



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 80/2011

In the matter between:

RUTH SIMANGELE ZEEMAN (born SHONGWE) Appellant

And

BHEKITHEMBA REGINALD SITHEBE Defendant

Neutral citation: *Ruth Simangele Zeeman (born Shongwe) v Bhekithemba Reginald Sithebe (80/2012) [2013] SZHC 111 (11th June 2013)*

Coram: M. Dlamini J.

Heard: 30th November 2012

Delivered: 11th June 2013

Appeal – guiding principles on whether a matter could be decided on motion or has to be referred to trial – absence of declaratory order annulling customary marriage does not amount to absence of annulment per se.

Summary: The appellant noted an appeal from the Magistrates' Court to this Court against an order declaring her marriage to respondent as bigamous and therefore void. The ground for the declaratory order was that the appellant had contracted a Swazi law and customary marriage with one Daniel Zeeman who was cited in the *court a quo* as 2nd respondent (hereinafter referred to as 2nd respondent). The said marriage was found to be subsisting by the *court a quo*.

The Grounds for Appeal.

[1] The appellant has raised three grounds for his appeal as follows:

- “1. *That the Court a quo erred in fact and in law in holding that the customary marriage between Appellant and Daniel Zeeman is valid and subsisting because there is no declaratory order to the effect that the marriage was dissolved;*
2. *That the marriage between Appellant and Respondent is bigamous and as a result therefore it is null and void;*
3. *That there is no dispute of fact regarding the nullification of the marriage between Appellant and Daniel Zeeman.”*

[2] The story of the 1st respondent in the *court a quo* as appears in his founding affidavit briefly unfolds as follows:

[3] On the 1st February 2003 the 1st respondent entered into a civil rites marriage with appellant.

[4] A marriage certificate was registered and the appellant entered that it was her first marriage. Subsequently he learnt from the grapevine, as it were, that the appellant had been married to the 2nd respondent by customary law. On a follow up of this information, he discovered a marriage certificate between appellant and 2nd respondent.

[5] It was his contention that had he known of the marriage between appellant and 2nd respondent he would not have married the appellant.

[6] The appellant on the other hand strenuously disputed the averment by 1st respondent to the effect that at all material times, 1st respondent knew of the purported marriage between 2nd respondent and herself before the marriage between themselves. This issue was discussed and respondent was made aware that the said marriage was subsequently annulled by the Zeemans. The basis for the annulment was that the appellant was a minor during marriage with 2nd respondent and that the 2nd respondent had been her adoptive father. This is confirmed by annexure “D” a birth certificate indicating that 2nd respondent is recorded as her father. The appellant further denied any misrepresentation and challenged the respondent to produce proof of the same.

Court a quo

[7] The learned magistrate in his written judgment of 17th July 2012 considered the averments and submissions before him and eloquently summarized as follows:

“The contention by the Appellant is that 1st respondent contracted a

customary marriage with 2nd respondent. In the absence of any declaration nullifying this purported Swazi customary marriage, this marriage is still valid in law.

The fraud as alleged by the Applicant is that 1st Respondent entered her marriage to 2nd respondent as her first marriage, yet against her second marriage to Applicant and recorded that as her first marriage. It is also contented that 1st Respondent in her first marriage her maiden surname is recorded as Shongwe whilst in her second marriage it is recorded as Zeeman.

Applicant states that if it had not been the false representation that 1st Respondent was single, he would not have been induced into entering into marriage with 1st Respondent.

To buttress the allegations of fraud, Applicant notes the different dates purported to be dates of birth for 1st respondent. In Annexure "B" (Marriage Certificate between 1st Respondent and 2nd Respondent) her date of birth is recorded as 18th November 1961, in Ann. "A" it is recorded as 18th May 1964.

The Annexures relied upon by the Applicant in one instance depicts 2nd Respondent as husband to 1st Respondent in another instance 2nd Respondent is depicted as 1st Respondent's further.

According to the Applicant it was a serious misrepresentation of fact that 1st Respondent was single and if it had been brought to his attention that 1st Respondent had contracted a customary marriage in 1998 he would not have contracted the marriage in 2003 with 1st respondent hence his prayers for the cancellation of what he terms a bigamous marriage entered into fraudulently."

[8] He also narrated appellant's averments as follows:

“Respondent (1st) opposes the Application Respondent's argument is that the Applicant ought to have foreseen that there is a material dispute of facts which cannot be resolved through the papers, but viva voce evidence would be required to be led, hence he should have instituted action proceedings, or alternatively have oral evidence led on the contentions issues.

