



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2748/2009

In the matter between:

JOBE MBHUTI SHONGWE

Plaintiff

and

JOHN SOFANA SIBANDZE

1st Defendant

**THE REGISTRAR OF BIRTHS
MARRIAGES AND DEATHS**

2nd Defendant

THE MASTER OF THE HIGH COURT

3rd Defendant

THE ATTORNEY GENERAL

4th Defendant

Neutral citation: *Jobe Mbhuti Shongwe v John Sofana Sibandze & 3 Others*
(2748/2009) [2013] SZHC 114 (11th June 2013)

Coram: **M. Dlamini J.**

Heard: **12th April 2013**

Delivered: **11th June 2013**

action proceedings – requisites for civil marriage.

Summary: Serving before me is an action proceedings by means of combined summons at the instance of plaintiff. He sought for orders declaring a customary marriage between 1st defendant and his since deceased daughter null and void *ab initio* by virtue of 1st defendant having been married under civil rights to another woman at the time of the purported customary marriage with his deceased daughter. In its plea, the 1st defendant did not dispute this but submitted that the irregularity was subsequently corrected by a civil rites marriage between him and the deceased after the death of his first wife. He lodged a counter-claim and subsequent plea for a declaration of the civil rites marriage. In replica, the plaintiff disputes the existence of a subsequent civil rights marriage.

[1] The crisp issue is whether the defendant, having admitted that the customary marriage between the deceased and himself was null and void, did after the death of his 1st wife contract a civil rites marriage with the deceased.

[2] It is apposite for me that before I interrogate the evidence adduced in order to make a determination on the issue, I must mention that on the basis that defendant did not deny plaintiff's assertion that 1st defendant contracted a Swazi law and custom marriage during the subsistence of a civil rite marriage with a 3rd party, the orders in the combined summons declaring the customary marriage null and void *ab initio* were granted. The parties also consented to such orders. The Registrar of Births, Marriages and Deaths was ordered to expunge the entry of such marriage from its records and the said marriage certificate cancelled. The parties also consented to such orders.

- [3] What remained before court was a prayer by 1st defendant by means of a counter-claim to have the civil rites marriage declared valid.
- [4] In proof of his claim, the 1st defendant, under oath and directed by his Counsel, informed the court that at the commencement of 2006, in the company of a delegation from his family, he went to plaintiff who was also in the company of his family, wife inclusive to request for plaintiff's daughter's hand in marriage. Plaintiff and his family gave them a warm welcome and accepted their request. Plaintiff then requested for the cow as per custom. They informed him that the cow was far away in another region. He suggested they substitute it with cash of E2,500. They agreed to submit it later. A date for the wedding was set.
- [5] A second meeting followed where a detailed plan of the wedding was mapped. This was followed by a third meeting which finalized the programme of the wedding day. The officiator of the wedding was one **Mr. Mandla Cannon Dlamini, DW2**. He too visited plaintiff and his family to discuss certain issues with them.
- [6] On the 4th March 2006 both families assembled at Kukhanyokusha Church in Zion together with well wishers for the wedding. The bride, one Elizabeth Tozi Shongwe was handed to him by her father, the plaintiff, to be a lawfully wedded wife. The officiator, **DW2**, requested plaintiff and his daughter, the bride, to place each his or her hand on the Holy Bible. Thereafter, PW2 caused him and the bride to exchange marriage vows. The vows consisted of each party (himself and the bride) dedicating to one another lives and body and possession. Having exchanged the vows, **DW2** bound their hands together and declared that no one should ever separate

them. He then declared to all and sundry that the bride and 1st defendant were now husband and wife. Thereafter they performed the symbol of oneness and cut the cake.

[7] Before the party could disperse, each family was given the opportunity to say something. The bride's family spokesperson thanked everyone who was present to witness the plaintiff and his family handing over to the 1st defendant and his family his daughter to be a wife. Gifts were received from well wishers.

[8] 1st defendant's lawyer enquired from him as to what his intention was on that day. He said he was marrying the said Elizabeth Tozi Shongwe to be his wife.

[9] Although they live before as husband and wife, they continued after the wedding. However, after a while, Elizabeth Tozi Shongwe reported that she was ill. He in turn reported to plaintiff and his family. As her health deteriorated, plaintiff requested to take her in order to monitor her. This was the last day he saw his wife, Tozi Elizabeth Shongwe. He would come to see his wife but plaintiff and his family would decline him permission. He sent about two emissaries to enquire on the issue without any fruitful results. He, however, only saw his wife whenever he had to take her to hospital. He would wait by the road and she would come. He would take her to hospital and later drop her back to her parental home. He also communicated to her through the cellular phone. At one point in time women from members of her church came to pray for her. Plaintiff and his family refused them permission. His wife advised him that he should not come or if he did, he should be silent.

