



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 494/2007

In the matter between:

THOLAKELE DLAMINI (Born Khumalo)

Applicant

And

MONTI ZIKALALA

1st Respondent

REGISTRAR OF BIRTHS, MARRIAGES

AND DEATHS

2nd Respondent

THE MASTER OF THE HIGH COURT

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

DUPS FUNERAL UNDERTAKERS

5th Respondent

Neutral citation: Tholakele Dlamini (born Khumalo) v Monti Zikalala and 4 Others (2401/2011) [2013] SZHC 74 (3rd May, 2013)

Coram: M. Dlamini J.

Heard: 12th July 2012

Delivered: 3rd May, 2013

- *Interdict – requisites thereof – application for absolution from instance – duty of court to assess evidence on whether cause of action has been established.*

Summary: By means of a certificate of urgency, the applicant sought for orders declaring a civil rites marriage between the 1st respondent and one Vusi Sotja Dlamini to be null and void *ab initio* by reason that she was married to the said Vusi Sotja Dlamini in terms of the Swazi law and custom prior.

[1] The applicant *viva voce* under oath informed the court that in December 1988, a Swazi law and custom marriage was conducted upon her. One Msesi Dlamini smeared her with red ochre. Two children were born between Mr. Vusi Sotja Dlamini (hereinafter referred to as the deceased) and her *viz.* Mavela Dlamini in 1984 and Bandile Dlamini 1986. Subsequently eight herd of cattle were paid as bride prize. Here husband subsequently introduced the 1st respondent as his lover.

[2] This witness was cross-examined at length by 1st respondent's attorney. It was put to her that she was never married to the deceased. Subsequent questions put to her were instances demonstrating that she had no relationship with the deceased. For instance, it was sought to be demonstrated through cross-examination that she never attended to the deceased when he was in his sick bed. She did not know his cause of death and when deceased passed away she was not with him except for the 1st respondent. Further that the non-registration of marriage certificate and the absence of a representative from the Chief's kraal was an indication that there was never any marriage between the two. It was put further to this witness that the deceased nominated the 1st respondent as a beneficiary in most of the schemes he held.

[3] In all these questions, applicant stood her ground on the subsistence of a Swazi law and custom marriage between deceased and herself.

[4] The next witness for applicant was Ntengenyane Irene Dlamini born Mhlanga who gave evidence under oath. She was a fairly elderly woman who informed the court that she was born during the 2nd World War being 1st January 1943. She informed the court that she was married to the Nsingweni Royal kraal to one Mhlavuzza Dlamini in terms of Swazi law and custom. Among the children that were born by her and the said Mhlavuzza Dlamini was Vusumuzi Sotja Dlamini, deceased herein. Her evidence is that during his lifetime, the deceased married by Swazi law and custom applicant. The child given to applicant during this marriage ceremony was Tanele. She corroborated the evidence of applicant under cross-examination in that Msesi Manyatsi smeared her with red ochre and that the said Msesi was ill and could not come to court to give evidence.

[5] She stated further that she knew 1st respondent. 1st respondent came home with the deceased. The deceased informed her that he wanted to marry the 1st respondent. It was her evidence that if he wanted to marry 1st respondent, he should buy a scarf, a pinafore and give her money for buying the goat so that 1st respondent would be married under the same marriage regime as applicant. However, the two left home and never came back. The deceased however did later return home. 1st respondent also came and took deceased saying he had not paid rent. That was the last time she saw deceased alive.

[6] She confirmed that eight herd of cattle were paid for applicant. Her evidence was further that 1st respondent does not have children with the deceased and that she was not aware of any marriage between deceased and 1st respondent.

[7] She was cross-examined on that the issue before court was whether deceased was married to applicant. She replied that she was married and that she knew her since she got married to deceased. It was said that she was biased in favour of applicant because she bore her two sons which she replied that it was at her instance that she was smeared with red ochre. She was asked whether she was aware that what was at stake was money left by deceased to which she replied that she could not be bothered by money as even hers is counted by her children. She was cross-examined on the source of the eight herd of cattle at length. She confirmed her evidence in-chief that 1st respondent visited Kaluhleko twice only.

[8] It further came out clearly under cross-examination that deceased wanted to marry the 1st respondent in terms of civil rites marriage and she advised that it should be under Swazi law and custom as it was the case with applicant.

[9] The applicant closed its case.

[10] Respondent has applied for an absolution from the instance.

[11] The question before me is whether applicant has made up a *prima facie* case or is “*there evidence before the court upon which a reasonable man might, not should, give judgment ...*” as per **Gascoyne v Paul & Hinter 1917 TPD 170**. This enjoins upon this court to engage on the process of reasoning.

Issue:

[12] The bone of contention is whether applicant has established *prima facie* that when deceased entered into the civil rites marriage with 1st respondent,

there existed between applicant and deceased a marriage recognizable under our law.

[13] Section 7 (1) of the Marriage Act of 1964 states:

“7. (1) No person already legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or civil rites and any person who purports to enter into such a 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 re-marrying one another in terms of this Act.”

[14] From the above section it is clear that our law recognizes two types of marriages *wit*, civil rites and Swazi law and custom marriages.

[15] The question in *casu* is whether applicant was married to the deceased. The 1st respondent challenged under cross-examination the existence of such marriage. The applicant in her evidence stood her ground that she was married to the deceased. In corroboration, she called deceased’s mother who confirmed having performed the Swazi law and custom marriage upon the applicant. She further indicated that the deceased came home with 1st respondent and intimated to her that he intended to marry the 1st respondent. Her response was that as he had already contracted a marriage in terms of Swazi law and custom, he should also marry the 1st respondent under the same regime. Her evidence is that the deceased and 1st respondent left. It

was put to this witness that she disliked the 1st respondent and that she preferred the applicant because she bore her sons. To this, she replied that the deceased and 1st respondent interfered with her rights as a mother of having the second daughter in law by refusing to be married. She had wished that 1st respondent be her second daughter in law but for the conduct of the deceased who left without returning with the necessary items in order to perform the marriage upon 1st respondent. It was her evidence that she was not aware of any marriage between deceased and the 1st respondent.

[16] It is my considered view that applicant was married to the deceased, **Mr. Vusi Sotja Dlamini**. This is demonstrated from the evidence of applicant herself who states that she was smeared with red ochre. Her mother in law, second witness also corroborated her in this regard.

[17] The honourable judge, M.C.B Maphalala J. in Sipiwe v Lindiwe Mabuza and Others Case No. 4577/08 citing his Lordship Chief Justice Nathan in R. v Fakudze and Another 1970-1976 S.L.R states:

“There are a number of ceremonies performed at the wedding but the legally significant one is the anointing of the bride with red-ochre (libovu). Unless and until this has been done, she is not regarded as having been married.”

[18] In the totality of the above, it is my considered view that a reasonable man might find in favour of applicant.

[19] In the result, I enter the following orders:

1. Respondent’s application for absolution from the instance is dismissed.

2. Costs to follow the event.

M. DLAMINI
JUDGE

For Applicant : **Mr. H. Mkhabela**
For Respondent : **Mr. B. J. Simelane**