IN THE HIGH COURT OF SWAZILAND

HELD IN MBABANE CIVIL CASE NO.822/03

In the matter between:

DOROTHY SIBANDZE	APPLICANT
VS	
JAMESON DLAMINI	RESPONDENT
CORAM	SHABANGU AJ
FOR APPLICANT	MR V. DLAMINI
FOR RESPONDENT	MR S.C. DLAMINI

27th May, 2004

The Applicant commenced proceedings by way of notice of motion on 11th April, 2003 seeking the following order;

(a) "Declaring the marriage in terms of Swazi Law and Custom entered into between the Applicant and the Respondent null and void ab intio.
(b) That the Respondent pays the costs of this Application. "

The basis of the application as set out in paragraphs four and five of the founding affidavit is that the respondent had prior to the customary marriage ceremony with the applicant, contracted a civil rites common law marriage. The applicant has annexed to the founding affidavit a certified copy of the marriage certificate which reflects that on

26 May, 1964 the Respondent performed a civil rites marriage ceremony with one Gladys Hlatshwayo. The certificate further reflects that the common law is the law governing the consequences of the marriage. The applicant states in her founding affidavit that she was smeared with red ochre during a customary marriage ceremony performed sometime in 1976 at the Respondents' parental homestead at KaMfishane area. The applicant states further that the Respondent paid between eleven and thirteen herd of cattle to her parents. She says she cannot recall the exact number of cattle paid by the Respondent to her father one Samuel Sibandze. She also says "I must mention that I am not in possession of the Teka certificate due tot he fact that our marriage in terms of Swazi taw and custom was never registered." There are two living children aged 24 and 21 born out of the Applicants' union with the Respondent. She says she was unaware at the time the customary marriage ceremony was performed that the Respondent was a party to a subsisting civil rites common law marriage with the said Gladys Hlatshwayo. The Applicant then concludes as follows in the founding affidavit;

"I an advised and verify believe that in the circumstances the purported second marriage between the Respondent and I is null and void ab initio in view of the provisions of section 7 of the Marriage Act of 1964 and also the principles of the common law that any person who is already validly married by civil rights is incompetent or in terms of Swazi Law and Custom whilst the former marriage remains in existence."

The matter was argued before me on 2nd April, 2004 on the basis of a point in limine raised by the Respondent to the effect that the matter was res judicata having been finally disposed of on 8th November, 1996 when Mr Justice Sapire upheld a point in limine and dismissed the application with costs. The point in limine as raised in case no. 1239/96 between the same parties was formulated in

the following terms

"I am advised and verily believe that this Honourable Court does not have original jurisdiction in this matter as both parties are members of the Swazi Nation and the dispute is in connection with a Swazi customary marriage. This matter is for determination in accordance with Swazi law and custom."

In upholding the point Mr Justice Sapire gave only a ex tempore order to that effect. The clear effect of his order was that the High Court of Swaziland does not have jurisdiction to entertain a matter involving a dispute between two members of the Swazi Nation

concerning a Swazi Customary marriage. So this court determined in case numbers 1239/96 that it had no jurisdiction to entertain the matter.

The exceptio rei iudicatae is based on the irrebutable presumption that a final judgement upon a claim submitted to a competent court is correct. The presumption is founded on public policy which requires that litigation should not be endless and upon the requirement of good faith which does not permit of the same thing being demanded more than once. (See AFRICAN FARMS & TOWNSHIPS LTD V. CAPETOWN MUNICPALITY 1963 (2) SA555(A)564). In spite of the fact that the defence is known at common law as an exceptio it cannot be raised by way of exception but must be raised in a special plea. Unless the facts upon which the defence is based are admitted, the party raising the defence must lead evidence to establish the defence. See LOWREY V. STEEDMAN 1914 AD 532. If the defence is not specifically pleaded it will be deemed that the defence has been waived. See BLAIKIE-JOHNSTONE V. P. HOLLINGSWORTH (PTY) LTD & OTHERS 1974 (3) SA 392 D @ 395. See also L.T.C HARMS in AIMLER'S PRECEDENTS' OF PLEADING further observes at page 258 of the 3rd edition.

"The judgement and order must be a final and definitive judgement and order on the merits of the matter. For that reason an order given in interim interdict proceedings or an order that is subject to variation or review because of changed circumstances cannot be relied upon. LEROUX & ANDER V LEROUX 1967(1) SA 446(A) 463, AFRICAN WANDERERS FOOTBALL CLUB (PTY) LTD V. WANDERERS FOOTBALL CLUB 1977 (2) SA 38(A); VERHAGEN V. ABRAMOWITZ 1960(4) SA 947(C)."

