

**THE HIGH COURT OF SWAZILAND**

**SANELE SYDNEY DLAMINI**

**Plaintiff**

**AND**

**CYNTHIA ELSIE DUDU DLAMINI (nee MOTSA)**

**Defendant**

**Civil Case No.519/04**

**CORAM: S.B. MAPHALALA - J.**

**For the Applicant: Mr. D. Madau**

**For the Respondent: Mr. Warring**

**JUDGMENT**

**9<sup>th</sup> September 2005**

[1] On the 19 August 2005 I granted a final decree of divorce in favour of the Plaintiff where defendant had been barred in terms of Rule 31 of the High Court Rules. Counsel for defendant, Mr Warring appeared and argued vigorously that the order should not be granted as defendant can still defend the matter. Thereafter, ensued a tit-for-tat between Counsel as to whether plaintiff should be granted the order after adducing oral evidence in the normal way. After hearing the evidence of the plaintiff I granted a final decree of divorce and intimated that reasons thereof will follow in due course. Following are those reasons.

[2] The genesis of the matter is that plaintiff issued combined summons against the defendant on 19<sup>th</sup> February 2004 for, *inter alia*, an order for divorce on the grounds of defendant's adultery/alternatively an order for the restoration of conjugal rights failing which an order of divorce; custody of the minor children of the marriage; and return of his property currently in the possession of the Defendant. The parties were married to each other in terms of Civil rights having entered into an antenuptial contract. They were married to each other on the 5<sup>th</sup> October 1995 and at Mbabane and the marriage still subsists.

[3] On the 26<sup>th</sup> February 2004 defendant filed her notice of intention to defend.

[4] On the 8<sup>th</sup> June, 2005 plaintiff filed a notice of bar calling upon the defendant to file her plea to the plaintiffs summons within three (3) days of receipt hereof, failing which she will be *ipso facto* barred from doing so and plaintiff will apply to court for judgement by default.

[5] Indeed, on 10<sup>th</sup> August 2005 plaintiff filed a notice of application for judgement by default in terms of Rule 31 (2).

[6] The question therefore is whether despite being barred defendant can still advance a defence to the action.

[7] Rule 31 (3) (a) thereof provides as follows:

*"Whenever a defendant is in default of delivery of notice of intention to defend or a plea, the plaintiff may set the action down as provided in sub-rule (5) of default judgement and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, oral or documentary, and in the case of any other claim, after hearing such evidence as the court may direct, whether oral or documentary, grant judgement against the defendant or make such order as to it seems fit. "*

[8] In the instant case it is clear that the defendant has been *ipso facto* barred from filing any further pleading. It is trite that a failure to deliver any pleading within the time stipulated in the rules involves the defaulter in certain penalties. He may be barred from delivering the pleading and his default may result in judgement being granted against him (*See Herbstein and von Winsen, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition at page*

550 and the cases cited thereat). However, the Rules also provide that when a party has been barred from pleading he may apply to court for a removal of such bar. In such a case, the provisions of Rule 27 (1), (2) and (3) apply. In *casu* no application in terms of rule 27 has been made. In the circumstances, plaintiff was entitled to default judgement as granted.

[9] The a foregoing are reasons for granting the order on 19<sup>th</sup> August 2005.

S.B. MAPHALALA

JUDGE