IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE
In the matter between:

Appeal Case No. 28/2018

HAMILTON SIPHO DLAMINI — **Appellant**

and

EUNICE MBHAMALI — **1st Respondent**
CIVIL REGISTRATION & VITAL STATISTICS DEPARTMENT, MINISTRY OF HOME AFFAIRS — **2nd Respondent**
THE ATTORNEY GENERAL — **3rd Respondent**

Neutral Citation	:	*Hamilton Sipho Dlamini vs Eunice Mbhamali and 2 Others* (28/2018) [2019] *SZSC* 5 (20/03/2019)
Coram	:	**M.C.B. MAPHALALA CJ, R.J. CLOETE JA, AND S.B. MAPHALALA JA.**
Heard	:	05 MARCH 2019
Delivered	:	20 MARCH 2019

SUMMARY : *Appeal against Judgment of Court a quo – Only issue to be established is whether a customary marriage was entered into before a marriage by civil rites on the facts before the Court – Onus on Appellant to prove his case on a balance of probabilities – Appellant failed to discharge such onus on the facts before the Court – Appellant failed to call crucial witnesses to prove his case – Appeal dismissed and Counter-Application filed by Respondent succeeds – Judgment of Court a quo confirmed.*

JUDGMENT

CLOETE – JA

[1] The Appellant (Applicant in the Court *a quo*) brought an Application in the High Court in 2016 for an Order in the following terms against the first Respondent (Respondent in this matter) and notionally against the second and third Respondents;

1. **Declaring the civil rites marriage entered into by and between Applicant and First Respondent to be bigamous;**

2. **Directing Second Respondent to cancel and delete the particulars of the marriage by civil rites entered into by and between Applicant and First Respondent on 3rd March 1981;**

3. **Costs in the event of opposition.**

[2] In support of the Application, the Appellant filed his Founding Affidavit in which he *inter alia* alleged;

At Paragraphs 7 to 15 thereof;

"7. **On 23rd April 1979 I performed the teka ceremony on the said Phindile Mdziniso whose surname is wrongly entered into the marriage certificate as Ndzinisa. By the time I tekaed her I had paid eleven herd of cattle as lobola. The red ochre was smeared by Idah Fakudze who is now deceased but Temandiya Fakudze and Dudu Dlamini among others were present when the red ochre smearing took place. I attach a copy of the marriage certificate and mark it annexure "A"** (my underlining)

8. **Before the teka ceremony took place I informed the Umphakatsi in accordance with the dictates of Swazi law and custom.** (my underlining)

9. **Around the same time I met and fell in love with Eunice Winile Mbhamali and as a result of our relations she fell pregnant in 1981 while she was undergoing training as a teacher at William Pitcher College.** (my underlining)

10. **First Respondent informed me that the college informed her that she should produce a marriage certificate that she was married otherwise she would be expelled from the institution on account of her pregnancy.** (my underlining)

11. **I and First Respondent decided that we should go to the District Commissioner's office to get a marriage certificate and pretend that we were indeed getting married, so that she may continue with her education at the college.** (My underlining)

12. **Indeed on 3rd March 1981 we approached the District Commissioner's office and purported to get married by civil**

rites for the sole purpose of obtaining a marriage certificate. Indeed a marriage by civil rites certificate was issued being certificate 66/1981, a copy of which is attached hereto marked annexure "B". (my underlining)

13. **It was never mine and First Respondent's intention to get married by civil rites because she was fully aware that I had a wife married by Swazi Law and Custom and this would offend the Marriage Act of 1964. Our intention was that First Respondent be my second wife in terms of and in accordance with Swazi Law and Custom.**

15. **As previously pointed out, the marriage by civil rites was nothing but a farce, it was meant to prevent the expulsion of First Respondent on account of her falling pregnant while at college before she was married."** (my underlining)

[3] Phindile Lephlinah Dlamini (Nee Mdziniso) (Phindile in this matter) filed a Confirmatory Affidavit in which she sought to confirm the allegations of the Appellant, most of which is in any event hearsay but it is important to point out that she stated as follows;

"2.2 I was tekaed on 23rd April 1979 and I was smeared with red ochre by Idah Fakudze who is now deceased and that Lomandiya Fakudze witnessed the teka ceremony and was present throughout the said ceremony; (my underlining)

2.3 Applicant paid lobola and I danced the umtsimba and therefore a fully fledged legal wife." (my underlining)

[4] One Dudu Dlamini filed a Supporting Affidavit in terms of which she stated that she was present on 23 April 1979 when Idah Fakudze smeared Phindile with red ochre and as such signifying that Phindile was a wife to the Appellant and that the said Idah Fakudze has since passed away.

