IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal Case No: 13/2014

In the matter between

NOLWAZI MNDZEBELE **Appellant**

And

PATRICIA CEBSILE MNDZEBELE (NEE MSIBI) **Respondent**

Neutral citation: *Nolwazi Mndzebele vs Patricia Cebsile Mndzebele (Nee Msibi) [17/2014] (2014)* SZSC 60(3December 2014)

Coram: RAMODIBEDI CJ, M.C.B.MAPHALALA JA, and LEVINSOHN JA

Heard: 11 NOVEMBER 2014

Delivered: 03 DECEMBER 2014

Summary: *Application to declare a marriage dissolved – Court holding that such not proved on the papers having regard to Swazi law and custom*

JUDGMENT

LEVINSOHN JA

1. The parties will be referred to by their respective designations in the Court a quo.

2. On 14th June 2013 the applicant launched motion proceedings in which she sought the following relief:

1. Declaring the marriage in terms of Swazi Law and Custom between Mathews Bantubantu Mndzebele (hereinafter referred to as the deceased) and the respondent properly dissolved.
2. Costs in the event of opposition.
3. Further and/or alternative relief.

3. The case made out in her founding affidavit was briefly the following. She averred that the deceased Bantubantu Mndzebele was her father. In 2007 the deceased married the respondent according to the tenets of Swazi customary law.

4. In 2009 the couple experienced matrimonial problems causing the respondent to leave the matrimonial homestead.

Thereafter she approached Kwaluseni Royal Kraal and informed them that she wished to separate from and/or divorce the deceased. The Indvuna of the area arranged for the families of both the deceased and the respondent to be summoned to a meeting to discuss the issue regarding a divorce. A meeting was held on 13th May 2012. The respondent informed both families that she wanted out of the marriage. The respondent's father requested that the families meet on their own. They would thereafter report to the Royal Kraal the results of their meeting. No meeting materialised and no report was forthcoming. According to the applicant the deceased subsequently reported to the Royal Kraal that he did not want his wife back.

5. The deceased passed away on 15th August 2012. According to the applicant the Respondent did not mourn the deceased as is befitting a wife according to custom. The Applicant says that she was taken by surprise when she was summoned to a meeting at the Master's office and informed that the Respondent claimed that she was the deceased's surviving spouse and consequently, a beneficiary in his estate.

6. The Applicant makes the submission that the marriage between the deceased and the Respondent had been dissolved according to Swazi law and custom.

7. The Respondent opposed the application and delivered an answering affidavit. In essence she disputed the allegation that her marriage was dissolved. The Respondent averred that she had in fact reported to the Indvuna of the area that there were domestic disputes between her and the deceased. At no stage did she request a separation or divorce.

8. She admitted that a meeting was called. The Umphakatsi referred the matter back to the families for deliberation. Respondent says she was reprimanded for reporting her problem to the Umphakatsi before allowing the respective families to deal with it. According to the Respondent there was no subsequent report-back to the Umphakatsi – their difficulties had been resolved at the family level. Certainly on her version no divorce took place.

9. The Respondent averred that she is entitled to benefit from the deceased's estate. Indeed, this is evidenced by the deceased's last will and testament which she annexed as "PMM3".

10. Now the learned judge in a most thorough and comprehensive judgment concluded that the Applicant had not established that the marriage between the deceased and the Respondent had been dissolved. The legal principles and the application of these to the facts in casu are clearly set forth in the judgment. It would be a work of supererogation were I to traverse these once again. In my view the learned judge correctly stressed what I consider to be the most important point in the case, and that is a quotation taken from a decision of this court in **Nxumalo v Nellie Siphiwe Ndlovu and Others case no. 43/2010.**

> "*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."

11. In summary the learned judge found that a meeting of the respective families did not take place and consequently, the evidence before her established that there was no dissolution. In my view on the papers this conclusion is unassailable.

12. Unfortunately, this is not the end of the matter. Ms Ndlangamandla who appeared for the Applicant before us attempted to raise an entirely new issue –one that did not feature in the Applicant's founding affidavit but surfaced in reply. It is alleged that pursuant to Section 7(1) of the Marriage Act of 1964, the deceased's marriage to the Respondent on 27th November 1995 was a bigamous one having regard to the fact that a previous marriage to one Rita Zwane (the mother of the present Respondent) subsisted at the time.

Section 7(1) reads as follows:

"No person legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or civil rites and any person who

purports to enter into such a marriage shall be deemed to have committed the offence of bigamy."

13. Now the operative phrase in the above section is "marry in terms of this Act". This is defined in Section 1(2) of the said Act as: - "This Act applies to all marriages intended to be solemnised after the commencement of this Act, except **marriages contracted in accordance with Swazi law and custom."** (emphasis added).

On the face of it, the marriage certificate "PMM1" records that the deceased and the Respondent did indeed enter into such a customary marriage. **In Ex parte Ginindza reported at 361 of the Swaziland Law reports 1979- 1981**. Nathan CJ said the following at page 362:

"In my view at the risk of restating the position, the second marriage must be marriage under or in terms of the Act; and a marriage by Swaziland Law and custom does not qualify as such…."

14. It seems to me that even on the assumption that we were entitled to consider the point (which I am firmly of the view that we are not) prima facie the Applicant has difficulty in pursuing it. However, as

the matter was not fully argued before us, I refrain from reaching a final conclusion thereon.

In the premises the appeal falls to be dismissed with costs.

P.LEVINSOHN JA
JUSTICE OF APPEAL

M.M. RAMODIBEDI
CHIEF JUSTICE

M.C.B. MAPHALALA
JUSTICE OF APPEAL

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