IN THE HIGH COURT OF SWAZILAND

RULING

Case No. 953/2015

HELD AT MBABANE

In the matter between:

SETSABILE N. GININDZA	**Applicant**
And	
COMFORT G. MYENI	**1st Respondent**
THE REGISTRAR OF BIRTHS,	
MARRIAGES AND DEATHS N.O	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral citation: *Setsabile N. Ginindza and Comfort G. Myeni, The Registrar of Births, Marriages and Deaths N.O and Attorney General* (953/15) [2017] SZHC 84 (31stMarch, 2017)

CORAM: C. MAPHANGA, JUDGE OF THE HIGH COURT

HEARD: 31st March, 2017

DELIVERED: 31stMarch, 2017

Summary

Civil law- remedy of declaratory order of right- Swazi law and custom- the applicable rules and pre-requisite formalities for dissolution of marriage-how divorce is initiated and the role of the Swazi traditional family and administrative authorities-no consensual decision of family court-traditional chieftain inner council or umphakatsi sua motu declaring marriage invalid- effect of- Held application lacking in the requirements necessary as condition precedent for a finding of dissolution as pre-requisite to declarator and expunging of marriage certificate- where the relevant institutional authorities have declared marriage invalid declarator incompetent.

[1] This application was moved before me on the 31st March 2017 and I reserved judgment on to consider the parties submissions.

[2] I now make my ruling:

In the application the Applicant is seeking a declaratory and certain ancillary orders. These appear in the Notice of Motion as follows:

1) Declaring that (a) marriage in terms of Swazi law and custom between the Applicant and the 1st Respondent was lawfully dissolved;

2) Directing the 2nd Respondent to cancel the marriage certificate No. 6922 from the Register of Marriages;

3) Directing 1st Respondent to pay costs of the application in the event it is opposed ……..” (sic)

[3] The Applicant has deposed to a founding affidavit to which she attaches a copy of her marriage certificate with the 1st Respondent as she does certain confirmatory affidavits of one Thoko Shongwe and one Dan Mango in support of her application.

[4] The essential emerging facts are that the Applicant was married to the 1st Respondent in 2006. The customary rites attendant on the Swazi traditional marital ceremonies of *teka* and smearing with red ochre were, accordingly duly celebrated but the final transactions of settlement of the bridal accounts by way of delivery of *insulamnyembeti* and *lobola* were never performed. The significance of this feature in the evidence is of moment herein and I intend to revert to this aspect later herein.

[5] The marriage was beset with difficulties in that there was no peace between the spouses. The Applicant alleges that the 1st Respondent was abusive and violent and was given to assaulting her but this situation persisted until matters came to a head and she fled the marital home and as a result the parties have been estranged and apart since March 2010.

[6] Since then the Applicant has been resident at her parental home in Fairview Township, Manzini. Although the 1st Respondent denies the allegations of abuse and assault the rest of the circumstances as pertains to current status of the marriage and the prevailing estrangement are common cause.

[7] From the Applicant's account she states that since 2010 several attempts were made by her family to seek consultations between her family and that of her husband for purposes of holding discussions over the marital problems.

[8] To this end she states that there were several instances when her family attempted to **procure** these meetings which prove to be unsuccessful and gives account of these events.

[9] She claims that due to the frustrations at the failure to convene a meeting of the families it was then that in 2014 she and her family took the initiative of approaching the traditional authorities in her chiefdom of Kontshingila.

[10] She states that they sought to engage the Inner Council of the Kontshingila Royal Kraal of Kagwegwe to facilitate a meeting of the families. However it emerges despite the fact that under the **aegis** of the said Inner Council the families did meet the families were at cross purposes and could not resolve the matter.

[11] From the Applicants own account it appears her family requested the meeting with only one object for an endorsement and some agreement that the parties had fallen out and their relationship broken down. They were seeking a consensual termination at family level. That was the premis and purpose driving the applicant's initiative and not an attempt at reconciliation or resolution.

On the other hand it appears the 1st Respondents family were not keen on this idea and were desirous of some process of negotiations and

reconciliation. As a result there was no meeting of the minds and the talks were inconclusive and the parties accordingly reported this impasse to the Inner Council.

