

IN THE HIGH COURT OF LESOTHO

In the matter between :

Caswell Motlatsi Mokhali

Plaintiff

VS

Agnes Mamatsepe Mokhali (nee Molapo)

Defendant

Before The Honourable Chief Justice B.P. Cullinan

For the Plaintiff : Mr R. Pheko
For the Defendant : Mr M. Mathe

JUDGMENT

This is a divorce action. The parties were married in 1974. They are now aged 47 years and 41 years respectively. There were four children born to the marriage, a boy and three girls: the boy is now adult and the three girls are aged 18 years, 15 years and 13 years. The plaintiff filed a summons for restitution of conjugal rights, failing which a decree of divorce on the ground defendant's malicious desertion. The declaration in part reads as follows:

"With a settled mind to terminate the said marriage Defendant has, without any reasonable cause, done the

following wrongful and unlawful acts to wit:

- "(a) she is in the habit (of) taking intoxicating beverages excessively and when drunk she abuses plaintiff and the minor children and often comes home late or sleeps away from the marital home;
- (b) generally she does not care for the minor children and does not do any household work;
- (c) she tells Plaintiff often that she no longer loves Plaintiff and that she wants a divorce;
- (d) she misuses the money Plaintiff gives her even though she does not work;
- (e) she is in the habit of obtaining loans for her own benefit without the knowledge and consent of Plaintiff;
- (f) she has persisted in the aforesaid behaviour despite Plaintiff's persistent requests to desist therefrom.

In the premises Defendant has maliciously deserted Plaintiff."

The action was not defended, there being no appearance by the defendant. At the hearing, the plaintiff gave evidence in support of all the above allegations, testifying that the

defendant's behaviour had commenced in 1987 and that in particular he and his elder children did all the housework, and though the defendant continued to live in the the same household, they no longer shared the same bed.

The Court granted an order of restitution of conjugal rights. Before the return day, the defendant filed an application for leave to defend the action. In brief she deposed that though initially served with the summons, the plaintiff subsequently undertook to withdraw it, so she entered no appearance: the plaintiff however resuscitated the action (some 21 months later) and she only learnt of it when served with the order for restitution of conjugal rights. In any event, the Court discharge the rule and granted leave to defend. In her plea the defendant denied all of the plaintiff's allegations. In particular the plea reads:

"Defendant denies that she used intoxicating beverages excessively. She also denies that she ever got drunk from using intoxicating beverages. Defendant avers that at no stage did she abuse the minor children and Plaintiff when drunk.

Defendant denies that she was in the habit of coming home late or sleeping away from the marital home"

"Defendant avers that as a housewife at no stage did she neglect to take care of her children and avers that she had

properly done her house duties. Defendant alleges that Plaintiff is the one who neglected the family particularly when he had been transferred to Mafeteng from 1983 to 1987.....

Plaintiff is the one who was in the habit of telling Defendant in front of the children that he no longer loved her. Plaintiff would utter these words whenever Defendant confronted him about his extra marital affairs..... Defendant admits that she made loans and this was when the Plaintiff was living in Mafeteng because Plaintiff had neglected to provide for the family.....

Defendant avers that when the Plaintiff had been transferred to Mafeteng he lived in Mafeteng as man and wife with a certain Makeke Mothobai. The Defendant condoned the said adultery. The Plaintiff has since on or about the 13th March, 1992 maliciously deserted the parties' matrimonial home at Khubetsoana and he is presently living in adultery with one Selemeng Tsosane at Maseru East, Maseru"

The plaintiff in chief stated that he adhered to the evidence which he had given when the matter was apparently uncontested. The defendant in her evidence strongly denied all allegations. It would seem from the evidence of both parties that the plaintiff was transferred by his employers to Mofokeng in 1979 and thereafter to Mafeteng in 1983/1984. After a year's stay in Mofokeng and he took the two eldest children to stay with him - the third child was then one year old and the fourth child had not yet been born. When he was transferred to Mafeteng however, no member of the family accompanied him. He

rejoined the family, however, in April 1987, when transferred to Maseru. At one point in his cross - examination the plaintiff testified that "I haven't stayed with her from 1979 to 1987." During those years the defendant maintained the matrimonial home and for most of that period looked after the four children.

