IN THE HIGH COURT OF SWAZILAND

In the matter between:

ESTER THOKO ZULU	Applicant
VS	
PETER EZRA NKAMBULE	Respondent
CORAM	F. X. ROONEY
FOR APPLICANT	F. NDZIMANDZE
FOR RESPONDENT	S. EARNSHAW

JUDGMENT

31/3/89

Rooney, J.

This is an application under Rule 42 of the Rules of the High Court for an order setting aside a decree of divorce pronounced by Dunn, J. on the 24th September, 1987.

The applicant and the respondent were married on the 15th September, 1975. On the 12th November 1985 the respondent commenced an action in this Court in which he sought an order calling upon his wife to restore conjugal rights and, failing which, an order of divorce on the grounds of malicous desertion. On the 1st December, 1986, the applicant filed a defence and counterclaim. In this she was represented by a firm of attorneys. In the counterclaim she prayed for restitution of conjugal rights etc. and a decree of divorce by reason of the defe-dant's adultery. In a further pleading the respondent admitted his adultery.

The attorneys for the parties drew up a Deed of Settlement which provided, inter alia, for the applicant to have custody of the children of the marriage and for the respondent to pay E250 a month for their maintainance. The agreement was conditional upon the defendant (the present applicant) obtaining a final decree of divorce. The respondent undertook to withdraw his action against the applicant and she promised to continue with her claim. The agreement was signed on the 24th September, 1987, immediately before the matter came up for hearing before Dunn, J., who thereafter pronounced the dissolution of the marriage between the parties.

This application was not filed until the 11th May, 1988. The only explantion offered for this delay is that the applicant "immediately after pronouncement of judgment, instructed attorney Lukhele of Manzini who promised to look into the matter but to no avail". In her replying affidavit the applicant repeats this averment and annexes a copy of a letter written by Mr Lukhele in support. The letter, dated 8th March 1988 makes no reference to the proceedings before Dunn J. and advises the applicant to apply for an increase in the amount of maintainance for her children.

In her founding affidavit, the applicant complains that at the time she signed the "Deed of Settlement" she was emotionally disturbed, confused mentally, weak and exhausted. She claims that she did not appreciate the nature of the entire proceedings. She said that the matter should not have proceeded

as "no evidence whatsoever was led.....to establish the existence of the marriage" and that an order for restitution should have been issued "as the only allegation against me was malicious desertion and not adultery".

This allegation is based upon the incorrect assumption that the divorce was granted in favour of the respondent, which is not the

case. The applicant's founding affidavit goes on to repeat her denial that she deserted her husband and the allegation against him that he committed adultery. The applicant submits that if these facts had been known to the judge he would not have made the final decree.

It is in her replying affidavit that the applicant makes this case -

> "I state that even though the Deed of Settlement is valid, a decree of divorce ought not to have been issued in as much as I did not proceed with my counterclaim against respondent. At no stage did I give evidence to the effect that the respondent committed adultery and in fact I was not called upon at any stage to give evidence".

This presents an entirely new case to the Court. It contradicts her founding affidavit. The applicant says that she was granted a divorce that which she had not sought and/she "signed the Deed of Settlement but the effect thereof carries no weight in as much as what I consented to was a withdrawal by respondent of the divorce action". This seems to suggest that the applicant was well aware of the nature of the settlement and only signed it to procure the withdrawal of her husband's action against her and nothing more.

The case made by the applicant in her founding affidavit was quite different from that advanced in her replying affidavit. The general principle is that an applicant cannot for the first time make a case in a replying affidavit (Jay's Properties v. Tungin 1950 (2) S.A. 694 following de Villiers v. de Villiers 1943 TPD 60. No application to condone this departure from the normal practice was made and the respondent had no opportunity to answer what was a new case, raised by the applicant.

