



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL APPEAL CASE NO. 37/2018

In the matter between:

MUSA GOODMAN DLAMINI

Appellant

And

NOMPUMELELO DLAMINI (Born Nxumalo)

Respondent

*Neutral Citation: Musa Goodman Dlamini vs Nompumelelo Dlamini (37/2018)
[2018] SZSC 23 (29th May 2019)*

Coram:

S.P. DLAMINI, JA

J CURRIE, AJA

S.J.K MATSEBULA, AJA

Date Heard: 18th April 2019

Date delivered: 29th May 2019

Summary

Civil Law - Appeal against judgments of Court a quo – Application for condonation for late filing of heads of argument – Application dismissed – Appeal against judgment of the Court a quo – restoration of conjugal rights – what constitutes restoration – Appeal upheld and marriage dissolved.

JUDGMENT

S.J.K MATSEBULA, AJA -

INTRODUCTION

[1] The Appellant (Plaintiff in the Court *a quo*) first issued summons commencing action before the Manzini Magistrate's Court against the Respondent (Defendant in the Court *a quo*) for:-

- (a) a final decree of divorce;*
- (b) a division of the joint estate in proportions as agreed; and*
- (c) joint custody of the children of the parties.*

[2] The Plaintiff (Magistrate Court) in his particulars of claim alleged:-

- "5. Since late 2008 the Defendant was on numerous occasions and at different places including Mkhulamini and places in the Republic of South Africa committed adultery with one Bongani Dlamini. The Plaintiff has never condoned Defendant's adultery.*

6. *Further, Defendant has constructively dissented Plaintiff with an aim to end the marriage. Defendant refuses Plaintiff conjugal rights since the 8th October 2010 to date. Defendant conducts herself in an abusive manner against the Plaintiff, in that she comes home very late at night and wakes up the Plaintiff.*
7. *In addition the Defendant has maliciously dissented the parties' matrimonial home at Malindza. The Defendant on the 5th February 2011 stated that she no longer had the desire to be married to the Plaintiff and that she was not going to return to the matrimonial home.*
8. *From the marriage between the parties two children were born. Both children are still minors and are presently in the care of the Plaintiff. It would be in the best interest of the children if custody and control of the children would be shared between the parties.*
9. *The marriage relationship between the parties has irretrievably broken down and there is no reasonable prospect of the restoration of a normal marriage relationship between them due to Defendant's adultery.*

WHEREFORE PLAINTIFF CLAIMS;

(a) A final decree of divorce

(b) A division of the joint estate in proportions are agreed."

[3] The Defendant replied to the effect that:-

"4. AD PARAGRAPH 5

The contents of this paragraph are denied.

5. AD PARAGRAPH 6

The contents of this paragraph are denied and the Plaintiff is put to the proof thereof.

6. AD PARAGRAPH 7

6.1 *The contents of this paragraph are denied.*

6.2 *The Defendant avers that the Plaintiff evicted her from the marital Home on 5 February 2011 after the Plaintiff had discovered that:*

6.2.1 *The Plaintiff was engaged in an extra marital affair with Cebile Nxumalo (born Gule):*

6.2.2 *That the Defendant had come upon the Plaintiff and the said Cebile Nxumalo in the course of sexual relations on 1 February 2011 at the Plaintiff's parental home at Gunduvini;*

6.2.3 *The Defendant avers that it is the Plaintiff and not the Defendant who has conducted an extra-marital affair and it is the Plaintiff who has maliciously deserted the Defendant."*

The Defendant further submitted that the marriage relationship between the parties has broken down as a result of the conduct of the Plaintiff.

[4] Then the Defendant filed a counter – claim on the following grounds:-

"1. The Plaintiff in convention is the Defendant in reconvention and the Defendant in reconvention is the Plaintiff in convention however, the parties shall simply be referred to as they are in the Plaintiff's particulars of claim as the plaintiff and the Defendant.

2. The Defendant repeats prayers 1.2.3. and 4 of the Plaintiff's particulars

of claim.

