

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MATŠEPO THAKALEKOALA

PLAINTIFF

and

TANTU THAKALEKOALA

DEFENDANT

J U D G M E N T

Delivered by the Hon. Mr. Justice G.N. Mofolo  
on the 6<sup>th</sup> day of September, 2001.

This is a matter in which the applicant has applied to this court for the appointment of a liquidator of the joint estate.

The facts of the case are that in a separate action the respondent in the instant application had sued, the applicant for divorce on the ground of applicant's adultery. In CIV/T/391/94 where the respondent was plaintiff and applicant defendant the court had granted dissolution of marriage against the present applicant. The certificate of marriage in CIV/T/391/94 above merely reads:-

The court grants judgment for plaintiff

- (a) for dissolution of marriage;
- (b) the ancillary matter to be attended to later.

As expected, it was the expectation that the ancillary matter would be attended to later; what the ancillary matter was supposed to be is not clear from the certificate but both Mr. Hlaoli and Mr. Matooane agree the ancillary matter had to do with property of the joint estate. This court is informed that because of civil riots and commotion of September, 1998, most court records were burned when a wing of the old High Court was torched by rioters. The court is also informed counsel who handled CIV/T/391/94 was a different counsel. Mr. Hlaoli for the applicant has submitted that he has proceeded as he has done because Mr. Matooane would not agree to have the joint property equally divided between the parties on the ground that a party who is divorced on ground of adultery forfeits the joint estate. Mr. Hlaoli not agreeing with Mr. Matooane had proceeded as he has done by launching the present application. I am to say that though the certificate of urgency does not say that divorce was on the ground of adultery, counsel for applicant and respondent agree that this was the ground for divorce.

Ordinarily, where a court grants divorce and defers ancillary prayers, the ancillary prayers are decided on the same basis as the divorce by leading

evidence.

In one of Mr. Hlaoli's supporting affidavits dated 25 May, 1999, he has applied to this court for an order in the following terms:-

1. That the ancillary prayers left unresolved in divorce granted between above parties be finalised.
2. That the parties hear to lead evidence on the following unresolved issues:-
  - (a) Division of property
  - (b) Costs of suit
  - (c) Further and/or alternative relief.
3. That this Honourable court grant such further and/or alternative relief as it may deem fit.

As to the procedure followed here, this court endorses it because where parties do not agree, differences have to be submitted to court for decision.

Under the same cover Mr. Hlaoli has another supporting affidavit whose paragraph 1 reads:-

I am an attorney of record in these proceedings and I am authorized to make this affidavit in support of appointment of the liquidator in view of the difficulties encountered in determining the extent of the properties involved as the parties have not been together for some years now.

## Paragraph 2

I state that it will be in the interest of the parties to have somebody to collect and distribute the property of the parties which has been in the hands of the defendant/respondent.

As I understand Mr. Hlaoli supposing I am right, he would have the application for ancillary relief proceed in the ordinary way and in the event the court found for the applicant that the joint property be subject to division, the property is to have been identified in order to facilitate division. On this basis, should the court order division of the joint property, it stands to reason that a liquidator would need to be appointed but certainly not should the court order forfeiture of the joint estate.

According to Mr. Hlaoli's argument, he says each party to the state has made contributions and this court is not to order a forfeiture order but to decide the fate of the estate in the light of individual contribution to the enhancement of the estate.

Mr. Matooane has not pursued his points of law.

The parties have agreed that the bundle of documents be handed in at any stage of the evidence.