[10] Later, he learnt that his wife had passed on. He learnt from announcement over the radio and newspaper circulation. Plaintiff never sent a delegation to his family to deliver the report. He moved an application before this court for return of her body in order to bury her. A meeting between him and both parties' lawyers was arranged. It is then that he heard for the first time that he was not married to Elizabeth Tozi Shongwe. His wife was buried without his presence and participation.

[11] He summed up his evidence by handing a visual record diskette where his wedding was recorded together with photographs and wedding invitation cards. All corroborated his evidence-in-chief.

[12] On cross examination he was asked whether bans of marriage were ever published. He responded to the negative stating that such was a new concept to him. He indicated however, that there was an announcement in church. He could not remember whether **DW2** did invite any person who had an objection to the two being joined in matrimony. He said he usually comes late in weddings and therefore he was not privy to all the details that take place. He further indicated that he never paid the cow requested by plaintiff nor the sum of E2,500.

[13] He was asked whether **DW2** did announce on the wedding day that the two had already undergone a customary marriage. He responded to the positive. He was asked further as to whether he recalled that **DW2** informed the wedding that what was to happen on that day was to bless what had been done by the Sibandzes. He confirmed this. On whether he did sign a marriage register, he informed the court that there was nothing that was signed.

[14] **DW2** identified himself as **Roney Mandla Dlamini**. On oath, he informed the court that as he was acquainted to the **1st defendant** and one Elizabeth Tozi Shongwe, who were living together as husband and wife, he enquired whether they underwent the Christian marriage. The two informed him that they were married in terms of Swazi law and custom. He advised them that as **1st defendant** was a leader of a church, the Christian community frowned upon couples who did not perform or go through church in their marriage. He then reason with them in this regard. The two requested him to conduct a marriage blessing on them as they were already married in terms of Swazi law and custom. He agreed on condition that he confirmed from independent witnesses of the subsistence of the customary marriage.

[15] His first port of call was Mahlalini, the parental homestead of the **1st defendant**. He spoke to **1st defendant's** father whom he described as an elderly man. **1st defendant's** father confirmed that he had caused Elizabeth Tozi Shongwe to undergo the customary marriage at the instance of **1st defendant**. He confirmed that **1st defendant's** first wife laDludlu was deceased. **DW2** requested that the woman who smeared Tozi with red ochre be called. Upon arrival from a nearby homestead she confirmed the smearing of Elizabeth Tozi Shongwe with red ochre on behalf of **1st respondent**. **DW2** related to her the reason for such an enquiry. He informed her that **1st defendant** and Elizabeth Shongwe had requested him to conduct a Christian blessing on the said customary marriage. He therefore deemed it fit to ascertain and confirm whether the said two did undergo the customary marriage before he could conduct a blessing. The **1st defendant** was also present. They both left.

[16] On their way he requested 1st defendant to direct him to the headman of the area. He also confirmed the two having contracted a Swazi law and custom marriage from the headman.

[17] He also had occasion to discuss the matter further with 1st defendant and Elizabeth Tozi Shongwe. He enquired whether her parents were aware of their Swazi law and customs marriage. They confirmed that they were aware as the special goat portion was sent to her parents.

[18] She however pointed out that her parents were angry with her as they did not approve of the type of marriage she contracted. She asked him to apologise on her behalf to her parents.

[19] He proceeded to plaintiff and his family. Having introduced himself and passed the message by their daughter, he stated as follows:

“I told them that she (their daughter) now wants a blessing which would be a religious ceremony and that they should be part of that ceremony to witness it.”

[20] It was his evidence that plaintiff and his wife accepted the extended invitation.

[21] On the 4th March 2006, the plaintiff and his family were present at the celebration. As an officiator, he enquired as to who was giving Tozi to be married to 1st defendant. He then explained as follows in his evidence in chief:

“I was asking as to who was giving her for a blessing.”

[22] Following the question, plaintiff rose up. He then posed:

“Are you bringing Tozi Shongwe to be blessed in marriage?”

[23] The response from plaintiff was in the positive. He then requested plaintiff to:

“bow as a sign of respect that he was now giving his daughter as a blessing to the marriage.”

[24] Plaintiff obliged, the evidence ran. There were exchange of vows and rings. He then stated as follows:

“I pronounced the matrimonial blessing upon two of them. I declared them that in the eyes of the church as married.”

[25] The celebration ended in that note.

