



THE HIGH COURT OF SWAZILAND

JANE DLAMINI

Applicant

And

UNIVERSAL PANELBEATERS (PTY) LTD

1st Respondent

MASWAZI NSIBANDZE

2nd Respondent

Civil Case No. 821/2003

Coram

For the Applicant

For the Respondent

S.B. MAPHALALA – J

MR. P. DUNSEITH

MR. L. MAMBA

JUDGEMENT

(On point of law in limine)

(16/05/2003)

Serving before court is an application brought under certificate of urgency on the 16th April 2003, for an order *inter alia* a) staying the sale in execution to be held in Case No.

271/2002 on the 17th April, 2003 at 09h 30; b) directing the 2nd Respondent to deliver an interpleader notice in terms of Rule 58 within 7 days; c) directing that the vehicle certain Toyota Camry SD 605 DN be kept in safe custody at the Applicant's residence at Bhunya pending final determination of the interpleader proceedings; d) costs to be costs in the interpleader proceedings.

The founding affidavit of the Applicant is filed in support thereto.

I heard the matter at 8.00am on the 17th April 2003, as the purported sale was scheduled for 9.30am that very same morning. *Mr. Mamba* placed it on record that his client was served late with the papers hence they could not file answering affidavits, however, he advanced a point of law *in limine* from the bar. I heard arguments for and against the point raised and reserved my ruling on the matter. However, I granted prayer (a) viz staying the sale in execution to be held in Case No. 271/2002 on the 17th April 2003 at 9.30am. I intimated to the parties that a full judgement would follow in due course. *Mr. Mamba* was of the view that the point raised disposes of the matter. However, *Mr. Dunseith* holds a contrary view. Following are my views of the matter.

The point of law raised by *Mr. Mamba* for the 1st Respondent is simply that the Applicant does not have *locus standi* to move this application. *Mr. Mamba* attacked the paragraph which seeks to establish her *locus standi*. The paragraph reads as follows:

"2 I am an adult Swazi married woman, duly assisted by my husband in so far as may be necessary, residing at Lamgabhi area, Bhunya, Manzini district, Swaziland".

The attack is premised on the *dicta* in the South African case of *Wilson Yelverton vs Gallymore 1950 (2) S.A. 26* at page 27 that a woman married in community of property, who is not a public trader, cannot sue in contract, even with her husband's assistance. That in *casu*, it is presumed that the marriage is in community of property unless the contract be proved. *Mr. Mamba* further directed the court's attention to the work by *H.R. Hahlo, The South African Law of Husband and Wife (3rd ED)* at page 203 to buttress

his point. The learned author states that capacity to make a contract and capacity to appear in court are two different matters and are not necessarily coincident in any one person. **“It is not the subject matter of the suit, but the woman’s legal capacity which makes the husband’s assistance necessary (see *Watkins vs Fick*, 1941 W.L.D. 229 at 233, per *Ramsbottom J.* If the husband assist his wife she has *locus standi in judicio* and can bring or defend an action herself. But she may still be the wrong party to sue or be sued, for the claim in dispute may not be enforceable by or against the wife.**

The essence of *Mr. Mamba’s* objection is that from the face paragraph 2 of the founding affidavit the Applicant is presumed to be married in community of property and thus she cannot sue in contract, even with her husband’s assistance.

Mr. Dunseith advanced *au contraire* arguments. The gravamen of his arguments is that the presumption relied upon by *Mr. Mamba* only applies in South Africa as in Swaziland Section 25 of the Marriage Act created a different presumption to that which operates in South African law.

“Section 25 (1) reads as follows: “If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them unless prior to the finalization of the marriage the parties agree that the consequences following from the marriage shall be governed by the common law”.

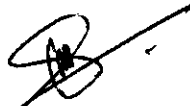
Further, *Mr. Dunseith* contended that in *casu* we only have the affidavit of the Applicant and there is nothing to gainsay what she has deposed in this affidavit. The issue of marital power does not arise in this case.

These are the issues before me. The right to sue or the liability to be sued depends in the first place on capacity. In order to be capable of either suing or being sued, a person must have *locus standi in judicio*. Consequently persons who are wanting in the capacity cannot be parties to any civil action unless that want of capacity has first been implemented. Thus where the marital power of the husband over his wife has not been excluded by antenuptial contract the general rule is that the wife has no *locus standi in*

judicio, unless she is assisted by her husband (see *Beck Pleading in Civil Actions (3rd ED)* by *I. Isaacs* at page 2 *in fin* 3 and the cases cited thereat).

I have considered the arguments for and against the point *in limine* raised and my considered view is that paragraph 2 of the founding affidavit of the Applicant suffices to establish that she has the necessary *loci standi* to launch these proceedings. The paragraph appears to me to be the standard paragraph in matters of this nature. The issue of marital power does not arise in this case. Further it would appear to me that the presumption enunciated in the South African case of *Wilson – Yelverton vs Gallymore* would not apply in our law in view of Section 25 (1) of the Marriage Act No. 47 of 1964. I agree with *Mr. Dunseith's* submissions in this regard.

In the result, I overrule the point of law *in limine* and order that the Respondent file the requisite affidavits. Costs to be costs in the main application.



S.B. MAPHALALA

JUDGE