**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Case No. 323/2012

In the matter between:

**John Barry Craven** **Plaintiff**

**And**

**Thuli Ruth Craven** **Defendant**

**Neutral citation:** *John Barry Craven vs Thuli Ruth Craven* (323/2012) *[2019] SZHC 120* (*08 July 2019)*

**Coram : T. L. Dlamini J**

For Plaintiff : Mr. K. Simelane

For Defendant : Mr Z. Jele

Heard : 4th July 2019

Delivered : 8th July 2019

***Summary:*** *Civil law – Attestation and authentication of affidavits – Plaintiff instituted divorce proceedings against the defendant – In its Plea, the defendant pleaded*

*that this court does not have the jurisdiction to hear the matter – It was submitted that the parties are domiciled in the United Kingdom and that their matrimonial home is at 44 Mandalay Court, London Road, Patcham Brighton.*

*The plaintiff denied that they are domiciled in the United Kingdom but pleaded that they are domiciled in the Kingdom of Eswatini – The leading of oral evidence on this issue became necessary - The defendant, as the party who raised the issue of lack of jurisdiction by this court, was the first to take the witness stand – During her cross-examination, the plaintiff's attorney sought to cross-examine her on the contents of her answering affidavit filed in interlocutory proceedings – The defendants attorney objected to the use of the affidavit – This then necessitated that arguments be heard on the objection.*

*For determination is whether or not the objection is supported by relevant laws – And whether it should be sustained or dismissed – Held that the answering affidavit is a document that cannot be accepted and relied upon in the courts of the Kingdom of Eswatini on account of its non-compliance with the provisions of The Authentication of Documents Act 20/1965 - Objection upheld.*

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## RULING ON OBJECTION RAISED

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[1] In April 2012, the plaintiff instituted divorce proceedings against the defendant. In June 2015, the plaintiff filed an interlocutory application under a certificate of urgency. He sought an interim order interdicting and restraining an estate agent from remitting to a company rentals collected in respect of a house that is jointly owned by the two parties. This was so because the estate agent, acting on the instruction of the defendant, stopped to deposit the rentals into a joint account of the parties but started to deposit them into a personal account of the defendant. The interim order was sought pending finalization of another action proceedings instituted by the Plaintiff.

[2] On account of the volume of the file, I ordered the attorneys of the parties, in May 2018, to hold a pretrial conference in order to streamline the issues for determination. The pretrial was duly held but the parties informed the court that there are issues that they do not agree upon and require oral evidence to be led. It was agreed with the court that the parties will give oral evidence on that aspect.

[3] The defendant, Thuli Ruth Craven, was the first to be led in evidence. During her cross-examination, the plaintiff's attorney sought to cross-examine her on evidence she gave in her answering affidavit to the interlocutory application filed in June 2015.

[4] The defendant's attorney objected to the use of the answering affidavit. The objection was premised on four grounds, *viz.*, (a) failure to meet the prerequisites of an affidavit; (b) integrity of the affidavit; (c) non-compliance with the provisions of The Authentication of Documents Act No.20 of 1965 and The Commissioners of Oaths Act No.23 of 1942; and (d) non-compliance with the required manner of executing affidavits in the country where the affidavit was signed and sworn to.

[5] The plaintiff opposed the objection raised and submitted that it is ill-founded. He premised his opposition on the argument that he is not seeking to introduce the affidavit but only questioning the defendant on her own document that she signed and filed before this court. It was also submitted

that the court relied on this affidavit in making the judgment that it issued in the interlocutory application.

[6] The first point of objection raised is that on the face of the affidavit, its integrity is questionable and does not seem to be authentic. For this reason, the court was urged not to place any reliance on it.

[7] To substantiate the above mentioned point of objection, the defendant argued that the sequence of the numbering of the pages of the affidavit is not consistent. The body of the affidavit ends at page 17 yet the signature page that follows is numbered page 16. It was also argued that the page that preceds page 17 is also page 16. The inference made therefore was that the signature page is not an integral part of the main body of the affidavit but was for another affidavit.

