# IN THE HIGH COURT OF SWAZILAND

## JUDGMENT

Civil Case No.1766/2014

In the matter between:

| | |
|---|---|
| **IVEANAH JOHNSTON (borne Jute)** | **Applicant** |
| **vs** | |
| **MARLIN CHRISTOPHER JOHNSTON** | **1st Respondent** |
| **MAGAGULA HLOPHE ATTORNEYS** | **2nd Respondent** |

**Neutral citation:** *Iveanah Johnston vs Marlin Christopher Johnston & Another (1766/2014) [2015] [SZHC 46] (20th March 2015)*

**Coram:** **MAPHALALA PJ**

**Heard:** 23rd January 2015

**Delivered:** 20th March 2015

**For Applicant:** Mrs. J. Currie
(of Currie Boxshall-Smith Associates)

**For 1st Respondent:** Mr. L. Mamba
(of L.R. Mamba and Associates)

Summary: *(i)* *1st Respondent has filed a Notice to anticipate a* ***rule nisi*** *stating that he was not served with the Application by the Applicant.*

*(ii)* *The Applicant contends that it served the 1st Respondent by fax.*

*(iii)* *Then court after hearing the arguments of the parties to and fro has come to the considered view that service through fax is not an authorised method of service in terms of the Rules of this court. Therefore, for this reason the* ***rule nisi*** *issued ought to be discharged forthwith.*

**No legal authorities cited.**

**The Application on Notice to anticipate**

[1] Before court for decision is a Notice to anticipate in terms of the Rules of this Court filed with the Registrar on the 20th January, 2015.

[2] The 1st Respondent has filed this notice with an Opposing Affidavit outlining a number of topics including the **anticipation order** in paragraphs 3, 4, 5, 6 & 7 of the Opposing Affidavit, that “no prospects of success on appeal” in paragraph 10; in paragraph 11, 11.1, 11.2 and 11.3 dealt with the topic that “Applicant abused process”. Paragraph 12 dealt with the topic that **Applicant misrepresented the Order of Court.** In

paragraphs "Ad1" to "Ad11" dealt with the Applicant's Founding Affidavit and the **rule nisi** under attack.

[3] The attorneys of the parties appeared before court where Mr. L. Mamba appeared for the 1st Respondent and the Applicant was represented by Mrs. Currie. The attorneys filed Heads of Arguments and advanced their arguments on the 23rd January 2015 where I reserved by judgment on the issue in dispute to a further date. Follows is the judgment of the court.

**The background**

[4] The material facts of the matter as gleaned from the Heads of Arguments of Mr. L. Mamba for the 1st Respondent are as follows:

> **"1. On the 29th October, 2014 the Applicant procured an *ex parte* order in terms of which the 2nd Respondent was interdicted from making any payments or releasing money held by them on behalf of the 1st Respondent pending finalization of this Application.**
>
> **2. In terms of order No.3.2 the Respondents are called upon to show cause why this amount should not be paid into the account of the Applicant's attorney on finalization of this Application.**
>
> **3. It is clear that the main purpose of the Application is a final order for the payment of the money as prayed in order 3.2 and that the**

**interim order was merely intended to preserve the funds pending the final order.**

**4.** **The background of the matter as gleaned from the papers serving before the Court is following:**

**4.1** **The parties were married in community of property;**

**4.2** **The marriage encountered some problems and the 1st Respondent filed for divorce before this Honourable Court in 2006;**

**4.3** **These proceedings were withdrawn by the 1st Respondent who then changed his domicile to Gauteng, South Africa where he instituted the proceedings in the North Gauteng High Court in 2007 under case no.47672/07;**

**4.4** **Meanwhile, during that same year the Applicant under case no.1802/06 in the above Honourable Court on the 16th March 2007 procured an order in the absence of the 1st Respondent for, *inter alia*, payment of maintenance in the sum of E12 000.00 per month. The order is annexed marked "IJ2";**

**4.5** **The divorce proceedings were finalized and an order issued for a final decree on the 1st March, 2011. In terms of that order, an Agreement of Settlement, "MJ3", was made an Order of Court;**

**4.6** **According to the Settlement Agreement Alan Jordaan was appointed liquidator of the joint estate;**

**4.7** **In terms of the settlement, the parties abandoned "*all*** claims ***regarding maintenance against each other in toto*** **and they agreed that "*neither of them shall have any further***

