness before this Court that he has not only those characteristics but his demeanor in this Court has been near contemptuous while giving evidence under cross-examination.

The defendant denies that he is in love with the plaintiff's wife. He denies that he fell in love with her at the time her husband was transferred to Phororong.

The defendant testified that the plaintiff's wife was made aware of the instant proceedings by him. He said she is still under his employment. When told that the plaintiff is still legally married to his wife the defendant said he became aware when the plaintiff exhibited the marriage certificate in Court. The plaintiff's wife is said to have come to attend this trial not at her husband's behest but because the defendant warned her against involving him in trouble.

The plaintiff's counsel proceeded to cross-examine the defendant and the defendant in turn replied as follows:-

"Evidence says the plaintiff, your wife and Rev. Morojele went to Ha Simione Makhaleng looking for the plaintiff's wife - ?

I heard that evidence.

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In your evidence in chief you said you only saw Rev. Pitso ....?

Yes.

It was never put to plaintiff or his witnesses that you would come to say that you did not see your wife and Rev. Morojele - ?

I never saw my wife and Rev. Morojele. I only saw Rev. Pitso.

It was never challenged that they went there the three of them - ?

I don't understand this for it is only today that I am giving evidence and I am denying it today.

So you admit that before you gave evidence today these witnesses were not asked about these incidents - ?

I don't deny that they were asked questions but I am saying today I deny that.

Are you saying that the plaintiff said nothing at the meeting held concerning his wife - ?

There was no such meeting as this is confirmed by Rev. Pitso saying he never said a thing to me."

I have no doubt that in denying obvious events which took place the defendant has a lot to hide. His attitude accounts for the milk in the cocoa-nut.

The defendant called in aid the evidence of D.W.2 'Mamatseliso Mthobeni who is the plaintiff's wife's sister. She testified that she was sent by the head of her maiden family to accompany the plaintiff's wife to her in-laws but the plaintiff's mother drove them away hurling a lot of abuse at them into the bargain. She said that the plaintiff and his brother also chased them away with sticks and sjamboks. But it was never put to the plaintiff that he chased his wife and her sister away with sticks and sjamboks. All that was said is that because of the noise the plaintiff's mother made accusing the plaintiff's wife and her sister of having shortly insulted her the plaintiff failed to take

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advantage of the wife's return.

In argument Mr Matsau referred me to R.L. T. Thabane vs A. Thabane and T. Ntsukunyane 1971-73 LL.R at 145 where it is said

"Where a spouse enters into an illicit association with another person who is fully aware of his or her marital status, that spouse's husband or wife may be entitled to damages for loss of consortium and for contumelia. However no damages are recoverable for loss of consortium where the spouses have been living apart for some time before the association is formed, and the recovery of damages for contumelia will depend upon such matters as the effect of the association on the plaintiff's standing in the community and whether any insult was uttered in public or in private."

In Gower vs Killian 1977(2) SA LR. at 393 the head note indicates that

"In an action for damages for alienation of affections and for adultery, it appears from the evidence that plaintiff's wife had met the defendant at work, where they had fallen in love, and that they had been together in Johannesburg, working on a stall their employer had at the Rand Easter Show. Defendant admitted committing adultery with plaintiff's wife on a number of occasions. The evidence further revealed that, at a meeting between plaintiff, defendant, plaintiff's wife and his mother-in-law, the defendant had suggested a divorce and said that he would pay the costs thereof as he was the 'guilty party responsible for breaking up your home.'"

It was held

- (a) "that the fact that plaintiff's wife left after being in the defendant's company at work and in Johannesburg was not enough. It had to be shown that the defendant coaxed the plaintiff's wife away from him, that he talked her over and persuaded her to leave him.
- (b) "Further, that the defendant's admission that he was the 'guilty party' responsible for breaking up the plaintiff's home was not enough: such evidence was equivocal and did

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not amount to an admission by the defendant that he had actively enticed the plaintiff's wife away from him and had seduced her affection for her husband:

- (c) Accordingly, that the plaintiff had failed to discharge the onus in so far as the alienation of affection was concerned, but in respect of adultery the defendant having admitted such adultery, that the plaintiff should be awarded M1,500 damages."

Relying on the above authorities the defendant's counsel urged on me to dismiss the plaintiff's claims.

But in The South African Law of Persons and Family Law Barnard et al say at page 166

"When a third person infringes the consortium by adultery, enticement or harbouring, a claim for satisfaction against the third party can be instituted on the grounds of injuria."

I have no doubt that the defendant infringed the plaintiff's consortium by harbouring. The defendant actually prevented the plaintiff from contacting his wife by spiriting her away in his own van. I have no doubt that if the defendant had let the plaintiff meet his wife, or if he was prudent enough to heed the plaintiff's complaint that he was dissatisfied with his wife living with him such an act would have gone a long way towards mitigating damages claimed.

It appears that the defendant felt that it was not in his interests to oblige the plaintiff in his unrelenting pleas. His whole attitude was like that of a ferocious beast from whose mouth nobody could dare snatch a meaty bone without running a serious risk to his own life.

For injuria occasioned by the harbouring of his wife the plaintiff is awarded M11,000. Because the plaintiff's rehabilitation restored only a fraction of the esteem he was held in by the community and his congregation for contumelia suffered in respect of further

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degrading his standing in his community as a priest  
the plaintiff is awarded M4,000 only plus costs of  
suit.

J U D G E.

2nd March, 1990.

For Plaintiff : Mr Mphalane  
For Defendant : Mr Matsau.