The plaintiff himself testified that the defendant was self-employed for a period, as a hawker selling clothes. He testified that she depended solely upon him for maintenance from 1987 onwards, presumably when he returned from Mafeteng. She had deposed in an affidavit that she had sold "soft goods" up to 1989, when she stopped such activity on his request. There was no viva voce evidence on the part, however, and I accept therefore that the defendant was self-employed for three or four years while the plaintiff was in Mafeteng. Indeed, the family was able to employ a domestic during 1986, presumably due to the extra money earned by the Defendant.

The evidence is therefore as I have said, that for a period of eight years the defendant alone cared for the matrimonial home and the two youngest children, and for most of that period for the two oldest and indeed was also gainfully occupied for some of that period. That aspect is in contrast with the plaintiff's evidence that on his return in 1987 and thereafter the defendant neglected the family and that he and the eldest two children did all the working, ironing, cooking and general housekeeping. The plaintiff's evidence on the point, which the defendant hotly

denies, maintaining that the plaintiff knows nothing of any housework, is not in keeping with the picture previously painted, that of a caring and indeed resourceful mother. Suffice it to say, for the moment, that the plaintiff's version requires some support.

There is the issue of the defendant's borrowing of money. She acknowledges this aspect, but testifies that the occasions when she did nso were rare and that she did so only when he failed to maintain the family when on transfer. This he in turn strongly denies. Nonetheless the plaintiff is a bank official. He is now an Assistant Manager, so that it is safe to assume that when he was on transfer in Mohale's Hoek and then Mafeteng, he was earning a reasonably good salary. Despite this we have the evidence that during the latter period, when he was in Mafeteng, the defendant nonetheless took up employment as a hawker. I cannot see that that would have been necessary if the plaintiff had fully supported the family. To say the least of it, I am not satisfied that the defendant obtained loans with any frequency, nor that such loans were, as the declaration alleged, "for her own benefit."

The declaration alleges and the plaintiff testified that the defendant wished to have a divorce. Quite clearly that is not the case: it is the plaintiff who seeks divorce.

The plea makes two allegations of adultery. With regard to the first allegation, there are no details supplied in the plea, as they should have been, but they supplied in the defendant's affidavit. The defendant testified that she found the plaintiff *flagrante delicto* in bed with one Makeke Mothobai in a house at Seapoint in Maseru. This was sometime during the period October to December, 1989. She maintained that the plaintiff admitted that he had been living with Makeke while he was in Mafeteng. The parties' relationship thereafter soured, and the plaintiff at one stage declared that Makeke was his wife and that she had given birth to his child. The plaintiff denied all this in cross-examination. He stated that the defendant had but found him in Makeke's sitting room, and not her bedroom. Earlier, however, when asked whether he "used to visit her (Makeke) at her place", he replied that "that is not true." It is significant indeed that, in replication to the defendant's plea, while the plaintiff specifically denied "that he is living in adultery with Salemeng Tsosane and avers that this lady is Plaintiff's co-worker and not his lover," the replication contains no reference whatever to the defendant's allegation concerning Makeke Mothobai.

The defendant maintained that after her discovery of the affair with Makeke, relationships soured to such an extent that the plaintiff filed the divorce action shortly thereafter, that is, in January 1990. She testified that she referred the summons to the parties' families and the plaintiff, after an apology

before them, undertook to withdraw the summons. After that they "lived in peace."

The defendant's evidence is borne out by the fact that although the defendant did not enter any appearance to the summons, it lay there for 21 months before the plaintiff took any action thereon, that is, on 29th October, 1991, when he issued notice of set down for hearing. The defendant indeed testified that the plaintiff's action in the matter arose out of further marital difficulties in that month: on 3rd October, 1991 he did not sleep at home: he refused to answer her questions in the matter and thereafter spent little time at home: ultimately she found him on a Sunday in the company of Seleming Tsosane in the latter's house at Ha Tsosane, though not it seems in any compromising circumstances. Finally, as the plaintiff himself testified, he left the matrimonial home in March, 1992.

