CIV\T\564\95

IN THE HIGH COURT OF LESOTHO

In the matter of :

HLOMPHO MAKHETHE **Plaintiff**

vs

NEO MAKHETHE **Defendant**

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 20th day of October, 1997

The parties above are wife and husband respectively.

The plaintiff sued the defendant in the main for adultery but did not pursue the suit for divorce on that ground and instead opted for the alternative basis for divorce on grounds of the defendant's malicious desertion; accompanied by her prayer for custody of the minor child born of the marriage; maintenance of the minor child at the rate of M200-00 per month; forfeiture of the benefits of the marriage

plus costs of suit.

On 22nd April, 1997 *Miss Tau* appearing for the plaintiff wished to bring to the Court's attention the following state of affairs; and is recorded by Court as follows :-

> "*Miss Tau* informs Court that this matter was crowded out on 20-3-97. We left with *Mr Monyako* (for Defendant) for the Registrar's office to obtain a suitable date which was for today and tomorrow. We served *Mr Monyako's* office with notice of set down. I made him aware last week Thursday that this matter would proceed today.
>
> I wish to say while waiting for Court to convene this morning I talked with *Mr Monyako* on the phone. He said he couldn't come to Court because he is not properly dressed. He also said his client went to see him yesterday saying he was ill but has not provided him with medical certificate to that effect.
>
> May it be recorded that in December 2nd 1996 *Mr Monyako* also failed to attend court when matter was on the roll.
>
> We are ready to proceed and are not convinced of reasons advanced by *Mr Monyako's* failure to appear today. My client still lives with his client and she says the defendant went to work to-day.
>
> We ask to be allowed to proceed in this matter".

The defendant's name was called three times outside Court and the Court Orderly reported "no response".

Accordingly the Court acceded to the plea to proceed with hearing this

matter.

But as a matter of caution the Court decided to hear evidence on oath regarding the plaintiff's allegation that despite the allegation that the defendant was ill he in fact went to work this morning i.e. 22-4-97 and gave scant, if any attention to the fact that he was instead required here before this Court. The proceeding was accordingly as follows :

"PW1 HLOMPHO MAKHETHE s\s :

I am plaintiff. Defendant is my husband. We live at Ha Abia Lithoteng. We live in the same house but different bedrooms.

Yesterday evening my husband was in the house. I learnt this when I arrived from work.

I saw him this morning in his overalls going to work. He wears these overalls normally when going to work. He didn't say he was ill.

Thats all."

Miss Tau : "we submit reasons advanced by defendant and his attorney could not prevent them from coming to court. So I ask Court to proceed with the matter."

Court: Matter is to proceed.

It was upon this note that the Court heard evidence of PW1, the plaintiff, the brief summary of which is to the following effect :- Exhibit "A" a Marriage Certificate reflects the names of the parties to this suit. The marriage was contracted on 22nd January, 1986 by Christian rites. One child, a girl named 'Maneo Makhethe was born of this marriage on 7th May, 1990. This minor girl is in the custody of both parents but presently is with plaintiff's parents at Lower Thamae. This is so because of the child's ill-health. With settled intent to terminate the marriage relationship the defendant does not accord the plaintiff conjugal rites.

Life with the defendant is bitter and intolerable. He assaults the plaintiff time and again.

The Court has before it Exhibits "E^{1}" and "E^{2}" being photographs taken after a severe assault meted out by the defendant to the plaintiff whose swollen lips, bruised swells below the eyes and general discolourisation due to blows allegedly delivered at her by the defendant, have their own gruesome tale to narrate. Indeed the Court is able to see that such blows whatever has caused them were delivered with unwholesome savagery and meanness of purpose calculated at making whoever clapped his eyes on the plaintiff; immediately look the other way.

