



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO 28/2024

In the matter between:

‘MAISAKA TSIMANE

APPELLANT

AND

‘MALIPALES A MEI

RESPONDENT

CORAM:

MOSITO P

DAMASEB AJA

VAN DER WESTHUIZEN AJA

HEARD:

11 OCTOBER 2024

DELIVERED:

1 NOVEMBER 2024

SUMMARY

Special Plea – Delict of adultery – Development of common law – Need for evidence in special plea – Role of amicus curiae – Law Society and Attorney General – Remittal for reconsideration.

Held: High Court's decision set aside; matter remitted for reconsideration with evidence and participation of stakeholders.

JUDGMENT

MOSITO P

Background

[1] This appeal arises from the High Court (Makara J) judgment of 28 February 2018. In that judgment, the respondent initiated a civil summons against the appellant, seeking the following relief: (a) payment of M300,000.00 (three hundred thousand maloti) for *contumelia*; (b) payment of M200,000.00 (two hundred thousand maloti) for loss of *consortium*; (c) interest on the sums above at a rate of 18% *per annum*, or the prescribed rates from the date of judgment until the date of payment; (d) costs of the suit; and (e) any further and/or alternative relief.

[2] The appellant contested the action and, in doing so, raised a special plea, arguing that the plaintiff's cause of action is evident from her declaration. The appellant respectfully contends that the common law of delict founding the plaintiff's action, which recognises a claim for damages by a spouse against a third party who has engaged in an intimate extra-marital affair with the other spouse, should be developed to preclude such claims for damages. The court *a quo* considered the special plea and ultimately dismissed it with costs. However, no evidence was presented in support of the special plea, as would have been required in such circumstances.

[4] The appellant approached this Court on three grounds of appeal. First, she complains that the Court *a quo* failed to decide the special plea raised by the appellant (the defendant in the Court *a quo*), to the effect that the common law offence of adultery is no longer sustainable today. Second, she complains that, instead, the court *a quo* introduced a constitutional question, and by so doing, the Court erred because what was before it was not the constitutionality or otherwise of the common law offence of adultery. What was before the Court *a quo* instead was whether there was a need to develop the common law offence of adultery. Third, she complains that the Court *a quo* also erred in not finding (as it should have done) that the common law offence of adultery is no longer sustainable in Lesotho.

[5] The court *a quo* did not consider the merits of the action. It only disposed of the special plea. However, it is necessary to outline the facts as far as relevant in this matter.

The facts

[6] As pleaded in the plaintiff's declaration, on 10 November 2007, the respondent and her spouse entered into a civil marriage. The marriage still subsists. The respondent alleges that the defendant wrongfully, unlawfully, and intentionally enticed and persuaded her spouse to desert her marital home. Due to this persuasion and enticement, the respondent's spouse turned out to be violent and abusive towards the respondent. The respondent's spouse did this to compel her to sulk (*ngala*) to her maiden home,

after which the appellant would move in and cohabit with the respondent's spouse. Consequent to the said enticement and persuasion, the respondent's husband has filed divorce proceedings against the respondent.

[7] As a result of the appellant's adulterous relationship with the respondent's husband, the respondent alleges that she has suffered damages. She alleges that the *contumelia* inflicted upon her has turned her into a laughingstock amongst her acquaintances, family members, and friends because of the appellant's adulterous relationship in the amount of M300,000.00 (three hundred thousand maloti). The loss of *consortium* (affection, comfort, society, and services) the respondent enjoyed and would have continued to enjoy but for the appellant. She further alleges that this loss has caused her extreme emotional stress in the amount of M200,000.00 (two hundred thousand maloti).

Special issue for determination

[8] The central issue to be determined in this judgment is whether the High Court erred in deciding the appellant's special plea without requiring the presentation of evidence regarding the societal and moral context of the delict of adultery.

The law

[9] A special plea, by its very definition, introduces a defence that is separate from the merits of the case. It typically raises issues that if proven, would preclude the need to examine the substantive

merits. Therefore, these matters are often not apparent from the pleadings and must be substantiated through evidence. When a defendant raises a procedural defence, the burden lies upon them to prove the facts upon which that defence rests. The burden rests upon the defendant to establish and prove the facts that form the basis of the special plea.¹ The *onus* rests on the defendant to prove the facts underlying the special plea.²

[10] In summary, the requirement to present evidence supporting a special plea is a well-established principle. It ensures that factual defences are properly scrutinised and that judicial determinations are made on a sound evidentiary basis. Consequently, the failure to lead evidence supporting the special plea is a significant procedural oversight, justifying a court's dismissal of the special plea.

Consideration of the appeal

[11] At the hearing of this appeal, the respondent did not appear and was not represented by counsel. The appellant's counsel proceeded with her appeal. In the counsel's words, this Court was to determine whether '[t]he High Court was right in approaching the special plea raised by the appellant (then defendant) in an action for adultery damages. In the Court below, the court was invited to develop the common law and abolish the delict of adultery. In this appeal, this Honourable Court is to determine whether the High Court was right in approaching the matter as if the plea turned on the constitutional validity of the offence.'

¹ Van Der Westhuizen v Smit NO 1954 (3) SA 427 (SWA) at 430.

² Peacock v Marley 1934 AD1, Masuku v Mdlalose 1998 (A) SA 1 (SCA).

