

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/48/2014

In the Matter Between:-

‘MAKATLEHO MOKHELE

PLAINTIFF

AND

TOTA MOKHELE

DEFENDANT

JUDGMENT

CORAM	:	MOKHESI J
DATE OF HEARING	:	25TH OCTOBER 2019
DATE OF JUDGMENT	:	14TH NOVEMBER 2019

CASE SUMMARY: *Matrimonial Causes: An order of forfeiture of benefits of marriage following a degree of divorce on the ground of malicious desertion – Principles applicable articulated.*

ANNOTATIONS:

BOOKS : Hahlo, *The South African Law of Husband and Wife* 5th
Ed. Juta

CASES : *Mahase vs Mahase* LAC (2011-2012) 179
Harris v Harris 1949 (1) SA 254 (A)
Ex Parte De Beer 1952 (3) SA 288

MOKHESI J

[1] INTRODUCTION

The parties were married in community of property and the said marriage was dissolved on the basis of the defendant's malicious desertion on the 92nd November 2016. Division of the property of the joint estate was deferred, and this matter concerns that issue. In the summons and declaration there is a prayer for forfeiture of marital benefits. The defendant's Attorneys were served with Notice of Set down of this matter on the 12th September 2019, and on that date only Advocate Pitso Pitso for the plaintiff was before court. There was no appearance for the defendant.

- [2]** Given that I was convinced that the defendant had been duly served, I directed that *viva voce* evidence be led. It was plaintiff's evidence that in the year 2009 on her first engagement as a teacher, she took a personal loan with Standard Lesotho Bank. The amount of the loan was M8000.00 and with it she bought an unnumbered site at Thabaneng, Leloaleng in the district of Mafeteng, urban area. Further, in the year 2011 she revolved on the initial loan by taking a further loan in the amount of M36,000.00 and bought Toyota Corolla Sedan (2005 model). She testified that the defendant contributed nothing in the acquisition of the residential site and the Toyota Corolla vehicle, neither did he contribute in repaying the said loans. The plaintiff further, in 2013, revolved on the loan by taking another loan in the amount of M20,000.00 and built a house on the site she had bought with the initial loan. In the same year, she further took another loan with which she bought household properties, and paid labour costs for constructing the said house. She testified that the defendant contributed only in respect of buying household properties. She said the purpose of buying the vehicle was so that it could be utilized as a taxi to generate some money. She testified that the said sedan is still operating as such with the defendant as its driver for his exclusive benefit. Before the vehicle could be bought the defendant was employed at the Chinese Supermarket as a clerk. The defendant did this lowly job as he had advanced up to Form C in terms of schooling. The loan

agreement document was handed in as an exhibit and it bore the plaintiff as the bank customer.

- [3] It is trite that forfeiture of benefits of marriage should be granted whenever claimed (*Harris v Harris 1949 (1) SA 254 (CA) at 264*). In *Hahlo, The South African Law of Husband and Wife* 5th ed. . pp. 377 – 8 the position regarding division of estates is stated as follows:

“ Whereas an order of division (or no specific order) means equal division of the joint estate irrespective of the amounts contributed by husband and wife, a general, non-specific order of forfeiture of benefits means equal or unequal division, depending on whether the defendant or the plaintiff contributed more to the common fund, for an order of forfeiture, even where this is not expressly stated, amounts to an order for division of the joint estate, coupled with an order for the forfeiture of the benefits which the penalized spouse has derived from the marriage. Since the order does not affect benefits which the other spouse has derived from the marriage, the estate will be divided in equal shares if the penalized spouse has contributed more to the joint estate than the other one, there being nothing which the order of forfeiture can operate; but if the contributions of the spouse in whose favour the forfeiture order was made , exceed those of the penalized spouse the latter will be deprived of the benefits which he has derived from the contributions made by the other spouse.” (*see also: Mahase vs Mahase LAC (2011-2012) 179 at 183A-B*).

- [4] The order of forfeiture is intended to protect the rights of the plaintiff to her separate contributions to the property of the marriage, and this includes not only windfalls such as bequests and gifts, but also acquisitions made as a result of industry, economy or investment (*Ex Parte De Beer 1952 (3) 288 at pp. 289H – 290A*)

[5] Since I only had the benefit of plaintiff's testimony, and if what she told the court be true, it is clear that the responsibility of accumulating matrimonial property always fell on her shoulders alone; she acquired the loan to buy the site; after buying the site she returned to the bank for another loan in terms of which she bought a Toyota Corolla which is still in the possession to date for his sole benefit; she further took another loan (a substantial one) to build a home, and when the house was complete she took a further loan to buy household property. The defendant contributed a little in buying these household properties. The defendant is currently in possession of both the house and the sedan. The said Toyota Corolla is utilized for carrying fare-paying passengers. Against this background I am convinced that the following forfeiture order can be appropriately made:

- a) The plaintiff is awarded the unnumbered and developed site situated at Leloaleng Thabaneng in the Mafeteng urban area.
- b) The defendant is awarded a Toyota Corolla VIN:AHT53AE9409958727; Engine NO. 7A9507705 plus all household property.

MOKHESI J

FOR THE PLAINTIFF: ADV. PITSO PITSO INSTRUCTED BY A.T MONYAKO & CO. ATTORNEYS

FOR THE DEFENDANT: NO APPEARANCE

