IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 828/2013

In the matter between:

PATRICIA CEBSILE MNDZEBELE (NEE MSIBI)		**Applicant**
and		
NOLWAZI MNDZEBELE	**1st**	**Respondent**
CALSILE DLAMINI	**2nd**	**Respondent**
10 OTHER TENANTS	**3rd**	**Respondent**
MASTER OF THE HIGH COURT (E/M 202/12)	**4th**	**Respondent**
ATTORNEY GENERAL	**5th**	**Respondent**

In Re

NOLWAZI MNDZEBELE	**Applicant**
And	
PATRICIA CEBSILE MNDZEBELE (NEE MSIBI)	**Respondent**

Neutral citation: ***Patricia Cebsile Mndzebele (nee Msibi) v Nolwazi Mndzebele& 13 Others (828/2013) [2014] SZHC 52 (28th March 2014)***

Coram: **M. Dlamini J.**

Heard: **5thMarch 2014**

Delivered: **28thMarch 2014**

Dissolution of marriage in terms Swazi law and custom – practice requirement of two families deliberating on the issue with view of reconciliation, whereupon failure the two families may resolve to have marriage dissolved – parties simple say so does not dissolve a marriage – there must be outward manifestation of their intention to opt out of it as prescribed by customs and practices or law.Failure to wear mourning gowns does not dissolve a marriage nor does it indicate dissolution of a marriage per se.

Summary: The applicant obtained, on *ex parte* basis, an interim order, interdicting first respondent from collecting rentals and those collected prior to be remitted to fourth respondent, and that first respondent be removed as executor of late estate Mathews Bantubantu Mndzebele *inter alia*. On the return date,I ordered that the matter be dealt with on the merits. The applicationfiled by the first respondent was consolidated with the case *in casu*. In this application, the first respondent as applicant, sought for an order declaring a Swazi law and custom marriage between the deceased Bantubantu Mndzebele and the applicant dissolved.

[1] By reason that the interim orders granted depended for their determination on whether the marriage between first respondent and the deceased subsisted, I will deal with the main application and cite the parties as they appear therein, *viz*. first respondent as the applicant and the applicant as respondent.

The Parties

[2] Although the parties are not so defined in the pleadings serving before me, it turned out during the hearing that the applicant is a daughter of the

deceased, Mathews Bantubantu Mndzebele (deceased) but not born by respondent. The respondent as apparent was married to the deceased in terms of Swazi law and custom.

Parties' contention

[3] The applicant contends that the respondent having married the deceased in terms of Swazi law and custom in 2007, the couple experienced marital challenges and respondent after packing her belongings, left the marital home. Applicant avers further:

> "7. *On the 22nd September 2009, the respondent approached the Kwaluseni Royal Kraal to inform them that she wanted to separate from and / or divorce the deceased.*
>
> 8. *The indvuna of the area then arranged that the families of both the deceased and the Respondent be called to a meeting at the Royal kraal to discuss the issue of the Respondent's divorce.*
>
> 9. *On the 13th May 2012, a meeting between the family of the deceased and the Respondent was held wherein the Respondent informed both families that she wanted out of the marriage.*
>
> 10. *The father of the Respondent then requested that the families meet on their own and they will thereafter return to the Royal Kraal with a report of their meeting.*
>
> 11. *The families however never returned with a report to the authorities at the Royal kraal and I am advised that the proposed meeting between the families never materialized.*
>
> 12. *After a period of about two weeks, the deceased approached the Royal kraal to inform them that he also did not want his wife back as by then she had left her matrimonial for a period of about a year without him knowing her whereabouts and he requested that she must not return to him as she had been physically abusing him.*
>
> 13. *On the 15th August 2012, the deceased passed away and the Respondent only attended his funeral as an ordinary member of the community. She did not*

mourn (kuzila) the deceased like his wife would have done and instead my uncle's wife mourned my father in her place.

14. I was taken by surprise on the 13th May, 2013, almost nine (9) months after the death of the deceased, when I was called to a meeting by the Master of the High Court to inform me that the Respondent had come with a marriage certificate claiming to be the deceased's wife and therefore a beneficiary in his estate."

[4] The respondent concedes that her marriage experienced challenges such that she had to leave the matrimonial home.

[5] The respondent has raised a number of *points in limine* such as non-joinder of the Master of the High Court; the application being infested with dispute of facts; applicant's evidence based on hearsay and that applicant has failed to establish a clear right.

