IN THE HIGH COURT OF SWAZILAND

CIV. CASE 101/87

In the matter of:

MARTHA LUTHANGO (Nee MPHAHLELA)	Plaintiff
VS	
ALFRED THABO LUTHANGO	Defendant
CORAM:	HANNAH, C.J.
FOR APPLICANT:	MR. DUNSEITH
FOR DEFENDANT:	MR. LUKHELE

RULING ON DEFENDANT'S APPLICATION

FOR ABSOLUTION FROM THE INSTANCE

(30/10/87)

Hannah , C . J.

In this action the plaintiff wife seeks a decree of divorce on the ground of the defendant's adultery, alternatively an order for restitution of conjugal rights on the ground of malicious desertion failing compliance with which a decree of divorce .

In order to deal with Mr. Lukhele's application that at the conclusion of the plaintiff's case the defendant is entitled to absolution from the instance it is first necessary to summarise the salient features of the plaintiff's case. The parties were married on 26th November 1983 having lived together prior to that date for some eight years. However, according to the plaintiff, within two years of the marriage the defendant began to act strangely frequently absenting himself from the matrimonial home without good reason and frequently returning home after midnight with unacceptable excuses. One Sunday in 1985, acting on certain information, the plaintiff went to the flat of Mrs Francina Maseko, a widow, and discovered the

defendant seated in the lounge having a drink while Mrs Maseko was in the kitchen preparing a meal. The defendant had previously led the plaintiff to believe that he would be elsewhere in Mbabane that day and was unable to give the plaintiff any satisfactory explanation for his presence in Mrs. Maseko's flat. A month or so later the plaintiff once agin discovered the defendant drinking in Mrs. Maseko's flat and following that the defendant failed to return home for three days. Thereafter the plaintiff said that the marital relationship grew worse and worse. The defendant purchased a caravan which he placed in a caravan park near Mrs. Maseko's flat and Mrs. Maseko was observed to be a visitor there. The plaintiff discovered certain documents in the defendat's car which to her mind confirmed her suspicions that the defendant and Mrs. Maseko were having an affaire. She discovered some evidence that the defendant had paid one of Mrs. Maseko's electricity bills, Mrs. Maseko was seen driving the family's van and when the defendant purchased a Peugeot motor car Mrs. Maseko was also seen driving that. The defendant was seen driving Mrs. Maseko to and from work and she was seen in his company at football matches. The defendant sometimes made secretive telephone calls from the matrimonial home.

The plaintiff became convinced that the defendant and Mrs. Maseko were having an affaire and the matrimonial relationship grew steadifly worse: quarrels frequently erupted, incidents of violence occurred

and, according to the plaintiff, she and the defendant became as strangers to one another. Eventually, unable to tolerate the defendant's behaviour further, the plaintiff moved out of the matrimonial bedroom first to that of the children and later to the garage which she converted into sleeping quarters for herself. The marriage became an empty shell and cohabitation effectively ceased.

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On 20th January 1987, acting on the advice of her lawyer, the plaintiff set out to obtain some firm evidence of the defendant's adultery. Accompanied by Mrs. Jele, a neighbour, she followed the defendant and saw him enter Mrs. Maseko's flat at about 9.15p.m. At about 4.30a.m. the following morning she and Mrs. Jele returned to the flat and kept watch. At about 6.30a.m. they saw the defendant leave. Armed with this additional evidence the plaintiff launched the present proceedings in which she frankly admits her only interest is to obtain a divorce. She said that she regards the marriage as at an end, that there is no question of reconcilation and that any trust she may once have had in the defendant has now been completely destroyed.

That, in essence, is the plaintiff's case and it is on this case that Mr. Lukhele submits that the defendant is entitled to absolution from the instance. He submits that no case of malicious desertion has been made out, the plaintiff, on her own admission, being the party who withdrew from cohabitation. He further submits that even if a case of desertion has been made out, on the evidence thus far adduced the plaintiff has disentitled herself to an order for restitution because she had made it abundantly clear in her evidence that she would not be prepared to comply with such an order. And as for the allegation of adultery Mr. Lukhele contends that the evidence creates no more than suspicion and falls far short of the clear proof which the courts demand in such a case.

