

**THE HIGH COURT OF SWAZILAND**

**WILLIAM MABUZA**

Applicant

**And**

**MUSA SHONGWE**

Respondent

Civil Case No. 234/2006

Coram: S.B. MAPHALALA-J

For the Applicant: MR. L. SIMELANE

For the Respondent: MR. M. MABILA

## JUDGMENT

(10<sup>th</sup> February 2006)

[1] Before court is an urgent application directing the Respondent to return two minor children namely, S and T S to the custody of the Applicant. Respondent was married in terms of Swazi law and custom to Applicant's daughter who is now deceased. Two minor children were born out of this union. It has now become a bone of contention whether the marriage between the Respondent and the deceased was valid. The Applicant contends that it was not valid because certain traditional formalities were not observed i.e. the payment of **lobola** and the beast (**insulamnyembeti**) have not been paid. The Respondent on the other hand contends that the marriage between him and the deceased was made valid when deceased was smeared with the red ochre.

[2] *Professor Thandabantu Nhlapo* in his textbook titled *Marriage and Divorce in Swazi Law and Custom*, at page 44 state that according to Swazi law and custom three marriage formalities must be observed before a customary marriage comes into existence:

- i) The bride must be smeared with **libovu** (red ochre) during the marriage ceremony (**umtsimba**);
- ii) **Lobola (emabheka)** cattle must be delivered in full or guaranteed;
- iii) The **lugege** and **insulamnyembeti** beast must be handed over and the **lugege** beast must be slaughtered.

[3] According to the above-cited author the smearing of the bride with the red ochre is the single most legally significant event in the formation of a marriage in accordance with Swazi law and custom. The learned author then cited *Nxumalo (undated: 16)* where he stated:

"When a Swazi bride has been anointed her marriage is complete. The anointment ceremony, called **kugcotshiswa libovu** involves smearing the face and body of the bride with a red ochre substance (**libovu**), a type of clay mixed with fat. This substance is commonly smeared on the face in the form of a cross across the forehead and down the nose. Anointment marks the end of marriage ceremony".

[4] The above-cited principle is contained in several decisions of this court and is now beyond dispute.

[5] In the case of *R vs Fakudze and another 1970 - 76 S.L.R 422* the High Court, sitting with

assessors, approved the rule as stated in the report of the Swazi Law Panel (1964) and stated as follows:

"There are a number of ceremonies performed at the weddings, but legally significant one is the anointing of the bride with red ochre (**libovu**). Unless and until this has been done, she is not regarded as having been married".

[6] In *R vs Timothy Mabuza and another* 1979 - 81 S.L.R 8 it was held that if the smearing with red ochre has been done, though not at the proper place, the woman smeared will nonetheless **"be considered as married under customary law, even if no lobola has been paid"**.

[7] Further in *Jabulane Kunene vs Estel Masuku and others - Civil Case No. 1413/98* it was held, *inter alia*, that a customary marriage comes into existence upon the smearing of the red ochre, that is when such marriages become valid marriages in terms of the customary law.

[8] The learned author in the above-cited textbook further adds at page 47 as follows:

"The Swazis themselves say that the red ochre is their equivalent to the wedding and infinitely more binding. Traditional society takes pride in the fact that the red ochre ceremony is a once-in-a lifetime affair. That is to say, once a woman has been "smeared" by one family she will never again undergo the same treatment at the hands of someone else, (this is usually the starting point for the Swazi argument that there is no divorce in customary law) on those occasions when a previously married woman has to go through a second ceremony with someone else, the smearing is done with lard (**liphehla**) or in modern times, Vaseline".

[9] The learned author states at page 76 thereof that "in customary law when a wife dies the tie between her family and her husband's continues and the marriage itself may continue to subsist if the latter accepts a substitute wife (**inhlanti**) from the former".

[10] It would appear to me from the above-cited legal authorities that the stance adopted by the Respondent in *casu* is the correct one. The Respondent was married to the deceased in terms of Swazi law and custom and the children born out of the union are legitimate children. A child born or conceived by a married woman is presumed to be legitimate, i.e. the law presumes that the woman's husband is the child's father. The rule is expressed in the maxim *pater est quern nuptiae demonstrant*. The presumption may be rebutted by acceptable evidence to the contrary, showing, on a balance of probabilities, that the woman's husband is not in fact the father of the child, (see *PQR Boberg, The Law of Persons and the Family*, 1977, *Juta* at page 323 and the cases cited thereat). In the present case, it is common cause that the Respondent is the father of the two minor children born out of his union with the deceased who he married in terms of Swazi law and custom.

[11] What remains for this court is to determine the issue of custody of the minor children. Should the court grant custody of the minor children to their father or their grandfather? The Applicant contends, *inter alia*, that the fact that the Respondent is the surviving parent does

not give him a right over custody of the minor children. The person who will take care of the welfare of the children has a right to have custody. Applicant contends further that the best interests of the children will be served if they are in his custody as compared to the Respondent since Respondent stays with his wife and experience has shown that stepmothers fail to take good care of stepchildren.

[12] The Respondent on the other hand contends, *inter alia*, that a natural and biological parent of a legitimate child may only be deprived custody if it is shown that he cannot best cater for the interests of the child. That in the present case such allegation has not been made, otherwise the question of the best interests of the children is of paramount consideration.

[13] It is trite law that parents are entitled to the custody of their children unless they are unfit to have it. Custody is that portion of the parental power which pertains to the personal life of the child (see *PQR Boberg (supra)* at page 459 and the cases cited thereat). The question therefore in the present case is whether the Respondent is unfit to have custody of the two minor children. The Applicant alleges that the Respondent is unfit to have custody of the minor children because of his wife who is the childrens' stepmother and therefore will fail to take good care of them.

[14] I have considered both arguments in this matter as well as the affidavits filed of record and I cannot say that Respondent is unfit to have custody of the two minor children. The fact that he is married to this other woman does not render the Respondent unfit.

[15] In the result, for the afore-going reasons the application is dismissed with costs.

**S.B. MAPHALALA**  
**JUDGE**