IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 5/2011

In the matter between:

MALCOS SENGWAYO	**APPELLANT**
and	
THULISILE SIMELANE	**1ST RESPONDENT**
THE REGISTRAR OF BIRTHS, MARRIAGES AND DEATHS	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

Neutral citation:	Malcos Sengwayo v Thulisile Simelane & Others (5/2011) [2011] SZSC 20 (31 May 2012)
Coram:	RAMODIBEDI CJ, MOORE J.A., DR. S. TWUM JA.
Heard:	**14 MAY 2012**
Delivered:	**31 MAY 2012**

Summary: **Husband and wife - Family disputes may be better settled by alternative dispute resolution rather than costly and time consuming litigation - Mediation through the facilitation of an experienced mediator allows the spouses to make a significant input into the resolution of their differences - Application for re-instatement of an appeal already heard and dismissed by this Court refused - No appeal from a decision of the Supreme Court - Application for leave to appeal and for condonation of late filing of notice of appeal refused - Lawyers' duty to the Court paramount - Appeal dismissed with costs.**

MOORE J.A.

INTRODUCTION

[1] This case is a sad example of the emotional turmoil, and the consumption of precious time and limited family resources which takes place when spouses fail to resolve disputes and disagreements which inevitably arise in all families, by arriving at a fair and agreed consensus; but rather choose to ventilate their differences through the costly and ultimately internecine conflict which litigation involves.

[2] It is for this reason that in a number of common law jurisdictions, the old fashioned call to arms “see you in court” has been abandoned by discordant spouses. Nowadays, particularly in family matters where cooperation between spouses, in their own interest, and more so in the interest of their children is so beneficial to all parties concerned, there has been a fruitful and constructive resort to one or more of the increasingly utilized avenues of alternative dispute resolution.

[3] Experience has shown that mediation, where erstwhile spouses, bristling with hostility, can be shepherded away from their hitherto intransigent positions and deftly guided to a mutually advantageous consensus largely of their own making, is the strategy which has proved to be so successful that it has become compulsory in many advanced jurisdictions where the nuclear option of litigation has been relegated to being the choice of last resort.

THE APPLICATION

[4] The application before this Court involves prayers for unusual reliefs.

It is for an order in the following terms:

1. Reinstating the application for leave to appeal.
2. Granting the appellant leave to appeal against portions of the judgment of Ota J. handed down on 9th December 2010.
3. Condonation of the late filing of the notice of appeal dated 24th February 2011 (as amended).
4. Costs of suit in the event of opposition.
5. Further and/or alternative relief.

BACKGROUND

[5] It may be convenient to refer to the principal parties as the husband and wife and collectively as the spouses who were married in community of property in Mbabane on the 30th July 1988. The relevant parts of the story are best told sequentially:

i. On the 12th December 2004 the wife brought an action in the Magistrate's Court held at Mbabane in which she claimed orders for:

a) judicial separation
b) sole custody of the minor children

c) maintenance for the minor children at the rate of E1,000.00 per month

d) Costs.

That action was later abandoned.

ii. It would appear that in or about the month of December 2004 the wife left the matrimonial home leaving the minor children of the marriage there.

iii. On the 14th April 2008 the husband filed a Notice of Motion in case No. 1349/2008 seeking the following orders:

1. Declaring the marriage in community of Property entered into by and between Malcos Bhekumthetho Sengwayo and Thulile Simelane on the 30th July 1988 to be null and void.

2. Directing the Registrar of Births Marriages and Deaths to cancel all entries in the Marriage Register concerning the above marriage.

