

CIV/T/150/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

'MABATLOUNG MAIME ..... Plaintiff

and

BONAVENTURA THABO MAIME ..... Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 20th day of February, 1996.

On 17th April, 1989 Plaintiff herein filed, with the Registrar of the High Court, a combined summons commencing an action in which she claimed, against the defendant:

- "1. Decree of divorce on grounds of defendant's adultery;
2. Custody of the minor child of the marriage;
3. maintenance for the said child in the sum of M200-00 per month;
4. Forfeiture of the benefits of the marriage;
5. Costs of suit;
6. Further and/or alternative

relief. "

ALTERNATIVELY:

- " 1. Restitution of conjugal rights, failing compliance therewith;
- (a) Decree of divorce on grounds of defendant's malicious desertion;
- (b) Custody of the said minor child;
- (c) Maintenance for the said child in the some (sic) of M200.00 per month;
- (d) Forfeiture of the benefits of the marriage;
- (e) Costs of suit;
- (f) Further and/or alternative relief"

Defendant filed a notice of appearance to defend the action. The plea was duly filed.

It is common cause, from the pleadings, that on 29th May, 1979, Plaintiff and Defendant got married to each other here in Maseru by civil rites and in community of property. The marriage still subsists. A baby boy was, on 15th June, 1979 born of the marriage. However, on 5th November, 1984, Plaintiff left the parties' matrimonial home. She had since not returned.

In her declarations to the summons, Plaintiff, inter alia, alleged that defendant, with a settled intention to bring an end to the bonds of a valid marriage, had committed adultery, on divers occasions,

with different women whose names and further particulars were unknown to her, a fact which defendant, however, denied in his plea. In any event, Plaintiff alleged that she had condoned the adultery.

In her declaration to the summons, Plaintiff further alleged that since December 1984 defendant had been living in adultery with a certain woman by the name of 'Mamaama Maama of Roma ha Maama in the district of Maseru. She had not condoned that adultery.

In his plea, defendant denied Plaintiff's allegation that he was living in adultery with a woman called 'Mamaama Maama and put Plaintiff to the proof thereof. He alleged that it was, in fact Plaintiff herself who was living in adultery with a man called Nqheku Ntsonyana at Orlando East - House No. 6333 Soweto - in the Republic of South Africa. Plaintiff had, however, not asked the court for condonation of her adultery. She was, therefore, approaching the court with unclean hands.

According to Plaintiff's declaration to the summons, defendant subjected her to numerous assaults for some of which she had to seek medical assistance. Although he was able, and in law obliged, to maintain the minor child of the marriage, defendant failed to

do so. Since May, 1984, defendant denied her conjugal rights and, for no valid reasons, spent nights away from the matrimonial home. Wherefor, Plaintiff prayed for relief as claimed in the summons.

In his plea, defendant denied Plaintiff's allegations that he subjected her to numerous assaults for some of which she had to seek medical assistance; he denied to have failed to maintain the minor child of the marriage; he disputed the allegations that since May, 1984 he had denied Plaintiff conjugal rights; spent nights away from the matrimonial home for no valid reasons; and put Plaintiff to proof thereof. Consequently defendant prayed that Plaintiff's action be dismissed with costs.

It is, perhaps, convenient to mention, at this juncture, that the claim for forfeiture of the benefits arising from the marriage was, during the course of the hearing of this matter, abandoned, by consent of the parties who agreed that, in the event of a decree of divorce being awarded, each party would keep whatever property was in his/her possession. The court needs not, therefore, concern itself with the claim under this heading.

No witnesses were called to testify on behalf of the Plaintiff who, however, herself gave evidence on

oath in support of her case. In his defence, defendant called one witness and he himself testified from the witness box.