Exhibit "D" a medical report by Dr Maitin prepared on 25-09-95 reads :

"Report of Injuries on Mrs Hlompho Makhethe

1. 1-1½ cm laceration of the lower lip near (L) corner

2. Haematoma forehead very tender - diffuse in nature

3. Tenderness and softness of the scalp especially over the right temporal region suggestive of an underlying haematoma.

4. Left ankle swollen and tender. Extension extremely painful suggestive of a sprained ankle.

C.T. Maitin

Signed "

~~The plaintiff swore that the defendant only afforded her conjugal rights when~~ abusing her and asking her who her sleeping partners are. In this type of attitude one is able to quickly read an element of sadism mixed with a transferred degree of hardly veiled voyeurism manifested by the defendant.

The plaintiff dismissed as sham the defendant's plea that customarily he couldn't sleep with her while she was still giving suck to their child. Her reason for discounting the defendant's plea was that this plea is flawed because she doesn't lead customary life so she is not bound by nor has she felt any need to succumb to such practices. She buttressed her contention in this regard by stating that the

defendant and she had a child before their marriage and had sex six months after the birth of that child Tšepo born on 2nd June, 1982.

She observed the start of the defendant's attitude to impose himself for his twisted sexual lust based on who she was sleeping with, in 1993 i.e. three years after 'Maneo was born. She dubbed it as "funny then that when we had sexual relations six months after the child was born out of wedlock he should now advance his customary belief about the undesirability of engaging in sex while 'Maneo was still breast fed three years after her birth in wedlock."

~~The plaintiff was at pains to inform the Court that she is weary of constantly~~ being accused of infidelity by the defendant. In one instance recently when she asked the defendant to sign a policy document for their child he said the plaintiff should ask the man she runs around with to sign it.

She demonstrated the untenable state of livelihood led at the joint home of the parties to this suit. It struck this Court as nothing short of an apology for a matrimonial life. Each one of the parties leads his or her own kind of life. The defendant doesn't provide for the child. Parties don't have meals from the common cooking. The defendant buys half loaf of bread and tin of fish for himself. He

doesn't buy any soap for washing. All he does is pay the maid not out of sense of duty to share expenses or contribute to the common good of members of the household but because the plaintiff had ordered the maid not to wash the defendant's clothes unless he paid her. This meant unless he paid her he would have had to do his own washing.

Outlining in detail the unhappiness that underlay the core of the parties' marriage the plaintiff told the Court that the defendant maintains the child in a sporadic manner and as will be shown later mostly when he is under one form of pressure or another. She thus proceeded and testified as follows namely, that the defendant started paying M900-00 in February. Then in March he paid M500-00. Before then he used to tell the plaintiff that he had his own commitments to attend to. In December he bought clothes for the child. Since 1990 till December 1996 he would provide M200-00 for the maid and some money for transport.

When asked if he wouldn't put in money voluntarily for the upkeep of the family he would tell the plaintiff that her own "commitments came out of the trees".

In an attempt to help the Court in making a fair assessment of the earnings of the parties with a view to determining the amount that should go to maintenance

the plaintiff informed the Court that when last she saw the defendant's payslip in August his wages amounted to M1200-00 per month. The payslip was handed in marked "Exhibit B". It relates to August 1996.

Asked how it came about that in February and March 1996 he gave her undoubtedly such big sums of money she said the defendant was probably running away from this case. I tend to agree for I see that minutes of pre-trial conference were filed on 31st January, 1996 and preparations were brisk for arrangement of trial date immediately thereafter. So it must have dawned on him that things were becoming serious and the best way would be for him to give some sop to Cerberus.

The plaintiff works as an employee of what was called Barclays Bank and later called Stanbic Bank. She informed the Court that she has many commitments in the joint house-hold. But the defendant is indifferent to all this. Part of his salary goes towards payment of a Company vehicle which he wrecked through his drunkenness. He got involved in an accident with three vehicles and was beaten up by taxi drivers who had perceived that he was immediately trying to run away from the damage he had caused.

The plaintiff produced a document "Exhibit C" to substantiate her statement

that the defendant's employer i.e. Lesotho Electricity Corporation inflicts a monthly deduction of M412-00 on his salary towards making good the damage he had caused to his employer's vehicles.

The plaintiff has built a house on loan and pays M1500-00 monthly towards its costs. The defendant pays nothing in that regard barring the M200-00 he pays the maid per month. Another benefit that the defendant is entitled to is a certain number of free units of electricity supply.