3. Custody of the minor children be granted to applicant.

4. Costs of suit against 1st Respondent in the event the application is opposed.

iv. On the 26th November 2008 the wife filed a combined summons in Case No. 4519/08 in which she claimed:

a) Payment of the amount of E8 800 000.00;
b) 9% interest from date of issuing of summons to date of final payment;
c) Costs of suit.

v. On the 9th December, 2010 Ota J ordered *inter alia* that "1. Proceedings under Case No. 1349/2008 be and is hereby stayed and the same be and is hereby consolidated in Case No. 4519/2008, to be heard simultaneously as one; 1. a. Case No. 1349/2008 and Case No. 4519/2008, as consolidated, be and are hereby referred back to the Registrar of the High Court, for allocation of a trial date, 1. b. It is further ordered that the respective affidavits filed by the parties in this application, stand as pleadings for the trial".

vi. Ota J also interdicted the husband from transferring and/or encumbering certain properties pending final determination of the proceedings instituted under Case

No. 1349/2008 and 4519/2008, as consolidated. The husband was also ordered to pay E6,000.00 per month being maintenance for the wife and the 2 children born of the marriage, pending the finalization of litigation between the parties subject to review as the circumstances demanded. No order was made as to costs.

THE PREVIOUS APPEAL

[6] What I would call the previous appeal was heard by this Court as Civil Appeal No. 05/2011. It was included on the Final Supreme Court Roll for May 2011 Session and listed for hearing on Thursday 5 May 2011. It was duly heard on that day. The parties were identical except that in the previous appeal the husband's full name was stated as MALCOS BHEKUMTHETHO SENGWAYO whereas in the instant appeal his middle name of BHEKUMTHETHO is not shown. The judgment of this Court was prepared by my distinguished brother The Honourable Chief Justice and concurred in by my brother Twum and me. As the summary above that judgment, delivered on the 31st

May 2011 indicates, the matters critical to the instant appeal - "Appellant filing an appeal out of time - No condonation sought - The order appealed against interlocutory and therefore not appealable without leave - Appeal struck off the roll with costs" - were fully addressed by this Court.

[7] As the learned Chief Justice made clear in the opening paragraph of his authoritative judgment from which there can be no appeal, Case no. 1349/2008 was, at the time of hearing of the previous appeal, "admittedly still pending in the court *a quo.*" This court was also cognizant of the fact as stated at paragraph [4] of its judgment that:

> "On 9 December 2010 the High Court (Ota J) granted all the prayers sought by the first respondent herein with the exception of prayers 5 to 7. It is instructive to observe, however, that the court granted those orders pending the finalization of the litigation between the parties. The present appeal is brought against those orders."

[8] The issues for determination by this Court in the previous appeal were clearly identified by Ramodibedi CJ in paragraph [7] of his judgment:

> "[7] At the hearing of this appeal two issues were raised for determination, namely:-
>
> (1) a point of law raised by the first respondent to the effect that the appeal in this matter was filed out of time and
>
> (2) a point raised by the Court *mero motu* whether the orders appealed against were interlocutory and, if so, whether an appeal lies to this Court without leave."

[9] Continuing at paragraph [8] the learned Chief Justice's dictum foreshadowed the fate of the previous appeal. It reads:

> "[8] As will be demonstrated shortly, these issues are, in my view, determinative of this appeal in the circumstances of this case."

Having carefully considered the two issues before this Court as set out in paragraph [7] of its judgment, Ramodibedi CJ expressed the conclusion reached by this Court in clear and binding terms in paragraph [15] of this Court's judgment when he said:

> "[15] In light of these considerations I have come to the conclusion that the appeal ought to be struck off the roll on this ground as well. Strictly speaking, there is no proper appeal before this Court."

[10] When this Court ruled that there was no proper appeal before it, reference was being made to the appeal filed on the 24th February 2011 which was an appeal against the judgment of the High Court delivered by Her Ladyship Justice Ota on the 9th December 2010. But, as was pointed out by Justice Ota herself, that judgment was interlocutory only, her Ladyship having ordered that cases No. 1349/2008 and 4519/2008 as consolidated be referred back to the Registrar of the High Court for allocation of a trial date. As this Court noted in its judgment of the 31st May 2011 "the court granted those orders pending the finalization of the litigation between the parties. The present appeal is brought against those orders." This Court concluded that "strictly speaking, there is no proper appeal before this Court." That conclusion was reached because of the inexcusable breaches of the several rules referred to in the text of this Court's judgment.

