



# IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1844/2020

In the matter between:

**JAMES MAJAHODVWA NCONGWANE**

Applicant

And

**DUDUZILE MARGARET MNGADI**

First Respondent

**REGISTRAR OF BIRTHS, MARRIAGES AND DEATHS**

Second Respondent

**THE ATTORNEY GENERAL**

Third Respondent

**Neutral Citation:** *James Majahodvwa Ncongwane v Duduzile Margaret Mngadi and 2 Others (1844/2020) [2023] SZHC 395 (22 December 2023)*

**CORAM:**

**N.M. MASEKO J**

**FOR THE APPLICANT:**

**N.D. JELE**

**FOR THE 1<sup>ST</sup> RESPONDENT:**

**F. M. TENGBEH**

**HEARD:** 11/06/2021

**DELIVERED:** 22/12/2023

**Preamble:** Civil Procedure – Swazi Law and Customary – Determination of dissolution of a Swazi Customary marriage to be dealt

with by an appropriate and competent traditional structure – the matter is referred to such traditional structure or structures for such adjudication

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## JUDGMENT

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### MASEKO J

- [1] On the 25<sup>th</sup> September 2020, the Applicant launched motion proceedings enrolled for the 16<sup>th</sup> October 2020 for an order in the following terms:-
1. The Swazi Law and Custom marriage between the Applicant and 1<sup>st</sup> Respondent is confirmed to be dissolved;
  2. The 2<sup>nd</sup> Respondent is ordered to cancel the marriage certificate No. 201381 of the Applicant and the 1<sup>st</sup> Respondent in the Register of Marriages;
  3. The 1<sup>st</sup> Respondent is ordered to pay costs of this application only in the event she opposes this matter.
- [2] The Founding Affidavit of the Applicant is used in support of this application and the First Respondent has filed an Answering Affidavit in opposition of this matter.
- [3] The Applicant has not filed Replying Affidavit, however, he has argued that the matter be referred to the traditional structures to deal with the issue of whether the Swazi Customary marriage was dissolved or not.
- [4] Mr Jele submitted that the matter be referred back to the traditional structures since there is a dispute as to whether the said customary

marriage was dissolved in accordance with the traditional processes. Mr Jele argued that this Court does not have jurisdiction to deal with that aspect of the matter hence it be referred back to the traditional structures.

- [5] Mr Jele referred to Section 151 (3) (b) of the Constitution of the Kingdom of Eswatini Act 001/2005 (the Constitution) which states that:-

*“Notwithstanding the provisions of subsection (1), the High Court –*

- (b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.”*

- [6] Mr Jele further argued that where there is a dispute as to whether a Swazi Customary marriage is dissolved or not, that issue ought to be referred to the Swazi Court or appropriate traditional structure to deal with that aspect. Mr Jele referred to paras 30-31 of the case of **Samuel Myeni Hlawe v Beatrice Tholakele Seyama and Two Others (56/2018) [2017] SZSC 41 (09 October 2017)** where His Lordship M.J. Dlamini JA states as follows:-

*“[30] In casu, the answer to our question must now be clear. The respondent, as we know, denies that ‘divorce’ under customary law has occurred and that notwithstanding the many years of separation she is still wife to appellant, notwithstanding his disavowal. What this attests to is that a man cannot just wake up one day and declare that a woman he legally smeared with red ochre is no longer his wife, be she a witch or an adulterer. The fact that the appellant and respondent are not ad idem on the question of dissolution requires the Court to review what is alleged to have happened or not happened. Under normal circumstances a matter*

like the present would be sent back to the appropriate Court structure for a determination of the issue of dissolution – a determination which would be tedious to nit-pick the things or events appellant says have happened in support of his case for dissolution. Rather, it would be neat only to indicate what has not happened resulting in dissolution being incomplete. The issue before Court is **deregistration** of the customary marriage of the parties not dissolution of their marriage, which latter issue, however, has taken the front seat. And rightly so too because without dissolution **deregistration** cannot occur. An appeal on the question of dissolution from the **'Family Court'** (for lack of a better expression) or the Chief's Court is not to the High Court but to a Swazi Court of appropriate jurisdiction.

- [31] Whether a customary marriage subsists or is dissolved is a matter for a Swazi Court or equivalent traditional council. The shortcomings faced by this Court in appeals such as the present is that the researchers and writers have largely relied on oral accounts by informers and not on hard cases decided by the appropriate courts and councils. The common law courts should mainly rely on evidence generated by the traditional authorities exercising jurisdiction in customary matters, of which the 'Family Court' is none. The Judicial Commissioner can assist guide litigants where to go for the appropriate decision. Litigants should not come before the High Court on their own unsupported evidence regarding the dissolution of their marriages. This is to avoid instances such as the present where the husband is pitted against his wife (possibly in the full glare of their children). Litigants applying for de-registration of their marriage should come with independent evidence or proof by an appropriate authority having jurisdiction in the matter."

- [7] On the other hand Mr Tengbeh for the 1<sup>st</sup> Respondent submitted that the Applicant has failed to satisfy the requirements for a declaratory order and that this Court has jurisdiction to deal with the matter in so far as to deny the declaratory order sought by the Applicant. Counsel argued that a Replying Affidavit has not been filed herein by the Applicant to controvert the Answering Affidavit. Mr Tengbeh argued that there has been no rebuttal of the 1<sup>st</sup> Respondent's Answering Affidavit and therefore the Applicant is not entitled to the declaratory order. Mr Tengbeh argued that the issue of a referral of the matter to the appropriate structures is one that has not been prayed for and has not been dealt with in the Founding Affidavit, and thus the First Respondent has been brought to Court unnecessarily, and therefore that this application be dismissed with costs.

#### **ANALYSIS OF THE MATTER**

- [8] In the course of litigation there arise instances where one of the parties may feel that an alternative procedure be adopted owing to issues which have been raised by the opposing party and there is no justification why the Court should reject that alternative procedure, if it would bring justice and fairness to the matter. This is the position *in casu*. Authority is legend that matters concerning the dissolution of a customary marriage are the prerogative and preserve of the Family Council (*Lusendvo*), the Chief's Council and the Swazi Court. When a matter comes before this Court, it only comes for declaratory orders as well as the deregistration of the customary marriage, and not for the dissolution, because this Court does not have jurisdiction to deal with such matters unless they come before it on review or appeal as per Section 151 (3) (b) of the Constitution.

[9] The Applicant has not filed a Replying Affidavit because the 1<sup>st</sup> Respondent has raised a dispute of fact as to whether the Customary marriage was dissolved or not. Under normal circumstances this Court would be referring the matter for oral evidence on the disputed issue however this being an issue of the dissolution of a Swazi Customary marriage this Court has no jurisdiction to determine that, therefore the course of referral adopted by Mr Jele is in my view proper. The case of Samuel Hlawe (supra) is very instructive in this regard. There is no way by which this court can deal with prayers 1 and 2 without the issue of dissolution having been dealt with first by an appropriate traditional structure or structures. Once that phase of dissolution is dealt with, then the matter can be enrolled for prayers 1 and 2, to be dealt with on their merits.

[10] In the circumstances, I hereby hand down the following order:-

1. The matter is referred to the Swazi Court Mbabane and/or appropriate traditional structure or structures to determine the status of the Swazi Customary marriage between the parties.
2. The proceedings with regards to prayers 1 and 2 are stayed pending the final determination of the customary issues referred to in para 1 herein above.
3. Each party is to pay its costs.

  
**N.M. MASEKO**  
**JUDGE**