

**IN THE HIGH COURT OF ESWATINI**

**CASE NO. 1878/2023**

**HELD AT MBABANE**

In the matter between:

**SAKHILE DUMSILE HLATSHWAYO**

**1<sup>ST</sup> APPLICANT**

**And**

**BHEKIZWE PATRICK LUKHELE**

**1<sup>ST</sup> RESPONDENT**

**ESWATINI RAILWAYS**

**2<sup>ND</sup> RESPONDENT**

***NEUTRAL CITATION:***

**SAKHILE DUMSILE HLATSHWAYO VS**

**BHEKIZWE PATRICK LUKHELE &  
ANOTHER (1878/2023) [2024] SZHC 44  
(14/03/2024)**

**CORAM:**

**BW MAGAGULA J**

**HEARD:**

**18/10/2023**

**DELIVERED:**

**14/03/2024**

**SUMMARY:**

*Civil Law – Relief sought – Interdict in nature – Requirements for interdict – Point of law taken of disputes of facts – Point in limine dismissed without substance – Requirements for interdict revisited.*

**HELD:**

*Applicant has made concrete case for the relief sought – The Respondents opposition is without merit – He has failed to demonstrate that the marriage between the parties terminated – The allegation he has regarding the Applicant's previous marriage is also unfounded.*

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**JUDGMENT**

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**BW MAGAGULA J**

**BACKGROUND FACTS**

- [1] What appears to have started as a sweet love relationship between the parties at some point has degenerated into bitterness and resentment. It is common cause that the parties' love relationship culminated into a marriage in terms of the Swazi Law and Custom in 2020. After getting married, the parties lived together as husband and wife. First, at a rented flat in Mobeni, Matsapha. Subsequently, they established a homestead at Emphini in the District of Manzini. In acquiring the piece of land through Swazi law and custom, of kukhonta they were together as husband and wife. At least there is no substantial dispute pertaining to the fact that at the time of acquisition they

were a unit. Therefore, from that premise, the Court will look into the matter as from that stand point, being that when the homestead was established, the parties were husband and wife.

[2] Serving before Court is an application that has been instituted by the Applicant under a certificate of urgency, where the following relief is sought;

- 2.1 *That the Rules of the above Honourable Court relating to service form and time limits be dispensed with and this matter be heard as one of urgency.*
- 2.2 *Condoning non-compliance with the Rules of the above Honourable Court.*
- 2.3 *Ordering the 2<sup>nd</sup> Respondent to stop paying into the 1<sup>st</sup> Respondent's bank account at ABSA Bank in South Africa, compensation money which is due to the Applicant and 1<sup>st</sup> Respondent in the sum of E295 000-00 (Two Hundred and Ninety –Five Thousand Emalangeneni only).*
- 2.4 *Ordering the 2<sup>nd</sup> Respondent to forthwith pay the aforesaid compensation money to the offices of PS Mdluli Attorneys Mbabane.*
- 2.5 *Directing that a rule nisi do hereby be issued returnable on a date to be determined and fixed by the above Honourable Court calling upon the Respondents to show cause why an Order in terms of Prayers 3 and 4 herein set out below should not be made final.*

2.6 *Ordering that Prayers 3 and 4 herein shall operate with interim and immediate effect.*

2.7 *Granting costs of this application against the Respondents, jointly and/or severally, the one absolving the other.*

- [3] When the matter appeared before Court on the 15<sup>th</sup> August 2023, Counsel P. Mdluli who appeared for the Applicant, applied for a *rule nisi* in terms of certain prayers in the notice of motion. There was no appearance for the Respondent and as such no opposition. The Court granted *rule nisi* in terms of prayers 1 to 6 of the notice of motion.
- [4] On the 24<sup>th</sup> August 2023, being the return day, Mr M. Shongwe appeared for the 1<sup>st</sup> Respondent and a notice of intention to oppose was filed. The matter was then postponed to the 4<sup>th</sup> October 2023, by the consent. The *rule nisi* was extended accordingly.
- [5] Pursuant to the filing of a full set of pleadings and heads of argument the matter was argued on the 18<sup>th</sup> October 2023. After having the matter judgment was reserved. There was then the Christmas break, and this judgment now determines the matter.

## **The Applicant's Case**

- [6] The Applicant's case is brief and to the point. After getting married in terms of Eswatini law and custom on or during the year 2020, the Applicant and the 1<sup>st</sup> Respondent decided and agreed to build their matrimonial home and residence at Mpini area in the Manzini District.
- [7] With the assistance of one of her colleagues at her work, the Applicant got land and they (Applicant and 1<sup>st</sup> Respondent) paid for it, "*the cow*" in traditional language.
- [8] The building of the house commenced and continued until abruptly halted by the 2<sup>nd</sup> Respondent, who had to construct a railway line across the land on which they were building. Then they were offered compensation for such expropriation which is now at the centre of the dispute.
- [9] The Applicant's claim is wholly based and premised on two (2) key aspects;
- 9.1 That she is the lawful wife to the 1<sup>st</sup> Respondent and that they originally set out to look for land to build as husband and wife, and not just as strangers who had accidentally met. They proceeded to approach traditional authorities to "*khonta*" jointly as husband and wife. There is no dispute to all the afore-going.
  - 9.2 Being the one ordinarily resident in Eswatini the Applicant was hands-on their project and not only did she expend her money thereon, but also her time, work, effort and resources from

inception till the time the project was halted by the 2<sup>nd</sup> Respondent.

9.3 I submit that in mercantile civil law the relationship between the Applicants can be described as a partnership as both of them expended something into the project.

[10] It is therefore on the basis of that union and what transpired thereafter that the Applicant has approached this court to enforce her right to receive a half share of the pending compensation payment, as fair, just, and equitable division thereof. Any other formula of the division would be unfair and prejudicial, either to the Applicant herself or to the 1st Respondent, depending on the formula that would be based on.

### **The 1<sup>st</sup> Respondents Case**

[11] The 1<sup>st</sup> Respondent has taken a legal point of the existence of material disputes of facts on the matter. However, he has gone ahead to respond to the merits as well.

[12] It is submitted on behalf of the 1<sup>st</sup> Respondent that the application is fraught with material disputes of fact, which being ought to have been reasonable foreseeable by the Applicant. The Applicant seeks to interdict the 2<sup>nd</sup> Respondent from making payments to the Applicant's accounts, as the 1<sup>st</sup> Respondent argues. The Applicant is also alleged to premise her application on a purported marriage between herself and the 2<sup>nd</sup> Respondent. It is the 1<sup>st</sup>

Respondent's submission that the Applicant is married to one Mduduzi Dlamini and the marriage still subsists. The Applicant appears to dispute the marriage between herself and Mduduzi Dlamini. In light of that apparent dispute, the 1<sup>st</sup> Respondent contends that such a dispute can only be cured by the leading of oral evidence.

- [13] The 1<sup>st</sup> Respondent also contends that from the conspectus of the papers filed before Court, it is apparent that there is a material dispute of fact regarding the contribution made by the parties. It is 1<sup>st</sup> Respondent's contention that the Applicant never expended anything financially or otherwise towards securing the land at Mphini and developing same. The Applicant on the other hand alleges that she contributed financially, her effort, work time and resources.

### **The Law On Dispute Of Facts**

- [14] The High Court, in the case of **Sibonile Enid Ndlovu v Alfred Gcinaphi Dlamini Case No. 519/2002** stipulated the circumstances under which a dispute of fact may arise. The Court, at **page 3** of its judgment stated as follows;

**"...In Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.S 1155 (T)** the "principal ways" in which a dispute of fact may arise are set out as follows;

- i. When the Respondent denies all the material allegations made by the various deponents on the Applicant's behalf, and produces or will produce, positive evidence be deponents or witnesses to*

*the contrary. He may have witnesses who are not presently available or who though adverse to making an affidavit, would give evidence viva voce if subpoenaed.*

- ii. When the Respondent admits the Applicant's affidavit evidence but alleges other facts which the Applicant disputes.*
- iii. When the Respondent concedes that he has no knowledge of the main facts stated by the Applicant, but denies them, putting the Applicant to the proof and himself gives or proposes to give evidence to show that the Applicants and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which the Applicant relies to prove the main facts are untrue. The absence of any positive evidence possessed by a Respondent directly contradicting the Applicant's main allegations does not render the matter free of a real dispute of fact."*

[15] The 1<sup>st</sup> Respondent argues that the Applicant's stance of bringing forth the present proceedings by way of motion proceedings instead of action proceedings was at his own peril. It justifies the dismissal of the application.

