IN THE HIGH COURT OF SWAZILAND

JUDGMENT
(ex tempore)

Case No. 23/12

In the matter between

NOKUTHULA NONJABULISO DLAMINI **Applicant**

and

GOODWIL TSELA **Respondent**

Neutral citation:	*Nokuthula Nonjabulo Dlamini v Goodwill Tsela* (23/12) [2012] SZHC 44 (16 February 2012)
Coram:	Mamba J
Heard:	**16 February, 2012**
Delivered:	**16 February, 2012**

[1] On 11th January, 2012, the Applicant filed this urgent application seeking inter alia, an order

> '2 That the respondent shows cause on a date to be set by this Honourable Court why …[a] four piece carlton lounge suite (gold) should not be handed over to the applicant [and] that pending finalization of these proceedings, the Deputy sheriff seize and attach the goods referred to herein and hand same over to applicant for safe keeping….'

[2] The *rule nisi* was sought and obtained on an ex parte basis. She justified non service of the notice of motion prior to the *rule nisi* by stating that '… application has not been served, as the respondent may dispose of the goods thus defeating the purpose of this application.' This is a rather bold assertion. It is not motivated or supported by any factual statement. It is entirely baseless and unhelpful. Even under circumstances where an applicant says she believes that a respondent will or may destroy or alienate the property that is the subject of the application, such belief must be stated and reasons for such belief must also be stated. One must have reason or reasons to believe that a specified set of circumstances obtain. Where no reason exists for such belief, the holding of such belief is unjustified or unreasonable.

[3] The applicant stated that she had fallen in love with the respondent in 2011 and moved in to stay with him at his home in April of the same year. It was her assertion that she had agreed to marry the respondent when he proposed to her but such a marriage had not yet been contracted or concluded.

[4] The parties, it would seem, stayed together at the respondent's home for just under two months as the applicant states that she left the said home in June 2011 when the respondent expelled her from his home. It was during her stay at the respondent's home that she bought the furniture that is the subject of this application. She bought it on hire purchase and kept it at the respondent's home, she says. She voluntarily left it behind when she left the said home in June. She had hoped that reconciliation with the respondent would be reached and she would return to live with him at his home. When her hopes were dashed, she sought to take the relevant furniture and the respondent refused her permission to do so. He claimed, she said, that he had also paid a portion of the purchase price for the furniture. She argued in her papers in court that it was not fair that he should be allowed to enjoy the use of the furniture whilst he had expended nothing towards its acquisition. She said she was solely responsible for the payment of the full purchase price. She thus wanted to have possession and use thereof. The upshot of all this is this application.

[5] As stated above, a rule *nisi* operating with immediate effect was granted and the furniture in question was removed from the respondent and handed over to the applicant.

[6] In opposing the application, the respondent has questioned the issue of urgency. He also claims that he is married to the applicant in terms of Swazi Customary law. Such marriage, he says, was solemnized on 3rd April, 2011. He is supported in this regard by at least two persons who actually witnessed or participated in the solemnized of the marriage. These are Christina Nkambule who actually anointed her with red ochre; Between Maziya and Erick David Simelane the respondent's Chief's runner (Umgijimi) who was present when the Umsasane ceremonial piece of meat was given to the applicant's people.

[7] The respondent also states that his love affair with the applicant is much older than stated by her. This relationship or affair has resulted in the birth of two children. The first born is now eight years old. The second one is four years old. The respondent admits that it was the applicant who went to choose and purchase the relevant furniture. He states, however, that she did so under directions from him as her husband. He gave her the money for the initial payment. The furniture belongs to them both as a couple.

[8] The respondent further denies that he expelled the applicant from their matrimonial home. He states that she left on her own volition after he had confronted and presented her with evidence of her infidelity or unchastity.

[9] In reply, the applicant changes tune and says indeed their love relationship commenced in 2001 and not 2011, the latter is a typing error. She admits the issue of the two children but denies the marriage. She insists the furniture in question is hers. She insists further that because she is responsible for paying the instalments for the furniture, she has the sole right to its possession and use. This is obviously not entirely correct. Very often, couples share and divide their household responsibilities.

[10] It is trite law that an applicant who approaches the court ex parte must disclose fully the facts or circumstances that are relevant or have a close bearing on the application. I cannot say that the applicant has met this precept or obligation in this application. She lied about the time when her love affair with the respondent began. It is very convenient for her to blame it on a typing error in reply. It is not difficult to see why she could not maintain her original stance. The existence of the two children and the revelation by the respondent about her application against him for their maintenance was an insurmountable obstacle. Without deciding the issue

of the existence or otherwise of their marriage, prima facie, the evidence strongly suggests that the parties are husband and wife.

[11] There are also two fundamental or substantial disputes of fact, namely whether the parties are married to one another and who actually owns the furniture in question. The ownership of the furniture is relevant and important because if for instance it belongs to the respondent or the joint estate, different considerations obtain and the applicant has to prove that she has a right to be granted possession thereof to the exclusion of the respondent. Whereas if she is the sole owner thereof as she claims, this is enough to entitle her to the order she seeks.

[12] The above two major disputes of fact are central to this. They cannot be resolved in this application. The applicant was at pains in her founding affidavit to state that she owns the furniture herein. From her own showing, the respondent claimed that he had financially contributed towards the purchase of the lounge suite and would not let her take it away. She clearly was anticipating a claim of ownership by the respondent. These disputes of fact were clearly foreseen by her but she persisted in bringing her claim by way of application instead of filing an action. She erred in this regard. I have also noted that she failed to disclose the full facts in her ex parte application (for the rule nisi). Because of all these deficiencies and

shortcomings in her application, the rule nisi granted by the court herein cannot be confirmed. It is hereby discharged with costs. There are no grounds for me to exercise my discretion in any other way than to discharge the rule. No sufficient grounds exist for me to refer the matter to trial or oral evidence on the disputed issues.

[13] Counsel for the applicant informed the court from the bar that the value of the furniture involved in this dispute is less than E20 000.00 and when the court enquired why the matter had not been pursued before the relevant Magistrate's court, counsel's response was that both this court and the Magistrate's court had jurisdiction and therefore there was nothing amiss in bringing it before this court. I mention this aspect of this case just to reject it. All matters that are cognisable before the Magistrate's court should be filed and heard in that court. Very strong grounds should exist to justify a departure or deviation from this general principle.

MAMBA J

For Applicant : **Mr S.C. Simelane**

For Respondent: **Mr T. Fakudze**