

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/T/02/2016**

**In the matter between:**

**THABISO BEUKES**

**PLAINTIFF**

**And**

**MAMPHO BEUKES**

**DEFENDANT**

**JUDGEMENT**

**Coram** : **Hon. Mr. T.E. Monapathi J**

**Date of Hearing** : **2<sup>nd</sup> August 2022**

**Date of Judgement** : **15<sup>th</sup> September 2022**

Neutral Citation: Thabiso Beukes v Mampho Beukes [2022] LSHC 219 CIV(15<sup>th</sup> September 2022)

## **SUMMARY**

*Even against the fractious cohabitation of the parties it became overwhelming to conclude that Defendant's adultery and malicious desertion had been proved to result inevitable in a divorce order.*

## **ANNOTATIONS**

### **CASES CITED**

Hoohlo v Hoohlo C of A (CIV) No. 66/2011

Lepele v Lepele C of A (CIV) NO. 65/14 [2015] LSCA 26

Moshoeshoe v Moshoeshoe C of A (CIV) 81/19 [2020] LSHC 47

Stock v Stock 1981 (3) 1280

Jackson v Jackson 2002 (2) SA 303 (SCA)

Mapetla v Leboela C OF A (CIV) NO.44/11

T v M 1997 (1) SA 54 (A)

Homes Inc. vs. CA 302 SCRA 315

Selamolele v Makhado 1988(2) SA 372 (V)

Pachkodi Gulab Badhai v. Krishnaji and Others [1947] AIR Vol. 34 Nagpur 145

## **STATUTES**

High Court Rules No. 9 of 1981

[1] The Plaintiff in this trial framed the prayers as follows in his claim.

(a) A decree of divorce on the grounds of the Defendant's adultery.

ALTERNATIVELY

(b) A decree of divorce on the grounds of the Defendant's malicious desertion.

(c) Forfeiture of property.

(d) Defendant to have custody of the minor children.

(e) Further and/or alternative relief.

(f) Costs of the suits in the event of opposition to this matter.

[2] This divorce matter was instituted by the Plaintiff on the 6<sup>th</sup> January 2016. The plaintiff sought an order for dissolution of marriage based on the defendant's alleged adultery. In the alternative the Plaintiff sought dissolution of marriage owing to the Defendant's alleged malicious desertion. A final decree of divorce was granted by default against the Defendant herein in the main trial on 04<sup>th</sup> day of December 2018, on the grounds of her alleged adultery.

[3] The defendant instituted rescission proceedings under **Rule 45** (1) (a) of the High Court Rules,<sup>1</sup> against the Plaintiff, who was the Respondent in that application, praying for rescission of the default judgement. Her main contention was that the order for divorce created an ambiguity as there existed an error at the time it was granted, thus becoming prejudicial to the Applicant therein in many aspects.

---

<sup>1</sup> High Court Rule No 9 of 1980.

- [4] The rescission was granted against the Respondent and a trial started *de novo*. It had been ordered as to allow the Defendant herein to present her evidence in the main case and to also challenge the Plaintiff's evidence. In the main trial, the Plaintiff instituted divorce proceedings against the Defendant in terms of the prayers couched as they appear in the summons.
- [5] It is common cause that the parties got married by civil rites in community of property on the 14<sup>th</sup> April 2007 and their marriage still subsists. As is the case with the majority of marriages, the parties had problems *inter se*. It is common cause that the Plaintiff did have an occasion of assaulting the Defendant. It is common cause that the parties agreed to rent out their house at Ha Thetsane to live with the Plaintiff's mother at Upper Thamae from 2008 to December 2015. It is also common cause that the Defendant has been living at Naleli from December 2015 to date, with the Plaintiff having stayed behind at Upper Thamae with their three minor children.
- [6] It is disputed that the Defendant has had any adulterous affairs with any man as alleged by the Plaintiff. It is disputed that when the parties had a misunderstanding in 2009, the matter was not resolved but the Defendant came back on her own accord. The facts surrounding the trip to Katse are also disputed.
- [7] Plaintiff ordered the Defendant to call some men in the Plaintiff's presence to put an end to relationships with them, but Defendant refused. Defendant has maliciously deserted.

- [9]** The parties are married by civil rites in community of property and the marriage still subsists. All the children outlined under paragraph 5 of the summons are children born in wedlock. The couple had marital problems and it is apparent that those problems only grew because they were never solved. If they were solved, this court would have not even been seized with this matter in the first place.
- [10]** The Defendant was engaged in extra-marital affairs and the Plaintiff found out. After confrontation, twice, once with the Plaintiff and again with the policeman, she refused to end such adulterous affairs. The Defendant is at the root of financial issues that hit at the heart of their estate and financial affairs. She further left the matrimonial home and left with property making up part of their joint estate with the Plaintiff without his consent.
- [11]** After diligent consideration of all the facts beforehand the party's demeanor and the time that has passed since this case was instituted, it is the conclusion of this court that there are no prospects of reconciliation.
- [12]** The Plaintiff testified that the Defendant was in multiple extra marital affairs, including the one with one Khotso Mots'opho. The Defendant was confronted by the Plaintiff and she did not even deny the allegations. The Plaintiff's submissions are solidified by the testimony of one Molise and L/sgt. Sgt Matekane who also testified that the Defendant admitted having extra marital affairs and refused to cut adulterous ties with those notorious men. She said she needed time. However, the Defendant denies all allegations of adultery. She claims that the Plaintiff was the adulterous one.

