



**IN THE HIGH COURT OF SWAZILAND**

Held at Mbabane

Case No.: 607/2013

In the matter between

**PRECIOUS PHYLCIA LATIFF BORN AUGUSTA**

**Plaintiff**

And

**THE MINISTRY OF HOME AFFAIRS**

**1<sup>st</sup> Respondent**

**THE ATTORNEY GENERAL**

**2<sup>nd</sup> Respondent**

**FAIZEL M. LATIFF**

**3<sup>rd</sup> Respondent**

**In Re:**

**FAIZEL M. LATIFF**

**Plaintiff**

And

**PRECIOUS PHYLCIA LATIFF BORN AUGUSTA**

**Defendant**

**Neutral Citation:**

*Precious Phylcia Latiff Vs The Ministry of Home Affairs  
and 2 Others (607/2013) [2017] SZHC 107 (08<sup>th</sup> June  
2017)*

**Coram:**

Hlophe J.

**For the Applicant**

Mr Motsa

**For the Respondent:** Mr M.Ndlovu

**Date Delivered:** 8<sup>th</sup> June 2017

### Summary

*Civil Procedure –Matrimonial Proceedings instituted by way of summons – After pleadings had been closed and with a specific position established and maintained by the current applicant in terms thereof; the latter institutes application proceedings which are at complete variance with the position set out in terms of her plea in the main proceedings – Step taken by Applicant amounts to an amendment of the initial proceedings without regard to Rule 28 of the Rules of this Court which governs amendments – Applicant contends that the new application is realistically the raising of a point of Law –Respondent contends the application amounts to an irregular step and files a Rule 30 objection challenging the said application– Whether applicant entitled to the reliefs it seeks –Court of the view application amounts to an irregular step – Application dismissed with costs .*

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## JUDGMENT

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[1] Complaining of adultery allegedly committed by the Respondent, to whom he was married in terms of what was described as Sunni Islamic Law, the applicant instituted action proceedings against the Respondent seeking inter alia an order dissolving their said marriage, awarding custody of the minor child to her, claiming a contribution by the Respondent towards the

maintenance of the minor child, forfeiture of the proprietary rights arising from the marriage as well as costs of suit.

[2] From the papers initially filed of record it is clear that there was no dispute that whereas the parties were married to each other in terms of what they called Sunni Islamic Law, the defendant (current applicant) had committed adultery with someone else. The Defendant (Applicant) had sought to justify her said conduct in her plea by blaming the Plaintiff (current respondent) of having left her with no choice owing to the conduct he had himself exhibited towards her leading to the adultery complained of.

[3] This position was maintained up to the closure of the pleadings in the action proceedings, where after the applicant, now represented by new or different Attorneys after the initial ones had withdrawn, instituted the current application proceedings in terms of which she sought the following reliefs:

*(a) Granting Applicant (Defendant in the main action) leave to raise a question of law as to whether marriages according to Islamic Law are valid and legally recognized marriages in Swaziland.*

- (b) *Declaring that there is/was no valid marriage between the Applicant and the 3<sup>rd</sup> Respondent in so far as Islamic Law is not part of the Laws of Swaziland for the solemnization of valid marriages within Swaziland.*
- (c) *In the event that the above Honourable Court answers the question in prayer (a) above in the negative; that the Plaintiff's action be accordingly dismissed with costs.*
- (d) *Accordingly that the 1<sup>st</sup> Respondent be directed to forthwith expunge from its Birth's Marriages and Deaths register the certificate of the purported marriage between the Applicant and 3<sup>rd</sup> Respondent.*

[4] The application is founded on the affidavit of the applicant. She clarifies in the said affidavit that she is opposed to the grant of the divorce sought because according to her, she was never married to the Respondent lawfully or legally. This she says is because there is nothing like an Islamic Law marriage in Swaziland. She thus seeks to have this question determined in terms of her application because it is allegedly a point of law. There was a need, she claimed further, to try and curtail the divorce proceedings and

thereby save the court's time. I note however that in her plea in the action proceedings, the Respondent indicated unequivocally that she was not opposed to the divorce being granted; just as she did not dispute the validity of her marriage to the current Respondent.

[5] It is however worthy of note that there was annexed to the action proceedings, which have been referred to as the main matter in the applicant's papers, copies of two certificates one being a proforma bearing the words "*Marriage Certificate In accordance with Sunni Islamic Law.*" This certificate has its entries made by hand. These entries comprise the usual particulars of a marriage certificate. The other certificate is in the usual certificate form and bears the heading which reads: "*Certified Copy of entries In The Register of Marriages (Swazi Law and Custom or any other Law)*"

It is stated just below the heading that this certificate is "In terms of Section 28(2) of the Births, Marriages and Deaths Registration Act No 5 of 1983.

[6] The Respondent did not file an answering affidavit but simply filed a Notice in terms of Rule 30 which is in law an objection on the basis that the step

objected to was an irregular one. The Respondent stated therein that the applicant's pleadings were now at variance with each other and were mutually destructive. In this sense there was compared both the plea and the application and its founding affidavit which were clearly at variance with each other, with the plea acknowledging the existence of the marriage and that it was not opposed to the divorce sought on the one hand, while the affidavit denied the existence of such a marriage and sought to dispute the divorce sought. It was contended this disparity had rendered the applicant's pleadings excipiable.