In as far as it is relevant, it was common cause, from the evidence, that Plaintiff and defendant were citizens of Lesotho. Plaintiff was, however currently living in the Republic of South Africa. Prior to 29th May, 1979 they had been having sexual intercourse out of wedlock. However, on 27th May, 1979, Plaintiff and defendant concluded a contract of marriage by civil rites. The marriage was in community of property. A copy of a marriage certificate was handed in as exh "A" and proof thereof. Of the marriage, a baby boy, simon Batlounge Maime, was born on 15th June, 1979.

In November, 1984, Plaintiff left the matrimonial home. When she thus parted with defendant, Plaintiff left, at the Matrimonial home, the minor child who had since been staying with defendant. However, Plaintiff's parents subsequently took the child to their home for Christmas celebrations. They refused to return the child to the custody of the defendant on the ground that following the elopement of Plaintiff and defendant no compensation cattle had been paid. The child had since been staying at the maiden home of the Plaintiff.

It must be borne in mind that Plaintiff and defendant were admittedly married by civil rites. That being so, custody of the child born of the marriage, belonged to the parents viz. defendant and Plaintiff. If, before the marriage, defendant abducted Plaintiff and her parents believed they were entitled to payment of compensation cattle, the courts of law were available for them to approach. They had no right to take the law into their own hands and deprive defendant of the custody of his child. Their action was plain self-help which the law cannot, in my opinion, allow.

Be that as it may, it was further common cause that on 8th December, 1989 and whilst her civil marriage still subsisted, Plaintiff got married, again by civil rites, to a certain Nqheku Ntsonyana with whom she was currently living as husband and wife in the Republic of South Africa. A copy of a marriage certificate was handed in as exh "B" and proof thereof. In her own mouth Plaintiff told the court that at the time her marriage and Nqheku Ntsonyana was solemnized here in Maseru, she had concealed, from the marriage officer, the fact that she was still married to defendant by civil rites.

Assuming the correctness of the evidence that at the time she got married to Nqheku Ntsonyana by civil

rites, Plaintiff's civil marriage with defendant still subsisted, it must be accepted that her second marriage, i.e. the marriage between herself and Nqheku Ntsonyana, was null and void ab initio. Plaintiff was, therefore, living with Nqheku Ntsonyana in adultery for which, in the course of her evidence, she asked condonation, and rightly so in my opinion.

According to Plaintiff, her marriage to defendant had always been unhappy one. With a settled intention to bring an end to the bonds of a valid marriage, defendant spent nights away from the matrimonial home and had adulterous relationships with women whose particulars were unknown to her. She condoned defendant's adultery.

However, since May 1984, defendant denied her (Plaintiff) conjugal rights and had illicit love affair with a certain woman by the name of 'Mamaama Maama with whom he was currently living as husband and wife at a place called Naledi here in Maseru. She had not condoned defendant's adultery with 'Mamaama Maama.

It may be mentioned that it was common cause, from the evidence that the minor child of the marriage, Simon Batlounq Maime, did not grow hair on the head. According to Plaintiff, defendant failed to

maintain the child. He argued that he could not father children who grew no hair on the head. As the child, Simon Batlounge Maime, grew no hair on the head, it could not, therefore, have been fathered by him.

In the event of custody being awarded to her, Plaintiff intended taking the child to the Republic of South Africa where she would live with it without any need for the defendant to maintain it. The defendant would, however, still have access to the child whenever it was in Lesotho for a visit.

According to Plaintiff's evidence defendant subjected her to numerous physical assaults. Some of the assaults were so severe that she had to seek medical treatment. As it has already been stated earlier, in this judgment, she eventually left the matrimonial home and subsequently got married to Nqheku Nts'onyana.

In her evidence, Plaintiff told the court that when she got married to him, Nqheku Nts'onyana was also a married man and had children of his own. He had informed her that his wife had killed one of their children. Whilst she was in prison, she (the wife of Nqheku) became pregnant and delivered a child whom she again killed. It was then that he (Nqheku) decided to



part with the woman who was no longer his wife.