She further dressed her naked allegations with trust condoms invoice and a hotel receipt found in the Plaintiff's car and pocket respectively.

- [13] The Plaintiff maintains that evidence by the policeman was not challenged, the only thing that was challenged was his authority to tell the parties what to do with their private lives (the Plaintiff to end her adulterous affairs). These are the same affairs that the Defendant refused to end when asked to do so by the Plaintiff and later refused to do so when asked by Stg. Matekane who tried to reconcile the parties who were on an apparent brink of marital collapse. The Plaintiff further submitted that he never condoned any of the adultery by the Defendant.
- [15] On this issue of adultery, including the claims made by the Defendant herself, this Court finds the version of events laid down by the Plaintiff more probable. It is because based on all the pleadings and evidence, on the preponderance of probabilities, the Plaintiff established adultery as a ground for divorce.
- [16] The allegations made by the Defendant that the Plaintiff was the adulterous one just kicks of a dying horse, what this court see is a person trying to clutch at anything that could be reached. But this is an overreach. Even if her allegations were true, she did not substantiate them to the satisfactions of this Court. In fact, she did not substantiate them at all. The standard of proof is relatively lower in civil cases but even with this lighter burden the Defendant failed to solidify her case enough to tip the scales of probabilities in her favour.
- [17] The Defendant took a large portion of her submissions rebutting and challenging the evidential value and existence of the alleged "inappropriate

text messages” which even in the absence thereof the case against her is still solid and its probability is overwhelming.

- [18]** The Plaintiff testified that the Defendant disappeared on the 14<sup>th</sup> February 2015 and resurfaced the following day. He further testified that the Defendant registered a business which accumulated approximately one million and two hundred thousand Maluti (M1 200 000). She used the money and the Plaintiff further testified that she only accounted for one hundred thousand (M100 000). He further testified that the Defendant took away family property comprising of 200 bricks, 17 bags of cement and all the furniture and left the Plaintiff. The Defendant admitted this but only alleged that there was an agreement between the Plaintiff and her to that effect.
- [19]** The Plaintiff testified that he took out a loan to build a house at Ha Thatsane to which the Defendant contributed nothing towards. He further testified that he is still paying the said loan to date. The parties hired out the said house so that the rental money would be used towards payment of the loan. He also testified that the Defendant has abandoned their children and has never maintained the said children since 2018 and that the children are in the custody of the Plaintiff.
- [20]** In her submissions, the Defendants stated that there was a mutual agreement between her and her spouse. Hence, she could not possibly be said to have maliciously deserted the Plaintiff. In her submissions, that would be inconsistent with the very definition of thing she is being said to have done “maliciously deserted”.

- [21] The expression "onus of proof" is self-explanatory. It simply means the obligation to prove. And the standard of proof required to discharge the legal burden depends upon whether the proceedings are civil or criminal. In the former, the standard required is proof "on the balance of probabilities". Now, the question is; on the balance of probabilities, did the Plaintiff prove his allegations on the balance of probabilities?
- [22] The latin phrase that says *Ei incumbit probatio qui dicit, non qui negat* is quite apt. Loosely translated it means this; that **he who asserts must prove**. The law books are replete with authorities on this latin maxim and its meaning. The Indian court in *Pachodi Gulab Badhai v. Krishnaji and Others*<sup>2</sup> held that a party that who makes an allegation bears the burden of proving it.
- [23] It appears in the judgment of Van der Spuy, AJ in *Selamolele v Makhado*,<sup>3</sup>
- “The onus of proof and the legal requirements as to the discharge thereof It is common cause that plaintiff bears the overall onus of proof, ie he must prove his version that he was pushed from behind and did not fall fortuitously backwards after a scuffle with defendant. It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff.”*
- [24] In other words, as stated in *Homes Inc. vs. CA*,<sup>4</sup> "He who alleges a fact has the burden of proving it and a mere allegation is not evidence". This court is convinced that the Plaintiff proved adultery on the balance of probabilities.

---

<sup>2</sup> [1947] AIR Vol. 34 Nagpur 145.

<sup>3</sup> 1988(2) SA 372 (V), at 374.

<sup>4</sup> 302 SCRA 315.



