



IN THE HIGH COURT OF SWAZILAND

RULING

Case No. 1660/12

In the matter between

FUTHI FELICITY MAGAGULA

Applicant

IN RE:

FUTHI FELICITY MAGAGULA

Plaintiff

and

EVANS CHIBESAKUNDA

Defendant

Neutral citation: *Futhi Felicity Magagula v Evans Chibesakunda*
(1660/12) [2013] SZHC 28 (18 February 2013)

Coram: Mamba J

Heard: 15 February, 2013

Delivered: 18 February, 2013

- [1] Civil Law – Proceedings on matters of status of parties – jurisdiction founded on Domicile.
- [2] Roman-Dutch Law (Civil Law) – divorce action – jurisdiction based on domicile of husband at commencement of proceedings.
- [3] Civil Law – a void marriage is no marriage at all and consequently proceedings where the cause of action is nullity of purported marriage – domicile of the man not the deciding factor.

- [4] Civil Law – being single or celibate is as much a status as being married – domicile of the applicant at the time that proceedings are initiated is the deciding factor on the issue of jurisdiction.
- [5] Civil Law and Procedure – in an application to sue by edictal citation – applicant failing to establish her domicile – application refused and applicant granted leave to supplement her papers.

- [1] This is an ex-parte application wherein the applicant, who refers to herself as ‘an adult female major spinster of Lot No. 138, Dalriach West, Mbabane, Hhohho District, Kingdom of Swaziland’ has applied for an order that she
- “... be granted leave to institute an action against the defendant by edictal citation.”

The defendant (in the envisaged action) is Evans Chibesakunda, a male of Lusaka in the Republic of Zambia whose full and further particulars are unknown to the applicant.

- [2] The applicant states that she wants to institute an action against Mr. Chibesakunda “for the nullification” of a marriage contracted by the parties on 11th February, 2012 at the United Pentecostal Church at Checkers, Mbabane. This marriage is in community of property. The marriage certificate has, however, not been attached to her founding affidavit despite her saying it has been so attached in her founding affidavit and despite the court bringing this to Counsel’s attention on 11th February 2013 when the matter appear before me for the second time. Todate, this certificate has

not been furnished to the court. Nothing turns on this rather elementary lapse of care and diligence by applicant's Counsel, in this ruling.

- [3] The applicant states that after getting married to Mr Chibesakunda, she later learnt that at the time of the said marriage, he was married "to one Jane Wayne, hence, the purported marriage between myself and [Mr Chibesakunda] is null and void ab initio on grounds of bigamy."
- [4] The applicant states that Mr Chibesakunda resides in Lusaka in Zambia but his exact whereabouts in that City are unknown to her and she has never visited him in that country and he no longer visits her "at my place of abode". Her place of abode is of course 138 Dalriach West in Mbabane in Swaziland.
- [5] On the question of jurisdiction of this court, the applicant states that this court "has jurisdiction to hear and determine this action by virtue of the fact that the whole cause of action arose within its area of jurisdiction." By this allegation or cause of action, I understand her to be saying that the purported marriage between them took place in Swaziland. It is because the law of Swaziland is the *lex celebrationis* that this court has jurisdiction to hear and determine the matter, she argues.

- [6] When the matter first appeared before me during motion court on 8th February, 2013, I invited Counsel to address the court on the issue of jurisdiction as it appeared to me then that this was a matter of status and as such domicile of parties was at the centre of such jurisdiction. I also alluded to certain constitutional principles that might have a bearing on the issue. The matter was postponed to 11th February, 2013 for this purpose.
- [7] On 11th February 2013, two Counsel for the applicant approached me in chambers and sought further clarification on the directive I had issued on 8th February, 2013. Such clarification was, I hope and trust, given and the matter was postponed till 15th February. On 14th February, I received heads of argument from counsel on the question of jurisdiction including comments on the judgment in *TSABILE MAMBA v BHADALA MAMBA*, case 1451/09, judgment by OTA J delivered on 13th January, 2011, which I had invited counsel to consider and comment on.
- [8] Our law in respect of cases or matters of status is Roman-Dutch law and it has not been changed or modified by statute. The principles of Roman-Dutch law on this subject is, I respectfully hold, authoritatively and or accurately stated by *Herbstein and Van Winsen, Civil Practice of the Supreme Court of South Africa 4th ed by Late Louis De Villiers Van Winsen et al* (1997) at 75-76 as follows:

“The general principle is that in actions for divorce the court of the matrimonial domicile, sc the court within whose area of jurisdiction the husband is domiciled at the date when action is instituted, has exclusive jurisdiction. Provided that the requisite of domicile is present, all other considerations such as the place of marriage, the domicile at the date of marriage or at the date of the event on account of which divorce is sought, or the nationality of the parties, are irrelevant.