[26] Sometime later he learnt that Tozi was ill. He visited her and prayed. He later made a follow up. He was informed that she was at her parental home. He asked 1st defendant that they should visit her at her parental home for prayer. They went. They found the gate closed. He suggested that they should open it and enter. 1st defendant said that they should call first and announce their arrival. 1st defendant proceeded to make the call. The conversation was not long. He then informed DW2 that they were denied access. They left. He later learnt that Tozi was deceased.

[27] Under cross-examination, he confirmed what he stated in his evidence-in-chief that he merely conducted a marriage blessing upon 1st defendant and

Tozi. He expatiated that this ceremony is conducted where one is already married either under Swazi law and custom or by civil rites. The court requested this witness to outline the difference in procedure where one was not married. The witness explained.

“In that instance, there would be bans published and a register signed. In the instance case there was no such.”

[28] He was further asked as to whether 1st defendant was aware that what went on the 4th March 2006 was not a marriage but a blessing of a marriage and the witness responded:

“Yes, to the best of my knowledge I asked them when they approached me as to what they wanted me to do and they both said ‘we want you to bless our marriage as we are already married in terms of Swazi law and custom’”

[29] The cross examination continued:

“What is the significance of the vows in marriage blessing?”

[30] DW2 replied:

“When you are asking for God’s blessing, you must declare what you want God to bless.”

[31] The 1st defendant closed its counter-claim case. The plaintiff moved for an application for absolution from the instance. The matter was postponed for parties to file written submissions.

[32] On the next hearing date 1st respondent's Counsel withdrew his services. The matter had to be postponed to allow 1st defendant to solicit services of an attorney. He indicated later that he could not be represented and requested to appear in person. The court read the entire evidence before court to 1st defendant. 1st defendant requested for postponement to prepare his case and call for further witnesses. In the interest of justice, the court allowed 1st defendant to re-open his case and postponed the matter. The court was further guided by the dictum in **Collen v Rietfontein Engineering Works 1948 (1) S.A. 433** where his Lordship Centlivres J.A commenting on the discretion of the trial and appeal to allow further evidence, stated:

“This Court, has therefore before it all the material on which it is able to form an opinion, and this being the position, it would be idle for it not to determine the real issue which emerged during the course of the trial.”

[33] On the return date, 1st respondent led the evidence of **DW3, Henry Popi Sicelo Hlatshwayo** on oath. He identified himself as a cousin to 1st defendant. He related to the court that he was the emissary who accompanied 1st defendant's wife to her parental home when she had concluded the Swazi law and custom marriage. It was his evidence that 1st defendant's wife (Tozi's) parents accepted them. Although he requested plaintiff to dispatch a person who would go with him to see the cow which customarily accompanies a woman who has undergone a Swazi law and custom marriage, the plaintiff did not do so. He stated that he accompanied Tozi about a year after she was smeared with red ochre. He could not tell whether 1st defendant's wife (laDludlu) was still alive or

deceased then. He then handed to court a photograph indicating the said cow.

[34] He was not cross examined.

[35] A further witness took the witness stand. She was **Tryphinah Mdandane Sibandze**, who told the court that 1st defendant was her brother's son. She told the court that she did not know when laDludlu, 1st defendant's first wife died. However, when the wedding (i.e. events of 4 March 2006) took place, laDludlu had already passed on.

[36] She too was not cross examined.

[37] Plaintiff revived his application for absolution from the instance.

[38] The cardinal rule in application for absolution from the instance was well defined by his **Lordship Friedman A. J. in Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd 1978 (3) 1073 at 1076H – 1077 (A)**. His Lordship referred to the case of **Putter v Provincial Insurance Co. Ltd and Another 1963 (4) S.A. 771 (W)** as follows:

“In the ordinary case where there is only one defendant it can fairly be inferred that at the stage when the plaintiff has closed his case the court has heard all the evidence which is available against the defendant; any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the plaintiff. That being so it is considered unnecessary in the interest of justice to allow the case to continue any longer if, after the plaintiff has closed his case, there is no prima facie case against the defendant.”

[39] The learned judge expounded, using the English practice which is applicable in Roman Dutch jurisdiction as ours on question of evidence at page 1077 (E).

“The principle would appear to be that, where there is no evidence or a mere scintilla of evidence upon which a reasonable jury might find for the party bearing onus, the Judge is obliged to withdraw the case from the jury.”

[40] Generally the onus of proof rest with the party who asserts and *in casu* 1st defendant as the case proceeded on the basis of a counter-claim.

[41] From this premise, my duty is to determine on the totality of the evidence whether there is evidence upon which a reasonable man “*might find*’ for the 1st defendant.

