



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 889/2022

HELD AT MBABANE

In the matter between:

MPUCUKO DINGENI DLAMINI

Plaintiff

And

LAMILE ANGEL DLAMINI (NEE GININDZA)

Defendant

Neutral Citation: *Mpucuko Dingeni Dlamini vs Lamile Angel Dlamini (Nee Ginindza) (889/2022) [2023] SZHC 14 (03/02/2023)*

Coram: **J. M. MAVUSO J**

Heard: 04th October, 2022.

Delivered: 03rd February, 2023.

SUMMARY: *Matrimonial action, parties emaSwati living abroad, divorce action instituted before this Court, defendant visiting the country, refused and/or evaded service of summons instituting divorce action – Deputy Sheriff in addition to filing return of service giving*

oral evidence recounting the events pertaining to service of process upon defendant and how she refused and/or evaded service – Defendant having refused to accept services, divorce action heard on the basis of it being unopposed – Plaintiff led in evidence – An Order calling upon Defendant to restore conjugal rights granted – On the return date, without seeking any form of leave, or any Condonation – Defendant through her attorneys served and filed with the Court, a special plea and a claim in convention – On the return date, Plaintiff, files affidavit of non-return together with an affidavit of service of the restoration order , upon Defendant, in the City of Brampton, in the Province of Antario – Court grants final decree of divorce.

JUDGMENT

J.M. MAVUSO - J

SUMMONS

- [1] (i) Plaintiff in this matter caused divorce summons to be issued against his estranged wife, the Defendant herein, sometime in May 2022.
- (ii) The divorce action was instituted in this country on the basis that it is their country of domicile.

SERVICE OF SUMMONS

[2] Once the summons were issued, the Deputy Sheriff of this Court, Mr. Wiseman Dlamini was tasked with serving Defendant, personally, with a true copy of same.

[3] (i) The Deputy Sheriff, in execution of his duties, duly got in touch with the Defendant, and agreed on a rendezvous. When the Sheriff arrived at the place agreed upon, in Manzini, which turned out to be Defendant's friend's place of residence, Defendant is alleged to have come over to the gate where the Sheriff was waiting for her, only to turn back without collecting the summons and in the process leaving the Deputy Sheriff stranded outside.

(ii) Whilst still shocked by Defendant's behaviour, the Deputy Sheriff told the Court that he shortly, thereafter, received a call directing him to leave the summons with her lawyer, a certain Mr. Ginindza.

- (iii) The Deputy Sheriff told the Court that whilst still keeping watch over the premises, at a distance, a car left. When the Defendant was called, by the Sheriff she responded and informed him that she was on her way to her attorney, Mr. Ginindza and further advised him to come and serve her, with the Court process at her attorney's offices.

- (iv) When the Deputy Sheriff, shortly after the call, arrived at Attorney Ginindza's offices, as directed, he was met by the Receptionist who advised him that Mr. Ginindza was not available and that the Defendant had passed by and proceeded to town.

- (v) After waiting for a while, at the attorney's offices the Deputy Sheriff testified that he again called the Defendant only to be directed by her to proceed to KaHhohho, Defendant's parental home and to serve her there with the Court process.

- (vi) The Deputy Sheriff obliged, on the next day, following Defendant's instruction, he proceeded to KaHhohho, only to find that Defendant

was not there. Present at the homestead was Mbongeni Mdluli, who introduced himself as her brother and accepted service of the process, whilst explaining that his sister, the Defendant, had left for South Africa.

[4] Rule 4(i) of the High Court Rules as amended provides as follows:

“Where the process or application to Court is for an order affecting the liberty of the respondent, or is for an order for dissolution of a marriage, restitution of conjugal rights, judicial separation or nullity of marriage, the process or application therefore shall be served by delivery of a copy thereof to the respondent personally, unless the court for good cause shown gives leave for such process or application to be served in some other specified manner.”

The above Rule is clear on how a Defendant is to be served summons in a matrimonial matter. Service simply has to be personal. In the instant case, from the Deputy Sheriff’s evidence, it is clear that Defendant, did not want

to be served personally with the summons. She had no qualms playing the Deputy Sheriff, a fool. As a result of the foregoing, the Court was of the considered view that the service of process upon Defendant, in the circumstances, was in reasonable compliance with Rule 4 of the High Court Rules as amended. Defendant's attention was sufficiently drawn to the existence of summons against her.

- [5] (i) On the 11th August 2022, Plaintiff duly set the matter down for hearing.

An application on behalf of Plaintiff was made to have the proceedings conducted through audio-visual link. This was necessitated by the fact that whilst giving his evidence, Plaintiff was in Canada. There being no compelling circumstance which would warrant the non-utilisation of the technology, the Court granted the application made for its use.

- (ii) Section 6(1) of the Courts (Remote Participation) Act, 2018 provides for the use of audio-visual links in civil proceedings. The section provides as follows:

“6(1) AVL (an acronym for Audio Visual Link) shall be used in civil proceedings for the appearance of a participant unless due to the existence of compelling circumstances, the judicial officer determines otherwise.”

As indicated above there being no reason warranting refusal of the procedure being used, the Court duly granted the application.

[6] With the time for filing a Notice of Intention to Defend having elapsed, Plaintiff had the matter set down for hearing on the basis that it was unopposed.

[7] (i) After conducting his oral testimony and oral submissions made, Plaintiff was granted an order, calling upon Defendant to restore conjugal rights to the Plaintiff on or before the 18th September 2022 with a caveat that if she failed to do so, the Court would on the 19th September 2022 grant Plaintiff a final decree of divorce.

(ii) Due to the fact that Defendant ordinarily lives in Canada and was in the country on a short visit, an application was made by Plaintiff's

Attorneys for leave to have the restoration of conjugal rights order personally service upon her by an Attorney admitted to practice in Canada, North America. Leave was duly granted by the Court.

- [8] On the return day of the order Plaintiff submitted an affidavit of Non Return, in which, at paragraph 4 he states as follows:

“I confirm that I have not in any way or manner obstructed and/or hindered her from restoring the said rights and or complying with the Court Order which was served on her. I therefore submit that she has failed to restore the conjugal rights in terms of the Court Order and therefore pray for an order in terms of the said Court Order herein.”

- [9] On the 19th September 2022, Plaintiff’s Attorneys did not appear before Court. Subsequent thereto, with the rule having lapsed, they had same revived and extended to the 4th October 2022. On the 4th October 2022, the Court found in its file a Notice of Set down filed by N.E. Ginindza scheduling the matter for the 5th October 2022. Upon realising this, the

Court had the proceedings rescheduled from the 4th to the 5th October 2022, in order to allow both Counsel address the Court on what was taking place.

[10] Also filed in the Court file by N.E. Ginindza Attorneys was Defendant's special plea and a claim in reconvention. The Court is in no doubt whatsoever that when N.E. Ginindza Attorneys filed the aforesaid documents they were well aware of the restoration of conjugal rights order issued by this Court on the 11th August 2022. Paragraph 1.1 of the Defendant's plea though inelegant states as follows:

“The main relief sought by the Plaintiff herein is that the Defendant restores conjugal rights.....”

[11] (i) Prior to filing his purported client's special plea and claim in reconvention, Defendant's attorney failed and/or neglected to seek Condonation from the Court, of the late filing of the documents. The special plea and the claim in reconvention were filed on the 16th September, 2022, about a month after the Plaintiff had testified and an order for the restoration of conjugal rights granted on the 11th August 2022. The rule granted on the 11th August 2022 appears on the face of the Court record and there is no way, Defendant's attorney can claim

that he had not seen it. Looking at the affidavit of service of the restoration order upon Defendant, on the 31st August 2022, it would not be farfetched to assume that upon receiving same and probably not pleased with some if not all the orders therein, she was cajoled into attempting to defend the proceeding albeit out of time.