[8] The defendant further argued that under the United Kingdom law it is mandatory that each page of an affidavit must be initialed by the deponent and the signature page must follow immediately on from the text and not to be on a separate page. The affidavit to which objection has been raised was not initialed on its pages and the signature page stands alone and does not follow immediately on from the text. For this reason the defendant questioned the authenticity of the affidavit and urged the court not to allow it because its integrity is doubtful.

[9] I have carefully studied and compared the objected affidavit with the one that was filed by the defendant's former attorneys of record on the 10th June 2015. It is included in the Book of pleadings prepared and filed on 17 June 2015. My finding is that the affidavit is a true copy of the one that was filed by the defendant's former attorneys of record. The numbering of the paragraphs and the text is the same. The numbering of the pages is the same, with the signature page being numbered page 16 but coming after page 17. In my view and finding, this was a genuine error of numbering the pages.

[10] In matters where such mistakes occur, **Schreiner J.A.**, in the case of **Trans-African Insurance Co. Ltd v Maluleka 1956 (2) SA 273 at 278**, stated that "**…** *technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."* This *dictum* has been followed by our courts, the *locus classicus* being the judgment of the Court of Appeal in the matter of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors (23/2006) [2006] SZSC 11 (21 June 2006)**.

[11] The inconsistent numbering of the pages of the answering affidavit has not been shown by the defendant to be prejudicial to her case. As I have already stated, the inconsistency occurred when the answering affidavit was drafted. The text and content do not appear to have been altered, and have not been shown to have been altered. This ground of objection is accordingly

dismissed. It constitutes a mere technical objection that prevents the determination of the matter on its real merits.

[12] The other two grounds of objection, *viz.*, the failure to meet the requisites of an affidavit, and the non-compliance with The Authentication of Documents Act 20/1965 and The Commissioners of Oaths Act 23/1942, are entwined. They both speak to what is legally required of an affidavit in order for it to be accepted and relied upon in the courts of Eswatini.

[13] On the requisites of an affidavit, the defendant's attorney submitted that an affidavit must have consecutively numbered paragraphs and pages, and that each page of the affidavit is to be initialed by the deponent. This argument is correct and it finds support in the book by **Stephen Pete *et al***, titled **Civil Procedure: A Practical Guide, 3rd ed**, at page 159, where the authors state what I quote below:

> ***"The affidavit is divided into numbered paragraphs, each of which containing a separate averment (or allegation). Where, for some reason, it is more convenient to make more than one averment in a paragraph, the paragraph should be divided into numbered subparagraphs…***
>
> ***Each page of the affidavit, as well as any additions or alterations made to the affidavit, must be initialed by the deponent and by the commissioner of oaths."*** (own emphasis)

[14] The issues that were alleged to be tainting the authenticity of the affidavit became relevant again. It was argued that the affidavit doesn't have consecutive numbered pages because the signature page at the end is

numbered as page 16 yet it comes after page 17. It was further argued that page 16 is duplicated within the same affidavit as there is another page 16 which precedes page 17, and that the pages of the affidavit have not been initialed. Consequently, it was submitted that the affidavit does not meet the requisites of an affidavit and therefore cannot be accepted and relied upon in the courts.

[15] I wish to mention at the outset that I have already dismissed the objection made on the basis of the numbering of the pages. On the failure to initial each and every page of the affidavit, I take judicial notice of the fact that most attorneys of this court do file and rely on affidavits whose pages have not been initialed. An indulgence is therefore granted by this court to the defendant for her failure to initial each and every page of the answering affidavit.

[16] Another argument made was that the affidavit was signed and sworn to before a person who is not recognized under the laws of Eswatini as a commissioner of oaths. To support this contention, this court was referred to a judgment of **Her Ladyship M. Dlamini J**, in the case of **Pricewater House Coopers (Pty) Ltd & Another v Diamond Africa (3082/2010) [2013] SZHC 08 (28 February 2013)**.

