

CIV/T/42/2010

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAMATSELISO KHOELI (nee MOTLALEPULA)

PLAINITFF

And

KORI KHOELI

DEFENDANT

JUDGMENT

**Delivered by the Honourable Madam Justice N. Majara
on the 10th August 2011**

Summary

Action for Divorce – onus on plaintiff to make out a case of constructive desertion and to show that the defendant had the intention to terminate the marriage – plaintiff failed to successfully discharge the onus and show that by his conduct the defendant acted with a settled intention to terminate the marital bond – action dismissed.

This is a contested action for divorce instituted on the grounds of constructive desertion. I find it apposite to state from the onset that this judgment has been ready for delivery as far back as the first week of August 2011 but despite several notices in this regard through the Roll Office by means of publishing same in the

weekly rolls, parties herein never came to note it hence it is only delivered today upon the Court seeing Counsel for the defendant in the divorce roll.

I revert back to the judgment. It is common cause that the parties herein got married in 1992 by customary rites and the marriage was subsequently solemnized by civil rites in 1994. Three children were born of this marriage namely, two girls one of which passed away an infant, and a boy.

In order to prove her case, the plaintiff testified that since the inception of their marriage, she and the defendant lived happily until the year 2001 when he became abusive by beating her up whereupon she would run to her in-laws for their intervention. It was her evidence that on the 1st July 2006 the defendant slapped her and she ran to her aunt's place to date.

Further that on one occasion she had asked the defendant to go to the mill as they had run out of mealie-meal but he refused. A quarrel ensued and the defendant assaulted her and she sought refuge at her sister-in-law's. The plaintiff was allegedly one month pregnant at the time. The sister-in-law sent for the defendant but he refused to come. When he eventually did, he accused his sister of disrespecting him by calling him yet she is younger than him. She added that he did not want to listen to his sister and he eventually left them.

The plaintiff also testified that when she went back home, she found her husband absent until she went to sleep. On the following morning she took her clothes and left the matrimonial home and the defendant later found her at the sister-in-law's place. He enquired why the plaintiff was there and she informed him that it was because he failed to humble himself in front of his sister so she had decided to leave. The plaintiff's sister-in-law sent for the parents and gave them a report.

A date was set down for a meeting and the parties were brought together and the defendant was cautioned to stop assaulting the plaintiff.

The plaintiff further informed the Court that the defendant never stopped assaulting her. One day he assaulted her while she was bathing and the children intervened. In the same year of 2001, the defendant left the plaintiff while she was five months pregnant after denying that he had fathered the said baby. When he did come back home, the baby was six months old.

The said baby passed away and during its burial, there was a lot of confusion as the parents of the defendant did not know the child its father having denied paternity. The plaintiff further testified that during that time, she was not consulted on anything concerning the burial of the said child and the defendant's family took care of everything.

She also told the Court that the defendant would refuse to take the lunch box she used to prepare for him to work but would return home with home-made bread. He would not say anything to the plaintiff but she would learn when the defendant told the children that the bread was from his mother. At times the defendant would not allow the plaintiff to go to church yet when she joined her new church, she had sought permission from him and he had agreed.

The plaintiff added that when their daughter had her first period, they were not agreeable as to what should happen to her and even when the defendant wanted their children to visit his parents, he would just tell the plaintiff to prepare their things without consulting her.

The plaintiff stated before the Court that they fought about everything including where to leave the house key. That the defendant had asked her to leave it under a stone but she had refused for the reason that people might see it and steal from them. When the defendant once called to ask her where the key was, she told him to just enter the house as she had not locked and the key was under a mat. When they met later, the defendant asked the plaintiff why she had disobeyed him and slapped her. When he attempted to do so the second time, the plaintiff got hold of his hand and they struggled for a while until she managed to escape.

She fled to her aunt's place and the following day she went to her maiden home to report. When a meeting was convened, the parties were told to forgive each other and it was also agreed that the plaintiff would return to her matrimonial home. The plaintiff added that her mother-in-law and her husband had agreed that the parties would build their house on the mother-in-law's site and when she refused her husband accused her of controlling herself.

Further that the children are currently in the custody of the defendant and his mother and are not allowed to see the plaintiff except when they have needs and after she meets same, they go back to their father. That in January 2011 her daughter sent her a text message asking for educational stuff including school uniform and the plaintiff bought it after which the children left. The plaintiff added that it is because the husband had told the children that he could not afford to provide for their educational needs as he had planned to use his salary from the self-help project but had not yet received it. She added that she left the

matrimonial home to go and stay at her aunt's place since 2006 to date but had at some stage left to go and stay elsewhere.