1st Respondent contents that the issues where disputes of fact exist are that Applicant was aware of the customary marriage and that it was dissolved customarily.

Further, that Applicant cannot claim ignorance of the reasons leading to the annulment of the customary marriage i.e. 2nd Respondent could not marry his adopted child and that 1st Respondent was a minor at the time and her guardian consent ought to have been obtained.

With these material disputes of facts 1st Respondent ought to have foreseen because as such same cannot be resolved by motion proceedings.”

[9] The learned Magistrate proceeded to make his determination in the following manner:

“It is common cause that Applicant 1st Respondent contracted a civil rites marriage on the 21st February 2002.

It is also common cause that 1st respondent contracted a Swazi customary marriage with 2nd respondent on the 7th May 1998.

Only a bare statement unsupported by any proof that the customary marriage was dissolved through customary process. The mere assertion by the Respondent does not render the customary marriage dissolved. It does not help 1st Respondent to say that they did not know that they had to obtain a court order.

Even if it were to be proved on a balance of probabilities that Applicant knew the historical background about the adoption of 1st Respondent by 2nd Respondent and their purported customary marriage and its subsequent “dissolution” it does not change the lawful position that that marriage between 1st Respondent and 2nd Respondent is valid.

Having observed that this marriage (customary) is valid any marriage 1st Respondent to any other party (Applicant included) is bigamous and void ab initio.

To prove that one marriage is bigamous, the party alleging such should prove the existence of the marriage entered into prior to the marriage purported to be bigamous by one of the parties to the alleged bigamous marriage.

The party who alleges that the second marriage is not bigamous (wherein there is proof of the first marriage) has to file a declaration in the form of a court order annulling the marriage [there is no need whatsoever for extrinsic evidence]. In determining whether or not the marriage (subsequent) is bigamous does not give rise to disputes of facts.

The marriage between 1st and 2nd Respondents was never dissolved, hence Applicant’s marriage to 1st Respondent is null and void and of no force an effect.”

[10] He then granted respondent the orders sought.

Determination

[11] I must point out from the onset that there was no reply filed by respondent to counter applicant's answering affidavit.

[12] The first port of call upon the learned Magistrate was to ascertain whether there was any dispute of facts on the material averments. It is trite law as well propounded in **Arnold v Viljoen 1954 (3) 322 at 326-327** where his **Lordship Van Winsen J.** citing **Frank v Ohlsson's Cape Breweries Ltd, 1924 AD 289** at page 294 stated;

“The first question which arises is whether the application is one which should have been granted on motion. Now it is a general rule of South African (applying with equal force in our jurisdiction as well) practice that when the facts relied upon are disputed an order of ejectment will not be made on motion; the parties will be ordered to go on trial.” (words in brackets my own)

[13] The learned judge continues to highlight the *raison d'être* at page 327:

“The reason is clear; it is undesirable in such cases to endeavour to settle the dispute of fact on affidavit. It is more satisfactory that evidence should be led and that the Court should have an opportunity of seeing and hearing the witnesses before coming to a conclusion.”

[14] He wisely concludes:

“But where the facts are not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion.”

[15] The above position was well summarized in the celebrated case of **Plascon – Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) S.A. 623 (A)** at **634 L – 635 B** which led to the so called **Plascon Evans** Rule which is as follows:

“(W) here in proceedings on notice of motion dispute of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavit which have been admitted by the Respondent together with facts alleged by the respondent, justify such an order.”(my emphasis)

[16] I now turn to the affidavits filed in the *court a quo* to ascertain whether the honourable Magistrate was correct in holding that there were no dispute of facts. I do so guided by the **Plascon Evans** Rule which was well expounded in our *locus classicus* case of **Nokuthula N. Dlamini v Goodwill Tsela (11/2012) [2012] 28 SZSC** at page 17 where his **Lordship Agim** holding that it is only material, relevant facts which are to be considered defined such facts at page 18:

“A fact is material or relevant where the determination of a claim is dependant on or influenced fundamentally by it. Not all facts in a case are material. So it is only those that have a bearing on the primary claim or issue for determination in a way that they influence the result of the determination of the claim one way or the other. It is conflicts and

disputes on such facts that are relevant in determining whether an application can be decided on affidavits.”

[17] The above *dictum* calls for one to ascertain *in casu* the material or relevant facts necessary to decide on the results.

