CIV/APN/153/92

IN THE HIGH COURT OF LESOTHO

In the matter between

'MATSOBOTSI NTSANE	Applicant
and	
BERNARD PULE NTSANE	1st Respondent
KEITUMETSE HLAO (duly assisted by Her father)	2nd Respondent

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi Acting Judge on the 2nd day of March, 1994

On the 16th February, 1994 Mr. Putsoane for the Applicant and Mr. Mathe for the Respondent appeared before me. They both made very brief but well motivated arguments for which I am thankful I have had no hesitation after their arguments in discharging the rule and dismissing the application with no order as to costs The reasons for doing so now follow

The Applicant claimed the following Orders as against the two Respondents

"1. That the periods prescribed for service be dispensed with on the basis of the urgency of their application.

2. That a Rule Nisi issue returnable on a date and time to be determined by this Honourable Court calling upon the Respondents herein to show cause, if any, why -

(a) The First Respondent shall not be interdicted and restrained from assaulting, threatening molesting or interfering with the applicant in any manner whatsoever.

(b) The First Respondent shall not be ordered and/or directed to permit the Applicant and the minor children of the marriage to return to the matrimonial home.

(c) The Second Respondent shall not be ordered and/or directed to vacate the matrimonial home of the Applicant and never set foot thereat pending Judicial separation proceedings to be instituted within thirty days from the hearing and finalisation of this application,

(d) The Respondents shall not be ordered to pay costs

of this application.

(e) This Honourable Court shall not grant Applicant further and/or alternative relief.

3. That prayers 2 (a) and (b) and (c) operate with immediate effect as an interim interdict."

The Applicant's founding Affidavit was sworn to on the 14th April 1992.

A rule nisi was issued on the 23rd April, 1992 which reads as follows

"1. The periods prescribed for service be dispensed with on the basis of the urgency of his application.

2. A Rule Nisi issue returnable on the 10th August, 1992 calling upon the Respondents herein to show cause, if any, why -

(a) The 1st Respondent shall not be interdicted and restrained from assaulting restrained from assaulting threatening, molesting or interfering with the Applicant in any manner whatsoever.

(b) The 1st Respondent shall not be ordered and/or directed to permit the Applicant and the minor children of the marriage to return to the matrimonial home

(c) The 2nd Respondent shall not be ordered and/or directed to vacate the matrimonial home of Applicant and never set foot thereat pending Judicial separation proceedings to be instituted within thirty days from the hearing and finalisation of this application.

(d) The Respondent shall not be ordered to pay costs of application.

(e) This Honourable Court shall not grant Applicant further and/or alternative relief.

3. That prayers 2 (a) and (b) and (c) operate with immediate effect as an interim order."

Applicant and the First Respondent were married by civil rites in community of property on the 17th March 1982 and the marriage still subsists. The First Respondent and the Second Respondent are lovers and have on some occasions maintained a

rather open adulterous association, which has sometimes caused the two Respondents to maintain a lovers nest at the Applicant and First Respondent's matrimonial home. According to the First Respondent this lover's nest was maintained at some other place away from the matrimonial home. I wish this and other disputatious facts had been more clearer on the papers.

The Orders which were sought by the Applicant on the basis of urgency covered incidents which occurred at various times as alleged by the Applicant namely

(a) On the 9th October, 1990 the Respondents were at the home of Chabalala where the Applicant talked to the First Respondent and urged him to repair to their matrimonial home. The First Respondent was reluctant. My own suspicion is that he was reluctant to leave his lover behind. "He refused and I pulled him and we went home."

(b) In October 1990, particularly, the First Respondent assaulted the Applicant.

(c) In May 1991 the First Respondent assaulted the Applicant. It was with regard to the assault in (b) in which Applicant further said that "the First Respondent is in the habit of assaulting, threatening and molesting

> Applicant for no apparent reason". No further incidents were mentioned nor were there any circumstances stated. Likewise with regard to the incident under (b) above all we have is that the assault was "for no apparent reason or reasonable cause

No explanation was made for the delay by Applicant in filing this Application on an urgent basis without notice to the Respondents well over eleven months calculated from the date the last assault (namely, May 1991). I thought this did not augur well in proving the urgency of the Application. It certainly did not. No wonder, in my view, the statement in paragraph 11 of the Applicant's founding Affidavit that "I am apprehensive that I and the minor children will suffer substantial prejudice in that we have no accommodation and the Respondents assault whenever they meet" carried the matter no further when taken together with other unsatisfactory features as this judgment will show.