Suffice it to say that the defendant's evidence, supported by surrounding circumstances, has a ring of truth about it. I entertain no doubt that the plaintiff had committed adultery with Makeke Mothobai, but that such adultery was condoned. As to Seleming Tsosane, the probabilities are the said lady. It is not the defendant, however, who seeks divorce, but the plaintiff. Nonetheless, the issue of the plaintiff's adultery is relevant to his allegation that the defendant drinks excessively.

The defendant testified that she started drinking alcohol in 1977, at the invitation of the plaintiff, who wanted her to accompany him in social drinking : as she put it, "we used to drink and be merry". She denied however that she drank excessively, or that she neglected the children as a result thereof. She also denied that the plaintiff had advised her to reduce her intake of alcohol. Yet it was put by Mr Mathe to the Plaintiff that, although the defendant had at one stage drank excessively, she had reduced her intake after the plaintiff had advised her to do so. The probabilities are therefore that the defendant did drink excessively at one stage.

It was the plaintiff's evidence that his advice had fallen on deaf ears and that the defendant had continued to drinks excessively and to neglect her household duties. There are three aspects which support his evidence on the point. Furtherafter he left the matrimonial home in March 1992, he sent maney for groceries every month, but to the eldest daughter Matholoana, then aged no more than 15 years. It might be said that he did not wish to communicate with the defendant in any way. It is significant however that when either the groceries he despatched to the family, or the money for the purchase thereof, proved insufficient, it was Matholoana, then aged 16 years, and not her mother, who wrote a complaining letter to the plaintiff in January, 1993. It was as a result of that letter that the plaintiff, so he testified, gave Matholoana an extra R50 per month. The defendant did not dispute this evidence that the

defendant was in the habit of spending house - keeping money on alcohol.

Secondly, it was the defendant's own evidence that during the course of the hearing, that is, at a time when the plaintiff had not finished his cross - examination, she was assaulted one night on her way home. The Court was informed by Mr Mathe that the alleged assailant was a potential witness for the plaintiff, or so he had informed by Mr Pheko. In any event the plaintiff did not call any witness after his evidence had concluded. I do not see that the identity or potential status of the alleged assailant is relevant to the issues in this case: in any event, there is simply no evidence as to such potential status before me. The defendant's evidence as to the incident is however relevant for another reason.

She agrees with a statement made to the Majara Local Court, before which court the issue of the assault was tried, by her female companion on the particular occasion. The latter testified to the Local Court that she had attended the High Court with the defendant: when the hearing in the High Court concluded they visited the home of a friend and then left for home: it started to rain and they went to "Masebo's Restaurant", which the defendant testified, is a drinking place. According to the defendant, they spent a long time "trying to get transport" and ultimately left the drinking place between 9 pm and 10 pm. She was assaulted apparently en route to her home.

On the date in question, however, the High Court hearing had occupied the morning only: the Court did not sit that afternoon and the case was adjourned at 12:45 pm approximately until the following afternoon. That indicates that the defendant was free to return to her home at lunch time but to visit a friend instead and thereafter a drinking place. It seems to me that there must be many places in which to take refuge from the rain, other than a drinking place, and that two ladies would not venture therein unless there were accustomed to do so.

Mr Pheko put it to the defendant that she was drunk on the night in question, which allegation she denied. She admitted that she and her companion had shared three quarts": that indicates that she had consumed, on her own evidence, some three fints of draught beer. I cannot say whether such consumption, depending on the defendant's tolerance of alcohol, was in the circumstances exercise. In the least however such consumption reflects a familiarity with if not high tolerance of alcohol, which is hardly becomes a married woman with a relatively young family. More importantly, the return to that family, her youngest children being aged no more than 13 years and 11 years at the time, whom she had not seen since early morning, she was prepared to spend her time in a drinking place, when one considers the needs of those young children, to a very later hour at night.

