

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**‘MASENTLE MAPURU**

**Plaintiff**

**and**

**MAKARA MAPURU**

**Defendant**

**JUDGMENT**

**Coram:**

**Hon. Hlajoane J**

**Dates of Hearing:**

**1<sup>st</sup> April, 2014, 15<sup>th</sup> May, 2014.**

**Date of Judgment:**

**4<sup>th</sup> June, 2014.**

*Summary*

*Claim for divorce on account of defendant’s constructive desertion – Defendant having been served with the restitution order and only calling plaintiff who was at a restaurant to go to her and restore at the restaurant – The offer considered not to be genuine – Decree of divorce granted on account of defendant’s constructive desertion.*

## Annotations

## Statutes

1. Rule 36 (2) of High Court Rules 1980 (as amended)

## Books

## Cases

1. Manyokho v Manyokho 1979 LLR 638
2. King v King 1947 (2) S.A. 517 at 522
3. Selia v Selia 1991-96 LLR 1449

[1] These are divorce proceedings. Plaintiff has instituted divorce against her husband on the grounds of his constructive desertion.

[2] Parties herein entered into a civil rites marriage and in community of property on the 24<sup>th</sup> December, 2005. They were blessed with a son, Sentle Mapuru who was born on the 17<sup>th</sup> July, 2004 and was legitimized by the parties' subsequent marriage.

[3] The divorce has been opposed and defendant filed his plea, and a pre-trial conference was held in terms of the High Court

Rules<sup>1</sup>. At the trial plaintiff gave evidence and a restitution order was made.

[4] The restitution order was made on the 1<sup>st</sup> day of April, 2014 ordering the defendant to restore on or before the 14<sup>th</sup> April, 2014 and failing compliance therewith, to show cause on the 16<sup>th</sup> April, 2014 why decree of divorce shall not be granted on account of his constructive desertion.

[5] According to the return of service filed of record the Deputy Sheriff served the order personally on the defendant after two attempts of service at P.C. F.M. where defendant works. The date for such service is not given except the 12<sup>th</sup> April as date when return was made.

[6] On the return date, plaintiff filed an affidavit of non-return and the defendant on the other hand filed an affidavit of return. The affidavit by plaintiff indicated that defendant has failed to comply with the order of restitution within the time allowed by the Court. Defendant on the other side showed that he wanted to restore but plaintiff made it impossible as she refused and became uncooperative.

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<sup>1</sup> Rule 36 (20) of High Court Rules 1980 as amended

- [7] The Court then ordered *viva voce* evidence on the issue of compliance with the order for restitution. Plaintiff in her evidence showed that after he was granted the restitution order, defendant called her informing her that he had been served with the order. Defendant is said to have told plaintiff that it was urgent that they meet and plaintiff told him to go to her at home when he comes to collect the child as she was at that time at the industrial area.
- [8] Plaintiff then in her evidence said, defendant told her over the phone that the order said he was denying her sex, and said he was going to offer her sex there where she was at Gallitos buying food. Plaintiff then referred defendant to his lawyer. Plaintiff showed they are staying in separation with the defendant and she is the one staying with their minor child.
- [9] Plaintiff further showed that they were staying apart with the defendant as they used to quarrel over one 'Maphoka working at Lesotho Revenue Authority (LRA) and that presently defendant is living with Maphoka in adultery.

[10] She attacked defendant's affidavit of return by showing that they have no communication with the defendant. That even on the day that she had invited him to her place for discussion on the issue of conjugal rights the defendant never showed up. When defendant comes to collect the child to visit him he would just stop outside and blow his hooter for the child to come out to him.

[11] It also came out in plaintiff's evidence that she even suggested counselling for both of them. It would seem they did attend but defaulted as defendant suggested to the Court that it was plaintiff who never attended. He however seemed not to deny that counselling had been suggested by plaintiff.

[12] Defendant in his evidence showed that he was in fact served with the restitution order on the 8<sup>th</sup> April, 2014. Unlike what was said by plaintiff, defendant said it was the plaintiff who called him from Gallitos at the industrial area. This was on a Friday preceding the last day for him to restore.

[13] Defendant further said he too called whilst plaintiff was at Gallitos but plaintiff turned to show that she was still going to consult her lawyer. He also said plaintiff told him she was no

longer interested in sleeping with her. He said she was not saying that for the first time but had been saying that on several occasions. Defendant even blamed plaintiff's cousin as the one who always comes between them. He concluded by showing that he was still prepared to make things work between him and his wife.

[14] It will be observed that what defendant said in evidence most of it was not what was put to plaintiff in cross examination. He told the Court that he had been collecting the child from plaintiff's place even after having been served with the restitution order. He knew where plaintiff stayed. He said he went to plaintiff's place only to find plaintiff not at home. He did not wait for her but left.

