IN THE HIGH COURT OF SWAZILAND

CTV. CASE NO.1685/99

IN THE MATTER BETWEEN:

BONISDLE MARILYN MKHATJWA	Applicant
AND NEPHTAL MATSEBULA	: 1st Respondent
THE REGISTRAR OF BIRTHS	: MARRIAGES
AND DEATHS	: 2nd Respondent
THE ATTORNEY GENERAL	: 3rd Respondent
CORAM	: MASUKU J.
For Applicant:	: MR L.M. SIMELANE

No Appearance for Respondents

JUDGEMENT 27/7/1999

This is an application filed under a Certificate of urgency and in which the Applicant seeks an Order inter alia:-

1. Dispensing with the Rules of Court pertaining form of service and time limits and that this matter be heard urgently.
2. Declaring the marriage in accordance with the Swazi Law and Custom entered into between the Applicant and the 1st Respondent on the 18th February, 1988 null and void.
3. Directing the 2nd Respondent to cancel the entry in his marriage register in 2 respect of the said marriage.
4. Directing the Respondents to pay the costs of the application in the event it is opposed.

The Applicant BONISILE MARILYN MKHATSWA, in her founding Affidavit states that on the 19th February, 1988, the 1st Respondent and herself purported to enter into a marriage in accordance with Swazi Law and Custom, which "marriage" was consummated on the said date. Unbeknown to her, the 1st Respondent had on the 11th April, 1975 contracted a marriage in accordance with civil rites with one BUSISIWE THEMBI MDLULI, and which marriage still subsists. The discovery of the marriage to Mdluli was only made by the Applicant in September, 1994.

Upon discovery of the earlier marriage, the Applicant states that she confronted the 1st Respondent who confirmed the fact of the marriage to the Applicant and further confirmed that such marriage still subsists. The Applicant then severed her relationship with the 1st Respondent, left the matrimonial home and went to reside at her parental home at Boyane.

When the matter was first called before me on the 16th July, 1999,I refused to grant prayer 1 of the Notice of Motion relating to urgency as I formed the view that the matter was not sufficiently urgent to warrant the jettisoning of the normal time limits set out in the Rules of Court. In particular, I noticed that the Applicant had dismally failed to comply with the peremptory provisions of Rule 6.(25) (b). See in this regard HUMPHREY H. HENWOOD v MALOMA COLLIERY & ANOTHER CASE NO. 1623/94 and the cases therein cited.

I however allowed the Applicant to postpone the matter to the 23rd July, 1999, to afford the 1st Respondent the period of notice set out in the Rules. I further ordered that the 1st Respondent must be notified of the postponement and this was done.

The question to be decided, which was raised mero motu by the Court is whether the Applicant is

entitled to obtain the order sought i.e. the declaration of her marriage to the 1st Respondent null and void on the strength of application proceedings.

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It is trite and there is a plethora of authority to the effect that matrimonial causes, which naturally affect the status of persons should be instituted by was of action and not motion. See VAN DYK v FOUCHEE 1973 (2) SA 662 @ 663 A. HERBSTEIN

& VAN WINSEN, The Civil Practice of the Supreme Court of South Africa, 4th Edition state as follows at page 234.

"There are, on the other hand, certain classes of (sic) case(s) (for example matrimonial causes and illiquid claims for damages) in which motion proceeding are not permissible at all".

E. Spiro in his work entitled "Law of Parent and Child", 3rd Edition Juta & Co., 1971, states at page 248 - 9 that "nullity proceedings, i.e. proceedings where a declaration of the nullity of a marriage being null and void ab initio or because of its being voidable only, also fall in the catergory of matrimonial causes....". It is clear therefor, from the foregoing that the matter in casu is a matrimonial cause and should be instituted by way of action.

What has been stated above is the normal and general rule, which is, like most general rules susceptible to exceptions. The question now becomes under what circumstances does the Court, in its discretion, permit the granting of orders for nullity of marriage on motion, thereby detracting from the normal and general rule applicable.