[12] In that statement the Inner Council convened another but final meeting of the families on the 28th February 2015. During these proceedings before the Council it transpired that both sides remained at loggerheads.

The Application

There is now an emerging consensus on the approach applied by the courts when in comes to ascertaining the status or legal consequence of any situation or question under Swazi law and custom- particularly in instances when the court is moved to exercise its jurisdiction on the declaration of rights. That approach involves the establishment of Swazi law and custom as a proven fact or state of affairs and a source of law.

As to the source of law and the nature and purpose of the enquiry in such applications, the case of ***Matry Nompumelelo Dlamini and Ano. And Musa Clement Nkambule and Others,*** (unreported but being two applications consolidated due to the parity of the legal issues under case Nos 30146/06 and 3822/02) is considered the locus classicus on the subject. Therein the court identified the crisp issues as turning foremost on the question: how is a marriage dissolved under Swazi customary law?. This lands itself into a further question as to what are the legal formalities that have to be done in oderto have such a marriage dissolved. That is precisely the crisp question we face in this application. Its an exercise in ascertaining the content of Swazi law and custom on a specific issue.

That approach was equally front of mind in the case ***Knox Nxumalo NO v Nellie Ndlovu*** and Others where Foxcroft JA adumbrates it as follows:

> ***" We have been presented with material by both sides to assist establish for purposes of this case, Swazi law and custom. We have also been referred to a number of High Court decisions touching on the matter"***

Likewise in this matter, we are called upon to determine and pronounce, by way of declaration of rights, on the status of a situation under Swazi law and custom. Fortunately guidance can now be found in a number of seminal judgments of this court on the subject which illuminate the applicable

principles as applied on similar applications where a declaratory as to the annulment of a marriage under Swazi law and custom was the central issue to be determined.

In the case of ***Godfrey Mngadi and Fisiwe Mngadi***, an unreported case published under case No. 2988/2006, the court having traced the vestiture of the competence, original and inherent jurisdiction of the High Court to make and issue a declaratory in all matters including status questions under Swazi law and custom dealt with a similar application to the one before us. It crisply identified the key issue as a question of ascertaining whether the:

> **"*The marriage was formally, legally and effectively terminated in accordance with Swazi law and custom*"**

Further it characterised the determination of rights as a remedy that entails a two-fold enquiry, namely:

> **(a) whether the applicant is a person with an interest in an existing, future or contingent right or obligation; and**
>
> **(b) whether the case before the court is a proper one for the exercise of the courts discretion in making a declaratory order"**

(See the remarks of **M.C.B Maphalala J** (as he then was) in the **Mngadi** case op cit and the authorities referred to therein. Also **Herbstein and van Winsen** in ***The Civil Law and Practice of the Supreme Court of South Africa***, 4th Edition, at page 1053 and the cases cited therein).

That happens to be the starting point herein as it is a statement as to the courts powers on the subject. There are also a series of recent decisions of this court, the high watermark being found in the case of ***Matry Dlamini and Another v Musa Clement Nkambule and Others (consolidated cases Nos. 3016/06 and 3822/08) that we have referred to above.***

The issues

Where the matter to be determined is in essence the ascertainment of a feature or aspect of a status question on Swazi law and custom as a source of law, the principle adopted by the courts that of obtaining evidence to establish the state of the law under customary normative rules by leading expert testimony. That was indeed the approach adopted by the court in the Matry case.

In that case we can draw from following statement by the learned Mamba J on his findings as the now accepted bell-wether for a well-considered and informed exposition on the formalities and procedural steps attendant on dissolution or divorce under Swazi law and custom:

> "***On arrival at her home the woman relates to her father or guardian the reasons for her return. Her guardian is expected to respond to this by taking her back to her in-laws in order to allow the two families to formally deliberate on the matter. Where the matter is resolved without the marriage being dissolved, the Chief's kraal is not brought into the matter. However, where the decision is that the marriage should be terminated, the relevant Chief's kraal's (uMphakatsi) representatives, if more than one, should be invited and be fully informed of the deliberations and decisions taken, e.g. pertaining to the issue of lobola, custody of the children born of the marriage and such other issues which inevitably come to the fore following a dissolution of marriage***."

