IN THE SUPREME COURT OF ESWATINI

,JUDGMENT

HELD at MBABANE **Case No. 24/2021**

In the matter between:

Gcinaphi Susan Nxumalo Appellant

And

Fortune Nxumalo First Respondent

Registrar of Births, Marriages and Deaths N.O. Second Respondent

Attorney - General Third Respondent

Neutral Citation: Gcinaphi Susan Nxumalo and Fortune Nxumalo, and Others (24/2021) [2021] SZSC 30 (I 5th November, 2021).

Coram: M.J. Dlamini JA, N.J. Hlophe JA and M.J. Manzini AJA

Heard: 4th October, 2021

Delivered: l 5th November, 2021

Customary marriage: *Divorce - Cancellation of marriage certificate - No decision by the appropriate customary authority- Cancellation cannot be entertained by High Court.*

Civil Practice: *Founding Affidavit - New facts as basis of decision by the Swazi National Court - Cancellation of marriage certificate by the High Court not possible.*

JUDGMENT

M.J. Dlamini JA

Introduction

[I] In this matter, the High Court made the following order.

> "I. The customary marriage between the Applicant and First Respondent is hereby declared to be lawfully terminated as per the order of the ESwatini National Court held at Manzini on the 24th April 2019 presided over by Court President Chief Mfukama Mndzebele under Case No.02/2019.
>
> 2. The 2nd Respondent is hereby ordered and directed to expunge the customary marriage Entry Number 12702 in the Marriage Registrar of Marriages solemnized in the Kingdom ofEswatini on the 19 th April 2008 and duly registered on the 24 th January 20 l 7".

[2] The order of the Eswatini National Court referred to by the learned Judge a quo is contained as an attachment to the Respondent's replying affidavit and reads as follows:

> "CIVIL CASE FILE
>
> **In the Swazi National Court**
>
> **At** Manzini
>
> Case No. 02/2019.

Plaintiff: Fortune Njengebantfu_Nxumalo

Defendant: Gcinaphi Susan Dlamini

Claim: *Plaintiff requests the court to assist him and be granted his wish to cancel his marriage certificate with one Gcinaphi Susan Dlamini.*

Date of filing: 24/04/2019 { *Fees Paid*

Receipt No

Date of hearing: 24/04/2019

Judgment: *Based on evidence led before this court by both parties and their witnesses, this courl lhus recommends thal Plaintiff be granted his wish.*

Clerk of Court ..... **Court President** .. ,.....

[3] The Appellant (then First Respondent), appealed to this Court on the following grounds-

"!. The court *a quo* erred in law and in fact in granting the orders sought in the Notice of Application without the leading of oral evidence where serious and material dispute of facts which could not be resolved on the papers had been clearly established by the appellant (first Respondent court *a quo).*

2. The cou1t *a quo* erred in law and in fact in reaching a conclusion relying on new facts implemented by the 1st Respondent (Applicant in the court *a quo)* in its replying affidavit without affording the Appellant an opportunity to respond to these new allegations.

3. The court *a quo* erred in law and in fact in determining that the conduct of the Appellant constituted adultery in the context of Swazi law and custom so as to warrant a divorce and an order to expunge the customary between the Appellant and 1 st Respondent.

4. The court *a quo* erred in law and in fact in upholding and relying on the findings of the Eswatini National Court of the 24th April 2021 when same was sought when the matter was already */is pendens* in the court *a quo.* In essence this is to say the Eswatini National Court was *ipso facto* barred and or had no jurisdiction to deal or determine the dispute between the parties while it was pending in the court *a quo* without leave of the court *a quo.* "

[4] This matter was commenced by notice of application dated 3ś1 t January 2017. In that application, the 1st Respondent (as Applicant) sought a declaration that his customary marriage with the Appellant had been lawfully terminated and an order directing 2nd Respondent to expunge from the Marriage Register the registration of the said marriage.

(5] In his founding affidavit, 15[1] Respondent stated that he and Appellant were married by customary rite in 2008; they have one minor child and by 2010 the marriage had "irretrievably broken clown" due to Appellant's "continued adulterous conduct". He mentioned two males with whom Appellant was allegedly in adulterous relationship and that the Appellant had even admitted to be in "love and /or intimate relationship" with one of the men named. In light of the conclusion I have reached in this matter, I have not found it necessary to go into the merit of whether the marriage in issue had been lawfully ended to justify the orders granted.