[18] The issue at hand can be determined from averment by both parties. Respondent averred:

“18. *It is common cause from the aforesaid that the 1st respondent represented to me that she was single when we entered into the above mentioned purported Marriage ANNEXURE A. hereto yet she was already married by Swazi Law and Custom in terms ANNEXURE B. hereto.*

19. *When making this representation 1st Respondent knew it to be false and she knew that she had entered into a previously valid and Lawful Customary Law Marriage as set out above without disclosing same to me.*

20. *When 1st Respondent made the said representation as set out above she intended that I act on it and I was induced as aforesaid to my prejudice in that I married 1st Respondent on the 21st February 2003 as set out above.*

[19] Appellant however avers at page 21 of the book of pleadings:

“15. *AD PARAGRAPH 118, 19, 20 and 21 Contents therein are denied. As previously stated, the Applicant was aware that the 2nd Respondent had purported to marry me by*

Swazi Customary Law, and that the purported marriage was nullified by the Zeeman Family.

16. *I submit that no fraud was committed on the Applicant because he knew all the relevant facts now he is claiming he did not know before he married me.*

17. *I wish to state that the Application is riddled with disputes of facts and as such it cannot be resolved by motion proceedings. The applicant knew that there will be disputes of facts and as such he should not have used this form of proceedings.”*

[20] It is clear from the above that the assertion by respondent that he had not known that appellant was married before is highly contested. The question whether respondent knew of the purported marriage between appellant and Mr. Zeeman is essential in “*influencing*” the decision, herein. What is worse herein is that there was no reply to appellant’s answer in this regard.

[21] The court was duty bound to hold an enquiry to ascertain the facts on the ground as to whether the respondent knew about the purported customary marriage.

[22] The second issue that is raised by appellant is that the purported marriage was nullified by the Zeeman’s family on the basis that the appellant was a minor at the time of the marriage and that Mr. Zeeman’s was her adoptive father.

[23] It is not clear on what basis the learned Magistrate disbelieved the appellant that she was a minor and Mr. Zeemans her adoptive parent in the light of

the birth certificate annexure “D” which reflects Mr. Zeemans as appellant’s father and the absence of a denial or reply to these facts by respondent. In fact, *ex facie* the averment by appellant in her answer stands uncontroverted by respondent. However, justice demands that the assessor of facts ought to have called for further evidence on what the appellant alleges in this regard. To disbelieve or ignore such averments in the absence of any reply by respondent was tantamount to travesty of justice. Had he called for *viva voce* evidence, he would have been informed of the true position of the matter especially in light of the birth certificate indicating *prima facie* that Mr. Zeemans was once registered as the father of appellant. He would have realized that had this fact been established as it has been *prima facie* by annexure “D” the said purported marriage between appellant and Mr. Zeemans would be null and *void ab initio* by reason of repugnancy.

[24] I note that the learned Magistrate was influenced by absence of a court order declaring the customary marriage null and void in his decision. However, with due respect to the honourable Magistrate, this cannot be the position of the law especially when dealing with matters of Swazi law and custom. For instance, we know that Swazi law and customs marriages are conducted almost every week-end in this country. But it would be misconceived to infer or conclude that by virtue of the absence of a registered marriage certificate, there was no solemnization of the marriage.

[25] *Fortiori* where one alleges that the marriage under Swazi law and custom was nullified. The least the court could have done was to call upon further evidence to ascertain first and foremost whether the appellant was a minor and Mr. Zeemans ever his adoptive father. If the evidence points to the affirmative, whether on one or both of these factors surely in law the

question whether it was annulled by the Zeemans' family is neither here nor there. The marriage would be null and *void ab initio* by virtue of being repugnant not only in terms of the law but according to societal's norms and values.

[26] If the evidence was in the negative then the enquiry proceeds on whether the customary marriage was nullified or dissolved as the case may be. The absence of a decree to the effect that the marriage was nullified could not fully inform the court to decide on the issues at hand.

[27] What is grossly unjust in the orders granted by the *court a quo* is that the Deputy Sheriff was ordered to eject the applicant from the place of residence without any enquiry whatsoever on whether she was entitled to any share of the matrimonial home.

[28] For the foregoing, appellant's appeal must succeed and I enter the following orders:

1. The appeal is upheld;
2. The order of the *court a quo* *wit*;
 - 2.1 declaring the purported marriage between appellant and respondent cancelled and/or fraudulent and null and void and of no force and effect in law;
 - 2.2 directing the Deputy Sheriff to eject the Appellant with all those holding under her from the premises and not to set foot ever again on the property (matrimonial home);

2.3 Directing appellant to pay costs of suit
is hereby set aside;

3. The status quo ante is to take effect;
4. The matter is referred back to the court a quo for *viva voce* evidence before a different Magistrate.

**M. DLAMINI
JUDGE**

For Appellant : Mr. N. Manzini
For Respondent : Mr. E. Maziya