# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2872/07

In the matter between:

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| JABULILE PERSIS MAZIYA | APPLICANT |
| AND | |
| THEMBI KHANYISILE BHIYA | 1st RESPONDENT |
| ESTATE LATE NKOSINATHI EMMANUEL MAZIYA | 2nd RESPONDENT |
| THE MASTER OF THE HIGH COURT | 3rd RESPONDENT |
| THE REGISTRAR OF BIRTHS DEATHS & MARRIAGES | 4th RESPONDENT |
| THE ATTORNEY GENERAL | 5th RESPONDENT |

CORAM: MAMBA J

FOR APPLICANT: MR M. NDLOVU

FOR 1st RESPONDENT: MRS. BHEMBE

JUDGEMENT

October 2008

[1] Nkosinathi Emmanuel Maziya, (herein after referred to as the Deceased), according to the Applicant, married her in terms of civil rites at Mpundle Area in the Lubombo Region on the 28 September, 1991. The marriage was solemnized after the publication of Banns (of marriage). This marriage was registered at the District Registration Officer on the 9th October, 1991. The marriage certificate in this regard has been filed as Annexure A. Her date of birth is stated as the 24th May, 1959 whilst that of the deceased as the 4th December 1955.

[2] The Applicant further alleges that after the civil rites marriage aforesaid, the next day, i.e. 29th September 1991 the parties went to the home of the deceased and the Swazi custom of Kuhlambisa - whereby the wife presents gifts to her husband and her in laws - was performed. This was after she had gone through a marriage ceremony in terms of Swazi law and customary with the deceased.

[3] Annexure B, which is the marriage certificate for her marriage under Swazi law and custom, records that this marriage was solemnized on the 28th September, 1991 and not the 29th as stated on Oath by her. The Applicant states that this is an error which is due perhaps to the late registration of the marriage. It was registered on the 22nd November, 2002 and the applicant says she is not the person or informant who supplied the marriage details to the marriage Registrar. I also note that her date of birth is listed as the 24th May, 1954 and that of the deceased as the 3rd December

1955 on this certificate.

[4] It is common cause that on the 18 June 1997, the deceased went through a marriage ceremony in terms of Swazi law and custom with the 1st Respondent and this marriage was registered on the 22nd November 2002. It is common cause further that on the 17th October, 2002 the Deceased was granted a final decree of divorce against the Applicant. This was granted by the Siteki Magistrate's Court and this was based on the Applicant's malicious desertion.

[5] The Deceased died on the 27th December, 2006 and his Estate has been reported to the Master of this Court, the 3rd Respondent herein. It is in this regard that the Applicant seeks to have the marriage between the 1st Respondent and the Deceased declared bigamous and null and void ab initio as she contends that when the Deceased and 1st Respondent went through the marriage ceremony in terms of Swazi law and Custom on the 18th June 1997, the Deceased was incapable of marrying the 1st Respondent as he was at the time married to her in terms of civil rites. This marriage was dissolved on the 17th October, 2002.

[6] The first respondent alleges that the Applicant first got married to the deceased in terms of Swazi law and custom on the 28th September, 1991 as per Annexure B. This marriage was followed on the same day by the civil rites marriage in Annexure A, which was conducted in a Church to "bless" the customary law marriage.

The first Respondent submits further that because of this chronology relating to the two marriages between Applicant and the Deceased, the Applicant was actually married to the Deceased in terms of Swazi law and custom and the deceased "had no intention to enter into a civil rites marriage with Applicant as he intended to marry the two of us in accordance with Swazi law and custom.

[7] It is the first respondent's submission that her marriage to the Deceased was and is valid because at the time she married the deceased, he was married to the Applicant under Swazi customary law and he was under that regime, entitled to marry her (as his second wife). Finally, the first respondent argues that "the said civil rites marriage by [my] husband and Applicant was nullified and I submit that Applicant and I should be treated as wives to the deceased having been married in accordance to Swazi law and custom." (Per paragraph 4 on page 24 of the Book of Pleadings).

