CIV/T/591/88

IN THE HIGH COURT OF LESOTHO

In the matter between:

TUMAHOLE JULIUS THAMAE PLAINTIFF

V

MANKHALA LEONEA THAMAE DEFENDANT

Before the Hon. Chief Justice B.P. Cullinan.

For the Plaintiff : Mr. H. Nathane
For the Defendant : Mr. N. Putsoane

JUDGMENT

Cases referred to:

(1) *R v Van der Merwe* (1952)1 S.A. 647(O);
(2) *Van Lutterveld v Engels* (1959)2 S.A. 699(A);
(3) *Murison v Murison* (1930) A.D. 157;
(4) *Monapathi v Monapathi* C of A (CIV) No.18 of 1989, Unreported;
(5) *Gates v Gates* (1940) N.P.D. 361;
(6) *Smith v Smith* (1937) W.L.D. 126.

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The parties were married on 25th April, 1966. They cohabited until May 1966, when the plaintiff returned to his employment on the mines. A male child of the family, Thamae Thamae was born to the defendant on 10th September, 1966, as a result co-habitation before marriage. Unfortunately the child was short lived, and died on 20th September, 1966. Thereafter, in October 1966, the defendant left the matrimonial home, that is, the home of the plaintiff's mother, and never returned.

The plaintiff ultimately filed an action for divorce, based on malicious desertion, almost twenty-two years later, in 1988. The defendant filed a plea claiming that the plaintiff had constructively deserted her, in that he had advised her to return to her maiden home, due to "continuous quarrels between her and her mother-in-law", saying "that he would fetch her as soon as he found another place of residence, but up to date plaintiff has not done so". When it came to the hearing, however, the Court was advised that the matter was uncontested and, on the plaintiff's evidence, made an order of restitution of conjugal rights.

There was a further development on the return day.

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Mr. Putsoane, who had not drafted the plea, appeared for the defendant to announce that the defendant had informed him that, contrary to her plea, in which she had admitted the plaintiff's claim that "There are no children born of the said marriage", another child had in fact been born of the marriage. The plaintiff had sought an order of forfeiture, so the Court proceeded to hear evidence adduced by both parties on the aspects of the children of the marriage and the division of the matrimonial estate. The aspect of divorce itself remained uncontested and the Court, after evidence from the plaintiff of non-restoration of conjugal rights, granted him a decree of divorce on the ground of the defendant's malicious desertion.

The defendant claimed, in her evidence, that a further male child of the marriage, Malefane Paulus Thamae, was born to her on 11th December, 1971. The plaintiff testified that he had never co-habited with the defendant or had sexual intercourse with her after he had returned to the mines in May, 1966, and that the said child was not his child. He testified that the defendant never told him about her second child, that he did not

know the child's name and that he had learnt of the birth from the defendant's brother, Makotoko, who also worked on the mines, sometime in 1972. It was not, incidentally, the plaintiff's case that he had never seen the defendant after 1966: he testified that in those days he was granted leave from the mines at intervals of two years and that accordingly he met the defendant on his return to Lesotho in 1967, 1969 and in 1971.

That was his ultimate position, however. Initially, in his evidence in chief, he testified that the returned to Lesotho "towards the end of 1967", no more than that. In cross-examination he recalled that he also "make a point of coming" to Lesotho in 1972, after the report from the defendant's brother of the birth of the defendant's child, when he visited her parents in order to verify such birth. It was put to him that he had also returned to Lesotho in 1969 and again in 1971: he could not remember if he had returned in 1969 and he denied returning in 1971. He denied communicating with the plaintiff since 1966. He stated however that "I met her parents. I didn't meet her physically except once when she was with her parents". Then he conceded "On the

second occasion I met her at a Local Court". After an adjournment, he conceded that after he had gone to the defendant's maiden home in 1967, he had again met her in 1969 "at the Chief's place". While he had testified that he got leave every two years, he again denied that he had come to Lesotho in 1971. With the next question, however, he conceded,

> "In 1971 I came in February only for a week, and my boss wanted me to come back quickly."

