IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE CIVIL CASE NO. 1673/2018

In the matter between

ABSALOM MABUZA PLAINTIFF

And

GCINILE MABUZA (NEE DLAMINI) 1ST DEFENDANT
REGISTRAR OF BIRTHS, MARRIAGES
AND DEATH 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT

Neutral citation: *Absalom Mabuza v Gcinile Mabuza (nee Dlamini) & 2 Others (1673/18) [2023] SZHC 109 [2023] (4th May 2023).*

Coram : Tshabalala J

Heard : 09/08/2021
Delivered : 04/05/2023

Summary: Civil law - Action for divorce, and order declaiming foreign judgment null and void.
Civil Procedure – Points of law on jurisdiction and res judicata.

Held: Jurisdiction of the court derives from the common law principle of Eswatini that the court of the country where the married couple is domiciled has exclusive jurisdiction in matters involving status such as divorce; that the domicile of the husband (the Plaintiff in this case) determines the domicile of the married couple. Held further: Therefore, the Canadian court which granted divorce lacked competence to determine the divorce matter between the Plaintiff and the 1st defendant, therefore the foreign judgment is null and void ab initio. Principles of private international law discussed.

Held: The points of law on jurisdiction and res judicata accordingly dismissed.

JUDGEMENT

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[1] The plaintiff claims an order for restoration of conjugal rights on the grounds of malicious desertion failing which, the granting of decree of divorce per the particulars of claim.

Plaintiff's prayers are framed as follows:

(1) Restoration of conjugal rights within 7 days failing which a final decree of divorce.

(2) Forfeiture of all marriage benefits.

(3) Custody of minor children.

(4) Declare null and void purported decree of divorce by Superior Court of Justice of Toronto.

(5) Direct Registrar of Births, Marriages and Deaths to expunge from the records, registration of the parties' marriage.

(6) Costs in the event of unsuccessful opposition.

(7) Further and / or alternative relief.

[2] The action is opposed and 1st Defendant filed its plea as well as raised points of law, challenging the jurisdiction of this court; and asserting that the matter is *res judicata.*

The facts

[3] Plaintiff and Defendant contracted civil rites marriage in community of property solemnized on the 16th January1999 in Eswatini. The parties established their matrimonial home at Bethany in Manzini Region.

[4] The marriage experienced problems as a result the parties have been leaving apart since January 2012 when the 1st Defendant left the country for Canada where she currently lives with the parties' two children. The actual reasons and circumstances leading to 1st Defendant's departure from the matrimonial home for Canada is a subject of dispute. The Plaintiff claims that Defendant maliciously deserted him, while the 1st Defendant denies this and asserts that Plaintiff constructively deserted in that he forced her out of the matrimonial home through ill-treatment verbal, emotional and financial abuse.

[5] In addition to her plea 1st Defendant instituted a counter claim in which she seeks an order for maintenance of their two minor children to the tune of E7,500, per month, payment of school fees, division of matrimonial property in equal shares between the parties, and costs of suit if the counter claim is opposed without success.

[6] In the replication the plaintiff *inter alia* opposes the counter claim requiring him to contribute to maintenance. He opposes the claim for division of the joint estate.

[7] After close of all pleadings including discovery by both parties, Defendant filed a notice to raise two points of law: lack of jurisdiction of this court to declare null and void the decree of divorce issued by the Canadian Court, and *res judicata* on the ground that decree of divorce sought in this action has already been issued and finalized by the Superior Court of Justice of Ontario, Canada (SCJO).

[8] Heads of arguments were filed on the points of law and subsequently oral submissions made. This is the ruling on the raised points of law.

Jurisdiction

[9] The 1st Defendant concedes the following facts are common cause:

- From 2012 the parties ceased to leave together as husband and wife, the latter having left the matrimonial home.
- On or about July 2016 1st Defendant moved and obtained a final decree of divorce against the Plaintiff issued by a court in Canada, that is the Superior Court Justice of Ontario.[1]

[10] It is 1st Defendant's contention that the High Court of Eswatini has no jurisdiction to grant the prayers sought to set aside and declare as *null* and *void abinitio* a decision granted by another Court of Competent jurisdiction. Defendant submits that it is only the High Court in Ontario Canada that is clothed with jurisdiction to grant the prayers sought.

[11] Defendant submits that the proceedings *in casu* are moot, and that this court can only recognize and enforce the said judgment issued by state of Ontario Supreme Court. To this end 1st Defendant cites **Reciprocal Enforcement**

[1] Per annexure AMM3 to Plaintiff's Plea

of Foreign Judgements Act / 1922 and **the Regulations of 1923**, made thereunder.

[12] The 1st Defendant submits that by virtue of the said 1922 Act and 1923 Regulations, and the fact that Canada is a Commonwealth country, the Supreme Court of Ontario is a Competent court and its judgment is eligible for recognition and enforcement by this court.