Plaintiff then called Mamothoalo Mothoalo (PW2) as her witness. PW2 testified that she is the plaintiff's aunt and that the plaintiff came to her and reported that her husband was fighting her. After she stayed with her for a day or two, she proceeded to her maiden home. She was brought back by her parents as she was working in Maputsoe, where PW2 lives. PW2 informed the Court that both families convened a meeting to bring the parties together to live as husband and wife but the parties did not agree. Further that the plaintiff has been living with her since then, to date.

When he took the stand, the defendant Kori Khoeli informed the Court that he is not agreeable to the divorce and denied that he did had caused the plaintiff to leave the matrimonial home. He testified that they had their first fight in the year 2000 after the plaintiff joined her new church without his permission. That one day the plaintiff said she could hear something on top of their house roof which the defendant could not hear and he asked her to wake him up should it happen again. She then told him that a pastor from her church could come and assist with the problem, a suggestion to which he was agreeable. The pastor indeed came and performed some rituals.

The defendant further told the Court that their fight was the result of the plaintiff having left the house unlocked and when he asked her about it she told him where to look for it and after he found it he went about his business and left the house having locked it. Upon his return, he found the plaintiff sitting outside and he was surprised because they had agreed in the morning where to put the key.

When they got into the house, the defendant asked for the Bible as he wanted to read to her what the word of God says about how a wife is supposed to respect her husband but the plaintiff refused to give it to him.

That the plaintiff left during their quarrel and the defendant thought that she must have gone to PW2's place. When he arrived there, he was told that she had gone to her maiden home. DW1 sent word to his parents to inform them of what had happened. He then went to the plaintiff's maiden home and told her mother that he had come for his wife. The plaintiff's mother told him that she was tired of their quarrels and that it is better for the plaintiff to be a prostitute. DW1 stated that he was hurt by that as he thought the plaintiff would be honest with her mother with respect to the source of their quarrel.

The defendant further informed the Court that in 2001, he left for the Republic of South Africa with the plaintiff's knowledge and left the latter staying at his sister's rental flats. The defendant added that he used to call the plaintiff on his sister's public phone to tell her he had not yet found a job. The plaintiff told him that when he arrived home, he should go to his sister's and they will tell him where to find her.

Upon arrival from South Africa, the defendant found her staying there with their children when they were supposed to be with his mother and he asked why she had made such a decision without informing him. That he took the children to his mother's who in turn refused to take them saying his wife had caused her illness when she stole the children away from her. The defendant further told the Court that he never assaulted the plaintiff physically but only used the word of God to deal with and admonish her.

He added that he has been staying with the children since the plaintiff left until when they asked to go to their mother as he was struggling financially. He even went to the police to seek their intervention and the parties were asked to work things out and live in peace. When that did not work, she went to the plaintiff's place of worship to ask that they reconcile and the plaintiff asked him to leave unless he wanted to discuss the children.

One day he went to her pastor's house having enquired from PW2 about her whereabouts and he found her there in the morning in her night dress and he became suspicious that she was staying there because she had an affair with the pastor. They talked and he asked for her forgiveness for whatever it was he might have done wrong. He again went to her pastor and they talked to the person she was staying with and that is when she left the place and went to stay at PW2's place.

It was the defendant's case that he is contesting the divorce because he is not at fault and wants his family back together as he still loves his wife and has even given his consent to her to attend the church of her choice. He denied that the plaintiff has been maintaining the children since she left, save for the one time when they had to go to her and request her to help buy their educational stuff.

The defence called 'Mamotlokoa Motlokoa who is the defendant's sister. She stated that defendant and the plaintiff were fairly happy and only started fighting recently. She further informed the Court that the two families convened to bring the parties together after their fights and the plaintiff promised to go back to her matrimonial home and did not seem to have a problem with that suggestion

except, she never returned there. Further that the parties never fought physically but only quarreled as a result of which the plaintiff would run to her place.

The DW2 further told the Court that in 2001 when the defendant went to the Republic of South Africa, it was by agreement with the plaintiff. That the defendant used to call the plaintiff at the public phone which DW2 owned. He also used to write to her. She added that as much as the plaintiff bought the children the things they needed, it was only once and that it is DW2 who was taking care of the children with their mother's and defendant's assistance.

