

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/677/2018

In the matter between:

KHOSI CHAOLA

PLAINTIFF

and

ˆMATLELIMA CHAOLA

DEFENDANT

Neutral citation : Khosi Chaola v ˆMatlelima Chaola [2018] LSHC
07 Civ (06 February 2025)

CORAM : **KHABO J.,**
HEARD : **06 SEPTEMBER 2022**
DELIVERED : **06 FEBRUARY 2025**

SUMMARY

Family law - Divorce - Plaintiff seeking divorce on grounds of Defendant's malicious desertion - Defendant denying all allegations of desertion levelled against her by the Plaintiff - Parties' stories mutually destructive - In order to succeed in an action for malicious desertion, Plaintiff has to proof two things: (1) Defendant's conduct pointing to malicious desertion and (2) That the Defendant had an intention to terminate the marriage - Court finds Plaintiff not to have made out a case for malicious desertion - Resitution order not granted.

ANNOTATIONS

Cases cited

Hoohlo v Hoohlo

Kheleli v Kheleli CIV/T/46/06

Khoeli v Khoeli CIV/T/42/2010

Naidoo v Senti LAC (2007 - 2008) 161

Surties Investment v Ministry of Health CCT 122 of 2013

Other jurisdictions

South Africa

Belfort v Belfort 1961(1) SA 257 (A)

National Employers' General Insurance Co., Ltd v Jagers 1984 (4)
SA 622 (ECD)

Very v Very 1951 (2) SA 453

Literature

W.C.M Maqutu - Contemporary Family Law (The Lesotho Position)
National University of Lesotho, Roma, 2005

Wille's Principles of South African Law Juta, 7th ed., 1977

JUDGMENT

KHABO J.,

Introduction

[1] This is an action for divorce wherein the Plaintiff prays for:

- (a) *An order of restoration of conjugal rights failing compliance therewith;*
- (b) *A decree of divorce on the ground of defendant's malicious desertion;*
- (c) *Custody of the minor child to be awarded to the defendant with reasonable access to the plaintiff;*
- (d) *That both parties contribute towards the maintenance of the minor child;*

(e) *Division of the matrimonial property, the plaintiff be given the parties' 3 roomed house while the defendant be given an 8 roomed matrimonial house; and*

(f) *Further and/or alternative remedy.*

[2] The Plaintiff avers that parties entered into a customary marriage sometime in 1986, which was subsequently solemnised in 1994. Three children were born out of the said union. He alleges that the marriage was happy until his father's demise in 2012 when the Defendant allegedly misused funds that were intended for his burial. He testified that he was out of employment at the time, and had a burial society from which they received money for the funeral. He intimated that they agreed that his wife keeps it, but was not satisfied with how she used it alleging that she bought meagre groceries for the funeral culminating in him having to get assistance from other people for the burial.

[3] He intimates to the court that relations soured between him and his wife and she denied him conjugal rights since then

[2012]. He alleged that attempts at reconciliation with her coupled with mediation efforts by the family failed. He ultimately left the matrimonial home in 2017.

[4] The Defendant, on the other hand, entered an appearance to defend and a plea. She denies misusing funds for the funeral and argues that Plaintiff was merely unhappy because he is used to controlling their finances without consulting her and that this time around he was not in control of the funds. She avers that the Plaintiff is untruthful when he says she purchased the funeral groceries alone, alleging that they did it together.

The relevant law

[5] Our common law recognises only two grounds of divorce, namely, adultery and malicious desertion¹ which could either be actual or constructive, a position reiterated by W.C.M

¹ Kheleli v Kheleli CIV/T/46/06

Maqutu in his work - **Contemporary Family Law (The Lesotho Position)**.²

[6] The Plaintiff is claiming divorce on grounds of Defendant's malicious desertion. Wille in his **Wille's Principles of South African Law**,³ describes malicious desertion as comprising two forms, namely:

(a) *Actual desertion where one of the spouses leaves the marital home;*

(b) *Constructive desertion where one spouse induces the other to leave the marital home by actually ordering the other party out of the marital home, by beating the other spouse, insulting the other spouse, ignoring the other spouse, unreasonably denying the other spouse sexual relations, refusing to perform all or some of the most important duties that the other spouse is entitled to expect of the other spouse and any acts that would reasonably torture the other spouse either physically or mentally.*

²National University of Lesotho, Roma 2005 at p. 362

³ Juta 7th ed., 1977 at p.126

In order to succeed in a malicious desertion action, it is necessary to prove any of the above two factors.

The onus of proof

[7] The onus is a normal civil onus that requires proof on a balance of probabilities. Balance of probability is the standard of proof in civil cases demanding that the case that is more probable should succeed.⁴ The Plaintiff has to adduce sufficient admissible evidence to support his claim. The question to ask is whether Plaintiff has done enough to convince the court that his version is more probable than that of the Defendant.

[8] The onus is on the Plaintiff to prove that Defendant's conduct leads him to a conclusion that she intends to terminate the marriage. As stated in **Very v Very**⁵ by Shaw J., that:

It seems to me that the plaintiff should not only set out the conduct which he or she relies upon as a non - fulfilment of the defendant's

⁴ Surties Investment v Ministry of Health CCT 122 of 2013 at para 12

⁵ 1951 (2) SA 453 at 455

conjugal rights or obligations but should also set out that this conduct was coupled with the necessary intention to bring the marriage relationship to an end.

