IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1451/2007

In the matter between:

TSABILE MAMBA **Applicant**

And

BHADALA MAMBA **Respondent**

Neutral Citation: **Tsabile Mamba vs Bhadala Mamba 1451/2007) [2016] SZHC 51 (14th March 2016)**

Coram: **M. Dlamini J.**

Heard: **19th March 2015**

Delivered: **14th March 2016**

A right correlates to an obligation.

Summary: Applicant seeks for a cost order emanating from divorce proceedings. The court was also called upon to decide who should bear the costs for the minor children's visits to Swaziland.

Background

[1] The parties in the main action appeared as plaintiff (applicant) and defendant (respondent) for a decree of divorce and forfeiture of the matrimonial assets. This action turned to be acrimonious from its first day of hearing. The plaintiff from the onset prayed for an order in terms of Rule 43 (1) (a) and (b). After much deliberation, the court pronounced its ruling. It was in favour of the applicant. Applicant was granted maintenance *pendete lite* and a contribution towards costs of divorce action.

[2] It turned out that applicant's Counsel presented a bill running over E200,000.00 as contribution towards costs for the divorce action. Respondent's Counsel moved an application to have it set aside or debated by court. It must be borne in mind that the applicant is a resident of the United States of America, although she traces her birthrights in Swaziland. Two minor children were born from the civil marriage that was sought to be dissolved.

[3] Upon hearing the parties on the bill, the court ordered that it be referred to the Fees Committee of the Law Society for debatement. Surprisingly, on the return date, both Counsel reported to the court that the Chair to the Fees Committee, declined to comply with the order citing that the Committee was not privy to the litigation processes undergone by the parties. The court was shocked at this turn of events especially coming from a senior Counsel of the Chair's calibre. The court ordered that the Chair appear in

court so as to clarify the import of the order. It appears that Counsel did resolve the matter amongst themselves as an order for contribution of E82, 831 was entered as an order for contribution of costs towards the action proceedings in favour of applicant. At any rate, both parties then instructed senior counsel on the matter.

[4] The trial of the main action commenced. It became apparent when applicant gave evidence that both parties desired an end to their matrimonial relationship. A decree of divorce was entered by consent without further ado. What remained was the question of forfeiture of matrimonial assets.

[5] In the course of the trial on the issue of forfeiture of matrimonial consequences, the parties decided to enter into a deeds settlement. It was by consent of both parties made an order of court on the 26th November 2014. Unfortunately that was not the end of the matter. It was, unbeknown to everyone, the beginning of woes which has haunted all concerned up this far.

Claim for costs

[6] On 30th January 2015 the applicant moved the present application. She contends as follows:

> *"10. The Respondent has chosen not to comply and/or respect the Curt Order."*
>
> *11. By means of a letter addressed and delivered to the Respondent's attorneys, the Respondent was reminded to comply with the Court Order before the 30th December 2014, since the 30 days stipulated by the Court*

Order would have lapsed four (4) days before the deadline set in the reminder.

12. *The Respondent sought to impose his own time lines contrary to that which were ordered by the Honourable Court. In his attorneys' letter dated 17th December 2014 annexed hereto marked "TM3", the Respondent requested sixty (60) days extension for him to comply with the Court Order, contending that:*

    12.1 *He had an operation on his eye on the 03rd December 2014.*
    12.2 *He needs to hold a meeting with the shareholders of the company that owns the house in Beverly Hills, since the shareholders are based in South Africa and were returning during the festive holidays.*
    12.3 *That the bank needs six months in order to transfer half of the permanent shares into the Applicant's account."*

13. *By letter dated 19th December 2014 annexed hereto marked "TM4", my attorneys wrote to the Respondent's attorneys and highlighted the following discrepancies in his explanations:*

    13.1 *He must have known by the 26th November 2014, when he consented to the Court Order that he was due for an operation and should have made arrangements for compliance with the Orders of this Honourable Court forthwith. The operation was on the 3rd December 2014 yet the Court Order was made on 26th November 2014 in his presence, so the Respondent had ample time to make arrangements for compliance.*
    13.2 *Furthermore, my attorneys made an enquiry at Swaziland Building Society regarding transfer of permanent shares and they were informed that the process takes less than two days. They were further informed that if the transfer is stipulated by a Court Order it takes twenty four hours and there is a penalty of 0.01% that is incurred by the shareholder.*

14. *It is noteworthy that no issue was raised by the Respondent regarding the Court order to pay me the sum of E300,000-00 (Three Hundred Thousand Emalangeni) but I was generous enough to extend compliance therewith to 15th January 2015.*

15. *As will be shown below, I submit that the (60) sixty days the Respondent sought to extend compliance by was not only unreasonable but was part of his premeditated and/or willful contemptuous resolution."*

[7] She also revealed:

> *"16. The Respondent sent me an email on the 23rd December 2014 a copy of which is marked "TM5",*
>
> *17. In the email, he indicates, among other things, that:*
>
> *17.1 He wants to drag the matter for twenty (20) years which he does not mind because it has taken eight years anyway.*
>
> *17.2 The hearing itself will take not less than two (2) months during which time I will not be paid as I will be stuck in Court in Swaziland and not working in the United States of America (USA).*
>
> *18. Indeed, it is true that I cannot afford to take time away from work in the USA and travel back to Swaziland because I will be deprived of income that sustains me and my children.*
>
> *19. True to his contemptuous resolution, the date which the Respondent had been indulged to comply by (15 January 2015) came and passed."*

[8] Applicant avers that loan applications at the banks take at most a week. The applicant then concluded by a deposition to the effect that respondent is dilatory.