It is on the basis of this entire evidence that the Court has to determine the issue whether the plaintiff has made out a case for constructive desertion on the basis of which she can be granted divorce. In terms of the law, constructive takes place where one spouse induces the other to leave the matrimonial home either by word of mouth or by conduct namely, by making life difficult and intolerable for the other party in the matrimonial home.

It is inarguable that co-existence is not always easy and harmonious in any marriage despite the mutual love and the best intentions of the spouses. There are bound to be disagreements, fights and irritations of all sorts which are part and parcel of any type of union. Normally those are to be expected and not each and every one of them can be taken to necessarily translate into being intended to break the marital bond as envisaged by the law. Thus, in order for the one spouse to come to the conclusion that the other intends to terminate the marriage, there must be some conduct on the part of the former that will cause or lead the other to that conclusion.

In terms of our law, the Court has the power to grant a decree of divorce from the onset upon proof that the other has committed the matrimonial offence of adultery. Otherwise, where the plaintiff seeks divorce on the ground of malicious and/or constructive desertion, the actual remedy is that of a restitution order in the hope that the other spouse will return to the matrimonial home or desist from his intolerable conduct as the case may be. See in this regard the learned **W. C. M. Maqutu J** in his work, **Contemporary Family Law (the Lesotho Position)**, **2nd Edition p. 378- 379**.

To fortify this point, Maqutu J relied on amongst others, the case of **Very v Very 1951 (2) SA 453 at 455** wherein Shaw J expressed the following sentiments:-

“It seems to me proper that the plaintiff should not only set out the conduct which he or she relies upon as a non-fulfillment of the defendant’s conjugal rights or obligations but should also set out that this conduct was coupled with the necessary intention to bring the marriage relationship to an end.”

In the present case, the wife testified that her husband once slapped her during the year, 2001 and again in the year 2006 during their quarrel over his alleged refusal to go and find them some mealie-meal. That he also deserted her for about five (5) months sometime in 2006 when she was five (5) months pregnant with their last born child who has since passed away during the year. The defendant denied these allegations and went on to show that he has never laid a hand on his wife.

Thus, insofar as the assault allegations are concerned, it is the plaintiff’s word against that of the plaintiff. With respect to the alleged desertion, the defendant testified that he went to the Republic of South Africa in search of a job with the

consent of the plaintiff. He added that he used to communicate with her during the entire period of his absence. He was corroborated by DW2 in this regard.

Further, the defendant testified that he suspected that his wife was committing adultery with the pastor of her church, Setsoto, and though she denied it, the plaintiff did not rebut the testimony of the defendant to the effect that he did once find her in her night-dress at the alleged Setsoto's premises in the company of the latter, and that it was in the early hours of the morning, a fact that is rather suggestive in my opinion.

It is a trite principle of law that in matrimonial proceedings, the onus is on the plaintiff to prove that the defendant had the intention to terminate their marriage. In my view, although the evidence has established that there have been some misunderstandings between the parties, I am not persuaded that the plaintiff has discharged the onus of proving that the defendant did have the intent to terminate the marriage. Not only did he give evidence in contestation but the evidence of the other witnesses has shown that he has always made attempts at reconciliation but the plaintiff seems to be the one who is bent on not giving their marriage a chance.

As I have already stated no marriage is without its own challenges and problems and not every-one of them should be taken as conduct that means or falls within the definition of constructive desertion. Indeed as the learned Maqutu postulates, *'Conduct that might constitute malicious desertion must be of such an intolerable and cruel nature, which is persisted ...'*

In addition, in the similar manner that I found in the case in **M. Kheleli v M. Kheleli CIV/T/46/06 (unreported) p 3**, not only has the defendant herein

disputed all the plaintiff's allegations, he has also told the Court that he is prepared to do whatever it takes to make the plaintiff go back to their matrimonial home so that they can resume their married life as husband and wife and raise their minor children together. I am therefore unable to find that on the totality of the evidence that has been placed before me the plaintiff has successfully shown that the defendant's actions were a clear manifestation of his intention to make life intolerable and/or to terminate the bonds of their marriage.

It is for the above reasons that I find that the plaintiff has failed to make out a case for divorce and I accordingly dismiss her claim.

This being a matrimonial matter, I also order that each party should bear its own costs.

N. MAJARA
JUDGE

For the plaintiff : Ms Magumela

For the defendant : Ms T. A. Lesaoana