



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1473/13

In the matter between

DOCTOR MNCINA

APPLICANT

And

MONICA LINDOKUHLE MNCINA

RESPONDENT

Neutral citation: *Doctor Mncina v Monica Lindokuhle Mncina & 2 Others (1473/13)* [2014] SZHC 407 (5December 2014)

Coram: **M. S. SIMELANE, J**

Heard: 16 October **2014**

Delivered: 5 December **2014**

Summary: Civil law Dissolution of marriage contracted under Swazi Law and Custom – dispute of fact – referred to oral evidence.

Judgment

SIMELANE J

[1] The Applicant instituted proceedings in the instant matter by way of a notice of motion for an order in the following terms:-

“1.1 The Swazi Law and Custom Marriage of the Applicant and the First Respondent is confirmed to be dissolved.

1.2 This Second Respondent is ordered to cancel the entry of the Swazi Law and Custom marriage contracted by the Applicant and the First Respondent in his register.

1.3 Costs of suit in the event of opposition, against the Respondents who shall oppose the application.

1.4 Granting further and/or alternative relief.”

[2] The First Respondent opposed the application and deposed to an answering affidavit in which she raised points of law to the effect that this Court lacks the necessary jurisdiction to hear and determine this matter and that there were disputes of fact in the matter which were

foreseeable when the application was instituted and cannot be resolved without the aid of oral evidence.

- [3] The Respondent's further contention is that this Court lacks the jurisdiction to hear and determine this matter in that it relates to a marriage in terms of Swazi Law and Custom which has not been properly dissolved by the respective families and that the Court having jurisdiction in the circumstances is the Swazi Courts in terms of Section 9 (b) of the Swazi Courts Act No. 80 of 1950.
- [4] The Respondent contends that the Applicant did not file any replying affidavit to deny the Applicants allegation.
- [5] On the question of jurisdiction, I find that this Court has jurisdiction to deal with the instant matter. In the case of **Siphiwe Magagula (born Nkhambule) v Lindiwe Mabuza and Others Case No. 4577/2008, MCB Maphalala J** dealing with a similar point *in limine* stated as follows:-

“5.3.1 I am unable to agree with the First Respondent that this Court has no jurisdiction to determine the validity of a marriage solemnized in terms of Swazi Law and Custom. The Swazi Courts Act No. 80 of 1950 as well as the Swazi Administration Order of 1950 do not oust the jurisdiction of this court to deal with this issue. Furthermore, Section 2 (1) of the High Court Act No. 20 of 1954 provides as follows:

“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 laws possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa.”

5.3.2 The Supreme Court of South Africa has inherent jurisdiction to hear any matter brought before it subject to two limitations, firstly, that it has an Appellate jurisdiction; secondly, matters reserved for the decision of the Constitutional Court.

- Section 167 and 168 of the Constitution of the Republic of South Africa**
- Herbstein & Van Winsen, the Civil Practice of the Supreme Court of South Africa, 4th Edition, pages 37-40**

5.3.3 Section 151 of the Constitution of the Kingdom of Swaziland provides as follows:

“The High Court has-

- (a) Unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution.**
- (b) Such appellate jurisdiction as may be prescribed by our under this Constitution or any law for the time being in force in Swaziland.**

(c) **Such revisional jurisdiction as the High Court possesses at the date of commencement of this Contitution.”**

5.3.4 Furthermore, the Constitution does not oust the jurisdiction of the High Court in marriages solemnized in terms of Swazi Law and Custom Section 151 (9) of the Constitution oust the jurisdiction of this Court in matters relating to the office of the Ingwenyama; the office of Indlovukazi (the Queen Mother); the authorization of a person to perform the functions of Regent in terms of Section 8; the appointment, and revocation of the Swazi National Council and procedure of the Council; and the Libutfo (regimental) system.”

[6] Consequently, I dismiss this point *in limine* on jurisdiction which was raised by the Respondents.

[7] It is pertinent for me to note however that I am of the considered view that the foregoing avernments by the Respondent raise triable issues, namely,

“15. In casu the First Respondent alleged that her marriage to Applicant has not been mutually dissolved by the respective families.

16. The First Respondent further alleged:

16.1 That the issue of her separation with the Applicant was resolved by the Ekuvinjelweni Umphakatsi which came

to the conclusion that she must return to stay with the Applicant.

16.2 That she denied that the meeting of the 23rd March, 2013 was for the families to confirm that the Applicant and herself had failed to resolve the dispute between them and that the marriage had come to an end and that the marriage was then on that day automatically dissolved.

16.3 That she was told to come back to the Mncina homestead as she was still regarded by the Mncina family as their wife following the meeting of the 23rd March 2013 and denied that the marriage was on that day automatically dissolved.

16.4 That she denied that it was agreed by the families that the marriage should by consent come to an end.

16.5 That on the 16th August 2007 the matter was discussed by the Ekuvinjelweni Umphakatsi and the Applicant said he would come and take her back from her parental home.

17. The Applicant did not file a replying affidavit to deny the First Respondent's allegations."

[8] I find that these are issues that cannot be resolved on the papers serving before this Court. I am inclined to agree with the Respondent that there are disputes of fact in these proceedings which cannot be answered on the papers. It will be tantamount to injustice for this

Court to determine this matter without the aid of oral evidence as there is clearly a dispute of facts.

- [9] The law on the question of disputes of fact has been settled in Swaziland. The learned authors **Herbstein and Van Winsen** in the text, **the Civil Practice of the Supreme Court of South Africa 4th edition page 224** postulated this position of the law as follows:-

“It is clearly undesirable in cases in which facts relied upon are disputed to endeavor to settle the disputes of fact on an affidavit, for the ascertainment of the true facts is effected by the trial Judge on consideration not only of probability, which ought not to arise in motion proceedings but also of credibility of witnesses giving evidence viva voce. In that event it is more satisfactory that evidence should be led and that the court should have the opportunity of seeing and coming to a conclusion.”

- [10] This trite principle of law has been restated in this jurisdiction in a plethora of cases. These include but are not limited to the following; **Daniel Didabantu Khumalo v The Attorney General Civil Appeal No. 31/2010, Pauline Mnguni v City Jap Auto (Pty) Ltd and another Case No. 4728/09, Hlobsile Maseko (nee Sukati) v Sellinah Maseko (nee Mabuza) and others Case No. 381/10.**

[11] **COURT ORDER**

In these premises, I order as follows:-

- (1) That the disputes of fact in this matter be and are hereby referred to oral evidence.
- (2) No order as to costs.

**M. S. SIMELANE
JUDGE OF THE HIGH COURT**

For the Applicant: Mr M. Dlamini

For the Respondent: Mr Mthethwa