Thirdly, if such occurrence had been the defendant's sole default, it could well be overlooked. The incident, however, serves to corroborate the plaintiff's evidence that such behaviour was habitual. In this respect he annexed to an answering affidavit a letter, of complaint which he had written to the defendant in March, 1991. The defendant denies that such letter was ever written to her. The question arises as to how the plaintiff obtained possession of the letter: I assume however that as they shared the same household, repossession thereof posed no problem for the plaintiff. In any event, the letter in my view bears all the hall marks of a genuine letter, defying concoctions in this detail. It complains *inter alia* of her taking the key of the matrimonial home with her, so as to facilitate a late return, of her returning when he and the children were asleep. In particular he complained that,

"It is clear that you have made this house only a place of shelter from cold."

Suffice it to say therefore that I am satisfied that the defendant had been drinking alcohol to an excessure degree, as a result whereof she spent too much time away from the matrimonial home and had thereby neglected her duty to the plaintiff and their children. While the defendant testified that she had started social drinking in 1977, on the plaintiff's evidence at the first uncontested hearing, she had started to drink excessively in 1987. The question then arises as to whether such excessive drinking preceded the plaintiff's

adultery: did the defendant's drinking drive the plaintiff into adultery, or did the plaintiff's adultery drive the defendant to drink? In view of the incontrovertible evidence that it was the defendant who solely cared for the children from 1979 to 1987, when the plaintiff was on transfer, and when the children simply could not have cared for themselves, it may well have been the discovery in 1989 of the plaintiff's adultery, which triggered off the defendant's behaviour. Alternatively such behaviour may have commenced, as the plaintiff testified, in 1987.

I do not see that it is necessary to determine the point. I raise it however to illustrate that here is a case where the plaintiff, in his adultery, even if at first condoned, may well have caused the irretrievable breakdown of the marriage, or if he did not, at least contributed thereto by his behaviour, and must share the burden of blame. But as I have said, the defendant does not seek divorce, and under the present state of the law in Lesotho, she must bear the burden of guilt. In many other jurisdictions, particularly in England and the Republic of South Africa, the concept of guilt would be irrelevant, particularly when it comes to the division of the matrimonial estate, and the aspect of forfeiture: see the discussion at pp 373/376 of Professor Hablo's work The South Africa Law of Husband and Wife, that is, the Fifth Edition (second Impression, 1990) thereof. One can only express the hope that the legislation in Lesotho will ultimately take a leaf out of the statute book of 1969 and 1979 of England and South Africa respectively.

With the law as it stands, I am satisfied that the plaintiff has made out his case of constructive malicious desertion by the defendant, in that she habitually drank alcohol to an excessive degree, and thereby neglected her duty to him and the family. Accordingly I order that the defendant restore conjugal rights to the plaintiff on or before the tenth day after the delivery of this judgment, failing compliance with which order, the defendant shall show cause on the fourteenth day after the delivery of this judgment why a decree of divorce on the ground of her malicious desertion and an order granting the plaintiff's ancillary prayers should not be made against her.

The question of forfeiture, if it does arise, must of course be left to the return day. The Court so far has, in any event, heard little or no evidence of the content or value of or the contributions to the matrimonial estate. As to custody, all things being equal the custody of three girls now aged 18, 15 and 13 years should clearly go to the mother. The defendant's daughter's have always resided with her. I would be slow to say, in the absence of further evidence, that the defendant's drinking has rendered her an unfit mother. Considering the age of the three daughters, much would depend on their views: they are at an age when the Court should consult their views (or if the parties desire, bear the children's evidence) in the privacy of chambers. I have not had the advantage of doing so in this case. Meanwhile, I believe the *status quo* should be maintained. Accordingly I grant interim custody of the three minor children

of the family, Matholoana. Mamotlatsi Monts'eng, to the defendant, with reasonable access to the plaintiff, until further order of this Court.

Signed this 21st Day of March, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE