SWAZILAND

THE HIGH COURT OF SWAZILAND

HELD AT MABANE Case No. 1451/09

BETWEEN

TSABILE MAMBA Applicant

And

BHADALA MAMABA Respondent

Coram OTA J.

For the Applicant Mr. S. Dlamini

For the Respondent Mr. Flyn

JUDGMENT

13TH JANAURY, 2011

The facts of this case as can be gleaned from the totality of the affidavits filed are as follows:-

The parties herein are Swazis. They contracted a civil marriage in Swaziland, in community of property. Two children were born of the marriage namely, Lindelwa Mamba born on 22nd March 1999, and Nqaba Mamba, born on the 27th November 2001. Sometime in 2002 the parties relocated to the United States of America, as a result of the Respondents employment with the World Bank. The Respondent was then on secondment by the World Bank to the United States of America. The parties resided in the state of Maryland, in the USA. On or about the 27th January 2007, the parties separated due to marital problems that had developed between them. On the 12th of February 2007, the applicant filed a complaint for limited divorce before the Circuit Court for the Montgomery County, Maryland, USA. The Respondent filed an answer and a counter complaint to the applicant's complaint for limited divorce on the 29th of March 2007. The applicant's answer to the Respondent's counter complaint was filed on the 1st of May 2007. On the 2nd of May 2007, whilst the proceedings for limited divorce were pending in the United States, the Respondent commenced divorce proceedings against the applicant in the High Court of Swaziland. The applicant opposed the said proceedings by a special plea of lis alibi pendens, which special plea was upheld by the High Court of Swaziland. The High Court of Swaziland stayed the divorce proceedings instituted before it by the Respondent, pending the finalization of the proceedings, pending before the circuit Court for Montgomery country. On the 15th of October 2008, the applicant filed a complaint for Absolute Divorce before the Circuit Court for the Montgomery County – it is worthy of note that the complaint for absolute divorce was instituted under the same Case No. 60424 as the complaint for limited divorce. The record demonstrates that a judgement for Absolute Divorce was granted by the Circuit Court for the Montgomery County, on the 16th of July 2009, wherein the court ordered inter alia the following:-

1) That the plaintiff, Tsabile Mamba (applicant herein) is granted absolute divorce from the defendant Bhadala Mamba

(Respondent herein)

2) That the custody order entered March 13, 2008 (DE ≠ 55) shall remain in full force and effect.

3) That the child support order entered November 20, 2008, (DE ≠114) shall remain in full force and effect.

4) That the plaintiff (applicant herein) be restored to the use of her former name Tsabile Gugu Motsa

5) Payment by the Respondent of the sum of $187, 123-00 (One Hundred and Eighty Seven Thousand, One Hundred and Twenty Three United States Dollars) plus costs of $ 20,000 (Twenty Thousand United States Dollars) as and for attorneys fees.

It is the foregoing judgement of the County Court for Montgomery County, state of Maryland, USA, that the applicant seeks to Register and make an order of this Honourable Court, in the application presently under contemplation.

The Respondent is opposed to the relief sought by the applicant. He contends that the Circuit Court for the Montgomery County lacked the jurisdiction to entertain and determine the divorce proceedings instituted by the applicant. He contends that though he was resident in the United States of America, whilst on secondment by the World Bank, his domicile remained the Kingdom of Swaziland. That the consequences of the marriage between the parties were thus subject to the laws of Swaziland. He relied on Mathysen V Mathysen 1960 (1) SA 175 CPD 177 to 178 Steytler V Steytler 1913 CPD 725 at 730 – 731 Foord V Foord 1924 WLD 81 at 83.

Respondent further contends that the special plea of res judicata raised by the applicant in her heads of argument in opposition to the divorce proceedings he instituted in the High Court of Swaziland, is not maintainable . His contention is that for the judgement of the Circuit Court for Montgomery County, to found the special plea of res judicata, it must be a judgement of a court of competent jurisdiction. That the question of the competence of the foreign court is determined not by the laws of the foreign court but by the laws of Swaziland. That, it is obvious from the judgement which made a monetary award in respect of the proprietary consequence of the marriage, that the foreign court failed to apply the laws of Swaziland in determining the proprietary consequences of the marriage. That this failure amounts to a violation of the fundamental principle of Private International law recognized by this court. Therefore, the process and award of the USA court cannot be recognized in this court.

