

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3537/07

In the matter between:

SARAPHINA NAKIWE DLAMINI

APPLICANT

AND

THE PUBLIC SERVICE PENSION FUND

RESPONDENT

CORAM

MAMBAJ

FOR APPLICANT

MR M. THWALA

FOR RESPONDENT

MR K. MOTSA

JUDGEMENT

October 2008

[1] The applicant got acquainted with Sabicala Dlamini (hereinafter referred to as the deceased) in around 1970. They fell in love, and had their first child in 1974. In 1978 the deceased gave a herd of 12 cattle to the applicant's people "as lobola" for her. This was done after discussions between the deceased and the family of the applicant wherein the deceased indicated that he wanted to marry the applicant. The applicant began cohabiting with the deceased until he died in November 2004.

[2] In 1981 the deceased married Sibongile Lukhele in terms of Civil rites. This marriage was solemnized on 8th December 1981 and came to an end on 29th November 2003 when Sibongile died.

[3] On the 12th December 1982 the deceased had caused the applicant to be anointed with red ochre "in order to regularize our relationship in order to confirm and protect my wifely status as per the dictates of Swazi law and custom." The applicant avers further that "this act of smearing me with red ochre...was not of itself, an act of our marriage, but an act of giving fulfillment of the other previous steps that had been engaged upon by the respective families."

[4] Following the death of the deceased in 2004, the estate of the deceased was reported in the normal way at the office of the Master of the High Court and the applicant was treated and regarded by that office as the surviving spouse.

[5] The Applicant has filed a claim with the Pensions Fund, the respondent, demanding that she be paid all pension benefits in her capacity as the surviving spouse in the Estate of the deceased, who was a contributing member of the respondent.

[6] The respondent has, however, refused or declined to accord her this status. The respondent contends that the applicant "purported" to marry the deceased in 1982 when she was anointed with red ochre. When this event occurred, the deceased was already married in terms of civil rites to Sibongile Lukhele therefore the purported marriage between the applicant and deceased was bigamous and therefore null and void *ab initio* and of no force and effect.

[7] I should point out from the outset that a marriage under Swazi law and custom is not constituted by the giving of any *emalobolo*. On the contrary, *Emalobolo* or *Emabheka* is given on account of the marriage. *Emalobolo*, is a consequence of a marriage and not an essential element of a marriage. This is aptly captured by the Siswati saying that Kulotsholwa umfati hhayi intfombi: meaning "*Emalobolo* cattle are given for a wife and not a mere girl." This, to my mind, means that there should first be a marriage before *emalobolo* could be due and deliverable to the woman's family. The only exception known to me whereby *emalobolo* are given before the solemnization of a marriage is in respect of an arranged marriage (kwendzisa). An arranged marriage is of course an exception to your normal Swazi marriage. The arrangement may, even be concluded before the birth of the would-be-wife. Very often the parents or would-be parents of the unborn child would approach, usually a wealthy man, and offer him their daughter in marriage. If the offer is accepted, the man would usually deliver a portion of the *Emabheka* immediately. If no marriage is eventually concluded the cattle given as prospective *emalobolo* are returnable in full to the giver thereof.

[8] R T NHLAPO in his Book **Marriage and Divorce In Swazi Law and custom**, at page 70 states that;

"The only essential formalities for bringing into existence a valid customary marriage are:

- (i) The smearing of the bride with Libovu by the groom's people during an appropriate ceremony.
And
- (ii) The reaching of agreement about lobolo between the groom's family and that of the bride. (This can also be rendered in this form: the acceptance by the bride's family of the lobolo offered by the groom's people and the arrangements they propose for the payment thereof.)"

With the utmost due respect to the learned author, I am in agreement with what he states concerning the anointing of the bride with red ochre (libovu). The appropriate ceremony referred to therein is no doubt the *Kumekeza*. However, I find myself unable to agree that an agreement has to be reached concerning *Emalobolo*, or the suggestion that the bridesgroom may contract out of the giving of *Emalobolo*.

[9] The liability or responsibility of the groom to give *Emalobolo* stems not from anything agreed to prior to the actual marriage ceremony but from the existence of the marriage. It comes about as an operation of law. By marrying the woman, the man irrevocably agrees to give the requisite *Emalobolo* to her guardian. He may not contract or covenant out of such responsibility.

[10] Again, there are two terminological inexactitudes in what the learned author states. Firstly, marriage is marriage is marriage. To talk of a *valid* customary marriage is misleading as it suggests that there is an invalid marriage. Secondly, the handing over of

Emalobolo is not payment. The bride is neither bought nor are her reproductive capabilities or other services. Indeed at 40 Nhlapo (*supra*) states that;

"...lobolo has two important functions, the legitimation of children and as a guarantee of the good behaviour of the parties."