[5] It is not apparent from the papers whether the Dudu Dlamini who attested to the Supporting Affidavit is the same person as the Dudu Dlamini (nee Ndzimandze) who is the third Respondent in the Counter-Application of the Respondent.

[6] The Respondent filed an extensive opposing Affidavit in terms of which she raised various points in *limine*, vehemently denied the sequence of events as set out by the Appellant and insisted that her marriage to the Appellant was a perfectly lawful Civil Rites marriage.

[7] She further explained that Phindile was merely a live-in-lover who had lived at the Appellant's household since her parents had passed away when she was very young, that she was not married to the Appellant until after the marriage by Civil Rites and that was borne out by the fact that she did not have her own house at the time and lived in the Appellant's lilawu.

[8] That the allegations relating to the marriage certificate being required by William Pitcher College was totally untrue and that there was no such policy at William Pitcher College. In addition, the Appellant had not been honest with the Court in that she and Appellant already had a child together in 1979 while she was already at William Pitcher College.

[9] That the Marriage Certificate issued on the date of their civil marriage on 3 March 1981 clearly reflected that the Appellant was a bachelor and she was a spinster. Further, that Phindile had a personal interest in the matter and that she, as set out at Paragraph 15.5 of her opposing Affidavit;

"The deponent would do anything to cover Applicant's untruths as they have collectively perpetuated violence against me and my children and are conducting a reign of terror in the home. It would not be surprising

to discover that the deponent is behind all these as she wears the pants in the household".

[10] The Respondent then brought a Counter-Application seeking the following Orders against the Appellant, Phindile, Dudu Dlamini and others;

"1) Declaring 1st respondent's purported customary marriages to 2nd and 3rd respondents bigamous hence null and void.

2) Directing second respondent to cancel and delete any particulars evidencing such marriages of 1st respondent to 2nd and 3rd respondents;

3) Costs of application".

[11] Respondent filed a Founding Affidavit which in essence alleged that the Appellant's subsequent marriages to Phindile and Dudu were accordingly unlawful in terms of the Marriage Act 47 of 1964 and also contravened the provisions of the Births, Marriages and Deaths Registration Act 5 of 1982.

[12] The Appellant, the Respondent and Phindile filed various Opposing and Replying Affidavits which took the matter no further but resulted in the Court

a quo directing that the matter be referred to oral evidence on the pertinent issues.

[13] Appellant and Phindile gave oral evidence and in essence repeated what had been set out in their Affidavits and the Appellant failed to call any further witnesses who could have given extremely crucial evidence. This is dealt with below.

[14] The Respondent gave evidence and denied the allegations made by the Appellant and Phindile and insisted that she had entered into a legal and Civil Rites marriage with the Appellant and as such that the subsequent marriages by the Appellant to Phindile and Dudu were bigamous and unlawful.

[15] The evidence is perfectly summed up in the subsequent Judgment of the Learned Judge Hlophe in the Court *a quo* handed down on 4 May 2018 which resulted in the Application of the Appellant being dismissed and the Counter-Application of the Respondent being granted.

[16] It is against that Judgment which the Appellant has lodged an appeal and as such the matter before us. I need to state here that it is not necessary to set out the grounds of Appeal in any great detail in view of the fact that at the hearing of this matter, Counsel for the Appellant conceded and agreed that

the only issue which this Court needed to determine on was whether the purported customary marriage ceremony between the Appellant and Phindile indeed took place on 23 April 1979 and as such before the Civil Rites marriage to the Respondent on 3 March 1981.

[17] Mr Simelane for the Appellant argued that all the elements of the said alleged customary marriage had been proven by the Appellant as regards the payment of lobola, the smearing of the red ochre and by implication the reporting of the matter to the Umphakatsi.

