IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.722/14

In the matter between:

SARAH B. DLAMINI		**Applicant**
AND		
MARTHA NOKUTHULA MAKHANYA	**1st**	**Respondent**
JENNETH THOLAKELE SIHLONGONYANE	**2nd**	**Respondent**
CECELIA GCINAPHI MAKHANYA	**3rd**	**Respondent**
REGISTRAR OF BIRTHS MARRIAGES & DEATH	**4th**	**Respondent**
MASTER OF THE HIGH COURT	**5th**	**Respondent**
THE ATTORNEY GENERAL	**6th**	**Respondent**
THEMBA DLAMINI	**7th**	**Respondent**
ISAAC JIVA DLAMINI N.O.	**8th**	**Respondent**

Neutral citation: ***Sarah B. Dlamini v Martha Nokuthula Makhanya &7 Others (722/14 [2016] SZHC 112(8th July 2016)***

Coram: **M. Dlamini J**

Heard: **5th July, 2016**

Delivered: **8th July 2016**

- *dispute of facts on motion proceedings – Plascon-Evans Rule – referring matter to trial will not shift equilibrium – marriage regime – speculation or failure to institute divorce or report bigamy not proof that party was not married in terms of civil rites – children born of bigamous relationship not illegitimate* -

Summary: The applicant seeks for a declaratory order against first, second and third respondents. She contends that prior to deceased marrying the said respondent in terms of Swazi law and custom, he had contracted a civil rites' marriage with her. The first, second and ninth respondents are ferociously contesting the application.

Issue

[1] On the cumulative reading of the pleadings before me, the issue for determination is whether the deceased did contract a civil rites' marriage with the applicant. The main question for determination herein is whether the applicant was married to the deceased in terms of the civil rites. If the answer is yes, then what are the ramifications on the subsequent marriages in terms of the law?

Point in limine

[2] The respondents have raised a point of law which is seriously opposed. They submit that the matter is infested with serious disputes of facts which can only be resolved on oral evidence.

Legal principle on point of law

[3] The *classicus* case of **Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd (53/84) [1984] ZASCA 51: [1984] (2) All SA 366 A [1984] (3) SA 623; [1984] (3) SA 620 (21 May 1984**) which led to the **Plascon-Evans Rule** is very apposite to the issue at hand. The court cited **de Villiers JP** and **Rosenon J** in **Stellenbosch Farmers Winery (Pty) Ltd v Stellenbosch Farmers Winery (Pty) Ltd 1957 (4) SA 234** at paragraph J as follows:

> *"..... where there is a dispute as to the facts, final interdict should only be granted in the notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ...**Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.**"* (my emphasis)

[4] Sometimes the respondent may deny a fact alleged by the applicant. In such instance, the court is guided:

i) by the question of whether such denial raises "*a real, genuine or bona fide dispute of fact*", as it was so clarified in **Room Hire Co. (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd 1949 (3) S.A. 1155 at 1163-5**; or

ii) the court may elect to call the deponent to the respondents' affidavit for cross examination provided an application by the respondent has been made;

iii) In deciding the application to call for cross examination, the court may examine the denials or allegations by respondents with a view to ascertaining whether they are not;

a) *"far-fetched; or*
b) *clearly untenable that the court may be justified in rejecting them."* **Botha AJA** in Associated **South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd And Andere 1982 (3) SA 893.**

iv) The court may consider the application by inquiring as to whether referring the matter to trial will shift the equilibrium.

Determination

[5] I have carefully read the founding affidavit and more particularly the answering affidavits filed by the first, second and ninth respondents (respondents) who elected to oppose the applicant's application. It is my considered view that the respondents base their opposition on two grounds I intend to fully demonstrate.

[6] Firstly, the respondents dispute that the applicant was ever married to the deceased in terms of the common law regime. They contend that applicant and deceased married each other under Swazi law and custom as can be seen from the following:[1]

[1] see page 27 paragraph 4 and page 33 paragraph 20 of the applicant's book of pleadings

> "*4. According to my knowledge and belief, the applicant was married to the deceased in terms of Swazi law and custom.*" (as asserted by first respondent).

> "*20. According to the best of my knowledge and belief, she was married to the deceased according to Swazi law and custom as well.*" (by second respondent)

[7] Second respondent similarly avers that deceased could not have contracted a marriage in terms of the civil rites as he demonstrated hatred of such marriage and further at a meeting held in his lawyers' office over the question whether or not he had married, applicant in terms of civil rites, deceased denied the same.[2] She then states at paragraph 3 page 46:

> "*I am only aware that applicant was married in terms of Swazi law and custom*."