3. *There are two minor children born of the marriage namely:*

- a. Colile Dlamini a girl born on the 31st of January 1996; and*
- b. Nokwanda Dlamini a girl born on the 16th of February 2000.*

4. *Since January 2010 and at Gunduvini, Malindza, Manzini and elsewhere within the Kingdom of Swaziland, the Defendant wrongfully and unlawfully committed adultery with Cebile Nxumalo.*

5. *The Defendant relies in this regard upon her personal knowledge of this, she having found the Plaintiff on 1 February 2011 in the early hours of the morning at Malindza with the said Cebile Nxumalo.*

6. *The Defendant further relies on the Plaintiff's admission that he made to the Defendant in the presence of her family entourage, that he was engaged in an illicit extra-marital love affair with the said Cebile Nxumalo and that he would not break off this affair.*

7. *In addition thereto, upon the Defendant discovering the Plaintiff's adultery, with the said Cebile Nxumalo on 1 February 2011 at Malindza, the Plaintiff returned to the marital home and ejected the Defendant therefrom. The Defendant has been barred from returning to the marital home by the Plaintiff.*

8. *In the premises, the Defendant seeks an Order for a judicial separation from the Plaintiff based on his adultery."*

[5] The Hon. Magistrate dismissed the Plaintiff's application for divorce on the grounds of adultery and malicious desertion and accepted the defendant's evidence that it was the Plaintiff who had committed adultery and granted her prayers for judicial separation, joint custody of the children and costs of suit.

- [6] The Plaintiff/Appellant being dissatisfied with the Hon. Magistrate decision approached the High Court for redress. The grounds for appeal were the same as in the initial proceedings in the Magistrate Court, namely that the Respondent/Defendant committed adultery, Respondent constructively deserted Appellant through her conduct of withdrawal from the marriage, denying the Applicant marital favours, denial of conjugal rights to general hostility and abuse towards the Appellant and lastly malicious desertion by the Respondent by leaving the marital home at Malindza in 2011.
- [7] The Court *a quo* having examined the evidence given before the Magistrate's Court came to the conclusion that both the Appellant and Respondent had failed to substantiate their claims for adultery against each other.
- [8] The Court *a quo* further found that the Respondent had deserted the Appellant hence at paragraphs [63] to [66] of its judgement the Court *a quo* ordered:-
- “ [63] *In my view far from there being no proof of malicious desertion the facts speak for themselves. The learned Magistrate therefore erred in finding that the Appellant had not made out a case for malicious desertion.*
- [64] *Having determined that the Appellant had not made out a case for divorce on the grounds of adultery the relief prayed for in the summons for a final decree of divorce and the ancillary orders is not a competent one. It seems to me on the basis of the evidence the Appellant has made out a case in support of the alternative ground of malicious or constructive desertion but not of adultery as would*

suit an out and out order decree of divorce.

[66] *In upholding the appeal I accordingly also set aside the orders of the Magistrate Court, granting a decree of judicial separation, and now make and substitute the order of Court a quo with the following order:*

The Respondent is hereby ordered to restore conjugal rights within 14 days from the date of this order failing which a final decree of divorce shall issue."

[9] The judgement Court *a quo* was delivered on the 23rd November, 2017 and on the expiration of the 14 days, and more precisely, on the 15th February, 2018 the parties were back at the Court *a quo* for the return date for the order for the restoration of conjugal rights by the Respondent.

[10] The Respondent's case was that she had complied with the Courts' order to restore conjugal rights to the Appellant but the Appellant had rejected her overtures. The Respondent averred that on the 9th of December, 2017, she and her two sisters together with the two minor children of the marriage went to Malindza the other matrimonial home where the Appellant was and she demanded that the matrimonial house be opened so that she could do some cleaning as a way to show that she was resuming her wifely duties in compliance with the restoration of conjugal order of the Court. She states that the Appellant's response was to throw her together with her party and children out of the gate which the Appellant proceeded to lock barring them from entry. She stated that therefore she had complied with the Courts order

to restore conjugal rights to her husband, the Appellant.

[11] On the other hand, the Appellant's case is that the purported restoration of conjugal rights by the Respondent was not genuine or sincere in that:-

"(a) the Respondent came to the homestead where the other matrimonial home is situated in Malindza without advance notice;

(b) the Respondent, apart from their children, came with her sisters and another women who was in a black mourning apparel or inzilo.

(a) the Respondent and her party refused to be ushered into an out building, a round hut (indlu yaka gogo) whose utility according to Swazi custom is where important family matters are discussed. The Appellant says the purpose for inviting his wife and her party to this hut was to have a proper reception and discussions with the Respondent and her party.

(b) according to the Appellant, the Respondent refused to go to the hut for discussions and an altercation ensued between them. The woman in black or in mourning gowns was vocal and claimed she had a right to speak in the matter which right she had been given by the Respondent.

