



IN THE HIGH COURT OF ESWATINI
JUDGMENT

CIVIL CASE NO: 959/2019

In the matter between:

NANA TSABEDZE

PLAINTIFF

And

PHUMZILE DLAMINI

DEFENDANT

Neutral Citation: *Nana Tsabedze vs Phumzile Dlamini (959/2019)*
[2020] SZHC (98) 26th May 2020

Coram: **MLANGENI J.**

Last Heard: **19/03/20**

Delivered: **26/05/20**

Summary: Civil action – declaratory order – Plaintiff sought an order declaring her as lawful wife of the deceased, for purposes of benefiting from the deceased’s pension.

The deceased married the defendant in terms of customary rites and a marriage certificate was duly issued in respect of the marriage. Subsequently, and unknown to the defendant, he married the plaintiff – also by customary rites, but at the time of his death a marriage certificate had not been processed to finality in respect of the later marriage. When the plaintiff presented herself as wife of the deceased at the Public Pensions Fund she was rejected by the family of the deceased on the basis that she was not legally married to the deceased during his lifetime.

She was advised by the Pension Fund to obtain a declaratory order in respect of her marital status with the deceased.

After hearing oral evidence, it was held that the plaintiff had succeeded in proving that she was legally married to the deceased in terms of Swazi Law and Custom and a declaratory order was issued as prayed for, with costs.

JUDGMENT

[1] Solomon Siphon Mavuso was a Police Officer. He died on the 26th November 2018 and was buried at Nkomazi at his paternal home area. During his lifetime he was legally married to the Defendant in terms of

Swazi Law and Custom and a marriage certificate was issued in confirmation of the union. The deceased also had a concurrent relationship with the Plaintiff and two children were born therefrom.

- [2] Subsequent to the death of the deceased, the Plaintiff was informed of a meeting that was to take place at the Public Service Pension Fund for purposes of distributing the deceased's pension to the beneficiaries. She presented herself at this meeting, as a wife to the deceased. She does not have a marriage certificate and, unavoidably, her claim to have been legally married to the deceased was challenged. The Pension Fund adopted the position that the Plaintiff must furnish proof that she was indeed married to the deceased, and it was specifically suggested to her that she must obtain a declaratory order to that effect. The pension has not been distributed, until the marital status of the Plaintiff is determined and declared.
- [3] It is on the above basis that the plaintiff issued summons seeking an order declaring her **“a lawful wife to the late Solomon Siphon Mavuso.”** The order that she seeks is opposed by the defendant who, however acknowledges the plaintiff's two children with the deceased. The crisp issue for determination is whether or not the plaintiff and the deceased were legally married during the deceased's lifetime.
- [4] In her particulars of claim the Plaintiff has pleaded so much evidence that there might be no need for oral evidence. At the commencement of the trial I raised this concern and the Plaintiff's legal representative was quick to apply for condonation. Defence counsel, probably oblivious of the rule against pleading evidence in particulars of claim, had not raised the issue. Because of this, as well as the fact that no real prejudice was occasioned to the defendants, I granted condonation. In future I will not readily condone this because I don't want to be party

to what I perceive as a palpable decline of standards in this jurisdiction, especially in civil litigation.

THE PLAINTIFF'S EVIDENCE

- [5] The plaintiff described herself as Mrs. Mavuso, that she was married to the deceased through customary rites on the 1st November 2010, and that the teka ceremony was done at the deceased's grandmother's home at Herefords. The relationship had started in 2001, and when she was tekaed she already had one child with the deceased. She stated that the ochre was smeared on her by Gogo Shabangu who has since died, and she went on to mention those who were present at the homestead when the teka took place, being Paul Malambe, Gogo Jane Malambe and Bafana Malambe. She also mentioned Mfanizile Simelane who was the deceased's close friend, and that it is the said Simelane who was sent to the plaintiff's parental home to formally report that she had been tekaed. In Siswati this is notoriously known as **"kumikisa umsasane"**. Later on the court heard from the said Mfanizile Simelane that when he went to report the teka at the Plaintiff's parental home he was well-received.
- [6] The plaintiff further told the court that the marriage was subsequently registered at BMD Piggs Peak but the marriage certificate had not been issued when the deceased died. She and the deceased signed the registration form BMD-4, a copy of which was shown to the court. She also showed to the court a revenue receipt in respect of an amount of E45.00, being the Government levy for processing a marriage certificate. The revenue receipt is in the name of the deceased and it is dated 27th August 2015. On the body of the general receipt there is a column for **"IN RESPECT OF"**, and in relation thereto there is an