[8] There is another affidavit filed in this matter. It is titled: "*opposing affidavit*" by one Linah Loziga Magagula (born Dlamini). The basis for Linah to file this affidavit in this manner is not clear because she is not cited as a party to the proceedings. However, second respondent did refer to her in her answering affidavit. I will assume that this opposing affidavit was intended to be a confirmatory affidavit although it is not so couched in its body. I will nonetheless consider it as applicant did not object to it. She too attests that applicant was married in terms of Swazi law and customs.[3]She repeats first and second respondents' attestation in support of the view that applicant and deceased married under Swazi law and custom.

<u>Eighth respondent</u>

[2] see page 43 paragraphs 2.8 and 2.8.1)
[3] As per her paragraph 4 at page 51

[9] Eighth respondent applied to join issue. His application was granted by consent of the parties. He is described as an executor following a will executed by deceased. Like first, second respondents and Linah, he asserts that applicant was married in terms of Swazi law and custom. The reason advanced are that applicant never contended during the lifetime of deceased that she was married in terms of civil rites. Applicant also did not challenge deceased for marrying first, second and third respondents.

[10] I now turn to the second ground for opposing applicant's application as contended by the respondents. First respondent contends:[4]

> *"Besides accepting me, the applicant condoned the deceased's action of taking more wives and this is evidenced by the fact that she never instituted divorce proceedings."*

[11] Second respondent similarly attest:[5]

> "*Applicant did not issue legal proceedings for divorce throughout the lifetime of deceased. If indeed the civil rites marriage lasted for 53 years and Applicant concealed it therefore the conclusion that Applicant embraced and accepted polygamy is an irresistible conclusion. She effectively condoned what deceased did in marrying the three wives and having children therefrom.*" (my emphasis)

[12] She repeats at paragraph 3.7 page 48:

> "*I deny the contents of this paragraph, and aver that Applicant condoned the relationships and had embraced polygamy as a way of life in the Dlamini household*."

[4] See page 32 paragraph 17 of *fn*[1]
[5] See page 45 paragraph 2.10.6 of *fn*[1]

[13] The depositions highlighted above show that applicant condoned deceased's breach. What was this breach? It was a breach in terms of the contract that applicant intends to uphold *viz.* the civil marriage. Effectively respondents are saying there was a civil rite marriage and applicant condoned deceased's action of breaching it by concluding marriages in terms of Swazi law and custom. I say this because respondent would not argue the presence of condonation in the absence of any admission to the existence of the civil rights marriage. Condonation presupposes the existence of a contract and *in casu*, it is the civil rite marriage.

[14] I have already pointed out that the only factual finding that the court needs to establish in this matter is whether the applicant was married to the deceased in terms of civil rites. The rest turn on the position of the law. Having demonstrated that the respondents themselves in their own answering affidavits admit that applicant was married under civil rites, there is nothing that is disputed as a fact. This means there is no real and *bona fide* dispute of fact and therefore the matter should not be referred to oral evidence. In the words of **Plascon-Evans** Rule, the equilibrium shall not be shifted by referring the matter to trial.

The merits

Did the applicant contract a common law regime marriage?

[15] The applicant asserts that she was married to the deceased Richard Themba Dlamini in terms of common law marriage on 5th August 1960. The certificate of marriage is attached to her founding affidavit. I have already highlighted the answers by respondents to the applicant's sworn statement.

[16] The respondents have taken two views. They assert that applicant was married to deceased in accordance with Swazi law and custom. They also attest to applicant's condoning deceased action thereby effectively admitting the existence of a civil rites' marriage. In other words, they are saying the marriage is non-existent and at the same time saying it is existing. These two grounds are opposite to each other. They are mutually destructive. They cannot hold. It is for this reason that we say in law a party cannot approbate and reprobate at the same time. In the language of Justinian "*ambigua responnio contra proferetem est accipienda*" (an ambiguous answer is to be taken against him who offers it). For this reason alone respondents' submissions stand to fall.

[18] Second respondent pointed out that at one time deceased was asked by his attorneys, now my brother, the Justice of this court, as "*to whether or not the deceased had married applicant by civil rites' and deceased denied this.*" By reason that this question was directed to deceased on the marriage regime, and not just about any of the wives but specifically applicant' type of marriage, it appears to me that this matter was a bone of contention even during the lifetime of the deceased. The affidavit filed by my brother **Mlangeni J** who was then deceased's attorney, confirms this as he deposed:[6]

> "*One of the many instructions I had from him was to draft a will.* ***At this stage I had become aware that there was a dispute regarding the marital regime of his first marriage.*** *In one of the consultations we had at his home at Mahlanya, I specifically asked him whether his first marriage was by Civil Rites or in terms of Swazi Law and Custom. He unequivocally stated that his first marriage was in terms of Swazi Law and Custom. His first wife is the Applicant*."(my emphasis)

[6] See page 58 paragraph 3 of *fn*[1]

[19] The averment that applicant's marriage regime was never an issue during the lifetime of deceased flies on the face of respondents in view of the above deposition. It is not clear therefore why respondents, together with Linah say that they learnt for the first time that applicant was married to deceased under civil rites' marriage when they were in the offices of fifth respondent. If ever they did, it is then evidence that they did not know the deceased very well which is contrary to what they firmly attested to in their affidavits. Now that the applicant has produced evidence of her marriage *viz.* marriage certificate, the matter which commenced during the lifetime of deceased stands to rest.