[8] The civil rites marriage between the Applicant and deceased was of course not nullified but dissolved and I think this is what the first Applicant is in effect saying. There is, in my view, no substance in the first Respondent's submission that the Deceased had no intention whatsoever to marry the Applicant in terms of civil rights and in consequence never considered himself married to her under such rites. He obviously considered the civil rites marriage to the Applicant valid such that when he found himself having been deserted by her, he successfully filed for a decree of divorce. He

considered her his wife married to him under civil rites.

[9] Both parties have based their respective arguments on the provisions of section 7 of the Marriage Act Number 47 of 1964 (hereinafter referred to as the Act).

First, the Applicant submits that her civil rites marriage which was followed by the customary marriage is sanctioned by the proviso to section 7 (1) of the Act. This section provides that:

> "No person already legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that marriage was in accordance with Swazi law and custom or civil rites and any person who purports to enter into such 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 remarrying one another."

[10] From the outset, one notes that this proviso permits or allows a couple already married under Swazi law and custom or any other rites to remarry one another in terms of the Act. The second marriage must be in terms of the Act. The subsection does not govern or regulate the situation or instance wherein the parties are already married under the Act and want to remarry one another in terms of Swazi law and custom or other rites. If the legislature wanted to do so, it would have expressly said so. There are no words in the Act, in my judgement, which suggest that the legislature wanted to govern anything other than that which is expressly set out in the subsection. Where a couple married under

civil rites decides to go through a marriage ceremony in terms of Swazi law and custom such a ceremony cannot, in my judgement be called a ceremony in terms of the Act. The later or second ceremony would in my view be of no legal effect or consequence. The same is true of the practice oft observed whereby emalobolo is given following a marriage contracted under civil rites or under the Act.

[11] Smit JA in the case of **Dladla V Dlamini 1977 -1978 SLR 17 at 16-17** stated that:

> "The Act is however, silent on what happens to the first marriage entered into between the parties according to Swazi law and custom when they remarry each other by civil rites under the Act.... Neither of these enactments provides that in the case of a "dual" marriage the marriage according to Swazi law and custom is dissolved. ...The customary law marriage is a valid, marriage contract when entered into and there is no law which provides for its dissolution when it is followed by a civil rites marriage. Where, however, there is a conflict between them with regard to the consequences of marriage it has been held in this court in KHOZA v MALAMBE & ANOTHER, 1970-1976 SLR 380 and in the Lesotho Court of Appeal in Mokhuthu v Mayaapelo (civil appeal 1 of 1976) that the law of the land applicable to a civil rites marriage prevails over the customary law marriage. The customary law marriage between the parties is therefore today still in existence."

[12] This decision is criticized by RT Nhlapho in his Book, **MARRIAGE AND DIVORCE IN SWAZI LAW AND CUSTOM** where the learned author states that this statement was :

> "...based on a misreading of the import of the words of Mr Justice Milne in the Khoza case. The learned judge there was not discussing a dual

> marriage but a civil one in connection with which lobolo agreement had been concluded. ... Mr Justice Milne was thus faced with a simple civil marriage, not a dual marriage."

The author further points out that that statement by the judge was obiter and he concludes that

> "The position thus remains, unfortunately, where it always was. Existing authority is to the effect that the marriages are equal and that they exist alongside each other. There is not a single guideline as to their respective weighting, or as to what rules must be followed in cases of conflict between the consequences of one and the consequences of the other."

[13] Mr Bhembe for the 1st Respondent is in agreement with Nhlapho's views and submits that there is no cogent reason why, where there is a conflict in the consequences of the two marriages, the consequences of the marriage by civil rites should prevail over those of the customary rites marriage. He says the decision is arbitrary. He cites **TW Bennet (1985) Application of Customary Law in Southern Africa** at page 206 where the learned author argues that

> "The tendency, in Southern Africa - and there is also authority for this in Swaziland (Dladla v Dlamini case) - is to favour the civil marriage on the ground that it is somehow inherently superior to the customary marriage. ...The time has come to resolve conflicts on a sounder basis than the arbitrary preference for one type of marriage."