From the facts enunciated ante, the questions that vex this court to my mind are as follows:-

Whether there is any arrangement for the Reciprocal enforcement of judgement given in the superior courts between The Kingdom of Swaziland and the United States of America.

Whether the judgement of the Circuit Court for the Montgomery Country, USA, is competent to found the special plea of Res judicata, against the divorce proceedings instituted by the Respondent in the High Court of Swaziland in November 2007.

ISSUE ONE

Whether there is any arrangement for the Reciprocal enforcement of judgement given in the superior courts between The Kingdom of Swaziland and the United States of America.

The applicant contends that the applicable Roman Dutch Common Law permits the enforcement of the judgement of the United States of America in the Kingdom of Swaziland, especially because the court which pronounced the judgement sought to be enforced has international jurisdiction or competence.

The respondent on the other hand contends that there is no law permitting the reciprocal enforcement of judgements between the Kingdom of Swaziland and the United States of America. What then is the position of the law on this subject matter? The question of the Reciprocal enforcement of Foreign judgements in this jurisdiction is a question of statute. It is thus to the enabling statute that recourse must be had in ascertaining if the judgement of the Circuit Court for the Montgomery Country, Maryland, United States of America, can be registered and made the order of this court, as is prayed by the applicant. The enabling statute is the Reciprocal Enforcement of judgement Act No. 4 of 1922, Section 3 (1) thereof, which provides as follows:-

‘‘ If a judgement has been obtained in the High Court of England or Ireland or in the court of session in Scotland, the judgement creditor may apply to the court, at any time within twelve months after the date of

the judgement or such longer period as may be allowed by such court, to have the judgement registered in such court and on any such application the court may , if in all the circumstances of the case it thinks it just and convenient that the judgement should be registered in Swaziland, and subject to this Section, order the judgement to be registered accordingly''.

The ipsissima verba of the foregoing legislation, has put it beyond disputation, that it is the judgements of the '' High Court in England or Ireland or in the Court of session in Scotland'' that are registrable in the Kingdom of Swaziland. Furthermore, Section 5 Notice No. 97 of 1922 of the Reciprocal Enforcement of judgements Act, names 15 other Commonwealth territories other than the United Kingdom that enjoy reciprocal enforcement of judgement arrangement with the Kingdom of Swaziland. These do not include the United States of America. It is thus obvious to me from the enabling statute, that there is no arrangement for the reciprocal, enforcement of judgements given in Superior Courts, between the Kingdom of Swaziland and The United States of America. The common law position relied upon by the applicant in contending this issue, cannot hold sway in the circumstances, in the face of the express words of statute. To hold differently, would contravene Section 252 (1) of the constitution of Swaziland Act, 2005, which states in clear and unambiguous words that the principles of common law are applicable to the Kingdom of Swaziland '' except where and to the extent that those principles or rules are inconsistent with this constitution or a statute''. The applicant's prayer that the judgement of the Circuit Court for the Montgomery Country, Maryland, USA, be registered and made the order of this court therefore fails and is accordingly dismissed.

ISSUE TWO

Whether the judgement of the Circuit Court for the Montgomery County, is competent to found the special plea of res judicata against the divorce proceedings instituted by the Respondent in the High Court of Swaziland in November, 2007.

Under this issue the applicant is praying the court to recognize the conclusiveness of the foreign judgement rendered by the circuit court for the Montgomery County, Maryland, USA and therefore hold the divorce proceedings instituted in this court Res judicata.

The principle of Res judicata is one that is well founded in this jurisdiction. It is premised on the principle that there must be an end to litigation and that litigants have no right of their own having canvassed a matter as between the same parties, on the same subject and grounds of complaints, to seek to reopen and relitigate the same matter before the same or a different court.

In the case of Moresby-White V Moresby-White 1972 (SA) 3 the court expressed this view in the following language

'' Public Policy dictates that there be an end to litigation, that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered for ever settled as between the parties….''

In the recent Supreme Court of Swaziland judgement in the case of Mhlatsi Howard Dlamini V Prince Mahlaba Dlamini and another delivered, on the 30th of November 2010, in case appeal No.15/2010 that court enunciated the principle of Res judicata as follows, per Ramodibedi CJ

'' 16 The law relating to the plea of res judicata has been authoritatively stated at pages 249 – 250 of Herbstein & Van Winsen, where the learned editors point out that:

The requisites of a plea of Lis Pendens are the same with regard to the personal cause of action and subject matter as those of a plea of res judicata; which in turn, are that the two actions must have been between the same parties or their successors in title, concerning the same suspect matter and founded upon the same cause of complaint''.