P.W.1 'Matšepo Thakalekoala sworn has stated she was married to the plaintiff and the marriage was cancelled. On being married she had brought no property into the joint estate. When she joined plaintiff he had nothing. She says at the time of getting married to her husband she was not working and plaintiff was not working either. She says she sold beers - liquor and her husband repaired vehicles. She says she is not able to estimate how much she made annually. She says from the proceeds of beer sales they had bought a second hand vehicle - a mazda for R250-00 in about 1983. She says they lived as husband and wife in 1981 and marriage solemnized in 1987 and by then they were already staying together. She says she also sold vegetables, meat and clothing items. From the proceeds they bought kitchen, bedroom equipment and increased their sales. She says she wishes to refresh her memory; they had sought a business site at Seoli got it and bought it for M800-00 in 1984; bought a residential site at Lower Seoli, she does not remember when but there are Form C's and letter of agreement and she will detail the evidence later. She says they were allocated plaintiff's home at Ha Tsautse after the death of her husband's parents and they had lived there as husband and wife. There was a second site at Seoli acquired from a man who failed to pay repair costs on a vehicle; another site from a man whom both her and husband advanced money and was not able

to pay. They also had a counter fridge; 3 x door kitchen and scheme unit; 3 x door sink, 2 x display counters; 2 x cigarette counters; 1 x sweets counter; olivette telly machine; 1 x sharp till machine with battery; 5 x deep freezers; 2 fridges; 1 x burner stove with cylinder; 3 x gas primus stoves; 8 x plastic tables; 2 x big steel tables; 60 x plastic chairs; 45 x glass dinner plates; 36 cups and saucers; 36 teaspoons; 38 table spoons - the list is handed in and marked Exh. 'A' collectively. She says she will hand in some of the receipts though some receipts were left in the house because she was expelled by her husband the plaintiff in 1994. She says the receipts were issued in her husband's name. She says the long coffee table was bought in her name. She says she is saying the property should be shared because it is joint property though most of the property is with her ex-husband. He says he expelled her from the business in 1992 and from then on everything remained with him for she had been expelled. She says everything is with her ex-husband including bank accounts. She says even before he expelled her he used property to her exclusion. She says her ex-husband expelled her to leave the business so it could be run by him and she to stay at home and all he did was to send business book balances and prices to fix. He remained with workers though he was no longer staying at home but had rented a house with the woman he stayed with. She says this was in 1994 after being chased away. She says having been chased away her ex-husband married another woman by taking her to his people where a sheep was slaughtered for her. She says she did not see the sheep being slaughtered. She says her ex-husband separated with

this woman, took another who died in September, 2000. She says he stayed with this woman at the joint home. The woman had died in hospital but the funeral held at the joint home. She says in living with these several women the witness and her ex-husband were still married. She says when her ex-husband married the latest woman they were divorced.

Cross-examined by Mr. Matooane she says in 1998 when they divorced all the property was with the plaintiff. She says after leaving she does not know what happened to the property for when she left she only took her clothing. She says the receipts were in her bag being receipts from 1987 to the time she left. She denies she took property when she left. She says when first she lived with her ex-husband they rented a quarter and thereafter stayed at their residential home. In 1982 they made a shack and the house was built in 1984. That when she was married there was a house already furnished she denies. She says nobody stayed at Tsautse's after her ex-husband's parents died. As for sites acquired for repairing a vehicle and money owed her ex-husband and herself, she says she has a document regarding a site given for repairing a vehicle. She says she sees the document which shows a business site acquired in 1979 and her evidence is that the site was obtained while living with her ex-husband. She says the 1979 document was made by the chief and says it differs from the agreement. She says they had 4 sites including Tsautse. Shown Exh. 'B' collectively she says documents dated 01.10.75 and 28.01.97, 13.08.84 respectively. As for the 1975

document, she says these are the documents the chief wrote back-dated; she says 2 documents were back-dated.' That the sites were acquired before staying together with plaintiff her ex-husband, the witness denies. That the witness does not have receipts of things bought before 1987 for they started living together in 1987 and none of the receipts were pre-dated 1987, the witness says she had a receipt of 1984 being an agreement of a site. As for receipts pre-dated 1987 she says there are none. That her ex-husband hired a site from Phoofolo where the witness found him trading, the witness denies. Put to her that at all material times she had a maid paid by plaintiff, the witness says they both paid her. That at the shop there were workers and managers and she went to the shop because she had no work, the witness denies for her ex-husband did not go to the shop by reason of not being familiar with shop procedures. As for the mazda van, she had no documents save photographs. That there never was such a vehicle she says there was for it bore Reg. No.A7475. Put to the witness there was a green mercedes- benz bought before living together, the witness says they bought the vehicle while living together and it was the third vehicle bought. She says when she left in 1994 they had 3 vehicles. She says in 1998 she had left 3 vehicles behind and in 1998 she saw 2 vehicles: Benz Reg. ON 5009 (though it has been changed) plus Reg. Oxv 29027 a green mercedes-benz. Also a light hilux Reg. 6155. She says in 1998 there were 3 vehicles and she used to see 2 vehicles. That the green mercedes is 1971 model and not 1979 she denies. She says this is not the only vehicle they owned. She says the business she has referred to was