Then he added,

> "I just came home for a few days and went back."

That contrasted with his evidence, in re-examination, that, "After each 24 months I used to get two or three months leave". He added however,

> "It used to differ. In 1967 I came home as I had asked for some few days from work. In 1971 I came home as I had just asked for a week from

work."

The defendant's position was put to the plaintiff, but he repeatedly denied that he had cohabited with the defendant during April and May 1971 at Lekhaloaneng in Maseru or that he was the father of the defendant's second child.

The defendant testified that she met the plaintiff twice in 1967, once at Motsekuoa and once when he came to her maiden home at Boleka. On the latter occasion he asked her mother to release the defendant to him, but her mother requested him to first fetch his mother and sister, with whom the defendant had quarrelled. The plaintiff departed but did not return.

In 1969 the parties again met twice, the defendant testified. The plaintiff once again came to her maiden home, once again requesting his wife's return, saying that his mother was sick. The defendant's mother refused his request and the defendant herself chose not to return with him, which latter evidence, incidentally, served to confirm the aspect of desertion. The defendant testified

further that their second meeting in 1969 took place at the Local Court, where she had instituted a claim for maintenance.

In 1970, the defendant testified, she left her maiden home for Maseru, where she found work in a shop at Lekhaloaneng. There she rented a room in a house owned by one Tseliso. Her brother Khathaso also took lodgings in the same house. There she was joined by the plaintiff, while on biennial leave, in March 1971. She testified that the plaintiff had been informed of her whereabouts by her brother Makotoko. The plaintiff wanted her to return to the matrimonial home, but she refused saying "he should first bring his mother". He offered to take her to other than his mother's home. To this she agreed, saying nonetheless that "he should go back and prepare", but, she testified, "the case is still awaiting his mother and sister".

Nonetheless, as he had said that "we should make peace", and that he wished "to console me, since he had not seen me for a long time due to his mother and sister", she "accepted his offer of peace" and cohabited with him again at Lekhaloaneng.

She testified that the plaintiff stayed with her at Lekhaloaneng from a date near the end of March, 1971, through April, to May 1971, when he returned to the mines. During that time, they shared the same bed and had sexual intercourse on a regular and frequent basis. She recalled that she must have conceived in April, as she failed to menstruate towards the end of that month. She informed the plaintiff of this aspect and indeed he accompanied her on a subsequent visit to the doctor, the latter apparently confirming the pregnancy. In any event, the plaintiff, she testified, was aware of her pregnancy when he returned to the mines towards the end of May 1971. She met him again in June 1971 "at the bus stop", apparently in Maseru, when she was "visibly pregnant". She did not meet the plaintiff again in 1971.

A male child was born to her from that pregnancy on 11th December, 1971, and he was named Malefane Paulus Thamae. The first two names, being Thamae family names, were supplied by the defendant's mother and the latter's uncle Edward, when the defendant's brother Khataso visited them to inform them of the birth. The names were written on a piece of paper addressed to the defendant's

mother. Subsequently the plaintiff's mother performed customary rites upon the newly born child, that is, at the defendant's maiden home at Boleka, even though such rites are usually performed, it seems, at the home of the paternal grandparents. In this respect the defendant testified that such rites had also been performed at her maiden home in respect of her first-born child. She testified further, as to customary rites, that Malefane had stood over the grave at the burial of his grandmother, that is, the plaintiff's mother. It was put to the defendant that the family had not allowed Malefane to pour soil as custom demands: the defendant testified, however, that this was so, as Malefane was only a grandchild, and another child had been nominated to represent the children in the matter.

Despite all this, the defendant testified that the plaintiff never returned to her after May 1971, and that he had never maintained the child Malefane. For that matter, he did not maintain her. She had sued him for maintenance in 1969 both in Chief Seeiso's court and in the Local Court, as he was home on leave at the time and she was aware of his physical address. She failed to sue

him for the maintenance of Malefane as she was not supplied with his address by his family, while he was on the mines. She testified indeed that the plaintiff's mother was unable to supply the address, as the latter maintained that the plaintiff was not writing to her. It was put to the defendant, of course, that her plea had made no mention of the child Malefane. She replied that she had informed Legal Aid Counsel of this aspect, the plea having been drawn up some years ago by other than Mr. Putsoane.