The wholesale assumption on the identification or similarity of a sale as it exists under both Swazi customary law and the common law on the one hand and *emalobolo* or *emabheka* on the other hand may lead to great dangers of confusion. It is misleading. As Van Niekerk (1 CILSA, 1968 at 103) stated;

"It is not denied that the custom of *bogadi* and even the institution of marriage itself possesses many of the elements of contract, but it must be borne in mind that both the *bogadi* custom and marriage are more properly classified under family law than under the law of contract and that the principles and terminology of the law of contract should therefore only be circumspectly applied to these institutions."

I agree.

[11] Mr Thwala for the applicant argued that because the applicant and the deceased had a child, cohabited for a long time and the deceased gave 12 cattle as *Emalobolo* to the applicant's people, and the applicant was eventually anointed with red ochre in 1982, I should hold in her favour and rule that she was married to the deceased. The case of **R v FAKUDZE AND ANOTHER 1970-1976 SLR 422** was cited as supporting this view. I cannot agree.

[12] In **Fakudze's case (supra)** the first accused had been

cohabiting with one Beauty Motsa for whom he had given lobola but had not anointed her with red ochre. The crown sought to lead her in evidence against the first accused on the basis that as she had not been anointed with red ochre, she was not the wife of the first accused and was therefore a competent and compellable witness to give evidence against him. At 423-4 the learned Chief Justice crystallised the enquiry therein as follows:

"In my view the matter must be determined by an application of common law principles; and I start with the general premise (cf Demingo's case, supra) that spouses are not competent or compellable witnesses against each other.

The first question that arises for consideration is whether Beauty is to be regarded as the wife of accused no 1 for the purposes of this principle, where lobola has been paid but not smearing with red ochre (libovu) has taken place. I consulted my accessors in regard to this; and Counsellor Ntshalintshali stated that it was a novel question which had not arisen in his experience. Both he and Counsellor Dlamini, however, were inclined to agree with what is stated in the report of the Swazi law panel (May 1964) under the chairmanship of Mr Rubin with a number of high members of the various Swazi courts sitting with him. It is there said, at p10, "there are a number of ceremonies performed at the wedding, but the 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.*" (my emphasis .)

On this basis Beauty would not rank as a wife; and her evidence would consequently be admissible. But I do not consider that the court should be over-technical in its approach in a matter such as this. Beauty regards herself as the wife of no 1 accused; no 1 accused probably regards her as his wife and she is probably so regarded by the whole populace. The rule excluding one spouse from giving evidence against the other is based on public policy, the underlying motivation being the sanctity of marriage and the preservation of marital confidence flowing from the marital state. In England, however,

which is a monogamous country, the rule of public policy has been narrowed so as to exclude from its ambit marriages which are potentially polygamous. I am not satisfied that the rule should be similarly cut down in Swaziland where polygamous marriages are the order of the day."

[13] The court was considering whether or not to allow Beauty to give evidence against the first accused without his consent. It ruled that the rationale behind such a prohibition was to protect marital privileges and confidences. It ruled that *de facto* the first accused and Beauty Motsa were living as husband and wife although *de jure* were not such. It then held that public policy dictated that this relationship, for purposes of determining whether or not Beauty was a competent and compellable witness, they should be regarded as spouses. The court did not say they were married to one another. The court did not declare or pronounce them as married. It deemed them as being married (for purposes of the inquiry therein).

[14] As a matter of language and logic, when one thing is deemed to be another thing, it simply means that it [the former] is not that [the latter] which it is deemed to be. In Fakudze's case (*supra*) the court concluded its judgement by suggesting that the law in Swaziland should be amended and "a marriage such as I am now considering should be regarded as a marriage recognized in Swaziland even though it may not comply with all the requirements of strict Swazi Law." What was being considered by the court was, of course not a marriage.

[15] It appears to me to be settled law that unless a woman has been anointed with red ochre (libovu), she may never be regarded as having been married, as per the dictates of Swazi law and custom, even in instances where Emalobolo have been given as in casu. When the deceased purported to marry the Applicant, by anointing her with red ochre in 1982, he was disqualified from doing so as he was at that time married to Sibongile Lukhele in terms of civil rites. The giving of emalobolo in 1978 was nothing more than a declaration of intent by him to marry the Applicant.

[16] For these reasons the application was dismissed with costs.

MAMBA J

