

**IN THE COURT OF APPEAL OF LESOTHO**

**C OF A (CIV) NO.66/2019**

**HELD AT MASERU**

In the matter between:

**‘MAMOKOTJO LIBOTI**

**APPELLANT**

**And**

**MPOI LIBOTI**

**RESPONDENT**

**CORAM:**

DR K E MOSITO P

DR P MUSONDA AJA

N T MTSHIYA AJA

**HEARD:**

19 MAY 2020

**DELIVERED:**

29 MAY 2020

**SUMMARY**

*Practice - Judgments and orders - absolution from the instance -  
Test for - Reiterated that to escape absolution, plaintiff to make out  
prima facie case - Must tender evidence on which court might or*

*could reasonably find for him or her - High Court ought to have granted absolution from the instance - Absolution from the instance granted with costs.*

*High Court erred in granting orders that had not been sought by the plaintiff (respondent), by awarding respondent a house at Mohale's Hoek, which house was in appellant's possession – Appeal upheld with costs.*

## **JUDGMENT**

### **K E MOSITO P**

#### **Background**

1. This is an appeal against the order of the High Court (Sakoane J) handed down on 3 September 2019. The respondent approached the High Court by summons on 16 March 2013. The claim was for an order in the following terms:
  - (a) A decree of divorce on the ground of defendant's malicious desertion.
  - (b) Each party to keep property in his possession.
  - (c) Such further and/or alternative relief.  
*Alternatively*
  - (d) An order of restoration of conjugal rights failing which, a decree of divorce on the ground of defendant's malicious desertion.
  - (a) Such further and/or alternative relief.
2. On 29 October 2014, the High Court ordered the defendant to restore conjugal rights to the plaintiff. The defendant failed to

restore the said conjugal rights. Instead, the action was defended by the (current appellant.

3. In September 2015, the High Court granted a decree of divorce but deferred the ancillary prayers relating to property.
4. On 16 January 2018, the present respondent filed a notice of amendment of the prayers, by deleting the prayer that, each party to keep the property in his or her possession in paragraph 6(b) in the summons replacing it with the division of the joint estate.
5. On 2 February 2018, she filed a rule 30 application aimed at striking off the notice of amendment introducing the prayer for the division of the estate. On the record before us, there is nothing to indicate whether there was ever a consideration or determination of either the intended amendment or the Rule 30 application. I shall return to this point later on in this judgment.
6. On 3 September 2019, the High Court (Sakoane J), granted an order awarding the matrimonial home of the parties at Mohale's Hoek to the respondent. He awarded the appellant the parties' matrimonial home situate at Ha Matala in the district of Maseru. This amounted to a division of the joint estate. It is against this order that the present appellant has appealed.

### **Parties**

7. As alluded to above, the present respondent was the plaintiff in the court a quo. He is a male Mosotho adult of Ha Thamae Maseru, in the district of Maseru. The present appellant is a female Mosotho adult of the same place as the respondent. The parties were married by civil rites in 1987 and their marriage still subsisted when the matter came before the High Court. Out

of the said marriage, three children were born, and all of them are majors.

### **The factual matrix**

8. I now come to the pleadings. In in his particulars of claim plaintiff, alleged firstly that, the marriage between the parties had been a happy one until 1994 when the appellant maliciously deserted him. He alleged that the marriage was in community of property. He also claimed that each party keep property in his or her possession.
9. Secondly, he alleged that the appellant had left the matrimonial home since 2009. All attempts at reconciliation had been in vain.
10. For her part, appellant denied that she had deserted respondent. Her version of the story is that respondent was not living up to his allegations as head of the family. He did not maintain her. She contended that it was the respondent who deserted her. She alleged that she was still at the matrimonial home while it was respondent who deserted her.
11. I now proceed to outline the respective grounds of appeal herein below.

### **The appeal**

12. The notice of appeal reads that, the appellant notes an appeal against the order or judgment delivered by Sakoane J on the 3 September 2019. The first ground is that the learned judge erred in granting the order without hearing any evidence from the parties notwithstanding that it was appellant's case that the respondent had property in his possession.

13. The second ground was that, the learned judge erred in granting orders that had not been sought by the plaintiff (respondent) by awarding respondent a house at Mohale's Hoek, which house was in appellant's possession. She complains that this was done notwithstanding that the respondent had prayed in her claim that each party keep the property in his or her possession.

14. The third ground was that, the learned judge erred in granting the order of 3 September 2019 without considering an inventory of the whole estate drawn up by the respondent contrary to the Learned judge's order of 18 June 2019.

### **Issues**

13. The following questions require determination:

- a. Whether the High Court erred in granting the order without hearing any evidence from the parties.
- b. Whether the learned judge erred in granting orders that had not been sought by the plaintiff (respondent).