[13] Plaintiff's submissions: Divorce proceedings between the Plaintiff and Defendant must be subject to the domicile of the Plaintiff which is Eswatini. Plaintiff relies for this argument on Roman Dutch Law which is the Common law of this country. Plaintiff submits that the common law can only be changed by statute, and that there is no such statutory modification in Eswatini, of the common law rule on exclusive jurisdiction of the *forum domicilli* of the husband. Plaintiff cites **Herbstein and Van Winsen, *Civil Practice of the Supreme Court of South Africa,*[2]** wherein the editors state the general principle as follows:

> *"...in actions for divorce the court of matrimonial domicile, the court within whose area of jurisdiction the husband is domiciled at the date when action is instituted, has exclusive jurisdiction... All other considerations ...are irrelevant..."*

[14] Plaintiff submits that the Canadian Court ought to have inquired into and considered the law of domicile of the parties prior to entertaining and granting divorce order, and that there is no indication that it did so.

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[2] 4th edition (1997).

[20] According to the Common law in our jurisdiction a married couple assumes the domicile of the husband (matrimonial domicile). The common law general rule is that the wife assumes her husband's domicile. The wife remains attached to her husband's domicile for as long as the marriage subsists. See **Hahlo, Husband and Wife;**[3] **Spiro, Conflict of Laws,**[4] both of which were cited in the Lesotho appeal case of **Adam v Adam.**[5]

[21] It is also the rule of our common law which also bears similarities with the English law, that in matters concerning status of a person, the governing law is the *lex domicilii.* It is the *lex domicilii* of the parties that for instance determines existence or otherwise of grounds for divorce.

[22] In **Tsabile Mamba v Bhadala Mamba**[6] the court affirmed the statement of the common law enunciated by learned editors **Herbstein and Van Winsen,**[7] that, in an action for divorce the court of the matrimonial domicile has exclusive jurisdiction, and that where the requisite of domicile is present, all other considerations are irrelevant, including the place of the marriage the domicile at the date of the marriage or at the date of the event on account of which divorce is sought. In **Adam's**[8] case Maqutu J made similar observation:

> *"According to our common law the only court that has international competence to issue decrees of divorce that will be recognized in Lesotho is the court of a country in which the parties are domiciled."*

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[3] 4th ed at page 645
[4] 1st ed at page 20
[5] Civil APN / 327/94 [1994] lsca 183 (19 December 1994).
[6] SZHC Case No. 1451/2009.
[7] Supra.
[8] Supra.

[23] After exploring case law on the subject, the High Court in **Tsabile Mamba's** case[9] made a finding of law that –

> *"It is now therefore firmly established in our laws that in all matters affecting status, in the absence of express statutory power, the exercise of jurisdiction is conferred to the court of domicile of the parties at the time when the action commenced, and the fact that a party submits to or fails to object to the jurisdiction of the court does not confer jurisdiction in respect of such matters or absolve the court from satisfying itself as to the true domicile of the parties."*

[24] There is no doubt that this is the correct position of our law. See also affirmation of this enunciation of our law in the case of **Magagula *in re* Magagula v Chibesakunda,**[10] as beyond question, having noted that there was no statutory variation of this principle of common law. I agree with the learned Judges' views that in the absence of statutory modification of the common law, the principles remain effective.

[25] The court in **Noddeboe v Amanda Jane Noddeboe (nee Parsons)**[11] noted that some jurisdictions have made statutory in-roads into the common law to alter the strict adherence to the principle binding women to their spouses' domicile regardless of adverse circumstances. Indeed, it is overdue for the legislature in Eswatini to legislate and alter the common law rule attaching the wife's domicile to that of her husband as well as the jurisdictional requirements for a party to a marriage to sue for divorce in the husband's

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[9] Supra.
[10] 1660/12 [2013] SZHC 28 (18 February 2013.
[11] Case No. 461/2018 9 (a).

place of domicile, in all circumstances. Such amendments would expand the jurisdiction beyond the matrimonial domicile with the effect of lessening hardships to parties to a marriage, particularly women, who wish to file for divorce in jurisdictions most convenient to their circumstances.

[26] It is worthy to repeat for emphasis, some scathing observations of the hardship visited to women made in *orbiter dictum* by Mamba J[12] and the need for legislative intervention to modify the strict requirements of *forum domicillii* rule:

> *"The above statement of the law is rather old, archaic, lacking in legal reasoning, logic and fairness. It is arbitrary and discriminatory of married women. There is in my judgment neither rhyme nor reason to uphold this rule of our common law in this day and age..."*

[27] The learned Judge noted inconsistency of the rule with provisions on the rights entrenched by the 2005 Constitution Act, in particular the affront against equality before the law for married women:

> *"This rule of our common law is plainly inconsistent with the constitutional right of equality before the law, freedom against discrimination based on sex or gender, and the right to one's dignity. The rule basically relegates a married woman to a mere vassal, an appendage to a man and an immature or irrelevant minor or individual who has to follow her husband unquestioningly. That cannot be legally sound or proper or just. That divorce is a matter or issue of status is of no moment. Women have status and dignity too."*[13]

[12] In Noddeboe v Amanda Jane Noddeboe (nee Parsons) supra.
[13] Supra.