[15] In his evidence he said he could not wait for the plaintiff at her place as plaintiff had told her that there was no longer them. He however did not disclose as to when plaintiff said that. He mentioned of an occasion last year on a Sunday preceding Christmas.

[16] It was pointed out to the defendant that he never challenged the plaintiff when she said it was him who called her whilst she was

at Gallitos, at the industrial area to say he was coming to sleep with her there at Gallitos as she had complained about him to the Court. His response was that he denied because he said in fact it was plaintiff who invited him to go and sleep with her there. But all that defendant said in his evidence had not been put to plaintiff when she was cross examined.

[17] It was only plaintiff's counsel who bothered to file his heads. I never received any heads from the defendant's side.

[18] In stating the position of the law plaintiff's counsel referred to the case of **Manyokho v Manyokho**<sup>2</sup> where the Court per **Cotran CJ** in granting divorce and rejecting defendant's opposition after he had failed to restore came up with some important points to consider in similar cases.

[19] The four points in summary are the following:

- (a) that the offer to return must be genuine and not just a way of defeating the decree of divorce. There must be a clear intention of carrying out that offer even after.

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<sup>2</sup> Manyokho v Manyokh 1979 LLR 638

- (b) that a mere desire to return is not enough without showing a fixed and settled intention to resume marital life under normal conditions.
- © that previous history of parties marriage is relevant in throwing light on whether the offer to return is genuine.
- (d) the Court also to take into account the history of the litigation, allegations made, affidavits and *viva voce* evidence given on return date.

[20] The Court found the above points to have been informative enough in providing guidance when dealing with opposed divorce proceedings. Plaintiff approached the Court for relief. She was given chance to give *viva voce* evidence as was the defendant.

[21] Defendant in his evidence accepted that plaintiff even suggested going for counselling. Plaintiff on the other hand has shown that she had invited defendant to her place to discuss the restitution order but defendant failed to turn up.

[22] Defendant was served with the order on the 8<sup>th</sup> April, but only phoned plaintiff on a Friday preceding the last Monday the 14<sup>th</sup>



when he had to restore. Before then he had been coming to pick the child from plaintiff's place and not the plaintiff. He never left any message for the plaintiff about his intentions to restore, but called her over the phone requesting to go and sleep with her at Gallitos restaurant where she was buying food.

[23] From the evidence that was led by both parties, their previous history of their marriage has always not been a happy one. The parties are living in separation and defendant is living with another woman who according to plaintiff's evidence has been the cause of their quarrels. This was not denied by the defendant.

[24] Looking at the affidavit of return by the defendant, it is very brief and has not said much about why defendant only sought to restore on the 14<sup>th</sup> April when he had been served with the order on the 8<sup>th</sup> April. It would not be unreasonable to conclude that defendant's offer was not genuine. Looking also at how he approached the issue of restoration by calling plaintiff and offering to go and afford her conjugal rights at the restaurant where she was buying food. That was a mockery of the whole process of restoration.

[25] I looked at the couple as they gave their evidence, they are still young. The case referred to by plaintiff's counsel, **King v King**<sup>3</sup> is relevant to this case, the words by the Judge that said;

*“In the case of spouses who are young or comparatively young, physical cohabitation is usually regarded as one of the major aspects of the marriage. In fact in such cases a restoration of conjugal rights is often understood to mean willingness to reestablish such physical cohabitation.”*

[26] Can it be said that defendant was willing to resume cohabitation? Surely not, he was served on the 8<sup>th</sup> but only sought to restore by phone on the 11<sup>th</sup> April. His approach to the order that was served on him showed that he was not genuine when he said he wanted to restore. He only wants to frustrate the plaintiff in getting a divorce as he even never denied that he is staying with another woman.

[27] Plaintiff is asking this Court to follow the decision in **Selia v Selia**<sup>4</sup> where the Court in considering the parties' history concluded that defendant's offer to restore was not genuine. Defendant failed to maintain plaintiff and the child. Defendant during the restitution period had ample time of showing his

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<sup>3</sup> King v King 1947 (2) S.A 517 at 522

<sup>4</sup> Selia v Selia 1991-96 LLR 1449

willingness to restore. He was not genuine when he called plaintiff showing he wanted to restore.

[28] The Court in **Selia** *supra* took the view that conjugal rights consist of rendering continued cohabitation, which is safe, pleasant and tolerable. In our case, the defendant during the restitution order continued to neglect plaintiff but would only come pick up the child and bring him back. He never made any effort of showing a desire to resume cohabitation. He is even still living with another woman.

[29] Based on all what has been said above, the Court considers that defendant has failed to restore conjugal rights to the plaintiff. I therefore grant divorce on account of defendant's constructive desertion.

Postponed to 11/06/2014 for ancillary.

