

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOEKETSI MARAKA

Plaintiff

and

‘MAMPAKA MARAKA (Nee Mokitjimi)

Defendant

JUDGMENT

Coram : Hon. Hlajoane J

Dates of Hearing : 2nd April, 2014.

Date of Judgment : 12th August, 2014

SUMMARY

Decree of divorce on the ground of plaintiff's adultery alternatively on malicious desertion – Plaintiff had allowed defendant to work with a man whom he later claimed was her lover – Plaintiff himself living in adultery with a woman who has even borne him a child - Plaintiff

has failed to disclose his adultery – He came to Court with dirty hands – Claim for divorce dismissed with costs.

Annotations

Statutes

1. High Court Rules Act 8 of 1980

Books

Cases

- 1. Klein Wort v Klein Wort 1927 AD 123 at 124**
- 2. Goodrich v Goodrich 1946 AD 390 at 394**
- 3. Gate v Gate 1939 AD 150**

[1] Plaintiff and defendant were married by civil rites and in community of property on the 2nd November, 2001. They had before that been married customarily in 1989. Their marriage still subsists. There were two children born of the marriage, ‘Mamasenkane and Libokanyo. Plaintiff is before Court asking the Court to grant him divorce on account of defendant’s adultery, alternatively malicious desertion.

[2] The divorce is contested. The defendant filed her plea in which she had denied the adulterous relationship with one Tumonyane Mahao. What has been denied is the affair but working together with Tumonyane has not been denied.

- [3] It was a matter of common cause that defendant and plaintiff had been working together with Tumonyane. Plaintiff had in the past allowed the defendant and Tumonyane to travel together when going to replenish their stock for selling. Plaintiff said he had to stop defendant from going together with Tumonyane when he suspected that defendant and Tumonyane were having an affair.
- [4] Though defendant has always been denying any illicit affair with Tumonyane plaintiff showed that Tumonyane has been the cause of their quarrels. Plaintiff even said in his evidence that defendant even left the matrimonial home to go and live with Tumonyane at Ha Chepheseli. Tumonyane had the advantage of owning a car which they would always use to replenish their stock.
- [5] Plaintiff denied that he had been assaulting the defendant hence why defendant had to leave him. Plaintiff even said when defendant left their matrimonial home she was using Tumonyane's car to load the household property that she took away with her. That was denied by the defendant who however said she used Tumonyane's car because it had always been

parked at their place for safe keeping, but that when she took away her property she used her father's car.

[6] Defendant had again shown that ever since her husband complained about Tumonyane, she stopped using Tumonyane's vehicle but used that of one Maqalika. Defendant further showed in her evidence that it is the plaintiff who is living in adultery as he has now married another wife.

[7] Plaintiff has denied marrying another wife but his daughter in her evidence showed she was certain that her father has married a second wife and they have a child Mabote with his new wife. That second wife's name has become to be 'Mamabote following on the name of the child.

[8] In support of his case plaintiff had referred to cases which he has asked the Court to draw an inference that defendant and Tumonyane were not only desirous to commit adultery but they were also willing to commit adultery which in fact they did. The cases are **Klein Wort v Klein Wort**¹ and **Goodrich v Goodrich**².

¹ 1927 AD 123 at 124

² 1946 AD 390 at 394

[9] On the alternative ground for divorce, malicious desertion, referring to **Gate v Gate**³ plaintiff showed that a wife's persistent cruelty is a sufficient ground for malicious desertion provided that she had a fixed intention to put an end to the marriage.

[10] The defendant has alleged in the papers and in evidence that plaintiff used to assault her. This has however been denied by the plaintiff. Defendant called their first born 'Mamasenkane to testify on her behalf. The child has testified to the assaults not only to the defendant but to them by the plaintiff.

[11] Defendant has shown that due to the assaults by the plaintiff she even had to *ngala* to her maiden home. Defendant even handed in in evidence minutes of the Marake family meeting when she had invited the family to intervene. This was in July of 2008.

[12] Parties' daughter, 'Mamasenkane had testified to the fact that she was certain that what defendant said about plaintiff having married a second wife was true. She even knows that the new wife is 'Mamabote and the child is Mabote. She attended or had

³ 1939 AD 150

visited her home when she found that there was a feast for naming plaintiff's child with the new wife Mabote. This evidence corroborated that of the defendant that plaintiff is living in adultery with another wife.

[13] Plaintiff had accused defendant of an illicit love affair with Tumonyane, but defendant had denied that. Instead defendant had shown that the man was just a business colleague as his stall for selling vegetables is near that of the defendant. Also that it was plaintiff who had allowed the two to work together as Tumonyane had transport and would assist defendant in transporting his stock.

[14] As mentioned by counsel for the defendant in his heads, in divorce proceedings the fault principle plays an important role. In our law dealing with divorce we have two grounds of divorce namely, adultery and desertion be it malicious or constructive.

[15] Now looking at the facts of this case who can it be said is the one at fault? Plaintiff alleged that defendant had an affair with Tumonyane. He has not disputed that he had been happy with the defendant working together with Tumonyane but later viewed their relationship as sinister. Defendant denied that.

[16] Plaintiff on the other hand is said to be living with another woman as his second wife and they have a child together, Mabote. This was said by the defendant and has been confirmed by the parties' daughter. The plaintiff has thus approached this Court with dirty hands. He never disclosed his adultery and had never asked for its condonation. The defendant on the other hand has shown that she is prepared to forgive her husband for the sake of peace and reconciliation.

[17] There is no doubt that plaintiff married the second wife during the subsistence of a valid marriage between him and the defendant. He is therefore the guilty party, such disclosure by the guilty party has been provided for in the Rules of this Court.

Rule 21 (4)⁴

“Where a plaintiff who sues for restoration of conjugal rights, divorce or judicial separation has been guilty of adultery, he shall state the time and place of such adultery and in both summons and declaration he must pray for condonation thereof.”

⁴ High Court Rules Act 8 of 1980

[18] There can never be any condonation where a party has not asked for one. On the facts and evidence presented before this Court, the Court finds that plaintiff has failed to make out a case for divorce on the ground of adultery.

[19] Even on the alternative ground for malicious desertion, defendant has handed in a letter from plaintiff's counsel which clearly, though not translated, warned defendant never to bother plaintiff at his place. Defendant can never therefore be held to be in desertion.

[20] Plaintiff's claim is thus dismissed with costs. I have awarded costs though because the defendant has been dragged to Court as though she was the guilty party yet she has shown that she is still willing to work out things with her husband.

A. M. HLAJOANE
JUDGE

For Plaintiff: Mr Molise

For Defendant: Mr Nthontho

