IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Appeal Case No. 85/2018

In the matter between:

ELLEN MAGAGULA	**Appellant**
And	
THEMBA MAGAGULA N.O.	**1st Respondent**
ESTATE LATE JOHN MAHHELANE MAGAGULA ESTATE EM 232/2011	**2nd Respondent**
THE MASTER OF THE HIGH COURT	**3rd Respondent**

In re:

ELLEN MAGAGULA (NEE NENE)	**Applicant**
And	
THEMBA MAGAGULA N.O.	**1st Respondent**
NGCEBASE MAGAGULA (NEE DLAMINI)	**2nd Respondent**
ZODWA MAGAGULA (NEE HLETA)	**3rd Respondent**
NOMTHANDAZO MAGAGULA	**4th Respondent**
NOMAGUGU MAGAGULA	**5th Respondent**
NOMALUNGELO MAGAGULA	**6th Respondent**
KHONTAPHI MANZINI (NEE MAGAGULA)	**7th Respondent**
DAISY ATLEE (NEE MAGAGULA)	**8th Respondent**
THE MASTER OF THE HIGH COURT N.O.	**9th Respondent**
THE REGISTRAR OF DEEDS N.O.	**10th Respondent**
THE COMMISSIONER OF POLICE N.O.	**11th Respondent**
THE ATTORNEY GENERAL	**12th Respondent**
THE ANIMAL HEALTH INSPECTOR N.O.	**13th Respondent**

Neutral Citation	:	*Ellen Magagula vs Themba Magagula N.O. and 12 Others* (85/2018) [2019] *SZSC* 19 (28/05/2019)
Coram	:	**R.J. CLOETE JA, S.B. MAPHALALA JA AND J. M. CURRIE AJA.**
Heard	:	22nd MAY, 2019.
Delivered	:	28th MAY, 2019.
SUMMARY	:	*Appeal against refusal of rescission of a Judgment obtained in the absence of the Appellant – High Court had ordered the matter to go to oral evidence on two occasions after the interim interdict granted – The provisions of Section 42 (1) of the High Court Rules discussed – Original order not revived or reinstated nor the two orders referring the Parties to oral evidence having been set aside – The provisions of Rule 33(3) invoked relating to special order made – Matter referred back to the High Court for the hearing of oral evidence on specific issues – Appeal succeeds with costs.*

JUDGMENT

CLOETE – JA

[1] The application for the Condonation of the late filing of her Heads of Argument and Bundle of Authorities by the Appellant was granted in the interest of getting to the main matter even though the application was not

entirely satisfactory and this should not be taken as a relaxation of the stringent requirements for all future applications of this nature by all legal practitioners.

[2] The facts of this matter, mostly undisputed, are as follows:

1. The Appellant and Samson John Mahhelane Magagula (the Deceased) were married to each other in community of property in Swaziland, as it was then, on 10 December 1960 and which marriage subsisted and remained valid until the death of Deceased on 2 August 2011. As such the Deceased during his lifetime was the administrator of the Joint Estate.

2. On 17 September 1987 the Deceased unilaterally executed a last Will and Testament in terms of which he purported to testate the majority of the assets of the Joint Estate to a variety of persons including purportedly leaving the Appellant all movable assets in her possession as at the date of his death.

3. He appointed as the Executor of his Estate, in terms of the said last Will and Testament, one Themba Magagula who was the 1st Respondent in these proceedings. The said Themba Magagula, who incidentally appears

to have been a major beneficiary under the said unilateral last Will, proceeded to administer the Estate of the Deceased based on the said Will. (At this juncture I need to say that it is astonishing that the Master of the High Court seemed to countenance this activity in face of the trite Law applicable in Eswatini)

4. Fearing for her tenure on a property occupied by her and so as to protect her interests, the Appellant, alleging that in terms of the law she was entitled to one half of the Joint Estate, brought an application before the High Court for an order staying the distribution of the assets of the Joint Estate in terms of the provisions of the unilateral Will despite the fact that she was married in community of Property to the Deceased and such order was granted by the High Court per Justice M. Dlamini on 22 August 2013.

5. It is apparent and clear from the record of proceedings placed before us that the matter was opposed by all of the Respondents. At pages 27 onwards of the said Record the handwritten notes of the Judge clearly reflect that the matter was argued and as is reflected at page 38 of the Record, the said Judge, on 30 October 2013, referred the matter to trial by way of oral evidence on some specific issues. From that it is clear and unambiguous that the matter was part – heard at that point.

