

IN THE HIGH COURT OF SWAZILAND IRENE

DUDU THWALA

Applicant

And

Coram

For the Applicant For the Respondents

ELIZABETH MBHEDVOSE SHONGWE

1st Respondent

WILLIAM MNGUMANE MAGAGULA

2nd Respondent

THE MASTER OF THE HIGH COURT

3rd Respondent

Civil Case No. 1376/2006

S.B MAPHALALA —

J MR- HLOPHE

MR. THAKATA

[1] This judgment is a sequel to one I gave on the 26TH
January 2007, regarding this matter where Applicant has filed a
Notice of Application seeking an order declaring the
JUDGMENT
customary marriage contracted by her husband, Mandla David
Thwala with the 1st Respondent on the 15 July 1996 "*null and
void ab initio*" and of no force and effect and "*contra bonos*

2nd March 2007

mores". In this judgment the Respondent of a supplementary affidavit by the Registrar I condoned the filing by of Births, Marriages and Death.

[2] For present purposes the 1st Respondent has advanced a point *in limine* in her Answering affidavit as follows:

"The application is liable to be dismissed on the basis that matrimonial course, which naturally affects the status of persons should be instituted by way of action proceedings and not on motion. The application raises material disputes of fact which cannot be determined on papers unless *viva voce* evidence is led".

[3] In arguments before me Counsel for the 1st Respondent took the court through the affidavits filed of record to show the above stated position that there are material disputes of fact and therefore the point *in limine* ought to be upheld Counsel also relied heavily on two judgments of this court by Dunn J (as he then was) in the High Court cases of *Dlamini Kingdom vs Bowring and Minet (Swaziland) (Pty) Ltd - Civil Case No. 2220/1994* and that of *Dlamini Thabsile vs Manser Rudolf and others - Civil Case No.614/1993*. In the former judgment the court considered the *dictum* of Murray AJP in the case of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pry) ltd 1949 (3) S.A. 1155 (T)* at 1162 where the following was said: The crucial question is always whether there is a real dispute of fact. It does not appear that a Respondent is entitled to defeat the Applicant merely by bare denials such as he might: employ in the pleadings of a trial action, for the sole purpose of forcing his

opponent in the witness box to under go cross-examination. Nor is the Respondent's mere allegation of the existence of the dispute of fact conclusive of such existence"

[4] On the other hand Counsel for the Applicant contended the contrary that *in casu* there are no material disputes of fact, that whatever disputes alleged to exist are imagined by the Respondents. In this regard the court was directed to what is stated by the learned authors, *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 237. The legal principle stated in this textbook is that once the absence of a *bona fide* dispute on material facts is apparent, the Applicant is entitled as of right to have his claim enforced by the more expeditious and less expensive method of motion proceedings, and the court has no discretion to refuse to entertain such proceedings notwithstanding the loss to a Respondent of some tactical advantage that he might have enjoyed in the event of the institution of a trial action.

[5] It would appear to me on the facts of the matter and the arguments advanced by the parties that *Mr. Hlophe* for the Applicant is correct that there are no material disputes of facts in this case and therefore this dispute can be resolved on the papers as they stand.

[6] In the result, for the afore-going reasons the point *in limine* is dismissed and I make no order as to costs. The matter to proceed on the arguments on the merits of the dispute.


S.B. MAPHALALA