

SOUTH AFRICA / JUDGMENT

M v M (A216/2014) [2015]

ZAFSHC 36 (5 March 2015)

[2015] ZAFSHC 36

COURT

Free State High Court, Bloemfontein

BEFORE

Mocumie, Lekale

CASE / FILE NUMBER

A216/2014

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Case

No. : A216/2014

DATE:

05 MARCH 2015

In

the matter between:-

[F.....]

[M.....]

[M.....].....Appellant

And

[F.....]

[E.....]

[M.....].....Respondent

CORAM:

MOCUMIE J et LEKALE

J

JUDGMENT

BY: MOCUMIE, J

HEARD ON: 09 FEBRUARY 2015

DELIVERED ON: 5 MARCH 2015

MOCUMIE, J

[1] The appeal came before us on an unopposed basis on 9 February 2015. The order sought was granted and handed down on 17 February 2015 as we deemed it necessary to expedite the matter. The order granted reads:

“1. The appeal is upheld.

2. The order of the regional court is set aside and substituted with the following:

‘The regional court has jurisdiction to hear the divorce action in terms of section 28(1A) read with 29(1B) of the Magistrates’ Courts Act 32 of 1944 as amended and section 2 (1) of the Divorce Act 70 of 1979.’

3. The matter is remitted to the regional court for continuation and finalisation of the trial, [on the same papers and annexures.]

4. The matter to be allocated in the first term to be disposed of speedily.’

[2] In 2010 the Magistrates’ Court Act 32 of 1944 (the Act) was amended by the Jurisdiction of Regional Courts Amendment Act 31 of 2008 (the Regional Courts Act) with the purpose to, amongst others, extend civil jurisdiction to the regional courts to deal with civil litigation including divorce matters. This was received with a sigh of relief by the most indigent of our society as it meant that litigants could henceforth get their divorce at affordable costs.

[3] The appellant, the plaintiff in the main action, and the respondent, the defendant in the main action, for reasons unknown and not relevant in this appeal but definitely out of choice, were married in Phomolong, Lesotho, on 03 November 2007. For convenience, the parties will be referred to as in the main action. Pursuant to these new developments as set out in paragraph 2 above, on 22 May 2012 the plaintiff instituted a divorce action against the defendant under case number FS/BFN/RC/361/2012D in the regional court, Bloemfontein. On 8 August 2014 the defendant withdrew her defence and her counter claim as the parties had entered into a deed of settlement. The matter proceeded on an unopposed basis.

[4] On the verge of the plaintiff being sworn in to give evidence under oath, the regional magistrate (Mr Mkansi), mero motu, raised a point in limine regarding the jurisdiction of the regional court to dissolve a marriage entered into in a foreign jurisdiction. The basis of raising such point in limine, as he put it, was because the plaintiff and the defendant were different from parties who are married in the Republic of South Africa. He posed the

contentious question ‘...is there a specific reason why the parties would not go and finalise their divorce in Maseru, Lesotho, which is not far from Bloemfontein?’

[5] From the bar counsel for the plaintiff, responded to the question posed by the regional magistrate as follows:

‘There is no specific reason other than the plaintiff works and is domiciled (sic) for a number of years, also his paternal grandmother where the child stays, is domiciled in Bloemfontein and in this matter, the family advocate had to investigate regarding the arrangements,

regarding the child and they were also, it was easy for them to evaluate the situation, everyone was in Bloemfontein, so the reason

was practicality. It is not a legal reason that I can submit, the parties were in Bloemfontein, and they work here. Both parties

frequented my office several times. The previous attorneys of the defendant, two previous attorneys were also in Bloemfontein, and never was it the issue raised by them or any one...’

[6] After so interacting with the plaintiff’s legal representative, the regional magistrate concluded that:

‘I am not convinced that I have jurisdiction over the citizens who were married out of the borders of the Republic of South Africa. The second reason, the question of practicality why the plaintiff cannot pursue or proceed with this action in Maseru, Lesotho which is about 155 less than 160 km from Bloemfontein, I do not believe the question of practicality has merits. The plaintiff can institute divorce proceedings in Maseru, Lesotho, which is not far from the province of the Free State...’

[7] We gather from this ruling, in the absence of any order and reasons by the regional magistrate that he dismissed the action for divorce. It is this decision that is appealed against with leave of the trial court.

[8] The plaintiff was a South African citizen at the time of the marriage. He resides in Bloemfontein. He has been in South Africa,

Bloemfontein since he was born. When he instituted the action both parties were residents and domiciled in Bloemfontein, Free State,

South Africa.

[9] The main issue before the regional magistrate for determination was an action for the dissolution of a marriage between two people who were ordinarily resident in the regional division of the Free State. The cause of action, the irretrievable break down of the marriage, occurred in the regional division of the Free State.

[10] Mr van der Merwe submitted that the regional court had jurisdiction to dissolve the marriage as the plaintiff sought, based on the provisions of section 28(1A) read with section 29(1B) of the Act as amended read further with section 2(1) (a) and (b) of the Divorce Act 70 of 1979 (the Divorce Act). The submissions he made with reference to case law however did not persuade the regional magistrate in any way when he ultimately ruled that he did not have jurisdiction.

[11] It is trite that a marriage concluded in a foreign country is by law determined by the application of the principle of *lex loci celebrationis* which means the law of the place where the marriage was solemnised.[1] In terms of our common law, where a marriage was legally concluded in another country, the marriage is recognised as valid by our courts as long as when the marriage was solemnised there were no legal impediments to the marriage.[2] This common law position has not changed.[3]

[12] Section 28 (1A) of the Act as amended reads:

‘For purposes of section 29 (1B), a court for the regional division shall have jurisdiction if the parties are or if either of the parties is-

- (i) domiciled in the area of jurisdiction of the court on the date on which the proceedings are instituted,
- (ii) ordinarily resident in the area of the jurisdiction of the court on the said date and has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.’