- (ii) Defendant clearly had to apply for Condonation of the late filing of her papers, prior to filing them in the Court record. It is not difficult to understand Defendant's failure to seek Condonation first. The perceived difficulty which would have presented itself, is that she would have had to explain, when she first got knowledge of the summons, and more importantly, her obnoxious conduct towards the Deputy Sheriff, when he attempted to serve her personally, with a copy of the summons.

- (iii) The Court notes that in contrast to the Rules of this Court, Defendant's special plea, and claim in reconvention, were filed without the prior filing of a Notice of Appointment, regard being had that Defendant, had earlier on not defended the matter and as such, had not filed a Notice of Intention to Defend. As it is, at the time of

filing Defendant's process N.E. Ginindza Attorneys, were not on record.

[12] As alluded to above Defendant's Attorneys, together with the plea and claim in reconvention, also filed what they termed as a special plea.

Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa 5th edition, Volume 1 at Page 598, defines a special plea as:

“One that does not raise a defence on the merits of the case but, as its name implies, sets up some special defence which has its object either to delay the proceedings (a dilatory plea) or to object to the jurisdiction of the Court (a declaratory plea) or to quash the action altogether (a peremptory plea).”

[13] Defendant has filed a special plea in these proceedings and made a threefold categorisation thereof:

(i) In the first category, she submits that Plaintiff's summons does not disclose a cause of action.

- (ii) On the second, she contends that because, the service of the divorce summons, was not personally effected on her, the Deputy Sheriff's service was bad in law and did not accord with Rule 4 (2) (J) of the High Court Rule, which requires service of process in matrimonial matters to be personal.
 - (iii) In the third category of her special plea, Defendant contends that the procedure adopted, in hearing the matter and granting the restoration order was irregular.
- [14] (i) Starting with the third and last category of Defendant's plea, it is very unfortunate and regrettable that Defendant's Attorney did not peruse the record and make an effort to find out what took place on the 11th August 2022. Had he done so he would have realised that, Plaintiff gave oral testimony through Audio-Visual-Link, for Defendant to allege that:

“Plaintiff was not led viva voce.”

In these matrimonial proceedings is ludicrous. Not only did Plaintiff give oral evidence, his Attorney Mr. Howe went on to make submissions, after his testimony.

- (ii) On the second aspect of the special plea pertaining to personal service upon Defendant, of the divorce summons, the Court, at paragraph 3 of this Judgment has fully narrated, what took place between the Defendant and the Deputy Sheriff when he tried to effect personal service upon her. At paragraph 4 of this Judgment the Court has pronounced that, in the circumstances of this case, the Deputy Sheriff's attempted service upon Defendant, was good enough in law.

The Defendant's plea being unmeritorious, it is accordingly dismissed with costs. Costs to be costs in the proceedings.

- [15] For the reason that Defendant has failed and/or neglected to apply for the Condonation of the late filing of its papers, the Court will not concern itself with her plea and claim in reconvention. The only reason why it considered the special plea is because it had to establish whether or not there was some

special defence which could legally quash the action. Having found none, the Court accordingly, makes the following Order:

- (i) A decree of divorce is granted in favour of Plaintiff.
- (ii) Joint custody of the minor child is granted to both Plaintiff and Defendant with equal rights of access.
- (iii) Plaintiff and Defendant are to contribute equally towards the maintenance of the minor child until the said minor child, attains the age of majority or becomes self-supporting whichever event comes to pass first.
- (iv) Defendant forfeits the assets of the joint estate.

J. M. MAVUSO
JUDGE OF THE HIGH COURT OF ESWATINI

For the Plaintiff:

HOWE MASUKU NSIBANDE ATTORNEYS

For the Defendant: N.E. GININDZA ATTORNEYS C/O SITHOLE
MAGAGULA ATTORNEYS