(c) the alteration raised a spectacle such that it drew or attracted neighbors hence the Appellant decided to drive off and leave the Respondent and her party."

[12] The Honourable and Learned Judge *a quo* having examined the authorities on divorce issues, the requirement of the peremptory step of first issuance

of a restoration order and having analysed the actions of the parties when the restoration order was attempted to be complied with came to the conclusion which is the judgement of the Court found at paragraph 32 and 33 of that judgment couched in the following terms:-

“32 Indeed this is the regrettable position in our law (referring to the only two grounds of divorce, being adultery and malicious desertion) and until the long overdue legal reform in our law of divorce and generally our civil law of marriage to keep apace with the new social and constitutional exigencies this court is impelled to apply it as it finds it.

33. In the circumstances of this case I am left with no option but to order that the action for restitution of conjugal rights must fail as indeed the claim for divorce. As this Court did not the Mahlalela case above I believe that appropriate option or remedy for the Plaintiff will be to re-institute fresh proceedings in fitting circumstances for divorce where the cause for divorce exists.”

[13] The Appellant dissatisfied with this judgement has appealed to this Court.

[14] The Appellants grounds of appeal are that:-

“ 1. The Court a quo erred in law in holding that in the circumstances of this case, the Respondent restored conjugal rights to Appellant;

1.1 The Court a quo ought to have found that the Respondent’s conduct did not amount to a restoration of conjugal rights or a compliance with the order to restore conjugal rights.”

APPLICATIONS FOR CONDONATION

- [15] The Appellant filed an application for leave to appeal to this Court and served notice on Respondent's attorneys on the 21st June 2018. The Respondent's attorneys did not respond, that is, they did not file any opposing papers. The delay or non-filing of opposing papers by Respondent's attorneys necessitated the Appellant to file an application for condonation for late filing of its heads of arguments putting the blame on the Respondents non-filing of its opposing papers.
- [16] On the 17th October this Honourable Court granted the Appellant leave to appeal and with no order to costs.
- [17] On the 7th March 2019 and 8th March 2019, the Appellant filed its heads of argument and the bundle of authorities respectively.
- [18] The matter was set for hearing on the 18th April, 2019.
- [19] On the 17th April 2019, the Respondent filed an application for condonation for the late filing of its heads of argument, a day prior to the hearing of the matter. It alleged that the late filing was caused by lack of finances on its part to pay its attorneys. This application filed on the eve of the hearing obviously deprived the Appellant enough time to read and prepare its responses accordingly. This Court has noted in several matters that it seems every matter before hearing it on the merits is preceded by an application for condonation for late filing of one requisite document or other. In the recent case of **Sandra Khumalo and 4 Others vs Lomdashi Limited (76/2018)**

[2019]SZSC 7 (20/03/2019) this Court gave a final warning to litigants to stop forthwith the practice of filing condonation application in every matter and that it would not tolerate this malpractice unless the reasons are justifiable in the following terms at paragraphs [20] and [22]:-

“[20] Accordingly, despite all of the above warning, the malpractice by legal Practitioners in the Kingdom continues unabated. At page [38] of De Barry the following was said:-

Despite numerous judgments, circulars, warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of Court with seeming impunity and we hope that this judgment will demonstrate that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant abuse of such Rules. Having said that , this Court will always consider genuine, well documented Applications in terms of the rules provided that full acceptable details are set out in Founding Affidavits, the Court taken into confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising”

[21] Practitioners should take this as a final warning that this Court will no longer tolerate the total disregard for the Rules and as such by extension the disrespect for this Court” (my underlining)

In this case the attorneys were ordered to pay costs from their own pockets.

[20] In the present application for condonation, further, not much is said about prospects of success but in one sentence the Respondent simply says:-

“It is my statement further that I have good prospects of success on the merits” but doesn’t say what they are to enable the Court to evaluate them.”

- [21] She further attributes the late filing to the fact that the Respondent lacked finances to pay for her Attorneys to continue with the case.

