IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No.76/2014

In the matter between:

RUTH SIMANGELE ZEEMAN (born Shongwe) **Appellant**

vs

BHEKITHEMBA REGINALD SITHEBE **Respondent**

Neutral citation: *Ruth Simangele Zeeman (born Shongwe) v Bhekithemba Reginald Sithebe (76/2014) [2015] SZSC 27 (29 July 2015)*

Coram: **J.P. ANNANDALE AJA, M.D. MAMBA AJA and M.J. DLAMINI AJA**

Heard: 10 July 2015

Delivered: 29 July 2015

[1] Civil Practice and Procedure – matrimonial matter filed on application at Magistrate's Court and decided thereat. Successful appeal to the High Court which remits matter to Magistrate's Court to hear viva voce evidence on disputed facts but trial Magistrate declining to hear the case and re-sending it to High Court. This is irregular.

[2] Practice and Procedure – case irregularly referred to High Court for determination. Unopposed application to review and set-aside such referral made before High Court. Judge deciding main matter when infact issue before the court is the review applicant. Resultant order set aside on appeal.

[3] Practice and Procedure – judgment and orders – judge of the High Court has no jurisdiction to overturn orders issued by another judge of equal jurisdiction.

JUDGEMENT

MAMBA AJA

[1] This matter has a long history behind it. The parties married each other in terms of civil rites on 21 February 2003. Before this date, the appellant was or had been married to Jackson Daniel Zeeman. This marriage was in terms of Swazi Law and Custom and was solemnized on 12 May 1984.

[2] At the time of concluding the civil rites marriage, the respondent was not aware of the customary marriage aforesaid. The respondent then filed an application before the magistrate's court for the annulment of the civil rites marriage on the grounds, *inter alia*, that it was bigamous because at the time it was concluded, the appellant was already married to Mr.

Zeeman. This application was filed on 15 May 2012 under case number 2947/2012.

[3] In her opposing affidavit, the appellant stated that the purported marriage to Mr. Zeeman had been annulled in terms of Swazi Customary Law *inter alia* because she had infact been lawfully adopted as a child by Mr Zeeman and therefore she could not in law marry him. However, on 17 July, 2012, the application was granted by the court. The court did not hear any evidence on the matter. It held that the appellant ought to have filed a court order as evidence of the annulment of her marriage to Mr Zeeman, if indeed such an annulment had been granted or made. It ruled that in the absence of such a court order, there was no dispute of fact on the existence of the said marriage.

[4] The Appellant appealed this decision by the magistrate on 18 July 2012. The appeal was heard by the High Court on 30 November 2012 and concluded on 11 June 2013 whereupon the court upheld the appeal. The Court ordered that the matter must be remitted to the Magistrate's Court 'for viva voce evidence' on the existence or otherwise of the customary marriage between the Appellant and Mr. Zeeman.

[5] On 7 March 2014, the magistrate tasked to hear the matter, essentially declined to do so and re-submitted the matter to the High Court. He held as follows:

> 'I find it difficult to deal with this matter as it stands for the following reasons:-
>
> 1. No viva voce evidence has been led as directed by the High Court.
> 2. The mental status has been put to doubt.
> 3. The respondent is said to have issued summons for divorce at the High Court, now represented by a different attorney.'

The Learned Magistrate stated that the matter had been set down on various occasions to allow the appellant herein to lead evidence on the annulment aforesaid and she had failed to do so.

[6] On 10 October, 2014, the respondent filed a review in terms of rule 53 of the rules of the High Court seeking to set aside the decision by the magistrate declining to hear the matter and referring it back to the High Court. The application was set down for 17 October 2014 and was served on the appellant's correspondence attorneys on 08 October 2014. The respondent's main ground for review was stated as follows:

'…I verily believe that the judgement of the [magistrate] referring this matter to the High Court for determination after same had been referred by the High Court to the Magistrate's Court was/is in the circumstances, irregular, unprocedural and an improper step and ought to be reviewed, set aside and or corrected for the following reasons:

There is no provision for referring a civil matter from the magistrate's court to the High Court in terms of the Magistrate's Court Act or Rules or established practice, and, in the circumstances, that is the reason why an order is hereby sought as set out in the notice of motion …' (See page 7 of the Record).