at Lekhaloaneng at Hae Phoofolo's and they had left for their own at Seoli in 1991. She says she sees the document dated 28.01.87 - she says the other side is residential site, developed. She says a separate site had a house; the other site was the one given for repair of vehicle belonging to Matala Mochochokoane, a site on which there was a house, a flat with single room, unused. Another one they resided at is family house at Lower Seoli. She says she had a document for this dated 01.01.75 being a document by the chief. She says she sees the 1979 document which is a business site at Seoli's bought from Junisi Makhobalo Theko in 1984; she says she had a supporting document dated 28 January, 1987. She says they were not paying in lump sum but by instalments though she may be making a mistake concerning years. She says the 1984 site is Mochochokoanes; the 1987 one is Jams Theko Makhobalo's, a business site. She says she knows the document being an agreement dated 1994 - she now says she does not know it. She says she knows about the 1982 site though she does not know the document. She says the documents she has handed in shows the 1982 site. She says the person who signed the document (J.M.Rasethuntša is blind and cannot see). She says the writing is in bold and faint form. The witness says she does not recall if she has 1987 receipts. As for the Form C's they are 1975 and 1979 though she does not agree with years. She says she does not know the 1987 receipts because she was not staying with her husband for husband not present in Lesotho around 1975-79.

That she is not able to identify the 1982 site because they were married in 1987 she says they stayed together in 1981. She says there was no Sesotho marriage and they had just stayed with her ex-husband. She says her husband's mother was old and disabled and there was nobody to marry off ex-husband.

Re-examined the witness says sites were acquired during marriage and she knows and can show this

Plaintiff's case.

D.W.1 Pitso Tantu Thakalekoala sworn states: that he was born on 12 March, 1946 and was married to 'Matšepo Thakalekoala. He says they divorced in 1998 having lived together from 1982 - 1988 when the marriage was solemnized. He says from 1982 - 1988 there was no marriage, not even customary marriage. He says about 1990 - 1991 they separated because wife had love affairs with soldiers. He says they ended staying together in 1990 to 1998 when they were divorced. He says after 1998 he got married but the marriage no longer subsisted for his wife had died at child's birth. He says he married after divorce his first wife and lived with second wife from 1998 to - July, 2001. He says during his marriage with 'Matšepo he had a residential site and a business site the former at Lower Seoli and the latter at Besele. He says he has documents though he has not converted title. Other than these he had no other

sites.

By his home he says he means his father's home. He says he has no documents relating to the sites. He says he is the last born for the eldest is Charles Malefane Thakalekoala. He says Charles gave his second wife permission to build on the site. He says he married the second wife customarily. As for two other sites at Seoli's he denies the existence of these. He says when he stayed together with his first wife she was not working and never worked at the shop for there were hired people. He says he worked as a mechanic and an electrician. He says he had a domestic servant. He says in course of repairing vehicles he was informed by his driver that there was a site for sale and he had hired the site and sold beers. He says his wife did not sell beers for he had a saleslady. As for the shop, he hired Mr. Phoofolo's shop premises and ran a café, 'Matšepo had never worked at his business. He says wife took money to her home - the reason she did not work. She worked at a shebeen at Seoli's and her illegitimate son used to be at the shebeen visiting. He says seeing him there he thought he came there to take money and for this he had chased his wife from work. He says it was not a long time she worked. He says he found out from wife's son that wife had difficulties. He says when wife left she took away some blankets and sheets - mostly bedroom items, bed, headboard and cooking utensils. He says he does not know what else she took for he was outside; he says she also took a cooking pot.

