SWAZILAND HIGH COURT

CIVIL CASE NO. 3656/05

BETWEEN

EUNICE CAIN... **APPLICANT**

AND

LOUISE PHELEDI SIMELANE	**1ST RESPONDENT**
THE MASTER OF	
THE HIGH COURT...	**2ND RESPONDENT**
THE ATTORNEY-GENERAL...	**3rd RESPONDENT**

CORAM: AGYEMANG J Z.

FDR THE APPLICANT: MAGAGULA ESD.

FDR THE DEFENDANT: P.M. SHILIJBANE ESD.

JUDGMENT

In this application, the applicant's main prayer is for this court to direct that the purported marriage between the first respondent and Willibald Tshabalala (deceased) be declared null and void. She is also praying for an order that the costs of this application be paid by the first respondent. The fact giving rise to this case are that, the second respondent, appointed the first respondent alleged to be the widow of one Willibald Tshbalala of Marizini, Swaziland (now deceased and referred to hereafter as "the deceased"), executrix of his estate on.

The present applicant alleging herself to be the lawful wife of the deceased and thus the proper widow, has brought the present application for the purported marriage between the first respondent and the deceased contracted in Swaziland, to be declared null and void by reason of the subsisting civil marriage between herself and the deceased at the time of his death. In her founding affidavit, the applicant deposed that on 19th February 1958, she contracted a marriage by civil rites in community of property in Durban, South Africa with the deceased then known in South Africa as Willie Pietersen. She alternately alleged that the marriage was celebrated in a church officiated by a Roman Catholic priest and then at a court before witnesses who had all died. Two children, Lana Tshabalala (deceased) and Jennifer Tshabalala were the issues of the alleged marriage. The applicant alleged that she lived in Durban with her said husband until he moved to Swaziland. This was around 1972. She alleged that in 1996, she came to Swaziland to see her children after she had been informed by the sister of the deceased that the latter was living with another woman. She testified that when she came to Swaziland, she found that the deceased was indeed living with another woman but that although she had not known the status of the union, she had not bothered to find out if they were married as she had not wished to interfere.

In the course of time, it came to her attention that the deceased had died. So it was that she returned to Swaziland, and while staying at the house of the deceased's brother,

expressed her desire to place a stone at his grave. She alleged that the second respondent, at a meeting held in his office, appointed the first respondent executrix of the estate of the deceased on the basis that the first respondent was the surviving spouse. Deeming herself the lawful wife of the deceased at the time of his death, she considered the first respondent's claim to a half-share of the estate unlawful. She thus commenced the present, suit seeking the aforesaid prayers.

In support of her assertion of a valid marriage (which she alleged was subsisting at the time of the death and therefore also at the time the deceased contracted a civil marriage with the first respondent), the applicant tendered in evidence, a photocopy of a document purporting to be the marriage certificate evidencing the marriage between herself and the deceased. It was admitted as exhibit A. In exhibit A, the groom was referred to as Willie Benard Pietersen. It was the applicant's sworn testimony that the deceased, referred to as Willbard Tshbalala was the same person described as Willie Benard Pietersen in the marriage certificate exhibit 'A'. Explaining how such a circumstance came to be, the applicant alleged that while he was in South Africa, in order to avoid being treated as a black person and so that he may enjoy the privileges accorded "coloured" people, the deceased used the name of Pietersen. These privileges she said, included living in a cleaner street and having a bigger house. As aforesaid, the applicant tendered a photocopy of what purported to be the marriage certificate evidencing the marriage between herself and the deceased, alleging that she had handed over the original certificate to her lawyer who had misplaced same. During cross-examination, the applicant acknowledged that it was in 1997 that the loss of the certificate had been told her by her lawyer. In spite of this she alleged that she had only made an attempt to secure a copy from an office in Pretoria in September 2008 and had been told to come back in January 2009.

It was the case of the applicant, that the said marriage which was evidenced by the marriage certificate, not having been dissolved, was subsisting, thus making the purported marriage between the first respondent and the deceased, void.

The applicant's case was supported by two witnesses: her daughter Jennifer Tshabalala and Polycarp Tshabalala the brother of the deceased. According to Jennifer Tshabalala who introduced herself as the issue of the marriage between her father: Willbald Tshabalala and her mother the applicant herein, she lived in South Africa for a short while with her parents during which time she allegedly used the last name of Pietersen. This was before she was brought to Swaziland by her father at a pre-school age. Contrary to what the applicant asserted: that the alleged change of name of the deceased resulted in their children attending "coloured" schools, Jennifer testified that she did all her schooling in Swaziland.