The jurisdiction of the court will not be affected by any change of domicile after the institution of proceedings, and any matters ancillary to the main action must be decided in the same court.

Jurisdiction in divorce matters cannot be conferred on a court by consent or submission. The failure by a defendant to raise an objection to the jurisdiction does not relieve the court of the obligation of satisfying itself that it has jurisdiction.”

(I have omitted all the footnotes.)

- [9] The learned authors above specifically refer to divorce actions. The present case is, however, not a divorce action and the intended or envisaged action shall not be such an action. It shall be an action to declare the purported marriage between the parties a nullity. This element makes the case distinguishable from *Tsabile Mamba* (supra). However, the general principles therein stated, are in my judgment beyond question. At page 20 of that judgment, Ota J stated the position as follows:

“It is now therefore firmly established in our laws in all matters affecting status, in the absence of express statutory power, the exercise of jurisdiction is confined to the Court of the domicile of the parties at the time when the action commenced and the fact that a party submits to or fails to object to the jurisdiction of the court does not confer jurisdiction in

respect of such matters or absolve the court from satisfying itself as to the true domicile of the parties.”

(The underlining is mine.)

[10] Counsel for the applicant accepts the legal position as stated above and correctly, in my view, submits that in nullity actions or proceedings as in the present case, jurisdiction may be founded on some other factors other than the domicile of the husband at the commencement of the proceedings.

[11] Relying on *Ex parte Oxtan*, 1948 (1) SA 1011 Counsel submits that “the status of the applicant has not been affected by the purported marriage, hence she never acquired the domicile of her purported husband and as such this Honourable Court has jurisdiction to grant her leave to sue the defendant by edictal citation.” Reliance was also placed on the fact that Swaziland was the *Lex loci celebrationis*, i.e. the purported marriage was contracted in Swaziland.

[12] Of course, this is of itself alone not entirely correct. The exceptions stated in Private International Law, 4th ed by Forsyth, are in general terms. The first element that the applicant has to prove or establish is her own domicile at the time of the commencement of the proceedings. The fact that her marriage was a nullity demands this of her in contrast to the situation where she would be suing for divorce, in which case she would need to establish

the domicile of her husband. As in *Exparte Oxton* (supra) the court ruled that it had jurisdiction because the applicant was at the time domiciled within its jurisdiction, although the purported marriage had been celebrated beyond its shores.

[13] English law is slightly different I gather. An English court would (in nullity proceedings) have jurisdiction simply on the basis that the purported marriage was celebrated within its area of jurisdiction.

[14] I have underlined the word status in the *Tsabile Mamba* (supra) quotation because of the general principle that in all cases of status one has to look at domicile of the relevant person in the proceedings. As stated by Viscount Dunedin in *Salvesen (or von Lorang) v Austrian Property Administrator* (1927, A.C. 641), adopted and applied by SEARLE AJ in *Exparte Oxton* (supra);

“They say that in an action for divorce you have to do with a *res*, to wit, the status of marriage, but that in an action for nullity there is no status or marriage to be dealt with, and therefore no *res*. Now it seems to me that celibacy is just as much a status as marriage. I notice that in the Oxford Dictionary the word ‘status’ is defined (*inter alia*) as: ‘The legal standing or position of a person – condition in respect e.g. of liberty or servitude, marriage or celibacy, infancy or majority’. The judgment in a nullity case decrees either a status of marriage or a status of celibacy.”

[15] In the present application the applicant has not stated or established her domicile. I can find nothing in her founding affidavit suggesting where she is domiciled. The fact that she bears what is prima facie a Swazi name, cannot in my judgment be even approximated to be an incident of her domicile either of choice or origin. That she says she is “of 138 Dalriach West, could be indicative of her residence and not domicile, which connotes a fixed or settled intention to live at a place permanently. Residence on the other hand lacks the element of permanency in it. It connotes staying rather than living at a certain place or location.

[16] For the forgoing reasons this being a matter of status, the applicant has not established that she is domiciled within the jurisdiction of this court. Consequently, I cannot grant the application. The applicant is, however, granted leave to amend her papers accordingly should she be so advised.

[17] The case is postponed to 22nd February, 2013.

MAMBA J

For Applicant:

Ms. P.A. Mathonsi