The plaintiff maintains that the defendant would if interested, be able to contribute towards maintenance of his family and the upkeep of his house-hold. But he has failed to pay even for the child's medical expenses. The child was admitted at Queen Elizabeth II hospital on 5th September 1996 and transferred to Pelonomi Hospital in Bloemfontein on 9th September, 1996, and remained there for three weeks without the defendant paying the bill that followed. His only contribution was M100-00 per each of the two trips that the plaintiff had to undertake once a month to go and see the child. It was even then thanks to the pressure exerted by the plaintiff's father that the defendant parted with the M200-00 to meet the expense in question.

It has been shown that the defendant assaults the plaintiff. The plaintiff has sought to show that the assaults meted out to her are usually based on false accusations that she is associating with men whose existence is exclusively in the defendant's imagination especially when such is given impetus to by an element of drink. In substantiation of this statement the plaintiff referred to an incident when her Bank was to play host to its counterpart's employees from Bophuthatswana. The entertainments for the guest were held, at Lake Side Hotel in Maseru and 'Melesi Lodge at Thaba Bosiu. The defendant was informed of this by the plaintiff. The defendant, in the manner of a ghost at the feast, pitched on the scene, made free with drinks laid out for the guests despite that this was at a private function. He generally conducted himself in a manner that was clearly calculated to embarrass his wife, first by calling her names and pointing at her button-down skirt and inviting his friend Thabo Mokoena to look at the plaintiff's thighs while at the same time asking his friend in a voice raised for the benefit of all strangers around and present "don't you want thighs?"

The plaintiff complains therefore that the defendant assaulted her at 'Melesi Lodge, whereupon she left for her marital home. The defendant came there later and found the plaintiff already in bed and started kicking her and insulting her. The plaintiff's evidence corroborates that contained in her doctor's report i.e. "Exhibit

D". The photographs i.e. Exhibits E^1 and E^2 leave nothing to the imagination regarding the degree of savagery and severity with which the assaults were meted out to the plaintiff's face. All one can infer from these injuries is that they were inflicted with a wicked intent.

One of the factors which places the plaintiff in mortal fear of the defendant for her life, which in turn betrays the defendant's state of mind and attitude towards the parties' marriage in general and the plaintiff's safety in particular is that whenever the parties quarrel the defendant tells the plaintiff that

> "Bullets cost only five cents. A lawyer stays elsewhere and away from us. So I will do what I will. I have been in jail before so it is better if I live in jail".

All this makes the plaintiff uncomfortable and truly makes her feel that the defendant threatens to kill her and might just do so when he has sufficiently worked himself into a frenzy for the purpose.

The plaintiff indicated that after these assaults and threats she is seriously apprehensive that when alone she might come to some harm because the defendant at times boasts and gives her the gypsy's warning that his friends would not just stand by and let him suffer. She further told the Court that the defendant is hardly ever sober. Having asserted that the defendant has constructively deserted her the

plaintiff asked the Court to order the defendant to restore conjugal rights to her, failing compliance therewith to grant her divorce, custody of the minor child 'Maneo, maintenance at the rate of M250-00 per month and forfeiture of the benefits of the marriage plus costs.

On the return date the Court granted only the prayer for divorce having overlooked the fact that the rest of the prayers had also been canvassed in evidence on 22nd April, 1997. The Court's oversight was in part due to the fact that when addressed about restitution order submissions were confined to divorce and its undesirability. Consequently when giving the order of divorce the Court deferred the hearing of the question relating to other prayers to some future date. At first blush that might have seemed wrong and unnecessary as the tenor of my explanation above may appear to suggest. The Court as indicated above heard evidence relating to those other prayers. Again at first blush it might seem not to have been necessary to defer their hearing to some future date. For the moment I can only say the quality of a garment is proved by how well it weathers the elements.

On the return date i.e. 19-09-1997 the Court heard submissions based on an affidavit filed by the defendant and opposed by the plaintiff who had also filed her affidavit in response to the defendant's affidavit styled "Opposing Affidavit"

supported by the supporting affidavit of one Felix Thaabe.