In the case of **Floyd Mlotshwa and Another vs Chairman of the Electoral and Boundaries Commission** and Others (96/2018) [2019] SZHC 3 (2019) it was held that :-

- “(a) lack of finances for continuation of the litigation is not a sufficient reason for condonation for late filing; and
(a) Applicant must satisfy the Court that he has prospects of success on the merits.”*

- [22] For the foregoing alone this Court had no option but to dismiss the Application for condonation. But that is not all, Counsel for the Respondent was not present in Court when this Court resumed its sitting and she had to be called by an officer of this Court by shouting her name or the representative of the Respondent three time off the door of the Court but to no avail. The Court had no option as there was no explanation for her absence, she had even failed to notify either the Registrar or her counterpart if she would be late. The Court had no better option but to continue with the matter on the papers filed. The Court as stated above found the application for condonation failing to meet the required standards for an application for condonation and dismiss the application; soon thereafter she made entrance and sat down until the Court had to enquire as to who she was and her business in Court when she eventually arrived. The Court using its discretion allowed her to address it on the merits of the case because it sought to have justice done to the matter more so that this matter deserved finality soonest as it had a bearing on the interests of the minor children of the marriage.

On the Merits

[23] The Court shall now analyse the conduct to the parties to ascertain whether or not restoration can be held to have been done or the restoration or was complied with. The Court was of the view that the Respondent had attempted to restore but had been prevented from doing so by the Appellant. The Learned Judge at the Court a quo at paragraphs [20] to [21] of the judgment reasoned that and was satisfied too that since this was not only constructive desertion but physical desertion and therefore it was enough that the Respondent had also physically presented herself at the matrimonial home:-

"[20] It is also very clear that the defendant has physically attempted to restore conjugal rights. It is not possible to gauge whether her intentions were genuine nor can it be shown that she was given any viable opportunity of showing or proving this intent. What greater gesture of such restoration was required of her than to physically present herself to her husband at the material home.

[21] It was suggested by Mr. Magagula that the defendant's bona fides in returning and restoring conjugal rights were circumspect as she displayed a hostile, confrontational attitude that indicated that she was still unreformed and not peaceable. Mr. Magagula urged that was indicative of her unwillingness to submit to the authority of her husband. I must hasten to observe that in this matter and given the background facts of this matter, this is not a case of constructive desertion as it is one founded on actual physical desertion by the defendant; having left the material home. So it is disingenuous to say her bona fides or want thereof could be inferred from her conduct or insubordination to her husband or from the attitude for that matter. She simply returned as she was called upon to do so"

[24] I disagree with the Learned Judge but hold that the physical presentation of the defendant before her husband must be accompanied by a mental state

or intention to genuinely restore conjugal rights and full and healthy cohabitation. When I am analyzing the defendant's actions or behavior it is clear that her actions were not conducive for resumption of full cohabitation with her husband. This can be inferred from the company she came with and their purpose was not to restore conjugal rights and further they are strangers to the Court's restoration Order.

- [25] The Appellants case is that the Court *a quo* erred in law in holding that the Respondent's conduct amounted to or constituted a restoration of the conjugal rights or that it was a full compliance with the order for restoration.
- [26] The Respondents answer is that, on paragraph 4 of the Respondents Heads of Argument, "she did all that was required of her to comply with the order for restoration of conjugal rights. Her intention even to date is to return to her home and family, but the Appellant is making it difficult for her to do so."
- [27] The Respondent in her Heads of Argument does not go to the gist of the Appellant's contention that the mere presence of the Respondent at the matrimonial home, refusal to hold discussions and the presence of her accompanying sisters can it be said to be full restoration of conjugal rights or not.
- [28] The Appellant does not deny that the Respondent did come to their matrimonial home in Malindza but avers that she came with her two sisters, a woman in mourning gowns and their children armed with a video recording equipment or camera. The Respondent wanted the matrimonial house to

be unlocked so she and her company could go in and start cleaning the house. The Appellant says he invited the Respondent, and presumably with her sisters, to a hut reserved for family discussions of important issues and she refused the offer.

- [29] Nozipho Nxumalo – Shabangu in a confirmatory affidavit, one of the persons who accompanied the Respondent says at paragraph 5 –

“It is my statement further that the Appellant refused that we get into the house to assist the Respondent with the cleaning up in preparation for her return and taking up her position as a wife. She had told me that she had been ordered to return to Malindza to resume her wifely duties there”
(my underlining)

- [30] This statement is relevant as to why the Appellant refused to open the house and directed that talks be held in a hut reserved for family discussions. A dwelling house is a private place or sanctuary where visitors and strangers can only enter on the permission of the person or persons who dwell there. There are certain things in a dwelling which are not open to the gaze or not open to the eyes of strangers or to the touch and removal by strangers. In this case, the Respondent and her party had come without any prior notice. One’s dwelling house cannot within a blink of an eye be turned into a museum where strangers just walk in and touch things as they please. This act alone is relevant when assessing the state of mind of the Respondent whether the intention was to restore conjugal rights or to provoke the Appellant to act in the manner that he did by refusing them entry and further driving away or locking them off the premises.