- [7] It was further stated on the said Rule 30 Notice that the application and the reliefs sought in terms of it amounted to using a wrong, procedure to seek to amend the applicant's initial pleadings in the action proceedings, which were under the same case number as these ones. It was said this amounted to an amendment of its previous pleadings because the application sought to put a different version to that espoused in the plea which in effect amounted to a correction of the initial position. The variance brought about by the application to the initial position has already been referred to above.

- [8] The thrust of the applicant's case as I understand it, is that they are entitled to institute the application they have because same was akin to filing a supplementary affidavit as was the case in **Voltex (PTY) LTD Vs The Chief Executive Officer of Swaziland Electricity Board and Others Case No. 384/04.**
- [9] It was argued further that this application amounted to a Point of Law. Such a point, it was argued could be raised at any point and that this was allegedly held to be the position in **NUR and Sam (PTY) LTD Vs Galp Swaziland LTD (13/2015) [2015] SZSC 40.**
- [10] The other point raised by the applicant is that even if the application amounted to an irregularity, there was no prejudice occasioned the Respondent as a result. The position, it was argued, was trite that any irregularity which does not occasion prejudice to the other side ought to be ignored. The cases of **Mangaliso Stanley Mahlalela Vs Sarian Thangithini Mahlalela and 3 Others [2014] SZHC 17** and that of **Swazi Trac (PTY) LTD Vs Bonginkhosi Magagula [2015] SZHC 11** were cited in support of this principle.

[11] It is my considered view that the procedure adopted by the applicant is very novelistic and unusual indeed. It is not founded on any of the Rules of Court. If realistically the applicant believed she was taking a point of law as she contends, assuming she was entitled to take such, there is no doubt in my mind she would not have taken that point by means of an application supported by an founding affidavit which had to set out certain pertinent facts. It would have been taken by means of a Notice To Raise a Point of Law which need not be supported by an affidavit. A point of law would not require facts to support if it was a genuine one. The application filed does not only seek an answer on whether a Sunni Islamic Marriage is a valid one in Swaziland than it covertly seeks the other specific orders set out in the Notice of Motion.

[12] There is an obvious confusion of the procedure applicable in application proceedings and that applicable in action proceedings. Even assuming that what was happening in terms of this application was supplementing the averments in the plea. It is trite that an affidavit is supplemented whereas a summons and its particulars of claim are amended. Rule 28 is very clear on



how one goes about amending the averments contained in a plea and it is very different from filing a supplementary affidavit. It is therefore clear that the principle extracted from the Voltex (PTY) LTD case cited above is being applied out of context by the applicant. Action proceedings cannot be supplemented but the summons or particulars are amended after complying fully with Rule 28 which governs the amendment of pleadings.

[13] Whereas it could be true that a point of law could be raised at any stage, there is no denying that there is a procedure involved in doing so. If it is in an application, such a point would be raised by means of a notice which does not require an affidavit to support it as any contrary procedure brings with it a need for appropriate facts to be placed before Court, thereby confirming that what is raised as a point of law is not one but is merely alleging a factual situation. In action proceedings a point of law is raised by means of a special plea. I have already indicated that what happened in the applicant's application herein was not the raising of a point of law. There is therefore no doubt in my mind that the principle extracted from the **NUR & Sam (PTY) LTD Vs Galp Swaziland [2015] SZSC 40** case is applied out of context as well.


[14] Much as a point of law can be raised at any stage of the proceedings so is an amendment to pleadings. That is it can be done or made at any stage of the proceedings before judgement according to rule 28 of the High Court Rules depending on whether or not it engenders prejudice to the otherside.

[15] It is at that point in my view that the court would have to determine whether or not there is any prejudice to be suffered by the other side. It seems to me to be difficult for a court to rule there is no prejudice to be suffered in a case where there has been no amendment applied for in court and in terms of the Rules of Court to enable it determine the position of the other side. Whereas I cannot fault the correctness of the principle enunciated in such cases as **Mangaliso Stanley Mahlalela Vs Sarian Thangithini Mahlalela and Three Others [2014] 217 SZSH** and **Swazi Trac (PTY) LTD Vs Bonginkhosi Magagula [2015] SZSH 11**, to the effect that an irregular step that causes no prejudice to the objecting party ought to be ignored, I do not agree that the principle is meant to cover situations where a wrong procedure has been applied for deliberately and in total disregard of the proper one. Ofcourse I agree that a rule of thumb may not be appropriate to pass but

emphasize it is a matter of the court having to exercise its discretion judiciously and correctly.

[16] In any event on the facts of this matter, it is difficult for me to agree that there is no prejudice being suffered by the Respondent in a case where an amendment is being sought with the result that a different case from that pleaded is brought about through a completely wrong procedure.

[17] For the foregoing reasons, I am convinced that the objection raised by the Respondent should be upheld with the result that the application by the applicant be and is hereby dismissed. Costs should in this case follow the event which means that they should be borne by the applicant.



**N. J. HLOPHE**  
**JUDGE – HIGH COURT**