endorsement **“MARRIAGE 6908076100179”**. During cross-examination of DW1, the defendant, she confirmed that the long number mentioned just above is the personal identity number of the deceased. I therefore accept it as proof that the deceased did complete form BMD-4 for purposes of registration of the alleged marriage between himself and the Plaintiff, and that he did this in the company of the Plaintiff, and they both signed the said form.

[7] It is common cause that when the deceased died the marriage had not been registered at BMD. That is the apparent reason why a certificate was not issued. I hasten to mention, however, that for purposes of the present matter I only need to establish whether the alleged marriage was solemnized or not – specifically, it being a customary marriage, whether the plaintiff was smeared with red ochre. It is settled in this jurisdiction that the smearing of red ochre is the critical and decisive part of a traditional marriage¹. This, in my respective view, could be the subject of some debate in view of the importance of bride price (lobola) in our culture, as well as the bride’s mother’s beast known as **“insulamnyembeti”**. The importance of lobola is borne out by the space in the certificate where the number of cattle paid for lobola is to be endorsed.

[8] After due completion of Form BMD-4 and payment of the required levy the deceased appears not to have lodged the documents at BMD. According to the Plaintiff she became aware of this after the death of the deceased. She was called to the Police Station where the deceased last worked and handed original documents that included the BMD-4 form, the general receipt, a house plan and a copy of the marriage certificate between the deceased and the defendant. These documents, she was informed, were found in a drawer of the desk that

¹ R v Fakudze and Another 1970-1976 SLR p422 at page 423.

the deceased used. This confirms that the deceased did not lodge the pertinent documents at BMD for purposes of registration of the marriage. But, as alluded to above, the non-registration of the marriage is not a relevant factor in these proceedings, a certificate being nothing more than official confirmation and proof that a lawful marriage did take place. It follows that where a marriage certificate is challenged, oral evidence could well show that it was not properly issued or that it was otherwise obtained fraudulently.

[9] PW1 stated that at the meeting of next of kin at the Public Pension Fund the main person who challenged her claim to marital status was deceased's elder brother whose name is David Mavuso, otherwise referred to as Mdavu. She stated that it shocked her to the core because she and the said Mdavu knew each other very well. When the deceased was alive not only did Mdavu accept her but he also affectionately referred to her as **'skoni'**, which means **'sister in-law'**. But the most astounding allegation by the plaintiff is that the said Mdavu was part of the team that went to the plaintiff's parental home to ask for her hand in marriage, so although he was not present when the teka ceremony took place it was well within his contemplation that his brother intended to marry the plaintiff as a second wife, and he had no reason to doggedly deny this in the manner that he did. The plaintiff also stated that the defendant knew her - she once came to the residence where the plaintiff and the deceased resided and found her there.

[10] During cross-examination, it is of significance that it was not put to the plaintiff that she was not smeared with red ochre as she alleges. Below I capture some of the questions and answers during cross examination of the plaintiff:-

Q: Do we agree that the marriage was not registered because the documents were not re-submitted?

A: Yes

Q: There are hand-written comments on the right hand top side of form BMD-4, in red, as follows: **"1st wife's certificate?"** what does this tell you?

A: I think they wanted him to find and bring in the other marriage certificate which I found at the Police Commander's office.

Q: Did you ask the deceased about why the certificate was not processed?

A: He would say that he was busy but he would in due course make time to have it finalized.

Q: Have you ever been to the Mavuso homestead?

A: Many times.

[11] The court asked this witness if she has an idea why Mdavu has taken this adverse position against her and she said that she did not.

