



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No. 536/18

In the matter between:

Jabulani Mlangeni

Applicant

And

Gugu Mlangeni (Nee Mkhabela)

1st Respondent

Registrar of Births Marriages and Deaths

2nd

Attorney General

Respondent

3rd Respondent

Neutral Citation: *Jabulani Mlangeni v Gugu Mlangeni (Nee Mkhabela) and 2 others 536/2018SZHC-43 [2018]*

Coram:

D TSHABALALA J

For Applicant: P Dlamini
For 1st - 3rd Respondents: No appearances

Heard on: 22 June 2018
Delivered: 07 March 2019

Summary: Customary law - Swazi Customary marriage- dissolution of Customary marriage-legal requirements for dissolution of customary marriage-onus on the applicant in an unopposed application to prove that customary procedure was followed and further that the marriage was dissolved by a competent authority. Held: the court is satisfied that legal requirements were substantially met.

JUDGEMENT

[1] This is an uncontested application for declaration of a customary law marriage as dissolved. The applicant seeks the following relief:

1. *Declaring the marriage by Swazi Law and custom between the applicant and the 1st Respondent contracted on the 11 November 2008, terminated or dissolved in 2013;*
2. *Directing the Registrar of Births, Marriages and Deaths to expunge the Marriage Certificate of the said marriage from the Registry of Births Marriages and Deaths.*
3. *Granting the 3rd Respondent visitation rights of her minor child*
4. *Costs of suit in the case of opposition.*

[2] When counsel for the applicant appeared before me I required him to argue the matter in the light of the latest Supreme Court's decision in the case of *Samuel Myeni Hlawe v Beatrice Tholakele Seyama & 2 others*.¹ Counsel for the applicant submitted that *Hlawes case*² was distinguishable from the present case in that in the former case not all the processes for dissolution had been followed hence the adverse judgement by Supreme Court against the declaration of the marriage as dissolved. Counsel further argues that the proper understanding of the Supreme Court's decision in *Hlawe* 's case was not that Customary marriage was permanent or indissoluble. I reserved judgement for review of the position of the law and the said judgment in *Hlawe's case*.

[3] In *Hlawe* 's case the Supreme Court confirmed the decision of the High Court dismissing an application for declaration of a Swazi Customary marriage as lawfully dissolved by the traditional structures. In dismissing the appeal, the Supreme Court had this to say:

"[3 J In my opinion even without entering into the issue of the possible washing of the red ochre, respondent was correct in taking the view that all that was alleged to have been done by the appellant and his family in pursuit of dissolution did not meet the requirements of Swazi Customary law for the dissolution of the customary marriage between the parties and the Court aqua cannot be faulted in its finding in this respect. The appellant is of course free to further pursue the matter

¹ 56/2016) (2017] SZSC 41 (09¹¹ October 2017).

² *Supra*.

before an appropriate authority competent to give a binding decision.³

(Underlining is added).

[4] What is clear from the above quoted paragraph is the assertion by the Supreme Court that a Customary marriage can be dissolved by a competent authority, subject to meeting certain legal requirements. The Supreme Court concluded that the appellant's claims that he had followed all the procedures for the dissolution of a marriage in accordance with Swazi law and custom were not correct.⁴ The Supreme Court's authoritative decision in *Hlawe case* provides guidance that supersedes any previous decisions of this court on the subject. The court therefore needs to scrutinize the evidence tendered beyond assertions of an applicant that it has followed the procedure and requirements for termination of the marriage. The court must be satisfied that the alleged termination was by an authority competent to give a binding decision.

[5] There are previous decisions of the High Court in which processes for dissolution of Swazi customary marriage have been outlined. As stated above the *Hlawe case* sets the tone for this court to follow on processes that give rise to legal dissolution of a Customary marriage. The evidence tendered will be considered and subjected to the test set out in previous Court decisions in line with the guidelines of the Supreme Court. A brief summary of the facts in *Hlawe's case* will be helpful. The applicant sought in the High Court, orders firstly, directing the Registrar to expunge record, entries in respect of a marriage certificate of the parties, as they were no longer married, secondly,

³ See Paragraph [38].

