

IN THE HIGH COURT OF SWAZILAND

ZODWA ENRLICHER

PLAINTIFF

(nee Sigudla)

v

STEFAN ENRLIICHER

DEFENDANT

CASE NO 2919/96

This is an action for restitution of conjugal rights. The plaintiff was granted leave to serve the summons commencing action by substituted service. Service by publication of the summons in the TIMES of Swaziland. In the Founding Affidavit supporting the application for this leave the Applicant now the Plaintiff stated as a fact that the parties were " domiciled within the jurisdiction of the above Honourable Court."

The plaintiff was however vague as to her husband's present whereabouts, and the allegation that he was "believed still to be in the country" appears to be based on hearsay evidence of an undisclosed source. The relief she sought was however granted to the plaintiff.

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ENRLICHE WPD

When the matter was placed on the roll for hearing as an unopposed matrimonial action she appeared with counsel. At the outset counsel produced cuttings from the newspaper, One of them was the publication of the order permitting service by publication. The other cutting purports to be a shortened form of summons commencing action in the present instance. The original summons was not produced and does not appear to have been filed.

Counsel informed me that an original summons had been filed and I allowed him to lead evidence from the Plaintiff. Although she testified to the marriage and the Defendant's subsequent desertion of her, her allegations did not establish that this court has in fact got jurisdiction to hear this matter by reason of the domicile of the parties within the area of its jurisdiction. The plaintiff said that the Defendant had not been born in Swaziland and she was not able to demonstrate that, even prima facie, he had established a domicile of choice in this country. She could not even say that he was presently physically living here. Even before the desertion he did not spend much time with her in a common home.

In these circumstances it is not possible to come to Plaintiffs assistance. The absence of a summons in the first place renders the proceedings fatally defective and incomplete. Proof of service is unacceptably defective in that the cuttings from the newspaper in themselves prove nothing. The publication in the newspaper should be proved by affidavit in which full particulars of the publication are set forth and to which full page extracts from the newspaper should be attached. Proof of publication in this form only is acceptable.

Furthermore contrary to what the plaintiff said in the founding affidavit supporting her application the parties are not domiciled within the area of jurisdiction of this court.

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The Action is dismissed. The attorney, because of the incompetent handling and presentation of the Plaintiffs case may not recover any fees or disbursements incurred both in regard to the action and the application which preceded it including the costs of the advertisements.

S W Sapire

Acting Chief Justice