6. Even though it appears that the Court file relating to some of the issues in the High Court or parts thereof have gone missing, thankfully some vital documents remained available and in that regard, on the assumption that there had been further activity in the matter, it is apparent that Justice Mamba heard the matter subsequently and on 13 October 2014 issued the following order as set out at page 26 of the record:

"IT IS HEREBY ORDERED AGAINST THE PARTIES AS FOLLOWS:

a) Matter referred to oral evidence as ordered by the Court on the 30th October 2013.

b) Parties to hold Pre – Trial Conference and forward a minute to Registrar indicating inter alia how many witnesses are to be led and the appropriate time required for that.

c) Record of proceeding before Dlamini J. are to be transcribed and made part of the record herein.

d) Matter removed from the Roll."

7. Thereafter it is apparent that the Attorney acting for the Appellant withdrew his services in terms of a Notice of Withdrawal dated 24 February 2016 which was allegedly signed in acknowledgement of receipt by the Appellant in person. The matter then went quiet for some time.

8. Then, for some unexplained reason, the Respondents mysteriously caused the Notice of Withdrawal of her previous Attorney to be served on her by the Deputy Sheriff on 13 April 2016.

9. Then, on a date unknown to us, since the purported notice of set down was not in the Court record nor could it be produced by Attorney Maseko acting for the Respondents at the hearing, apparently the matter was set down on a Motion Court day without any notice being given to the Appellant and on 16 September 2016 Justice Nkosi caused the following troubling final order to be granted and it is necessary to set out the order in full:

"FINAL COURT ORDER

BEING	**:**	**An Application**
WHEREUPON:		**Having heard counsel for the <u>Applicants</u> and <u>Respondents</u> and read the papers filed on record.**

IT IS ORDERED THAT:

1. **Applicant's Application dated 21st August 2013 is hereby dismissed."**

(My underlining)

10. Mr. Maseko for the Respondents admitted that the basis for that order was incorrect and conceded that the application was brought *ex parte* without notice to the Appellant and that the Appellant was never heard. The

import of the so called final Court Order appears to have been a dismissal of the Appellant's original application and it is apparent that there had not been any form of application by either the Appellant or the Respondents to reinstate the order granted on 22 August 2013 and that there also had not been any application by other party to set aside the specific orders handed down by the High Court on 30 October 2013 and 13 October 2014.

11. The clearly erroneous order of 16 September 2016 was then served on the Appellant but there is no reasonable explanation as to why the purported notice of set down giving rise to such order had not been served on a very elderly woman who is by all accounts not conversant with the law?

12. The Appellant then instructed her current Attorney to act on her behalf and to bring the necessary application in terms of the provisions of Rule 42 of the High Court to rescind the order of 16 August 2016. The matter was heard by Justice Fakudze on 5 July 2018 and delivered on 1 October 2018. Her grounds were basically that the Judgment was obtained in her absence, that she had not received any notice setting down the matter in the first instance, that the matter had in fact been referred on two occasions to oral evidence by two separate High Court Judges and as such had been granted in error.

13. In the said Judgment, Justice Fakudze found against the Appellant on the basis that the application for rescission had not been brought timeously and that the Appellant had failed to comply with the provisions of High Court Rule 16 (4) (b) in that she had failed to furnish an address for service of documents on her after the withdrawal of her original attorney. This is the Judgment appealed against to this Court on the following grounds:

"1.1 The Court *a quo* erred and misdirected itself by failing to consider that the *rule nisi* granted on the 22nd August 2013 in the main application referring the matter for oral evidence had elapsed. Hence, the final Court Order was erroneously granted because there was no formal and/or substantive application to revive the *rule nisi* filled before the Court when the main application was dismissed.

1.2 The Court *a quo* erred and misdirected itself by failing to consider that there was an error in the main application when the Court *mero motu* decided to do away with a formal notice of setdown and/or formal application enrolling the matter for final judgment. It was therefore necessary for the first respondent to file a notice of setdown and/or formal application before the Court for its final judgment.

1.2.1 The Court *a quo* ought to have found that the 1st Respondent should have served a notice and/or formal application upon the appellant personally when no new attorneys of record had been appointed in terms of the rules and clearly indicate that the matter will then be finally determined without oral evidence.

2.1 The Court *a quo* erred and misdirected itself in finding that the appellant ought to have provided an explanation for a

rescission application under Rule 42 (1) (a) of the High Court rules.