The defendant called her brother Khataso as a witness. He corroborated her evidence as to cohabitation with the plaintiff in March/April/May 1971, as he also lodged in Tseliso's house. There was one significant difference however: it was his evidence that Tseliso's house, where the parties co-habited and he resided, was at Borokhoaneng in Maseru. He testified that the plaintiff had informed him of the defendant's pregnancy. His evidence as to dates was somewhat confused, differing from that of the defendant's in places: he testified for example that the plaintiff had departed in April 1971. But then I would not expect his evidence to tally exactly

with that of the defendant. Quite clearly, it did not tally when it came to their place of residence: in this respect he maintained that he worked in the same shop as the plaintiff in Lekhaloaneng, but that they both resided at Borokhoaneng, which apparently is not adjacent to Lekhaloaneng. In this respect also, another witness for the defendant, Policewoman Mary Moeketsi, testified that she had first met the parties in 1984 and in particular she had met the defendant and her child Malefane, "at her (the defendant"s) home in Borokhoaneng". The witness herself was a neighbour of the defendant, residing at Borokhoaneng.

As to the registration of the birth of Malefane, the defendant testified that "I registered the child's birth at Q.E. II Hospital" in Maseru. "The certificate is at home", she added, "I can produce it, even to-day". Apparently the registration there referred was an administrative registration for the purposes of the Queen Elizabeth II Hospital. Again, the certificate referred to was apparently a baptismal certificate, which was examined by both Counsel that afternoon, but was not produced in evidence. In any event, it seems that there

had been no statutory registration, as nine days later a birth certificate was produced in evidence, which had been made but two days earlier, indicating that the birth had been registered on the same day, that is, seven days after the defendant had concluded her evidence. The certificate indicates that Malefane Paulus was born of the defendant on 11th December 1971 at Queen Elizabeth II Hospital, the father's name being recorded as that of the plaintiff. The defendant, however, is recorded as being the informant. As the birth was registered more than a year after the birth (see section 15 of the *Registration of Births and Deaths Act*, 1973) the defendant was required, as a routine administrative requirement, to swear an affidavit in the matter. Nonetheless, the certificate is but *prima facie* evidence of its contents (see section 13 of the Act) and takes the case no further than the evidence before the Court. Indeed, the fact that the defendant waited some 20 years to register the birth, must militate against her. As against that, the birth of the child was administratively registered at the Hospital and both Counsel informed the Court that there is a baptismal certificate in existence, but the Court has no knowledge in either case as to whose name was

was supplied as being that of the father of the child.

Three other unsatisfactory aspects arise in the defendant's evidence. There is the aspect that her pleadings, as I have said, are contrary to the case she now wishes to present. While her evidence in the matter is not supported, the point is that she now appears before the Court and testifies that the plaintiff is the father of her child.

Again, there is the contradiction between the evidence of the defendant and her brother as to the location of the co-habitation between her and the plaintiff in 1971. In this respect she testified:

> "In 1970 I came to maseru for work. I found work at Lekhaloaneng. I was working in a shop. I lived at the residence of one Tseliso. I never met the plaintiff in 1970.
>
> In 1971 we met in March. I met the plaintiff at Lekhaloaneng *where I stayed.* We stayed together until I had this child Malefane

Thamae."

The defendant explained that by the word "had" she had meant "conceived". In any event, the passages quoted indicate that she both worked and resided at Lekhaloaneg at the time. It may be that the plaintiff did not consider it necessary to differentiate between her place of work and place of residence. It may be, however, that she subsequently moved to Borokhoaneng, where Policewoman Moeketsi met her in 1984 and thus it may be that the evidence of the defendant's brother Khataso is concocted, that is, as to his presence, and that he placed the cohabitation at Borokhoaneng, as that at one stage was the defendant's home. Even if the defendant's brother is lying, however, that does not necessarily mean that the defendant herself is lying.