Condonation

[20] Having found that applicant was married under common law, the question is not whether applicant did condone the deceased's subsequent action of marrying the first, second and third respondents but whether the action of deceased could be condoned in terms of the law.

Marriage regime

[21] The applicant asserts that she was married in terms the Marriage Proclamation under Chapter 133 of the Laws of Swaziland. Section 10 which stipulates:

> *"10. Any person who is married, whether such marriage took place within or without the Territory, and who enters into a second marriage before the dissolution of the first, shall be punished with imprisonment not exceeding three years."*

[22] Subsequent to chapter 133 section 10, in 1964 the legislature in Swaziland enacted the Marriage Act No.47 of 1964. Chapter 133 was therefore no longer

operative in the Kingdom. This new piece of legislation carried similar provisions as the Marriage Proclamation, Chapter 133.

[23] Swaziland recognises two forms of marriage regimes, namely civil rites' marriage and the marriage in terms of Swazi law and custom. This position is inferred from section 7 of the Marriage Act No.47/1964 (the Act) which reads:

"Person already married.

7. (1) No person already legally married may marry in term 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:

Provided that nothing contained in this section shall prevent parties married in accordance with Swazi law and custom or other rites from re-marrying one another in terms of this Act.

(2) No person married in terms of this Act shall, during the subsistence of the marriage, purport to contract a legally recognized ceremony of marriage with any person other than the lawful spouse of the first-named person.

(3) Any person who contravenes sub-section (2) shall be deemed to have committed the offence of bigamy."

[24] Section 7's promulgation is to the effect that parties intending to contract a marriage may, among themselves marry under both regimes. The section prohibits a party who is married under the civil rites regime to marry a third party under any of the regimes. It however allows a man married under Swazi law and custom to marry another woman in terms of the same regime. In other words, the Act recognises that our jurisdiction is patriarchal in terms of Swazi law and custom marriage only as it provides for polygamy.

[25] Turning to the case *in casu*, Linah Loziga Magagula (Linah) attested that applicant was married to the deceased in terms of Swazi law and custom where applicant was smeared with red ochre during her traditional wedding. First, second and eighth respondents attested similarly. However, a material averment is lacking and that is the date of the said marriage. This date would assist the court in determining whether the applicant's together with the first, second and third respondents' alleged Swazi law and custom were concluded prior to the 5thAugust, 1960. If this was the case, it would have meant that the marriage of the 5th August 1960 to the applicant would have been invalid in terms of section 7 of the Act. However, this is not the evidence before me. I must pose to mention though that from reading the entire answering affidavit, the respondents could not testify of the date of the said Swazi law and customs marriage by applicant because the basis upon which they assert that applicant was married under customary law is mere speculation. For instance, they say that if applicant was married under common law, she would have filed for divorce and would not have accepted their wedding gifts or would have absented herself from their own traditional weddings and etcetera.

[26] I therefore accept that applicant was married to the deceased on 5th August 1960 as supported by the certificate of marriage filed herein. I note that eighth respondent has alluded to the certificate as "*fraudulent*". Eighth respondent's assertion stands to be rejected for a number of reasons. Firstly, the reference to fraudulent is not asserted with precision but so stated in passing as he puts it as follows:

> "*I wish to highlight that it is applicant that caused the confusion by submitting a fraudulent civil rites' marriage certificate at the next of kin*."

[27] Further, no further averments are stated which support such bold allegation. Eighth respondent fails to shed light on how, where, when and by whom was the certificate subjected to fraud. Eighth respondent's averments in this regard stands to fall.

[28] Second respondent alleged some irregularities on the face of the certificate. For instance, that the certificate does not reflect the full name of the marriage officer except to state that it was **S. Papin**; is without designation order; is silent as regards the law governing the proprietary consequences; and it fails to show the order of marriage.

[29] It is my considered view that the discrepancies, if at all, pointed out by the second respondent, do not vitiate the marriage that took place on the 5th August 1960. Applicant's application is further fortified by annexure at page 14[7] which is a certificate copy of entries to the Register of Marriage. This certificate copy is evidence that on 30th September 1993, a date *ex facie* appearing on it, the civil rites' marriage between applicant and deceased was registered in the register held by Government for that purpose. At any rate, applicant secured an affidavit from the Priest confirming applicant's marriage in terms of the civil rites.

