

THE HIGH COURT OF SWAZILAND

G M

Applicant

And

F M

Respondent

Civil Case No. 2988/2006

Coram: S.B. MAPHALALA - J

For the Applicant: MR. S.C. SIMELANE

For the Respondent: IN ABSENTIA

JUDGMENT

(15th September 2006)

[1] This matter came before me in the uncontested motion of the 1st September 2006, where Counsel for the Applicant sought an order that the court declares that a marriage between the parties has been legally and effectively dissolved in accordance with Swazi law and custom. Counsel submitted that the court has the power to grant the said declaration. I reserved my ruling on the matter. Following is my ruling in this case.

[2] Before proceeding with the determination of this legal question I wish to sketch briefly the facts of the matter as gleaned from the Founding affidavit of the Applicant. The Applicant is married to F M (born Vilane) in accordance with Swazi law and custom. The said marriage took place in the year 2000 and one child namely L M, aged six years was born from the union. Upon being married they stayed together as husband and wife at the matrimonial home at KaQobonga Township in Mbabane. The parties started having problems in their marriage during 2003 which were as a result of multiple factors, including infidelity on the part of the Respondent and the fact that she lacked commitment towards the marriage, and there being no respect in between them. The parties attempted solving these problems and to that extent they even involved their respective families to assist in reconciliation. All efforts were however to no avail.

[3] The Respondent, eventually left the matrimonial home of her own accord in March 2005. Efforts were made to facilitate her return with no success.

[4] Applicant then met his family and it was decided that he sends the groom's messenger ("**gozolo**") and the chief groom ("**umyeni**") to thank her formally ("**kubongwa**") and inform her family that she was now cut off from the Mngadi family and would no longer be regarded as being married to the Mngadis and that was done in May 2005.

[5] On the basis of the above-cited facts Applicant contends that his marriage to the Respondent was formally, legally and effectively terminated in accordance with Swazi law and custom, and therefore she is no longer his wife.

[6] According to Section 2 (1) of the High Court Act No. 20 of 1954 the High Court shall be a superior court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa.

[7] In South Africa the power embodied in Section 19(1) (a), (iii) of the Supreme Court Act to make a declaratory order was originally conferred by statute in 1935 (in Section 102 of the General Law Amendment Act 46 of 1935, now superseded by the present subsection), and has the effect of increasing the original jurisdiction of the superior courts at common law. Before 1935 a declaratory order that did not at the same time grant relief to any of the parties was not countenanced in practice (see *Norris vs Mentz* J930 WLD 160).

[8] It appears to me in terms of Section 2 (1) of the High Court Act No. 20 of 1954 cited above in paragraph [6] that the High Court "**possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa**".

[9] The question whether or not an order should be made in terms of the above-cited Act in paragraph [8] must be examined in two stages. First, the Applicant must satisfy the court that he is a person "interested" in an "existing, future or contingent right or obligation". Secondly, if on that point, the court decides whether the case is a proper one for the exercise of the discretion conferred on it. (see *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 1053 and the cases cited thereat).

[10] In the present case I am satisfied that the Applicant is an interested party in an existing right and would therefore exercise my discretion in favour of granting the declaration as sought in the Notice of Motion, and it is so ordered.

S.B. MAPHALALA

JUDGE