IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 1419/13

In the matter between:

ROSE NETTER SHABANGU Applicant

VS

ABEDNIGO SHABANGU 1st Respondent
MAGISTRATE MUSA Z. NXUMALO 2nd Respondent
THE ATTORNEY GENERAL 3rd Respondent

Neutral citation: *Rose Netter Shabangu vs Abednigo Shabangu & Others (1419/2013) [2015] SZHC 177 (12 October 2015)*

Coram: FAKUDZE, J

Heard: 2 October, 2015
Delivered: 12 October, 2015

Summary: ***Review of the decision of the Nhlangano Magistrate court – basis for the review is that the Magistrate erred in granting divorce to Plaintiff without affording the Defendant any hearing. Summons were served on Defendant and the Notice of Intention to Defend was filed. The Plea was never filed by Defendant and the matter proceeded as undefended – held that***

the marriage between the parties was lawfully dissolved – held further that there were no irregularities in the manner in which the matter was handled by the Court a quo and there is no basis for the decision to be set aside. Applicant to pay for the costs of the Application.

JUDGMENT

BACKGROUND

[1] It is common cause that Applicant and 1st Respondent were married by civil rights and in community of property in January 1993 at Siteki in the District of Lubombo. One child, who is now a major, was born of the marriage. On or about the month of May 2013, whilst the marriage was still subsisting, 1st Respondent instituted divorce proceedings against Applicant at the Shiselweni Magistrate's Court in which action he sought the following orders:

(a) An order for the restoration of conjugal rights.

(b) Failing such restoration, a final decree of divorce.

(c) Costs of suit.

(d) Further and /or alternative relief.

[2] A Notice of Intention of Intention to Defend was filed by the Applicant assisted by the Clerk of Court because Applicant claims that she is indigent. She went further to appoint the Office of Clerk of Court as her domicile of citation and execution where all legal processes would be served.

[3] The matter was first set down for the 9th July, 2013 and Applicant alleges that she came to Court only to be told that she would be called again when the matter is

set down. In the Answering Affidavit resisting the Review, 1st Respondent denies that the matter was set down for the 9th but alleges that the purpose was for 1st Respondent's attorneys to obtain a trial of balance as appears on the face of the Notice of Set Down.

[4] The matter was again set down for the 23rd July, 2013 wherein Applicant alleges that she was present in Court but was never called when the matter was before Court. She further alleges that after inquiring from the Clerk, she was told that an Order had been issued against her calling upon her to restore conjugal rights on or before 29 July 2013 failing which a decree of divorce would be granted against her. 1st Respondent denies in his Answering Affidavit that Applicant was in Court on that day and that when she was called three times, she did not respond. Applicant further claims that the Order calling upon her to restore conjugal rights was never served on her notwithstanding that she had filed a Notice of Intention to Defend the proceedings and a Plea. This allegation is also denied by the 1st Respondent who claims that the Order was served on Applicant. Applicant claims that following the issuance of the restitution Order, she took steps to comply by going to Pigg's Peak to restore the conjugal rights. 1st Respondent harassed her and that made it impossible for her to restore. This is denied by the 1st Respondent who says that there was no such attempt.

[5] On the 30th July, 2013 a decree of divorce was finally issued against Applicant and was served at the Clerk of Court's office. Applicant alleges that she could not appear on the 30th July, 2013 because her employer refused her permission to attend Court.

APPLICATION FOR THE REVIEW

[6] In the light of what has been said above, Applicant avers that she approached her Attorney who advised that a Review Application by the High Court would be the best step to take in the circumstances. It is common knowledge that the High Court is empowered to review the decisions of all subordinate Courts of justice within Swaziland. This is provided for in Section 4 of the High Court Act, 1954.

The Applicant alleges in her Application for Review that the following issues are the basis upon which this Court is asked to review and set aside the

Proceedings and decision of the C*ourt a quo* in Civil Case 305/13. These are that:

(a) The *Court a quo* committed an irregularity by not calling my name three times outside the Court when the matter was first heard on the 23rd July 2013, particularly because I was within the Court premises on that day.