[17] In the above case, the respondent opposed an application and raised two points of law , one of which was that the founding affidavit was

inadmissible because it was attested to by a person who is not a recognized commissioner of oaths in the Kingdom of Eswatini. In determining this point of law, **Her Ladyship M. Dlamini J**, correctly so in my view, first defined what an affidavit is, and who is entitled to attest to it as a commissioner of oaths.

[18] On what is an affidavit, Her Ladyship adopted the definition given by **De Villiers J.P**. in the case of **Gardwood Municipality v Rabie 1954 (2) S.A. 404 at 406**. This definition was approved and adopted by this court in the case of **New Mall (Pty) Ltd v Tricor International (Pty) Ltd (302/2012) [2012] SZHC 180 (24 August 2012)** where an affidavit was defined as:

> ***"a sworn statement in writing sworn to before someone who has authority to administer an oath."***

[19] On the definition, the court further highlighted as quoted below:

> ***"a solemn assurance of a fact known to a person who states it, and sworn to as his statement before some person in authority such as a Judge or a Magistrates or a justice of the peace, or a Commissioner of court or Commissioner of Oaths."***

[20] The authors **Stephen Pete *et al* (supra)** in their book define an affidavit as follows:

> ***"An affidavit is a statement made under affirmation or oath (also called a sworn statement), which is signed and affirmed, or sworn to, by the person making the statement (known as the deponent) before a commissioner of oaths."*** (p.158)

[21] From the above definitions, it clearly appears that an affidavit has to be sworn to before a commissioner of oaths. In the Kingdom of Eswatini, two pieces of legislation, *viz.*, **The Commissioners of Oaths Act 23/1942** and **The Justices of the Peace Act 63/1954**, set out who is entitled to attest to an affidavit as a Commissioner of Oaths.

[22] The Commissioners of Oaths Act lists categories of persons who are recognized as commissioners of oaths in the Kingdom of Eswatini. Their appointments are by virtue of certain offices that they occupy in the country. It is of significant importance that notice is taken of the fact that these offices are all within the Kingdom of Eswatini. These persons include, among others, a Justice of the Peace who is defined by the Justices of the Peace Act to be all Regional Secretaries and Cadets, the Commissioner of Police and the Deputy Commissioner of Police.

[23] The officer before whom the defendant's answering affidavit was signed and sworn to is not one of the listed officers in the two pieces of legislation. He is therefore not a recognized commissioner of oaths within the Kingdom of Eswatini. Consequently, the affidavit is rendered to be one that is not properly attested to. For that reason, it becomes inadmissible before the courts of Eswatini.

[24] The Authentication of Documents Act makes provision for instances where affidavits signed and sworn to before commissioners of oaths of foreign

countries are to be accepted for use before the courts of Eswatini. Section 10(1) for instance, permits the acceptance and use of affidavits signed and sworn to before a commissioner of oaths of Botswana, Lesotho, Republic of South Africa and Namibia. The section provides as quoted below:

> ***"10. (1) A document which is –***
>
> ***(a) ...***
> ***(b) an affidavit purporting to have been sworn before, and attested by a Commissioner of Oaths of –***
> ***(i) Swaziland outside Swaziland; or***
> ***(ii) Botswana, Lesotho, the Republic of South Africa or Namibia within such territories respectively;***
>
> ***shall, without further authentication, be accepted for use in a court in Swaziland unless it is proved not to have been signed or sworn by the person by whom it purports to have been signed or sworn."*** (own emphasis)

[25] The words I underlined imply that this affidavit would, under normal circumstances, require to be further authenticated before it can be accepted for use in the courts of Eswatini.

