IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 448/12

In the matter between

ZWELAKHE NHLEKO	**Applicant**
and	
MAGISTRATE SEBENZILE NDLELA N.O.	**1st Respondent**
ATTORNEY GENERAL	**2nd Respondent**

Neutral citation:	*Zwelakhe Nhleko v Magistrate Sebenzile Ndlela N.O.* (448/12) [2012] SZHC 197 (23 MARCH 2012)
Coram:	Mamba J
Heard:	**23 March 2012**
Delivered:	**23 March 2012**

[1] Practice and procedure – peace binding inquiry in terms of s 341 of the Criminal Procedure and Evidence Act 67/1938 – administrative or quasi – judicial and not a trial.

[2] Practice and procedure – in the course of a peace binding inquiry – Magistrate granting an order for judicial separation and maintenance – such not competent.

[1] This is an urgent application for review under the provisions of rule 53 of this court, wherein the applicant seeks inter alia, that this court reviews and sets aside '...the decision of the first respondent made on 13th February 2012 ...under case number P/B 22/12.'

[2] Whilst the respondents were given sufficient time to respond to the application, they never did so and at the end of the day the matter has been determined on the papers filed by the applicant alone. I hasten to add here that a consent order was granted by this court when the matter first appeared on 2nd March 2012 whereby Bongile Phumlile Simelane who was a party in the court a quo was joined as the 3rd respondent herein.

[3] In support of his application, the applicant makes the following averments which have not been challenged by the respondents and this being the case, they are deemed to be common ground.

[4] The applicant and the third respondent are married to one another in terms of Swazi Customary law but were, at the material time staying apart and this was by mutual agreement between the two. The applicant stays in Mbabane where he works and visits his family in Manzini on certain

weekends. The complainant works at the George Hotel in Manzini and lives at Ngwane Park, in Manzini too and that is where the family lives or has its home.

[5] Sometime in February 2012, the applicant was summoned to appear before the Manzini Magistrate's court on 13th February 2012 "to respond to a peace binding enquiry instituted by Bonsile P. Simelane." (See the relevant summons attached as annexure ZN1). This summons was as a result of an unsworn statement made by the third respondent to a police officer at the Manizni Police Station on 15th November 2011. In that statement the third respondent complained that the applicant was being violent and abusive towards her and had assaulted her on various occasions. At one stage she had to be "treated for injuries and broken ribs all over the body and the applicant had threatened to kill her. I shall return to this statement later in the judgment.

[6] The applicant states that on 13th February 2012, he appeared before the first respondent and was summarily ordered not to 'conduct myself violently towards my wife or not to assault or threaten to assault her.' He states further that

'10. The first Respondent further recorded that I and my wife have elected to stay apart for a while and that I offered the sum of E1000.00 (One Thousand Emalangeni) per month for maintenance with effect from March 2012 which must be deposited with the Clerk of Court Manzini. A copy of the Court Order is annexed hereto Marked "ZN2".

11. I humbly submit that I was never given an opportunity to make representation on the order for separation and the E1000.00 (One Thousand Emalangeni) monthly contributions for maintenance. After my wife had presented her side of the story namely that;

11.1 I assaulted her sometime around May 2006 and or around March 2010.

11.2 She wants out of the marriage because of the assaults, and;

11.3 She produced my salary advise reflecting that I was earning above E4 000.00 (Four Thousand Emalangeni). I submit that she produced an old salary advise.

12. No mention was made of maintenance and I was not offered an opportunity to present my side. In fact I still love my wife and no reason exists whatsoever for a judicial separation. [I]

> Also do not earn more than E4 000.00 (Four Thousand Emalangeni). A true copy of my salary advise is attached hereto, Marked "ZN 3".
>
> [And] … In this matter the first respondent acted ultra vires section 341 of the Criminal Procedure and Evidence Act 67/1938 … by ordering a separation of a married couple and ordering monthly maintenance.'

He says the said section of the Act empowers the first respondent to make a peace binding order and not such substantive reliefs as judicial separation *a mensa et thoro* (board and bed) and maintenance orders.

[7] According to the handwritten photostat copy of the record of the proceedings of 13th February, 2012, the following is recorded:

> '**13/02/12**
>
> PO: S. Ndlela
>
> Interpreter: E. Thusi
>
> Applicant and Respondent are sworn in.
>
> Applicant says that she is married to the Respondent. Applicant says Respondent usually assaults Applicant. Applicant says that they have marital problems.

