IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1349/08

In the matter between:-

MALCOS BHEKUMTHETHO SENGWAYO **Applicant**

and

THULISILE SIMELANE **1st Respondent**
SILENCE GAMEDZE N. O **2nd Respondent**

In re:

THULISILE SIMELANE **Applicant**

and

MALCOS BHEKUMTHETHO SENGWAYO **Respondent**

Neutral citation: *Malcos Bhekumthetho Sengwayo v Thulisile Simelane and another* (1349/08) [2012] SZHC.. (7th May 2012)

Coram: HLOPHE J

Heard: 08/03/2012

Delivered: 7th May 2012

For the Applicant: Mr. Z. D. Jele

For the Respondent: Mr. B. Magagula

JUDGMENT

[1] The Applicant seeks an order of this court *inter alia* interdicting and restraining the second Respondent from executing a writ of execution issued in favour of the 1st Respondent on the 25th January 2012 as well as a rule nisi calling upon the Respondents to show cause why certain orders which include the following ones should not be made final:-

1.1 That the writ of execution issued out of this court dated the 25th January 2012 be set aside.

1.2 That any amounts paid by the Applicant pursuant to the writ be refunded to the Applicant.

1.3 That the execution of the Judgment of Ota J, be stayed pending finalization of the appeal under Supreme Court case no. 5/2011.

1.4 Costs of suit on the scale as between attorney and client.

The prayer asking for an order interdicting the second Respondent from executing the writ of execution complained of was asked to operate with immediate and interim effect pending finalization of the matter.

[2] The background information to the Application can be summed up as follows. On the 9th December 2010, this court (per Ota J) issued an order in terms of which it *inter alia* ordered the current applicant to

contribute a sum of E6000.00 per month towards the maintenance of the applicant and their two children born of a marriage between the two, which is currently strained. The bitterness arising from the marriage aforesaid saw the filing of an application for the nullification of same allegedly on the grounds that the applicant then (current applicant herein) had already been married in terms of Swazi Law and Custom at the time he concluded the civil rites marriage with the current 1st Respondent. The latter retorted by instituting action proceedings seeking *inter alia* damages under several heads which she claimed resulted from the same marriage.

[3] The judgment of Ota J referred to above was a sequel to the above mentioned proceedings and sought *inter alia* an order compelling the current applicant to pay maintenance *pende atelite* over and above consolidating the two pending proceedings referred to above.

[4] Following the issuance of the Judgment referred to by Judge Ota, the current applicant noted and appeal against same to the Supreme Court of Appeal. This appeal was however struck off the roll for two reasons; being that same was noted out of time and because it was noted without leave of court yet it was interlocutory as it was pending finalization of the consolidated matter. This happened during the May 2011 sitting of the Supreme Court.

[5] The applicant retorted by thereafter filing an application for leave to appeal together with seeking an order condoning the late filing of the leave to appeal. This was meant to be heard in the November 2011 sitting of the Supreme Court.

[6] The appeal was however not prosecuted in the November 2011 sitting of the Supreme Court, allegedly because attorneys had embarked on a boycott of the courts at the time. The application was thus struck off the roll of matters pending before the Supreme Court of Appeal.

[7] It was as a result of the striking off by the Supreme Court of the application referred to above that the 1st Respondent issued out of this court a writ of execution on the 25th January 2012 to execute the Judgment of Ota J. The 2nd Respondent executed the writ of execution on the same day resulting in the Applicant paying a sum of E40 000.00 of the E78 000.00 sought as arrear maintenance, whilst making a postdated cheque for the balance in the sum of E38 000.00. The Applicant says he was not necessarily accepting his fate as brought by the Judgment in paying the amounts but he did so to ward off the Deputy Sheriff who he alleges was aggressive in executing the writ. On the 26th January 2012, the Applicant purported to revive its application for leave to appeal and condonation for late filing of the application for leave by means of a notice of reinstatement of the application struck off the roll by the Supreme Court, subsequent to which the applicant appointed his current attorneys to pursue his application aforesaid.

[8] It would appear that the cheque for the balance of the amount of E78 000.00 sought to be executed on the 25th January 2012 was not honoured by the bank after it was stopped by the Applicant. This prompted the Respondent to embark on a further execution of the writ of execution on the 2nd March 2012. It was this execution which resulted in the present application where the applicant sought the reliefs mentioned above.

[9] As a basis for the reliefs sought, the applicant claims that it was irregular and was in fact not opened to the Respondents to execute the writ of execution because there had been revived an application or leave to appeal the Judgment being executed. It was contended that by continuing to execute the writ in the face of the application pending, the Respondents were not only taking the law into their hands but were abusing the court process as well.