[26] The defendant's answering affidavit was not signed and sworn to before a commissioner of oaths of one of the four listed countries. *Ex facie* the signature page, it was signed and sworn to before a Solicitor named **Thomas Callaghan** in Edward Harte LLP, Brighton, East Sussex. This place is in the United Kingdom. It therefore doesn't qualify, under section 10 of the Authentication of Documents Act, to be accepted for use in the courts of Eswatini.

[27] A further reading of The Authentication of Documents Act leads to section 13 which makes provision, for the acceptance and use in the local courts, of documents that have been signed in the United Kingdom. Section 2 of the Act defines a document as quoted hereunder:

> ***"document" means a book, record, deed, power of attorney, affidavit, certificate, contract, plan, map, drawing, writing and any other method of conveying information in visible form;"***

[28] In terms of the above quoted legislation, a document signed in the United Kingdom or Commonwealth need to be authenticated by the certificate of a notary public, mayor, permanent head of a government department, the registrar or assistant registrar of a court of justice having unlimited jurisdiction, the high sheriff of such a country, or an officer designated, in such country, as an authority competent for the purposes of the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents made at the Hague dated 5th October 1961.

[29] Section 13 of The Authentication of Documents Act provides as quoted hereunder:

> ***"13. (1) A document signed in the United Kingdom or, without prejudice to section 12, in any other country or territory within the Commonwealth shall be sufficiently authenticated if authenticated by the certificate of –***
>
> ***(a) a notary public, if it bears his signature and seal of office, or***
> ***(b) the mayor or provost of a town, if it bears his signature and seal of office, or***
> ***(c) the permanent head of a government department, or***

***(d) the registrar or assistant registrar of a court of justice having unlimited jurisdiction, or***
***(e) the high sheriff of such a country, or***
***(f) an officer designated, in such a country or territory, as an authority competent for the purposes of the Convention, to issue a certificate (apostille):"*** (own emphasis)

[30] The defendant's answering affidavit has not been authenticated by the certificate of any of the above named officers. For that reason, it cannot be accepted and used in the courts of Eswatini.

[31] According to the **Black's Law Dictionary, 10th ed**, the term "authenticate" means "*1. To prove the genuineness of (a thing); to show (something) to be true or real; 2. To render authoritative or authentic…*"

[32] The argument made by the plaintiff's attorney is that the objected affidavit is a document that was written by the defendant herself in order for the court to rely on its contents. It was filed and is part of the pleadings, and was in fact relied upon by the court when making its judgment in the interlocutory application. It was further argued that she should not be allowed to benefit from this affidavit when it suites her and then object to its use when it doesn't suit her.

[33] Emphasis was made that the plaintiff wishes to cross examine the defendant on a document that she (defendant) personally wrote and furnished to the court as a version of her case. The definition of what is a document, submitted the plaintiff's attorney, is wide and that there appears to be no single common law definition. Reliance was placed on the book titled **Principles of Evidence, 3rd ed.** by **P.J. Schwikkard and S.E. Van Der**

**Merwe** and the case of **R v Daye [1908] 2 KB 333 at 340,** per **Darling J**, who stated that a document is "*any written thing capable of being evidence and it does not matter what it is written on.*"

[34] The definition, as expounded by the plaintiff's attorney in his arguments, is consistent with the definition given by section 2 of the Authentication of Documents Act. **See: paragraph [27] above**.

[35] Of fundamental importance is that in terms of section 13 of The Authentication of Documents Act, a documents, in its variety of forms, if signed in the United Kingdom, ***shall be sufficiently authenticated if authenticated by the certificate of a notary public,*** and the other specified officers.

