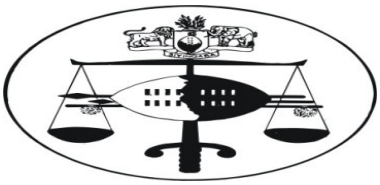


IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 1292/2019**

In the matter between:

SIBONGILE NXUMALO NEE DLAMINI **Applicant**

And

FAITH BAPHILE VILAKATI **1st Respondent**

EXECUTOR OF ESTATE OF LATE

HAMILTON SENZO NXUMALO **2nd Respondent**

HIS WORSHIP DUMISA MAZIBUKO N.O. **3rd Respondent**

REGISTRAR OF BIRTHS, MARRIAGES AND DEATH **4th Respondent**

MASTER OF THE HIGH COURT **5th Respondent**

PUBLIC SERVICE PENSION FUND **6th Respondent**

ATTORNEY GENERAL **7th Respondent**

MBEWENHLE NXUMALO **8th Respondent**

TENELE NXUMALO MAZIYA **9th Respondent**

FLAG NXUMALO **10th Respondent**

MLUNGELE NXUMALO **11th Respondent**

GCINA NXUMALO **12th Respondent**

VELEFINI NXUMALO **13th Respondent**

LINDENI NXUMALO **14th Respondent**

Neutral citation **:** ***Sibongile Nxumalo nee Dlamini v Faith Baphilile Viakati and 6 Others (1292/2019) [2020] SZHC 85 (8th May 2020)***

Coram **:** **M. Dlamini J**

Heard **:** **14th April, 2020**

Delivered **:** **8th May, 2020**

Review application **:** ***…where the presiding officer having all the material facts relating to both procedure and substantive failed to consider them in either whole or in part. It is also in cases where if the trier did consider them, he did so wrongly by reason that he either failed to apply his mind to the circumstances of the case serving before him or misconstrued the issues and facts serving before him. [13]***

Rescission **:** ***The principle of our law that once a court has passed its judgement or final orders, it becomes functus officio is subject to exceptions. One of the exception is that a court can still change its orders or judgement if for instance it had not risen. Here the court must point out the justiciable grounds for doing so [16] Our law recognizes a number of grounds justifying to a court, albeit risen, to vary or***

> ***rescind its judgment. The grounds are provided for in terms of the Rules or Orders of court as the case may be. They are also founded in common law. … in rescission applications, the information is usually not before court. The court's attention is not directed to the relevant and material fact or if before court, the court's attention was not drawn to it. So the perception is that had the court been informed or its attention drawn to the fact, the court would not have reached the conclusion it did and therefore passed the impugned judgement or final orders.[17]***

Summary: The applicant is contesting her decree of divorce ordered by the Magistrate Court by means of a review. She alleges the decree was issued without service of summons to her. The first and sixth respondents have ferociously opposed her application by raising a number of legal grounds.

The Parties

[1] The applicant is an adult female Liswati. She resides in Mangwaneni area, region of Manzini.

[2] The 1st respondent is an adult female and Liswati. She resides at Ludzeludze in the region of Manzini.

[3] The 2nd respondent is an adult male Liswati. He is the executor of the estate of late **Senzo Hamilton Nxumalo**.

[4] The 3rd, 4th, 5th and 7th respondents are all officials of government. The 3rd respondent is the Presiding officer whose decree of divorce is challenged. The 4th respondent is so cited as it expunged applicant's marriage certificate while 3rd respondent is in charge of administering deceased estates including that of **Hamilton Senzo Nxumalo** (deceased). The 7th respondent is the legal representative of the government officials cited herein.

[5] The 6th respondent is a parastatal body, duly registered in terms of the laws of this Kingdom. It collects and administer pension funds for civil servants.

[6] 8th to 14th respondents are all beneficiaries of the estate late **Hamilton Senzo Nxumalo.** They were co-joined to the proceedings as a result of 1st respondent raising non-joinder. The court granted applicant leave to join them with costs to the 1st respondent. They have however decided to await the court's decision on this matter as they adopted a neutral approach. I guess because the court was informed that the 4th and 6th respondents had by the time of this application already distributed all the assets of the deceased.