***claims against the other of whatever nature whatsoever"*** **(clause 4);**

**4.8 The liquidator carried out his duties and on the 25th August, 2014 issued a report. They report is annexed to the 1st Respondent's papers marked "MJ3";**

**4.9 There is no record in terms of "MJ3" of Mrs. Johnston claiming arrear maintenance in terms of the 2007 order nor of her objection to the liquidator's report on the basis of arrears not being provided for in the distribution."**

## The 1st Respondent's arguments

[5] The 1st Respondent has filed comprehensive Heads of Arguments of Mr. L. Mamba prefacing the 1st Respondent's contention by raising two points **in limine.** First, arises that of non-disclosure in the **ex parte** Application and the second arises from there being a dispute of fact and the last being that Applicant attempt to cure the deficiencies in the Founding Affidavit by the introduction of new material in its reply.

[6] I must say that the gist of the 1st Respondent opposition is that 1st Respondent was not served with the Application even when the court ordered that all the parties be served in this Application.

[7] It is contended for the 1st Respondent that when launching the Application **ex parte** and obtaining a **rule nisi** with interim effect, the Applicant made the following material non-disclosures:

> **"6.3.1 That the order that she had procured on the 16th March, 2007 had been to the effect that the maintenance may be paid from the company Stiltek (Pty) Limited.**
>
> **6.3.2 That she had in fact been authorized to administer the joint estate property.**
>
> **6.3.3 That she in fact had utilized the income from the said company as maintenance for herself.**
>
> **6.3.4 That she in fact never claimed that the said maintenance, was due to her in the last four years.**
>
> **6.3.5 That in terms of the Agreement of Settlement, all claims for maintenance *inte se* the parties had been abandoned.**
>
> **6.3.6 That the liquidator had issued a report in respect of which no objection was raised by the Applicant.**

[8] It is contended for the 1st Respondent that the Applicant was required to place all material facts before the court, which "might have influenced the decision of the court" and this is so because the Applicant launched these proceedings without affording the Respondents an opportunity to place its version before court.

[9] That, cumulatively, all the facts mentioned above demonstrate that there would not one but numerous material facts that were not be before this court when the order was granted **ex parte.**

**The Applicant's arguments**

[10] The attorney for the Applicant advanced arguments in opposition of the above claims of the 1st Respondent that service was effected on the 1st Respondent. This is about the essence of the arguments of the Applicant regarding the arguments of the 1st Respondent advanced above. That the Notice to anticipate the Rule be dismissed with costs.

**The court's analysis and conclusions thereon**

[11] Having considered the above arguments of the attorneys of the parties in this regard and I am inclined to agree with arguments of the 1st Respondent. I say so for the main reason that there is no doubt that there was no service of the Application and that the Applicant deliberately contrived to have the matter heard **ex parte**. The Applicant states that the Application was sent by telefax. I agree **in toto** with the arguments of the 1st Respondent that there are three problems with this version:

**11.1 There is no reason why the Applicant would fax the bulky Application when the 1st Respondent's attorney office was a few hundred metres from her attorney's office;**

**11.2 Secondly, there is no evidence of the fax having been sent;**

**11.3 Thirdly, service by fax is not an authorized method of service in terms of the Rules of this court.**

[12] In the present case a party who had an interest in the matter was ignored and not served as if he did not exist. This was a gross violation of the principles of **audi alteram rule** and by all standards of justice and equity such should not be tolerated by the courts.

[13] I must also mention that there is another disturbing aspect of the matter in the present Application that on the 17th December 2014, the Applicant filed the present Application upon a Certificate of Urgency for an order interdicting the 2nd Respondent from paying out monies to the 1st Respondent pending appeal.

[14] The Applicant essentially sought the same relief under the present case as she had sought under case No.1525/14 i.e. an interdict. In this regard I agree **in toto** which the argument of the 1st Respondent that Applicant

strategically brought the case under a different case number and sought to have a second bite of the cherry as it were. The present Application being interlocutory in nature; should have been brought under case No.1528/14 and not under a new case No.1766/14.

[16] Furthermore, I am in agreement with Mr. Mamba for the 2nd Respondent that Applicant was seeking to enforce a money judgment (**ad pecunium solvendum).** There is no explanation why a writ cannot be issued.

[17] In the result, for the aforegoing reasons Applicant would not be entitled to an interdict whether interim or final. The **rule nisi** is accordingly dismissed with costs on the ordinary scale in exercise of my discretion.

**STANLEY B. MAPHALALA**

**PRINCIPAL JUDGE**