

**IN THE HIGH COURT OF SWAZILAND**

**CASE NO. 1796/2004**

**In the matter between:**

**LAWRENCE NDZINISA**

**PLAINTIFF**

**AND**

**PHINDILE DLAMINI  
SIBONISO CLEMENT DLAMINI  
MZAMO MOSES NXUMALO  
THE MASTER OF THE HIGH COURT  
THE ATTORNEY GENERAL**

**1<sup>st</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT  
4<sup>TH</sup> DEFENDANT  
5<sup>th</sup> DEFENDANT**

**CORAM**

**MAMBAJ**

**FOR PLAINTIFF**

**Adv. L. Maziya**

**FOR 1<sup>st</sup> DEFENDANT**

**Mr A. Lukhele**

**JUDGEMENT**

**6<sup>th</sup> November, 2008**

[1] The Plaintiff, Lawrence Ndzinisa, filed this action on the 24 June, 2004 but died before the case could be finalized. Because of this, sometime this year, the case was temporarily halted and it resumed once the Executor of his Estate had been appointed and had given instructions to his attorneys to continue with the trial. For the sake of convenience, I shall continue to refer to Mr Lawrence Ndzinisa as the Plaintiff.

[2] The Plaintiff is the natural or biological father of the late Martin Ndzinisa (hereinafter referred to as the deceased) who died in a motor vehicle accident on the 25<sup>th</sup> July, 2001 and has instituted these proceedings essentially against the 1<sup>st</sup> Defendant seeking an order:

"Declaring the purported marriage between the deceased and the first defendant to be null and void ab initio."

[3] The Plaintiff concedes or accepts that the 1 Defendant and the deceased did go through a ceremony of marriage in terms of Swazi law and custom but contends that the said ceremony did not constitute a valid marriage and

"was null and void ab initio because it did not fully comply with the requirements of a marriage conducted in accordance with Swazi law and custom [inasmuch as]

(a) Red ochre was not smeared upon the first Defendant.

(b) Consequently, no emissary was dispatched to the family of

the first Defendant to report the smearing of red ochre and to present the customary piece of meat."

It is common cause that the ceremony in question took place at Maliyaduma, at the plaintiff's brother's home on the 22<sup>nd</sup> August 1992.

[4] The first Defendant filed her plea and avers that both of the two issues or events complained of above did take place and she was accordingly lawfully married to the deceased in terms of Swazi law and custom. She avers further that the said marriage subsisted at the time of the death of the deceased and also subsists to date, as such marriage is not dissolved by the death of a spouse.

[5] I should mention that initially the 1<sup>st</sup> Defendant raised a special plea arguing that as the matter involved the determination of the validity or

otherwise of a marriage in terms of Swazi law and custom, this was a matter that had to be heard and determined by a Swazi National Court. The special plea was withdrawn and the parties agreed that the matters in issue or complained of were purely matters of evidence which this court could equally hear and determine as a Swazi National Court. The parties were further agreed that if in particular, the first defendant was not anointed with red ochre, she could not be said to have been lawfully married to the deceased and therefore could not qualify as the surviving spouse in the estate of the deceased, which was reported to the 4<sup>th</sup> Defendant herein.

[6] I now examine the evidence that was led pertaining to the events in issue herein.

[7] The Plaintiff was the first to testify and notwithstanding the two grounds stated above upon which he bases his action, he enumerated a lot of other things which he alleged vitiated the marriage between the deceased and the first defendant. These are the issues he raised:

- (c) After the solemnization of the marriage, the marriage had to be reported to the Regional Administrator's office by at least five witnesses and this was not done;
- (d) After the solemnization of the marriage (that is the *Kuteka* - which also includes the anointing of the woman with red ochre), the first defendant's people did not notify him or his people of the number of cattle that he was required to give as *emabheka/emalobolo*;
- (e) The *Umtsimba* and *Umhlambiso* ceremonies which are the dancing and giving of gifts by the 1<sup>st</sup> Defendant and her people to the plaintiff's people respectfully, were never performed;
- (f) The ceremonial meat known as *umsasane* that had to be taken by his people to the 1<sup>st</sup> Defendant's people as evidence of the marriage was never given;
- (g) After the alleged marriage, the deceased and the first Defendant went to live together at Mhlume. After a while they quarreled and the first Defendant left Mhlume and stayed away from the Deceased and twice

sought the intervention of the plaintiff who however failed to resolve the problem. After her departure aforesaid, the 1<sup>st</sup> Defendant's people failed to return her to the Deceased as they were expected to do in terms of Swazi Law and Custom;

(h) After the marriage ceremony, the plaintiff's people did not escort the 1<sup>st</sup> Defendant to her home to report that she had been married to the deceased. In this case she would have been escorted by emissaries from her in laws and would be expected to bring with her the spear she would have carried during the *Kumekeza* ceremony;

(h) The first defendant deserted the deceased and only returned to the deceased's home upon his death and wanted to put on the widow's mourning dress. This was denied to her by him; Lastly plaintiff complained that

(i) The first Defendant sued him before the Swazi National Court and caused him to be fined a herd of six cattle or payment of a sum of E600.00.