Neither party has attempted to place before this Court any record which may exist, of the proceedings before Dunn, J. All I have is the

formal order of this Court dissolving the marriage. If the applicant was dissatisfied with the judgment given by Dunn J. an appeal lay to the Court of Appeal under section 14 of the Court of Appeal Act 1954. She has not,availed herself of that right. It should be made clear that whereas there does exist jurisdiction to rescind a judgment of this Court in a proper case, I have no authority, as a member of this Court, to entertain or act upon any application or action, however presented, which in effect constitutes an appeal against the decision of another judge of this Court.

Rule 42 of the High Court Rules reads -"Variation and Rescission of Orders 42.

(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party effected, riscind or vary -

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party effected thereby;

(b) an order or judgment in which is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not in granting any relief under this rule, make any order rescinding or varying any order of judgment unless satisfied that all parties whose interests may be affected have notice of the proposed."

This rule is not of much assistance to the applicant. The order was not granted in her absence. There is no ambiguity or patent error in the decree of divorce. On the face of it, it is valid, regular and clear

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as to its purport. The decree was not pronounced as the result of a mistake common to the parties.

They had just signed an agreement under which the respondent undertook to withdraw his action and the applicant to proceed with her/claim in reconvention. Even if the divorce was procured against the wishes of the applicant and in a manner which was irregular it was not the result of a mistake common to the parties.

It was submitted by Mr Ndzimandze that the Court has an inherent power to correct its own error. The Court has certain limited powers at common law to set aside its own judgments. It is not alleged that the divorce was obtained by the fraud of the respondent. Ne new docu-men has been presented which might give rise to a claim on the ground of instrumentum noviter reptertum.

There remains the question of justus error. In the case of Childerley Estate Stores v. Standard Bank of S.A. 1924 Q.P.D. 163, the Court stated at p. 168 -

> "We arrive at this position then, that so far as justus error is concerned, default judgments may in some cases be set aside under the Roman Dutch Law on the ground of justus error, and that judgments, whether by default or not, may be set aside in the seven exceptional cases abovementioned on the ground of instrumentum noviter repertum, though evidently some of those cases are nowadays obsolete and inapplicable; there are further, the exceptional cases of setting aside a decree of perpetual silence and the doubtful case of setting aside a judgment in a matrimonial suit on the ground of justus error. Moreover, judgments entered by consent may be set aside under certain circumstances on the ground of justus error (Arg. Voet, 22.6.6.7. and De Vos v. Calitz, 1916, C.P.D. 465). There may be other exceptional instances. But I

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> must say that I know of no such further general application of the doctrine of justus error to judgments as would entitles the vanquished party to bring an action to set aside a judgment on the ground that the Court gave the judgment in error, even if such error was just and was induced by a non-fraudulent misrepresentation made by the other party to the case. And no attempt has bee made by plaintiff's counsel in this case to produce any authority which would justify such an extensive application of the doctrine. On the contrary it seems clear that Voet, in stating that judgments may be set aside on the ground of fraud, and (in the exceptional cases) on the ground of instrumentum noviter repertum, intends impliedly to exclude any other grounds ejusdem generis for setting aside judgments delivered in defended cases after both parties have been heard, and the action has been faught to a finish. The same may be said of Huber (5.37.7.11) and Schorer (notes 527 et seq. to Grotius)"

The majority of decided cases are concerned with default judgments. See for instance Naidoo v.

Cavandish Transport Co. (PTY)Ltd. 1956 (3) S.A. 244 and Briston v. Hill 1975 (2) S.A. 505 where the Court granted summary judgment in the absence of the applicant.

In the present instance the proceedings conducted before Dunn J. resulted in a divorce being granted in favour of the applicant. If it is contended that the judge was mistaken in granting that relief then the applicant ought to have appealed against that decision (Pistorius v. Cohen 1928, 162 at 168 per Feetham J.). It. is still open to the applicant to seek leave to present her appeal out of time.

This application is dimissed with costs.

F.X. ROONEY

JUDGE