⁴ See paragraph [35].

costs in the event of opposing the application and, further or alternative relief. The application was dismissed by the High Court. The Supreme Court formulated the issue for determination as follows:

"Whether the marriage that was sought to be expunged from the official records of the 2nd respondent had been terminated properly according to the tenets and procedures of Swazi law and custom (Swazi customary law)."

- [6] The parties therein were married in 1979. Ten years later in 1992 problems arose and the marriage became dysfunctional due to the respondent's adultery. After noting of the admitted adultery certain procedures and deliberations were undertaken between the parties' respective families. There was a dispute between the parties in court as to what exactly happened. One party contending that all requirements of Custom were met to end the marriage, while the respondent argued to the contrary, and considers herself still married to the appellant. She asserted that her adultery was condoned; that customary procedures were not followed for the proper dissolution of the marriage. The Supreme Court proceeded with the matter on the assumption that adultery was not condoned. The Supreme Court extensively reviewed the history, literature, and authorities dealing with dissolution of Siswati Customary marriage. In its quest to answer the question *"did the marriage dissolve?"* The Supreme Court found that despite the appellant's stance that he considered their marriage to have been dissolved, the appellant failed to state when the dissolution occurred. The Supreme Court made an observation that *"the procedure to dissolution is by no means a clear path, without any potholes and blind rises, if there is a path at all."* It is this elusive

procedure that the court must

endeavour to decipher and determine whether it has been followed in order to dispense justice to the litigants.

[6] The facts *in casu* are briefly that the parties married under Swazi law and Custom and duly registered their marriage with the 2nd respondent, a certificate was issued on the 31 July 2009. The applicant alleges that the marriage no longer subsists, having "*been dissolved as of 2013.*"⁵

[7] From 2013 the applicant was convinced that the respondent had extra marital affair with a man where upon he and or his family initiated and held meetings with the respondent's family. The first meeting was held on the 26 May 2013, attended by applicant, applicant's father, and six other people from his side. On the 1st respondent's side attendees were the first respondent, and two others. The 1st respondent denied the accusations of unfaithfulness and the families meeting ended without any resolution.

[8] The second meeting of the two families was held on the 5 July 2014, with no tangible results. The matter was subsequently reported to the pt respondent's chiefdom ofMpolonjeni which sent a delegation of two to the Chiefdom ofNkhanini where the matter was referred due to its seniority. A subsequent families meeting was held on the 22 November 2014 where an emissary for the Nkhanini Chiefdom

⁵ See paragraph 12 of the Founding affidavit.

was represented. Again, the meeting bore no fruits. It is not quite clear whether the Nkhanini Chiefdom was that of the applicant or 1st respondent or for both of them.

[9] Yet another families meeting followed on the 21 February 2015 where Mpolonjeni/Mahwalala Royal kraal was represented by four people, while the Chiefdom was represented by *Umgijimi*. This meeting produced no results. In March 2015 the applicant involved the office of Regional Administrator. The meeting of the 10 May 2015 before the Administrator was attended by the applicant's and 1st respondent's teams. The applicant states that subsequent to several meetings a meeting for final determination was held before the "Regional Officer" on the 24 November 2017, attended by the parties, their respective families and the Chiefdom's *Umgijimi*. The applicant and the 1st respondent made their feelings known before the Regional Officer that they wished to terminate their marriage relationship.

[10] The Regional Officer prepared affidavits deposed to respectively by the applicant, the 1st respondent and the *Umgijimi*, David Mbango Maseko of eSitjeni under Chief Lusendvo. In the affidavits the applicant and the 1st respondent confirmed their marital problems and their final decision for their Customary law marriage to be nullified. The *Umgijimi* deposed *inter alia* that **the parties' community leaders have made efforts to reconcile the couple in their differences without success**. He confirmed that the parties' expressed wish that their marriage certificate to be nullified.

