

CIVIL CASE NO. 2035/06

HELD AT MBABANE

In the matter between:

MENZI ISRAEL NGCAMPHALALA

APPLICANT

and

THE SENIOR MAGISTRATE

1ST RESPONDENT

SIMILE NGCAPHALALA

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

CORAM

: Q.M. MABUZA -AJ

FOR THE APPLICANT

: MR. S.C. MDLULI (MTHEMBU
ATTORNEYS

FOR THE 2ND RESPONDENT :

ADV. P. FLYNN INSTRUCTED
BY MR. S. MASUKU OF
MAPHANGA HOWE MASUKU

JUDGEMENT ON REVIEW 7/12/06

- [1] This matter came before this court on review. In terms of the notice of motion dated 2/6/05 the Applicant seeks an order reviewing and setting aside for irregularity the matrimonial proceedings in the Magistrate Court under case No. 838/04.
- [2] In support of the application the Applicant filed an affidavit wherein he set out the irregularities complained of.
- [3] The background to this matter is that the 2nd Respondent sued out a divorce summons against the Applicant in the Magistrates court Manzini.
- [4] In the particulars of claim the 2nd Respondent basing her claim on constructive desertion sets out various incidents of physical and verbal assault upon her by the Applicant. Some of these assaults were very brutal.
- [5] The 2nd Respondent in her prayers seeks the following:
- a) An order for restoration of conjugal rights, failing which a final decree of divorce.**
 - b) Custody of the children of the marriage**
 - c) Maintenance contribution by the Defendant in the sum of E3,000.00 (Three Thousand Emalangeneni) and any such sums that the court may deem meet for the welfare and support of the children;**

d) A forfeiture Order against the Defendant of his share of the joint assets and property of the marriage;

e) Further and/or alternative relief.

[6] The Applicant filed a notice of intention to defend and a plea wherein he responds to the allegations of assault. He also raises instances of assault. He also raises instances of adultery by the 2nd Respondent which he says he never condoned.

[7] The Applicant's plea indicates a breakdown of the marriage as does the summons which breakdown is common cause to the parties. Significant in the plea is the prayer that 2nd Respondent's action be dismissed with costs. There is no counterclaim which would normally set out the Applicant's cause of action and prayers. A counterclaim would also give the 2nd Respondent an opportunity to plead to the Applicant's allegations.

[8] The first irregularity cited was that the trial proceeded in the absence of the Applicant's attorney. The learned Magistrates response is set out at page 33 of the Book of Pleading as follows:

“The Court agrees with Mr. Masuku that at least an Attorney from Miss Mamokgobo's offices should have come to Court to make a formal application that the matter be postponed giving their reasons. The Court might have questions but now it cannot make those enquiries. Further the fax was a communication with the Plaintiff's Attorney with no formal communication to the Court. It is not Attorneys that can decide whether a

matter should be postponed or not. Postponements are made by way of application from the bar and if the Court is satisfied with those reasons it allows it. The Court is seriously of the view that the matter is being willfully delayed, given its history. The Court orders that the matter should proceed.”

[9] I agree with the learned Magistrate. The correct procedure is to request a colleague from the same law firm to appear in person before the judicial officer to move an application for postponement. It is unethical to write to the opposite attorney and leave the matter in his/her hands.

[10] The failure by the Applicant and his attorney to accord the court due respect is highly unethical. I note that there was no apology tendered to the learned magistrate which is very disturbing to say the least.

[11] The case of **Madinitsky v Rosenberg 1949 (2) SA 392** was cited by the Applicants attorney in his Heads of Argument. That case is distinguishable from the present case for the reason that in that case counsel for the Defendant was present in person in court when he applied for a postponement. He was able to place the reasons therefore in person to the court. I find that there was no irregularity and the Applicant fails on this ground.

[12] The second irregularity cited was that the service of the restitution order was irregular thus making the whole process defective.

The Applicant contends that the restitution order to restore conjugal rights was not served personally on him but was served on his attorneys. I agree with the Applicant that the service was irregular.

[13] The Applicant also contends that service was effected by an

article clerk and not the messenger of court. I agree with the Applicant that service by anyone other than the messenger of court is irregular unless leave has been sought from the court to serve by any other method.

[14] Service of process in matrimonial matters particularly those relating to divorce are unique from other general matters. The correct procedure should always be followed unless good cause is shown for derogating there from and by leave of court. See order vi Rule 3 (i) of the Magistrate Act 1938.

[15] The irregularity complained of was in my view cured or implicitly condoned when the Applicant attempted to restore conjugal rights. Addressing the learned magistrate at page 38 of the Book of Pleadings, Ms Mamokgobo had this to say

“The Defendant was advised that an order was issued by the Court and that he should restore conjugal rights as stated.”

The review must fail on this point as well.

[16] The third irregularity is that the learned magistrate failed to address the issue of Applicant’s first marriage and how it impacted on the Applicants marriage to the second Respondent. This then would have been the determining factor as to whether the civil marriage between the Applicant and the 2nd Respondent was voidable or null and void. It would have also determined what procedure to follow in terminating the civil marriage.

[17] The complaint is raised that the learned magistrate rejected

affidavits filed by the Applicant in which the circumstances of the first marriage are set out.

[18] My view is that the correct procedure with regard to the affidavits and their contents would have been for the Applicant to raise their contents in his plea or even amend his plea to incorporate this new issue and simultaneously file a counter claim wherein he challenged the procedure used by the 2nd Respondent in terminating the civil marriage.

[19] The 2nd Respondent would have made apt responses in her plea to the counterclaim by pleading *inter alia* that she was not aware of the Applicant's first marriage. Their marriage certificate bears this out. Question 24 thereat states: "**order of marriage**" under particulars of the groom. The Applicants response is "**1st**" meaning that it was his first marriage. The Applicant in my view closed the door himself by ending with the plea only and not filing a counterclaim against the 2nd Respondent.

[20] It seems to me that the Applicant suffers from a unique habit of **unclean hands**. He should have come to court with clean hands by admitting this marriage even if he had failed to do so on his wedding day where he knowingly committed bigamy.

[21] This Court has not been asked to make a finding as to whether the marriage between the Applicant and the 2nd Respondent is void or voidable. In my view and for the reasons outlined above

I find that the learned magistrate acted properly by refusing to accept the affidavits. This court was referred to Order XVIII Rule 5 (6) of the Magistrate Court Act. This rule envisages a situation where the procedure for drawing pleadings has been properly followed. The affidavits appear to have sprouted like mushrooms from nowhere and correctly did not have a slot to fit in. The magistrate correctly rejected the affidavits.

[22] The proper and legitimate action the learned magistrate ought to have taken was to refer the affidavits and the certificate of the civil marriage to the Director of Public Prosecutions for prosecution of the offence of bigamy against the Applicant.

[23] The application for review is dismissed. The Applicant is ordered to pay costs hereof plus the certified costs of counsel. The matter is remitted back to the learned magistrate for continuance.

Q.M. MABUZA -AJ