I think the proper reference to these affidavits by the defendant and plaintiff should have been founding and answering affidavits respectively. Functionally and in essence this is what they are. Thus it should be appreciated therefore that the defendant opted not to file any replying affidavit despite that the plaintiff's affidavit loudly cried for a response to her charges against the defendant. I shall come back to this aspect of the matter later when considering logical consequences of the defendant's omission alluded to in this paragraph. For the moment it is important to deal with the substance of the defendant's affidavit filed in opposition to the granting of divorce. The plaintiff's responses will be pertinent in this exercise. But even before dealing with the substance of the matter at issue the Court assured *Mr Monyako* that it had without reservations accepted his apology for what he perceived as his own faults referred to at the start of this judgment.

In brief the defendant averred in his affidavit that he received the Restitution Order on 23rd April, 1997.

He gave a strikingly graphic account of sleeping arrangements in his three bed-roomed house where he lives with the plaintiff. He averred that for a period of

one year his wife has been sleeping in a room she shares with the maid and children; that she has thus moved out of the main bedroom notwithstanding the defendant's supplications and entreaties to her to return to the main bedroom.

He avers that on 24th April, 1997 he showed the plaintiff the Court Order and requested her to get back into the main bedroom so that he could restore to her conjugal rights, but the plaintiff did not comply with the defendant's request. He says on that day he had called Felix Thaabe to visit him. Apparently he didn't disclose to him the purpose for the invitation. Thaabe is the deponent in the defendant's supporting affidavit.

The defendant told Thaabe at sleeping time that he was going to call the plaintiff to prepare bedding for the visitor. The plaintiff refused to budge from where she had already gone to bed with the children. It was then that the defendant took it that an opportune moment had arrived for him to show the visitor the Order of Restitution as he and the visitor shared the main bedroom for the night. He goes on and says "I never during the course of the night heard a knock which I could have responded (*sic*) in order to comply with the Court's Order". The defendant avers that the following day he confronted the plaintiff with having made it impossible for him to comply with the Court Order but was vouchsafed no reply by

her.

He thus submits that it is the plaintiff who has made it impossible for him to comply with the Court Order of Restitution of the plaintiff's conjugal rights; and therefore prays that the marriage be saved from dissolution.

The salient points of the plaintiff's responses to the defendant's averments are that she denies that the defendant ever or at all persuaded her to return to the main bedroom. She denies that she met with the defendant on the 24th April, 1997. The first time she says she met with the defendant after the issuance of the Restitution Order was on 25th April, when she went into her house in the morning of that day to collect a blanket in preparation for going to the house of a neighbour who she learnt had passed away. She denies that the defendant ever asked her to prepare bedding for Felix Thaabe. She denies that Felix Thaabe was at her house. She explains that she had not spent the night of 24th April 1997 at her house. She was at a friend's place that night and only arrived home at 9.00 p.m., and on discovering that the house was covered in gloom of darkness she decided to go back without entering because she has a phobia for dark interiors of buildings. She only saw the defendant in the morning basking in the sun when she left her home for work.

The plaintiff avers that the core of her conversation with the defendant did not extend beyond her asking him when he would pay the money for the maintenance of the minor child and the salary of the maid none of the two of which things he did.

During this encounter which centred on when the defendant was likely to pay for the general upkeep of the household, the defendant did not broach the subject of the restoration of conjugal rights. The plaintiff maintains the starting point would have consisted in the defendant's visible effort to maintain the child and pay for the necessaries of his family's life but it seems this never occurred to him. Thus contrary to what plaintiff on reasonable grounds understands to constitute restoration of conjugal rights by defendant as gleaned from his affidavit, he was only keen on doing "an act of sexual intercourse with me without restoring conjugal rights to me, that is why he had to invite an onlooker".

The plaintiff goes on to say the defendant made no effort to-date to restore conjugal rights; she also denies that she made it impossible for the defendant to do so. In fact he has, according to her, called her an old whore. She accordingly invites this Court to reject his story as a mere fabrication. She vehemently denies that the defendant still loves her and asserts, on good ground, that "if he did he would have taken advantage of this opportunity that the Court had given him".

