

IN THE HIGH COURT OF SWAZILAND

CASE NO. 1479/03

JABULANI MASEKO

PLAINTIFF

AND

SITHEMBA PORTIA MASEKO

DEFENDANT

CORAM

K.P. NKAMBULE –J

FOR PLAINTIFF

MR. J. MASEKO

FOR DEFENDANT

MR. M.H. MDLULI

JUDGEMENT 19/08/04

This is an action for a restitution order, and failing compliance then for a decree of divorce. The ground on which the claim is based is malicious desertion in that:

- a) Defendant lacks respect for the plaintiff as her husband.
- b) Defendant excessively indulges in alcoholic beverages, resulting in unruly and unbecoming behaviour causing injury to the plaintiff's name, dignity and good repute.
- c) Defendant verbally and physically abuse plaintiff.
- d) Defendant physically assaults plaintiff.
- e) Defendant is persistently cruel to persons close to the plaintiff, particularly the plaintiff's minor children born out of wedlock; which is not acceptable to the plaintiff.

According to plaintiff, as a result of the defendant's unlawful conduct aforesaid he was obliged to find alternative accommodation away from the common home, saving himself the indignities he had gone through at defendant's instance.

The parties were married on 4th July, 1997 in Manzini. The husband was at the time a state prosecutor. There is one child born of the marriage - namely Phetsile Maseko, who is three years old.

In summary, the evidence of the plaintiff was that as husband defendant failed from the beginning of the married life to accord him respect as expected of a married woman towards her husband. As a result in March 2003 he was literally forced out of the matrimonial home.

According to plaintiff, the defendant drank . alcoholic beverages excessively. This embarrassed plaintiff in so far as his plans were concerned and it did not augur well in so far as his status and his station in life was concerned.

As a result of her drinking sprees she would come at ungodly hours and sometimes the early hours of the morning.

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According to plaintiff, though he cannot remember all the dates of abuse, he however recalls a date on 11th January 2002 where he came after 1.00 a.m. and three days later, she came in at 11.00 p.m. In both occasions defendant would be abusive both verbally and physically. This was in the presence of the child who was only 2 years old.

As a result of the abuse windows and doors were broken and at some stage he would call the police who would come and calm her down. Sometimes this would be done in full view of her friends and relatives who would be visiting them.

According to plaintiff when he was forced out of the matrimonial home the windows were all broken as a result of defendant throwing stones at them. The doors had dents and cracks. Plaintiff found this to be very embarrassing taking into account the neighbourhood they were living in.

Defendant denies having verbally or physically abused the plaintiff. She told the court that when they started drinking they were drinking together. Plaintiff started going away and drinking with his friends. Defendant denies that she lacks respect of her husband.

According to defendant, plaintiff did not tell her that she was drinking heavily and he did not tell her that he did not want her to drink anymore. Defendant stated that she never physically or verbally abused plaintiff, but that it was plaintiff who used to assault her.

From the foregoing it is clear that there was indeed a feeling of animosity between the couple. It is also clear that this emanated from the drinking sprees by defendant which are not denied. It is also clear from plaintiff's evidence that the defendant would come in the early hours of the

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morning. This was the cause of the quarrel as there was a two year old child who needed both her parents to take care of her.

Defendant does not deny that she would go drinking. She however says they started drinking together with her husband. She also does not deny the fact that she would come in the early hours of the following day. She however says that her husband did not tell her that she was drinking heavily.

It is basically settled, I think, that conjugal love embraces three components;

- (i) eros (passion)
- (ii) philia (companionship)
- (iii) agape (self-giving, brotherly love).

And in the view of Young Jin TVT 1968 (3) SA 554 at 555 (E) "a final denial of one or more of these elements, done maliciously and without good cause could constitute desertion for the purposes of the law of divorce".

The question for determination in this matter is whether the second component existed between the two parties at the time plaintiff left the matrimonial house. From the evidence clearly there was no companionship. It is further clear that the conduct of the defendant of excessive drinking and total disregard of the feelings of her partner destroyed the companionship which is the basis of conjugal love.

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From the foregoing it is the opinion of this court that plaintiff has been able on a balance of probabilities to prove malicious desertion.

K.P. NKAMBULE

JUDGE

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