[36] The plaintiff's attorney submitted that authenticating a document can be done in many ways. Generally, it means tendering evidence of authorship. He referred the court to the case of **Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa 1971 (3) SA 937 at 340** where **Human J** stated the following:

> ***"The law in relation to the proof of private documents is that the document must be identified by a witness who is either (i) the writer or signatory thereof, or (ii) the attesting witness, or (iii) the person in whose lawful custody the document is, or (iv) the person who found it in possession of the opposite party, or (v) a handwriting expert, unless the document is one which proves itself, that is to say unless it:***
> ***(1) is produced under a discovery order, or***
> ***(2) may be judicially noticed by the court, or***
> ***(3) is one which may be handed from the Bar, or***
> ***(4) is produced under a subpoena duces tecum, or***
> ***(5) is an affidavit in interlocutory proceedings, or***
> ***(6) is admitted by the opposite party."***

[37] In as much as the text quoted from the judgment by **Human J** speaks to the identification of a document by the writer of that document, this fact does not over-ride the statutory requirement of section 13 that a document signed in the United Kingdom ***"shall be sufficiently authenticated if authenticated by the certificate of a notary public"*** and the other specified officers.

[38] Certificate is defined in section 2 to mean "*a certificate in the form set out in the Second Schedule;*" When one looks at the second schedule of the Act, you find a specimen of the required form of certificate.

[39] There is no hesitation in my mind that the defendant's answering affidavit requires certification as specified in section 13 of The Authentication of Documents Act because it is a document that was signed in the United Kingdom.

[40] On interpreting and applying statutory provisions, the Malawi election case of **The State v The Electoral Commission, *Ex Parte*: Friday Anderson Jumbe & 3 Others, Judicial Review Cause Number 38 of 2014** is instructive and relevant in my view. The court was called upon to determine two issues. First was the question of whether or not the Malawi Electoral Commission was entitled under the law to conduct a physical audit of the election results before announcing them. This question was answered in the affirmative and the court held that the Commission was entitled under the law to conduct a physical audit of the election results before announcing them.

[41] The second question was whether the eight days' time limit for publishing election results can be extended by the Commission or the Court or Parliament. A determination of this question was important because **section 99** of the **Parliamentary and Presidential Elections Act** of Malawi stipulates as quoted below:

> ***"The Commission shall publish … the national result of an election within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination thereof …".***

[42] This question became relevant after there was an agreement between the Electoral Commission and political parties to do a physical audit of the election result before announcing them. Consequent to the agreement, more time was needed beyond the stipulated eight days' period. In deciding this question, **Justice Kenyatta Nyirenda J**, of the High Court of Malawi, quoted **Unyalo CJ** of the Supreme Court of Appeal in the case of **Royal International Insurance Holdings Ltd v Gemini Holdings and Another [1998] MLR 318** who stated as follows:

> ***"It is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, is that where the words of a statute are themselves plain and unambiguous, no more is necessary than to construe those words in their natural and ordinary sense. In such a case the intention of the legislature is best declared by the words themselves."***

[43] **Justice Kenyatta** underscored this principle, and I entirely agree with him, by stating what I quote below:

> ***"…it is the duty of the court to accept the purpose decided on by Parliament. This applies even though the court disagrees with Parliament. It even applies where the court considers the result unjust, provided that it is satisfied that Parliament really did intend that result."***

[44] The Judge goes on to quote **Lord Scarman** in the case of **Duport Steads Ltd v Sirs [1980] 1 WLR 142** who stated as follows:

> ***"…in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactment. In this field, Parliament makes and unmakes laws [and] the judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires… If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute."***

[45] For the above reasons, the court held that neither the commission nor the court has the power to extend the eight days' period. The commission was ordered to comply with the eight days' period. At the time when the order was issued, the period remaining for the commission to announce the results was less than 30 minutes.

[46] On the basis of the above expounded principles of interpretation of statutes, I am duty bound to give effect to the provisions of The Authentication of Documents Act, no matter how undesirable the outcome may be. Common sense and fairness require the court to allow and accept the affidavit to be used. I am however duty bound to give effect to the statute. The defendant's answering affidavit was signed in the United Kingdom. For that reason, it requires authentication by a notary public or the other officers specified in section 13.

[47] The objection is accordingly upheld.

T.L. DLAMINI J

JUDGE OF THE HIGH COURT