She alleged that it was her information that her parents had been married in South Africa but she could not be certain of the date and that this marriage was never dissolved. Indeed her uncertainty and confusion over the matter became apparent during cross-examination when she alleged in one breath that she was a little child when her parents got married and in another, that they got married before she was born in 1963.

According to Polycarp, brother of the deceased, his brother whose real name was Willbald Tshabalala lived in South Africa for a while before he returned home to Swaziland and that the deceased used the name of Willie Pietersen while he lived in South Africa. The witness also alleged that he knew of the marriage between the applicant and the deceased which he said was witnessed by one Agnes Masuku. He also testified that the alleged marriage between the applicant and the deceased was not dissolved at the time of the death of the deceased.

The defendant testified that she got married to the deceased in 1979 at Manzini by special licence and that the marriage was contracted in court, was subsequently celebrated before a pastor. The marriage she said, was known to the entire Tshabalala family including her now deceased mother-in-law. No-one objected to it.

In order to lead evidence, counsel settled the issues arising in this suit thus:

1. Is or was Willie Benard Pietersen the same person as Willbald Tshabalala only under a different name;
2. Did the applicant and Willie Benard Pietersen or Willbald Tshabalala contract a valid marriage while in Durban;
3. If the applicant and Willie Benard Pietersen or Willbald Tshabalala did enter into a valid marriage, was it still in force at the time of the alleged marriage between the deceased and the first respondent;
4. Even in the event there is evidence that Willie Benard Pietersen and Willbald Tshabalala was the same person, is there sufficient proof that they were indeed married.

Out of these, I have condensed these matters as issues for determination.

i. Whether or not the applicant was married to the deceased;
ii. Whether or not the said marriage was subsisting at the time the deceased contracted a civil marriage with the first respondent and further at the time of the the death of the deceased;
iii. Whether or not the applicant is entitled to the prayers she is seeking in this suit.

The deceased a native of Swaziland who lived in South Africa for some time, returned to live Swaziland in or about 1972. In or about 1979, he went through a ceremony of marriage with the first respondent who then lived with him as his wife until his death. There is no controversy over the fact that the couple lived together openly and this fact was known to

members of the deceased's family, one of whom the applicant said, informed her of that state of affairs. Contrary to the applicant's assertion in her founding affidavit, the said state of affairs was known to her as well for she saw the couple cohabiting when she came to Swaziland in 1996. The applicant at the time she saw this for herself, raised no contention that her lawful husband was living with another woman. Indeed she alleged that she did not even bother to find out if the couple was married as she did not wish to interfere.

Upon the death on the deceased, the family of the deceased did not inform the applicant of his death. Indeed she alleged that she was apprised much later of this, following which she came to Swaziland and asked to be shown the grave so she could put a stone thereat.

The applicant is now alleging in these proceedings, that she had in fact been married to the deceased, the father of her two children (one of whom is surviving) all along, and that the civil marriage which they allegedly contracted subsisted until his death.

Since the entire application was predicated upon her alleged subsisting marriage with the deceased, the applicant assumed the burden of proof of the marriage she alleged. In the discharge of this burden, she relied on the photocopy of a marriage certificate said to evidence the marriage between one Willie Benard Pietersen and Eunice Cain, and the evidence of two persons: her daughter and the brother of the deceased.

There is no gainsaying that the best evidence rule requires proof of a civil marriage whether it was contracted in this jurisdiction or not, to be by way of the production of a marriage certificate as prima facie evidence unless such were shown to be unobtainable, see: ***Wittekind v. Wittekind 1948 (1) SA 826;*** Exhibit "A" purported to be a copy of such marriage certificate. The original certificate which was not produced in court, was said to have been handed over to counsel for the applicant who had misplaced same. Nor was a properly authenticated copy as required by our rules of evidence, produced, see: the

Authentication of Documents Act 1965, ***also Booysen v. Booysen 1958 (3) SA 734 (0).*** It is my view that the photocopied document tendered in proof of the applicant's case ought not to have been admitted at all. This is because although at the point of admission, it was alleged that efforts had been made to trace the original document misplaced by the lawyer without success it was later that it came to light during the cross-examination of the applicant, that no such industry had been applied as a certified copy of the certificate could with reasonable diligence, have been procured in an office in Pretoria, South Africa. No explanation was given as to why the lawyer who allegedly misplaced the certificate so crucial in proof of this case, neglected to apply for a new one or a certified copy and certainly the nonchalance exhibited by the applicant who allegedly waited for about a year before allegedly making any effort at procuring one cannot be excused. In the premises, it is safe to say that no reasonable explanation was given as to why such could not be procured and tendered before this court.