(b) The Court a quo committed another irregularity by not enquiring if I had been served with the interim Order for the restoration of conjugal rights before issuing a final decree of divorce against me.

(c) The Court a quo committed another gross irregularity by granting a final decree of divorce against me without hearing any evidence when I had in fact already made attempts to restore conjugal rights to the First Respondent.

(d) The Court a quo should not have entertained the matter because it lacked jurisdiction. I am not domiciled within the Court a quo's area of jurisdiction. I only reside there because that is where I am employed. My place of domicile is my matrimonial home in Pigg's Peak.

[7] 1st Respondent has filed an Answering Affidavit opposing the Application for Review. By and large 1st Respondent is denying the allegations contained in Applicant's Founding Affidavit and is putting Applicant to strict proof thereof. He goes on to shed some light on what happened during the trial. It is worth noting that the Applicant opted not reply to the allegations contained in the Respondent's Answering Affidavit. The Clerk of Court has also filed the Record of Proceedings of the Court a quo through the Office of the Attorney General and I have had time to go through it. It is also interesting to note that in the Record of Proceedings, the Magistrate who heard the matter alleges that he granted the divorce in favor of 1st Respondent because it was undefended by the Applicant.

BASIS FOR REVIEW

Before I go on to determine my analysis of this Review Application and the conclusion thereof, I must point out the basis upon which this Court can review a civil matter from a Magistrate's Court.

[8] There are basically four grounds upon which a matter be reviewed and these are:

(a) The absence of jurisdiction.

(b) Interest in the case, bias, malice or corruption.

(c) Gross irregularity in the proceedings, for example, failing to observe the *audi alteram rule.*

(d) The admission of inadmissible or incompetent evidence or the rejection of the same.

Authority for this proposition is the book titled "Civil Procedure, **A Practical Guide" Second Edition, authored by Stephen Pete /David Hulma and Others**. See page 328.

[9] These considerations are also succinctly put across by **His Lordship Tebbut J.A. in the matter of Takhona Dlamini v The President of the Industrial Court and another: Appeal Case No:23/1997**. His Lordship quoted with approval the judgment of Corbett J.A. **in the case of Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132** at 152 where the learned Judge said the following:

> "***Broadly, in order to establish review grounds, it must be shown that the President failed to apply his mind to the relevant issues in accordance with the behest of the statute and tenets of Natural Justice… such failure may be shown by proof, inter alia, that the decision has been arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further ulterior or improper purpose, or that the President misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones, or that the decision of the President was so grossly unreasonable as***

to warrant the inference that he had failed to apply his mind to the matter aforesaid……"

The parameters for review as drawn by the learned Judge were also referenced to by **Justice M.C.B. Maphalala as, he then was, in Debbie Sellstroom v Ministry of Housing and Urban Development and others; Civil Case No: 610/2013.**

THE COURT ANALYSIS AND CONCLUSION THEREON

[10] Having considered all the papers filed by the Parties to this Application, the Record of Proceedings of the Court a quo, arguments by Counsel for both

Parties and the Heads of argument, I have noted the following which constitutes the basis for my judgment in this matter:

(i) No Plea by Applicant

[10.1] Although Applicant filed the Notice of Intention to Defend she did not file the Plea at all. The Clerk's Record of Proceedings and the Book of Pleadings submitted by Applicant's attorney bear testimony to this truth. This is so notwithstanding that Applicant avers is paragraph 9 of the Application for Review that ***"I timeously served and filed my Notice of Intention to Defend. I annex hereto marked 'A' a copy of the said Notice. Subsequent to that and through the Clerk of Court I duly served and filed my Plea. The Respondent filed replication and the matter is ripe for hearing."***

[10.2**]** According to th**e** Herbstein and Van Winsen on The Civil Practice of the High Courts of South Africa, Fifth Edition, the Plea "is the answer by a defendant to the claims of a plaintiff and in which his defence is set out." See page 585. Failure by Applicant to file the Plea in the Court a quo

was a clear indication that she did not want her defence to be known by the Respondent.