[13] To the extent relevant and referred to in s28 (1A), s29 (1B) provides that a court shall have jurisdiction in an action which occurred within its district or regional division.

[14] Section 2(1) Divorce Act 70 of 1979 reads:

‘A court shall have jurisdiction in a divorce action if the parties are or either of the parties is –

- (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
- (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date’.

[15] It follows, axiomatically, that in terms of s28 (1A) read with s29(1B) of the Act as amended and s2(1) (a) and (b) of the Divorce Act, a regional court has jurisdiction in a divorce action between parties who were married in another country as long as (i) they are

or one of them is domiciled in the jurisdiction of the court on the date on which the action is instituted or (ii) they or one of them is ordinarily resident within the court's jurisdiction when the action is instituted and have or has been ordinarily resident in the Republic of South Africa for at least one year prior to the institution of the action. This is the legal position in South Africa.

[16] After an in-depth and thorough perusal and study of the papers, and submissions on behalf of the plaintiff, without any reasons

supporting the ruling made, it is still not clear why the regional magistrate was of the view that he did not have jurisdiction. There is no indication that there are conflicting decisions on this issue in the regional courts across the country and more specifically in the Free State. Neither does the regional magistrate say so expressly. Nor does he say that the relevant sections of the Act as amended and the Divorce Act are unclear.

[17] As indicated already, the regional magistrate did not give reasons for his decision. He did not even expressly state that he was dismissing the action for divorce or staying the proceedings pending a decision by this court on the issue of jurisdiction that he had raised *mero motu*. Even when he was given the proverbial 'second bite at the cherry', to provide reasons for his decision when the plaintiff

lodged leave to appeal, he again chose not to give reasons.

[18] Courts are obliged to give reasons for their decisions. This is a manifestation of the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done. The Constitutional Court in *Strategic Liquor Services v Mvumbi*[4] had the occasion to deal with a labour matter in which the Labour Court, despite repeated requests, failed to furnish reasons for its decision.

[19] At paras [15] to [17] of the judgment[5] the court states:

'[15] It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process. In *Botes and Another v Nedbank Ltd*[6], Corbett JA pointed out that 'a reasoned judgment may well discourage an appeal by the loser': 'The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the court of appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did.'

[16] That the Labour Appeal Court considered the employer's application for leave to appeal without requiring Nel AJ to supply

reasons, and without in their absence furnishing its own, is most regrettable. The application before that court gave it the opportunity that Nel AJ let slip through his fingers, namely to give the employer reasons for its failed attempt to review the CCMA outcome.

[17] In Mphahlele[7] this court noted that there is no express constitutional provision for leave to appeal requiring judges to furnish reasons for their decisions (and on this basis upheld the long standing practice of the Supreme Court of Appeal not to furnish reasons when determining applications for leave to appeal). We add that there is likewise no express statutory provision requiring judges who have given judgment *ex tempore* to furnish written reasons when later required. Nonetheless, as this court pointed out in Mphahlele, a reasoned judgment is indispensable to the appeal process. Judges ordinarily account for their decision by giving reasons-and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons-

‘explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal, or where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters.’

The fact that the regional magistrate did not give reasons made our task unnecessarily arduous, although we finally decided, in the interest of justice and speedy resolution of this appeal, to dispense with the

reasons.

[20] Finally, it must be stated that for an unopposed divorce matter, which litigants chose to be dealt with by the regional court for the obvious reason of affordability, to have come to this court on appeal, even if ‘just across the road’ as the regional magistrate remarked, has caused more harm to the entire system than can ever be imagined. First, it has given a wrong impression that the regional court is not up to the task to deal with divorce matters. Second, it has denied the litigants in this case their right to approach a court of their choice and in the process denied them access to justice and speedy resolution of what seems to be a matter that could have been disposed of in less than fifteen minutes at a nominal fee. The Regional Court President must consider this case as one pointing to lack of training or inadequate training on divorce matters and take steps to remedy this, so that it should not be repeated.

[21] Considering the fact that this appeal was by no means as a result of any wrongdoing on the parties’ part, they are entitled to proceed on the same papers to continue with the action and not issue fresh summons.

[22] It is for the above reasons that the order set out in paragraph 1 of this judgment, slightly amended, was granted.

B. C. MOCUMIE, J

I concur

L.J. LEKALE, J

On behalf of the applicant: Adv. R. Van Der Merwe

Instructed by:

J.L. Jordaan Attorneys

Bloemfontein

[1] Chitima v Road Accident Fund 2012

(2) All SA 632 (WCC).

[2] Pretorius v Pretorius 1948 (4) SA 144 (O) 147-149.

[3] The Domicile Act 3 of 1992 provides that where either or both parties are not domiciled in the same country or state or when the marriage is solemnized in a place where either or both spouses are not domiciled, the law of the place of the husband's domicile, at the time of the marriage, will govern the legal and proprietary consequences thereof. This theory is clearly outdated and in conflict with the principle of equality (s9 of the Constitution of South Africa). Legal reform is required. Compare with the Hague Convention of 1978.

[4] Strategic Liquor Services v Mvumbi NO 2010

(2) SA 92 (CC).

[5] Mvumbi footnote 4.

[6] Botes and Another v Nedbank Ltd 1983

(3) SA 27 (A). See also S v Calitz en 'n Ander 2003

(1) SACR 116 SCA.

[7] Mphahlele v First National Bank of South Africa Ltd [1999] ZACC 1; 1999 (2) SA 667 (CC). See also SALJ, Vol. 115, (1998) 117.

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