IN THE HIGH COURT OF SWAZILAND

RICHARD JOHN STANLEY PERRY N.O. VS

NANA GOODNESS MAGONGO (NGWENYA) & 4 OTHERS

Civ. Trial No. 1276/97

Coram	S.W. Sapire, CJ
For Plaintiff	Mr. Flynn
For Defendant	Mr. Mophe (1st - 2nd)

JUDGMENT (1/03/99)

This is an application for rescission of a judgment. On the 6th November 1997 the first respondent in this application, (who is the Executor Dative in the estate of the late William Magangeni Magongo), sought and was granted an order that the second and third respondents were the lawful wives of the deceased during his lifetime. The application for this relief had been served on other interested parties including the present applicants. They consulted an attorney who notified the other parties of their intention to oppose. Affidavits were filed on their behalf. The matter was set down for argument on 6th November 1997,

In regard thereto the attorney concerned says

"On the 14th October 19971 received a notice from the Registrar of the above honourable court to the effect that he had allocated the 6th November 1997 as the date for hearing of the matter."

He then claims to have written to the Registrar and the other parties informing them that the date was not suitable to him because of his commitments in the criminal court at Nhlangano,

To his amazement, he says, he was served with a notice of set down for the 6th November. He again made it clear that it would not be possible for him to take part in the hearing.

On 5th November he received a letter from the Registrar that he would leave the matter for the decision of the Court. This must have made it clear to him that the first respondent was proceeding with the application despite his (applicants' attorney) difficulty. The only action he took thereafter was to instruct his secretary to request attorneys Lindiwe Khumalo-Matse & Co. to "bring it to the Court's attention that he had a clash of dates and that he would be taking part in a criminal trial in Nhlangano". There is no affidavit from the secretary that she conveyed her instructions to the attorneys concerned.

As could have been expected, when the matter was called the first respondent proceeded with the application in the absence of the applicants or their attorney. An order was made which the applicants now seek to set aside. The applicants themselves have made no affidavits in this connection and it is only the attorney whose explanation is before the court.
His conduct constitutes willful default. He knew the application was due to be argued on the day in question. He knew that the first respondent had not heeded his complaint that the date was not convenient to him. Often attorneys are able to and do meet each other's convenience (sometimes without sufficient consideration of their client's interest). This does not mean that the attorney had any basis for absenting himself from the hearing. He does not even say that he requested a postponement and was turned down. Had he done this and had this happened he would have known full well that the matter would proceed in his absence.

As far as the other necessary element of an application such as this is concerned, namely some indication of prospect of success in their opposition to the relief sought and granted the papers are woefully deficient. Although allegations of fraud and deceit have been made with little restraint there, is no evidence to suggest that the marriage certificate is not genuine.

The applicants will be bound by the acts of their attorney and the application is dismissed with costs.

S. W. SAPIRE

CHIEF JUSTICE