Having regard to the range of decisions of this court on the remedy of a declaratory order that a marriage solemnised under Swazi law and custom has been lawfully terminated, certain core essential requirements can be discerned and regarded as a settled test to be applied. These have been distilled to the following:

(a) there has to be have been a meeting of a family council comprising the respective spouses' families;

(b) the family council would have to firstly ascertain the source of the conflict or problem giving rise to the dispute between the parties and seek a reconciliation and if that fails reach a consensual dissolution of the marriage in that event; and

(c) such a dissolution would have to be reported to the highest local traditional forum in the chiefdoms; the *Inner Council or umphakatsi* as a final step.

This proposition is amply supported by a welter of case law in recent decisions of this and the Supreme Court. See **Patricia Mndzebele (Nee Msibi) v Nolwazi Ndzebele and Others SZHC Civ. Case No. 828/2013; Knox M. Nxumalo v Nellie Siphiwe Ndlovu and Others SZSC Civ. Case No. 42/2020; Matry Nompumelelo Dlamini and Ano v Musa Clement Nkambule and Others SZHC Civ Case Nos. 3046/06 and 3822/08. See Also Siphiwe Magagula v Lindiwe Mabuza and Others Civ Case No. 4577/08** and the authorities relied on therein.

In opposing this application the applicant's husband, the 1st Respondent, has through his attorney Mr S. J. Simelane, raised preliminary points. Foremost in these points *in limine* is that there several are material disputes of fact rendering the matter irresoluble on the papers. I disagree with this position. If there are any disputes, these are not on the pertinent or critical facts and therefore cannot be deemed material disputes. On the essential facts I am satisfied that the the circumstances are common cause in the main.

It is not in dispute that several overtures have been made by the Applicant and her family since 2010 to seek a meeting with the 1ST Respondent's family. It is also common cause however that the objective of the Applicant and her family was, contrary to the convention was not to seek a reconciliation but to exert pressure on the Respondent and his family to acquiesce to her wish to be formally separated from the 1st Respondent and their marriage terminated as she deemed the marital situation to be intolerable. In her founding affidavit she pointedly states that her family made several requests for a meeting 'for purposes of discussing termination of the marriage relationship'.

It emerges from the affidavits that the 1st Respondent has at all times been reluctant and in the course of events demurred, delayed, avoided and even sought to frustrate the Applicant's efforts. As a result the Applicant resorted to seek the intervention of the Kontshingila Royal Kraal's Inner Council (*eMphakatsi*). It was only through the auspices of the Kontshingila inner council that a meeting between the two families was ordered and facilitated.

When that meeting could not resolve the issues the parties reported back to the inner council on the unfolding state of affairs. It was in that forum, we are told, that at that briefing meeting the *libandla* or inner council of the Kontjingila Royal Kraal ventured into the enquiry to ascertaining the legal status of the marriage by investigating whether the requisite formalities for contracting a marriage under Swazi law and custom had been fulfilled. It is common cause that the Inner council in the outcome determined and ruled that there was no valid marriage between the parties.

The issue to be determined is whether the application meets the test that has been laid down as pre-requisite to the sought remedy of a declaratory order of the nature sought by the applicant on the papers. I do not think so. A critical step in the now well established test, that of consultations and serious attempts by the families of the husband and wife at reconciliation and failing that the formalities at the family council level for dissolution clearly did not take place. There is no doubt that was in part, due to the fact that the 1st Respondent and his family were opposed to the approach by the Applicant and her family and there was no co-operation between the families with the result that the matter ended up being escalated to the *umphakatsi* when the families failed to resolve it.

The Court in the *Matry Dlamini* case mooted the question as to what happens in instances where one of the parties resists the dissolution of the marriage before the traditional authorities. In that case Mamba J left the question unanswered.

The court was not well placed to make a definitive finding on that specific question- for want of expert evidence to establish what the exact circumstances and relative legal consequences would be where the families either fail to reach an agreement or are unable to find an amicable dissolution of the marriage.