A further aspect is that of the duration of the pregnancy. The defendant was quite emphatic that Malefane when born was 'full-term'. She maintained indeed that both her children were full term. She testified:

"I reckon I conceived in first week of April. I went over 8 months. [Malefane was] born in the 9th month.

Thamae the first child was full term - normal weight. Malefane Paulus was *a big baby*. He wasn't underweight."

Assuming that Malefane was full-term, that would place conception early in March, rather than April, 1971. It may be, however, that some 20 years later, the defendant cannot give exact evidence as to such matters. It may be, for example, that she met the plaintiff in February, when he himself says he was in Lesotho, rather than March.

In any event, those are the unsatisfactory aspects in the defendant's evidence. But what of the evidence of the plaintiff? He was clearly evasive as to his movements to and from Lesotho. In particular he at first continued to deny that he had come to Lesotho in 1971, until forced in cross-examination to admit that he had. In this respect his evidence of taking only a week's

leave or "a few days" leave in 1971, is inconsistent with his evidence of two or three months' biennial leave.

The point is that the plaintiff, even on his own evidence, pursued the defendant on his annual leave in 1967 and again 1969. He had not deserted her; she had deserted him and clearly she, then, in 1971, aged 28 years, was still attractive to him, aged 33 years. It is only natural to expect therefore that he would again pursue her on his annual leave in 1971. She was then removed from her maiden home and her mother's influence and supervision, and if he failed to entice her back to his home, it would not be surprising that he might wish to spend his leave from the mines int he company of his wife at her lodgings.

The point is again that there is no evidence that the defendant ever gave birth to other than the two children Thamae and Malefane. It is surely then a coincidence that in twenty-five years of separation from the plaintiff, she gave birth to only one child, Malefane, whose conception took place at a time when the plaintiff was on biennial leave in Lesotho.

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There is again the aspect of the child's three names, demonstrating a link with the plaintiff and his family, and in particular demonstrating that the defendant had maintained *ab initio* that the plaintiff was the father of her child. It was the defendant who deserted the plaintiff in 1966 and did not wish to return to him. I imagine that if it was the case that, five years later, she had given birth to another man's child, she would not wish to give the child the plaintiff's name, but rather her own maiden name, or the name of the putative father. Instead of that we have the evidence that Malefane attended the funeral of the plaintiff's mother. I can well understand that he was not allowed to pour soil, as plainly the plaintiff did not wish to acknowledge paternity. Nonetheless, the very presence of Malefane at the graveside and his very wish to pour soil, is indicative of the consistency of the defendant's position throughout.

It was the plaintiff's own evidence that he "made a point of returning" to Lesotho in 1972, to verify the birth of Malefane. That I consider would have been somewhat unusual behaviour if the defendant, a wife

estranged and separated for over five years, had given birth to another man's child. If the plaintiff was so concerned with such adultery, why then did he wait some seventeen years before filing suit for divorce and in particular, why did he not allege adultery in his pleadings? Mr. Nathane submits that that was a matter within the discretion of the plaintiff. Of that there is no doubt. But it was clear all along to the plaintiff that the defendant maintained that Malefane was his child. The presumption of legitimacy applied, and the onus was clearly upon the plaintiff to disprove legitimacy, and in that event to frame his pleadings accordingly. The suggestion then arises, that the plaintiff at a distance on the mines in South Africa, wished to evade his responsibility in respect of Malefane, and that he delayed seventeen years in filing action, as he did not wish to give rise to such aspects before the Court and hence when he did file action it bore no reference to any alleged adultery.

It will be seen therefore that there are inconsistencies in the evidence for both parties. When it comes to credibility, I consider that the defendant

fared better than the plaintiff, who as I have said was plainly evasive and contradictory in places. But I do not see that that is the ultimate test. At the end of the day, as I have said, the onus lies upon the plaintiff, on a balance of probabilities, to disprove legitimacy (see e.g. *R v Van der Merwe* (1) and *Van Lutterveld v Engels* (2). That being the case, I am not satisfied that Malefane's birth was other than legitimate. I have not been asked for a declaration in the matter. Suffice it to say that I find that the child Malefane Paulus Thamae, born of the defendant on 11th December, 1971, that is, conceived and born in lawful wedlock is the legitimate son of the plaintiff.