As I have said before now, the admission of exhibit A was erroneous having been based upon a mistake of fact and ought properly to be discounted. But even if the court at this stage chose to rely on it, that document as it stands has a number of problems:

The information appearing on the fact of exhibit "A" (a document somewhat difficult to decipher by reason of the presence of numerous tiny black marks), were these: a signature unaccompanied by a name, purporting to have been placed thereat on behalf of the Secretary for the Interior, the place of the celebration of the marriage which was said to be Durban, the date thereof 19th of February 1958, and the names of the parties, Willie Benard Pietersen and Eunice Kathleen Cain. Exhibit A certainly lacked some information that on its face, were meant to be included in it such as the Identity Number of the groom Willie Benard Pietersen, and the Registry that issued the certificate. It was also unclear what was contained in the stamp appearing on the face thereof. I must add that there were no

signatures of the couple, of witnesses to the event or the marriage officer who celebrated the alleged marriage. It was apparent to me that even if exhibit "A" which purported to be a photocopy of the marriage certificate were acceptable, its weight was much diminished by the said defects therein contained.

Learned counsel in his heads of argument has contended that as the alleged marriage was said to have been contracted in South Africa, the marriage certificate that was tendered should have been in compliance with South Africa's S. 42 of the Births Marriages and Death Registration Act of 1963 as amended.

He contended that this was not so and so, making same inadmissible. First of all, I must point out that the said statute was not placed before the court, but secondly and more to the point, it is doubtful that the provisions of a 1963 Act unless same were expressly made to apply retrospectively would affect the validity of a marriage said to have been contracted in 1958. But the argument is superfluous for I have held that the document exhibit "A" although admitted, will not be relied upon and is in any case of little probative value as it stands.

The applicant led other evidence in corroboration of her assertion of marriage. Her daughter Jennifer and the brother of the deceased both testified that they knew of the marriage. Their evidence was however by way of reputation which is not sufficient to establish a civil marriage. Indeed the evidence of Jennifer lost much of its value when she prevaricated on the date of the alleged marriage. It seems to me that if she could not be accurate as to the date of the event, she could at least be certain as to whether or not she had been born at the time it took place. The marriage was alleged to have been contracted in 1958, Jennifer was born in 1963; yet she testified positively under cross-examination, that she was a little girl at the time the marriage took place. I found it to be of interest that not quite long after she said so, she changed her story and said that she had in fact not

been born at the material time. The evidence of the deceased's brother who also gave evidence of the reputation of the marriage, was also watered down when he positively asserted that one Agnes Masuku had been a witness to the ceremony - an assertion the applicant herself gave the lie to.

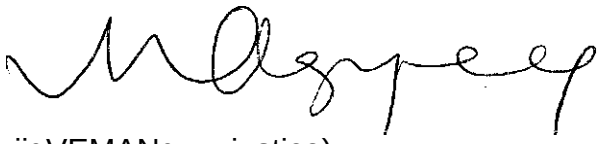
Regarding the identity of the deceased Tshabalala as Pietersen, Jennifer testified that her father Tshabalala, was once known in South Africa as Pietersen. She however gave her own last name as Tshabalala although she alleged that in her pre-school years before she came to live in Swaziland with her father, she was known as Pietersen. No corroborative evidence such as a birth certificate bearing the name of Pietersen or other such document was led to support this assertion.

The brother of the deceased's evidence corroborated that of the applicant that the deceased once went by the name of Pietersen while he lived in South Africa. But even if the multiplicity of voices led me to arrive at a finding that the deceased once went by the name of Pietersen while he lived in South Africa, that without more would not establish that he it was who took part in the marriage purportedly recorded in exhibit A which did not include his identity number or his signature.

It seems to me that all that the applicant established by the evidence she led is that she had a relationship with the deceased who fathered her two children. She did not establish a civil marriage. I hold this to be a fact. The applicant's assertion that she had a valid marriage with the deceased that was subsisting at the time of his death has not been established and I hold the same to be a fact.

The present application which seeks a direction of the court nullifying the marriage between the first respondent and the deceased is hereby dismissed with costs as being without merit.

Dated the 29th day of January, 2009.



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HIGH COURT JUDGE