

IN THE HIGH COURT OF LESOTHO

In the matter of :

PALESA NKHOKE

Plaintiff

v

SELOMO NKHOKE

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lchohla
on the 12th day of September, 1991

The plaintiff sues her father for M3210-00 being money lent to the defendant's wife from September 1985 to date.

The plaintiff testified that she is the oldest child of the defendant and PW2 'Mapalosa Nkhoke.

The manner in which she alleges her claim arose is that when her mother was expelled from the matrimonial home by the defendant PW2 (the mother) and two minor children sought refuge at the plaintiff's abode.

The plaintiff, in turn started supplying PW2 and the two children with the necessaries of life including building her a house on the basis that the agreement between them for the goods supplied to PW2 was binding on the defendant because a woman married in community of property can in law pledge her husband's credit.

/The

The plaintiff produced receipts obtained in the purchase of building material for PW2's house. She further stated that the actual expenses she went into in finding the defendant's wife and children in food, clothing, shelter and school fees far exceeded the amount reflected in the duplicate copies of the receipts handed in and collectively marked Exhibit "A".

In putting questions to the plaintiff and her witnesses Mr. Z.Mda for the defendant successfully, in my view, managed to elicit answers damaging to the plaintiff's case. He managed to show that while the plaintiff indicated that the agreement to have her moncys paid back was solely entered between PW2 and the plaintiff, PW2 on the other hand showed that this agreement was entered between her, the plaintiff and the defendant in 1983. Both the plaintiff and PW2 stated that the agreement was oral.

PW2 conceded that her evidence that the defendant had taken part in this agreement was an entirely new matter which not even the plaintiff, had raised. She ascribed this state of affairs to the fact that she is not familiar with court procedures as she had never been to court before.

The defendant's counsel also indicated that the plaintiff had failed to discharge her onus in that she said she did not know if the extent of her support to defendant's wife and children was within the defendant's means regard being had to the fact that in assessing the amount by which a husband's credit can be pledged by his wife regard must be had to the style of life of the parties and their level of income. Thus even assuming that in supplying her mother with these necessaries of life it could not be the case that the

/defendant

defendant would have his credit pledged in the amount exceeding his means to repay. Needless to say the defendant's case has consistently been that he could not support the plaintiff's mother and the two children while they were living away from the matrimonial home.

There has been evidence in support of the defendant's case given by PW2 herself that the defendant made an attempt to fetch her from her maiden home but found PW2's parents or guardians absent.

PW2 stated that she did not consult any doctor after allegedly being assaulted by the defendant because she lost no organ as a result of any such assault.

At the end of the case for the plaintiff the defendant's counsel rose to apply for the discharge of the defendant from liability and dismissal of the plaintiff's claims.

Mr. Mda submitted in support of this application that in his plea the defendant denied liability and averred that his wife had left the matrimonial home without good cause. Further that the defendant was not obliged in law to support and maintain the minor children whilst living with their mother in desertion.

Learned Counsel further submitted that the plaintiff failed to support her claim in that her testimony was to the effect that she had been assisting the defendant paying fees for the children's schooling because the defendant was not working. He further submitted that no agreement was ever concluded between the defendant and the plaintiff in terms of which the defendant undertook to recompense the plaintiff for her assistance.

Mr. Mda brought the Court's attention to the plaintiff's evidence that she was aware that the defendant had taken some steps to get PW2 back to the matrimonial home. Evidence shows that he did not only go to PW2's maiden home for this purpose but also sought the intervention of the Ramokoatsi Local Court. Learned Counsel demurred that on the contrary the plaintiff did nothing on her part to normalise the situation between her parents, but aggravate it by providing PW2's needs in order to thwart the defendant's efforts. Learned Counsel accordingly submitted that the plaintiff has played an active role in alienating her mother from her father, thus she should not be seen to want to benefit from this.

It was pointed out that the plaintiff failed to show how the amount of her claim was arrived at despite that the defendant had joined issue on the sum allegedly borrowed by him. Further, it was submitted that the plaintiff did not gainsay the suggestion made to her that if she maintained her mother as she alleged she did so beyond what the defendant could afford. The defendant's case was however that he had not invited anybody to maintain PW2.

The learned Counsel stated that it is trite that the scale on which support is to be rendered depends on the social position, financial means and style of living of the spouses. See H.R. Hahlo The South African Law of Husband and Wife 4th Ed. P. 113.