[11] The applicant has also filed before this court, evidence of deliberations that took place to reconcile the parties at Chieftainship level in the form of a report by the Mpolonjeni Chieftdom through its Committee referred to as Mahwalala Zone 6 Committee. This is the Committee that provided a platform for the parties' meetings with their respective parents and *Umpahakatsi's* representatives on more than one occasion. The Report⁶ captures in particular, deliberations of a meeting of February 2015.

[12] The contents of the report briefly stated are that the said Mahwalala Zone 6 Committee engaged the applicant and the 1st respondent together with their respective families on the couple's differences on three occasions. The matter proved difficult to resolve, and that the committee failed to assist the parties to reconcile. The husband declared that he no longer wanted a relationship with his wife due to her unfaithfulness. The Committee declared its failure to resolve the matter and referred **it** to Ndabazabantu.

[13] The issue for determination in this matter, (like in *Hlawe's* case) is whether the requisite procedures were duly followed for termination of the Customary marriage, whether the marriage legally dissolved? I proceed to investigate that question.

⁶ Annexure ^{11E} to the Founding affidavit.

[14] In the High Court cases *Matry Nompumelelo Dlamini v Robert S Dlamini & 2 others* *Musa Clement Nkambule v Cynthia Makhanya & 2 others*,⁷ His Lordship Mamba J sitting with assessors - Chief Petros Dube of Mpolonjeni and Mr Vilakati of Lobamba, dealt expansively with the legal formalities that should be met before a Swazi Customary law marriage can be dissolved. The Court heard expert evidence on legal requirements for dissolution of this marriage regime. From the guidance of the expert evidence the Court was able to make its decision. The Court in these cases faced a similar application for orders declaring the two Customary marriages to have been legally dissolved, as well as ordering the marriage certificates to be nullified or expunged from the Registrar's records.

[15] The Court in *Matry's* cases reviewed the law dealing with dissolution of a Customary law marriage. Having done so the Court decisively concluded that "*dissolution or divorce obtains under Swazi law and custom In my view beyond doubt*"⁹ The Court quoted the following passage from Thandabantu Nhlapho, Marriage and divorce in Swazi Law and Custom, 52-3: "*It seems fairly settled now that a customary marriage can be dissolved: the reasons and the procedures, however are quite different from those involved in the dissolution of a civil marriage*"

⁷ Case nos. 3046/06(1) 3822/8(2).

⁸ Registrar of Births Marriage Death.

⁹ See paragraph [I I].

¹⁰ See Paragraph [12].

[16] Relying on Customary Law expert evidence the court in *Matry's cases*¹¹ found that the first formal step in marriage dissolution proceedings at the instance of a man is that, having failed to reach an understanding with his wife, he packs the wife's personal belongings into a bundle and sends her off to her parental home in the company of a young girl. See also *Hlawe's case*.¹² In some instances *umyeni* (husband's representative) also accompanies the wife. Thereafter the wife's family takes her back to her in-laws. This allows the start of deliberations by two families on the couple's differences. Such talks may result with amicable resolution of the problem, without the marriage being dissolved, and without the involvement of the Chief's kraal. However, if no reconciliation is reached and the situation is such that the marriage may be dissolved the Chief's kraal representative should be invited and fully informed of deliberations and decisions taken by two families, concerning pertinent issues involved in the dissolution and following the dissolution of the marriage. According to *Hlawe's case*, the Chief should not only be informed of deliberations or decision, but his representative should be actively involved in the deliberations. He intervenes where necessary, even preside over the deliberations, the Supreme Court stated in the *Hlawe case*. According to the *Hlawe* decision, if no settlement is reached in the deliberation, the meetings are moved to the Chief's kraal for a full hearing and determination. The Supreme Court stated that the *umphakatsi's* role is not that of a passive observer, but active and could be decisive if necessary. The Court stated that the significant role of *umphakatsi* ensures that the marriage is not dissolved except for a good reason.¹³

¹¹ *Supra*.

¹² *Supra* at Paragraph [35].

¹³ See *Hlawe's case* at Paragraphs [9] - [12].