[18] In addition, despite not being part of the grounds of appeal of the Appellant nor being set out in the Heads of Argument of the Appellant, Mr Simelane relied on what was set out at Page 109 of the Record of Proceedings relating to the seniority of the wives as depicted in seating arrangements at functions and in particular the following exchange between the Respondent and the Judge in the Court *a quo*;

"JUDGE: What would be the sitting arrangement be like as the wives of the applicant

RW1: He would sit in front, then I would be in the middle, but never took note of that as I knew my place...

JUDGE: Who would be the 1st one?

RW1: **It would be LaMdziniso then myself and lastly Landzimandze, at times I would be last, <u>but I did not care of the sitting order</u>"** (my underlining)

[19] Mr Simelane advised the Court that the Appellant, in bringing the Application concerned, was driven to regularise his marriages so that eventually his Estate would result in all of his wives and children being treated fairly and equally.

[20] Mr Mamba, for the Respondent referred the Court, as regards the seating arrangements, as set out at Pages 110 and 111 of the Record;

"RC: **As the court pleases...on the question of the sitting arrangement that His Lordship posed to you Make Mbhamali, was same a product of a certain instruction from your in-laws or it was just convenience or it happened automatically?**

RW1: **My in-laws would direct us as per the sitting arrangements because they are from far and do not know what. I would then keep quiet and not disagree to what they were saying...**

RC: **But you confirm that such arrangements would vary any certain instances?**

RW1: **That is correct...the applicant was once asked as to the order of his wives but he didn't come out clear."**

[21] He further argued that there was no credible evidence before the Court of the alleged 1979 customary marriage, that the William Pitcher College story held no water and that despite the Appellant acknowledging that he had specifically been advised by the District Commissioner about the consequences of a Civil Rites Marriage, he nevertheless went ahead and by his own admission this was dishonest. There was no explanation why the Application was only brought in 2016 and why crucial witnesses had not been called.

[22] As Mr Mamba pointed out the crux of the matter was clearly set out by the Learned Judge in the Court *a quo* at Paragraphs 15, 16 and 17 which bear reproduction as follows:

"[15] **According to the applicant in his oral testimony he first married Mdziniso in 1979 before marrying the First**

Respondent in terms of civil rites. Even as he concluded the civil rites marriage he alleges he knew it was just a pretence and not a real marriage because he had always wanted his affairs to be governed by Swazi Law and Custom. He asserted that he had always looked forward to a polygamous set up. It was put to him that in fact his civil rites marriage to the applicant was the first one and that it preceeded the one he had concluded with Mdziniso. It was put to him that in fact Mdziniso had started staying at his parental homestead before she was married, an act attributed to the fact that she had lost her parents very early in life and that her desperation for a place to stay at had forced her to go and live at the applicant's homestead, particularly after she had given birth to applicant's child. She was in this sense a live in lover who was not married to the applicant at the time of her marriage to him. He denied only that she was unmarried when she stayed at his home. He insisted she was already married at this point.

[16] **It also transpired that the applicant had not been candid when he said the child the First Respondent was pregnant with in 1981 was her first one. It was clarified and accepted**

that the first one between the two of them had been born in 1979. It was therefore put to him that the civil rites marriage was never necessitated by a requirement of a marriage certificate being required from one giving birth out of wedlock as alleged at the William Pitcher College. If this was the case, it was argued the applicant would have obviously concluded the less cumbersome marriage, namely one in terms of Swazi Law and Custom which accommodated polygamy particularly because the applicant himself had not contended such a marriage was not recognized at the said college.

[17] **On what the purpose of the civil rites marriage was, he maintained that it was to secure a marriage certificate for the First Respondent as required by the William Pitcher College where she was a student given that she had fallen pregnant before marriage. He otherwise maintained that the said marriage was a pretence by both of them. Answering a question on whether he was made aware what the requirements of a civil rites marriage were including that one already married in terms thereof could not lawfully marry someone else, he said he was aware of it because it was**

explained to them before they could conclude such a marriage."

[23] It is trite law that for a litigant to succeed in a matter, he has to discharge the onus placed upon him to prove that his version of events is true on a balance of probabilities.

