



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal No. 23/2013

In the matter between

JOHN BHEMBE

Appellant

And

PHINDILE BHEMBE (NEE DLAKUBI)

Respondent

Neutral citation: *John Bhembe v Phindile Bhembe (23/2013)* [2014]
SZSC 23 (30 May 2014)

Coram: RAMODIBEDI CJ, DR TWUM JA and MCB
MAPHALALA JA,

Heard: 20 MAY 2014

Delivered: 30 MAY 2014

SUMMARY

Husband and wife – Interdict – The High Court granting an order restraining the appellant from entering his matrimonial home with the respondent wife without any reference to judicial separation or divorce – The court further releasing the family car to the respondent wife where no such prayer was sought in the lis – Appeal upheld with no order as to costs.

JUDGMENT

RAMODIBEDI CJ

[1] This appeal may best be summed up as a classical comedy of errors as will become apparent shortly. It is a stark reminder to both judges and legal practitioners of the fundamental need to scrutinise closely the pleadings and prayers sought in litigation in order to determine the appropriateness or otherwise of the orders sought in each case.

[2] The respondent wife, as applicant, brought an application in the High Court. She sought and obtained an interim relief in the following terms:-

- (1) Restraining the appellant husband from entering the matrimonial home. Pointedly, this prayer was made without any reference to judicial separation or divorce. For all intents and purposes, therefore, it was a prayer for final relief;
 - (2) Placing under judicial attachment a certain Kia motor vehicle pending the outcome of a divorce action which was to be instituted by the respondent wife against the appellant.
- [3] On the return day Dlamini J made the following order as fully set out in paragraph [44] of her judgment, namely:-

“[44] In the result the following orders are entered:

- 1. The interim order granted by this Court on 23rd February 2012 is hereby confirmed.*

2. *The motor vehicle XSD 028 AH Kia Picanto, grey, placed under judicial attachment on 23rd February 2012 is released to the applicant.*

3. *Respondent is ordered to pay costs of suit including those of Senior Counsel.”*

[4] The appellant is aggrieved by the court *a quo*'s decision. He has appealed to this Court on two grounds, namely:-

“1. The Court a quo erred both in fact and in law by granting an interim order in terms of prayers 3.1 of the Notice of Motion and subsequently confirming the said order when the said relief was not supported by any grounds and/or reasons in the Respondent[’s] founding affidavit.

Alternatively the relief sought by the Respondent in respect of prayer 1 was incompetent as the evidence led indicated that the marriage between the parties still subsisted and the regime of their marriage requires cohabitation and consequently the Court a quo erred both in fact and law by granting the same.

2. *The Court a quo erred both in fact and in law by ordering and directing that the motor vehicle to wit:*

*REGISTRATION: XSD 028 AH
MAKE: KIA PICANTO
COLO[U]R: GREY*

Be released to the Respondent when no such relief had been sought by the respondent in particularly (sic) because the parties are not yet divorced and the evidence led indicated that the marriage between the parties was in community of property with the result that each party was entitled to the usage of the assets of the joint estate.”

[5] The facts show that in November 1989, the parties entered into a customary law marriage in terms of Swazi Law and Custom. Thereafter, and on 16 October 1992, the parties entered into a civil rites marriage in community of property.

[6] Describing the parties’ marriage in paragraph [19] of its judgment, the *Court a quo* said this:-

“[19] The parties to this application are married to each other both in terms of the Swazi law and custom and civil rites.”
(Emphasis added.)

Now, that statement requires qualification as it is, in my view, not entirely correct. It is not legally possible for a couple to be married to each other “both” in terms of the two forms of marriage which fall under completely different regimes and cannot subsist side by side with each other. The proviso to s 7 (1) of the Marriage Act 1964 makes the position abundantly clear. The section reads as follows:-

“No person already legally married may marry in terms of the Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy:

Provided that nothing contained in this section shall prevent parties married in accordance with Swazi law and custom or other rites from re-marrying one another in terms of this Act.”

[7] As is plainly evident from this section, when a couple married in accordance with Swazi law and custom enter into a civil rites marriage, they are actually “re-marrying” one another. What this then means is that their customary marriage falls away and is superceded by the civil rites marriage with all its consequences, which include community of property. In Lesotho a similar principle was laid down in such cases as **Zola v Zola 1971 – 73 LLR 286 (HC); Khaka and Another v Pelesa and Others 2000 – 2004 (LAC) 986** at para [11].

[8] The court a quo’s order restraining the appellant husband from entering the matrimonial home where there is no pending divorce or judicial separation contemplated in relation to that prayer undoubtedly runs counter to the well-known consequences of a civil rites marriage in community of property. In my view Mr S. Jele counsel for the appellant, correctly submitted in paragraph 5 of his heads of argument when he stated the following:-

“5. The Appellant submits that marriage between parties creates a consortium omnis vitae – physical, moral and spiritual

community of life. Flowing from marital relationship are the duties and obligations of co-habitation, loyalty, fidelity, mutual assistance and support. Spouses are under a duty to live together and to afford each other marital privileges.”

Counsel is indeed supported by a plethora of authorities. See, for example, **Sandile Xavier Francis Dlamini v Bhekiwe Dlamini (born Hlophe), Appeal Case No. 35/2009**. It is indeed trite law that, in a marriage in community of property, the property of the parties becomes a joint estate that is owned by the spouses in equal undivided shares. It is, by operation of the law, a universal partnership.

Accordingly, the learned Judge a quo’s order cannot stand and must be set aside.

[9] Similarly, insofar as the court a quo’s order in relation to the Kia motor vehicle is concerned, it is self-evident that the order granted was not sought in the *lis*. Whereas the application was to have the motor vehicle placed under judicial management, *the court a quo* inexplicably went further and *mero motu* released it to the respondent to the

appellant's obvious prejudice. The appellant is understandably aggrieved by that order. We were, indeed, informed by both counsel at the hearing of this matter that more than two years down the line since that order was granted, the respondent has still not instituted any divorce proceedings. What this means is that an order which was meant to be temporary pending divorce has now become permanent in effect. This cannot be right.

[10] This Court has stated before, and it bears repeating, that a litigant cannot also be granted a relief which he/she has not sought in the *lis*. See, for example, **Commissioner of Correctional Services v Ntsetselelo Hlatshwako, Civil Appeal No. 67/09** at paragraph [7]; **Umbane Limited v Sofi Dlamini and 3 Others, Civil Appeal Case No. 13/2013** at paragraph [9]. It follows that this part of the *court a quo*'s order can also not be allowed to stand.

[11] In the result, the appeal is upheld. The following order is made:-

- (1) The order made by the *court a quo* is set aside and is replaced with the following order:

“The rule is discharged and the application dismissed with costs.”

- (2) This being a family dispute, there shall be no order as to costs.

M. M. RAMODIBEDI
CHIEF JUSTICE

I agree

DR S. TWUM
JUSTICE OF APPEAL

I agree

MCB MAPHALALA
JUSTICE OF APPEAL

For Appellant : **Mr S. Jele**

For Respondent : **Ms N. Mazibuko**