

# IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/649/10

In the matter between:-

**‘MABASIA NGATANE  
RETHABILE NGATANE**

**1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT**

**AND**

**NEO NGATANE  
NTHAKOANA NGATANE  
ALLIANCE INSURANCE COMPANY  
STANDARD LESOTHO BANK (PTY) LTD  
MASTER OF THE HIGH COURT  
THE COMMISSIONER OF TRAFFIC AND TRANSPORT  
COMMISSIONER OF POLICE**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT  
5<sup>TH</sup> RESPONDENT  
6<sup>TH</sup> RESPONDENT  
7<sup>TH</sup> RESPONDENT**

## **JUDGMENT**

**Coram : Hon. Mahase J.  
Date of hearing : 12<sup>th</sup> February, 2007  
Date of Judgment : 14<sup>th</sup> March, 2013**

### **Summary**

*Civil Procedure – Husband and Wife – Divorce – Parties’ joint estate – including companies shares – division of same – custody of the parties’ minor children – None filing of plea by plaintiff/defendant in reconvention – Rule 30 of the High Court Rules.*

ANNOTATIONS

CITED CASES:

- **Smith N.O. v. Brummen 1954 (3) S.A. 555**
- **Monument Art Co. v. Kenston Pharmacy (PTY) LTD 1974 (2) S.A. 371**
- **Petzel v. Leinverber 1953 (3) S.A. 62**

- **Hudson v. Hudson 1927 A.D. 259**

STATUTES: **High Court Rules No. 9 of 1980**

BOOKS: **Contemporary Family Law of Lesotho, 1<sup>st</sup> Edition pp 265 - 267**

- [1] The Proceedings herein have been pending before this court since the year 2002. The case has been enrolled many times before different Judges of this Court but to date, the divorce proceedings have not been finalized.
- [2] Parties herein have been living apart from each other for many years. From the court record, they have been living apart from around the year 2002. To be precise, the plaintiff claims to have been expelled by defendant from their matrimonial home during easter of 2002.
- [3] That she was forced to leave behind their two minor children as she ran away from defendant who she claims verbally and physically assaulted her. Of course, defendant denies the allegations with the result that each of the parties to this proceedings blames the other for the constructive desertion and or for total break down and collapse of their marriage.
- [4] These proceedings are characterized by the filing of a number and various interlocutory applications before different Judges thereby making it one of the unfortunately protracted divorce proceedings in the history of this Court.
- [5] Suffice it to mention that the plaintiff ('Mamonyane) has in her declaration spelt out in details the numerous adulterous associations/relationships which

her husband, the defendant has engaged in since their marriage on the 5<sup>th</sup> January 1985, while their said marriage is still in subsistence.

[6] Two children have been born out of the parties' union. They were respectively born on the 17<sup>th</sup> April 1986 and the 26<sup>th</sup> April 1996.

[7] According to the plaintiff's declaration her husband, the defendant herein has had numerous adulterous relationships with certain ladies. He has even fathered a child with one Bokang Lebitso with whom the defendant is to date residing at the parties' matrimonial home.

[8] The defendant has duly filed a notice of appearance to defend the case. He has also filed a plea in which he has among others spelt out the circumstances which let him to expel the plaintiff from their matrimonial home.

[9] In a nutshell, and whilst denying the allegations of plaintiff directed against him the defendant contends himself with only stating that it is the unbecoming behaviour and abusive attitude of plaintiff which have let to the complete break down of the relationship between them. Except what he has stated at paragraph 4 of his plea, defendant has not been specific nor has he particularized or explained that which he calls unbecoming behaviour of the plaintiff.

[10] He has also not denied the specific adulterous relationships to which the plaintiff has alluded in her declaration. He has, most significantly not

pleaded issuably to such allegations, nor has he applied to court that such behaviour of his be condoned by this court.

[11] It is trite law that, that which is not denied nor challenged in any way has to be accepted as the truth. The defendant has asked this court to dismiss the plaintiff's claim with costs.