I turn then to the aspect of forfeiture. There is a prayer for such in the statement of claim and the Court has no discretion in the matter (*Murison v Murison* (3) at p.161). Accordingly I order that the defendant forfeit the benefits of the marriage.

When it comes to forfeiture, there was no evidence of the three valuations referred to by the Court of Appeal in *Monapathi v Monapathi* (4) per Schutz P. at p.6.

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Clearly the plaintiff was chiefly to blame for this situation, as he adduced no evidence whatever in chief as to the matrimonial estate. The defendant testified that the plaintiff had acquired some livestock before they separated, and tried unrealistically and unnecessarily to persuade the Court that the identical livestock and their progeny were still in existence 25 years later. In any event neither party put any *value* on the contents of the matrimonial estate. The plaintiff claimed that when the defendant departed in October, 1966, she took matrimonial property with her. He was on the mines at the time. His sister, Mrs. Mamabolaoane Tsobo, was present in the matrimonial home at the time, and she testified that the defendant on two occasions removed property: she carried the property, however, on her head and Mrs. Tsobo's evidence indicates that the defendant took no more than clothing and bedding and some pots and pans, though the defendant denied taking any utensils.

The defendant testified that the matrimonial home contained a 3-door kitchen unit, table with 4 chairs, bed, wardrobe, lounge suite and also 8 sheep, 4 head of cattle and 2 horses. The defendant herself testified

however that

> "All the property I have mentioned was bought by my husband. It remained behind when I left. They were his property as he used to give the money to his mother to buy them. She used to show me the money saying he had said she should buy the animals and after she had bought she used to show them to me."

Again, the defendant testified that the plaintiff commenced in 1966 to build a house which he completed in 1983. The parties cohabited for no more than six months and it is the defendant's own evidence that she made no contribution to the property purchased by the plaintiff and presumably therefore to the building materials to start the building of the house. Any property which she did bring in, namely her clothing and bedding, she subsequently removed.

In the case of *Gates v Gates* (5), referred to in *Monapathi* (4), Selke J observed at pp.364/365 that it was necessary to ascertain "the value of the *joint* estate as

it exists at the date of the order for divorce" and the value of the contributions made respectively to the estate by each spouse. The learned Judge went on at p.365 to observe:

> "If, after such proof has been given, it appears that the existing value of the defendant's contributions is equal, or greater than, that of the plaintiff's, then there is no forfeiture in fact, and the existing estate is divided between them in equal shares, exactly as if no forfeiture had been decreed. If, on the other hand, the value of the contributions proved to have been made by, or on behalf of the plaintiff, exceeds that proved to have been made by, or on behalf of the defendant, then the forfeiture consists of half of difference between the values thus established."

In the present case it can safely be said that during the first six months of the marriage the sole contribution to the joint estate made by the defendant was the clothing and bedding which she brought to the matrimonial home. This she took away with her. Thereafter, even though the parties were separated, the Court is concerned not just with the estate in the plaintiff's possession but with the joint estate, that is, including the property in the defendant's possession, which formed part of the joint estate as at the date of

divorce. The Court has heard no evidence of any property in the defendant's possession. That she was able to support herself is evident: indeed she also supported Malefane. She was employed during 1970 and 1971. Thereafter it seems she sold fruit, as she gave her occupation as a fruit seller and she testified that she supported Malefane by the sale of apples.

When it comes to the value of the contribution of each party to the joint estate, it can be said that the value of the property in the possession of, that is, owned by each party on the date of the order of divorce, represents the value of the respective party's contribution to the joint estate (see *smith v Smith* (6)). The practical effect of an order of forfeiture is that the guilty party retains the value of his or her contribution to the estate, except where that contribution exceeds fifty per cent of the estate: in that event the guilty party retains no more than fifty per cent. Assuming for the moment that the property owned by the defendant is valued at less than fifty per cent of the joint estate, it seems to me that the order of forfeiture would be satisfied by ordering each party

to retain the property respectively owned by them.