The applicant's case

[7] The applicant was married in terms of the civil rites marriage to the deceased, **Hamilton Senzo Nxumalo** on 22nd December, 1986. The marriage certificate reflects further that their marriage was without antenuptual contract. In her founding affidavit, she deposed that in 2009, she received summons presumably for divorce. She acquired *pro bono* Counsel who opposed the summons. Before the matter could see the light of the day in court, she averred:

> *"[M]y late husband's attorney of record withdrew the matter from court."*[1]

[8] She further asserted:

> *"20.*
>
> *The officers of the 4th Respondent showed me a decree of divorce that was granted by the 3rd Respondent on the 30th October 2012 and was granted at the Manzini Magistrate court under case number 2776/12.*
>
> *21.*
>
> *I was amazed because I was not served with the summons nor with the decree of divorce. In fact I was completely unaware of such proceedings and my late husband did not tell me of such during his lifetime."*[2]

[1] Paragraph 16 of page 10 of book of pleadings
[2] Page 1 paragraphs 20 and 21

[9] She also attested:

"29.

"There was serious miscarriage of justice in granting the decree of divorce, if in fact it was granted. The decision of 3rd Respondent is open to review by this Honourable Court. This is so because the decree of divorce was granted without my knowledge nor I was served with the summons. Furthermore the civil register of the court a quo do not show when the decree was granted.

30.

This is much against the principle of audi alteram partem. Should it had been brought to my knowledge that there were such proceedings I would have defended same as I did with those that were filed at the High Court which were eventually withdraw by my late husband."[3]

[10] She ended by praying:

"31.

I have now approached this Honourable Court to seek a review of the decree of divorce alleged to be granted by the court a quo on the 30th October 2012 herein annexed marked ***"CD"***

32.

[3] Page 13 paragraphs 29 & 30 of book of pleadings

It is my humble submission that the marriage between 1st Respondent and the deceased be declared a nullity and bigamous as since my marriage and my deceased husband subsisted until the time of the demise of my husband.

Wherefore I pray that this Honourable court grant me relied as set out in the notice of motion to which and [sic] affidavit is attached."

1st and 6th Respondents' answer

[11] In their answer, the respondents raised a number of legal points both procedural and substantive.

Preliminary

[12] I must mention that this court had issued orders calling upon the Registrar to file the record of proceedings in the *court a quo*. It turned out that the applicant's deposition that the record could not be located was correct. The matter was eventually set down at the instance of the 1st and 6th respondents who were adamant that the matter could be disposed of without the assistance of the record of proceedings.

Adjudication

Legal Principles

Review

[13] The first point raised on behalf of the respondents is that the applicant ought to have challenged her divorce decree by means of a rescission application and not a review. The general import of a review application is where the presiding officer having all the material facts relating to both procedure and substantive failed to consider them in either whole or in part. It is also in cases where if the trier did consider them, he did so wrongly by reason that he either failed to apply his mind to the circumstances of the case serving before him or misconstrued the issues and facts serving before him.

[14] **Hebsten and Van Winsen** summed the grounds for review as follows:

> *"9(a) Absence of jurisdiction on the part of the Court.*
>
> *(b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer.*
>
> *(c) Gross irregularity in the proceedings.*
>
> *(d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."*

[15] I must point out however, that the above are not the only grounds upon which a litigant may seek a review. The proposition that

grounds for review are in-exhaustive still stands. However, in as much as the grounds for review are endless, there still remains a clear line of demarcation between a review and a rescission application. The grounds are not inextricably intertwined.

Rescission

[16] The principle of our law that once a court has passed its judgement or final orders, it becomes *functus officio* is subject to exceptions. One of the exception is that a court can still change its orders or judgement if for instance it had not risen. Here the court must point out the justiciable grounds for doing so. In some instances there may be a new intervening factor justifying the court's change of mind.

[17] Our law recognizes a number of grounds justifying a court, *albeit* risen, to vary or rescind its judgment. The grounds are provided for in terms of the Rules or Orders of court as the case may be. They are also founded in common law. The general perception unlike in review where the information is before court but misconstrued or overlooked, in rescission applications, the information is usually not before court. If it is, the court's attention is not directed to the relevant and material fact. So the perception is that had the court been informed or its attention drawn to the fact, it would not have reached the conclusion it did and therefore passed the impugned judgement or final orders. In brief, the judgement must have been obtained in *justus error* for a rescission application.