2.1.1 The Court *a quo* erred and misdirected itself in finding that in the absence of a reasonable explanation the final court order erroneously granted in the main application cannot be rescinded, notwithstanding the fact the appellant was waiting for a hearing date to lead oral evidence in those issues that were reserved for trial."

14.Mr. Mntshali for the Appellant had filed comprehensive Heads of Argument and referred the Court to his Heads and as such his Arguments. In particular he pointed out that the matter was in fact part heard as is clearly reflected in the High Court Judgments of 30 October 2013 and 13 October 2014 and that given that the Respondents took the trouble to serve the Notice of Withdrawal and the order of 16 September 2016 they should similarly have served on her the Notice of Set down for that application.

[3] The Respondents had also filed extensive Heads of Argument and it is necessary to deal in some detail with the specific issues canvassed with Mr. Maseko for the Respondents.

[4] It was conceded that;

1. The marriage of the Appellant and the Deceased was in community of property and that the marriage subsisted until the death of the Deceased

and that each of the Spouses was at law entitled to one half of the Joint Estate. (On this issue, in fairness to Mr. Maseko, he argued that despite the law being what it is, the peculiar circumstances of the matter should be taken into account and that the Court should not be blindfolded by the law);

2. The purported final Court Order of 16 September 2016 was incorrect as it was in fact obtained *ex parte* and that the Appellant was neither present nor heard in that application;

3. No application was brought by either party to reinstate the order of the High Court made on 22 August 2013;

4. No application was made by either party to set aside the orders of the High Court made on 30 October 2013 and 13 October 2014;

5. The last Will and Testament made by the Deceased was not a joint Will but made unilaterally and that the details set out in the power of attorney to pass transfer of a property as set out on page 114 of the record were incorrect in that it purported to show that the Will concerned was a Joint Will.

6. Mr. Maseko left the decision relating to this matter in the hands of the Court after the above issues were canvassed.

[5] I need to deal with the Judgment of the Court *a quo* relating to the rescission application. At paragraph 12 of the Judgment, the Judge correctly points out the law as it stands and I quote paragraphs 12, 13 and 14 of the Judgment in full whilst stating that I am in absolute agreement with all of those paragraphs:

"The Law

[12] There are three (3) ways in which a judgment taken in the absence of one of the parties may be set aside, namely in terms of (i) Rule 42; (ii) Rule 31(2) (b) or (iii) at common law. In order to obtain a rescission in terms of Rule 42(1) (a) the Applicant must show that the prior order was erroneously sought or erroneously granted. The Learned Author Erasmus on Superior Court Practice, Juta Co states at B1-308 as follows:-

"An order or judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such order, or if there existed at the time of its issue a fact of which the judge was unaware, which would have

precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment."

[13] **Likewise in Allen Magongo v Edmund Alexander Hamilton [2014] SZHC 28, Hlophe J observed that "...................*Applicant under this rule must show the court that an Order was granted in his or her absence that affects him or her was granted in error; if this is proven............the order without further enquiry must be rescinded".***

[14] **On the lapsing and revival of an interim order Mabuza J observed in Trevor Sibusiso Dlamini v KDG Logistics case No. (351/16) [2016] SZHC as follows:**

> ***"[13] On the day the matter came before court, the issue of the Interim Order in favour of the Applicant was never addressed and therefore it lapsed and was never revived.***
>
> ***[14] There is no application before me to revive the interim order referred to in paragraph 10 herein above.***
>
> ***[15] The difficulty that this court faces is that the interim order which had incorporated the order as to costs lapsed and was never revived nor was it confirmed. The***

debate for costs was appropriate at revival or confirmation."

(My underlining)

[6] As indicated I agree entirely with all of the above however I cannot, with respect, agree with the eventual findings of the Court *a quo* which appeared to me to be heavily based on the provisions of High Court Rule 16(4)(b) and, again with respect, not based on the issues relating to reinstatement of the original Interim Order and the compliance with or setting aside of the Orders made on 30 October 2013 and 13 October 2014. I must add that in fairness, the Court *a quo* did, at the hearing of the matter, raise issues relating to the prior proceedings and that the Court was advised that the file/s in the 2013 matter had gone missing and it does not appear from the Judgment that the issue of compliance with the Judgments of 30 October 2013 and 13 October 2014 were canvassed at the hearing.

[7] From what is before us, it is clear that the Interim Order of 22 August 2013 was never revived by any party and on that basis alone, with reference to the matter which the Court *a quo* itself referred to, namely the **Trevor Sibusiso Dlamini** matter, the Court should have granted the rescission application.