[14] Whilst I accept that the law is silent on what happens to the first marriage when the couple remarries under the Act, I am with due respect unable to agree that the two marriages can co-exist-side by

side. As pointed out by Nhlapo (supra) the court's remarks are obiter and perhaps per incuriam. This point was not in issue in those cases referred to. The conclusion is inescapable that the proviso to section 7 of the Act governs potentially polygamous marriages and not one where the husband is already married to more than one wife. A marriage under the Act is monogamous; a marriage under Swazi customary law is potentially polygamous; meaning that a man married to one woman has the right, during the subsistence of that marriage to marry other women in terms of the rules of customary law. This is the antitheses of monogamy or a civil rites marriage. So, from the start the consequences of the two marriage systems or regimes go separate ways.

[15] A marriage can not be both monogamous and polygamous, or put differently, a couple can not at the same time be married under the Act and under Swazi customary law to one another. I am in respectful agreement with Nhlapo (supra) at 38 where he says "monogamy and marital fidelity are basic consequences of a civil marriage." Monogamy can never be polygamy. This would lead to an anomaly and absurdity as in the present case where the Applicant and the deceased were married under both regimes. When the deceased obtained a decree of divorce against the Applicant in 2002, it was only the civil rites marriage that was dissolved. The parties remained married under Swazi law and Custom. This, I believe, is not what the legislature intended to achieve in enacting the proviso to section 7 of the Act. The reverse

situation whereby the customary marriage is dissolved, is equally anomalous and absurd. And again, a man with ten wives may be married to ten of them under customary law and be married to one of them under both regimes if he decides to take advantage of the relevant proviso herein. This is equally unfathomable.

[16] Where a couple married under Swazi law and custom decides to remarry one another in terms of the Act, the conversion is total and irrevocable. The parties must be taken to have intended or to have decided to change the law regime governing their marriage. I think this is the most logical conclusion to be drawn from this.

[17] I should also point out that I do not think that the proviso under consideration has any application to a man who is already married to more than one wife. It is only restricted to a couple that is in a potentially polygamous marriage. Once the couple remarry under the Act, it converts the marriage into a monogamous one governed in terms of civil rites.

[18] In casu, whether the Applicant's 1st marriage to the deceased was under Swazi law and custom or civil rites does not change the result. First, if the first marriage was under customary law as contended by the first respondent, and followed by the marriage ceremony under the Act, the first marriage was converted into a marriage under the Act. This marriage was then dissolved by the decree of divorce of the 17th October, 2002. When the deceased purported to marry the 1st respondent in terms of Swazi law and

custom on the 18th June, 1997, his civil rites marriage to the Applicant still subsisted. This disqualified him from marrying the 1st respondent.

Secondly, if the 1st marriage between the Applicant and deceased was that contracted under civil rites, the subsequent purported marriage between them under Swazi customary law was a nullity. It was not sanctioned by the proviso to section 7 of the Act. It was therefore ineffectual. The Applicant and the deceased remained married in terms of civil rites and again this prevented the deceased from marrying the 1st respondent in 1997.

Thirdly, even accepting for the moment that the two marriages between the Applicant and deceased co-existed and were compatible with each other, this would mean that as of the 18th June 1997 the deceased was married to the Applicant under both civil and customary rites. Still the civil rites marriage or its consequences would have precluded or prevented the deceased from marrying the 1st respondent at that time.

[19] Whether or not the Applicant was aware of the purported marriage between the deceased and the 1st respondent or acquiesced to it is in my judgement, of no moment in this application.

[20] For the aforegoing, the application was accordingly allowed with costs

**MAMBA J**