Furthermore, there is no replication in the Court a quo's Record of Proceedings and the Book of Pleadings to establish the truthfulness of Applicant's allegation in paragraph 9 of the Notice of Motion for Review.

This Court therefore concludes that the Court a quo was correct in proceeding with the matter as an undefended one. In the light of the foregoing, there was no basis for Applicant to be heard because she had defaulted in filing the Plea and was therefore not a party to the proceedings. There was also no need for any enquiry to be made by the Court a quo to determine if Applicant had been served with the interim Order and that there was an attempt by Applicant to comply. This is all based on the fact that the matter remained an undefended one.

(ii) *Replying Affidavit not filed by Applicant*

[10.3] Failure on the part of Applicant to challenge 1st Respondent's allegations in the Answering Affidavit in the Review Application amounts to an admission of all that 1st Respondent says in his Answering Affidavit. Applicant had an opportunity to counter some of the allegations made by the 1st Respondent. Three examples suffice to put across this point that Applicant's failure to reply was suicidal on her part. 1st Respondent denies in paragraphs 11and 19 of the Answering Affidavit that on the 23rd July 2013, Applicant was in the vicinity of the Court a quo. Applicant alleges that Respondent was called three times and Applicant did not

respond. 1st Respondent further denies in paragraph 13 that there was an attempt by Applicant to restore conjugal rights. 1st Respondent alleges in paragraphs 11 and 18 that all the processes were served on the Applicant's place of domicile and execution which was the Office of the Clerk of Court.

[10.4] As said earlier, a Replying Affidavit gives opportunity to an Applicant to address some of the issues raised by Respondent in the Answering Affidavit. It therefore becomes extremely dangerous for an Applicant to forego this opportunity. It is trite law that a party stands and falls by his or her papers. **In Swaziland National Housing Board V Dumsile P Dube, Civil Trial 301/ 09**, the Learned Judge, Justice M.C.B Maphalala, said "the general rule which has been laid down repeatedly is that an Applicant must stand and fall by his Founding Affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts, that the respondent is called upon either to affirm or to deny."

(iii) The jurisdictional issue

[10.5] Applicant alleges in paragraph 20 of the Notice of Motion that the Court a quo should not have entertained the matter because it lacked jurisdiction. The reason for the irregularity according to Applicant is that ***"I am not domiciled within the Court a quo's area of jurisdiction. I only reside there because that is where I am employed. My place of domicile is my matrimonial home in Piggs Peak."***

With due respect, I find this argument problematic. Section 5 (a) of the Magistrates Courts Act, 1938 specifically provides for the Magistrates Courts' jurisdiction in civil matters. The Section says "saving any other jurisdiction assigned to any courts by this Act or by any other law the persons in respect of whom the court shall have jurisdiction shall be -

(a) Any person who resides, carries on business or is employed within the district."

By her own admission, Applicant says that she is resident in Shiselweni and she is also employed there. The Court had jurisdiction to hear the matter between Applicant and Respondent and therefore Applicant's argument has no leg to stand on.

[11] Applicant's Counsel has referred me to various authorities in her Heads of argument which might constitute the basis for Review in divorce proceedings. Unfortunately for Applicant, these authorities pertain to matters where the proceedings are defended or contested. As said earlier, the failure by Applicant to file the Plea placed her in jeopardy.

[12] In the light of all the foregoing considerations, I therefore come to the conclusion that Applicant has not established sufficient grounds for review as set out in her Notice of Motion. I accordingly dismiss this Application with costs.

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M.R. FAKUDZE

JUDGE OF THE HIGH COURT

FOR APPLICANT: B. DLAMINI

1ST RESPONDENT: N. MABUZA