[6] I agree with the respondent that the Master of the High Court ought to have been joined in the said proceedings, because the ultimate effect of the order sought would have a bearing on the distribution of the estate of the deceased. However, that as it may, it is my considered view that it will not serve any justice to have the matter dismissed or postponed for the sole purpose of the Master of the High Court to be joined. This is because the joining of the Master to such proceedings is a matter of form and it will not influence the decision of this matter. This finds support from the case of **Cash PaymentServices (Pty) Ltd v Eastern Cape Province 1991 (1) S. A. 324** at 353:

"More often than not independent tribunals, having done their duties … take the attitude that they will abide the decision of the court and leave the other matters to the interested parties to dispute before court."

[7] On the second point contending disputes of facts, I ordered oral evidence to establish whether the respondent did approach the Royal kraal for

dissolution of the marriage and postponed the matter for such purposes. However, before the return date, the parties indicated that the court should decide the matter on the pleadings as they stood. I consider this point abandoned by the respondent. It follows from the nature of the third point that it too is abandoned. The question on clear right remains for determination.

<u>Issue:</u>

[8] With the respondent not disputing that she left the matrimonial home, the question for determination is whether there was dissolution of the marriage between the respondent and the deceased.

[9] Applicant has asserted that the respondent, before deserting the deceased, proceeded to the Royal kraal where she informed the Chief that "*she wanted to separate from /or divorce the deceased*". The Chief's runner then decided to call for a meeting of the deceased and respondent's families. The said meeting took place. These averments are repeated by the Chief's runner in an annexure filed in support of this application. It is evident from the said annexure that in the meeting of the two families, he enquired from respondent's family whether they were aware of the reasons they were summoned to the Chief's kraal. The father of respondent replied to the effect that they were not aware. It is then that the Chief's runner respondent as per applicant's annexure:

> "*The Council says, 'once the families have concluded their deliberation, they should bring a report to the Chief's kraal'*."

[10] I pause herein to point out that the response by the Council in the Chief's kraal was in accordance with the law in matters pertaining to dissolution of

marriage in terms of Swazi law and custom. As well canvassed in **Knox Nxumalo v Nellie Siphiwe Ndlovu and Others, case No. 42/2010 / 43/2010** where their Lordships held, citing **N. Rubin School of Oriental and African Studies, University of London** at page 21:

> "*Divorce may take place extra-judicially, i.e. as a result of agreement reached between the husband, [in consultation with his family council [lusendvo] and the father of his wife].*"

[11] Their Lordships proceeded to eloquently outline the procedure leading to dissolution of marriage under Swazi law and custom. They pointed out:

> "*Such an agreement [divorce] is preceded by the return of the wife, to the home of her father after which negotiations will take place between him and the husband concerning the future treatment of the cattle paid as marriage consideration…. There is consensus amongst the authors that for the dissolution to take place there must be a meeting of the families and a serious attempt to resolve the matters by the families. If this fails, a divorce can then be arranged if the differences are irreconcilable and a refund of lobola is made after the talks have exhausted all possibilities of reconciliation. It is only then that the matter can be taken to the relevant Chief so that the dissolution can be formalized before the Chief…*" (underlined my emphases).

[12] The above procedures appear to have operated in the minds of not only the Chief's runner of applicant's Royal kraal but on both respondent and deceased including their families. It is for this reason that we do not hear of any objection from either respondent or deceased or their respective families upon the ruling by Council to have the two families deliberate on the matter and submitting the outcome to the Chief. Both families, I would safely conclude, appreciated that the procedure would be as stated by the Chief's runner to have the two families meet. As already stated, the Chief's Council, the deceased, together with respondent and their families

appreciated the procedures to be adopted in the dissolution of marriage in terms of Swazi law and custom. This procedure, as pointed out, was confirmed by the Supreme Court in **Knox Mshumayeli Nxumalo** *supra*.

[13] From the pleadings, it is clear that there was no such meeting. This was despite the assertion by the Chief's runner as appears in the annexure by applicant that the Royal kraal did make a follow up of this meeting to no avail and further the two families never returned to the Chief's kraal. One bears in mind that the duo (deceased and respondent) families first approached the Royal kraal on 13th May 2012 and the deceased died on 15thAugust 2012. It is my considered view that had the two been serious on their divorce, this was a reasonable and sufficient period for the two families to hold a meeting and return with their resolution to the Chief's kraal especially considering that the Chief's kraal was making a follow up on the matter. This follow up by the Chief's kraal reasonably translates into constant reminder to the duo of their marriage status by the Chief's runner. This to me is a clear indication that the two never intended to have their marriage dissolved despite their say so. In fact, parties to a marriage, whether under civil rites or Swazi law and custom, cannot have their marriage dissolved by simple word of mouth. Marriage is a sanctified office which deserves honour by those inside and outside it. There must be outward manifestation of their intention by parties who wish to opt out of it as prescribed by customs and practice or the dictates of the law other than their say so.