### **The law**

14. It is prudent to sketch the legal principles on which the case falls to be decided. This Court has more than once, deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation.<sup>1</sup> In several of its decisions this Court also deprecated the practice of granting orders which are not

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<sup>1</sup> *Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd* 1995 – 1999 LAC 698; *Sekhonyana and Another vs Standard Bank of Lesotho Ltd* 2000-2004 LAC 197; *Theko and Others v Morojele and Others* 2000-2004 LAC 302; *Attorney-General and Others v Tekateka and Others* 2000 – 2004 LAC 367 at 373; *Mota v Motokoa* 2000 – 2004 LAC 418 at 424. *National Olympic Committee and Others vs Morolong* 2000 - 2004 LAC 449.

sought for by the litigants.<sup>2</sup> In the *Mophato oa Morija v. Lesotho Evangelical Church's*<sup>3</sup> case, this Court (per Grosskopf JA) said the following at page 360:-

The appellant's first ground of appeal was that the court a quo erred in making the above order when neither the appellant nor the respondent had asked for it. Counsel for the respondent, on the other hand, submitted that the court a quo was fully entitled to grant such an order since the notice of motion included a prayer for further and/or alternative relief.

I do not agree. The relief which a court may grant a litigant in terms of such a prayer cannot in my view be extended to relief which he has never asked for and which is not even remotely related to what he has asked for. It is equally clear that the order was not granted at the request of the respondent and it does not appear on what grounds the court a quo could order the respondent.

15. Furthermore, sitting as a court of appeal, and being bound by the record, this Court should be slow to have regard to what may be contained in documents or reports that do not constitute part of that record.<sup>4</sup> This Court is confined to the four corners of the record before it.

### **Consideration of the grounds of appeal**

16. In light of my views on the first two grounds of appeal, I find it unnecessary to deal with all the three grounds. The first ground is that the learned judge erred in granting the order without hearing any evidence from the parties notwithstanding that it

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<sup>2</sup> See for example *Nkuebe v. Attorney General and Others* 2000 – 2004 LAC 295 at 301 B – D; *Mophato oa Morija v. Lesotho Evangelical Church* 2000 – 2004 LAC 354.

<sup>3</sup> *Supra*.

<sup>4</sup> *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) at para 28.

was appellant's case that the respondent had property in his possession. Before testing the validity of the trial Judge's conclusion, it is necessary to make some observations concerning the nature of the respondent's cause of action and what was required to be proved to substantiate it. Before ordering the division of a joint estate, a court must first satisfy itself that such an estate exists. It must also ascertain what kind of assets are contained in such an estate. A non-substantiation of a fact in a declaration has important and serious consequences for a plaintiff. While it stands, it usually binds him and the plaintiff need not adduce any evidence to prove the admitted facts.<sup>5</sup> Otherwise, the plaintiff must. If he does not adduce any evidence, then the result would, in most probability, be one for absolution from the instance. This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff.<sup>6</sup>

17. In the second ground, the appellant argues that, the learned judge erred in granting orders that had not been sought by the plaintiff (respondent), by awarding respondent a house at Mohale's Hoek, which house was in appellant's possession. She complains that this was done notwithstanding that the respondent had prayed in her claim that each party keep the property in his or her possession.

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<sup>5</sup> AA Mutual Insurance Association Ltd v Biddulph and Another 1976 (1) SA at 735A - E.

<sup>6</sup> Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A

18. As indicated above, in the summons, the respondent asked the Court for an order that each party must keep the property in his or her possession. On 16 January 2018, the present respondent filed a notice of amendment of the prayers, by deleting the prayer that, each party to keep the property in his or her possession in paragraph 6(b) in the summons replacing it with the division of the joint estate. There is however, no evidence on record that the said amendment was ever considered, let alone granted.

19. As indicated above, this Court should be slow to have regard to what may be contained in documents or reports that do not constitute part of that record.<sup>7</sup> This Court is confined to the four corners of the record before it. It is equally clear that the order was not granted at the request of the respondent and it does not appear on what grounds the court a quo could order the respondent.

### **Order**

20. In view of the above reasoning, the following is ordered:

- (1) The appeal succeeds with costs.
- (2) The order of the High Court is altered to read: “The defendant is absolved from the instance with costs.”

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<sup>7</sup> Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd 2011 (2) SA 282 (SCA) at para 28.





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**DR K E MOSITO**

**PRESIDENT OF THE COURT OF APPEAL**

I agree,



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**DR P MUSONDA**

**ACTING JUSTICE OF APPEAL**

I agree



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**N T MTSHIYA**

**ACTING JUSTICE OF APPEAL**

**For the Appellant:**

ADV L KETSI

**For the First Respondent:**

Adv R SETLOJOANE