CIV. T. NO. 705/88

In the Ex Parte Application of:

MASHWELE JOHN DLAMINI 1st Applicant

and

EMELINE DUDUZILE DLAMINI 2nd Applicant (Born Msibi)

CORAM : F. X. RODNEY

FDR APPLICANTS : VILAKATI

JUDGMENT

21/4/89

Rooney,_J.

In the Notice of Motion the applicants seek the following relief -

1. That the purported marriage between the First applicant and the second applicant be and is hereby declared null and void.
2. Authorising the Registrar of Births, Marriages and Deaths to expunge the said marriage from his records.

On the 8th March, 1965, the applicants were married by the Regional Secretary at Manzini pursuant to the Marriage Act, 1965. The brodegroom described himself as single. However, on the 12th October, 1977 he had married Sibongile Ntshangase by Swazi law and custom. The first applicant deposes that his former marriage still subsists .

Section 7 of the Marriage Act reads -
"No person already 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 lights and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy ....."

The first applicant explains the circumstances In which the bigamy was committed. The second applicant was at the time a student teacher who was pregnant by the first applicant. The civil marriage was employed as a device to avoid her expulsion from the teachers training college. Full particulars of these circumstances have not been provided, but, I note that the second applicant gave birth to three children between 1980 and 1984,of whom the first applicant acknowledges his parentity.

It is the stated intention of the parties that following the decree now sought in this Court, they will marry under Swazi law and custom.

The purported marriage of the applicants is void ab initio. The present proceedings are of xx declaratory nature in so far as the decree of nullity is concerned. (see Ex parte Oxton 1948 (1) S.A. 1011 per Searle A.J= at 1017)=

The first applicant is prima facie guilty of the crime of bigamy and now seeks to undo his own unlawful

act. If the second applicant was aware of the existence of the previous marriage under Swazi law and custom she is an accessory to the crime. It might be argued that the parties are estopped from seeking a

declaratory order on the grounds that they do not come to this Court with clean hands. The point has not been raised in these proceedings and I hesitate to state a definitive view. However, there is some authority for the opinion that an estoppel cannot arise. In Hayward v. Hayward 1961 (1) ALL E.R. 236the Probate Divorce and Admirality Division held that no estoppel existed. Philimore J. said at 241

"It seems to me that it would be contrary to all principle if a ceremony which is by definition null and void could be converted into something valid and binding and capable of confering status by the act or inaction of a party to if. It would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth, namely that a marriage is bigamous, and so correcting the status of the parties to it and of their dependents merely because one or both of them has chosen to assert its or validity or because one of them failed to dispute or has concurred in the assertion of its validity by the other

This court deals not merely with disputes between parties but with status. Marriage is not an ordinary contract - it is an intitution which 'confers a status on the parties to it, and upon the children that issue from it, 'as LORD PENZANEE pointed out in Mordaunt v. Mordaunt (19). It is an old maxim that estoppels are odious because they tend to shut out the truth (15 HALSBURY'S LAWS (3rd Edn) 203 para 382),and it is well settled that they cannot override the law of the land (PHIPSOIM ON EVIDENCE 9th Edn,), p 705 and cases cited there). If the law declares a bigamous marriage void and criminal, is this court nevertheless to treat it as valid and refuse to declare the truth by reason of the conduct, however unmeritorious, of one or both of the parties to it?"

In Vlook v. Vlook 1953 (1) S.A. 485, Dowling J. granted an application by a husband who had entered into a bigamous marriage with the respondent and who had been convicted of bigamy for an order a nulling such marriage. Unfortunately Dowling J. did not supply his reasons and this lessens the authorative value of the decision,

In Ex parte Ginindza 1979-81 S.L.R. 361, Nathan J. declared a marriage null and void in circumstances similar to those In the present case. The husband was married under Swazi law and custom and he subsequently married the second applicant under the Marriage Act. The purpose of the husband was to avoid the possibility of being prosecuted for bigamy. This Court made the declaration that the civil marriage was null and void. The question of estoppel, was not raisedo I must express doubt as to whether the applicant could have successfully defended a charge of bigamy by relying upon the order made in this Court.

Bigamy is committed when the purported marriage is contracted. It is the actus reus. The subsequent declaration by the High Court did not absolve the applicant from its consequences. If it did anything, it confirmed the bigamous charactor of the void marriage and thus the guilt of the applicant.

I see no objection to granting to the applicants the first claim for relief. The second claim affords difficulty., It was granted to the applicant in Vlook v. Vlook (Supra). Counsel submitted that it would not be in the interests of the State to allow a public

register to be inaccurate™ Dowling J. appears to have accepted this proposition without first

examining it.

A marriage must be registered under Part v of the Births, Marriages and Deaths Registration Act 1927. The Act does not provide for the alteration of entries in any marriage register. In the regulations made under tha Act, provision is made under 13 (2) and (3) for the correction of palpable errors and omissions,. No other authority to correct errors can be found in the statute,,

The accurate recording of births, marriages and deaths is important not only to the individuals concerned, but, to society as a whole. The register contains record of historical events and the passage of the generations. In the case of a marriage the record confirms that the event took place, but, is not concerned with the validity or otherwise of the marriage so recorded.

It is submitted that this Court has an inherent power to authorize the registrar of births, marriages and Deaths to expunge the bigamous marriage from the records. No auth ority has been cited to me and I can find none,, In certain South African jurisdictions it has been held that a superior court has authority to correct errors in the registry. For instance, in Ex parte Whitefield 1911 T.B.D. 40 it was held that the court had jurisdiction to authorize the Registrar-General to amend an error in the name of a contracting party which arose due to a misunderstanding by the marriage officer. Curlewis J, referred to a previous decision in the Cape Colony (Kitley V. Colonial Secretary 17 C,T.R. 113) when the word "widow" was substituted for the word "spinster" in the marriage register. Other examples are to be found in Ex parte Peach 19 25 T.P.D. 692, ex parte Groth 1927 W.L.D. 303 and Ex parte Lewis 1927 W.L.D. 192.

In ex parte Finkv 1930 C.P.D. 17 an application to correct an error was refused on the grounds that this was a matter for regulation and not for intervention by the Court.

(Supra) Apart therefore from the case of Vlook v. Vlook/I know of no case in which an order similar to that sought in these proceedings has been granted. In the interesting case of Dinuzulu v. Attorney-General 1958 (3). ALL E.R. 555 the plaintiff claimed a mandamus against the registrar-General in England directing him to correct or erase the entry in the register of marriages relating to a bigamous marriage. Mandamus was refused because the entry of marriage in the register was not made ultra vires, as the word "marriage" in S. 23 of the Marriage Act 1836 extended to a ceremony of marriage although the marriage was void, and the power under the Act to correct entries in the register did not enable it to be expunged or a note to be made to it that the marriage was void.

There is nothing in either the Marriage Act 1964 of this country or in the Births, Marriages and Deaths Act which makes the position different from that obtaining in England. The word "marriage" as defined in the latter statute "means a civil or a marriage entered into in accordance with Swazi law and custom". The obligation to register such marriages under part V of the Act exists, irrespective of the validity of such marriages. It is the ceremony that must be entered upon the records for the practical reason that if the marriage Officer was aware of the impediment he would not be expected to proceed with the ceremony.

The bigamous marriage of the applicants did atake place and it is so recorded. I am not persuaded that this Court has any power inherent or otherwise to make an order expunging that marriage from

the record.

In the result, I make the declaration that the purported marriage contracted between the applicants on

the 8th March, 1985 is null and void. I dismiss the application that 1 direct the Registrar to expunge it from the record

F.X. ROONEY

JUDGE