[7] It is significant to observe; and this has not been challenged by the respondent, that both Counsel were agreed that the decision by the magistrate was bad in law and the review was not being opposed. The matter was eventually set down for hearing on 03 December 2014. Neither the appellant nor her Counsel appeared in Court that day and the Court issued the following order:

'1. The marriage solemnised between the parties on the 21st February 2003 is hereby set aside as being null and void ab initio on the basis that the first respondent was at the time of the marriage legally married to Jackson Daniel Zeeman.

2. The Deputy Sheriff is hereby directed to evict the first respondent from the Applicant's home situated at Lot No. 30 Mountain View, Ezulwini Town Umncozi Street, Hhohho Region.'

This is the order of the Court *a quo* that is now the subject of this appeal.

[8] In her grounds of Appeal the Appellant states that the court *a quo* erred in law and in fact in granting the above orders because

'…this was not the prayer that the [respondent] had sought, as he had only asked the Honourable Court to review and correct or set aside the ruling or decision of the Magistrate given on 28 February 2014 [and]

2. The Learned Judge in the Court *a quo* erred in law and in fact in not remitting the matter back to the magistrate in the Court *a quo* to deal with the matter to finality without sending it to the High Court for directions.'

The appellant has submitted supplementary grounds of appeal, which are in my judgment, surplusage for the determination of this appeal.

[9] It is plain to me that, with due respect to the judge in the court *a quo*, that the matter or issue before the court on 03 December, 2014 was not the main matter that had been referred to the High Court by the magistrate,

but the review application. Both parties were in agreement that that was the matter before the court on that day. Further, both Counsel were in agreement that the decision by the Learned Magistrate was wrong and ought to be set aside by the Court *a quo*. It was this consensus or agreement that accounted for the none appearance of the appellant and her attorney on the appointed date.

[10] As a general rule, cases from the Magistrates' Court go to the High Court either on appeal or review there is no revolving door policy or practice on this. Thus, the referral of the case by the Magistrate to the High Court was in the circumstances of this case irregular and the referral should have been declined as well.

[11] From the above, it is obvious that the Court *a quo* erred in hearing and deciding the main application referred to it by the magistrate when in fact that was not the matter or issue before it that day. The resultant judgment thus cannot stand and it stands to be set aside. It was issued in error.

[12] Admittedly, this may have been a suitable matter for rescission under rule 42(1) of the High Court Rules but I do not think that the Appellant should be unsuited for failing to take that route. The decision of the Court *a quo* is final and definitive in its terms and is therefore appealable. The fact

that she has chosen to appeal to this court rather than apply for a rescission in the Court *a quo*, may in a suitable case have a bearing on the issue of costs but not on the eventual outcome of the appeal.

[13] There is yet another reason why I think this appeal must succeed. The High Court per Dlamini J ordered that the matter must be remitted to the Magistrate's court for the leading of oral evidence on the issue in dispute. That order was binding on the magistrate. It was thus not open to the magistrate to decline to hear it. Equally so, it was not open to the Court *a quo* to revisit that judgment by Dlamini J and hear the matter contrary to her order that it should be heard at the Magistrate's court where it had been initiated.

[14] This is a matrimonial dispute. For all intents and purposes, the parties are still married to each other. For this reason alone, and both Counsel were agreed on this, there should not be any order for costs herein. In the result I make the following order:

(a) The appeal is upheld and the decision of the Court *a quo* is hereby set aside and in its stead the following order is granted:

> 'The referral of the matter to the High Court by the Magistrate is hereby declined. The magistrate's court

is ordered to deal with the matter as ordered by Dlamini J in her judgment dated 11 June 2013.'

(b) Each party is ordered to pay his or her own costs of this appeal.

_____

M.D. MAMBA AJA

I agree.

_____

J.P. ANNANDALE AJA

I also agree.

_____

M.J. DLAMINI AJA

For the Appellant: **Mr. L.M. Maziya**

For the Respondent: **Mr. E. Maziya**