The Court takes a very dim view of a man who instead of making a sincere attempt at complying with a restitution order, decides to call a friend or a confidant whose business appears to me to have been none other than to keep an eye on when the restitution of conjugal rights effected by means of sexual intercourse between the parties was carried out. This attitude to me smacks of trivialisation of the purpose for which the order was granted.

Judging the defendant on his own papers I come to no other conclusion than that his act was merely calculated at further embarrassing the plaintiff. In any event the plaintiff's version is at sharp variance with the defendant's. As I stated earlier, in evidence by affidavits where no sound reason is given why oral evidence shouldn't have been led, the Court is entitled to accept what is common cause between the parties and to reject that of the applicant (in this proceeding the defendant whose so-called opposing affidavit is in effect a founding affidavit) while accepting that of the respondent (in this proceeding the plaintiff whose so-called replying affidavit is in fact an answering or opposing affidavit). On this score then the defendant's claim that he tried to restore conjugal rights stands to fail because what his story implies is that he is bent on deceiving the Court in the light of the fact that the plaintiff says she was not at the home while the defendant says she was and he saw her. I have already indicated that on its own his version as outlined in the

defendant's affidavit is riddled with improbabilities. So on this score alone it stands to be rejected.

Mr Monyako strenuously argued and sought to be enlightened on the meaning of restoration of conjugal rights short of intercourse and in the light of the fact that his client tried to comply with the restitution order but for the fact that the plaintiff made it impossible for him to succeed in that the plaintiff's attitude seems to revolve on the notion that the defendant had merely wanted to have sexual intercourse with her once and go away immediately thereafter as usual.

It seems there is some substance in the plaintiff's contention because one sees no patience on the part of the defendant, but instead an abrupt giving up at the first encounter with an obstacle. If it is true, though proved facts indicate differently, that he tried to restore conjugal rights on 24th April, 1997, nothing shows that he did anything by way of ensuring success in his compliance with Restitution Order on any subsequent days. The period allowed for him to comply extended from 22nd April to 5th May, 1997 yet in his own evidence the attempt was made on 24th April, 1997, while the following morning was devoted to moaning at the plaintiff about making it impossible for him to comply with the Order the previous night, bearing in mind that on 24-4-97 he himself stood in the way of his own interests by dragging

along an "onlooker" in the presence of whom the plaintiff, taking into account the sleeping arrangements in that household, would scarcely feel free to make the overtures that the defendant suggests he had set his keen ear for that night. In any case I have indicated that the respective versions of the parties are in sharp conflict on this point.

In line with the generality of *Miss Tau's* argument that restitution implies resumption of normal life and sincere attempt at reconciliation, which in part would give an answer to *Mr Monyako's* concern, reference to **The South African Law of Husband and Wife** 4th Ed. By H R Hahlo at 409 would prove fruitful, to wit;

> "That the plaintiff is suffering from venereal disease is no ground for the refusal of a restitution order, which does not necessarily involve an order on the defendant to submit to intercourse. 'There are other conjugal rights besides this one, and because one right can be legitimately and temporarily withheld (it does not follow that there is) ground for withholding all'. ..... In ***Morton*** Gardiner J P refused to make a restitution order where the plaintiff's home was an infirmary and he was not in a position to receive the defendant in case the latter decided to return to him. In ***Buchner,*** on the other hand, a restitution order was made although at the time of the action the plaintiff was serving a term of imprisonment".

These two cases show that restitution does not necessarily mean involvement of sexual intercourse. But since the mental conduct of the defendant in this instance is of paramount importance the fact that he was looking forward to sex with his wife

when he had on tow his friend into the bargain, while aware of the sleeping arrangements in his particular home, suggests that he wilfully flawed any chance he would otherwise have had of sleeping with his wife. Thus his failure to restore conjugal rights was deliberate.