[42] The 1st defendant’s claim is based on the assertion that on the 4th March 2006 at Kukhanyokusha Church in Zion, he contracted a civil marriage with one Tozi Elizabeth Shongwe, now deceased.

[43] It is apposite for me at this juncture to highlight the procedures to be followed in solemnizing a civil rites marriage as clearly laid out in **Marriage Act No.47/1964** (hereinafter referred to as the **Act**). Section 8 of the Act reads:

“Requirement of banns or special licence.

8. *No marriage shall be valid unless within a period of not more than three months previous to its solemnization banns have been*

published as provided in this Act or a special licence has been issued in terms of section 14.”

[44] These banns record the full names, marital status and place of residence of the parties intending to marry. The said banns are displayed for three consecutive Sundays in a public or conspicuous place such as the church building or outside the walls of the District Commissioner or Regional Administrator.

[45] Parties need not comply with section 8. They may approach the district officer and request for a special licence to marry in terms of section 14.

[46] The publication of banns or in the absence of banns the obtaining of a special licence is a preliminary step towards the solemnization of a civil rites marriage.

[47] I guess this preliminary procedure is meant to demonstrate fully that both parties have consented to enter into the contract of civil rites marriage. This, I must point *en passé* that it is in direct contrast with the Swazi law and custom marriage where consent to marry is inherent in the action of both parties for instance the man proposing and the woman accepting the proposal.

[48] The Act in terms of section 20 prescribes the manner the ceremony should be conducted.

[49] The section reads:

“The ceremony: civil.

20. *A marriage officer who is not a minister of religion or who does not hold a responsible position in a religious denomination or community shall solemnize a marriage in the following manner:-*

a) *he shall put the following question separately to the bride and bridegroom. “Do you (name of the bride or bridegroom) solemnly declare that you know of no legal impediment to your marriage to (name of bridegroom or bride) here present?”;*

b) *upon receiving an affirmative answer to the question put to the bride and bridegroom in accordance with paragraph (a) , the marriage officer shall request the bridegroom and bride separately to repeat after him the following words:*

“I, (name of bridegroom or bride) call upon all persons here present to witness that I take (name of bride or bridegroom) to be my lawfully wedded (husband or wife).”;

c) *if the parties are to use a wedding ring the marriage officer shall instruct the bridegroom to place the ring upon the wedding finger of the bride and shall thereafter instruct the parties to join in their right hands. The marriage officer shall then repeat the following formula –*

“I declare that A. and C. D. here present in the eyes of the civil law joined together in matrimony.”.

[50] It is further pointed out by the legislature that section 20 should be complied with substantially as per the proviso under section 19.

[51] The register of marriage must be signed by both parties.

[52] It would appear to me that the above procedure as outlined by the Act is peremptory.

[53] This can be inferred from Section 23 which reads:

Penalty of conducting a marriage ceremony otherwise than in terms of this Act.

“23. A marriage officer who conducts a marriage ceremony otherwise than in terms of this Act shall be guilty of an offence and liable, on conviction, to a penalty of a fine not exceeding two hundred Emalangi or imprisonment for a period not exceeding one year.”

[54] I now juxtapose the above requirements of the law with the evidence adduced in *casu* to ascertain whether what transpired prior and on 4th March 2006 was in compliance substantially with the Act.

[55] **DW1**, 1st defendant informed the court that there were announcements at Kukhanyokusha Church in Zion of the marriage between the two. However he could not be specific on the period of announcement. He further did not tell the court that the marital status of both of them was announced. The banns would mention the name of the male and against it read “*bachelor*” and the female “*spinster*”. I am alive to the South African position that the preliminary requirement was abolished. From the totality of the evidence adduced by 1st defendant, it is clear that 1st defendant viewed the events of 4th March 2006 as contracting a marriage.

[56] He demonstrated this by stating that:

- He went with a delegation to plaintiff to request plaintiff's daughter's hand in marriage;
- Plaintiff agreed;
- On 4th March 2006 plaintiff handed over her daughter to him to marry;
- DW2 caused them to take marriage vows;
- They exchanged rings;
- DW2 pronounced them married.

[57] In support of the above, defendant submitted to court a compact disc. This was admitted by consent of the parties as an exhibit.

[58] The court viewed the visual compact diskette.