NO APPEAL FROM SUPREME COURT

[11] Section 14 6 (1) of the Constitution declares that "The Supreme Court is the final Court of Appeal." This means that no judgment or order of this Court may be appealed against. In **Mndawe and Others v Central Bank of Swaziland** [2011] SZSC 19 Ramodibedi CJ sitting as a single judge of this Court held that in terms of section 21 of the Industrial Relations Act 2000, no further appeal lies to the Supreme Court. The application for condonation of the late filing of the record of proceedings in that case was dismissed. The applicants had filed a "Notice of Appeal to this Court." They did not file the record of proceedings. The learned Chief Justice considered the application plainly misconceived. As His Lordship put it: "This is so because no further appeal lies to this Court after the Industrial Court of Appeal has disposed of the matter." A litigant is not permitted to reach beyond the upper limit of a court's jurisdiction.

[12] In **Tsabedze v University of Swaziland** [2011] SZSC Swazilii.org 16, this Court deemed the appeal to have been abandoned where the appellant had failed to submit the record for certification within the

time prescribed by the rules. In the **Tsabedze** case, this Court considered and applied **Thokozile Dlamini v Chief Mkhumbi Dlamini and the Commissioner of Police** Civil Appeal No. 2/2012; **Dlamini v Dlamini and Another** [2010] SZSC 3 where the summary reads:

> "Civil Appeal - Flagrant disregard of the Supreme Court Rules - Appellant failing to lodge record of proceedings timeously - Rule 30 of the Supreme Court Rules - No application for condonation made - Appellant failing to file heads of argument timeously - No prospects of success on appeal - Appeal deemed to have been abandoned and accordingly dismissed with costs."

[13] In **Swaziland National Association of Civil Servants v Swaziland Government** [2011] SZSC 53, this Court articulated the principle applicable to applications for adjournment. Such applications are not granted simply because they are made. So, too, with applications for condonation and for extensions or enlargements of time stipulated in the Rules of this Court.

REINSTATEMENT OF MATTER/LAWYERS' DUTY TO COURT

[14] Counsel for the wife submitted with considerable force that:

> "It will also be argued on behalf of the 1st Respondent that the current appeal is *res judicata* as it was determined with finality by this court on the 31st May 2011. The Appellant therefore is estopped from resuscitating this matter under the guise of an application for leave to appeal and the condonation of the late filing of the appeal. Those issues were deliberated upon in the judgment delivered by the court in May. The Appellant is now late. He was meant to institute the application for condonation prior to the matter being heard in May 2011. The appellant is now deliberately clouding issues by making an impression that when the court struck off the matter with costs on the 31st May 2011, it gave him guidance and a lee-way to institute a fresh application for condonation. That cannot be because the matter was dealt with to finality. If the court would allow that, that would be tantamount to re-opening the whole matter again yet it has been dealt with finality."

[15] Counsel for the husband's wan submission under the above head relied upon the plea that:

> "the failure by the appellant's attorney to appear before court in November 2011, was not due to wanton neglect or disregard for the court, but was occasioned by a difficult situation, wherein attorneys in the country had resolved not to attend court". None appearance "was occasioned by the resolution of the Law Society of Swaziland."

[16] A resolution of the Law Society of Swaziland is deserving of the highest respect except where it collides with the obligations of an Attorney to his client, and to the court, and is inconsistent with his or her Oath of Office. By that oath an Attorney swears that:

> "I will truly and honestly demean myself in the practice of an **Attorney** according to the best of my knowledge and ability."