General analysis

[6] From the outset the Court considered whether the court *a quo* had correctly directed itself in basing its decision on the 'order' of the Swazi National Court dated 24th April 2019. Mr. Manzini for the Appellant when asked by the Court whether there was any order or pronouncement of a court or authority of appropriate jurisdiction dissolving the

customary marriage responded in the negative. Reading through the 'order' or 'verdict' referred to by the learned Judge *a quo* it was clear that it could not be a judgment or order dissolving the customary marriage. Without such a judgment the matter ought not to have come before the High Court for the purpose of expunging from the Register or cancelling the said marriage certificate. Mr. Jele for the 1st Respondent tried hard but could not overcome the hurdle.

[7] It is a customary court or council that has authority to hear and dissolve a customary marriage. The parties' Chiefs Council at Buyandeni which also doubles as a traditional court in customary practice could have heard and decided the matter, with appeal to the [1]Swazi National Court in the event of a party not being satisfied with the decision of the 'Chiefs Court'. That did not happen. lnstc:ad the Swazi National Court was used as a court of first instance. That is not a problem. A party not happy with the decision of that court could appeal to the Swazi Court of Appeal. Whether the decision of the Swazi National Court being in the fonn of a recommendation was appealable need not be determined here.

[8] All that happened was that an earlier deliberation of the dispute between the parties by the families of the parties was 'reported' to the Chiefs Council. It appears that Council did not hear and decide the matter between the parties. The representative of the I st Respondent is stated as having "reported that the Nxumalo and Dlamini families had met at the Nxumalo homestead to deliberate on /a-Dlamini's marital behavior which they said could not be tolerated any more". What should then have happened is that the Council should have called the parties and representatives of their families, heard the dispute and come to a decision as to the continued subsistence of the marriage. That apparently did not happen. That is probably what led the I st Respondent to take the matter to the Swazi
National Court.

[9] This Court faced with what it considered to be a jurisdictional issue had difficulty coming to the assistance of the 1st Respondent in his quest for the cancellation of the

[1] **A siSwati marriage is as much a marriage of families as it is of the man and woman.**

marriage certificate.. It is a marriage (a Swazi customary marriage) we are dealing with, and not just a short-term, informal contract. Marriage is the cornerstone of any civil society as a defined community. If the community is to be sound and strong the family base and cornerstone should not be shaken and dislodged on doubtful grounds. When we started Law School, it was the general understanding that the Swazi customary marriage was virtually indissoluble. When the marriage became unsustainable, the husband would set up a home nearby and there his wife and her children would stay; there the husband would maintain the (adulterous) wife and the children. That is, (or was it?), the Swati way oflife. Unfortunately, with time, that is gradually receding and fading into the dim past. Interestingly, al page 45 of the Record, the Is t Respondent stated: "/ *tried to cancel or nullify the marriage certificate but she refused, saying she is a fully wedded bride through Swazi law and custom to the Nxumalo family".*

[I OJ From paragraph 8 of its judgment the court *a quo* dealt with the different stages *andfora* the matter had taken since institution. In para [14] the learned Judge stated:

> "[14] It is common cause that after the parties testified before the National Court President ChiefMfukama Mndzebele and Assessors the court reached the ***verdict*** as contained in the Record of Proceedings of the National Court at pages 50-51 of the Boole
>
> > 'I. Both parties admitted before this court that they are lawfully married through Swazi Law and Custom.
> >
> > 2. All procedures were followed when the two got married from kubika endlunkhulu, to kuteka, to lobola (tingege) to kutsimba.
> >
> > 4. Culturally only two things send a wife back home, kuphinga ne (and) kutsakatsa.
> >
> > 5. Defendant admitted to her husband that he (sic) had committed adultery, even before their families and before this court, with one Mfanafuthi Mabuza engaging in sexual intercourse,

> 13. Based on all the above evidence led before this Court, Plaintiff is I thus ***recommended*** by this court that he be granted his prayer as per culture.
>
> 14. The Court critically looked into the issue and saw it right that Plaintiff be granted his wish also looking at the bad threatening repercussions this marriage can have on Plaintiff; *'kuyingoti, umfati loyingwadla angakubulalisa* '.