- [31] The order for restoration was directed to the Respondent and Respondent only and alone. A marriage contract is a contract between only two persons, it is private matter sometimes requiring performance of certain things in private, such as being intimate and displaying affection of each other. The presence of the sisters, as we have noted, was unhelpful towards the restoration of conjugal right.
- [32] The parties had separated and stopped living in the matrimonial home or house for more than seven years, having done so since 2011. Preliminary discussions were expected before resuming the status of living together. The discussions would, probably have involved issues that caused the strife or separation in the first place with an agreement as to how those issues or disagreements are solved so as to permit a full and healthy cohabitation. In my view the Respondent should have given in and allowed those discussions to take place to permit discussions to take place negating her physical presence to restore conjugal rights.
- [33] In passing, one may note that customs and rules governing customary marriages and civil rites marriages differ in many respects. In customary marriages, the wife marries to the family of the husband and when she has been expelled back to her parental home, after discussions, she is accompanied back to her husband's family. Being accompanied back is a norm and is accepted in these marriages. In civil right marriages, only two parties matter, the contractors, that is, the wife and husband. Where a Court, for example, orders restoration of conjugal rights, such order is directed to one of the parties and there is no need for third parties. Indlu yakaGogo is part of Eswatini culture, it is a place of refuge, a place of discussions of important family issues and a place of performance of certain cultural practices. The concept of indlu yakagogo may be foreign in civil

marriages where important matters may be discussed in the matrimonial house. The present case is not being decided on the mixing of these practices but on the intention, the mind of the restorer of conjugal rights had when she went to restore conjugal rights.

- [34] The issue of the woman in morning gowns or a sister to the Respondent is also relevant. I do not intend to be embroiled in the practices, customs or perceptions about persons in mourning gowns under Eswatini customs. Her relevance in this case is that she accompanied the Respondent to restore the Respondent's conjugal rights. Not only did she accompany the Respondent but actively participated in a matter I would say was private. We are not told what exactly she said but there is an allegation by the Appellant that her participation was not welcomed by the Appellant yet on the other hand Respondent protected her and said she had been given permission to speak by her, the Respondent.
- [35] What I deduce from this is that the sister, meaning the woman in mourning gowns was not a mediator chosen by both parties to assist them. So her role is unclear and it led to a confrontation with the Appellant who protested of her presence. The Appellant regarded her as an interference. In my opinion her presence did not help the parties and especially it not assist the Respondent to fully and completely restore conjugal rights but led to confrontation and hostility and thus negated the mission to restore conjugal rights.
- [36] During the hearing, both counsel for the parties admitted that the marriage relationship between the parties is irretrievably broken. There is no longer

any love and affection and life would be a strife. It emerged that the parties at some time tried to agree on the division of property belonging to the estate but each party came with a list or inventory which differed from the other party's inventory or list. In any event, the division could not come through without first obtaining a decree of divorce based on the acceptable grounds of divorce as they obtain in this country, namely, adultery or malicious desertion.

[37] The Court *a quo* has already pronounced itself or held that the grounds of adultery have not been proven hence not available to the parties. Both Counsel descried the failure of Parliament to move with the times and by statute add further grounds such as irretrievable brake down of the marriage relationship. Other countries have promulgated that five years absence from the matrimonial home without the consent of the other spouse is a ground for divorce and got rid of the archival principle of first ordering for the restoration of conjugal rights. This Court and the other Courts have on numerous occasions called upon Government and Parliament to modernise our ancient and colonial Marriage Act of 1964 to no avail. People whose marriage relationships have broken down must be free to end the contract of marriage and free themselves from such unworkable and sometimes violent relationships.

[38] The two parties in this case ceased in 2011 of having a marriage relationship when they separated from sharing the matrimonial bed as well as the joint matrimonial home. This Court could not force people who no longer have and cherish each to do so.

[39] This Court has been referred to a few authorities by the Appellant's Counsel whilst the Respondent's Counsel has not filed the list or book of authorities but cited the case of *Serfortain 1974 (1) SA 287 (NC) at 288-9* where it was held that the Court will not grant a plaintiff a final decree of divorce if he has refused to accept his spouse back. But that is the very issue before this Court. The Appellants in short is saying he did not refuse to accept the Respondent because the Respondent's action purporting to restore was not genuine and not *bona fide*.

