



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No: 179/2015

In the matter between:

NKOSINATHI GORDON DLAMINI

APPLICANT

and

CHANTEL DOROTHY DLAMINI (BORN LITTLER)

RESPONDENT

In re:

CHANTEL DOROTHY DLAMINI (BORN LITTLER)

APPLICANT

and

NKOSINATHI GORDON DLAMINI

1ST RESPONDENT

THE COMMISSIONER OF POLICE

2ND RESPONDENT

Neutral Citation : Nkosinathi Gordon Dlamini v Chantel Dorothy Dlamini
(Born Littler) (179/15) [2016] SZHC 113 (8 JULY 2016)

Coram : Q.M. MABUZA J

Delivered : 8 JULY 2016

SUMMARY

Civil Law: Practice – Pleadings – Rescission of default judgment – Factors to be set out by Applicant – Applicant’s failure to do so – Application dismissed with costs.

JUDGMENT

MABUZA –J

- [1] This is an application for rescission of judgment by the Applicant, Mr. Nkosinathi Gordon Dlamini. The judgment sought to be rescinded was granted by order of this Court on the 27th February 2015 in favour of the Respondent Chantel Dorothy Dlamini. Mr. Dlamini also seeks an order allowing himself to defend the matter in the main proceedings as well as costs in the event of an unsuccessful opposition by his wife.
- [2] Mr. Nkosinathi G. Dlamini and Ms. Chantel D. Dlamini (born Littler) are husband and wife. They were married by civil rites in community of property on the 7th October 2000 and their marriage still subsists. It is stated that there are pending divorce proceedings between them under High Court Case No. 455/2012.

[3] There are two minor children born of the marriage namely:

- Landokuhle Nathan Dlamini, a male born on the 10th January 2002; and
- Michelle Luyanda Dlamini, a female born on the 20th January 2005.

[4] The couple's marriage has been an unhappy one culminating in the Respondent leaving the matrimonial home at Ezulwini. She left her children behind.

[5] Because she had difficulty in getting satisfactory access to her children she filed for custody per application dated 13th February 2015. The application was set down for hearing on the 16th February 2015 at 2.30 pm. The application was *ex parte*. She obtained the following order:

(i) A *rule nisi* hereby issue in terms of Prayers 2,3,4,5 and 6 of Notice of Motion.

(ii) Prayer 5 to operate with immediate and interim effect pending finalization. The rest of the prayers postponed to return date.

[6] According to the return of service filed by the Deputy sheriff for the Hhohho District, Mr. Themba Dlodlu, he served the order obtained *ex parte*; the

certificate of urgency and Notice of Motion upon Nkosinathi Gordon Dlamini (the Applicant) on the 20th February 2015 at 0730 hrs at his place of residence at Ezulwini opposite Spintex Village, District of Hhohho by handing both copies personally to him after exhibiting the original and explaining the nature and exigency of the said process.

[7] On the 27/2/2015 which was the return date, the Court confirmed the order of the 16/2/2015. This order reads as follows:

“(1) Applicant is hereby granted immediate custody of the parties’ minor children namely –

1.1 Landokuhle Nathan Dlamini (a male born 10th January 2002);

1.2 Michelle Luyanda Dlamini (a female born 12th January 2005).

(2) That the Deputy Sheriff and or any other duly authorized person be and is hereby authorized to take into custody the aforesaid minor children and deliver them to the custody of the Applicant with immediate effect.

(3) That the Second Respondent be and is hereby ordered and directed to assist the Deputy Sheriff or any other authorized person and/or the Applicant herein, to put into effect prayer 1 above, and to offer such protection required to give effect to any Order that may be issued by the above honourable Court in terms of these proceedings.

- (4) That the First Respondent be and is hereby restrained and interdicted from harassing, threatening and/or assaulting the Applicant in any manner or form.**
- (5) That the First Respondent be and is hereby restrained and interdicted from being within 100 metres of the Applicant wherever she may be.**
- (6) That in the event that First Respondent is in breach of the aforesaid Orders prayed for above, he be committed to Gaol/Jail for no lesser period than 30 days or for such other period to be determined by the above Honourable Court subject to default of the First Respondent.**

[8] It is the order of the 27/2/2015 that the Applicant seeks to rescind hence the application for rescission filed on the 4/3/2015. The application is brought under Rule 42 (1) (a) and (b).

[9] Rule 42 provides as follows:

“42 (1) The Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously granted in the absence of any party affected thereby;
- (b) An order or judgment in which there 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.

[10] The Applicant contends that the order sought to be rescinded was erroneously granted in his absence. The Applicant's contention cannot be correct because the interim order, certificate of urgency and Notice of Motion were served in him personally by the Deputy sheriff on the 20/2/2016 at 0730 hrs at his residence at Ezulwini.

[11] The said documents had earlier been served on the Applicants then attorney of record Makhosi C. Vilakati on the 20/2/2015.

[12] The Applicant had two opportunities within which to respond to the Respondent's application. He could have even attended Court personally on the 27/2/1016. He has not stated why he did not do so. The first requirement for an application for rescission to succeed is that the Applicant should state why **he** was in default on the date of hearing. The Applicant has failed to state why he was in default on the 27/2/2016. Consequently there is not urgency as alleged by him. It is self-created.

[13] The second requirement for an application for rescission to succeed is that the Applicant has to set out a valid bona fide defence in support of the

application. The Applicant has not set out any bona fide defence to the application.

[14] The Applicant further contends that there is a patent error in the order sought to be set aside. However, he has not set out any grounds and or basis of the alleged error upon which the judgment was obtained.

[15] The Applicant made much of the absence of a socio-legal report. In as much as it is appreciated that such a report may be important in order to assist the Court determine what is in the best interests of the minor children; the absence thereof does not vitiate the validity of the Court order.

[16] Furthermore, the basis of the custody application was fully set out the main application and the best interests of the children properly considered by the learned judge who issued the order sought to be rescinded.

[17] In light of the foregoing the application is dismissed with costs on the ordinary scale.

JUDGE Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. B.S. Dlamini

For the Respondent : Mr. J. Rodriques