The common law rule on the conclusiveness of foreign judgement is applicable in the Kingdom of Swaziland pursuant to the constitution of the Kingdom of Swaziland Act 2005, which preserved the

principles of common law via Section 252 (1) thereof, in the following words ' subject to the provisions of this constitution or any other written law the principles and rules that formed, immediately before the 6th September 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the Common Law of Swaziland except where and to the extent that those principles or rules are inconsistent with this constitution or a statute''

The rule on the conclusiveness of a foreign judgement can only be successfully invoked if

The parties and cause of action are the same in all the proceedings

The judgement is final and conclusive between the parties

The judgement is one on the merits and is given by a court of competent jurisdiction.

In casu, it is common cause that the judgement of the circuit court for the Montgomery Country, exhibited herein as annexure A, is a judgement emanating from an action before that court between the parties herein. It is common cause, that it is the same parties that are before the court in the divorce proceedings instituted by the respondent before the High Court of Swaziland on or before the 2nd of May 2007. It is common cause that the subject matter i.e. divorce determined in the foreign court is the same matter which the Respondent seeks to relitigate before the High Court of Swaziland via the suit he instituted there at on or before the 2nd of May 2007.

The bone of contention however is the jurisdiction of the circuit court for Montgomery Country, USA to entertain and determine the divorce proceedings upon which the said judgement is predicated. The question of the jurisdiction of the foreign court to entertain and determine the divorce proceedings falls squarely within the domain of Private International law. The onus of proving that the foreign court had the jurisdiction to entertain and determine the divorce proceedings lies at the door step of the applicant. The poser is, has the applicant discharged this onus of proof? In proof of this fact the applicant contends that the jurisdiction of the foreign court is premised on the fact that the parties were resident in the state of Maryland, USA for a period of one year prior to the institution of the action.

That the residence of the parties in the United States of America was permanent or for an indefinite period and dependent on uncertain events in the parties lives. This contention the applicant based on the Respondents deposition in his counter complaint to the limited divorce and custody filed by the applicant as per annexure TM 4 at page 36 of the book of pleadings, wherein the Respondent averred as follows:-

''that the husband (the Respondent) is gainfully employed and enjoys a stable position with the World Bank. As a result the husband can provide a stable environment for the children and he is the parent best able to provide the children with the stable life style that they need''.

It was further contended by Mr S.K Dlamini, Counsel for the applicant, that the Respondent submitted to the jurisdiction of the foreign court when he counter claimed for limited divorce and custody. On the other hand it was contended replicant for the Respondent by advocate P. Flynn, that the question of divorce between the parties was the exclusive preserve of the forum domicillii of the Respondent, therefore, the foreign court lacked jurisdiction. This advocate Flynn contended, is premised on the fact, that though the Respondent was seconded to the United states by the World Bank, his stay there was however not permanent. In the circumstances, his domicile remained the Kingdom of Swaziland. Therefore, it is only the laws of Swaziland that were applicable to the divorce proceedings. Advocate Flynn further submitted that though the Respondent filed a counter claim to the initial proceedings for limited divorce, he however did not participate in the subsequent absolute divorce proceedings and cannot therefore in the circumstances, be said to have submitted to the jurisdiction of the foreign court in relation thereto. He contended that in any case, submission to the jurisdiction of a court in matrimonial causes, cannot confer jurisdiction on a court which ab initio lacked the jurisdiction to entertain and determine same. He also contended that there is no evidence that the lex domicilli of the Respondent was considered by the Foreign Court in the course of determining the divorce proceedings and that the mere fact that the Foreign Court

made a Monetary award regarding the proprietary consequence of the marriage between the parties shows that the laws of Swaziland were not considered.

Now divorce involves a change of status and matters of status are generally governed by the lex domicillii. Therefore, it is the lex domicilli of the parties that will determine whether there are grounds for divorce and the ancillary claims arising there from see Private International Law by C.F Forsythe and T.W Bennet page 253, Kahn (Husband and Wife) 539 – 40. Salvesen V Administration of Australian Property (1827) AC 641

The common law position on this subject matter was considered by The learned editors Herbsteinand Van Winsen, as follows on pages 75 to 76 of the text, The Civil practice of the Supreme Court of South Africa (4th edition) ''The general principle is that in action for divorce the court of the matrimonial domicile, sc the court within whose area of jurisdiction the husband is domiciled at the date when action is instituted, has exclusive jurisdiction. Provided that the requisite of domicile is present, all other considerations such as the place of marriage, the domicile at the date of marriage or at the date of the event on account of which divorce is sought, or the nationality of the parties are irrelevant.