[30] The averment that applicant ought to have protested, filed for divorce or laid a charge of bigamy against the deceased also has no bearing on the fact that applicant contracted a civil rites' marriage with the deceased. Although not so expressly stated, it appears to me that the respondents are raising estoppel. **Ebersohn J.** in **Swaziland Sugar Association vs Eis Marketing (Pty) Ltd (1974/04) [2006] SZHC 148** at para 25 pointed out as follows:

[7] Of the book of pleadings

> *"The person who pleads estoppel has to establish that he acted on the faith of a representation made to him by the represent or and that, in doing so, he altered his position to his detriment."*

[32] Addressing a similar point **F. X. Rooney J**[8] as he then was, having found that the subsequent marriage was null and void and the stated:

> *"The first applicant is prima facie guilty of the crime of bigamy and now seeks to undo his own unlawful act."*

[33] The learned Judge then cited the English case of **Hayward**[9] as follows:

> *"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 conferring status by the act or inaction of a party to it.** It would surely be remarkable as a proposition of law if this court were to be e 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.**"* (my emphasis)

[34] **Simelane v Simelane and Others (NVLL) [1997] SZHC 69 (06 June 1997**) **Dunn J** had a share on this subject as he articulated:

> *"Once it is accepted that a marriage that is null and void ab initio is a non existent marriage, which does not require a formal act of annulment to deprive it of effect, it is difficult to see why the guilty party should be precluded from having this proclaimed by the court. On the contrary, it clearly in the public interest that the question whether or not there is a marriage should be settled once for all, never mind at whose instance. Status is, by its very nature, indivisible: there is a marriage or there is not. The application of estoppels to a void marriage would lead to the*

[8] Dlamini v Dlamini (NVLL) [1989] SZHC 15 (21 April 1989)
[9] Hayward v Hayward 1961 (1) ALL ER 236 at 241

absurd result that a marriage could be both existent and non-existent: existent as far as those are concerned who are estopped from asserting its validity; non-existent as against the world. I am, with respect, in agreement with the views expressed by the learned author.

There is further, the rule referred to by Mr. Khumalo that <u>public policy does not permit estoppels to operate in circumstances where its application would produce a result not permitted by law.</u> See Rabie, THE SOUTH AFRICAN LAW OF ESTOPPEL p105. The defence of estoppels is not open to the 1st respondent in this case." (my emphasis)

[35] In the final analysis, the marriages between the deceased, first, second and third respondents are null and void *ab initio* by reason that they are bigamous in terms of section 7 of the Act. It would be remise of me not to point out the *arbiter* words of **Dunn J** in **Simelane** (*supra*) at page 4:

"The rule that a marriage which is null and void ab initio is without legal effect and cannot be ratified in subject to a number of exceptions, one of these being the case of putative marriage. If the requirement for such a marriage are met, certain of the effects of a valid marriage may attach to it. For example, the court may, on application, declare the children born of the marriage to be legitimate."

[36] I must point out that *in casu*, the children born of first, second and third respondents are legitimate by virtue of section 31of our Constitution (2005) which abolishes the status of illegitimacy over children.[10]

[37] The rights of the children born out of the union with deceased and the first, second and third respondents are not adversely affected by the finding of this court to the effect that their mothers' marriages to the deceased are null and void. In fact, in terms of section 31 of the Constitution, the children of the first, second and third respondents from deceased enjoy the same status as that of applicant.

[10] supra

[38] By no means in terms of the preceding paragraph do I pronounce by inference on the rights of the first, second and third respondents over their proprietary rights**.** **Dunn J** in **Simelane** *supra* also pointed with regards to putative marriages, *"Application may also be made to court for orders relating to the property rights of the parties"* subject of course to proving that the marriage was putative. That is not the case before me.

[39] In the above cumulative circumstances, I therefore enter the following orders:

1. Applicant's application succeeds;

2. The purported marriages between the late Richard Themba Dlamini to first, second and third respondents are bigamous and therefore hereby declared null and void *ab initio*;

3. Fourth respondent is hereby directed to expunge all entries in the marriage register in respect of the late Richard Themba Dlamini and first, second and third respondents;

4. Costs of suit to be paid from Estate late Richard Themba Dlamini.

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M. DLAMINI
JUDGE

For Applicant	**:**	**P. Flynn instructed by Hlabangani & Associates**
For 1st & 2nd Respondents	**:**	**B. J. Simelane of B. J. Simelane Attorneys**
For 8th Respondent	**:**	**T. Mamba of Mkhwanazi Attorneys**