With the difficulties attendant on application proceedings and affidavits that are often thin on detail one could foresee that a statement framed as paragraph 6 (d) of the Applicant's founding Affidavit was framed, was bound to give problems.

" The First Respondent having ejected me from the matrimonial home together the minor children of the marriage and

is presently staying with the Second Respondent at my matrimonial home. But I wish to state that I have condoned whatever adultery has been committed by them and I want to return to my home with my children, since they have nowhere to stay." The First Respondent in answer to the above says

> " I deny that I expelled the Applicant from the matrimonial home. The Applicant left for her parental home before December 1990. She left for no good cause. She used to insult me and when I asked her to stop she left the matrimonial home After she left I tried tog et her back and she told me in front of her parents that she would never return to me. She said she would only return if I left our matrimonial home. The Applicant's parents wrote a letter to my parents to the effect that I should leave the matrimonial home. A copy of the said letter is hereunto annexed and marked "A". I admit that I live with the Second Respondent but we do not live at the Applicant's marital home. I had to live with the second Respondent because Applicant had made it plain that she did not want to continue with our relationship"

I observe that in the Applicant's replying Affidavit a lot goes into attempts to reply to the above statement, which in the end serves to admit that the matrimonial home of the parties was not

occupied by the Respondents but was unoccupied at the material time. I found it difficult to believe t he Applicant This was moreso when the Applicant's Affidavits were all the way unsupported in any way. I thought these disputes of fact were serious.

I need now to mention the following facts which only came out in the Replying Affidavit of the Applicant. Firstly that the First Respondent was charged before Mapoteng Local Court under case number CR 173/90. A medical report was also referred to Both document, namely the judgment and the medical report were said to be attached to the Replying Affidavit marked LA1 and LA2. They were in fact not annexed, neither were they exhibited from the bar when this Court requested. It may well be that they do not exist at all. The assault, it was alleged for the first time, was done on the 8th October, 1990. Likewise in connection with the alleged assault, it was alleged that the Second Respondent was charged criminally and fined M50.00 together with one LINEO PEETE. It is important to note that this LINEO PEETE only comes out in this narration about the judgment (LA3). This judgment was alleged to be annexed to the Replying Affidavit but it was not . Neither was this LA3 exhibited to the Court when a demand was made. I discovered at a very late hour that the Replying Affidavit although served on the Respondents' Attorneys it was not filed with the Registrar. I had been of the impression that it did not exist until Counsels from the bar volunteered a copy to

me. I made an adverse finding that the Replying Affidavit is defective by reason of referring to evidence that does not exist at the same time requiring this Court, as it were, to act on non existent pieces of evidence.

Mr. Mathe has submitted that even besides the thinness of the Applicant's founding Affidavit the failure by Applicant to refer to very important facts (which the First Respondent has himself disclosed to this Court) amount to absence of good faith or alternatively serious non-disclosure. This marks the Applicant as a person who does not take this Court into her confidence. I could not agree more. An examination of paragraph 2 (b) of the First Respondent's answering affidavit and annexures thereto show that on more than one occasion the Applicant's and First Respondent's families met at the instance of the 1st Respondent with a view to reconciling the parties. On another occasion the chief's court decided that "This Court dismisses the Plaintiff's complaint. They must go back home and must go and live in peace." The then Plaintiff was the present Applicant. Mr. Mathe further contended that the Court when first hearing the application for the interim Order and in possession of this information on facts (which the Applicant had failed to disclose) the court might have decided otherwise than issue the Rule nisi. It must be further borne in mind that these alleged intervention by families and the Chief took place during

this long period when Applicant and First Respondent had separated and before the Applicant launched this Application. I have already made my remarks about the delay. I took the view that the Applicant did not exhibit utmost good faith in this application This High Court in its various judgments has approved Greenberg J in PHILLIP vs MAY 1936 (1) P.H.16 when he said " The rule has been repeatedly laid that in Ex parte application utmost good faith is required " (See also the remarks of Maqutu A.J. in LINKOE CITY vs LESOTHO FOOTBALL ASSOCIATION AND FOUR OTHERS CIV/APN/1/94 - 12/01/94 (unreported)