The truth of the matter is however that the property owned by the defendant does not represent her sole contribution to the matrimonial estate. She has completely supported Malefane, a child of the family, for 21 years and indeed educated him. That contribution is represented by a diminution in the value of the property owned by her. To put it another way, had the plaintiff supported Malefane, the defendant would have amassed more property. No doubt such aspect could be dealt with by an order for payment of arrears of maintenance of Malefane. But it seems to me that such an order, made after 21 years, would be unrealistic, involving extreme complexity of calculation. In *Gates* (5) Selke J. held at pp.365/366 that the Court was entitled to take the services of the wife in managing the joint household and caring for the children into account in calculating her contribution to the joint estate. I cannot see that the defendant made any contribution, in a monetary sense, to the management of the joint household, over a period of only six months in the home of her mother-in-law. But quite clearly she made a significant contribution to the joint estate in

caring for and in the maintenance of Malefane. The difficulty is to arrive at a percentage of the value of the joint estate which would represent such contribution. Doing the best I can, I would assess that contribution at fifteen per cent of the value of the joint estate.

The defendant's contribution to the joint estate is accordingly represented by the value of the property owned by her, plus a sum equivalent to fifteen per cent of the said property owned by the plaintiff, that is, fifteen per cent of the joint estate. As the order of forfeiture is made against the defendant, she is not entitled to the benefits of the plaintiff's contribution: she is of course entitled to retain her own contribution, that is, the property owned by her, plus an amount (or property in the same value) equivalent to fifteen per cent of the value of the joint estate, as also representing her contribution. Should the property owned by her exceed in value fifty per cent of the joint estate, the joint estate shall be divided equally between the parties. Again, where the property owned by her is less than fifty per cent of the joint estate, but the addition of fifteen per cent of the joint estate would

have the effect of increasing her share of the joint estate to more than fifty per cent, then the additional sum will have to be reduced so that the defendant's resultant share of the joint estate shall not exceed fifty per cent.

There is then the aspect of the actual value of the property owned by each party, and hence the actual value of the joint estate. Not an iota of evidence was adduced on this point. Clearly it is desirable and would, as Schutz P. observed in *Monapathi* (5) at p.6, reduce costs, if the parties were to agree such valuations. Failing such agreement, however, I order that the property owned by each party on the date of the order for divorce be valued by an independent umpire, the identity of such umpire to be agreed by the parties, or, in default of such agreement, the umpire to be appointed by the Court.

When the umpire has thus ascertained the value of the property owned as aforesaid by each party and thus the value of the joint estate, three possible situations may arise, namely, where

(i) each party owns fifty per cent of the joint estate, or

(ii) the property owned by the defendant is valued at more than fifty per cent of the joint estate, or

(iii) the property owned by the defendant is valued at less than fifty per cent of the joint estate.

Those situations shall be dealt with as follows:

(i) where the joint estate is thus equally divided, the parties shall each retain the property respectively owned by them; or

(ii) where the property owned by the defendant is valued at more than fifty per cent of the joint estate, the plaintiff shall retain all the property owned by him and the defendant shall pay to the plaintiff such amount, or shall transfer to him such

property, as shall have the effect of decreasing the defendant's proportion of the joint estate and increasing that of the plaintiff to fifty per cent thereof; or

(iii) where the property owned by the defendant is valued at less than fifty per cent of the joint estate the defendant shall retain the property owned by her and the plaintiff shall pay to the defendant such amount, or shall transfer to her such property as shall represent fifteen per cent of the value of the joint estate; provided that where such payment or transfer by the plaintiff would have the effect of increasing the defendant's share of the joint estate to more than fifty cent thereof, such payment or transfer shall be limited in extent to the effect that the defendant's resultant share of the joint estate shall be equal to fifty per cent thereof.

As to costs, the plaintiff as the main breadwinner should bear them. I award costs to the defendant.

Dated this 14th Day of February, 1995.

B.P. CULLINAN
CHIEF JUSTICE