

THE HIGH COURT OF SWAZILAND

MGCIBELO MALAZA

Applicant

And

TIMOTHY MAPHENDUKANE MAGAGULA

Respondent

Civil Case No. 3791/2002

Coram S.B. MAPHALALA - J

For the Applicant MISS GWIJI

For the Respondent MR. SHILUBANE

RULING

(ON POINTS IN LIMINE)

(28/08/2003)

This is an application where the Applicant seeks relief to nullify the marriage certificate of the late Joyce Thandi Magagula and the Respondent on the grounds that it was procured fraudulently.

The material facts in support of the application are found in the founding affidavit of the Applicant who is the natural father of the late Joyce Thandi Malaza who died on the 15th April 2002, at the Clinic, Mbabane. The Applicant has outlined in detail the sequence of events in support of his case and has also filed supporting documents to the application. The supporting affidavit of one Timothy Malaza who is a brother to

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the deceased is also filed thereto. A further supporting affidavit of one Nosipho Mkhabela who is a daughter of the deceased is also filed of record. Finally, a confirmatory affidavit of one Matilda Malaza is also filed.

In opposition the Respondent has filed his answering affidavit where a number of points of law in limine are raised. In turn, the Applicant has filed a replying affidavit accompanied by supporting affidavits of Nozipho Mkhabela and that of Matilda Malaza.

The points of law raised which are the subject matter of the dispute are ipsissima verba as follows;
"Points in limine

5.1. I am advised and verily believe that this matter is one that cannot be resolved on affidavits as there is a host of facts in dispute.

5.2. Further the Applicant is abusing the process of the court in that:

5.2.1. The marriage certificate is prima facie proof that the marriage did take place, for once a woman is smeared with red ochre, it becomes conclusive evidence or proof that the woman is married to that

particular person and lobola can be delivered at a later stage, which is what happened in the present case.

JURISDICTION

5.2.2. The application is fatally defective in that the Applicant seek relief to nullify the marriage certificate, yet this Honourable Court lacks jurisdiction to adjudicate matters on Swazi law and custom unless assisted by assessors.

CLAIM FOR DAMAGES

5.2.3. The Applicant seeks relief to nullify the marriage certificate on the ground that lobola had not been paid needless to say that Applicant should institute action for a claim for damages to recover the said lobola as a remedy.

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For these reasons, may it please this Honourable Court to dismiss the application with costs".
When the matter came for arguments counsel filed Heads of Argument;

On the first point the Respondent contends that the matter cannot be resolved on affidavits as there is a host of facts in dispute, which the Applicant foresaw or should have foreseen would arise, as a result the court should dismiss the application with costs. To support this view the court's attention was drawn to the South African case of Room Hire Co. (Pty) vs Jeppe Street Mansions (Pty) Ltd 1949 (3) SA. 1155 (T). Firstly, the Applicant contends that the issue was discussed and finalized, such that the Applicant sent people to remind the Respondent to pay the lobola which was later delivered and rejected by Applicant; Secondly, Applicant contends that on registration of the marriage certificate her daughter Matilda Malaza never was in attendance same. Respondent submits that the said Matilda Malaza was in attendance in that her name appears under column 26 of the marriage certificate hence oral evidence would need to be led if she wants to prove that she was in attendance., The Applicant on the other hand contends that the issue of lobola was never discussed, that no guarantee of same was made, and no lobola or part thereof was ever delivered, contrary to Respondent's declaration of the Registry of Births, Marriages and Deaths that 6 herd of cattle were paid for lobola, as reflected in column 24 of the marriage certificate.

It appears to me on the above that there are a host of facts in dispute, which the Applicant foresaw or should have foreseen would arise, and the application on the basis of the ratio in Room Hire Co. (Pty) Ltd (supra) ought to be dismissed on this ground.

Coming to the issue of non-joinder, it would appear to me that Mr. Sholubane is correct that the application is fatally defective in that the Applicant has not joined the Registrar of Marriages in his application whereas he seeks an order to nullify the marriage certificate. In terms of Section 28 (3) of the Births, Marriages and Deaths Registration; Act No. 5 of 1983, the Registrar of Marriages had to be joined as it provides thus:.

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"Every such certificate signed by the Register or registration officer shall be prima facie evidence of the particulars set forth therein in all court of law and public offices."

Had the Respondent not complied with all the requirements as laid down in the Births, Marriages and Deaths Registration Act No. 5 of 1983, more specifically Sections 26 and 28, he could not have been granted the certificate thus the need to lead viva voce evidence to prove that the requirements, were not complied with, essentially in light of Applicant's allegation that the registration of certificate was procured by fraud.

On the issue of jurisdiction on the basis of the authorities cited by Mr. Shilubane that the court lacks the

jurisdiction to adjudicate upon the matter as a court of first instance. Further, Section 11 of the Marriage Act creates a criminal offence for such instances.

Lastly, on the issue of the claim for damages I agree with the Respondent in this regard that the Applicant should have instituted an action for a claim for damages to recover the said lobola.

In the result, the points of law in limine raised on behalf of the Respondent ought to succeed and the costs to follow the event.

S.B. MAPHALALA

JUDGE