



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

**CASE NO. 516/17**

**HELD AT MBABANE**

In the matter between:

**SIMO MTHETHWA**

**PLAINTIFF**

**And**

**MUMCY VILAKATI**

**DEFENDANT**

**Neutral Citation:** *Simo Mthethwa and Mumcy Vilakati [516/17] SZHC 187  
[2018] (16 August 2018)*

**Coram:** **M. LANGWENYA**

**Date Heard:** **6 June 2018**

**Date Handed Down:** **16 August 2018**

**Summary:**

*and wife  
marriage  
in  
ab initio  
was still  
after the plaintiff  
plaintiff  
the home they  
defendant  
the defendant  
ownership nor  
that the house is  
that this court  
subject of the  
the matter must be  
traditional structures and  
Court on appeal or review-  
judgment refused.*

*Civil Procedure-Application for summary judgment-  
plaintiff and defendant lived together as husband  
for a period of more than ten years before their  
was annulled by the Court-the marriage which was  
terms of Swazi law and custom was declared void  
because it was entered into while the defendant  
married to a certain Sithole by civil rites-  
and defendant's marriage was annulled the  
sought an order ejecting the defendant from  
shared previously as husband and wife-the  
entered an appearance to defend the action-  
argues that the plaintiff does not have sole  
possession of the house/home in question-  
jointly owned and possessed by both parties-  
has no jurisdiction over this matter as the  
dispute is on Swazi nation law –that  
adjudicated upon through the  
only come to the High  
Summary*

**JUDGMENT**

[1] On 6 April 2017, the plaintiff issued summons in terms of Rule 17 (1) of the High Court Rules against the defendant claiming *inter alia* the ejectment of

the defendant from the defendant's house at Mthethwa homestead and costs of suit.

[2] Upon being served with the summons, the defendant duly entered appearance to defend.

[3] In response to the notice of intention to defend, the plaintiff filed an application for summary judgment on 10 May 2017. The plaintiff alleged that the appearance to defend was filed by the defendant solely for the purposes of delaying the action as the defendant did not have a *bona fide* defence to the plaintiff's ejectment proceedings against the defendant.

[4] On 7 June 2017, the defendant filed an affidavit resisting summary judgment where she did not deny that:-

- i) The High Court nullified and declared *void ab initio* the marriage between the plaintiff and the defendant.
- ii) The home and or house which is the subject of the dispute is located on Swazi nation land.

[5] In opposing the application for summary judgment, the defendant contended that because the subject of the matter at hand is a home situated *esicintsini* on Swazi nation land; and that because the parties to the dispute are resident on Swazi nation land, the most suitable regime to resolve the dispute is

customary law as administered by the traditional structures. It is the argument of the defendant also that the High Court only has appellate and review jurisdiction on the matter. The defendant contends further that only the traditional structures have power to order her ejection. The defendant argues that the house from which she is being ejected was built jointly by herself and the plaintiff for that reason, the plaintiff does not have an unfettered right of possession and/or ownership of the said property.

### **Brief Factual Background**

[6] On 19 May 1998 and at Timbutini in the district of Manzini, the parties to the action purported to marry each other in terms of Swazi law and custom. At the time of the purported marriage, the plaintiff was unaware that the defendant had on 18 March 1995 contracted a lawful civil rites marriage in community of property with a certain Philemon Sithole and two children were born of the marriage. The civil rites marriage between the defendant and Philemon Sithole was dissolved on 1 November 2000.

[7] It is on the basis of the purported marriage between the plaintiff and the defendant that the two lived together at the plaintiff's parental homestead.

[8] In April 2012, the plaintiff instituted action proceedings against the defendant to annul the purported customary marriage between the parties. The order annulling the marriage was issued on 7 November 2016. It is the plaintiff's argument that on the basis of the order annulling the marriage between the

plaintiff and the defendant, the latter does not have a right in law to occupy the house situate at the plaintiff's parental home.

[9] The defendant argues conversely that the house she occupies was built by herself jointly with the plaintiff; that she has as much right to live in that house as the plaintiff does.