It is significant that Nqheku Nts'onyana was not called as a witness to testify in this trial. The information he allegedly gave to Plaintiff about his wife in the absence of the latter was, in my view, inadmissible hearsay and, therefore, of no assistance to the court.

In her evidence, the Plaintiff further told the court that, following their marriage, she and Nqheku Nts'onyana lived happily at the latter's parental home in Orlando West - the Republic of South Africa. However, they later on decided, on their own accord, to establish their separate homestead in Orlando East - the Republic of South Africa, where they were currently living together as husband and wife. The children born of the marriage between Nqheku Nts'onyana and his former wife were staying with the parents of Nqheku Nts'onyana at his parental home in Orlando West - the Republic of South Africa.

In his defence, defendant called 'Mangheku Nts'onyana who testified as D.W.1 and told the court that she was 60 years old. She originally came from a place called Thabana - Morena ha Bofihla in the district of Mafeteng. She was, however, currently staying at Orlando West in Johannesburg - the Republic

of South Africa. Nqheku Nts'onyana was her own eldest son who was born in 1954.

In 1975 Nqheku Nts'onyana lawfully got married to Alina Nts'onyana (nee Machachamise) also of Thabana-Morena ha Konote in the district of Mafeteng. The marriage was in accordance with the Sesotho law and Custom. Fifteen (15) herd of cattle were paid as bohali. The marriage was blessed with five (5) children. However, of the five children, two were still-born and a third one passed away when it was already eight (8) months old. D.W.1 denied, therefore, the evidence of Plaintiff that, according to Nqheku Nts'onyana, Alina Nts'onyana killed two of her children. She denied that Alina was ever imprisoned and whilst she was in prison she became pregnant and gave birth to a child whom she also killed.

D.W.1 told the court that there was a time when Alina, who was living with her husband Nqheku Nts'onyana at her (D.W.1's) house in Orlando West, had to go to her maiden home at Thabana-Morena ha Konote for two months. She went there to attend to her mother who had taken ill.

It was during the absence of his wife, Alina, that Nqheku Nts'onyana brought Plaintiff to her

(D.W.1's) house in Orlando West and started living with her as man and wife. She (D.W.1) did not approve of it and, therefore, told Plaintiff to leave her house. Eventually Plaintiff left, together with Nqheku Nts'onyana, and she (D.W.1) did not know where they were living in Johannesburg. The relationship between her (D.W.1) and her son, Nqheku Nts'onyana, had since become sour. Alina Nts'onyana and her two minor children were, however, still living with her at her (D.W.1's) house in Orlando West - the Republic of South Africa. D.W.1 denied, therefore, the evidence of Plaintiff that she (Plaintiff) and Nqheku Nts'onyana had peacefully lived together as husband and wife at her (D.W.1's) house in Orlando West.

Defendant himself testified as D.W.2 and told the court that Plaintiff was not testifying to the truth when she said he had denied her conjugal rights since May, 1984 and that he spent nights away from the matrimonial home for no valid reasons. According to him, defendant was a soldier and the only occasions he spent nights away from the matrimonial home were when he was on duty. He denied that he and the woman called 'Mamaama Maama were living at Naledi as man and wife. According to D.W.2, ever since Plaintiff left the matrimonial home he had lived with his own sister who had been doing the cooking and the washing for him and the minor child, Simon Batlounge Maime.

After Plaintiff had left the matrimonial home, in November 1984, he (D.W.2) went to her maiden home looking for her but could not find her. Plaintiff's parents then took the minor child to their home under the pretext that it was paying them a visit during Christmas season. They later refused to restore custody of the child to him on the ground that, following his elopement with Plaintiff, no compensation cattle had been paid. D.W.2 and his parents subsequently met Plaintiff's parents in an attempt to sort out his problem with Plaintiff but to no avail.