[11] On the basis of the foregoing, <lid the National Court find that Appellant has committed adultery and the marriage be pronounced dissolved? In the founding affidavit nowhere is there evidence that Appellant was found committing adultery or in a situation so compromising that adultery may be reasonably inferred to have occurred, Adultery has been defined as *'a voluntary sexual intercourse between a married person and a person who is not their husband or wife* '.[2] Does the Appellant's mere admission to have committed adultery, without any other evidence, suffice to ground a divorce under Swazi law and custom?

[12] In para [12] of the judgment *a quo,* it is stated: "The First Respondent herself testified under oath. She confessed that she committed adultery in 2015 with Mabuza and further had another adulterous relationship with one Ntshangase when her husband was away in Cape Town, RSA on a business trip.. ," Surely, if as 1st Respondent averred, the Appellant had engaged in 'numerous' adulterous relationships she should have been caught red-handed or sufficiently so at least on one such illicit escapades. But no, there is no such other evidence on record. If Respondent confessed, did she really understand the meaning and effect of that confession? Why confess to adultery but resist separation? Curiously, at page 48, the Respondent, on oath, said: "In 2015, it's true I committed adultery as my husband has said but we apologistc<l, nw and my family. On the second

[2] Concise Oxford English Dictionary

time (instance), Ntshangase offered to make me a small celebration but I refused. My husband left for a trip to South Africa and I asked Ntshangase my boss to do that celebration for me. When he called me I didn't pick his calls because I was with one, Ntshangase. He only just kissed me on the cheek. I took him to Ntshangase's place although we didn't enter the premises". This is rather surprising corning from the Appellant. It is difficult to rationalise.

[13] With respect to the Ntshangase fellow mentioned in the foregoing paragraph, in paras l 9 and 20 of the founding affidavit, it is alleged (by the I st Respondent):

> "19. We resided together as husband and wife until February 2015 when I discovered that the First Respondent was in an adulterous relationship with one Bongani Ntsahangase, an adult male... 20. The First Respondent
> admitted to the adultery with Bongani Ntshangase when l questioned her".

[14] In para [5] of his judgment, the learned Judge *a quo* wrote:"... Further she also confessed to having an extra-marital relationship with a certain Ntshangase and at some point in time in the company of the said Ntshangase during the night they kissed, when her husband was in Cape Town on a business trip...." Paragraph 7 of the so-called Record of Proceedings of the National Court that the Judge *a quo* referred to, reads: "Further evidence was revealed on a second instance, defendant just kissed Ntshangase at night and willingly, and based on her past behaviour it is only just that Plaintiff think otherwise".

[15] But of serious concern in these proceedings is the source and authenticity of this document generously referred to by the court *a quo.* In the Record of Proceedings filed in this Court, the document purportedly recording the proceedings before the Swazi National Court begins on page 44. It has no heading of its own and appears by association and proximity to be an attachment to 'FN3'. It begins thus:

"I am Fortune Njengebantfu Nxumalo, E/M/A 42 years of Matsapha, di Ndlaluhlaza, Dully sworn statement.

"We got married in 2008 in the form of Swazi law and custom and settled together as husband and wife ... "

[16] The document proceeds from page 1 to page 11 where paras 13 and 14 are found. In the judgment of the court *a quo* the abridged excerpt is found on pages 7-9. It is a reproduction of the document apparently accompanying the 'decision' of the Swazi National Court (i.e. FN3) as already set out herein above. It is relatively well-written and the usual mistakes, gaps and 'inaudibles' you find in a transcript in the superior courts, are not found here. On its face, it does not appear to be a transcript. Is it a true record of the court proceedings? There is no certification by a transcriber that the transcription is a cotTect record. I have some reservation as to the authenticity of the Record and or the regularity thereof.