The witness says he has seen the list prepared by his wife. He says he has marked what he knows and does not know. He says that which he has not marked he does not know and does not have in the house. He says in the list there is no wearing apparel. He says utensils were not bought by him and he does not know much about them. He says plates and some pots are there and he is able to say what's there and missing. He hands in list which is marked Exh. A<sup>2</sup>. He says it is not true his wife did bookkeeping for him. He says between 1991 - 98 his wife never came back to him saying she wanted portion of the property.

Cross-examined by Mr. Hlaoli the witness agrees they worked together with his wife to generate resources. He agrees from the resources he bought household items or family property, he says he has not shown property acquired by him alone for though he bought the property they were staying together. He agrees he has not shown money brought into the estate. He says he has two sites acquired during the universal partnership of marriage and at time of the divorce they were part of the estate. He says the liquor sold was of small quantity.

Defence case.

In addresses Mr. Hlaoli for the applicant has said he is praying for division of the estate in that at all material times applicant has contributed to the assets

of the estate. Notwithstanding that applicant was divorced by the respondent on grounds of adultery, Mr. Hlaoli says the guilt of the party is not alone the ground for forfeiture of benefits arising out of a joint estate and he has quoted *Monapathi v. Monapathi* (LLR 1993-1994 p.29). He says forfeiture applies only if one of the parties has contributed more and says a proper case has been made for division of the joint estate and appointment of a liquidator.

On the other hand, Mr. Matooane says there is a disparity in the earnings for the one was profitably engaged while the other wasn't. He says forfeiture order is the proper order for the applicant has not shown contributions were equal and there was no proof what the state of the estate was in 1998 being at the time of divorce. Mr. Matooane also says as there has been no formal transfer in terms of the Land Act, 1979, failure to transfer renders the transaction null and void. He says the parental site does not fall into the joint estate. He has said the forfeiture order is to be based on the matrimonial home.

That respondent said applicant took property in the bedroom Mr. Matooane says the respondent was not challenged on this.

This court has collected a lot of material from *Hahlo - The Law of Husband & Wife - 5<sup>th</sup> Ed.* Thus *Hahlo* (p.375) quoting *Singh, 1983 (1) 781 (C)* says the court in this case had decided that the wife's misconduct with another man

accounted to 'substantial misconduct' and outweighed the fact that the marriage lasted 20 years. Further, according to *Hahlo (ibid)*, one of the factors which influenced the court in *Soupionas, 1983 (3) S.A. 757 (T)* at 759 B in its decision not to make a forfeiture order for which both parties, on different grounds, had applied was that they had lived together for 9 years before marriage.

F.S. Steyn J. is quoted as saying:-

'If people, after finding solace and satisfaction in each other's physical company for a period of years, decide to marry, the legal consequences of the marriage must be an important motivating factor for that contract of marriage and, consequently, all the material consequences of that marriage must have been thoroughly contemplated between the parties and it would be sound policy to enforce such contractual views of the parties against each other.'

Parties in the instant case have lived together from 1981 - 1987 before marriage so that before marriage they lived together for 6 years - an important period in their lives when they worked together in a spirit of comradeship and give-and-take. Living together as man and wife before marriage and marrying later was nothing but to give effect in a concrete fashion their relationships before marriage. In a decision which I am going to make, this court is fortified by the fact that earlier the respondent ex-husband had said his wife did not work in the

shop doing bookkeeping for him but had later changed to say 'we worked together with wife to generate resources'. Because of this, I have not found respondent ex husband to be a truthful person.