[12] Two other witnesses for the Plaintiff, PW2 and PW3, confirmed that the plaintiff was indeed tekaed by the deceased, and they were part of the teka ceremony. PW2 was Paul Malambe who told the court in chief that his home is at Herefords and that the deceased was his relative. He stated that the Plaintiff was smeared with red ochre by his biological mother, one Culwase Malambe, born Shabangu. He emphatically stated that when the teka happened he was at the

Malambe home **“ebaleni”**, and that prior to this occasion traditional authorities were informed that this was going to happen. After the ceremony, the plaintiff was taken to her parental home by the deceased’s friend, Mfanzile Simelane, to formally report that she had been tekaed. The deceased subsequently reported to the Malambes that the reporting went well, and the witness in turn reported to the traditional authorities that everything went well. The witness made mention of a meeting which took place at Piggs Peak Regional Administration offices in May 2019 where the intention was to have an affidavit of teka made for the plaintiff. He told the court that David Mavuso (Mdavu) was present at this meeting and that he categorically told the gathering, in the presence of the Administrator, that he does not know the plaintiff (**“Akamati”**), she is known to the Malambes. The Administration officer was persuaded that the Plaintiff was indeed tekaed and, after admonishing David Mavuso about his wayward behavior, he proceeded to prepare an affidavit of teka, which the court has been.

[13] Under cross-examination PW2 said that he was not at the exact site where the taka actually took place, adding that men are not allowed to be there, but he reiterated that he was present within the Malambe homestead. Upon being asked a question, he stated that at Herefords community he occupies several positions of authority. He further stated that when form BMD-4 was completed at BMD offices he was present, and the deceased was told to take the form to Piggs Peak for further formalities.

[14] PW3 was Mfanzile Simelane. He is a Police officer and he said that he was a close friend of the deceased and they knew each other since 2004. They did many things together, including watching soccer when they were not on duty. They were both known to each other’s families,

including their children. When they first got to know each other the deceased had one wife, but subsequently he had two wives, the second one being the Plaintiff. He told the court that the deceased invited him to come to Herefords where a teka ceremony was to be conducted. He did go there and witnessed the ceremony where the plaintiff was tekaed. He was subsequently asked by the deceased to accompany the deceased, in accordance with custom, to her parental home to formally report that she had been tekaed. I quote a portion of his evidence below:-

“I was driving my own vehicle and he (the deceased) was driving his. At Mbabane we left my vehicle and we all got into his motor vehicle to Emajotini. Before we got to the homestead I was shown the homestead, to which I proceeded. I delivered the message and umsasane. It was dark. As I ran away after delivering the message they caught up with me after I tripped. They did not harm me.”

Such is the extent of detail in PW3’s evidence. He further stated that when form BMD-4 was completed he was present and he appended his signature on the form as a witness. His name and signature appear on the bottom left corner of form BMD-4

[15] The witness mentioned that after the death of Solomon the deceased’s brother, David Mdavu Mavuso, sang a different tune in that he was now refusing to acknowledge the plaintiff as his brother’s wife. PW3 says that he warned David Mavuso against creating conflict between the deceased’s wives. Cross-examination of this witness was brief and inconsequential. This witness, like PW1 and PW2, was not told by the defence that a teka ceremony did not take place as alleged or at all.

What this means is that in effect the defendant does not deny that the teka ceremony did take place, and one can only wonder why this litigation went as far as it did.

THE DEFENCE EVIDENCE

[16] DW1 was the defendant. Having stated that she was married to the deceased by customary rites in March 1996, she proceeded to say that she knows the plaintiff and that the latter has two children with the deceased, but she does not know that the plaintiff was married to the deceased. She further stated that when the deceased was sick and hospitalized she is the only one who was there for him. That is how brief her evidence in chief was.

[17] She was cross-examined extensively in respect of the documents that the plaintiff testified on - the form BMD-4, the general receipt and many other things. About the documents, she stated that she saw them for the first time when she was called by the Station Commander to pick up her marriage certificate, and the Commander told her that the documents were found at the deceased's desk in a drawer. When asked about the signature on BMD-4 which allegedly belonged to the deceased, she said she cannot deny that as she was not sure. She further stated that she does not know that the plaintiff was tekaed at Herefords and she does not know the Malambe home either, adding that the deceased never told her that. In her own words:-

“I am not sure whether he tekaed her or not. Now that he has died it no longer helps me. Whilst he was sick this would have helped me as someone would have assisted me.”

