



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2581/2011

In the matter between:

CHISTINA NYAWO

Applicant

And

GEORGE MAZIYA

Respondent

Neutral citation: *Christina Nyawo v George Maziya (2581/2011) [2013] SZHC 71 (3rd May 2013)*

Coram: **M. Dlamini J.**

Heard: **20th September 2012**

Delivered: **3rd May, 2013**

– interdict – requirements thereof – proof that property amassed at the instance of applicant sufficient proof of clear right for an interdict – question of subsistence of marriage immaterial.

Summary: The applicant seeks for orders compelling the respondent to return certain cooking utensils and be restrained from alienating a homestead where both parties resided as husband and wife following a customary law marriage contracted in terms of Mozambican culture.

Evidence

- [1] *Viva voce* evidence was led by both parties in this matter following disputes apparent from the pleadings.
- [2] The applicant under oath informed the court that respondent married her in May 2005 in Mozambique in terms of the customary law of marriage of Mozambique, although she started cohabiting with respondent in 2003. While living with respondent she approached the owner of a butchery where she did cleaning. In return the owner of the butchery allowed her to conduct her own business of cooking at the butchery premises. The capital for the business was a salary she had obtained from working for one of the local teachers who paid her a sum of E200.00. In 2007 the owner of the butchery sold it to another businessman. This new owner refused her permission to continue conducting the business of cooking. She then approached respondent's employer requesting for premises to continue with the business. By that time respondent was a security guard. Mrs. Carmichael, respondent's employer agreed. She borrowed the sum of E3,000.00 from one Fikile Mkhwanazi as capital for the new business. Her evidence further is that respondent advanced her a sum of E500 as capital. However, respondent demanded payment. She paid respondent the whole amount. By this time however, respondent was not employed. Although she started this business, respondent requested that the licence be registered under his name. The business performed well such that she bought a motor vehicle in 2010. She also purchased a homestead with a five room house for a sum of E7,000.00. She also purchased more utensils for her business. It was her further evidence that respondent, although unemployed, refused to assist her in the business. Respondent however, did run the business when she had to go for maternity leave. Although she left the business with

a full stock, upon her return she found that respondent never restocked. Respondent refused to give her any money collected from the business. She had to borrow money and start all over again.

[3] In January 2010 respondent became violent. He would assault the applicant. These assaults were persistent and a series of meetings were held where her mother, pastors and persons from the local royal kraal were involved. She also reported the matter to the police and to SWAGAA, a non-governmental agent dealing with matters of domestic abuse. A number of court orders were issued restraining respondent from assaulting applicant. Nothing proved to deter respondent from his assault. According to this witness, the assault inflicted upon her were at times so severe that she defecated on herself and on one occasion she was admitted in hospital. He eventually hired a motor vehicle and packed applicant's belongings, ordering her to go back home. The Royal Chief's kraal seemed to favour respondent as it ordered her to return to Mozambique. The respondent also went to her business and removed all the cooking utensils. She was left without a business to run. By this time the respondent was in a love relationship with different women including her employees. She decided to approach this court.

[4] Applicant also maintained her evidence in-chief under cross-examination on the question of generating income to finance the business and the homestead without respondent's contribution. She further stood her ground that she started the business with her hard earned income. The respondent further challenged the evidence that he forced the applicant to leave their common home. He put it to this witness that at all material times he tried to reconcile with the applicant. Respondent's Counsel further put it to this witness that the respondent paid a balance owing of the bedroom suit. The witness informed the court that she paid the whole amount.

- [5] The respondent under cross-examination denied ever marrying the applicant in terms of Mozambican culture. It was put to this witness that the ceremony conducted in Mozambique was signaling an engagement and not a marriage. Although the applicant was cross-examined for days, nothing much turned on the rest of the cross-examination.
- [6] The second witness on behalf of applicant was one Mr. John Gabriel Bulunga, who under oath informed the court that the applicant approached him looking for a place to build a home. He decided to sell her his five room house for the sum of E7,000. The applicant paid the sum of E5,000 in installments. The last instalment of E2,000 was paid by the applicant in the company of respondent. He then produced proof of the transaction.
- [7] He stood his ground on the evidence that applicant purchased his house and paid the purchase price.
- [8] The third witness for the applicant was Mrs. Carolina Mathonsi, who informed the court that respondent approached her and requested her to lead a delegation to applicant's homestead to conduct a marriage ceremony in terms of Mozambican customary law. She gave a detailed account of the procedures followed in this type of marriage. It was her evidence that at the end of the ceremony the two were declared husband and wife and were duly congratulated.
- [9] Under cross-examination she maintained that she was well versed with Mozambican cultural marriage and that between the parties it was performed to the latter. She disputed respondent's position that what was conducted on that day was merely an engagement ceremony.