[17] It indeed, the document was part of the proceedings before the National Court its date would be 24th April 2019. How could that document be used in support of proceedings begun in January 2017, without any explanation? The court *a quo* did not address this aspect. On this appeal, it is challenged as irregular. That is, the proceedings before the Swazi National Court were irregular as the application was already pending before the High Court. While the answering affidavit was liled on 6th April 2017, the replying affidavit containing the 'decision' of the National Court was filed in August 2019, some twenty-four months later. The 'decision' of the Swazi National Court terminating the marriage between the parties was supposed to be the basis and *sine qua non* of the nullification of the marriage certificate by the High Court; it should have been contained in the founding affidavit. The proceeding before the High Court was irregular and I can see no basis for its redemption in the absence of any explanation.

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[18] Paragraph 2 of the judgment *a quo* reads: "The Founding Affidavit of the Applicant and annexures hereto is used in support of this application". There does not appear to be any condonation for the late filing of the replying affidavit. In para [6] of the judgment *a aqua* it reads: "It is common cause that the two families deliberated on this matter on about two occasions.... However, due to the parties not fully cooperating in fulfilling the Siswati customary requirements, the Applicant launched proceedings before the Eswatini National Court in Manzini for the dissolution of the said marriage between the parties". And in para [7], the judgment refers to the Applicant's "desperate endeavour to have the marriage annulled" and says that the "Indvuna of Buyandeni, Thunzini Royal Kraal, Magwaza Gumedze ... testified before the National Court in Manzini on the 24th April 2019". But the proceedings before the Swazi National Court should have preceded the application to the High Court. That must have been obvious to all concerned.

[19] Assuming that the Appellant did commit adultery - even though we do not know where and when the said adultery was committed other than her alleged admission - the critical question is whether the Swazi National Court in Manzini did dissolve the marriage between the parties. Allied to and connected with that question is: if the National Court in Manzini did dissolve the marriage between the parties on the 24th April 2019 would that dissolution legitimately or procedurally stand in support of the application launched in January 2017? The matter is not just one of procedure, but is essentially one ofjurisdiction.

[20) In my reading and interpretation of the alleged 'decision' of the Swazi National Court of 24th April 2019, I could not conclude that that was a judgment dissolving the marriage between the parties for two reasons. In the first place, the matter before the court encapsulated under Claim is described as a *request* for the court to assist the Plaintiff by

granting him his wish to "cancel his marriage certificate" with the Appellant. In my opinion the *Claim* should have been stated as a divorce or dissolution of the marriage. Before ordering the cancellation of any marriage certificate the High Court is enjoined to consider and determine if the marriage had been duly dissolved by the authority of

appropriate jurisdiction under customary law. In other words, the parties cannot just agree to 'divorce' without any duly determined fault under customary law. This would be so regardless whether the application is opposed or not. The issue before this Court, as I see it, is not whether the customary marriage between the parties was correctly terminated but whether the marriage was terminated at all. Even if! be wrong in doubting the evidence of the alleged adultery or the 'verdict' of the Swazi National Court, I have no doubt of the incompetence of the evidence of the 'new facts'. The second ground for rejecting the 'decision' as a judgment dissolving the marriage between the parties is that the Judgment (on the Form used) is stated as a 'recommendation'.

Conclusion

[21) The law and practice require that there be a final judgment determining the customary marriage terminated to be recognised by the High Court before the order to expunge the registration of the marriage certificate from the Register of Marriages under the administrative custody of the 2nd Respondent is granted. It is not enough that there be adultery (or witchcraft): what *is* required is a lawful decision dissolving the marriage. I was unable to find such a decision in this matter. Importantly, however, as I have intimated above, I agree with the second and fourth grounds of appeal that the Court a quo erred in relying on 'new facts' contained in the replying affidavit. As it is often said the matter stands or falls on the founding affidavit. There was no explanation why the application was launched without the 'new facts' and no opportunity was permitted to Appellant to provide a supplementary answer, if any. In the result the application was without cause.

[22) I accordingly make the following order -

1. The appeal is allowed.
2. The order of the High Court is set aside and substituted as follows:

"(a) The application is hereby dismissed;

(b) Each party to pay their own costs".

I Agree

I Agree M.J. Manzini AJA

For Appellant N.S. Manzini

For I st Respondent N.D. Jele

For 2nd and 3rd Respondents: No appearance