The learned authors go on to describe the requirements which must be met by a defendant or respondent if the plea of the exceptio rei iudicatae is to succeed. He says "the judgement relied upon must be a judgement given in ligation to which the present parties or their privies were parties. This would not, however, apply to a judgement in rem. LE ROUX supra. ...The cause of action in both cases mus the the same and the same thing (relief) must have been claimed or may have been claimed in both cases, AFRICAN FARMS case supra at 562. GOLDFIELDS LABORATORIES (PTY) LTD V. PMATE ENGINEERING (PTY) LTD 1983 (3) SA 197 (W). LILEY V. JOHANNESBURG TURF CLUB 1983(4) SA 548(W)55I. "

See also HOFFMAN & ZEFFERT, THE S.A. LAW OF EVIDENCE.

Applying the above principles to the facts of the present matter, it is clear that (a) present proceedings are between the same parties as in the previous proceedings in case number 1239/96. (b) The same thing or relief is claimed by the applicant in both matters, namely an order declaring or nullifying what is described as marriage between the parties, (c) the cause of action in both cases is the same, namely, that when the customary law "marriage" ceremony was performed there was already in existence a subsisting common law civil rites marriage between the respondent and the said Gladys Hlatshwayo. However it is also clear that in the previous proceedings this court refused to entertain the matter upholding the point in limine to the effect that it had no jurisdiction. The argument may be made, therefore, that this court has finally determined and disposed of the issue whether it has jurisdiction to entertain the matter and grant the relief sought. On the other hand this court in declining

to entertain the matter did not give a judgement on the merits of the matter and therefore its ex tempore order on the issue whether it has jurisdiction to entertain the matter does not render the matter to be res judicata. It has in any event been said that issue estoppel as a doctrine is not part of the Roman Dutch law. It does seem to be accepted that one of the essential requirements for the plea of res judicata to succeed is that the prior judgement has to be on the merits. I have already referred to L.T.C HARMS', AIMLER'S PRECEDENTS OF PLEADINGS 3rd Edition at page 258 in support of this legal proposition. Similarly, HOFFMAN AND ZEFFERT S.A. LAW OF EVIDENCE 3rd Edition at page sixty three, observe;

"The judgement on the merits of any court, including a foreign court can found a plea of res judicata provided that the court had jurisdiction in the matter and the judgement is a final one. For this purpose a judgement is final if it has determined the substantive rights of the parties even if it could be reversed on appeal or rescinded, it is binding until it has been actually reversed or rescinded... The judgement has to be on the merits. An order refusing an application is a final order, and when it has been made on the merits, can ground the exceptio. The requirement that the prior judgement has to be on the merits does not signify that the proceedings have to be contested: a default judgement may ground the exceptio. " The underlining is mine.

See also : AFRICAN FARMS & TOWNSHIPS LTD V. CAPETOWN MUNICIPALITY supra.

5

The point raised by the respondent therefore would fail in light of the abovequoted passage because the prior order raised by the respondent in support of the contention based on res judicta was not on the merits, A related question which arises is whether the applicant is not estopped from again disputing the issue of law which this court decided in case number 1239/96, namely that this "court does not have original jurisdiction" to entertain the matter because of both the fact that both parties are members of the Swazi Nation and the fact that the dispute is in connection with a swazi customary marriage. In English law a judgement does not operate only by way of consumption and novation of the cause of action. It also estops the parties from later disputing any point of fact or law which was essential to the decision. This is known as the doctrine of issue estoppel. However as HOFFMAN & ZEFFERT in the SOUTH AFRICAN LAW OF EVIDENCE 3rd edition at page 265, observe "there was no doctrine of issue estoppel in Roman Dutch law. The requirement that the same thing must have been claimed, which all the authorities insist was essential to the exceptio rei judicatae, would be inconsistent with such a rale. There do not seem to be any cases of issue estoppel mentioned by the Roman Dutch writers, and the Roman maxim resjudicata pro veritate accipitur does not appear to have meant more than that litigation could not be reopened after the condemnatio had been pronounced."

Therefore in light of the aforegoing reasons the applicant is not barred from bringing the present proceedings. The preliminary point taken by the respondent is therefore dismissed with costs.

ALEX S. SHABANGU

ACTING JUDGE