[18] Also relevant to this discussion is that the error must be committed by the court and certainly not at the instance of the applicant. The rationale is that no litigant should benefit from his own wrong. For instance where a litigant fails to file a notice to defend after service of summons, and subsequently a default judgement is entered against it, it cannot later hope to have such judgement rescinded. A good cause must be shown for a rescission application to succeed.

Case at hand

[19] Is the procedure adopted by applicant correct herein? In setting out its ground for the review of the *court a quo's* final orders of the decree for divorce against her, the applicant deposed:

> *"20.*
>
> *The officers of the 4th Respondent showed me a decree of divorce that was granted by the 3rd Respondent on the 30th October 2012 and was granted at the Manzini Magistrate court under case number 2776/12.*
>
> *21.*
>
> *I was amazed because I was not served with the summons nor with the decree of divorce. In fact I was completely unaware of such proceedings and my late husband did not tell me of such during his lifetime."*[4]

[4] Paragraph 20 & 21 page 11

Common cause

[20] It is not in issue that the decree of divorce was obtained by default judgement as there was no Notice to Defend. The respondent filed an order obtained from the same court prior to the decree of divorce. This was leave to sue by edictal citation. The applicant has also asserted that in the year 2012, when the decree was obtained, she was residing out of the jurisdiction of this Kingdom, in the Republic of South Africa.

Dispute

[21] It is disputed by the respondent that the applicant was not served in as much as Counsel for responded did not file the newspaper clip of the edictal citation. From the above circumstances it is clear that the honourable Magistrate *a quo* was not aware that there was a dispute over service of summons. In fact it can be said that the Magistrate was of the view that the applicant had been served. It is difficult to state whether the magistrate found that the applicant had been served through edictal citation as the entire file at the court *a quo* could not be located.

[22] What is certain is that the applicant alleges that the decree of divorce was obtained through *justus error* as she was never served. This matter was therefore appropriate for rescission and not for review as demonstrated under sub-title “legal principles.”

Ad merits

[23] Even if for a second it could be said that this court has reached the wrong conclusion that the applicant ought to have applied for a rescission before Magistrate **Mazibuko** who decreed the divorce, the merits of the applicant's case are wanting. The applicant has deposed:

> *"17.*
>
> *Sometimes **around March 2019,** before my husband passed away I went to offices of the 4th Respondent to acquire an identity card for my child, and was informed by the officers that I could not take my child identity using the Nxumalo surname as I was divorced sometimes in 2012.*
>
> *18.*
>
> *The fact that I was divorced amazed me because as far as I remember the divorce proceedings that my husband instituted were withdrawn sometime in 2012.*
>
> *19.*
>
> *It later appeared from the record of 4th Respondent that my late husband married the 1st Respondent sometime in 2015, and the certificate indicate that my late husband had married for the first time.*
>
> *20.*

The officers of ***the 4th Respondent showed me a decree of divorce that was granted by the 3rd Respondent on the 30th October 2012 and was granted at the Manzini Magistrate court under case number 2776/12."***

[24] However, in her replying affidavit, the applicant deposed:

"12.2 I only knew at or around ***April 2018*** *when I went to the Births, Marriages and Deaths (BMD's) offices in order to enter my birth and marriage certificates into the new system. That is when I found out that about the marriage. The officers at BMD's advised me to report the matter to the Police Officers because I had the question on how the deceased had married the 1st Respondent at the same time being my husband."*[5]

[25] She also averred again in reply:

"24.1 The contents of this paragraph are in dispute 1st Respondent is put to proof thereof. ***I stated that on or about February 2019, I had a meeting with the deceased****, my brother and my son at the Home Affairs Officers concerning the acquiring if my son's identity document. I discovered that I could not assist my son in*

[5] Page 86 paragraph 12.2 of the book

acquiring the identity document using the Nxumalo surname because I had been divorced."[6]

[26] The averments at paragraph 12.2 are repeated later at para 39 as follows:

"39.

Ad paragraph 22.2

The contents therein are denied. 1st Respondent is put to strict proof thereof. I state that ***I only learnt that there is a marriage sometimes around April 2018.*** *I had went to the Registrar of Births, Marriages and Deaths (BMD's) to enter my birth and marriage certificate in to the new system."*[7]

[27] Now the question is which date the court should consider as the first time the applicant became aware of her divorce. This question is critical for the principle of our law is to the effect that a rescission application must be filed within reasonable time.