The evidence comprising of, *inter alia*, the testimony of Sgt. Matekane, became flesh to the skeleton that is the allegations made by the Plaintiff. This Court finds that the Plaintiff discharged his burden of proving the ground of adultery on the preponderance of probabilities. That being said, the Court will not deal with the prayer on the alternative which was the prayer for a decree of divorce on the grounds of malicious desertion. If the court pronounces itself on this issue it would be just for academic purposes.

[25] I would like to state right here that I agree with the wise words of my late brother Ramodibedi P in the case of **Hoohlo v Hoohlo**<sup>5</sup> outlined hereunder where he said:

*“It is appropriate to commence this judgment with a regrettable observation that in recent years it has become evident that some trial judges in this jurisdiction are increasingly becoming trigger happy, if I may respectfully be permitted to put it that way, in granting divorce at the slightest opportunity.”*

[26] This drastically growing practice in our Courts of lightly granting divorces is a growing cancer in our legal system that needs to be rooted out because it is inconsistent with the principle of sanctity of marriages. Notwithstanding, where a Court is satisfied that on the balance of probabilities that a ground (s) for divorce has been proved such Court will grant divorce.

[27] The Defendant was right in her submission when quoting the then learned Acting Justice of Appeal, P Musonda when the following remarks were made in the case of **Lepele v Lepele**;

---

<sup>5</sup> C of A (CIV) No. 66/2011.

*“Marriage and divorce are very sensitive fragile issues which have to be handled carefully as to preserve the sanctity of marriage. This calls for a careful analysis of all facts placed before this court before it finally grants a divorce.”*<sup>6</sup>

[28] In **Moshoeshoe v Moshoeshoe**<sup>7</sup> the Court observed that; “Upon concluding marriage in community of property parties become co-owners of their joint estate. Equal division of the joint estate follows dissolution of such marriage **unless a competent court order otherwise.**” [my emphasis] In *casu*, the Court orders otherwise. This is after diligent and precise examination of the peculiar facts of this case.

[29] The Court is convinced that the Defendant has already taken substantial household property as established by the Plaintiff. She has been squandering the assets of the joint estate. She has not lived in the house for so long and she has no emotional attachment to the house. The Plaintiff established to the satisfaction of this Court that the Defendant would not suffer any prejudice, as a result of the forfeiture order. In response the Defendant did not, on the preponderance of probabilities, establish that she would be prejudiced.

[30] On the issue of custody of minor children, I draw strength from Scott JA in the case of **T v M**,<sup>8</sup> where it was stated that:

*“Generally speaking, I think, it can be accepted that once a natural bond between parent and child (whether legitimate or illegitimate) has been*

---

<sup>6</sup> C OF A (CIV) NO. 65/14 [2015] LSCA 26.

<sup>7</sup> C OF A (CIV) 81/19 [2020] LSHC 47.

<sup>8</sup> 1997 (1) SA 54 (A) at p 60.

*established it would ordinarily be in the best interests of the child that the relationship be maintained, unless there are particular factors present which are of such a nature that the welfare of the child demands that it be deprived of the opportunity of maintaining contact with the parent in question."*

It was stated by my late brother Ramodebedi P, in **Mapetla v Leboela**<sup>9</sup> that it has been stressed in countless cases that, where the custody (and even guardianship) of a minor child is in issue, the court must reach its conclusion by considering what will be in the child's best interests. (See also **Jackson v Jackson 2002 (2) SA 303 (SCA) at p 307**).

[31] In the case of **Stock v Stock**<sup>10</sup> the duties of this Court in cases where custody of a minor child sought was outlined as follows;

*"It has also been stressed that a judge, seized of a matter in which custody is in issue, sits as the upper guardian of the minor child or children involved. In this capacity, the judge is under a duty, insofar as he or she thinks it necessary, to conduct an investigation wider in scope than the information placed before the court by the parties, in order to be satisfied that the order which is made is, indeed, in the best interests of the minor child."*

[34] It is in that vein that this Court finds that there has been a bond established between the three minor children and the Plaintiff and it is in the best interests of the children that such a bond stays undisturbed. This is also strengthened by the fact that when the Court considers the respective ages and genders of the children and the fact that they have been raised and taken care of by the Plaintiff all along, the Court finds no reason to disturb the status *quo* in the light of custody of minor children.

---

<sup>9</sup> C OF A (CIV) NO.44/11.

<sup>10</sup> 1981 (3) 1280.

[35] Having considered all the facts and circumstances of this case, this Court is inclined to grand a decree of divorce against the Defendant as prayed for in the summons in the following terms:

- a) A decree of divorce is hereby granted on the grounds of Defendant's adultery.
- b) Defendant to forfeiture matrimonial property.
- c) Plaintiff to have custody of three minor children and Defendant to have reasonable access.
- d) There shall be no order as to costs.

**T. E. Monapathi**

---

**JUDGE**

For Plaintiff : Adv. Naha

For Defendant: Adv. Tuke