[14] The applicant, supported by the Chief's runner as evident from the annexure, avers that the respondent informed the Royal kraal (Council) that she no longer wanted anything to do with the deceased and the deceased in turn later told the Council that he no longer wanted respondent.

[15] The circumstances of the case *in casu* are akin to those in **Knox Mshumayeli Nxumalo** *supra*. In that case, one of the deceased's wife (laTfwala) left the matrimonial home and the deceased (Ndlovu) entered into a civil rites marriage with another wife (Nelie). He (Ndlovu) later contracted a marriage under Swazi law and custom. One may conclude that even the deceased (Ndlovu) formed the intention that as laTfwala left the matrimonial home, the marriage between him and laTfwala was dissolved. However their Lordships held at page 15 of the judgment:

> "*The evidence of LaTfwala that the deceased had not come to her parents' home to take her back to his home, and that no meeting was ever held by the respective families of husband and wife was not challenged in cross examination and must stand. Even if a wife intends to leave "**for good**" (on departing)* ***the customary practice of family meetings must be observed.***"(underlined and bold my emphasis)

[16] Their Lordships continued and hit the nail on the head, as follows on the same page:

> "*None of this happened and* ***to hold that the marriage simply dissolve automatically in the light of a desire, upon leaving by the wife never to return to the husband, cannot in my view, be correct.***"(underlinedand bold my emphasis)

[17] Needless to re-emphasise that all the parties *in casu* were aware of the importance of holding a meeting between the two families before approaching the Royal kraal. This was never done and as their Lordships in **Knox Mshumayeli Nxumalo***op. cit.* pointed out, the marriage could not "*automatically dissolve*" regardless of respondent (wife's) intention to "*leave for good*" as averred *in casu*. I guess the rationale for this position of our law is to try as much as possible to retain the marriage in line with the principle that:

"*The Swazis have an almost illimitable capacity for compromise, and* ***it will only be the most stubborn cases*** *where there is grievous cause for complaint that the separation will be effected*."(underlined and bold my emphasis)

[18] I appreciate that their Lordships in **Knox Mshumayeli Nxumalo's** case were of the view that the procedure of having the two families meet and deliberate on the marriage was so during the period of LaTfwala and Ndlovu (1966) and that it could be that due to the fast evolving customary practices, the procedure today might have changed. The majority of cases that come before court show that the practice has not changed. As already demonstrated, *in casu*, the parties were fully vest with the same procedure as canvassed in the case of **Knox Mshumayeli Nxumalo**.

[19] It is further submitted through the annexure by applicant from the Chief's Kraal that the respondent did not mourn or wear mourning gowns for the deceased as per customary dictates. However, that is not a barometer for testing whether a marriage exist or not and failure to wear mourning gowns does not dissolve a marriage under Swazi law and custom. At any rate, it is deceased's family that ought to send a delegation to a widow who has been separated from her husband to fetch her and perform the ritual of mourning and wearing mourning gowns. The widow cannot *mero motu* do so and worse still to do so on her own is taboo in terms of Swazi law and custom which might be meted with penalties by the widow's Chief's kraal.

[20] I must point one other peculiar aspect of marriage in terms of Swazi law and custom and this was stated by their Lordships:

"*…even death does not automatically bring an end to a marriage*" (see para 12 of **Knox Mshumayeli Nxumalo** *op. cit.*)

[21] **Thandabantu Nhlapho** in **Marriage and Divorce in Swazi law and Custom** expands at page 75:

> *"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. Whatever 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."*

[22] The above principle of our law therefore leads to the conclusion that the marriage between the respondent and the deceased still subsists.In the foregoing, the respondent has established a clear right to the orders sought in the interlocutory application.

[23] In the premise, the following orders are entered:

1. The applicant's main application is dismissed.

2. The interim orders granted on 5th November 2013 in favour of first respondent are confirmed *viz.*

2.1 Applicant is hereby interdicted from collecting any monthly rentals from respondent's matrimonial home;

2.2 Applicant is ordered to remit all rentals collected by her to the office of the Master of the High Court;

3. Applicant is ordered to pay costs of suit including cost of interlocutory application.

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M. DLAMINI
JUDGE

For Applicant	**:**	**N. Ndlangamandla**
For Respondent	**:**	**N. Ginindza**