[10] Themba Musa Khumalo gave evidence in support of applicant in relation to respondent packing and sending her back home. He stated that he was a neighbour to applicant's parental home. He was present when respondent brought applicant home with her clothing. His evidence is that he enquired from the delegation as to whether the applicant had committed adultery or witchcraft. The response was to the negative. He then informed the delegation to go back with applicant and reconcile. However, because it was late and applicant had a young child, it was decided that she would return the following day. However, the following day respondent sent a truck full of applicant's items.

[11] Nothing turned on this witness's cross-examination in relation to the issues at hand.

[12] The next witness was Themba Mthembu who identified himself as the Pastor of the parties. He confirmed the violent attack upon the applicant by respondent and the number of meetings where attempts were made to reconcile the two. He also confirmed that respondent chased away applicant on several occasions.

[13] A further witness on behalf of applicant was Ntombifuthi Eunice Mkhwanazi who gave evidence along similar lines as applicant in relation to the applicant starting the business and that respondent never ran the business. She also confirmed having advanced applicant a sum of E1,500 as capital for her business, which she paid back. She also confirmed the assaults upon applicant by respondent and respondent abusing money from the business whenever applicant was unable to attend to it. She further confirmed that the applicant was called at the Chief's kraal where she was told that they cannot entertain matters of persons who are not married to

each other as respondent informed them that he was not married to the applicant.

[14] The applicant closed its case.

[15] Respondent called one Mr. Sabelo Vusi Maziya who is a member of the Chief's kraal inner council and brother to respondent. He gave evidence on the deliberation that took place at the Chief's kraal when the matter between the parties had been reported. His evidence was that respondent complained of applicant having multiple love relations including a girl she had come with. It was his evidence that the council ordered that the matter between the parties be discussed at family level.

[16] His evidence further is that he decided to reconcile the two. A meeting took place among the three of them. In that meeting respondent admitted to multiple partners and begged applicant not to leave him. Applicant disclosed that respondent was assaulting her.

[17] He further divulged that they all boarded a motor vehicle carrying applicant's clothing to her parental home. Applicant further decided to call a neighbour Mr. Khumalo. His evidence was at variance with that of Mr. Khumalo. He stated that during the deliberation, they reported that respondent wanted to reconcile with applicant. However, applicant flatly refused to come home and said her matter will end on that day.

[18] Subsequently, Mr. Maziya's evidence proceeds, applicant hired a truck and collected all her belonging from respondent.

[19] Under cross-examination it was disputed that there were any deliberations at Chief's kraal and that he attempted to reconcile the two.

[20] Villa Vasco Nkabindze informed the court that he was present once when respondent, his wife i.e. applicant and himself were together with Mr. Bulunga. Respondent gave Mr. Bulunga a sum of E3,000 as payment for a house he had purchased from Mr. Bulunga.

[21] In cross-examination it was put to him that he did not know the source of money and he responded to the affirmative.

[22] Zephaniah Sigwili Nkonyane, a Chairman of the inner council stated that the respondent came to report a dispute with applicant. Applicant also came to report. They told them to go and collect their parents. Applicant failed to come with her parents but with a small girl and a woman. They were sent back and informed to come later with their parents. While they were awaiting for their return, they heard that applicant had reported the matter to another Chief's kraal. They accompanied respondent to that Chief's kraal where applicant informed them that she no longer wanted respondent. This Chief's kraal could not resolve the matter but stated that the parties would be called later. They waited in vain.

[23] Under cross-examination, this witness revealed that respondent had informed them that he was not married to the applicant but engaged.

[24] The respondent was a last witness.

[25] Throughout the evidence respondent referred to applicant as his wife. He explained that as far as he was concerned the applicant was his wife although they never married.

[26] It was his evidence that at all material times he has been working under employment.

[27] He established a business where his sister worked. He would supervise the business. His sister left in 2004 and it is then that he took applicant to work in the business. They both worked in the business until 2007 when the new businessman took over the butchery. He approached his boss Mr. Carmichael and requested for a place to construct a structure for the business. He obtained a loan of E3,500. He worked together with applicant in the new business. He was later approached by Mr. Bulunga who informed him that he was leaving for Mozambique and that he would like to leave his homestead with him. He, together with applicant went to inspect the homestead. They accepted Mr. Bulunga's offer and he paid deposit of E2,000. He then paid installments of E3,000 and E2,000. He later went to the Chief's kraal where he paid a cow for the piece of land. The purchase money was sourced from the business.

[28] His evidence was that although he secured a licence and lease for business, he opened an account for his wife where the profit from the business was banked. This money became the source of conflict between them. Applicant deserted their bedroom. As he live with his mother-in-law, he was accused of not wanting her. Although he reconciled for a while with applicant, he found her with her mother bad-mouthing him. He took children to school and upon his return found the applicant packing her clothes and she left home. He called her but her cellular phone was off. She had left behind a nine month old baby who was breastfeeding. She went to report him to the prosecution for assaulting and abusing her. He was summoned whereupon the Magistrate ordered them to reconcile. Applicant poured water in the petrol tank of his car. He assaulted her. She ran to the Pastor. Upon her return she informed him that she did not want

him. She repeated the same before the Police. The police advised them to solicit assistance from the Chief's kraal. He requested Mr. Nkonyane to reconcile them. At the Chief's kraal, applicant informed the meeting that she did not want him. The inner council advised that they deal with the matter at family level. When they went to his father-in-law, his father-in-law chased them away. Applicant came to collect her belongings.