[12] At the hearing of this appeal, this Court asked Mrs Phafane for the appellant whether it was proper for the court *a quo* to have determined the special plea without the benefit of evidence as it did. In all fairness to the learned counsel, she conceded that it was not. At the heart of this concession is the fact that, in the context of a special plea, where the appellant argues that the common law should be developed to abolish the delict of adultery, the question arises as to whether this matter could be adequately addressed without the support of factual evidence.

[13] Such a plea inherently challenges the foundational assumptions of common law, suggesting that a claim for adultery damages is no longer in step with modern society's values. Yet, for a court to properly adjudicate on this issue, it must be informed by understanding how societal attitudes have shifted, particularly regarding marriage, fidelity, and individual autonomy.

[14] The development of the law must be sensitive to the evolving needs and values of the community it serves. This sensitivity implies a need for empirical data or evidence that reflects society's current moral compass. Without such evidence, a court may risk making a decision detached from the community's lived realities and failing to reflect the dynamic nature of social norms. The judicial function, therefore, is to interpret the law and do so in a manner that respects the societal context in which it operates.

[15] The development of the law must be grounded in a comprehensive understanding of its societal implications. In the context of the delict of adultery, this would mean examining whether such claims still serve a meaningful purpose or whether they perpetuate outdated moral judgments inconsistent with constitutional rights to dignity, privacy, and equality. By engaging with these principles, it becomes apparent that determining the delict of adultery purely on the basis of a special plea, without the support of evidence, may overlook critical considerations about society's evolving views on marriage and individual autonomy. The absence of evidence deprives the court of the opportunity to understand how the delict operates within the current social framework and whether its continued recognition aligns with modern constitutional values. As the law should reflect legal doctrine and the moral and social fabric of the society it governs, evidence becomes indispensable in ensuring that legal developments are both legally sound and socially relevant.

[16] As a way of trying to get the societal views on the wisdom and desirability of whether or not to abolish this delict, the appellant's counsel was amenable to the Court's suggestion that the Law Society could be permitted to appear as an *amicus curiae* in the matter.

[17] The Law Society of Lesotho, established under the Law Society Act 1983, has a fundamental role in improving, modernising, and developing the law in Lesotho. As a body representing the collective expertise of the legal profession, the Law Society is uniquely positioned to provide informed and balanced perspectives on legal

issues of significant societal impact, such as the delict of adultery. The involvement of the Law Society as *amicus curiae* (friend of the court) in matters where the continued relevance and application of a legal principle, such as the delict of adultery, are under scrutiny, is not only appropriate but necessary. This need can be justified on several grounds.

[17] The need for the Law Society of Lesotho to be served and allowed to contribute as *amicus curiae* concerning the possible abolition of the delict of adultery is both clear and compelling. The Law Society's statutory mandate to improve the law, its expertise in legal reform, and its capacity to provide a broader societal perspective make it an invaluable resource in this context. By offering its insights, the Law Society would help ensure that any decision to retain or abolish the delict is informed by a comprehensive understanding of legal principles, societal values, and constitutional imperatives, thus contributing to a just and well-rounded judicial outcome.

[18] The learned counsel also appreciated the potential participation of the Attorney General. The participation of the Attorney General as *amicus curiae* in a case concerning the potential abolition of the delict of adultery is well justified. The Attorney General's role in advising on constitutional and legal reforms, protecting the public interest, and ensuring that Lesotho's legal framework remains current with regional and global trends makes their contribution indispensable. By providing a broader perspective that integrates legal, constitutional, and societal considerations, the Attorney General can help the court reach a decision that reflects both the principles of justice and the

evolving needs of society. This involvement would facilitate a more informed and balanced judgment and reinforce the legal system's capacity to adapt and evolve in a manner that serves the public good.

Disposal

[19] In light of the foregoing discussions, it is clear that the High Court's decision to determine the special plea without the benefit of evidence was erroneous. The court failed to properly consider the need for empirical data or representations that would have provided a comprehensive understanding of society's evolving views on the delict of adultery, including its relevance to constitutional principles of dignity, privacy, and equality. Therefore, this Court believes that the court's judgment *a quo* should be set aside.

[20] The matter should be remitted to the High Court for proper reconsideration, with instructions to allow the parties to present evidence on the societal and moral context of the delict of adultery. Furthermore, the High Court should permit the involvement of stakeholders such as the Law Society of Lesotho and the Attorney General, both of whom may appear as *amicus curiae* to provide insights into whether or not the delict should be abolished.

Court Order

[21] In the result:

- (a) The appeal is upheld.
- (b) The judgment of the High Court (Makara J) delivered on 28 February 2018 is hereby set aside.

(c) The matter is remitted to the High Court for reconsideration of the special plea, with directions to allow:

- (i) The presentation of evidence and empirical data relevant to the societal and moral context of the delict of adultery.
- (ii) The participation of the Law Society of Lesotho and the Attorney General as *amicus curiae*, to provide their perspectives on the potential abolition of the delict.

(d) Costs of the appeal shall be costs in the cause.



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



P T DAMASEB
ACTING JUSTICE OF APPEAL

I agree



VAN DER WESTHUIZEN AJA
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT:

MRS M.TOHLANG-PHAFANE

RESPONDENT:

NO APPEARANCE