[28] **Eloff JP**[8] eloquently stated in this regard:

*"**It is in the interest of justice that there should be relative certainly and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue***

[6] Page 90 paragraph 24.1
[7] Page 95 paragraph 39
[8] **First National Bank of SA Ltd v Van Rensburg NO and Other 1994 (I) SA 677 at 681**

thereof to know that the last word has been spoken on the subject.

As was said in the Genticuro case, it the common law is sought to be invoked the application should be made within a reasonable time. ***A reasonable time has lapsed and there is no explanation for the delay****."*

[29] From the preceding paragraph reflecting applicant's deposition, it is clear that she stated that she first learnt of her divorce in March 2019. The court was told that the deceased died on 3rd March 2019. 1st respondent in her answer disputed that applicant only became aware in the said date of both her divorce and 1st respondent's marriage to the deceased. The applicant replied and deposed that she knew in April, 2019. This is a date after the demise of the deceased. However, realizing that she went to the department of Home Affairs where she first learnt of her decree before the demise of her husband, she then deposed that she learnt in April, 2018 of her divorce. What brings certainty to this date (April, 2018) is that she repeated the said date later in the same pleadings (reply).

[30] The court's duty is to ascertain whether the applicant challenged her decree of divorce within reasonable time. It is faced with various contradictory dates from the applicant herself. Counsel for applicant earnestly urged this court to consider March 2019 and consider the other dates as a typographic error.

[31] Which date should the court accept from the applicant? A date that would render justice to the whole matter. I have already demonstrated that applicant averred that she had a meeting where the deceased was present at Home Affairs. As common cause, deceased died on 3rd March 2019 as the court was told during arguments after an illness that saw him confined on his bed for a while. This therefore means the dates of 3rd March, 2019 must be eliminated by reason that deceased met his death while on his sick bed. It also could not be April, 2019 as deceased had passed on the previous month following that applicant learnt for the first time that she was divorced at a meeting at Home Affairs where the deceased was present. We are then left with one date and that is April 2018. This date as shown above was repeated by applicant in her reply. Correctly so, as it is the date upon which she first learnt of the divorce proceedings, if her averments are anything to go by.

[32] The 1st respondent asserted that by 2015 when she was married by the deceased, the applicant was aware of both her decree of divorce and her marriage to the deceased. Now there is variance to the date. However, this period asserted by the 1st respondent does not change the conclusion that the applicant being aware of the decree of divorce failed to challenge it within reasonable time. Accepting her say so that she first learnt of the decree in April, 2018, she failed to challenge it for a period spanning over a year. I appreciate that she deposed that

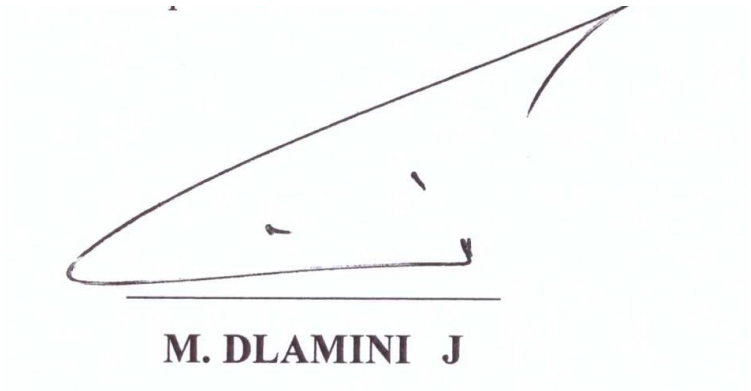
she reported the matter at the police station. The question was why? Did she expect the police to reverse the decree? Why did she fail to approach her *pro bono* attorney as she did in 2007? This is more so as she is a very fortunate litigant who is favoured with *pro bono* services in the country.

[33] In the analysis, her application must fail by reason that she failed to challenge the decree of divorce within a reasonable period as dictated by the principles of law. The law cannot come to her rescue now at the demise of the deceased.

[34] In the final analysis, I enter the following orders:

34.1 The applicant's application is dismissed;

34.2 No order as to costs.



For the Applicant : **S.M. Dlamini** of M.S. Dlamini Legal

For the Respondents : **M. Mntungwa** of Robinson Bertram