[12] It is a matter of common cause that in her summons, the plaintiff has asked the court to grant the following orders/prayers in her favour:

- Restoration by defendant of conjugal rights to her, failing which a decree of divorce against the defendant.
- Custody to her of the minor children of the marriage with reasonable access to defendant.
- Payment of maintenance by the defendant in respect of each of the parties' minor children in the sum of M2,000.00 per month.
- An order for division of the parties' joint estate.
- Contribution by defendant towards her legal fees/costs in the sum of M2,000.00.

[13] This matter was ultimately set down for hearing on the divorce roll a number of times since the 24<sup>th</sup> September 2003.

- [14] The case was then postponed by consent of the parties so as to enable parties to settle the question of the division of their joint estate. To date all endeavours to have this issue amicably settled have failed.
- [15] However while such negotiations were still going on, the plaintiff's (in reconvention lawyer) went behind the defendant's lawyer (in reconvention) and approached my brother Peete J. and had evidence lead as though the matter was uncontested.
- [16] The defendant filed his plea only after all negotiations to have the issues pertaining to custody of the parties' children as well as visitation and the issue with regard to the division of the parties estate had broken down.
- [17] What in effect this entails is that the defendant did not file her plea to the counter claim because by consent parties were going to have some issues amicably resolved or settled. This therefore means that her failure to file such a plea timeously or at all was not intentional or negligent.
- [18] The problem in this case is that parties keep changing the instructions which each has given to one's lawyer to an extent that even this Court is no longer certain about what the real issue(s) are herein.
- [19] Be that as it may, it would appear that parties are agreed that the divorce should proceed uncontested but that matters pertaining to ancilliary issues be argued.

- [20] The issue now before this court, which issue has to be determined is with regards to the striking out of a plea to the counter claim. The plea in question was filed in 2005 and was filed after the restitution order was granted.
- [21] According to the court minute dated the 10<sup>th</sup> March 2005, my brother Peete J. ordered the defendant in reconvention to restore conjugal rights to the plaintiff in reconvention on or before the 24<sup>th</sup> March 2005, failing compliance therewith, plaintiff to show cause on the 30<sup>th</sup> March 2005 why a final decree of divorce should not be granted upon the grounds of the said plaintiff's desertion.
- [22] Ultimately, the defendant in reconvention failed to restore conjugal rights as ordered by Court for the reason she has explained in her affidavit dated or filed in this Court on the 12<sup>th</sup> April 2005; after having been served upon the attorney of record of the plaintiff in reconvention. Refer to same.
- [23] In a nutshell, it is her case that her husband had made it virtually impossible for her to restore conjugal rights because he has placed the security guards at the gate at their matrimonial home and with specific instructions to never allow her to enter the premises, and says she was not allowed by the said guards to enter the gates at her matrimonial house.
- [24] She has stated clearly at paragraph 7 of this affidavit that her intention is to restore conjugal rights as ordered but she had been obstructed from doing so by plaintiff in reconvention.

- [25] In reply to the above, the plaintiff in reconvention has not pleaded issuably to that pleading. He contends himself with only saying that ( I quote) “*upon service of the restitution order, she made an attempt to return home, which was astounding to me; and obviously not genuine as we are both aware that the marriage relationship between us has broken down completely*”. Refer to replying affidavit dated 14<sup>th</sup> April 2005.
- [26] In short, the plaintiff in reconvention admits that the defendant in reconvention made an attempt to restore conjugal rites, but he runs short of saying why that attempt failed. Instead he has come to the conclusion that their marriage relationship has completely broken down.
- [27] With the greatest respect, it is not for him to make this finding or decision. This is for this Court to determine as the procedure for restoration of conjugal rights is designed to enable this Court to make such a determination in divorce matters. In any case, the breakdown or irretrievable break down of a marriage is not a ground for divorce in this jurisdiction.
- [28] Failure by him to admit or deny this averment does not advance his case in any way; instead, because of this, that averment/fact that he made it impossible for her to restore conjugal rights stands admitted and unchallenged. Refer to paragraph 5 of defendant/ plaintiff in reconvention lawyer’s affidavit at pages 3 and 4 of heads of argument filed on 31<sup>st</sup> October, 2006, and also to the response of the plaintiff/defendant in reconvention at page 10 of her answering affidavit.