The jurisdiction of the court will not be affected by any change of domicile after the institution of proceedings, and any matters ancillary to the main action must be decided in the same court. Jurisdiction in divorce matters cannot be conferred on a court by consent or submission. The failure by defendant to raise an objection to the jurisdiction does not relieve the court of the obligation of satisfying that it has jurisdiction''

SeeWebber V Webber 1915 AD 239, Ex Parte Oxton 1948 (1) SA 1011 (C) Holland V Holland 1973 (1) SA 897 (7) Howard V Howard 1966 (2) SA 718 (R) V Granoth V Granoth 1983 (4) SA 50 (C) at 53E – 54C, Weatherley V Weatherley (1879) Kotzi 66. I see no statutory exceptions to the foregoing position of the law, and none is urged in this application.

It is now therefore firmly established in our laws in all matters affecting status, in the absence of express statutory power, the exercise of jurisdiction is confined to the Court of the domicile of the parties at the time when the action commenced and the fact that a party submits to or fails to object to the jurisdiction of the court does not confer jurisdiction in respect of such matters or absolve the court from satisfying itself as to the true domicile of the parties.

In the light of the foregoing, the contention of Advocate Flynn that submission cannot confer jurisdiction and that lex domicillii must hold sway in the divorce proceedings therefore, has much to commend itself for, in the circumstances.

It is common cause that the parties herein are Swazis. It is common cause that the marriage between them was contracted in Swaziland. It is not disputed that prior to their departure to the USA that the domicile of the husband was Swaziland. It was thus incumbent upon the foreign court, to ascertain the question of the domicile of the husband at the time of institution of the divorce proceedings before it. There is no evidence that the question of the domicile of the Respondent was tried and proved by the foreign court before it assumed jurisdiction.

There is also no evidence to show that the law of the domicile of the Respondent was ever proved, tried and applied to the proceedings before the foreign court, It was incumbent upon the applicant who alleges that the foreign court had jurisdiction, to put these material facts before the court.

The glaring and undisputed fact is that the foreign court's assumption of jurisdiction was predicated on the fact that the parties were resident in the state of Maryland, USA, the area of jurisdiction of the foreign court, for a period of one year prior to the institution of the action before it. It is by reason of this fact that advocate Flynn is dogged in his contention that the Respondent who maintains that his domicile at all material, times has been and has remained the Kingdom of Swaziland, must be afforded the opportunity of proving the fact of his domicile in the divorce proceedings instituted in the High Court of Swaziland. I agree with him. I

say this because I am firmly convinced that the divorce granted to the applicant by the foreign court in an action founded on the fact of residence simpliciter of the parties in that country, is not a bar to the action instituted by the Respondent in the High Court of Swaziland. This is because if the Respondent was in fact not domiciled in the United States of America at the time that action was instituted, then the proceedings before that country are a nullity so far as the courts of this country are concerned. Thus, the Respondent in my view cannot be deprived of his right to have the issue of domicile determined in the court of the country in which he alleges he was actually domiciled at all material times. To hold otherwise might have the effect of depriving the respondent of the fundamental right which stems from the fact of domicile and might result in injustice. I am firmly convinced therefore that the Respondent is entitled to pursue his action and to prove that he was domiciled in the Kingdom of Swaziland at the time of the institution of the action. Both actions were instituted in 2007 at the time the parties were resident in the USA. The respondent is therefore in my view entitled to prove that fact of domicile which can be established by residence coupled with animus manendi, since the foreign court obviously failed to determine this. This is more so as the special plea raised by the applicant is not premised on the allegation that the High Court of Swaziland lacks the jurisdiction to entertain and determine, the Respondents action but on the defence of res judicata. If in the result the Respondent is able to establish the fact of domicile in Swaziland in 2007 when the two actions were instituted, then the judgement of the circuit court for the Montgomery country will in that event be a nullity as far as this court is concerned and in consequence cannot be recognized by the courts of this country. It is in the light of the totality of the reasons ante, that I hereby dismiss the applicants application in its entirety. Costs to follow the event.

OTA J.

JUDGE OF THE HIGH COURT