According to authorities, a divorce order has to be made at time of divorce and since this is not what happened in the instant case, the question is whether it can be made later. This court's view is that at time of divorce ancillary prayers were deferred forfeiture order being a prayer that was deferred. Since the prayer was postponed I see no reason why it cannot be decided at this stage. I do not think that it is necessary to go into individual nuances of contribution for these are not immediately discernible to me notwithstanding Mr. Matooane's submission that the ex-husband was more profitably engaged than the ex-wife. I doubt because a man going to the mines and being profitably engaged there leaving a wife behind who nurses children, tends stock and pursues farming, surely it cannot be said that the one has contributed more than the other. In the case of present parties, while the respondent ex-husband pursued his profession the applicant ex-wife sold beers and later looked after family business. The only discernible differences calling for a forfeiture order is when, before marriage, a husband or wife has distinct contributions which may outweigh the other; otherwise there can be such considerations where parties are salary earners and the one earns more than the other. In fact, in old law the court could order that the 'guilty' spouse forfeit the whole or part of his or her contributions to the

marriage. This, in modern law, is obsolete for only the excess of plaintiff's contributions over those of the defendant are liable for forfeiture. (*see VL Cens For 1.1.59; Sententien van den Hoogen Road No. 8 p.25; Kerterman Woordenboek sv Dissolutie and Martens (1896) 17 N.L.R. 5; Celliers, 1904 TS 926; Ferguson, 1906 EDC 218; Anthony 1946 C.P.D. 871*).

Although in this country there is no Divorce Act or as it were Matrimonial Cause Act, in other jurisdictions where these acts exist the court has wide discretionary powers (see *S.9 (1) of the S.A. Divorce Act, 1979*) in terms of which a court instead of decreeing that a spouse to be penalized is to forfeit all the patrimonial benefits which have been derived from the marriage by reason of community, may order to forfeit only part thereof 'say a half or third and alternatively may order specific assets forfeit. A party apparently may not be made to forfeit more than the patrimonial benefits which he or she has derived from the marriage.

In view of my views as expressed above, I am attracted by the judgment in *Gates, 1940 N.P.D. 361 at 365-6* (the same case the Appeal Court pinned to its mast in *Monapathi v. Monapathi LLR 1993-94 p.29*) - where it was said the court is entitled to take service of the wife managing the joint household and caring for the children into account. On the other hand, where spouses have lived apart for some time before their divorce, their accumulations since the date of separation



must be regarded as *prima facie* separate contributions - see *Smith, 1937 W.L.D. 126; Ex parte De Beer, 1952 (3) S.A. 288 (T)*.

In the instant case the applicant ex-wife says she left the matrimonial home in 1994 while the respondent ex-husband says it was about 1990-91. From documents before me, the applicant is referred to variously as either 'Matšepo Thakalekoala or M. Thakalekoala while the respondent is referred to variously as Pitso Thakalekoala or Pitso Tantu Thakalekoala or Pat. Thakalekoala. Document Inv. No7689 dated 25 November, 1991 appears in M. Thakalekoala's name and there is no doubt that M. stands for 'Matšepo. According to the respondent, as applicant had already left the matrimonial home the property subject matter of the invoices quoted above could not have been bought by the respondent. I disagree and find that respondent is not certain or hides exactly when respondent left the matrimonial home. I agree with the applicant that she left the matrimonial home in 1994.

I have gone through the mass of exhibits before me and find that no property was bought or brought into the matrimonial home between the years when applicant left the matrimonial home and divorce.

I am only prepared to say that in the instant case both the applicant and respondent have contributed equally to the joint estate and consequently that the

estate is to be divided equally. The estate identified by the court consists of a mass of papers comprising Exhibit A collectively and Exhibit B collectively.

Mr. Hlaoli has asked for the liquidation of the estate. Liquidations of the estate and appointment of a liquidator is a costly exercise. This is a small estate with no sufficient resources to bear costs of a liquidator and it seems to me the appointment of a liquidator would defeat the grant of the order. While the application is granted as prayed, it is to be extend that the chief of the area is to oversee the liquidation and division of property both movable and immovable between the applicant and the respondent.

There will be no order as to costs.



G.N. MOFOLO

Judge

5<sup>th</sup> September, 2001.

For the Applicant: Mr. Hlaoli  
For the Respondent: Mr. Matooane