[16] The Court has been referred to the judgment of **Sibonile Enid Ndlovu vs Alfred Gcinaphi Dlamini**<sup>1</sup>, at page 3 where the court made the following remarks;

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<sup>1</sup> High Court Case No. 519/2002

*"It is trite law that where, at the hearing of motion proceedings, a dispute of fact on the affidavit cannot be settled without the hearing of oral evidence (see **Plascon –Evans Paints Ltd vs Van Reibeeck Paints (Pty) Ltd 1984 (3) S.A 623 (A)**). The Court may, in its discretion, a) dismiss the application; b) order oral evidence to be heard on specified issues in terms of the Rules of Court; or c) order the parties to trial. Every claimant who elects to proceed on motion runs the risk that a dispute of fact may be shown to exist, and the way in which the Court exercises its discretion as to future course of the proceedings in such an event will depend very much upon the extent to which the claimant is found to have been justified in accepting that risk (see **Hassim vs Mohamed 1931 (20 P.H.C 53 (T)**). If, for example, the Applicant should have realized when launching his application that a serious dispute of fact was bound to develop, the Court may dismiss the application with costs."*

**The 1<sup>st</sup> Respondent's basis for opposition on the merits;**

[17] The 1<sup>st</sup> Respondent key points of opposing the claim are as follows;

17.1 He has accused the Applicant of infidelity with many men, but without bringing any proof thereof. He has also not shown to the Honourable Court how these unfounded allegations are relevant to the compensation payment or to the matter at hand.

17.2 The 1<sup>st</sup> Respondent has accused the Applicant of having brought a man into their marital residence, where he further alleges that

he was assaulted, but he has not brought any proof thereof nor has he shown the relevance thereof.

17.3 The 1<sup>st</sup> Respondent has alleged that he heard a “rumour” that the Applicant was married elsewhere, but has not brought any proof thereof and has not shown the relevance thereof.

### **Analysis and Conclusion**

[18] The Court will first determine the point of law raised. The Applicant refutes that there are disputes of facts in this matter, 1<sup>st</sup> Respondent is accused of fabricating series of lies and half-truths to create a fictitious smoke screen of defamatory allegations against the Applicant and has provided no proof thereof. The Applicant contends that the key issue here is the marriage between them, it is through that union that underpins the joint ownership of the homestead. That is alleged to be the main issue under contention before Court.

[19] The Applicant therefore contends that there are absolutely no dispute of facts regarding the marriage, as the allegation of first marriage made by the 1<sup>st</sup> Respondent has not been substantiated. It is alleged to be a bare allegation and no proof that has been adduced before Court to support the assertion.

[20] The 1<sup>st</sup> Respondent also contends that the dispute of facts as alleged by the 1<sup>st</sup> Respondent, do not meet the requirements in the law. The arguments is buttressed by the notion that it is a requirement that the alleged dispute of facts

must be foreseen by the Applicant. It is therefore contended by the Applicant that what has been placed before court by the 1<sup>st</sup> Respondent, is only unfounded allegations which could not have been foreseen by the Applicant.

[21] The 1<sup>st</sup> Respondent has correctly cited the *locus classicus* in this case being the **Room Hire Company (Pty) Ltd vs Geppe (Pty) Ltd**<sup>2</sup>. In that decision the first principal ways in which a dispute of facts may arise would be where the Respondent denies all the material allegations made by the various deponents on the Applicant's behalf and produces positive evidence to the contrary.

[22] When the principle as set out in the above decision is applied to the fact of the matter at hand, it would mean the 1<sup>st</sup> Respondent should have first denied all the material allegations made by the Applicant. Then the question that arise is what are the material allegations in so far as the nature of the relief sought. The material allegation would concern *inter alia* that the parties were indeed married in terms of the Swazi Law and Custom. Secondly, that the marriage still subsists. Thirdly, that the parties established a homestead at Mphini as their marital home. I say the three are the material allegations because those are the three issues that would ultimately determine on how the compensation in respect of the home should go.

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<sup>2</sup> 1945 (30 S.S 1155 (T))

[23] The Court will consider how the 1<sup>st</sup> Respondent responds to these material allegations. First, he admits that he married the Applicant. However, he says he did not know at the time of marriage that the Applicant had been married before or was married to another man (whichever is appropriate). In other words, he is painting a picture that the marriage between them is null and void owing to the fact that the Applicant at the time was married to another man. Unfortunately, he has not produced positive evidence, as is required in the test formulated in the Room Hire case, for such an allegation. In his founding affidavit he has alleged that he once saw this marriage certificate in their rented flat in Mobeni. But it was not produced in Court. Therefore in the absence of evidence, the *dicta* enunciated in the Room Hire case has not been satisfied by the 1<sup>st</sup> Respondent. In the Room Hire decision, it was clearly stated that the Respondent must not only deny all (my emphasis), but must go further and produce positive evidence to the contrary.