[10] Whilst not seriously disputing the chronology of events set out above, the Respondents disputed that the Applicant is entitled to the reliefs sought. It is contended that there is no appeal pending before the Supreme Court of appeal given that the application for leave and condonation was struck off the roll by the said court. The effect of that striking off it is alleged, was to render the Supreme Court *functus officio* with the result that the said application could not be revived, through an ordinary notice of reinstatement if at all it could be revived.

[11] It was further contended that the rules of court provide that once an appeal is filed out of time with no condonation having been sought, the appeal is deemed to have been abandoned. No specific rule was however cited as supportive this proposition. In fact I must say I have failed to understand the logic behind this argument given that the concerned appeal had not been lodged it is difficult to understand how it then can be abandoned if it never existed.

[12] Nonetheless it was argued further that in acknowledgment of the appeal having been abandoned, the Supreme Court had in May 2011 struck off the matter from the roll because there was no appeal to dismiss.

[13] It was argued that whilst no leave could be sought from the Supreme which was now *functus officio* having struck off the roll the initial application, the applicant has only sought condonation of the initial application. He therefore cannot, as I understand the argument, proceed as if this application has already been granted because it has not yet been granted which distinguishes the application for leave and condonation from an appeal noted as of right.

[14] Whatever the merits of the Respondent's argument, it is clear from the material before me that the appeal noted after the 9th December 2010, when the Judgment being executed was granted, was struck off the roll during the May 2011 sitting of the Supreme Court. It is a fact that after the said struck off there was filed an application for leave to appeal and an application for the condonation of the late filing of it. After a filing of this application there was no execution of a writ presumably because both parties understood or accepted that it would be inappropriate to execute a writ when there was pending before the Supreme Court an application of that nature. I must say that during the argument of the matter I did not understand the parties to be arguing that the effect of such an application in law was any different from the manner in which they handled the matter during that interval. In fact although not exactly deciding this question this court has indirectly found that the effect of filing such an application is to stay execution of a judgment as is the case with noting an appeal. I refer in this regard to

Mvuselelo Fakudze v Mcolisi Mdluli and Millicent Nomalungelo Fakudze (nee Ngwekazi) High Court civil case no. 788/2008.

[15] It is a fact that the application for leave and condonation filed after the May 2011 session of the Supreme Court was struck off in the November 2011 session of the Supreme Court. It is therefore not in dispute that when there was issued and executed a writ of execution of the judgment handed down on the 9th December 2010, on the 25th January 2012, there was neither an appeal nor an application for leave to appeal and condonation of the late filing of such an application, pending before the Supreme Court.

[16] If this was the case, I then do not understand what would have been irregular with the writ of execution being issued under such circumstances so as to warrant its being set aside as prayed for by the Applicant herein. Furtherstill I do not understand why an execution carried out under such circumstances would have been faulted as well. Consequently there is no merit in the prayer that the monies paid to the Respondents as a result of executing the writ on the 25th January 2012 be refunded applicant.

[17] The same can however not be said for an execution that occurred after the application that had been struck off the roll had been reinstated. This I say because the position that an application struck off the roll can be reinstated is in my understanding a salutary rule of practice. Indeed if the court wanted it not to be reinstated it would have dismissed same. In this regard, I am of the view that the purported execution of the writ after the reinstatement of the application does call for an order

interdicting same. This is because there can be no doubt that the applicant is entitled to note an appeal or even to file an application for leave to appeal together with an application for condonation of the late filing of such an application. To then execute before the Supreme Court decides such an application would in my view be preposterous. Furthermore from their own previous conduct as noted above, the parties were clearly of the view that once instituted an application for leave to appeal and condonation has the same effect as a notice of appeal.

[18] I have dealt with the matter on the understanding that the Respondents were entitled to execute a judgment for the outstanding arrear maintenance and not just limited to approaching court for an order for contempt of court if there was no compliance with the court order to maintain as directed. I was bolstered in this approach by the observations of the courts in such cases as ***Swanepoel v Bovey 1926 TPD 457*** as well as ***Gillies v Gillies 1944 C. P. D. 157***. See also ***Herbrstein and Van Winsen's The Civil Practice of the Supreme Court of South Africa 4th Edition, Juta, page 821***.

[19] For the foregoing reasons and for the sake of clarity, I make the following orders:-

1. The prayer that the writ of execution issued on the 25th January 2012 be set aside be and is hereby dismissed.

2. The prayer that the amounts paid by the applicant pursuant to execution of the writ prior to the 26th January 2012, be refunded him be and is hereby dismissed.

3. Any further execution after the 26th January 2012, of the judgment of this court handed down on the 9th December 2010, be and is hereby stayed pending finalization of the application pending before the Supreme Court of Appeal.

4. Owing to the nature of the orders made, each party shall bear its own costs.

Delivered in open Court on this the ……day of May 2012.

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N. J. HLOPHE

JUDGE