Another important submission followed, namely that failure to file a claim which is conditional upon the granting of a Rule Nisi takes off the ground from under the Rule Nisi. It renders it void and that on that ground alone the rule ought to be discharged. Mr. Mathe goes on sofar as to say that at hearing on the return date (when such failure has occurred) the Court actually attempts to decide a nothingness. I felt that this was interesting and spectacular. These are the circumstances. Paragraph 6 of the Applicant's Founding Affidavit came out, in part, as follows " I intend to institute judicial separation proceedings against the First Respondent herein within <u>thirty days from the hearing of this application and finalization of this application"</u> (my underlining). Mr. Putsoane admits that to-date no such proceedings for judicial separation have been instituted, although he quite

remembers, that his client did attend at his office, some time ago, and gave instruction for filing of proceedings for judicial separation. He did not however admit that there had been failure or delay on the part of the Applicant.

It is clear that what the Applicant asked for is a temporary not permanent interdicts or order as the orders which were eventually issued can be seen. In this orders certain conditions are normally imposed which give this temporary order a character of being pendente lite. This is one of the orders. It was granted on condition that judicial separation proceedings would be filed. Both Counsels agree. My view was that this condition applied to all the orders granted, namely (a) (b) (c) (d) not to (e) only as the interim order was couched. Otherwise the whole principle would be jettisoned. I believe that that was not the intention of the Judge who issued the rule nisi. I gather that was not even the intention of the Applicant when regard is had to the opening of the paragraph 6 of the Applicant's Founding Affidavit. Mr. Putsoane replied that despite the principle, the way paragraph (c) of the Interim Order was stated namely. "within thirty days of hearing and finalization", suggests that it was only within thirty days after the finalization of the application. With respect Counsel is in error. What would happen if all the Orders were discharged as in the instant application. It would mean that the Applicant has not complied with the condition upon

which the interim order was granted. In JUTA & CO.LTD v LEGAL FINANCIAL PUBLISHING CO (PTY) 1969(4) SA 444 where an interim order sought was in the following terms

> " (1) an interdict pedente lite interdicting and restraining the first respondent from publishing or distributing any further copies of the book known as the Taxation of the Companies in South Africa by David Shrand, or from distributing the said book for resale pending the final determination of an action to be instituted by Applicant against it for a permanent interdict damages and ancillary relief, the Applicant ended up not filing the necessary replying affidavits and the promised action was never forthcoming. Application to file the replying affidavit was refused and the application for the interdict was dismissed with costs. The following were the remarks by VAN WYK J at page 445 at E-F".

> " There is such a thing as the tyranny of litigation, and a Court of law should not allow a party to drag out proceedings endlessly. In this case we are considering an application for an interdict pedente lite, which from its very nature, requires maximum expedition on the part of the Applicant." The similarities to the present application cannot be missed. (See also CHOPRA vs AVALON CINEMA SA

(PTY) LTD AND ANOTHER 1974(I) SA 470 D + CLD) I therefore took the view that on this ground amongst others I would discharge the Rule. It was irregular that applicant had, up to the stage of the argument or on the confirmation of the Rule Nisi, not filed the action for judicial separation.

I now come to the Court's discretion in the circumstances of the parties cases, with special concern to the remarks I have already made against the Applicant's case. In the face of the serious disputes of fact the faulty replying affidavit, the attitude of the Applicant and that the Applicant should have foreseen the dispute of facts and in the absence of an application for hearing of viva voce evidence or referral to trial what is the Court discretion? I was guided by the provisions of Rule 8(14) of the rules of Court and the Court of Appeal case of Chieftainess MAMOTLOANG NKHABU vs MINISTER OF INTERIOR AND TWO OTHERS C of A (CIV) No.1 of 1993 (whose remarks at page 7 I found quite apposite) to decide, as I did, that the application ought to be dismissed

T. MONAPATHI
Acting Judge

For the Applicant Mr Putsoane

For the Respondents Mr. Mathe