



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1549/2012

In the matter between:

SHEILA NONDUMISO NHLABATSI

Applicant

and

PHINEAS STANFORD DLAMINI

1st Respondent

**REGISTRAR OF BIRTHS MARRIAGES &
DEATHS**

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

THE LATE ESTATE OF WILSON DUMISA SUKATI

4th Respondent

Neutral citation: *Sheila Nondumiso Nhlabatsi v Phineas Stanford Dlamini & 2 Others (1549/2012) [2014] SZHC 16 (19th February 2014)*

Coram: **M. Dlamini J.**

Heard: **14 February 2014**

Delivered: **19th February 2014**

Dual marriage – decree of divorce in terms of common law – no cleansing of red ochre to dissolve marriage under Swazi law - parties intention to be governed by common law – decree of divorce sufficient – to demand cleansing of red ochre tautologous in circumstances and therefore unnecessary.

Summary: Serving before me is an application to declare the marriage between applicant and 1st respondent null and void on the basis that although a decree of divorce was granted in respect of a common law marriage in favour of applicant and 4th respondent, there was no subsequent ceremonial cleansing of marriage contracted under Swazi law and custom between applicant and 4th respondent.

Background

[1] In terms of pleadings the following is common cause:

- The applicant together with one Wilson Dumisa Sukati (4th respondent) contracted both Civil and Swazi law and custom marriage in 1985. In 1988 the parties separated and a decree of divorce was issued by the court in 1993.

- In 2002 the applicant entered into a marriage in terms of Swazi law and custom with 1st respondent.

Applicant's case

[2] The applicant contends that having been married to 4th respondent in terms of the civil rites marriage and Swazi law and custom, it followed that obtaining a decree of divorce was not sufficient. There ought to be a cleansing of red ochre ceremony in order to dissolve the Swazi law and customs marriage following the dual marriage between applicant and 4th respondent.

Issues

[3] Although the applicant avers in the founding affidavit that the 1st respondent deserted her and a series of family meetings were held in an attempt to reconcile the marriage, this line of argument was not pursued after 1st respondent appeared in person and under oath disputed the said depositions. As a result the court was left with the question of law as to whether there ought to be two processes of divorce in a dual marriage.

Adjudication

[4] When the matter appeared before me, I ordered a joinder of Wilson Dumisa Sukati and inevitably postponed the matter to a future date. By the return date, Mr. Wilson Dumisa Sukati was deceased. I had to postpone the matter for the estate of late Wilson Dumisa Sukati joinder. The estate decided to join issue with the respondent.

[5] It is correct that a person married in terms of common law marriage who intends to bring an end to the said marriage, applies to the common law courts for a decree of divorce. Once that decree is granted, its effect is to declare the marriage as ended.

[6] However, the answer is not so simplistic when it comes to the dissolution of Swazi law and customs marriage. It is for this reason that **Thandabantu Nhlapho** in **Marriage and Divorce in Swazi Law and Custom** introduces the chapter on Dissolution of Marriage by stating:

“We have seen that the characteristic feature of Swazi marriage are libovu (red ochre) lobolo and procreation – all underpinned by the crucial consideration that Swazi marriage involves a bond, not merely between individuals, but between groups of kin. These factors appear with equal impact in the following discussion of the dissolution of a marriage by Swazi law and custom.

B. DISSOLUTION BY DEATH

Under Swazi law and custom death does not necessarily dissolve a marriage. Because the contract is between the families of the spouses, the death of one spouse simply ushers in a new phase in the relationship. Whether this phase is established successfully and continues to thrive will depend on the sensitivity and goodwill with which the negotiations between the two families are carried out. It is above all else a negotiated phase.”

[7] The learned author proceeds at page 77:

“The question of dissolution by divorce in customary law is complicated both by language and by the enduring Swazi belief that marriage is indissoluble.”

[8] He further reveals:

“Striking evidence of the belief in Swazi society that marriage is a permanent status was found in the research among Swazi Court officials. Kuper for

instance declared: “Divorce is extremely rare among the Swazi”. But by far the most quoted is the statement by Marwick. “Divorce is extremely difficult to obtain among Swazis – it is difficult to separate from a wife”. Marwick also gives the reason:

“The Swazis have an almost illimitable capacity for compromise, and it will only be in the most stubborn cases where there is grievous cause for complaint that the separation will be effected.”

[9] The honourable author then proceeds to highlight various instances where divorce under Swazi law and custom may take place.

[10] What of the applicant *in casu*. It is apposite to state that the **Marriage Act No.47 of 1967** recognises that persons married to each other may contract another form of marriage only between themselves. Section 7 reads:

“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 rights and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy.”

[11] Following this enactment, **Cohen J in R. v Timothy Mabuza & Another 1970 – 76 S.L.R. 8 at 9 F-G** stated:

“In my view the sanctity of the Swazi marriage is as potent and valid in Swaziland as a marriage according to civil rites ...”

[12] Does this therefore mean that on the dissolution of either form of marriage, the differing forms of divorce must be conformed with by the parties to a dual marriage?

[13] **Smit JA in Dladla v Dlamini 1977 -78 S.L.R. 15** at page 17 propounded:

“...the two marriages, in a dual marriage, exist side by side, but where there is a conflict, the common law applicable to civil rites marriage prevails.”

[13] From the marriage certificate filed on behalf of applicant, an entry on behalf of applicant indicated that this was applicant’s first marriage. To me, it appears that the applicant did not consider the previous marriage under Swazi law and custom as anything to go by. It is for this reason when queried on the order of marriage between herself and the 1st respondent, she indicated that this was her first marriage. Had she viewed the Swazi law and customs marriage between 4th respondent and herself as significant, she would not have stated that this was her first Swazi law and custom marriage. This corroborates 1st respondent who informed the court that during the negotiations between the two families, neither respondent nor her family advised him or his family that there was any marriage under Swazi law and customs. From this given set of circumstances, it appears to me further that the parties’ (applicant and 4th respondent) chose to be governed in their lifestyle by common law.

[14] Further, the applicant and 4th respondent obtained a decree of divorce in 1993. That decree of divorce was a manifestation not only to both parties but to the society at large that a marriage between the two was no longer subsisting. So manifest was this position that applicant herself then proceeded to contract another marriage with the 1st respondent in terms of Swazi law and custom and *lobolo* was paid and accepted on behalf of applicant by 1st respondent. It is my considered view that having demonstrated to all and sundry that the marriage bond no longer existed by

means of a decree of divorce, it became unnecessary for the parties in this dual marriage to undergo the other process of dissolving a marriage especially in circumstances where their lifestyle was governed by common law as *in casu*. To do so would be tautologous in my view. At any rate, applying the principle by **Smit JA's** *supra*, the decree of divorce is sufficient. There is no need to dissolve the Swazi law and custom marriage. It was simultaneously dissolved in 1993 when the decree of divorce was pronounced upon the parties as from the totality of the evidence presented, they chose to be governed by common law.

[15] [16] In the result, the following orders are entered:

1. The applicant's application is dismissed;
2. The applicant is ordered to pay costs;
3. The Registrar is ordered to assist 1st respondent to prepare costs bill against applicant.

M. DLAMINI
JUDGE

For Applicant : L. Simelane

For 1st Respondent : In person

For 2nd Respondent: J. Mavuso