Respondent states that he used to assault Applicant as she does not want to have sex with him.

The court orders and directs the Respondent to stop forthwith to assault the Applicant and stop threatening Applicant – failing which he will be held for contempt of court.

The parties elect to stay apart for a while and Respondent offers the sum of E1 000.00 per month for maintenance with effect from March 2012 – to deposit same with Clerk of court.

S. NDLELA (SGD)'

[8] In the excerpt quoted above, the applicant denies that he was given the opportunity to answer the allegations against him or that he ever offered to pay a sum of E1,000.00 per month as maintenance or to say anything on the issue of their judicial separation. It is perhaps to be regretted that notwithstanding this serious allegations by the applicant, none of the respondents herein deemed it necessary to respond thereto. I find this surprising indeed in view of the applicant's assertion of what took place when he appeared before the 1st respondent. This unsatisfactory state of affairs has not been helped by the respondents' silence. The purported court record has, to boot, not been certified by the relevant Clerk of Court.

The contents thereof are clearly not consonant with the sworn statement of the applicant.

[9] Section 341 of the Criminal Procedure and Evidence Act provides as follows:

> '(1) If a complainant on oath is made to a magistrate that any person is conducting himself violently towards or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, then, whether such conduct occurred or such language was used or such threat was made in a public or private place, such magistrate may order such person to appear before him, and if necessary may cause him to be arrested and brought before him.
>
> (2) The magistrate shall thereupon enquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath, and may order the person against whom the complaint is made to give recognisances with or without sureties in an amount not exceeding fifty rand for a

period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.

(3) The Magistrate may, upon the enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to such enquiry.'

[10] In performing his duties or functions under the above section, a magistrate does not sit as, either a civil or criminal court. It is more of an administrative function whose aim or objective is to keep or maintain peace in general. The proceedings are not a trial but an inquiry based on the complaint by the person who has initiated such inquiry. Although the complaint may reveal a crime which has been committed, the Magistrate may not return a verdict of guilt. The crown is not a party to the proceedings either. Dealing with a similarly worded section the Court in R v Limbada , 1953 (2) SA 368 (N) at 370C – D, where the Magistrate had stated that an inquiry of this nature was purely an administrative matter or a quasi-judicial one and therefore no criminal appeal could be filed against his decision, Broome JP held that '...The machinery created by sec. 387 of Act 31/1917 is designed primarily to prevent the commission of an offence

rather than to deal with an offence already committed. A similar jurisdiction has been exercised by Magistrates in England from very early times. Its origin is not clear. One view is that it depends upon a statute of Edward III, passed some 600 years ago. Another view is that it is a Common Law jurisdiction which was in existence from an even earlier date. But however that may be, the jurisdiction rests, in South Africa, upon the clear statutory basis of sec. 387.'

And dismissing the appellant's argument, the learned JP stated that '...I feel it incumbent upon me to say that it did not leave me with any impression that the Magistrate was wrong in his finding.'

[11] It is also noted that the person against whom a complaint is made, is summonsed to appear before a magistrate once such complaint is made on oath. The summons is preceded by the sworn statement and not the other way round. In the present matter this was not the case. Rather, an unsworn statement was made to a police officer and this was the basis upon which the applicant was called upon to attend court. I am mindful of course that the submitted record indicates that both parties made their presentations under oath when both appeared before the first respondent on 13th February,

2012. This, however, does not detract from the letter and spirit of the relevant provisions of the Act.

[12] In terms of rule 53 (1) (b) of this court, the official or functionary whose decision is sought to be reviewed, corrected or set aside is not only restricted to sending the record of the proceedings and reasons for his decision to the Registrar of this Court; but he is at large to include such reasons or information as he may desire to give or make, which is relevant to a just conclusion of the matter. This rule is a procedural one.

[13] For the foregoing reasons; the proceedings before the first respondent having been quasi-judicial or administrative; an order of Judicial separation from board and bed, and for maintenance, was incompetent and such order is hereby set aside. The third respondent is at liberty, should she be so minded, to file an application for maintenance in the proper manner and forum so that it is adjudicated upon fairly or justly.

MAMBA J

For Applicant: **S.S. Mnisi**

For Respondents: **(No appearance)**