### **Summary Judgment: The Law**

[10] There is a plethora of case law dealing with the subject of summary judgment. In *Roscoe v Stewart*<sup>1</sup> it was held that the procedure for summary judgment was intended to eliminate bogus defences and defences which are obviously bad in law and have no substance or merit.

[11] In the case of *Shingadia v Shingadia*<sup>2</sup> summary judgment was described as:

**‘an extraordinary, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without trial’.**

[12] The *locus classicus* on the procedure for summary judgment is *Maharaj v Barclays National Bank Ltd*<sup>3</sup> where Corbett JA said the following:

**‘Accordingly, one of the ways in which a defendant may successfully oppose a claim of summary judgment is by**

---

<sup>1</sup> 1937 CPD 138

<sup>2</sup> 1966 (3) SA 24 (R)

<sup>3</sup> 1976 (1) SA 418 (AD) at 426 A

satisfying the court by affidavit that he has a *bona fide* defence to the claim. Where the defendant is based on facts, in the sense that material alleged by the plaintiff in his summons or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether/not there is a balance of probabilities in favour of one party or the other. All that a court enquires into is:-

- a) Whether the defendant has ‘fully disclosed the nature and grounds of his defence and the material facts upon which it is founded; and
- b) Whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law’

[13] Simply put, in the instant case, has the plaintiff shown to the satisfaction of the court that he has a clear case against the defendant which the latter cannot possibly answer? In my view, this question should be answered in the negative.

[14] It would appear from the facts of this case that the parties made ‘formal’ their living together when they purportedly sealed their marriage in terms of Swazi law and custom in May 1998. From May 1998 until the purported marriage was annulled in November 2016, the defendant has been living in the homestead/house as a wife of the plaintiff. The defendant avers that she

contributed to the construction of the house/homestead; and that she therefore co-owns the house with the plaintiff. This is not, in my view a long shot in the dark but a genuine and *bona fide* defence. It is also not a bald statement that the house in question is situated on Swazi nation land and as such is regulated by customary law which is the preserve of the traditional structures.

[15] I am of the view that the defendant has raised triable issues in this matter. It is reasonable to expect that parties who have been cohabiting for a period of more than ten years as husband and wife would pool together their resources and contribute for the development of their common household which in this case would include the construction of the house in which they both lived.

[16] In *Joob V Joob Investment (Pty) Ltd v Stocks Mavundla Zek Venture*<sup>4</sup> the Court gives a useful analysis of summary judgment applications and says the following:

**‘[T]he rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable or a sustainable defence of his or her day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts both of first instance and at the appellate level have during that time rightly**

---

<sup>4</sup> (2009) (5) SA (1) SCA

been entrusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA was keen to ensure first, an examination of whether there has been sufficient disclosures by a defendant of the nature and grounds of his defence and the facts upon which it is founded must be both bona fide and good in law.’ A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment...’

[17] In light of the above, I am of the view that the defendant has set out her defence with sufficient particularity and completeness in order to comply with the provisions of the Rules of this Court on summary judgment. The defendant has not made a bald denial of the plaintiff’s claim. She has explained that she co-owns and has joint possession of the house/home in question with the plaintiff because she also contributed in the construction of same. It is a triable issue that the matter should be dealt with by traditional structures since .the house in dispute is situate at esicintsini.

[18] In the instant case, I consider that the defendant has gone far enough to show that she has evidence which, if established at trial, will constitute a valid defence to the plaintiff’s claim. In all circumstances, I am satisfied that the defendant has raised a triable issue and should not be shut out at this stage.



## **Order**

[19] In the result, I make the following order:

- a) The application for summary judgment is refused.
- b) The defendant is granted leave to defend the action.
- c) The costs of the application including the costs of the opposed hearing are reserved for decision by the trial court.



---

**M. LANGWENYA J.**

For the Plaintiff: Miss S. Dlamini

For the Defendant: Mr. O. Nzima