[40] The true position of our law was captured quite correctly by His Lordship Maphanga J. in the Court a quo at paragraph 13:-

"It appears from authorities in determining whether the defendant has the requisite animus revertendi or real intention to return marital obligations and favours, it is her state of mind and not that of the Plaintiff that the law will focus unless it is to show in the circumstances of each case, that the Plaintiff has rejected or refused to receive the defendant into society."

[41] It is difficult to accept that when the Respondent went to the matrimonial home to restore conjugal rights she had the requisite intention to return when she invited her sister to come along who are not part of the marriage or party of the order of Court and further refusing to hold discussions first with the Appellant. The Court Order was directed to the Respondent to restore conjugal rights. I cannot see how her sister was to assist her in restoring the conjugal rights to her husband. The sister was an unnecessary appendage which, as I have pointed out above, negated the Respondent's intention to restore conjugal rights and favours to her husband.

[42] This Court was further referred to a passage in *H.R Halho* "The South African Law of Husband and wife" 4th Edition at page 415 where it is stated:-

"Restoration of conjugal rights means the restoration of cohabitation as man and wife. The factum of the return must be accompanied by the intention to restore the marital relationship. There is consequently no restoration of conjugal rights if the defendant returns to the plaintiff under circumstances that shows that he has no intention to resume marital cohabitation."

Surely the Respondent could not have intended to resume cohabitation with her husband together with her sister. In a confirmatory affidavit one of the sisters says they had gone there to clean the house in preparation for the return of the Respondent. This means they had not gone there to restore conjugal rights as per the Court Order but to make preparation in the form of cleaning the house. We are not told that the house needed cleaning as we assume the Appellant dwells in it and cleans it.

[43] I also hold the belief that talk and discussion are key elements in resolving disputes as well as general interactions between human beings. The Respondent having deserted the matrimonial home for about seven years, that is since 2011, she is not expected to simply walk straight into the matrimonial house as if she had left it in the morning but first should hold talks or discussions with the Appellant. The Appellant invited her for such discussions into the hut reserved for family discussions but she refused the offer. It must be borne in mind that the parties had contentious issues that had led them to live separately. The Appellant claims one of such issues touched on the Respondent's disrespect for the Appellant. In fact it is such

issues that needed to be discussed first, mapping the way forward if a healthy cohabitation was intended.

- [44] The Court was referred to a passage in *Saddler vs, Saddler* 1946 CPD at 653 was cited to us and it reads:-

“....in order to restore conjugal rights it was essential for the defendant to change his manner towards the plaintiff. A mere offer to receive the plaintiff would not be enough; there would have to exist in his mind an intention to desist from the former conduct which had made life intolerable for the plaintiff. If his intention was to receive the plaintiff, but to continue his former conduct, then his offer was not a compliance with the Courts’ Order.”

- [45] In the present case, the Respondent did not offer to return but she actually and physically presented herself at the matrimonial home but refused to hold the necessary discussions before demanding entry to the matrimonial house for cleaning purposes or for taking up cohabitation whichever was in her mind. The Appellant viewed her refusal for discussions as a continuation of her disrespect for him and therefore removed himself from the Respondent and her sisters by shutting gates thus terminating any further interactions. It is my view that the actions and the mind must be one towards the compliance of the Court Order for restoration. My considered view is that the Respondent failed to comply with the Court Order.

- [46] The Court issued a unanimous order which form part of and must be read as one with this judgment.

[47] Accordingly, the Court makes the following order:-

- 1. the application for condonation is dismissed;**
- 2. the appeal is upheld;**
- 3. the judgement of the Court a quo is set aside and substituted with the following:**

3.1 a final decree of divorce is hereby granted;

3.2 the matter is referred back to the Magistrate's Court of Manzini for determination of the following issues:

3.2.1 division of the joint estate; and

3.2.2 custody and maintenance of the minor children born of the marriage, if any,

4. pending the division of the joint estate the Appellant is interdicted from alienating or disposing of any of the estate assets as alleged by both parties; and


5. no order as to costs is made.



S.J.K. MATSEBULA

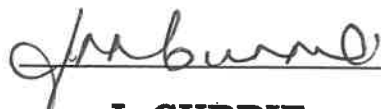
ACTING JUSTICE OF APPEAL

I agree



S.P. DLAMINI
JUSTICE OF APPEAL

I agree



J. CURRIE
ACTING JUSTICE OF APPEAL

For the Applicant : Zonkhe Magagula

For the Respondents : Ms. L. Simelane