[29] Having summarized the evidence and the probabilities, I now record my findings on facts.

[30] It is apposite to highlight from the onset that the evidence of respondent's witnesses was contradictory between themselves. The evidence of the Chairman of the inner council and that of the member of inner council Mr. Maziya contradicted each other in material respect. The Chairman stated that as applicant failed to appear with her parents, the inner council could not deliberate on their matter. When they expected the return of applicant, they were summoned to another Chief's kraal where again the matter could not be resolved. This is clearly at variance with respondent and Mr. Khumalo's evidence who stated that the matter was deliberated upon at his Chief's kraal. The version of the Chairman was put to respondent who adamantly replied that the Chairman of the inner council was lying. Respondent's version cannot be accepted. The evidence of the Chairman corroborated not only of applicant but that of Ntombifuthi Eunice Mkhwanazi who accompanied applicant to the Chief's kraal.

[31] It is common cause that the applicant was subjected to violence at the hands of respondent. Respondent informed the court in his evidence in-chief that he assaulted the applicant for pouring water into the fuel tank of his motor vehicle.

[32] The applicant seeks for an interdict against the respondent.

[33] In **Maziya Ntombi and Ndzimandze Thembinkosi (02/12) [2012] SZSC 23** at page 14 their **Lordships**, citing **Setlogelo v Setlogelo 1914 AD 221** at 227 upheld the requirements of an interdict as follows:

“The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.”

[34] In *casu*, the applicant has established on a balance of probability that she unilaterally worked for the properties under issue. Whenever respondent came to the business, the business would be a flop and applicant would have to resuscitate it, and this was not challenged.

[35] **National Employers Mutual General Insurance Association v Gary 1931 AD 187** at **199 Wessels J. A.** wisely concluded

“Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false.”

Finding of Fact

[36] In the premise, I find that the matter was never deliberated at the Chief's kraal in terms of applicant, her witnesses namely Ntombifuthi Eunice Mkhwanazi and on respondent's own witness Mr. Zephaniah Sigwili Nkonyane, the Chairman of the inner council of respondent's Chief's kraal.

[37] It was applicant's evidence both in-chief and under cross-examination that respondent assaulted her severally, such that she spent days in hospital and the matter was reported to a civic organization as well as to the Police. Respondent in his own evidence informed the court that applicant poured some water into the fuel tank of his motor vehicle and he ended up assaulting her. As the assault by respondent upon applicant is confirmed by respondent himself, I find that applicant was assaulted by the respondent.

[38] I have assessed the evidence of the various witnesses that appeared before me and I find that applicant unilaterally established the business under issue. Firstly it is highly improbable that one would work hard as respondent wished us to believe and then bank money to another person's account. This is more so because he claims he has no ties with such a person as the applicant as he insists he was not married to her. On his own showing he never maintained a bank account.

[39] Secondly it is not uncommon in our jurisdiction to find women amassing properties and registering the same in the name of the man as the head of the family. There is therefore nothing peculiar in the motor-vehicle, the trading licence of the business to be registered in the name of the respondent.

[40] Thirdly in my assessment, as guided by the principle outlined by their Lordships in **Orion Hotels (Pty) Limited t/a Pigg's Peak and Casino v Mag Air Cc 20/2010** page 25 where they wrote:

"The trial court faced as it was with the two irreconcilable version looked at the credibility and reliability of the witnesses heard as well as the probabilities of the matter..."

[41] I find that applicant and her witnesses were credible and reliable in their evidence. Her version was more probable and consistent.

[42] I therefore further find that not only did applicant single handedly amassed the properties under issue but whenever respondent came into the business, the business became a flop, compelling applicant to look for capital elsewhere in order to resuscitate the business.

[43] For the foregoing, it is my considered view following the dictum in **Nokuthula N. Dlamini v Goodwill Tsela (11/2012)[2012] 28 SZSC** where the court held AT PAGE 21:

“There is no doubt that the above facts disclose a dispute as to whether the two were married or just lived together for two months as lovers. This dispute in my view is not material to the question of who, as between, the two of them is entitled to the possession of the lounge suite.”

that it is unnecessary that this court make a pronouncement on the validity or otherwise of the marriage between the parties. It suffices that the contested properties were amassed at the instance and behest of applicant alone. In that way applicant has established a clear right which is cardinal in the requirements for an interdict.

[44] In the premises I order as follows:

1. The rule *nisi* granted on 8th December 2011 is hereby confirmed.

2. Respondent is ordered to pay costs of suit.

M. DLAMINI
JUDGE

For Applicant : **Mr. M. Sithole**
For Respondent : **Mr. M. Dlamini**