Lamenting this paucity the learned Justice Mamba, commented in that case that:

> ***"I was unable, despite some probing by me, to get a clear answer form the experts as to whether a decision for dissolution may be effective or valid in the fact of a disagreement by one family or party to the deliberations. Nothing turns on this uncertainty in these … applications as there appears to have been no disagreement on the final decision taken"***

In that case unlike in the matter before us it was unnecessary to determine the question for the stated reasons hence the matter was left moot. *In casu* that is precisely the question in light of the failure of the parties to reach consensus.

It is clear in light of the test emerging from the decided cases that, whatever the legal consequence or cause of the applicant fleeing the marital home- it alone cannot does not establish grounds for the dissolution of a marriage under Swazi law and custom without the formal procedures and remedial steps availing under customary law. The following statement attributed to the learned author **Professor Thandabantu Nhlapo** in his work *Marriage and Divorce in Swazi Law and Custom (1992)* gives insight into what effect if any desertion has in that situation:

> "(d)esertion emerges …as a significant ground for divorce….but above all the rules and processes involved in the formulation and dissolution of marriage underline the important fact that Swazi marriage is a consensual as opposed to an individual affair"

It therefore all comes down to this proposition as espoused in the *Nxumalo and Ndlovu* case above when the court, reciting the dictum of **M.C.B Maphalala J in** the *Siphiwe Magagula v Lindiwe Mabuza* case, tersely states the position to this effect:

> ***"Whatever the position in the past, it is now settled that a marriage solomnised in terms of Swazi law and custom is capable of being dissolved at the instance of either spouse and that dissolution is generally made during the meeting of members of the two families and not by a court of law"***

As a litigant, saddled with the dilemma such as hers driven by the desire to have her marriage terminated, it seems the Applicant has as her only recourse what the court in the *Nxumalo* case as per Foxcroft JA contemplated as follows:

> ***"to terminate an unwanted marriage, where no other grounds are available (and the applicant were) to leave her husband and return to her father's home with the intention of not returning to her husband……her father has the duty to return her as soon as possible but if he believes that the wife's reasons for her departure from the marital home are well founded, he then has a duty to protect her from returning to suffer ill-treatment such as unjustified beating, cruelty or serious neglect. In such a situation a meeting of***

> ***representatives of the two families is convened to attempt reconciliation…..If this fails a divorce can be arranged if the differences are irreconcilable and a refund of the lobolo is made, after the talks have exhausted all possibilities at reconciliation. It is only then that the mater can be taken to the relevant Chief so that a dissolution can be formalised before the chief" (added paranthesis)***

In that statement the court sums up the procedural law that the Applicant would need to establish was followed in order to succeed herein. It is in alignment with the rule in the ***Matry*** case. There appears no doubt that the procedures as contemplated in these cases as pre-requisite and evidence of dissolution by the appropriate traditional institutions were never achieved in this case. This is apparent ex facie the affidavits filed herein. As stated earlier these facts are in any case common cause.

This application, however, presents with another unique and anomalous situation in that whilst the declarator sought is for the confirmation of a formal dissolution of her marriage under Swazi law and custom as a matter of factual status, on the Applicant's own papers it appears the requisite formalities and procedures were short-circuited or truncated. There was thus no attempt at reconciliation or in light of the differences an agreement or agreement by the joint family court that the marriage was dissolved. That is at the heart of the matter. This renders the application for the declarotor sought woefully deficient.

Instead she sets out on the facts, a course of dealings or process culminating in the fateful meeting of the Kontshingila umphakatsi whose outcome was the inner council's ruling that there was no valid marriage between the parties. In other words accordingly the finding was that the purported marriage was *void ab initio*.

In his submissions the Applicant's attorney, Mr L.M Simelane, contended that the effect of the inner council's ruling was that the marriage between the parties was 'voidable at the instance of either party". This is not supported by the facts on the affidavits.

This assertion contradicts the applicant's own factual averments on what the ruling of the council was. The applicants statement in this regard as set out in her founding affidavit says:

> ***" It is my submission that in view of the Inner Council of Kontshingila Royal Kraal there was no valid marriage in terms of Swazi law and custom between the 1st Respondent and myself. The 1st Respondent did not comply with the formalities of solemnizing a marriage in terms of Swazi law and custom"***

Indeed the confirmatory affidavit of the chairman who presided over the Inner Council proceedings which the applicant has attached to her founding affidavit unequivocally confirms this finding or determination by the Inner Council that there was, in the Council's view, no valid marriage between the Applicant and the 1st Respondent in terms of Swazi law and custom.