Mr. Mda submitted that PW2's evidence did not support the plaintiff's claim but rather destroyed it in that first it was outside the ambit and purlieu of the pleadings, next it indicated that the defendant made efforts to be reconciled

/with

with PW2, yet it seemed she was bent on divorcing him. Thus from this and PW2's own admissions it becomes apparent that she was the one in desertion. Finally PW2 testified that the claim was based on the agreement entered into between plaintiff and the defendant including herself in 1983 in terms whereof the defendant was to pay back all that the plaintiff gave her.

The submission relating to this was that it conflicts not only with PW1's evidence but falls outside the issues defined in the pleadings. See Beck's Theory and Principles of pleading in Civil Actions by Isaacs 4th Ed :

"Once pleadings are filed the parties are bonded by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail unless amendments are granted".

The learned Counsel submitted that PW2 further dealt the plaintiff's case a mortal blow when she inclined to the suggestion that the defendant had adequate maintenance for her and the children at the matrimonial home and that the plaintiff had no business to maintain her.

It was submitted that Hahlo's statement at 114 rams the point home in circumstances parallel to those in the instant case in that :-

"Where the wife is the deserter she cannot claim support from her husband. His reply to her demands is that food and shelter are waiting for her in the matrimonial home".

I was referred to an unreported case CRI/APN/97/84

/Julius

Julius Jose Koroloso vs Rex saying -

"Our law is that if the wife leaves or deserts her husband without sufficient cause she loses her right to claim maintenance from him. He is not even liable for necessaries for any children which she has taken with her (Voortrekkewinkels Ko-operatief vs Pretorius 1951(1) SA 730(T); Bing and Laver vs Jan der Heever 1922 TPD 282; Excell vs Douglas 1924 CPD 477 at 481). The appellant is under no legal obligation to maintain the complainant as long as she refuses to return to their home".

Relying on the above authority Mr. Mda went further to state that because the plaintiff failed to show that the defendant's wife was not in desertion at the time the plaintiff harboured her the plaintiff's claim ought to be dismissed.

Responding to the above Mr. Mafisa submitted that the most important aspect of this case is that the defendant caused the plaintiff's mother to leave the matrimonial home. However in my humble view it is also worth considering that the defendant sought to invite the plaintiff's mother to the matrimonial home even before the plaintiff went into such expenses as building a house for her. Thus the submission that the defendant chose not to go to the witness box to answer the alleged serious charge loses its force.

It is significant that the defendant has not been shown either by PW1 or PW2 to lay any claim to the additional contribution made by PW1 to enhance his estate. However Mr. Mafisa submitted that it would not be necessary for the defendant to lay any claim to the enhancement to his estate even if the defendant's attitude in that regard could

be said to be grounded on the fact that he never solicited any such enhancement. The crucial point being that as long as the marriage subsists he is liable to a suit for unjust enrichment. Mr. Mda was quick to indicate that the plaintiff's suit was not based on unjust enrichment. Had it been so the defendant would have responded accordingly in his pleadings. Mr. Mafisa went further to indicate that despite the defendant's present attitude to the property added to his estate, nobody can stand in his way if he demands delivery of that property to him.

Mr. Mda in reply pointed out that the plaintiff's claim supported by her counsel's address clearly goes beyond the scope of her claim and buttressed this submission by referring to paragraph 5 of the plaintiff's declaration saying :


"The plaintiff's mother has from that day borrowed several sums of money from the plaintiff towards the maintenance of the said minor children whose father had failed to do or neglected while in law obliged to do. The defendant's wife has to date borrowed an amount of M3210-00 and the said sum of money has now become due and payable".

Mr. Mda pointed out that from the above quotation it becomes apparent that the necessities claimed were for children's maintenance and not for the plaintiff's mother. Thus this is an illustration of the fact that the plaintiff has gone beyond the ambit of her claim because while the plea shows maintenance claimed was in respect of the children; the bulk of the evidence shows it to be in respect of the plaintiff's mother.

I am persuaded that PW2's evidence illustrates that apart from the fact that the defendant went to the Local

Court to demand the return of his wife to the matrimonial home, even though he did not comply with that Court's order to go and sit down in conference with PW2's guardians the defendant had earlier gone there in the guardian's absence. To that extent the important thing is that PW2 was aware that the defendant wanted her back.

The application for the dismissal of the plaintiff's claim succeeds with costs. PW2 was perfectly entitled to bring the action for maintenance but she did not do so. It was for the wronged spouse to have brought the action not the daughter. This is akin to a child suing one of its parents for committing adultery with a stranger while the wronged spouse does nothing despite being able to bring the suit.



J U D G E

12th September, 1991

For Plaintiff : Mr. Mafisa

For Defendant : Mr. Z. Mda