[28] The *dicta* above speaks to the situation of the 1st Defendant who left her country to settle in Canada, under circumstances where her marriage to the Plaintiff was allegedly on the rocks. She has found residence in Canada for over a year, and the law there permits her to institute divorce proceedings against her husband regardless of the latter's domicile in Eswatini. According to our prevailing common law 1st Defendant's domicile is determined by the domicile of her husband, wherever she is and whatever her intentions.

[29] Our common law rule also dictates that in matters of status, such as marriage or divorce it is the court of the country where her husband is domiciled that has exclusive jurisdiction to entertain the matter.

[30] Despite my agreement *in toto* with the learned Judge's *dicta*, this court is nonetheless obliged to apply the law. Some Roman Dutch Law jurisdictions in Southern Arica have put in place legislative modifications of the common law rule. For example, in the case of Namibia, Section 1 of the **Matrimonial Causes Jurisdiction Act of 1979** provides the following:

> *"(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is*
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> *(a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted or*
>
> *(b) ordinarily resident in the area of jurisdiction of the court on the said date and has been ordinarily resident in*

Namibia for a period of not less than one year immediately prior to that date."[14]

A similar modification of the common law rule can also be found in **South African Divorce Act 70 of 1979**.[15]

[31] There is no question that a need exists for legislative interventions in Eswatini to address the plight of married women, to extricate them from compulsory domicile of their husbands.

[32] The 1st Defendant's point of law that this court has no jurisdiction is bound to fail. The court in **Mamba v Mamba**[16] faced with the similar challenge to its jurisdiction, found that, indeed it had jurisdiction to determine the domicile of the husband, that is whether he abandoned Eswatini domicile and acquired new domicile of the United States of America, where he took up a job. I firmly identify with that decision and find that, *in casu* the Plaintiff must be heard by inquiring into the proper domiciliary forum in respect of divorce action concerning the parties. It is the finding of the court that according to the dictates of the common law, it has exclusive jurisdiction to entertain the divorce action of the parties, and that the court in Canada which purportedly granted divorce had no jurisdiction to determine the divorce case.

[33] The court accordingly declares that it has jurisdiction and the point of law is dismissed.

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[14] Quoted in Noddeboe's case, supra.
[15] Noddoboe's case supra
[16] Supra

[34] *Res judicata*: The issue is whether the judgment of the Canadian court is competent to found a point of law based on *res judicata* against Plaintiffs suit for divorce before this court? The plea of *res judicata* is premised on the principle that there must be an end to litigation. It will be upheld where it is found that the same litigants have canvassed the same subject matter followed by a decision by the same or another court. In the case of **Mhlatsi Dlamini v Prince Mhlaba Dlamini & Another** [17] (quoted with approval in **Mamba's case)**[18] the Supreme Court had this to say on *res judicata:*

> *"16 The Law relating to the plea of res judicata has been authoritatively stated at pages 249 – 250 of Herbestein & Van Winsen where the learned editors point out that:*
> *The requisites of lis pendense are the same with regard to the personal cause of action and subject matter as those of a plea of res judicata; which in turn are that the two actions must have been between the same parties, or their successors in title, concerning the same subject matter and founded upon the same cause of complainant."*

[35] It is conceded by the Plaintiff that the requirements of *res judicata* as set out above, exist, except that the Canadian court which heard and decided the divorce matter lacked competence to do so, and this is a critical issue. The common law rule on conclusiveness of a foreign judgment can only be invoked if in addition to the two requirements of same party and same subject matter, the judgment is handed down by a court of competent jurisdiction. See **Mamba's case.** [19]

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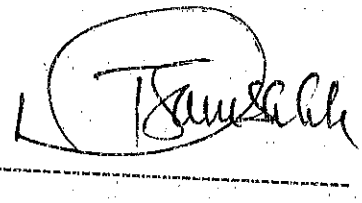
[17] Case No. 15/2010
[18] Supra.
[19] Supra

[36] It follows from the finding of this court that the Canadian Court lacked jurisdiction, (it being a *non-domicilliary* court) and that, its judgment, though on the merits, was not handed down by a court of competent jurisdiction. Therefore, the judgment cannot found the plea of *res judicata.*

[37] The points of law therefore fail and are dismissed with costs. The result is that the Plaintiff's action may proceed. Both parties having filed all pleadings viz summons, Plea and Counterclaim, Replication and Plea on Counterclaim, the matter is ripe for hearing on the merits.



D Tshabalala
Judge

For the Plaintiff: L. Dlamini (Lucas BKS Dlamini Attorneys)
For the 1st Defendant: Mr Mntungwa (Robinson Bertram Attorneys)
For the 2nd & 3rd Defendants: No appearances.