[9] Two essential elements are discernible here. That in an action for malicious desertion, the Plaintiff has a duty to proof two elements, firstly, Defendant's conduct pointing to malicious desertion and secondly, that the Defendant had an intention to terminate the marriage.

The evidence

[10] The Plaintiff paints a picture of someone who was pushed out of the matrimonial abode by the Defendant who he says made marital life unbearable for him, hence his prayer for a restitution order. Conversely, the Defendant claims to have been deserted by him, starting with him leaving the matrimonial bedroom. The Defendant has not filed a counterclaim, perhaps because she says she still loves her husband and that there are prospects of reconciliation.

Retorting to this, Plaintiff claims that the Defendant is not genuine because she made no efforts to mend their relations, despite ample opportunities to do so.

[11] The Plaintiff testified that they have not been living together as husband and wife with the Defendant and stopped being intimate in July 2012. That the Defendant refused for three years whilst he was still at the matrimonial home to afford him conjugal rights. He pointed out that they were already experiencing problems in their relationship prior to the funeral saga, but the latter exacerbated the situation. He avers that he left the matrimonial home in 2017, finding the situation intolerable. He indicated that intervention by the church was difficult because he was the senior most thereat as a Bishop.

[12] The Defendant is adamant that there are prospects of them working things out together. She denied leaving their bedroom, and said it is the Defendant who left. She testified further that she tried about three times to go to the Plaintiff at the church premises, where he stayed after he left the matrimonial home,

but he chased her away. Just by way of clarity, the Plaintiff testified that he is a Bishop at St John Apostolic Faith Mission Church of Southern Africa and is based at Maputsoe, in the Leribe District. He says the site on which the church and other properties are built belongs to him.

[13] The Defendant points out further that the Plaintiff used to accuse her of bewitching him. For her the marital challenges she is facing are but misunderstandings that can be resolved, and avers that she has no intention of terminating the marriage. She contends further that she took a covenant before the almighty God when she married the Plaintiff which she will not renege on. The Plaintiff is not amused arguing the Defendant is not genuine.

[14] As it is, it is Plaintiff's word against that of the Defendant. Their versions are mutually destructive of each other with each party accusing another of conduct aimed at terminating the marriage. It is for the court to ascertain which version is more

probable than the other in the circumstances of this case, which is a question of credibility of evidence.

Where plaintiff's and defendant's versions are mutually destructive

[15] The proper approach to address cases where parties' stories are mutually destructive is found in ***National Employers' General Insurance Co., Ltd v Jagers***⁶ quoted with approval in ***Naidoo v Senti***⁷ where the court stated that:

... in civil cases, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as in a criminal case, but where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on the preponderance of probabilities that his version is true and accurate and therefore, acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or

⁶ 1984 (4) SA 622 (ECD) at 624 - 5

⁷ LAC (2007 -2008) 161 at 164

not, the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate credibility of a witness will, therefore, be inextricably bound up with a consideration of probabilities of the case and if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour plaintiff's case anymore than they do to defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his case is true and that the defendant's version is false.

Conclusion

[16] In *casu*, the Plaintiff alleges that the Defendant denied him conjugal rights after their altercation on the use of the burial funds, Defendant, conversely, argued that it is the Plaintiff who left the matrimonial bedroom and ultimately left the matrimonial home to stay at the church premises.

[17] On the evaluation of evidence tendered, probabilities favour the Defendant. The Defendant has failed, on a *'preponderance*

of probabilities' to establish conduct on the part of the Defendant that establishes both the conduct and an intention to terminate the marriage. In ***Khoeli v Khoeli***⁸ the court restated the principle that in order to make out a case of constructive desertion and to show that the defendant had the intention to terminate the marriage, the onus rests with the plaintiff. In this case the court found that the plaintiff had failed to discharge the onus to show that the defendant acted with a settled intention to terminate the marital bond, and it dismissed the action.

The guilt principle or the guilt theory

[18] Lesotho has still retained the common law position in respect of the law regulating divorce. The Plaintiff may, therefore, only succeed in a claim for divorce if he or she proves the guilt of the other party. Such guilt will be demonstrated by proof of the commission of a matrimonial offence, of either adultery or malicious desertion by the other party to the marriage. To

⁸ CIV/T/42/2010

move away from this position, some jurisdictions have adopted the principle of *irretrievable breakdown of marriage* as a ground for divorce.

[19] Underscoring the principle of preservation of the sanctity of marriage (espoused by Lesotho) the court held per Hoexter JA., in ***Belfort v Belfort***⁹ that:

The second consideration is that the granting of a divorce is a matter of public policy and that the policy of the Courts is to uphold the sanctity of marriage and not lightly to put an end to what is the very foundation of the most important unit of our social life, the family.

Embracing the above principle, the Court of Appeal in ***Hoohlo v Hoohlo***¹⁰ admonished the High Court for granting divorce at the slightest opportunity.

⁹ 1961(1) SA 257 (A) at 259 H

¹⁰ C of A (CIV) No. 66/ 2011

ORDER

[20] Having found that the Plaintiff has failed to make out a case for malicious desertion, the court makes the following order:

- (a) The action is dismissed; and
- (b) This being a family matter, each party to bear its own costs.

F.M. KHABO
JUDGE

For the Plaintiff : Adv., P.B. Moyeye

For the Defendant : Adv., M.J. Motseki