According to my research, the first case in which the Court declared a marriage null and void on motion was POTGIETER v BELLMGAN 1940 EDL 264. Briefly stated, the facts in that case were that the Applicant went through a form of marriage on 6th April, 1939 with the Respondent. In the marriage certificate, the Respondent, as in this case, was described as a bachelor. The Applicant later learnt that the Respondent had previously contracted a marriage in 1933 and that he had a wife and child from that union. The Respondent was arrested for bigamy, a charge to which he pleaded guilty and was sentenced to 50 pounds. He also handed in a signed statement in which he admitted his previous marriage, and explained his reasons for deceiving the Applicant.

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On being served with the Motion proceedings for annulment of the marriage by the applicant, the Respondent wrote a letter in which he acknowledged receipt of the notice of motion and affidavit and further stated that he did not wish to oppose her claim because of the injustice to which he had subjected her.

Gane J., on appraising the facts of the matter was of the firm view that "proof in this case is overwhelming. Not only have I before me a certified copy of the record in which the respondent pleaded guilty to the charge of bigamy, but I have before me a full statement which he made before the magistrate, and also the letter which he has written to the Registrar. Under those circumstances, I see no reason at all why this matter should not be dealt with, as it is proposed to deal with it, on motion".

Gane J.'s approach was also followed by Kotze J. in the VAN DYK v FOUCHEE

case (supra), in which the Plaintiff married the Defendant on the 18th July, 1972, whereas the Defendant had married another woman on the 12th July, 1948. The first marriage was only set aside by the Cape Provincial Division in August, 1972. Kotze J., after an appraisal of the facts in that matter, came to the view that "these facts are probably incontrovertible" and accordingly sanctioned motion proceedings in a nullity suit, following POTGIETER v BELLINGAN case (supra).

It would therefore appear, regard being had to the above cited cases that the Court does not lightly sanction motion proceedings in nullity suits unless the facts are "incontrovertible" or "proof in that case is overwhelming." So strong is the Court's resolve to follow the general rule that Kotze J., after

granting the Order had to state as follows at page 663H :-

"Accordingly, I would stress that practitioners who resort to motion proceedings in cases of this nature do so at their peril. The general practice is to proceed by action."

Turning to the facts of the instant case, the question to be decided is whether I am convinced that there is in casu "overwhelming" or "incontrovertible" facts. I am of the view that there are no such overwhelming facts because unlike in the VAN DYK

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case, where the Respondent unequivocally admitted his guilt and stated his desire not to oppose the application, there is nothing at all from the 1st Respondent in this case.

Overwhelming facts, in the POTGIETER vs BELLINGAN case consisted in the Respondent's admission of his wrong, the verdict of guilt returned by the Magistrate Court hearing the bigamy charge, his plea of guilty thereto and his letter to the Registrar. This is a far cry from the facts in the instant case, which consists only in the allegations by the Applicant. Based on the ratio decidendi in POTGIETER vs BELLINGAN, I would refuse the Application. A close scrutiny of the VAN DYK case however suggests that what weighed upon the Court in that matter and the "incontrovertible facts" related, not to the Respondent's admission of guilt as in VAN DYK, but rather related to the type or class of the "marriage". If the marriage was voidable, then the matter could not proceed on motion but if the "incontrovertible facts" showed that the marriage was void ab initio, then the Court would sanction motion proceedings.

From the facts outlined in the Applicant's Founding Affidavit, supported by the certificates (which are however uncertified), the Respondent contracted two "marriages", the first according to civil rites and the second, which was with the Applicant, according to Swazi Law and Custom, This was clearly in contravention of the provisions of Section 7 of the Marriage Act, 47/1964, the relevant portion of which states as follows:-

7(1) "No person already legally 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."

It is clear from the aforegoing that the purported marriage between the Applicant and the Respondent was bigamous and was thus null and void ab initio. The Respondent is therefore deemed to have committed the offence of bigamy and with which he ought to have been charged.

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I take into account that the Respondent was served personally with the Notice of Motion and Affidavits for the initial hearing and was also served in terms of the Rules in relation to the postponement, with a Notice of set down. No notice to oppose nor have affidavits been filed opposing the grant of the order sought.

Following the precedent set out by Kotze J. in the Van Dyk case (supra), I find that this case, being one for the nullification of a "marriage" that is void ab initio, motion proceedings will be sanctioned,

I also note that notwithstanding service, neither the 2nd nor 3rd Respondents have evinced an intention to oppose the grant of the prayers sought. In the result, I grant an Order in terms of prayers 2 and 3 of the Notice of Motion.

T. S MASUKU

JUDGE