[9] The prayers in applicant's notice of motion read:

> *"3. That a rule nisi shall hereby issue calling upon the Respondent to show cause on 06th February 2015 before the High Court of Swaziland or on such extended return date as the court may determine:-*
>
> *3.1 why the Respondent should not be declared to be in contempt of the said order of court;*
>
> *3.2 why the Respondent should not be sentenced to such a term of imprisonment as the court may deem appropriate;*
>
> *3.3 why the Respondent should not pay the costs of these proceedings on a scale applicable to attorney and client."*

[10] During submissions, the applicant insisted on costs of suit for the reason that by the hearing date, respondent had complied. Applicant observed that he had done so following the application to court.

[11] The respondent deprecated as follows:

> *"6. Following the grant of the order by the court I immediately went to the Swaziland Building Society to advise them of the court order. this was mainly because the property in question although owned by a company LMS Services, was bonded at the Swaziland Building Society. Again I sought to obtain a loan at the Society for in respect to the E300,000-00, I was ordered to transfer to the applicant. And also since I was also ordered to transfer half of permanent shares (savings) I held with the society.*
>
> *7. May I hasten to add that I had a long problem with my eye which needed urgent medical attention. In the circumstances on the 3rd of December 2014, I then heard to travel to the Republic of South Africa for an eye operation. I was then indisposed up to the 19th December 2014. See annexure to "TM3".*
>
> *8. As a result to my condition I then requested my attorneys to request an extension of time upon which I was to comply with the court order. See annexure to "TM3".*
>
> *9. The response to my attorneys request from the applicant's attorneys was shocking. They articulated in paragraph 4 of their reply that "Whilst we empathise on his medical condition he must have known by the 26th November when he consented to the order that he was due for an operation and should have arrangement of compliance with the order of this Honourable Court forthwith" (See annexure "TM4".)*
>
> *10. I was amazed by the response from the applicant's attorneys in light of my condition. Be that as it may, the applicant's attorneys did grant me the extension to January the 15th 2015.*
>
> *13. I wish to reiterate that I have not acted in a contemptuous manner towards the above honouable court. As highlighted above, I have done*

everything within my power to comply with the consent court order. May I add that the consent order was obtained in a bit of a haste and I have had no prior knowledge of the procedures in relation to the bank on my loan application as well as on the issue of the transfer of shares as per annexure "TM6B", if I had such knowledge, I would have in the circumstances brought it to the court's attention prior to the consent order being entered into."

[12] On the issue of the email directed to applicant, he deposed:

> *"15. I wish to state that applicant's attorneys have selective in bringing the private communication between myself and the applicant, I am advised that the applicant has not put the court in here confidence by so doing, however this is just meant to tarnish my image before the Honourable Court. I respect the applicant and because of the nature of this application I ask that I do not divulge earlier communication between myself and the applicant. Worth noting is that from the onset of email, I stated that "I have been pondering on the message you sent me yesterday." The applicant has been harassing me and I have respectfully and quietly avoided any confrontation with her, and this email was written in a fit of anger and the court should not look at it in isolation of the circumstances at the time."*

[13] He also pointed out:

> *"16. To show that I have always wanted to comply with the court order I have now transferred to the applicant the sum of E300,000-00 as per the court order, further to that I have paid to her half the shares from the Swaziland Building Society and my attorneys are working with the applicant's attorneys in the transfer of the property. And I refer to the confirmatory affidavit of Miss Gabisile Maseko. Annexed hereto are proofs of payments marked "A and B" respectively."*

<u>Determination</u>

[14] Even though the contempt charge against the respondent was not pressed on at the hearing of this application, it is necessary that I interrogate whether respondent was contemptuous. The reason is for an order of costs to be

mulcted against the respondent, it must be shown that he was at fault as the principle of law on costs is that costs follow the event. **Lord de Villiers JP**[1] once held:

> *"Questions of costs are always important and sometimes difficult and complex to determine, and in leaving the magistrate a discretion the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties. And if he does this and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion."*

"Weighing the various issues ..., the conduct of parties"[2]

[15] The deed reads:

> *"6.1 That the house described as Lot No. 1396, situate in Berverly Hills, Mbabane be transferred to me by the Respondent within (30) thirty calendar days;*
>
> *6.2 That the Respondent shall pay half of the savings (permanent shares) at Building Society to my account within (30) thirty calendar days;*
>
> *6.3 The Respondent shall pay a sum of E300,000-00 into the my account within (30) thirty calendar days;*
>
> *6.4 I shall retain custody of the children;*
>
> *6.5 The Respondent shall contribute a sum of E8,000-00 (Eight Thousand Emalangeni) per month as maintenance, which would increase annually in line with the consumer price index."*

[16] From the onset, in all fairness, the time frame in the deed of settlement are unreasonably short. I must state that when in fact the parties came with the

[1] 1945 AD 513at page - Fripp v Gibbon and Co. 1913 AD 354 at 357
[2] See *n*[1]

deed to my chambers, this factor did cross my mind, but for the reason that the respondent was a senior banking official, working for the Central Bank, an institution with supervisory powers over all banks in the Kingdom, and further, that he was represented by Senior Counsel, I held my horses on questioning the time frame on the deed. Little did I anticipate that the matter would come back haunting the corridors of this court.

[17] The applicant has attached two copies of respondent's medical reports indicating that between the period 1st December 2014 to 12th December 2014 the applicant was attending to his eye operation. This period was extended again from 15th December 2014 to 19th December 2014. I guess the applicant received the two copies from respondent as justification for not complying with the court order of 24th November 2014. I note that applicant deposes that respondent ought to have known about the eye operation before signing the deed.

[18] However, applicant does not state how respondent or anyone for that matter, would tell when a misfortune such as the illness which befell respondent, would be in a position to know prior. That as it may, what is of material *in casu*, is that applicant does not present any evidence controverting that respondent was admitted away from Swaziland during this period. For that reason, I accept that respondent was prevented from complying with the court order in December by circumstances beyond his control. (*viz. majo*r)

[19] Now this leads me to the month of January. In other words, did respondent upon his return from his eye operation set on his laurels as it is often so put in our legal parlance?

[20] Again applicant in her founding affidavit attached a correspondence whose addressor was the Swaziland Building Society. It was dated 13th January 2015 which confirmed that the respondent had already applied for a loan of E374,800-00. Another letter attached by applicant in her founding affidavit originated from Swaziland Building Society is dated 14th January 2015. It reads:

> *"Further to your application to redeem 50% of your Permanent Shares, we advised that Society requires six months notice."*

[21] These two documents at the hands of applicant show on a preponderance of probabilities that the respondent did take the necessary steps to comply with the order. I bear in mind that the applicant contended that the two correspondences are silent on the dates of when respondent had made the loan application and further challenge respondent's step of applying for redeeming the shares. However, whether respondent applied after thirty days as per the court order, in the light of the finding that respondent was prevented by circumstances beyond his control in December to comply, nothing further can be said. What is of importance is that the two correspondences authored by the bank show that respondent did not fold his arms upon returning from the eye operation. They further show that at all material times, respondent kept applicant's counsel fully briefed on his circumstances and on how far he was in terms of complying with the court order.

[22] What fortifies respondent's defence further is that by the time he deposed to the answering affidavit, he had fully complied with the order pertaining to the shares and the payment of E300,000-00. He was still working with applicant's attorneys in transferring the property into applicant's name.

[23] In the totality of the above, I do not find that there was willfulness not to comply on the part of the respondent.

Visitation costs

[24] The applicant was awarded custody of the two minor children. However, parties applied that the court decides on who should foot the bill of the two minor children who, according to the respondent, are not to lose their footstool in the country of their birth.

[25] The principle of our law that every parent has a right to reasonable access to his minor children is without doubt. This right of access entails either respondent visiting the children in the United States of America or the children coming down to Swaziland. It was, however emphasized on behalf of respondent that the children were in the United States of America by virtue of custody having been granted to the applicant. The applicant herself went to the United States of America as a spouse of respondent who had been recommended for work with the World Bank. Upon reaching the United States of America, applicant decided to apply for residence. At all material times, respondent never intended to acquire permanent residence with United States of America. He always maintained his roots in Swaziland. It is on this line therefore that respondent wishes that his children should not lose their roots in Swaziland.

[26] Nothing was suggested by Counsel on how to decide this matter. The matter was left entirely in the hands of this court. It is my considered view that the respondent, who enjoys the right of access over the children should find the means to fly the children home whenever he may afford to, but on

school vacation. A right correlates to an obligation. The obligation is to foot the bill for a return trip.

[27] In the totality of the above, I enter as follows:

1. Each party is to pay his/her own costs;
2. Respondent's right to reasonable access, that is, costs of bringing children to the country and returning them to the United States of America are to be borne by him.

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M. DLAMINI
JUDGE

For Applicant : M. Khumalo of Magagula & Hlophe Attorneys

For Respondent : M. Dlamini of Robinson Bertram