[24] On perusal of the 1<sup>st</sup> Respondent's affidavit, it does not appear that he denies all the material allegations. Infact, he specifically admits that they are married. What he contends, is that the Applicant is alleged to have been married to one Mduduzi Dlamini. But no evidence or whatsoever has been produced to prove the existence of such a marriage. Secondly, he has not taken active steps to dissolve his own marriage to the Applicant. Especially in light of the alleged discovery of an existing previous marriage. He acquiesced and allowed his marital status to the Applicant to remain unabated.

[25] The Court is then left with no other alternative, but to conclude that the marriage still subsists in the absence of any proof of dissolution or of active steps being taken to dissolve it. It is on that basis that this Court will dismiss this point of law of material disputes of facts. It has no substance at all. I will now proceed to determine the matter on the merits.

[26] In my considered view, in cases involving the proprietary consequences of a marriage, particularly when the court is tasked with determining or apportioning the value or benefits derived from a home acquired jointly by both parties, it becomes exceedingly challenging to quantify the extent of each party's contributions with mathematical precision, as well as to establish a fair sharing formula. This complexity arises from the multifaceted nature of contributions made by each party, encompassing financial investments, labor, and other intangible factors that contribute to the acquisition and maintenance of the home. Therefore, arriving at an equitable distribution of assets requires a nuanced assessment of various factors and consideration of the unique circumstances of each case, rather than relying solely on numerical calculations.

[27] It is on that basis that I consider fair, to apportion the value or proceeds evenly between the parties. The issue here is not how much in cash did each party contribute. As long as both parties agree that this is their home, there was a lot that was done by both parties which added value towards the eventual establishment of the home. To therefore, take into consideration only the

monetary contribution, would usher a jaundiced view, which may lead to a skewed outcome.

[28] The Court has already established that Applicant is married to the 1<sup>st</sup> Respondent and to no one else. The marriage has not been dissolved or declared null and void by any tribunal or any traditional structure or Court authority. The fact that their relationship is not as sweet as it was when it started, does not necessarily mean the marriage has been dissolved. There is a plethora of decisions of this court where it has been outlined, chapter and verse, how a marriage in terms of Swazi law and custom terminates<sup>3</sup>

[30] The Court agrees with the Applicant's contention that any other formula for the division of the proceeds of the sale will be unfair and prejudicial to either of the parties.

[31] It is also the finding of the Court that the Applicant has satisfied all the requirements of an interdict. She has a clear right to the relief sought owing to the fact that she has ably demonstrated that she co-owns the homestead in question with the 1<sup>st</sup> Respondent, by virtue of their marriage. Secondly, there is foreseeable irreparable harm that stands to happen if the relief is not granted. If the 2<sup>nd</sup> Respondent is allowed to make the payments to the 1<sup>st</sup> Respondent's bank account, to the exclusion of the Applicant, the latter will stand to suffer

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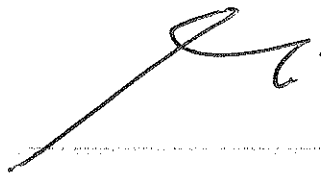
<sup>3</sup> See; Dlamini vs Dlamini and Others (1570/2013) [2014] SZHC 163 (21 July 2014); Dlamini vs Makhanya and Others (722/2014) [2016] SZHC 112 (8 July 2016); Nhlabatsi vs Dlamini and Others (1849/2012) [2014] SZHC 163(21 July 2014)

irreparable harm. It may be difficult for her to recover the money once paid to the 1<sup>st</sup> Respondent. Especially in light of the attitude that the 1<sup>st</sup> Respondent has clearly exhibited in the tone of his answering affidavit. The probability of the 1<sup>st</sup> Respondent willingly handing over the portion owed to the Applicant is very low.

[32] The 1<sup>st</sup> Respondent has failed in his answering affidavit to demonstrate on a balance of probabilities why the Applicant should be denied the relief she seeks before Court. The Court finds that clearly there stands to be irreparable harm suffered by the Applicant, if the order is not granted because when the money is paid to the 1<sup>st</sup> Respondent, she would be prejudiced financially.

[33] Due to the foregoing reasons, the Court will grant the following order;

- 1) The *rule nisi* granted by the Court on the 15<sup>th</sup> August 2023 is hereby confirmed.
- 2) Costs to follow the event.



**BW MAGAGULA**

**JUDGE OF THE HIGH COURT OF ESWATINI**

For The Applicant:

P. Mdluli – (P.S Mdluli Attorneys)

For The Respondents:

M. Shongwe - (Simelane Shongwe Attorneys)