[24] The only evidence led by the Appellant was his own version and that of Phindile who clearly has a significant interest in the matter and as set out above, the Respondent was of the firm view that Phindile was in cahoots with the Appellant relating to the whole issue of the customary marriage. It is in my view glaringly obvious that there is no credible independent evidence that the alleged 1979 customary marriage took place.

[25] Dudu Dlamini attested to two (2) Affidavits. Why was she not called to give the most crucial evidence in person since her allegations in the Affidavits remained untested by cross-examination?

[26] Why was Temandiya Fakudze (the name according to the Appellant in his Affidavit) or Lomandiya Fakudze (the name according to Phindile in her Affidavit), or both of them if they are separate persons, not called to give

evidence in person to confirm that they were allegedly present at the smearing of the red ochre.

[27] The impending customary marriage was purportedly reported to Umphakatsi. Why was a representative not called to confirm that this was the case?

[28] Why was no one called to give evidence of the alleged payment of eleven (11) head of cattle as lobola? To whom was it allegedly paid and when was it allegedly paid?

[29] Why was no evidence led to the effect that it was a requirement of William Pitcher College that any form of marriage certificate was required to be produced by a pregnant person to avoid being removed from the course of study concerned?

[30] Why did the Appellant conveniently not take the Court *a quo* into his confidence in his founding papers that he and the Respondent had already had another child in 1979 whilst she was at William Pitcher College? And finally, why would one wait for thirty (30) odd years to bring an Application if he really believed that the 1981 marriage was a sham?

[31] The Learned Judge in the Court *a quo* had the benefit of seeing the reactions and demeanour of those persons testifying before him and as such I see no reason to differ in any way with what he said at Paragraph 25 of his Judgment as follows;

"From hearing and observing the parties and their witnesses I prefer the evidence of Eunice Mbhamali to that of her husband and Mdziniso. She was to me more credible in what she said than what these two said". (my underlining)

[32] I can do no better than to unreservedly echo the words of the Learned Judge in the Court *a quo* in his Judgment where he stated as follows at Paragraph 26:

"[26] Furthermore I am of the view that of the two, the Applicant is the one who had completely no scruples. He was in his own words prepared to conclude a marriage that was a sham for his subsequent benefit. It is even worse that he entered into the position he did, notwithstanding his having been, in his own words, warned or advised it would be unlawful to conclude such a marriage including the meaning and effect of such a marriage having been explained to him. This

brings the application of the old principle of our law to the effect that *"falsus in uno, falsus in omnibus"* which means that if you tell a *"falsehood once, you should be taken to be one who always tells falsehoods."* I accordingly find that the applicant is not trustworthy."

[33] And further at Paragraph 28 of his Judgment the Learned Judge stated the following;

"[28] There is an even more fundamental reason why the applicant's application cannot succeed. The applicant has informed the court that as at the time he contracted the civil rites marriage, he already knew it was illegal to do so. Clearly when he went on to contract the unlawful marriage in the face of such awareness, he was making his bed on which he should lie. It therefore cannot avail him to now want to extricate himself from a position he deliberately put himself in by dragging the courts thereto."

[34] The Court *a quo* accordingly found that the marriage between the Applicant and the Respondent was concluded prior to the subsequent Customary Law

marriages with Phindile and Dudu and found that accordingly those two subsequent marriages were bigamous.

[35] For the reasons set out above it is not necessary to canvas any other further issues as it was conceded that if this Court comes to the same conclusion as the Court *a quo* that the Appellant has failed to discharge the onus on him to prove his case on the balance of probabilities, his Application must fail and the Counter-Application must succeed.

[36] I consequently find that the Appellant has dismally failed to discharge the said onus and as such his Application must fail and accordingly that the Counter-Application by the Respondent must succeed as was found in the Court *a quo*.

[37] It is necessary to point out, just as the Learned Judge in the Court *a quo* did, that this Court is not required to deal with or decide upon any patrimonial consequences flowing from the outcome of the proceedings as that would be a completely separate issue.

ORDER

1. The appeal is dismissed with costs on the ordinary scale.

2. The Judgment of the Court *a quo* is herewith confirmed.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

S. B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant : B.J. SIMELANE
For the Respondent : S. MAMBA