[29] Notably, the affidavit of the plaintiff in reconvention referred to above is a procedural irregularity as it has not been made by the plaintiff himself but by his attorney. It is indeed hearsay evidence which is inadmissible.

[30] On the basis of the unchallenged averments that it was the plaintiff in reconvention who made it impossible for the defendant in reconvention to restore conjugal rites, the plaintiff in reconvention filed an affidavit of non-return. What he has done by having filed that affidavit of non-return is a distortion of what actually transpired after a restitution order was served upon the defendant in reconvention. Indeed whether or not the divorce was to proceed uncontested, the procedural step of restoration of conjugal rights could not be waived by any of the parties herein, nor by this Court.

[31] This Court has sadly noted that counsel for parties herein could themselves also not agree on anything; e.g. they could not even agree as to why they were both in Court on the 12<sup>th</sup> February 2007. This is one of the issues and a common feature which has been causing not only a protracted delay in the finalization of this case but it also caused a confusion even to this Court which has been allocated this matter some five years since the case was first filed in Court.

[32] Be that as it may, it is common cause that even though the matter had not been formally set down for prosecution, the plaintiff in reconvention lawyer approached the court on the 10<sup>th</sup> March 2005 and evidence was led before my brother Peete J., as if the matter was uncontested.



- [33] Not only that, at that time the negotiations alluded to above, which were by consent meant to broker a settlement of this case amicably were still on going. In other words plaintiff's lawyer went to court behind defendant's lawyer.
- [34] The fact that negotiations to broker a settlement were still on going and that the settlement has to date not been reached is buttressed by the correspondence between counsel herein in the bundle of documents dated the 27<sup>th</sup> April 2010.
- [35] Further on, there is no formal notice of set down of this case for prosecution on the 10<sup>th</sup> March 2005. This is the day when an order of restitution of conjugal rights was granted to defendant/plaintiff in reconvention, and unknown to the lawyer of the plaintiff/defendant in reconvention. This Court has already alluded to what transpired at the time when the defendant in reconvention went to restore conjugal rights.
- [36] Plaintiff in reconvention is challenging the filing of the plea to the counterclaim which he alleges as having been filed irregularly because it is argued that it was filed hopelessly out of time because it was filed some two years since the counterclaim was filed.
- [37] While that might be so, the problem here is that, the defendant/plaintiff in reconvention, well being aware of the alleged irregularity, continued to take further steps in the cause with such knowledge of the irregularity or impropriety. This is clearly contrary to the provision of Rule 30 (1).

- [38] The defendant/plaintiff in reconvention then sat back and only came to court some two years later to obtain a restitution order, while he had not notified nor served the other party with a notice of bar and whilst parties were still brokering negotiations for a settlement and also contrary to the provisions of Rule 30 because the application in terms of that Rule should have been filed within fourteen days of the taking of an irregular or improper step.
- [39] Further on, the parties later appeared before this Court upon or after having served each other notices of set down. Those various dates are the 28<sup>th</sup> May 2007, 14<sup>th</sup> June 2007 and on the 28<sup>th</sup> April 2010 wherein they were once again ordered to discuss and settle the issues pertaining to custody and visitation as well as division of the joint estate. In other words, the defendant/plaintiff in reconvention took further steps in the cause even though it was well aware of and with knowledge of the irregularity.
- [40] In the premises, the application to strike out the plea to a counterclaim is refused; costs are awarded to the plaintiff/defendant in reconvention. Parties are once again ordered to come to court to inform this court the outcome of the negotiations for a settlement. If they have failed to reach a settlement, the matter should go to trial in the normal way, so as to enable this court to have the case finalized.
- [41] In this regard parties and or their counsel are ordered to approach the office of the Registrar for a date(s) of trial.

**M. Mahase**

## **Judge**

For Plaintiff/Defendant in reconvention - Adv.V. Kotelo

For Defendant/Plaintiff in reconvention - Adv. L. Molete (as he then was)