[8] It is important to note that the alleged marriage ceremony took place at the plaintiff's brother's home and the plaintiff, according to him, was not there. It is noted further that almost all of the events or matters complained of by the plaintiff are not essential elements of a marriage under Swazi law and custom. They are events that follow the solemnization of a marriage (under Swazi law and custom). For example, the report that is made at the Regional Administrator's office is to report that the parties concerned have married one another in terms of Swazi law and custom. It is not a request for permission to marry or anything else. The same with the report to the bride's people and giving of the ceremonial meat, these follow the marriage ceremony. Similarly, the *umtsimba* and *kuhlambisa* rituals are oft-times conducted long after the actual marriage ceremony and their non performance do not vitiate a marriage ceremony. All in all, the non performance of these events was not, not only not pleaded, but do not constitute the essential elements of a marriage under Swazi Law and Custom.

[9] Phephile Ndzinisa, one of the Plaintiff's daughters also testified on

behalf of her father. She told the court that she was present when an attempt to conduct the marriage was made and had to be aborted when the woman who had been requested to anoint the first defendant with red ochre could not come to do so. She said the ceremony was stopped. She said this was done on the instructions of the deceased who was eager to go back to his place of employment that day. She said as a result no goat or beast was slaughtered or ceremonial meat sent to the first defendant's people signifying the completion of the marriage. Her evidence is substantially the same as that of her sister, Fikile Ndzinisa who added that she left the homestead before the event was called off but before the woman appointed to anoint the 1<sup>st</sup> Defendant with red ochre came, as she was hurrying to go back to Mananga where she lived. Neither of these two witnesses was able to say who was designated to anoint the first defendant with red ochre and neither could say why a replacement could not be found in her absence. This is inexplicable in view of the fact that there were many people gathered at the homestead as it was a day on which LaGama had just removed her mourning dress, signifying the end of the mourning period following the death of her husband.

[10] Thoko Elizabeth Gama (LaGama) gave evidence for the 1<sup>st</sup> Defendant. She gave a detailed account of the events that unfolded in the morning in question. The events took place at her home after a request had been made to her by the deceased and the plaintiff. The whole *Kumekeza* or *Kuteka* (marriage) ceremony, the rituals or rites pertaining thereto, occurred at her direction or management. She was able, with remarkable ease, to say who did what during the process. She testified that after the *Kumekeza* rituals, the first defendant was made to sit on a grass mat near the door to the Gogo hut and there she was smeared with red ochre by Minah Nkambule, a relative of her late husband. The red ochre was actually given to Minah by her.

[11] She testified further that the 1<sup>st</sup> Defendant led Bandla Ndzinisa, Deceased and Isaiah Shongwe to her home with the ceremonial meat to report the marriage. This again was on her instructions acting in

consultation with the rest of the Plaintiffs people. Later Saraphinah Nkomondze took the first defendant to her home and left her there. In compliance with custom, first defendant was returned to her in laws by her parents. She was accompanied by LaMabuza who brought with her traditional beer as a token of appreciation of the marital bond that had been established between the two families. LaMabuza further informed the Plaintiff's people that a herd of fifteen cattle was required as *emabheka* (dowry) for the 1<sup>st</sup> Defendant. Lastly LaGama told the court that the Deceased also gave her money to buy on his behalf the *insulamnyembeti* heifer which she did and it was collected from her by the first Defendant's father. This beast - "the wiper of tears" - is given on account of a marriage and belongs to the mother of the bride. She further stated that the plaintiff was present and as the most senior male member of the family, participated in both her removal of the mourning dress and in the events pertaining to the marriage. During or immediately after the marriage, the plaintiff is said to have noted that the 1 Defendant's mother was related to him and presumably this relationship had been cemented by the marriage in question. She was very surprised that the plaintiff was now disputing the marriage and also denying that he was present on this occasion.

[12] LaGama's evidence is substantially corroborated by Jeremiah Lukhele who said he had been invited or requested by LaGama to come and witness the marriage in his capacity as the Chief's runner in the area. He witnessed all the relevant rituals including the anointing of the 1<sup>st</sup> Defendant with red ochre. He noted this in his note book, for record purposes.

[13] The evidence of the first defendant is on all fours with that of LaGama and Mr Lukhele regarding what occurred during and following the marriage ceremony herein.

[14] I note that the plaintiff has denied that he was present during the alleged marriage between the deceased and the first defendant herein and has not positively or categorically stated in his evidence that the first

defendant was not anointed with red ochre. Out of all the witnesses who testified herein it is only Phephile Ndzinisa who said this. Fikile could only say she did not witness it as she had to leave for Mananga before the ceremony was finalized or aborted. Phephile's evidence is clearly false insofar as she says the marriage ceremony was cancelled or aborted by deceased whereupon the deceased and the first defendant left for Mhlume immediately thereafter. The evidence is overwhelming as Mr Lukhele for the 1 Defendant submitted, that the first defendant was actually anointed with red ochre and was lawfully married to the deceased in terms of Swazi law and Custom.

[15] From the evidence before me, it is clear to me that the plaintiff was present during the wedding under consideration herein and was also involved in its preparation and or arrangement. For a long while after the marriage ceremony, he regarded and or treated the first Defendant as his daughter-in-law. When the couple experienced difficulties in their marriage, the first defendant enlisted his intervention, which he was ready to give. His efforts were apparently unsuccessful. The evidence by the first defendant is that when the deceased died, she was accused of having caused his death. As a result of this accusation she was denied the right to wear the customary mourning dress in bereavement for the deceased. It is perhaps not unreasonable to conclude that it is this belief, this accusation, by the plaintiff that has propelled him to bring this action.

[16] For the above reasons the plaintiff has failed to establish that the first defendant was not married to the deceased. In fact the evidence establishes on a preponderance of probabilities that she was. In the result the action was accordingly dismissed with costs.

**MAMBA J**