[17] The Court in *Marty's* case found that the joint family Court's decision was decisive on the dissolution of the marriage as opposed to the decision of either the husband or the wife.¹⁴ The Court also found from the experts evidence that the meeting for dissolution of the marriage usually takes place at the husband's home, and that however, it may take place at any other place convenient to the parties. This is refuted by the Supreme Court in *Hlawe 's* case wherein it is stated that such meetings should be at a neutral place like the Chief's representative's home and ultimately at the Chief's Kraal.¹⁵

[18] Guided by *Hlawe 's* Supreme Court's decision, I find that the following steps were undertaken in the applicant's case:

- 1) The differences arose between the applicant and his wife¹⁶ from 2013, based on her suspected infidelity;
- 2) The applicant did not pack his wife's belongings nor sent her to her parental home per Custom, instead the applicant demanded that the 1⁸

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st respondent called her parents, which demand she ignored.

- 3) The first joint families meeting was held on the 26 May 2013, the *Umphakatsi* was not represented, no reconciliation or resolution was reached. Another meeting followed with no consequence.

¹⁴ See para (16) of the judgement

¹⁶ **The is¹**

¹⁵ At paragraph [9].

¹⁶ **The is¹**

- 4) In 2014 the couple's matter was reported to the pt respondent's Mpolonjeni *Umphakatsi*.
- 5) Another family meeting where the *Umphakatsi* was represented was held on the 8 November 2014. The ultimate families meeting attended by the Chief's representatives, one David Mbango Maseko and Chief Petros Dube was on the 21 February 2015. Again, no resolution of the dispute nor determination was made.
- 6) It was after the meeting was moved to the Regional Administrator that a decision was reached to dissolve the marriage. The unidentified Regional Officer facilitated signing of affidavits capturing and confirming the families' decision to terminate the applicant and pt respondent's marriage. The important affidavit was the one deposed to by *Umgijimi*.¹⁷ The contents of the affidavits of *Umgijimi*, the applicant and the pt respondent are captured at paragraph [10] of this judgement.
- 7) In addition, the applicant has filed a report¹⁸ by the Committee that has been engaged with the matter alongside the Chieftainship.

[19] Save for the applicant's omission to send the pt respondent to her parental home with her personal belongings per the dictates of custom, all other legal formalities required prior to dissolution of the parties' Customary marriage have

¹⁷ Annexure "B,, to the applicant's Founding affidavit.

¹⁸ Mahwalala Zone 6 Committee Report.

been satisfied. The question is whether the omission in the circumstances of this case justifiably nullifies or invalidates the process of dissolution of the man-iage. According to the court in *Matry's* case the act of sending the wife to her home was the first formal step towards marriage dissolution proceedings at the instance of a man. The return of the wife to her home triggers the two families' talks concerning the couple's marital problems.

[20] *In casu* even though the wife was not sent to her parental home, nonetheless the requisite joint family meetings were held with the *Umphakatsi* with a view to resolve the parties' differences. The applicant has not explained why he deviated from the Customary practice and instead required the 1st respondent to invite her family to a meeting, with the wife's family eventually attending the first meeting on the invitation of the his family. Be that as it may I am not of the view that the deviation in the circumstances should bring to naught the processes that were undertaken and the ultimate decision for dissolution of the man-iage which was endorsed by the Chiefs kraal through its representative.

[21] In the premise I come to the conclusion that the applicant has made a case for the relief sought. I accordingly make the following order:

1. The customary man-iage contracted by the applicant and the 1st respondent is declared legally dissolved in accordance with Swazi law and Custom.
2. The 2nd respondent is ordered to cancel the relevant maniage certificate

from the Register of Marriages.

3. The pt respondent is granted the right of access and visits by the minor child of the parties.

4. There is no order as to costs.

A stylized, handwritten signature in black ink, consisting of a large, bold letter 'D' followed by a cursive 'T' and 'S' that are connected and flow into each other. The signature is positioned above a solid horizontal line.

D TSHABALALA
JUDGE OF THE HIGH COURT