Mr. Lukhele's first point present little difficulty. While the classic case of desertion occurs where the guilty party forsakes and abandons the innocent party desertion may also occur where the guilty party, with the intention of bringing the marital relationship to an end, effectively expels the innocent party from the matrimonial cohabitation by conduct which makes

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continued cohabitation dangerous or intolerable. Further, it has long been accepted that the matrimonial cohabitation may come to an end even though the spouses continue to live under the same roof. (see Hattingh v Hattinqh 1948 (4) SA 727) It will, of course, be a question of fact in each case whether there has been a withdrawal from life in common and in the present case, if the plaintiff's evidence is to be accepted, it would in my view, be open to the Court to hold that that had been established and that the withdrawal by the plaintiff was the result of the defendant's intolerable and expulsive conduct.

Mr. Lukhele's second point does however, present rather more difficulty. Where, as in the instant case, the plaintiff makes it clear that she has no intention whatever of resuming cohabitation with the defendant it does, at least at first blush, seem inconsistant for her to ask for an order for restitution of conjugal rights a and such an order, if made, would appear to be an empty one. This was recognised in certain early cases and no certain occasions led the Courts to refuse an order. For example, in Venter v Venter (1903, THC 381) Sristowe J observed that:

"it would be turning the administration of justice into a farce to make an order which the person who asks for it openly states that he will not permit to be obeyed."

and in Jooste v Jooste 1907 SC 329 at page 333 De Villiers CJ cited these remarks with approval saying that they occorded with sound practice.

However, the year previously in Kranz v Kranz 1906 SC 750 Innes CJ expressed the contrary view. Having reviewed early

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Roman Dutch authorities and a number of contempary South African decisions the learned Chief Justice said at page 757:

"I am not satisfied that in Holland the practice of applying for a restitution order as a preliminary to divorce was a uniform practice; but even to the extent to which it did exist, I am clear that it cannot be regarded as weakening the doctrine that one of the grounds for the dissolution of the marriage tie was malicious desertion. It was devised, it seems to me, as a convenient and sufficient test of the defendant's state of mind. The courts very naturally required to be satisfied that the desertion was malicious and persistent, and the fact that the defaulter disobeyed an order directing him to return placed that question beyond dispute. But once the test was satisfied the plaintiff was entitled to his decree of divorce on the ground of desertion. The rights of the parties really turned upon the state of mind of the defendant and his attitude consequent thereon. That being so, it follows that - apart from the question collusion - the plaintiff's mental attitude must be regarded as irrelevant to the inquiry ." The learned Chief Justice then observed that if the position were

otherwise:

"The result would be that plaintiffs who spoke the truth would fail in their actions, and that those who were content to feign a desire which they were far from feeling would succeed. Such a state of the law would have the effect of taking away from the honest plaintiff with the one hand a right of relief given him with the other; and in the words of Wessels J, it would tend to encourage perjury and trickery."

Despite the lack of uniformity in decision made at about the turn of the century the view expressed by Innes CJ in Kranz v Kranz (supra) came to be accepted by the Courts of South Africa as the one to be preferred and in more recent years has been consistently followed. See Hahlo's South African Law of Husband and Wife (4th ed) at pages 408 and 409. An order for restitution does not command the plaintiff to do anything but is made to provide attitude and conduct. If on the return day the Court is satisfied that the defendant has genuinely and sincerely complied with, or attempted to comply with, the order but that his efforts have been thwarted by the plaintiff a decree of divorce will be refused on the basis that he is no longer in desertion. If not, a decree will be granted. I see no good reasons to depart from the settled practice of the South African Courts and accordingly Mr. Lukhele's second submission must a 1 so fa i 1 .

As for the question of adultery, Mr. Lukhele is quite correct a when he says that no direct evidence of the submission of adultery has been adduced but this, of course, is frequently the case, where adultery is alleged. Direct evidence of adultery is seldom attainable. There is, however, evidence before the Court of what is sometimes; termed strong inclination coupled with opportunity. If the plaintiff's evidence and that of her witness is to be accepted there was a relationship of considerable intimacy between the defendant and Mrs. Maseko and, although them is no direct evidence that Mrs. Maseko was in her flat during the night the defendant is said to have spent there, it is difficult to envisage the defendant's purpose in spending the night at that flat away from his own home unless Mrs. Maseko had been present. In my view, the evidence of inclination thus far adduced taken in conjuction with the evidence of opportunity constitutes strong prima facie evidence that adultery occurred during the night in question. Accordingly, I find that the defendant is not entitled to absolution from the instance either on the question of adultery or on the charge of malicious desertion.

N. R. HANNAH

CHIEF JUSTICE