[8] It is compounded by the fact that it is clear from the record that the matter was in fact part heard in the High Court and that there had been two separate and distinct orders on 30 October 2013 and 13 October 2014 that the matter be referred to oral evidence after arguments have been submitted by the parties before Justice Dlamini and Justice Mamba, and, as indicated above there is no evidence that either or both of those orders were complied with or set aside.

[9] Accordingly the only conclusion which one could reasonably arrive at is that, given all of the above, the purported final Court Order of 16 September 2016 was erroneously granted and further compounded by the fact that it was granted in the absence of the Appellant and accordingly that the Court a quo should have granted the Appellant an order rescinding a Judgment granted in error.

[10] This case however raises many more serious issues including the rights of spouses married in community of property, their rights to deal with their share of the Joint Estate, fairness, the protection of the rights of elderly persons who are not law savvy.

[11] Without the need to quote any authority of any nature, it is trite that the law in the Kingdom of Eswatini relating to pertinent issues is simply the following:

1. A Civil Law marriage contracted by two consenting parties subsists until it is terminated by death or by order of a Court of law.
2. Such a Civil Law marriage, in community of property provides that;

    1. The husband is the administrator of the Joint Estate;
    2. Both the Spouses jointly own all of the assets of the joint estate;
    3. Upon termination of the marriage through death, the surviving spouse is entitled to a one half share of the entire estate as at that date;
    4. Either of the parties is only able to testate their own one half share of the joint estate;
    5. As regards termination of the marriage by divorce, there is a provision at common law which empowers a Court to order the forfeiture of the benefits arising out of a marriage in community of property to a delinquent spouse in exceptional circumstances.

[12] At this point it is necessary for me to point out the powers vested in this Court in terms of the provisions of Rule 33 (3) which reads:

"33 (3) **Even where the notice of appeal seeks to have part only of the judgment reversed or varied, the Court of Appeal may draw any inference of fact, give any judgment, <u>and make any order which ought to have been made and may make such further or other order as the case may require</u>, and such powers may be exercised in favour of all or any of the respondents or parties whether or not they have appealed from or complained of the decision under appeal."**

(My underlining)

[13] In exercising our right in terms of that Rule, this matter should be referred back to the High Court for the hearing of oral evidence (or on commission if circumstances demand) relating to the following:

1. The subsistence of the marriage in community of property between the Appellant and the Deceased up to the date of his death;
2. The validity of the purported last Will and Testament of the Deceased made on 17 September 1987;
3. The entitlement of the Appellant to assets of the Joint Estate in terms of the law;
4. Any other matter which the High Court deems to be necessary.

[14] It bears to be mentioned that Mr. Maseko advised the Court, correctly and honourably in my view, that the transfer of the immovable properties found in the Joint Estate of the Appellant and the Deceased had not been transferred and as such, further relying on the provisions of Rule 33 (3) above, I believe that it is necessary to make an Order preserving the *status quo* relating to all immovable property which should not be transferred to any party pending the outcome of the matter hereby referred back to the High Court.

[15] Accordingly the following Order is made:

ORDER

1. The Appeal succeeds and the Judgment of the High Court relating to the rescission of the Judgment of the High Court of 16 September 2016 is hereby set aside.

2. The Order of the High Court of 16 September 2016 is hereby set aside in its entirety.

3. The matter is referred back to the High Court for the hearing of oral evidence (or on commission if circumstances demand) relating to the following specific issues:

1. The subsistence of the marriage in community of property between the Appellant and the Deceased up to the date of his death;
2. The validity of the purported last Will and Testament of the Deceased made on 17 September 1987;
3. The entitlement of the Appellant to assets of the Joint Estate in terms of the law;
4. Any other matter which the High Court deems to be necessary.

4. The Interim Order granted by the High Court on 22 August 2013 be reinstated to the extent that the 1st Respondent and any of the other Respondents or persons acting on his behalf be interdicted from passing transfer of any of the immovable properties found in the Joint Estate of the late Samson Mahhelane John Magagula and the Appellant pending the finalisation of the matter in the High Court.

5. The costs of this Appeal shall be borne by the 1st Respondent in his representative capacity.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

S. B. MAPHALALA

JUSTICE OF APPEAL

I agree

J. M. CURRIE

ACTING JUSTICE OF APPEAL

For the Appellant	:	M. MNTSHALI
For the Respondent	:	W. MASEKO