



IN THE HIGH COURT OF SWAZILAND

Civil case No: 1570/2013

In the matter between:

MKHATSHWA DLAMINI

APPLICANT

AND

DUMSILE ELIZABETH DLAMINI

FIRST RESPONDENT

(BORN SEYAMA)

THE REGISTRAR BIRTHS, MARRIAGES AND

SECOND RESPONDENT

DEATHS

THE ATTORNEY GENERAL

THIRD RESPONDENT

Neutral citation: *Mkhatshwa Dlamini v. Dumsile Elizabeth Dlamini (Born Seyama) and Two Others (1570/2013) [2014] SZHC163 (21 July 2014)*

Coram:

M.C.B. MAPHALALA, J

Summary

Swazi Law and Custom – application to expunge the marriage entry from the register of Births, Marriages and Deaths – Termination of Marriage by Swazi Law and Custom – the applicant’s family sent the wife back to her parental homestead on allegations of adultery – the two families met to discuss the matter and the spouses failed to reconcile their differences – marriage accordingly terminated – applicant entitled to the order sought.

**JUDGMENT
21 JULY 2014**

[1] This is an application to expunge the marriage entry in the register of Births, Marriages and Deaths. The parties were married to each other in 1991 according to Swazi Law and Custom. No children were born of the relationship.

The applicant has alleged that during the subsistence of the marriage, the first respondent was engaged in extra marital relationships with other men; and, that in 2008, he reported her infidelity to her father.

[2] It is not in dispute that subsequent to the said allegations, the applicant's family sent the first respondent to her parental home in 2008 with her belongings in accordance with Swazi Law and Custom. Her father in turn sent a delegation to the applicant's family in 2008 to establish why her daughter had been sent back to her parental home. A meeting was held between the two families. The reason given by the applicant's family was that the first respondent was engaged in acts of infidelity and committing adultery with different men. After that meeting, the first respondent's family did not return their daughter to her in-laws. The first respondent has conceded in her Opposing affidavit that her family did not send her back to her in-laws "out of a concern for her safety and welfare". By virtue of Swazi Law and Custom, this is interpreted as a concession by the family of the woman that her expulsion is lawful, and, that the marriage has been terminated.

See: Marriage and Divorce in Swazi Law and Custom, Thandabantu Nhlapo, Websters Publishers (Pty) Ltd, Mbabane 1992 edition, at pp 77-89.

- [3] In September 2013 the two families met at KaZondwako Royal Kraal where they reported to the Traditional Authorities that they had resolved to terminate the marriage between the applicant and first respondent on the basis that the couple cannot reconcile their differences. The first respondent does not dispute this contention in her Opposing affidavit.

The applicant contends at para 14 of his founding affidavit as follows:

“14. (a) The Royal Kraal was advised that the two families (applicant’s and first respondent), had met and agreed that the Swazi Law and Custom marriage between their respective children had been cancelled.

(b) The Royal Kraal accepted the position adopted by the two families, before it.”

- [4] This evidence is supported by the first respondent’s uncle Jacob Dingane Seyama who deposed to a confirmatory affidavit to the applicant’s founding affidavit. At para 3 he states the following:

“3. (a) I am the first respondent’s uncle.

(b) I confirm that I was present at KaZondwako Royal Kraal, when applicant's family and that of the first respondent (where I come from), reported the agreement reached between the parties, with regard to the termination of the Swazi Law and Custom marriage between applicant and the first respondent.

(c) As an elder of the Seyama family, I was specifically summoned by the Chief to be present at the meetings held at KaZondwako Royal Kraal.”

[5] The first respondent denies the allegations of infidelity made against her by the applicant. However, she concedes that the two families attended a meeting at the Chief's Kraal where they advised the Traditional Authorities of their agreement to terminate the marriage. It is common cause that the Chief's Kraal did not deliberate on the matter but the two families merely informed the Chief's Kraal of their decision to terminate the marriage after the parties could not resolve their differences amicably. She contends correctly that this was a matter between the two families, and, that the Chief's Kraal had no jurisdiction to deliberate on the matter.

[6] It is well-settled that prior to a dissolution of a marriage by Swazi Law and Custom, the two families should meet and deliberate over the matter with a view to reach an amicable solution. If they do not succeed in resolving the dispute, and the differences between the parties prove to be irreconcilable, the marriage is terminated.

See: *Matry Nompumelelo Dlamini v. Musa Clement Nkambule* High Court Civil case No. 3046/2006; *Marriage and Divorce in Swazi Law and Custom*, Thandabantu Nhlapo, Websters Publishers (Pty) Ltd (supra) at p. 89.

[7] There is evidence that the two families deliberated over the matter after the applicant's family had sent the first respondent to her parental home on allegations of having committed adultery. Inturn the first respondent's father sent a delegation to the applicant's family to discuss the matter. Her family accepted the termination of the marriage during the meeting; and accordingly, they did not send her back to her in-laws. Furthermore, the relevant Chief's Kraal was subsequently advised of the decision of the two families in accordance with the dictates of Swazi Law and Custom.

[8] There are only two grounds of terminating a marriage by Swazi Law and Custom, namely, adultery and witchcraft committed by the woman. The marriage is terminated when the two families meet and the parties fail to reconcile their differences.

See: *Marriage and Divorce in Swazi Law and Custom* (supra) at pp 79-80.

[9] This country has a Dual Legal System which inturn has given rise to two marriage regimes, that is, marriage by Swazi Law and Custom as well as marriage by civil rites which was introduced by the Marriage Proclamation of 1964 which was subsequently replaced by the Marriage Act 47 of 1964. The

marriage by civil rites is regulated by the Roman Dutch Common law. The Common Law was introduced into this country by the General Law and Administration Proclamation No. 4 of 1907; section 3 thereof provides the following:

“3. (1) The Roman-Dutch Common Law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland.

(2) Save and except in so far as the same have been repealed or amended, the statutes in force in the Transvaal on the fifteenth day of October 1904, and the statutory regulations thereunder shall *mutatis mutandis*, and as far as they may be applicable, be in force in Swaziland. . . .”

[10] The marriage by Swazi Law and Custom has been recognised in this country prior to the colonial era in 1884 and, it is governed by Custom. This type of marriage is characterised by the payment of Lobolo by the family of the man to the family of his in-laws; it is also characterised by its recognition of polygamy. Most importantly this type of marriage creates a relationship between the two families; and, they play an important role in the negotiations leading up to the wedding itself, in the life of the spouses during the subsistence of the marriage as well as during the dissolution of the marriage. It is against this background that prior to its dissolution, the two families meet and discuss the misunderstanding between the parties with a view to achieve an amicable resolution of the matter; in the event that the differences between the

parties are irreconcilable, the marriage is dissolved. In the circumstances the applicant is entitled to an order expunging the entry of the marriage in the register of Births, Marriages and Deaths.

See: Marriage and Divorce in Swazi Law and Custom (supra) at pp 44-45, 77-89.

[11] Accordingly, the application is granted. No order as to costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant
For Fourth Respondent

Attorney Justice Mavuso
Attorney Martin Dlamini