Even if it were correct I find Mr Simelane's argument, predicated as it were on the misconceived assertion that the inner council deemed the marriage voidable, to be counter-intuitive and cannot accept its correctness as a legal proposition. It is in any event not even supported by the authorities he relies upon.

To buttress his contention, Mr Simelane referred us to certain academic authorities and specifically to a passage from **Professor Thandabantu's** work that we have already referred to in another respect. The learned author's passage that Mr Simelane relies in turn refers to an opinion by another academic as a statement on an aspect Swazi law and custom in the following terms:

> ***"Rubin considers the essentials of a Swazi marriage to be***
>
> ***(i) the parties must be of full capacity;***
> ***(ii) the consent of everyone involved must have been involved;***
> ***(iii) the bride must be anointed with libovu;***
> ***(iv) lobola must be paid and also (lugege and insulamnyembeti)"***

The last item refers to the grooms contractual obligations flowing from the union.

Significantly the learned author Rubin, hastens to state quite categorically, what the consequences of failure to meet the first three essentialia are and in so doing makes a critical distinction. According to Rubin if any of the first three essentials is omitted that would render the purported marriage to be utterly void. However he goes on to say that the fourth requirement of the payment of lobola, ony renders the marriage voidable at the instance of the bride's father ***'but only when her husband refuses to pay lobola"***

I cannot therefore reconcile Mr Simelane's reliance as support for his conclusion that the Inner Council of the Kontshingila Royal Kraal found that the marriage was 'voidable' for his contention that the marriage between the parties was lawfully terminated by the Inner Council. The assertion as to the Inner Council's finding as I have stated earlier is factually incorrect and therefore misplaced and the attendant contention therefore misconceived. The Inner Council simply declared the marriage invalid and void. But even if it was not a mistatement of the fact, the argument by the Applicant's attoney's is untenable if not counterproductive.

Far from supporting his contention the academic authorities on the contrary only adverts to the opinion that failure to pay *lobola* renders the marriage voidable and not invalid and therefore terminable only at the instance of the brides father where he can show that despite demand the husband is refusing to pay. I make no evaluation as to the correctness of that legal proposition in the absence of expert evidence on Swazi law on the matter nor is this an issue herein. I only make reference to the patent flaw in the applicant's case this being on the difficulties that beset the application before me.

Another inherent problem in the applicant's case lies in the remedy sought in terms of the foremost prayer in light of the facts relied on by her in her own affidavit. As the basis for the application is *inter alia* the finding by the Inner Council that no valid marriage exists between the parties, an application to this court to make a determination as to the dissolution of the marriage cannot be counternanced. In this regard the application is inherently flawed in so far as this court cannot be moved to determine the dissolution of that which does not exist.

But even if in effect the ruling of the Inner Council was to rule such a marriage voidable and thus terminable at the instance of the bride's father as per the authorities relied on by Mr Simelane (*a la* Nhlapho *et* Rubin *op cit*) there is no evidence that the applicant's father has invoked his remedial rights to press for lobola and having done so termination was invoked on that basis. The evidence

only points to the Inner Council having *sua motu* determining on the facts that the parties marriage was not legally valid.

There is another reason why this application cannot succeed. This is linked to another point in limine raised by the 1st Respondent in resisting the application. In my view the remedy for a declarator to the effect that the marriage between the parties has been lawfully dissolved under Swazi law and custom is not competent where such a marriage was been determined void *ab initio* by the traditional authorities. Such a relief would be an exercise in futility. Here we are faced with a ruling by the relevant traditional authorities that there was no valid marriage and as such, it stands to reason there is none that could have been annulled.

For the reasons stated above I also find that the application falls short of the requisite and essential requirements that must be set out before a declaratory order of the annulment can issue. It is now trite that in applications the litigant stands or falls on his or her own papers.

For the above reasons the application must fail with costs.

It is so ordered.

MAPHANGA J.

MAPHANGA J

For the Applicant : Mr. L. M. Simelane

For 1st Respondent : Mr. S. J. Simelane