[59] The following was revealed:

[60] **DW2 Mandla Cannon Dlamini** conducted the ceremony. There were a number of attendees. From the onset when he took the microphone, having prayed, announced that the Sibandzes (defendant family) did smear Tozi for purposes of having her as their wife. He stated that the two deemed it appropriate that their marriage which was conducted by the Sibandzes should not end there. They requested him to conduct the present ceremony in order for the Almighty God to bless and seal their marriage. He then invited the deceased's father to take his daughter's hand and place it on an open Bible as a sign that he was handing his daughter not to defendant but to the Almighty God. Plaintiff duly complied after pronouncing that he was

consenting to handing over his daughter as a wife to defendant at the instance of DW2. Defendant in turn took the hand of deceased from the Holy Book. DW2 informed all and sundry that this was a sign that defendant was receiving his wife not from any person but from God himself. He then engaged the two to taking the marriage vows commencing with defendant which were as follows:

“Do you agree that Tozi be your wife as per marriage?”

“Will you love her, respect and protect her in the Lord?”

“Will you love, comfort, respect, reject all others so long as she lives?”

[61] To which defendant replied: *“I do and I will do so.”*

[62] He proceeded:

“I, Johane do take you Tozi, I hold you to be my wife in terms of the marriage. I hold you to be mine. From today, in good or bad, rich or poverty, health or sickness, I will love, comfort, respect you in the Lord till death do us part as per God’s holy laws. This is my true promise.”

[63] The same process was undertaken by deceased.

[64] DW2 caused rings to exchange and the following was repeated by defendant and plaintiff after DW2’s pronouncement.

“I give you this ring as a token of our marriage. With my body, I shall respect you. Everything I have I give you and all I have we shall bear together with the love I have in God’s Holy love.”

[65] DW2 then requested everyone in the ceremony to be quiet as that was critical time marking the reason for their gathering. He then caused the two to kneel down with each ones hand holding the other and lifted above in the air. He took his holy rope and gird their hands in the air and prayed for the blessing of their marriage that they should be faithful to each other and their marriage to last till eternity.

[66] The evidence of DW2, however, is to the effect that what transpired on the 4th March 2006 was a marriage celebration ceremony. This evidence on behalf of defendant is supported by the visual compact discs which reflects that from the onset, DW2 informed the gathering the purpose of the ceremony. He divulged that defendant and deceased had already contracted a marriage in terms of Swazi law and custom and that it was at the instance of defendant and deceased that their marriage be blessed.

[67] It is correct that DW2 proceeded to administer the marriage vows as if the two were contracting a marriage. However, one cannot deviate from the clear announcement made by DW2 to all who were present that he was there to conduct a marriage blessing. The marriage vows cannot be viewed in isolation. At any rate DW2 explained that he caused the two to undertake the vows for purposes of clarity as to what God had to bless. DW2 also summed up his assignment by requesting all and sundry to be quiet as that was moment for which they had gathered. He identified this moment as time for calling upon the Almighty God to bless the marriage.

[68] In his evidence in-chief, DW2 indicated that he conducted the said marriage after conducting an investigation as to the existence of the customary marriage. Having been satisfied from enquiries of not only defendant and

deceased but others as well, he then agreed to conduct the marriage blessing ceremony.

[69] It appears after the evidence of DW2 that defendant appreciated that this evidence by DW2 was damning to his case. Although his case had been closed, he applied to have his case re-opened. The court allowed him.

[70] He called DW3 to the witness stand. His evidence was to demonstrate to the court that the said Tozi was wedded by defendant in terms of Swazi law and custom. Even if I were to accept for a second that the defendant was entitled to retract his prior admission that the marriage under Swazi law and custom was null and void by reason that it was conducted during the lifetime of defendant's wife who had been married under civil rites, this witness failed dismally to show that the marriage by customary rites between defendant and deceased was valid. He could not tell whether the two contracted the said marriage after the death of defendant's 1st wife.

[71] Similar evidence was adduced by DW4. She too could not tell the court as to when in relation to the death of defendant's 1st wife, was defendant married in terms of Swazi law and custom to deceased.

[72] In the wise words of his **Lordship Friedman A. J.** *supra*, I am afraid "*in the interest of justice*" I cannot "*allow the case to continue any longer*" as "*there is no prima facie case against the*" plaintiff.

[73] For the foregoing, I enter the following orders.

1. 1st defendant's counter-claim is dismissed.
2. 1st defendant is ordered to pay costs of counter-claim.

3. The Swazi law and custom marriage between 1st defendant and Tozi Shongwe is hereby declared null and void.
4. The marriage certificate issued by 2nd defendant is hereby declared cancelled.
5. 2nd defendant is ordered to expunge the entries of the said marriage from its register.
6. The 3rd defendant is hereby ordered to note the orders hereof and act accordingly.

**M. DLAMINI
JUDGE**

For Plaintiff : **Mr. L. Simelane**
For Defendant : **In Person**