

CIV/T/146/78  
IN THE HIGH COURT OF LESOTHO

In the matter of :

LOUIS KOBELI MOSEHLE (Defendant in Reconvention)	Plaintiff
v	
ENETT 'MASEBOTSA MOSEHLE (Plaintiff in Reconvention)	Defendant

JUDGMENT

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 28th day of November 1980

The plaintiff Louis Kobeli Mosehle issued summons against the defendant, his wife Enett 'Masebotsa Mosehle, praying for, amongst other things, a decree of divorce on the ground of her adultery, alternatively for an order of restitution of conjugal rights failing compliance therewith "a decree of divorce on the grounds of defendant's adultery". With respect to Mr.Masoabi who drafted the declaration this prayer in the alternative is defective but I shall assume that what he meant was that in the event of the defendant/wife failing to restore conjugal rights, the plaintiff/husband would pray for a decree of divorce on the ground of malicious desertion. The plaintiff/ husband has told me from the witness box, however, that he will not have her under any circumstances.

The defendant/wife denied adultery and or malicious desertion, and in reconvention, claimed, amongst other things, a decree for Judicial Separation on the grounds of her plaintiff/ husband constructive desertion by his persistent cruelty and failure to maintain. I shall call the parties as plaintiff/ husband and defendant/wife for convenience.

The parties were married by Christian rites in community of property on the 19th April 1960 at Morija. There is one minor child of the marriage, M., a girl aged about 11 years now and she has been in the plaintiff/husband custody (he is alleged to have snatched her against his defendant/wife's wishes) for some three or four years.

2

The plaintiff gave evidence but called no witnesses. He testified that in 1970 he returned home from the fields and saw his defendant/wife committing adultery with one Salone Shea. Another man called Tlanya Mohlane was with him at the time and saw her in the act. It was 2 p.m. She and Shea ran away. This adultery has not been proved as Tlanya was not called. In any event the plaintiff/husband testifies that he condoned this alleged adultery. According to him she committed adultery again with one Thabo Mangane. He gave no other details whatsoever. He says that in 1974 she deserted him and went to the Republic but returned in 1975 and lived in his own parent's home. After that he says "she lived with other men". Towards the very end of his evidence in chief he remembered that she also committed adultery with one Ratlala Selatiele at the latter's house where she stayed. In his declaration Ratlala Selatiele was the villain of the piece with whom the defendant/ wife was still living.

I have seldom heard a more unsatisfactory witness. Adultery certainly has not been proven for the law demands the clearest evidence of its commission although that proof need only be on balance of probabilities (Gates v. Gates 1939 A.D. 150 at pp 154-155, Goodrich v. Goodrich 1946 A.D. 390 at pp 395-396 and half a dozen cases cited in Hahlo, South African Law of Husband and Wife pp 379-393).

The defendant/wife's evidence is that she had never committed adultery with any one. She was assaulted frequently and chased out of the matrimonial home. The fact of the matter, she says, is that the plaintiff/husband wanted to get rid of her because she was unable to produce a boy. After their daughter was born they tried to have more children but they were unsuccessful. In 1977 the plaintiff/husband abducted a woman and brought her as a "customary" wife into his own parental home. That woman was "accepted" because a sheep was slaughtered. However the woman ran away from the plaintiff/husband after only one week and has not been seen since. The plaintiff/husband's own father, Pitso Mosehle (P.W.2) (grandfather to be exact since his father died young and it was he who brought him up) gave evidence for the defendant/wife and confirmed the above. The latter testified also that at no time did his son (the plaintiff/husband) report to him '(as is the custom) that his wife was committing adultery. He also confirmed that

3

plaintiff/husband had assaulted his wife on many occasions, once seriously, and the matter ended by his appearance before the Matsieng Central Court on a charge of assault where he was fined M6. A copy of the Judgment of that Court and a medical report (Exhibits B and C) were produced for my perusal.

I think the plaintiff/husband is a man who has no conscience at all. Ratlala Selatiele with whom his defendant/ wife was supposed to have committed adultery testified that as a result of the constant assaults of the plaintiff/husband on his wife the latter sought refuge in his home. He himself was married with 5 children. The defendant/wife is related to his own wife and her parents requested him and his wife to put her up temporarily until she finds a job. She stayed with them for about two months. She did not sleep in his and his wife's hut but at his mother's which was in the same compound. He gave his evidence impressively and I have no doubt at all that the plaintiff/husband's suspicions are not only unfounded but in all probability deliberately fabricated to meet his own ends of securing freedom from the marriage bond.

The defendant/wife says she does not wish to divorce her plaintiff/husband and she still loves him in spite of all what he has done. She needs a period of Judicial Separation in the hope of reconciliation one day but in the meantime she seeks orders that custody of their daughter be awarded to her and also payment of maintenance for both. Plaintiff/husband owns a cafe and is well off and the defendant/wife suggested from the witness box that I should further order her plaintiff/husband to vacate the matrimonial home, allow her back with her daughter into it, and that he should find elsewhere to live. This prayer was not, however, made on the pleadings and the plaintiff/husband did not have the chance to give me his point of view. I am not prepared, in the absence of adequate pleadings, to accede to the defendant/wife's request.

The matter of custody of the child has caused me some anxiety. It is the duty of the parties and their legal representatives to put before the Court sufficient material to enable it to decide the issue with confidence. Unfortunately they seldom do so and leave the Court to conduct its own inquisition. I think the plaintiff/husband is the guilty party but I must look at the best interests of the child. It is true that very young children, especially girls, should be

4

awarded to the innocent mother (*Tromp v. Tromp* 1956 (4) S.A. 738, and *Myers v. Leviton* 1949 (1) S.A. 203 at 214), but the fact of the matter is that the plaintiff/husband is more affluent and can provide for the material well-being of the child better than the defendant/wife who has a job only earning M35 per month and lives in places mostly on the charity of others. Furthermore the child is not too young, and has been with the plaintiff/ husband for 3-4 years now and must have settled into a routine. In addition the defendant/wife tells me that she sees the child daily as both of them live in the same village. I do not think the child's life should now be disturbed unless new factors come into the picture such as the plaintiff/husband acquiring a "customary" wife who illtreats the child.

In the result :

- 1) The plaintiff/husband's action for divorce on the grounds of adultery or malicious desertion is dismissed.
- 2) The defendant/wife claim in reconvention for a decree of Judicial Separation a mensa et thoro on the ground of physical violence inflicted on her by the plaintiff/husband (Henry v, Henry 1935 CPD 224) succeeds and it is accordingly granted.
- 3) Custody of the child will remain with plaintiff/ husband but if there is change in circumstances defendant/wife may apply for variation.
- 4) Defendant/wife will have access to the child at all reasonable times.
- 5) The plaintiff/husband will pay his wife M40 per month commencing 1st December 1980.
- 6) Plaintiff/husband to pay costs throughout,

CHIEF JUSTICE

28th November, 1980

For Plaintiff : Mr. Masoabi

For Defendant : Adv. Monapathi