At page 415 **Hahlo** above says :

> If on a return by the defendant the plaintiff refuses to accept him or her, the plaintiff becomes the deserter.
>
> Restitution of conjugal rights means the restoration of cohabitation as man and wife. The *factum* of the return must be accompanied by the intention to restore the marital relationship. There is, consequently, no restoration of conjugal rights if the defendant returns to plaintiff under circumstances which show that he has no intention to resume marital cohabitation. A willingness to resume sexual cohabitation is usually required but not necessarily so.
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> .....The return or offer to return must be genuine and *bona fide*, and not a mere ruse or stratagem to escape an order of divorce. ..... In ***Schepers*** 1951(1) SA 409 T the fact that the parties had had intercourse on an isolated occasion was held not to amount to a resumption of cohabitation."

I am of the view that the defendant in the instant case, if his averments are to be believed that he went along with Felix on the day he had intended restoring conjugal rights, embarked on a transparent ruse calculated at merely escaping an order of divorce. Surely asking Felix to accompany him for the purpose of restoring conjugal rights to his wife is not a means one would employ in trying to resume

normal cohabitation and marital relationship in the couple's crowded house.

Proper consideration of the authorities cited above when applied to the facts of this case should suffice to show that there is thus a clear difference between restoring conjugal rights and being possessed by an all-consuming urge to give vent to one's erotic obsession. Acceptable evidence places the defendant in the latter category. I need not over-emphasise the perversion that is manifested by his morbid delight in pestering his wife during sexual embrace to tell him her sexual partners.

Mr Monyako suggested that parties should be granted one more chance to try to reconcile. He suggested that the intervention of Priests and social workers might help salvage the marriage. My attitude is that the entire period between the issuance of summons and the morning just before the start of trial would have been utilised in that regard. Not only was there nothing done to try such options during that entire period but no such options were tried during the period between the return day and the date when the restitution order was made. Furthermore, it was not suggested that the plaintiff was at all consulted or her view point considered in trying avenues of the sort suggested. In short, it was simply too late for tears.

No doubt learned Counsel's desperate pleas much as they tend to overlook

the weight of evidence that went unchallenged during trial in the absence of both his client and him hinge on the firm ground supplied by **Hahlo** immediately below. Thus although it may surely be desirable that everything else be weighed including such evidence for final assessment of facts and consideration of what judgment to give, authorities point in a different direction for they clearly indicate that everything else that preceded the Restitution Order is *res judicata* and may not be re-opened. (See infra).

On the subject of Return day and decree of divorce **Hahlo** above at 412 says

> "The object of the proceedings subsequent to the preliminary action, in which the fact of desertion has to be established, is to convince the court that the offending spouse persists in his refusal to live with the innocent spouse. The court must be satisfied that, despite its order, the offending spouse refuses to restore conjugal rights. The only issues relating to the divorce as such, which are normally before the court on the return day, are, first, whether the *rule nisi* has been duly served on the defendant; secondly, whether or not it has been complied with. Whether the court has jurisdiction, whether there is a valid marriage, and whether there has been malicious desertion, are questions that are *res judicatae* and will not normally be reopened. As Schreiner J put it in ***Juszkiewicz***,
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> > 'The function of the judge on the return day.....is confined to seeing whether the restitution order has been duly served and whether the defendant has made return to the plaintiff'.....".

Finally, I indicated earlier that at first blush the order that ancillary matters be deferred to a hearing on extended return date might seem wrong in the light of the

fact that evidence covering them had been canvassed though this had escaped my mind when I made that order. I am glad that this Court's initial sentiments are vindicated by **Hahlo** at 413 where he says :

> "Whereas, save in the case of certain exceptional situations, the question of desertion is *res judicata* on the return day, orders made by the trial court as to custody, maintenance and other ancillary matters are not finally disposed of, and may be reopened on the return day, no matter how thoroughly they have been canvassed at the trial stage".

On this ground, while granting the final order of divorce and costs the court, even though having heard evidence on the ancillary matters before the return day, ruled that the question relating to custody, maintenance and forfeiture be reopened. For this purpose the parties are granted an opportunity to make their submissions through their counsel or otherwise on 27th October, 1997 which is a return day to which balance of the rule is extended and the outstanding matter accordingly postponed.

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JUDGE
20th October, 1997

For Plaintiff : Miss Tau
For Defendant : Mr Monyako