



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1926/09

In the matter between

VUSIZWE MAHLALELA

Plaintiff

and

NONHLANHLA MAHLALELA (born Dlamini) Defendant

Neutral citation: *Vusizwe Mhlalela v Nonhlanhla Mahlalela (born Dlamini)* (1926/09) [2013] SZHC 17 (08 February 2013)

Coram: Mamba J

Heard: **08 February, 2013**

Delivered: **08 February, 2013**

- [1] Civil Law – Roman Dutch law – two grounds of divorce only – adultery and malicious desertion.
- [2] Civil law – claim for divorce on irretrievable marriage break-down – such not ground in our law.
- [3] Civil law Procedure – In unopposed action – based on irretrievable marriage break-down after closing his case – plaintiff applying to reopen his case to lead evidence on malicious desertion by absent defendant – such potentially or inherently prejudicial to defendant – application refused.

[1] This is an unopposed divorce action and I guess it was for this reason that it was amongst the over ninety (90) cases that were before me in today's motion court.

[2] When the matter was first called, Counsel successfully applied that it be stood down to the end of the roll as he needed to lead viva voce evidence in support of the plaintiff's case. When the time came, this was done. The court heard the evidence of the plaintiff, who thereafter closed his case and urged the court to grant him a final decree of divorce.

[3] In his evidence, almost word for word, the plaintiff narrated his evidence as pleaded in his particulars of claim. I quote these particulars as stated in the relevant paragraph, namely:

“5. The marriage between the parties has irretrievable broken down such that the parties have not enjoyed the benefits of a marriage and for a period in excess of two (2) years the parties have not lived together as husband and wife.

WHEREFORE Plaintiff claims:

(a) Dissolution of the parties' marriage in community of property.”

- [4] From the above excerpt and from Counsels submissions in favour of the relief sought, plaintiff's case is solely based on irretrievable break-down marriage. There is further no indication at all as to what or who between the parties has caused this state of affairs in their marriage. Our law on this subject regrettably, is based on law which recognized only two grounds of divorce; adultery and malicious desertion, thus the so-called fault element. In South Africa, this was overhauled by the Divorce Act 70 of 1979 which introduced irretrievable marriage break-down and mental illness or continuous unconsciousness of one of the spouses as the only two grounds of divorce. (vide *Sacolo v Sacolo* case No. 4095/08) Failure rather than fault is at the centre of it all.
- [5] On being queried by the court during his submissions on whether irretrievable break-down of a marriage was a ground for divorce in our law, Counsel for the plaintiff, has readily and very properly in my view, conceded that it is not. He then, rather awkwardly and blandly I think, applied to recall the plaintiff in order for him to lead evidence to establish or show that the defendant was guilty of or had committed an act of malicious desertion.
- [6] To allow the plaintiff to lead evidence on malicious desertion would effectively be allowing of permitting him to base his case on a totally new

cause of action. I cannot permit this – even in an undefended or unopposed action such as this one. Infact, I would venture to hold that where the case is not opposed and the defendant is not present in court, it would be potentially dangerous and iniquitous to allow a plaintiff to change tune and base his case on a totally new cause of action. It is not inconceivable, for instance, that if the plaintiff's (original) claim had been based on malicious desertion, the defendant would have contested the action. In view of this potential prejudice to the defendant, this application must fail. It is perhaps now a cliché that a party must stand or fall on his case as pleaded. In this case the plaintiff falls on his case as pleaded by him.

[7] For the foregoing reasons, plaintiff's action must fail and it is hereby dismissed. The plaintiff has, I think, the right to relaunch his bid for divorce on fresh papers and based on another cause of action cognizable in our law.

[8] I repeat what I said in Sacolo (supra) namely:

“[13] As an epilogue, I would add one word on this matter. I entirely share the second Respondent's view that our divorce laws are outdated, archaic and completely out of touch with modern Swazi jurisprudence on matrimonial matters. A complete and radical rethink is desperately needed. Tying together a couple whose marriage has irretrievably broken down is a potent recipe for domestic violence or collusion. Where there is collusion, there is almost always dishonesty or perjury. The law thus drives couples who are otherwise law abiding

into committing unsavoury or criminal acts, just for them to escape from an unbearable or untenable rut. The words of ROPER J uttered over sixty years ago in **KUHN v KARP, 1948 (4) SA 825 (T) at 827-8** are apposite in this regard:

“The upholding of the marriage state is only one of the several objects of public policy. ...where a marriage has been wrecked beyond hope of salvage, the argument of public policy loses much of its force. ...To keep the parties tied to one another in the bonds of a marriage which has become a sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.”

[14] In 1845 **Punch Magazine** offered the following advice to persons about to marry – “Don’t”.

Those who know how difficult it is to obtain a decree of divorce under our law have heeded this advice and have been compelled to resort to less formal partnerships like cohabitation. Without any doubt, this is incompatible with Swazi Public Policy and jurisprudence and the finger must point to where the blame rests or resides : Parliament.”

That the marriage has irretrievably broken-down in this case is plain. Both parties hold this view. The plaintiff has unequivocally said so. For her part; the defendant has, by her silence and failure to contest these proceedings, tacitly said so. In a word, their marriage has failed. It is dead. This court does not think that present day Swazi Society is in favour of keeping sham or the so-called partner or dead marriages. NO. Our law needs to change in a way that will empower the courts to dissolve a marriage that has irretrievably broken-down. “In dissolving a marriage by divorce, [because it has irretrievably broken-down] the court does not kill a

live marriage: it certifies that the marriage is dead.” (HR Hahlo, the SOUTH AFRICAN LAW OF HUSBAND AND WIFE, 5th ed. at 331).

MAMBA J

For the Plaintiff : Mr C. Jele

For the Defendant : No appearance