[17] In a learned paper delivered at a Symposium on Professionalism in Canada entitled "A Lawyers duty to the Court," Robert Bell and Caroline Abela accurately described the duty of lawyers in the Kingdom of Swaziland to the Court when they wrote:

"A lawyer's duty to the court is a fundamental obligation that defines a lawyer's role within the adversarial system… A Lawyer's duty to the court relates to his or her status as a professional who serves, not only clients, but also the public interest … The duty to the court is also important because there are consequences for lawyers who do not uphold it. This is demonstrated by the penalties attached to civil and criminal contempt. **Poje v Attorney General for British Columbia** [1953] 1 S.C.R. 516 citing Oswald's Contempt of Court. 3rd Ed., at 36… Lawyers must respect the court. Respect comes in all forms - preparedness and timelessness are one aspect for consideration …

Not appearing for court is a common failure of a lawyer's duty to the court. It is not an infrequent occurrence when a lawyer does not appear before the court because the client has so instructed the lawyer. However, despite a client's instructions, it is a lawyer's duty to appear before the court if he or she is counsel of record. See **Duca Community Credit Union Ltd. v Tay**, [1995] O.J. NO. 3282 (GEN. DIV.). His first duty is to the

court and the public, not to the client: and when the duties to the client conflict with those he owes as an officer of the court in the administration of justice, the former must yield to the latter."

[18] In **Rondel v Worsley** [1966] 3 WLR 950 at 962 - 63, Lord Denning, that great exponent of the English Common Law, described the advocate duty's to the Courts of England and Wales in this way:

> "[The advocate] has a duty to the court which is paramount. It is a mistake to suppose that he is the mouth piece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously miss - state the facts. He must not knowingly conceal the truth…. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his clients, if they conflict with his duty to the court. The code which

> requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline."

[19] Since Lord Denning wrote those memorable words in 1966, a number of statutory provisions have incorporated the common law principles articulated by that eminent jurist. Those hallowed precepts now form the nucleus of rules governing the conduct and etiquette of lawyers throughout the common law world.

[20] In a speech delivered by the Honourable Marilyn Warren A.C. at the Bar Association of Queensland Annual Conference, Gold Coast 6th March 2011 entitled "The Duty Owed To The Court: The Overarching Purpose of Dispute Resolution in Australia", the author expressed the settled position in the states of Australia when she wrote at page 3:

> "Most would agree in principle that the inherent objective of the lawyer's overriding duty to the Court is to facilitate the administration of justice to standards set by the legal profession."

[21] The lawyer would hardly be in a position to discharge his or her overriding duty to the Court whilst engaging in a boycott at the behest of the Law Society, or in response to promptings from any other source, or by absenting himself or herself for any other reason, whilst bearing the onerous and sacred burdens of the lawyer of record.

[22] In all the circumstances of this case, I can do no better than to adopt and apply the dicta of this Court in **Unitrans Swaziland Limited v Inyatsi Construction Limited** delivered on the 7th November 1997 at page 13 - 14. See also **Sibusiso Boy Boy Nyembe v Pinky Lindiwe Nyembe (Born Mango)** Civil Appeal No. 62/2008; **Nyembe v Nyembe** [2009] SZSC 23 20th November 2009; **O.K.H. Farm (Pty) v Littler N.O. and Others** No. 56/08; [2009] SZSC 10 19th May 2009:

> "We have come to the conclusion that it would be unfair to the Respondent in this case were we to overlook the flagrant disregard for the rules exhibited by the Appellant irrespective of the Appellant's prospects of success on the merits of the matter.
>
> See in this regard SA Allied Workers Union (In Liquidation) and Others v De Klerk N.O. and Another 1992 (3) SA (AD) at p. 4 F -G

Blumenthal and Another v Thompson N.O. and Another 1994 (2) SA 118 (AD) at 121 in fin 122 (b).

The decision to dismiss the application for condonation has not been arrived at without some sympathy for the Appellant and its attorney. Nonetheless this is a matter of serious principle and our view is encapsulated in what was said by Steyn CJ in Saloojee & Another v The Minister of Community Development 1965 (2) SA 135 (A) at 141C-E namely:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.""

ORDER

For the reasons set out in the foregoing paragraphs it is the order of this Court that:

The appeal be and is hereby dismissed with costs.

S.A. MOORE JA
JUSTICE OF APPEAL

I agree

RAMODIBEDI CJ
CHIEF JUSTICE

I agree

DR. S. TWUM JA
JUSTICE OF APPEAL

For the Appellant : Mr. Z.D. Jele

For the 1st Respondent : Mr. B. Magagula