Asked whether she knew Mfanzile Simelane, PW3, she said that she knows him very well. One question that was put to her follows below:-

Q: He told the court that he is the one who took umsasane from Herefords to Majotini. Would you agree or deny that?

A: I am hearing that for the first time. I can neither agree no deny.

[18] Her attention was drawn to the revenue receipt that bears the name Solomon Mavuso, her deceased husband. She stated that the long number that is next to **"MARRIAGE"** is the deceased's personal identity number and she read it out as 6908076100179.

One other question that was put to her follows below:-

Q: Through this document (Form BMD-4) your husband was saying that he has tekaed Nana?

A: Correct.

[19] DW2 was David Petros Mfanzodlani Mavuso, otherwise known as Mdavu. He stated that he is a brother to the deceased. He further stated that during his lifetime the deceased had only one wife, the defendant. DW2 has an unbridled dislike of the plaintiff. I heard this in his tone and saw it in his face as he was giving evidence, both in chief and under cross-examination. I do not understand why he was made to testify on behalf of the defendant, not that it would have made any difference if he did not testify.

[20] Mdavu further testified that he does not know the plaintiff, he heard that she was the deceased's girlfriend and that they have one child. Later on, he said that he knows the plaintiff's parental home, he once

went there with his late brother who said to him he wanted to check on his **“children”**. He categorically denied that he was part of the delegation that went there to request the plaintiff to marry his brother. He said that the first time he heard that his late brother had a second wife was at the meeting at Public Service Pensions Fund.

[21] During cross-examination he was asked whether he knew Mfanzile Simelane, PW3, and he said yes, and added that the two were drinking buddies and they drank a lot. He denied that he ever discussed the status of the plaintiff with Pw3 after the death of the deceased. Some questions that were asked of the witness, and the answers thereto, are quite revealing and I reproduce some of them below:-

Q: You would find Nana at your brother’s house and ask her for food, calling her **“skoni”**
Skoni means sister in-law.

A: I never asked her for food. I never called her skoni and I will die without calling her skoni.

Q: Why wouldn’t you call her skoni though she has your brother’s children?

A: She has abused and humiliated me by bringing me here (to court).

For a moment in his hatred he forgot that it is not the plaintiff who brought him to court but it was the defendant who brought him there to testify in defence. Such is the extent of the witness’ aversion towards the plaintiff.

Q: From inception you never liked her?
A: She was not my wife.
Q: Were you present when she was tekaed?
A: No.
Q: Can you disagree that she was tekaed?
A: I disagree.

Asked by the court whether he would have gone to the teka ceremony had he been invited, his terse response was that he would not have gone there.

CONCLUSION

[22] Plaintiff's independent witnesses, PW2 and PW3, were both present when the plaintiff was tekaed. They know who tekaed her. Pw3 is the one who went with the plaintiff to make a formal report at her parental home Emajotini. He briefly described what transpired there. The evidence of the defence witnesses falls far short of challenging the version of the plaintiff. DW1, the defendant, in her honesty she did not go out of the way to deny the obvious. To a number of important questions relating to plaintiff's alleged marriage to the deceased, she responded that she did not know and would neither admit nor deny. DW2 was a total flop who is not ashamed of denying the obvious. His hatred towards the plaintiff, reasons thereof neither apparent nor avowed, had the better of him. He has no credibility at all and his evidence did not help the case of the defendant at all.

[23] The unavoidable conclusion that I come to is that the plaintiff was indeed tekaed by the deceased on or about the 21st November 2010, and that at the time of his death the deceased had two wives, the plaintiff and the defendant.

[24] I therefore make the following orders:-

24.1: It is hereby declared that the plaintiff was legally married to the deceased Solomon Mavuso.

24.2: The defendant is to pay the plaintiff's legal costs at the ordinary scale.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Plaintiff: Mr. B. Gamedze

For the Defendant: Mr. M. Mthethwa