However, Plaintiff and D.W.2 later met on the occasion of the funeral of the latter's grandmother. They took the opportunity to discuss their problem and agreed that Plaintiff should return to the matrimonial home. On that occasion they even had sexual intercourse at D.W.2's parental home which was at Roma. Notwithstanding their agreement that she should return to the matrimonial home, Plaintiff did not do so.

It is significant to note that it was common cause, from the evidence, that Plaintiff lived in the Republic of South Africa and, therefore, far away from the matrimonial home. For obvious reasons she could not, of her own knowledge, tell the court that D.W.2

was living with 'Mamaama Maama as man and wife at Naledi and, therefore, committing adultery. Moreover, it is worth noting that in her own words, Plaintiff told the court that when she left the matrimonial home, in November, 1984, she was aware that D.W.2 was committing adultery with 'Mamaama Maama. The evidence of D.W.2 that later, on the occasion of the funeral of his grandmother, he and Plaintiff had sexual intercourse was, however, not challenged. It can in my finding, be safely accepted as the truth. Assuming the correctness of this finding, it seems to me reasonable to infer that Plaintiff condoned the adultery between D.W.2 and 'Mamaama Maama, if at all it ever took place. That being so, Plaintiff could not be heard to say she was basing her claim for divorce, on the adultery which she had condoned.

As regard desertion, it is significant that although Plaintiff told the court that D.W.2 had subjected her to physical assaults for some of which she was obliged to seek medical treatment, the latter denied it and told the court that whenever Plaintiff had made a mistake in the family he would scold, rather than physically assault, her.

If she were testifying to the truth in her evidence that D.W.2 had subjected her to physical assaults for some of which she was obliged to receive

medical treatment plaintiff would, no doubt, have produced medical reports to substantiate her evidence. She did not do so. I am not convinced that Plaintiff was testifying to the truth on this point. She had not, therefore, made out a case for desertion, be it malicious or constructive.

On the question of maintenance, D.W.2 told the court that after Plaintiff had left the matrimonial home, in November, 1984, he alone had been maintaining the minor child of the marriage, Simon Batloun Maime. He loved the child who was his only male issue and, therefore, his heir. He was prepared, and able, to maintain it. However, after they had unlawfully refused to restore, to him, custody of his child he (D.W.2) tried to send money (M200) to Plaintiff's parents for its maintenance but they declined to accept the money on the ground that the child belonged to their family and not the family of Maime. They did not, therefore, require anything from him or, for that matter, the family of Maime. D.W.2 denied, therefore, Plaintiff's evidence that the child was in need of maintenance fee which he (D.W.2) refused/ failed to pay.

I have already pointed out earlier, that Plaintiff admittedly lived in the Republic of south Africa and, therefore, far away from her maiden home

in Lesotho where the minor child was currently staying with her (Plaintiff's) parents who were, however, not called to testify in this trial. Plaintiff was, in my view, not in a position to tell the court, of her own knowledge, that the child was in need of maintenance fee which D.W.2 refused/failed to pay.

Plaintiff did not impress me as an honest person. Before the purported civil marriage between herself and Ngheku Nts'onyana was solemnized, she had, for example, in her own words concealed, from the marriage officer, the fact that she was already validly married to defendant by civil rites and the marriage still subsisted. The purported civil marriage was, for obvious reasons, a nullity and Plaintiff was, therefore, currently living in adultery with Ngheku Ntsonyana.

Considering the evidence as a whole, I am not convinced that Plaintiff has made out a case for divorce on the grounds of either adultery or desertion. That being so, I am not prepared to condone her adultery with Ngheku Nts'onyana. She is, in my finding, living a loose life and, therefore, not a fit person to be awarded custody of the minor child of the marriage.

In the result, I come to the conclusion that

Plaintiff's action ought not to succeed. It is accordingly dismissed. This being a family dispute, I would, in my discretion, make no order as to costs.



B. K. MOLAI

JUDGE

20th February, 1996.

For Plaintiff : Mr. Fosa,

For Defendant : Mr. Mahlakeng.