IN THE HIGH COURT OF SWAZILAND

CIV. CASE No. 1537/96

IN THE MATTER BETWEEN:

NATALIA MATHATHANE SIMELANE APPLICANT

And

SIBONGILE SIMELANE (NEE MOTSA) 1st RESPONDENT

PUBLIC SERVICE PENSION FUND 2nd RESPONDENT

THE MASTER OF THE HIGH COURT 3rd RESPONDENT

CORAM : DUNN J.

FOR THE APPLICANT : MR. B. KHUMALO

FOR THE 1st RESPONDENT : MR. J.S. MAGAGULA

JUDGMENT

6th JUNE 1997

This application was filed under a certificate of urgency for hearing on the 28th June 1996. The relief sought included:

1. An order restraining the 3rd respondent from paying and/or directing payment of the pension from the estate of the late Philemon Mbhekeni Simelane to the 1st respondent pending the outcome of this application.
2. An order declaring the purported marriage entered into between

the late Philemon Simelane and the 1st respondent null and void ab initio.
3. An order directing that properties acquired by the 1st respondent by virtue of the marriage aforesaid be declared part of the joint estate between the deceased and the applicant.

It is not reflected in the file, as to what transpired on the 28th June. What is reflected is that the application kept being post-poned, by consent of the parties, from the 19th July 1996 until the 23rd May 1997 when the matter was called before me . On that day I was only addressed on the prayer for an order declaring the marriage null and void ab initio. This judgment is concerned solely with that relief.

The applicant states that she married Philemon Simelane in terms of the Marriage Act No. 47/1964.

She states that sometime during 1993 her husband purported to marry the 1st respondent by Swazi Law and Custom notwithstanding the subsistence of her marriage to him .She avers at paragraph 7 of her affidavit that the purported marriage was null and void ab initio as it was bigamous.

It was argued on behalf of the 1st respondent that the applicant is estopped from denying that the 1st

respondent was duly and lawfully married to the deceased for the following reasons –

1. That the applicant married the deceased on the 20th February 1993 and the applicant did nothing to stop the marriage.
2. That the applicant did nothing thereafter to have the marriage annulled.
3. That the applicant always accepted the 1st respondent as the wife of the deceased.

It was further argued on behalf of the 1st respondent that this was a proper case for the court to declare that her marriage was " at least putative" on the following grounds -

1. There was a marriage solemnised in accordance with Swazi Law and Custom and the prescribed formalities thereof were observed.
2. The 1st respondent contracted the marriage in good faith believing that the deceased and the applicant were also married by Swazi Law and Custom.

Section 7 of the Marriage Act reads as follows-

1. No person already married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous

Marriage was in accordance with Swazi Law and Custom or civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy:

Provided that nothing contained in this section shall prevent parties married in accordance with Swazi Law and Custom or other rites from re-marrying one another in terms of this Act.

2. No person married in terms of this Act shall, during the subsistence of the marriage, purport to contract a legally recognized Ceremony of marriage with any person other than the lawful spouse of the first-named person.

3. Any person who contravenes sub-section (2) shall be deemed to have committed the offence of bigamy.

This section together with the case law dealing with its interpretation and application is dealt with by the learned author Thandabantu Nhlapho in his book MARRIAGE AND DIVORCE IN SWAZI LAW AND CUSTOM at p30 et seq. In particular, the cases of JOSEPH JABULANE DUBE v R 1970 -76 SLR 93 and EX PARTE GININDZA AND ANOTHER 1979-89 SLR 361 dealing with the question of the effect of the sequence of marriages by a party under the Marriage Act and Swazi Law, on the provisions of subsections 1 and 2 are analysed. The authorities referred to by the learned author make it abundantly clear that a marriage under Swazi Law and Custom is a valid and legally recognised marriage in Swaziland. See R v TIMOTHY MABUZA AND ANOTHER 1979-81 SLR 8 at 9F and DLADLA v DLAMINI 1977-78 SLR 15 at 16E.

The marriage under Swazi Law and Custom entered into between the 1st respondent and the deceased was clearly bigamous for the reason that it was entered into during the subsistance of the applicant's marriage, in terms of the Act, to the deceased.

The. defence of estoppel which is raised by the 3rd respondent is dealt with by Hahlo, SOUTH AFRICAN LAW OF HUSBAND AND WIFE 5th edition at pl05 et seq. The learned author analyses the relevant South African decisions and concludes as follows at pl06-

Thus, it would seem that there is little prospect that our courts will ever admit estoppel in any form to be raised as a defence to an action for the annulment of a marriage ,and ,with respect, rightly so.

Once it is accepted that a marriage that is null and void ab initio is a non existent marriage, which does not require a formal act of annulment to deprive it of effect, it is difficult to see why the guilty party should be precluded from having this proclaimed by the court. On the contrary, it

is clearly in the public interest that the question whether or not there is a marriage should be settled once for all, never mind at whose instance. Status is, by it's very nature, indivisible: there is a marriage or there is not. The application of estoppel to a void marriage would lead to the absurd result that a marrige could be both existent and non-existent: existent as far as those are concerned who are estopped from asserting it's validity; non - existent as against the world.
I am,with respect,in agreement with the views expressed by the learned author.

There is further,the rule referred to by Mr. Khumalo that public policy does not permit estoppel to operate in circumstances where its application would produce a result not permitted by law. See Rabie, THE SOUTH AFRICAN LAW OF ESTOPPEL p105. The defence of estoppel is not open to tthe 1st respondent in this case.

The rule that a marriage which is null and void ab initio is without legal effect and cannot be ratified is subject to a number of exceptions, one of these being the case of a putative marriage. If the requirements for such a marriage are met, certain of the effects of a valid marriage may attach to it.

For example the court may, on application, declare the children born of the marriage to be legitimate.

Application may also be made to the court for orders relating to the property rights of the parties.

There are serious disputes of fact in the papers before me regarding the cicumstances under which the purported marriage took place .These disputes can only be resolved at a trial. Proper application would also have to be made, setting out which of the consequences of a valid marriage the 1st rspondent wishes the court to pronounce upon. The 1st respondent's answering affidavit does not deal with these matters and no useful purpose would be served by referring that aspect of the application to oral evidence. It is open to the 1st respondent to initiate appropriate proceedings for the relief she seeks.

The application for the annulment of the 1st respondent's marriage to Philemon Simelane is allowed with costs.

B .DUNN

JUDGE