

## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3046/06(1)  
3822/08 (2)

In the matter between :

MATRY NOMPUMELELO DLAMINI

APPLICANT(1)

ROBERT S. DLAMINI

APPLICANT (2)

AND

MUSA CLEMENT NKAMBULE

1<sup>st</sup> RESPONDENT (1)

CYNTHIA MAKHANYA

1<sup>st</sup> RESPONDENT (2)

...

THE REGISTRAR OF BIRTHS

2<sup>nd</sup> RESPONDENT

THE ATTORNEY GENERAL

3<sup>rd</sup> RESPONDENT

CORAM

MAMBA J (with  
Assessors)

FOR APPLICANT

... SIMELANE

FOR RESPONDENTS

AGS chambers

JUDGEMEN

T

28<sup>th</sup> August, 2009

[1] The two main reliefs sought in each of these cases are the same and the grounds upon which each action is based are the same, namely that the parties

have had their marriages *which* were contracted under Swazi law and Custom dissolved in accordance with the dictates of that marriage regime. Following the alleged dissolution the applicants have sought for an order:

"1. Declaring that the marriage in terms of Swazi Law and Custom between the Applicant and the first respondent has been lawfully dissolved.

2. Directing the second Respondent to cancel the marriage certificate...from the register of marriages."

[2] Whilst the applications were both not opposed by any of the Respondents, this court was unable to adjudicate thereon without hearing expert evidence on the question, inter alia, how a marriage is dissolved under Swazi customary law. To this end Counsel for the Applicants was advised and the court sought and secured the assistance of assessors in the form of Chief Petros Dube of Mpholonjeni and Mr Vilakati of Lobarnba, to whose assistance and patient guidance the court is greatly indebted. The final decisions on these applications are, however, mine and the said assessors are in agreement therewith.

[3] I now set out in summary form the essential facts or features of or in each case beginning with the first one listed above.

[4] Matry Nompurnelelo Dlamini, who is a Swazi female adult person of Mbekelweni area is a teacher by profession and was born on the 27<sup>th</sup> July, 1969. She got married to Musa Clement Dlamini of ... in terms of Swazi Law and Custom *on* 3<sup>rd</sup> September 1994. A herd of five cattle was given to her people as Lobola. One child was born of the marriage.

After the marriage the parties set-up their matrimonial home at the Respondent's parental home at Timbutini and Simunye and lived there together until at the beginning of 1997 when the Respondent ordered the Applicant to leave their matrimonial home to live at Malindza High School where she was a teacher. This followed a series of misunderstandings between them which was mainly caused by the infidelity of the Respondent.

[5] In ejecting the Applicant from their matrimonial home, the respondent actually removed all her belongings from their home and conveyed them in a motor vehicle to her school and told her never to return to the said homes. The removal of her property and the ban was in respect of both the Mhlume and Timbutini home.

[6] Several meetings to resolve the misunderstanding between the parties were held by their respective families without much success. The last of these meetings was held on 16<sup>th</sup> July 2006 about ten years after their separation. Present in that meeting were the parties, their respective families ...

The latter attended only as observers. The meeting resolved *inter alia*, that the marriage between the parties had irretrievably broken down and is "hereby dissolved because efforts for reconciliation of a normal marriage relationship have failed." This is contained in annexure B - which is a copy of the resolution in respect of that meeting.

[7] With minor variations or dissimilarities, the facts in the second application are the same as in the first one.

[8] Applicant and the first Respondent were married to each other in terms of Swazi customary law on the 14<sup>th</sup> February, 1999. The marriage ceremony took

place at the Applicant's home at KaMfishane in the District of Shiselweni. Two children were born of the marriage and these are in the custody of their mother.

[9] Following the said marriage the parties lived together at the Applicant's home until March 2005 when the first respondent left the matrimonial home and returned to her parental home at Lobamba. ...she departed from their matrimonial home after the parties experienced some serious irresolvable or irreconcilable differences or misunderstandings in their marriage. The main cause was that the Applicant persistently and cruelly treated the respondent.

[10] On the 13<sup>th</sup> September 200, the parties and their respective family representatives met at the Respondent's home and resolved ....

**Failed (and) an application be made to the High Court for an order declaring the marriage in terms of Swazi Law and custom lawfully dissolved and that the marriage certificate be cancelled from the Registrar of marriages."**

Unlike in the first application, there was no representative from the Respondent's Chiefs Kraal present during this meeting. However, a report of the meeting and the resolution taken there at was subsequently forwarded to the said Chiefs Kraal through Mnlupheki Manana, who is the Chief's Runner. He has confirmed this in his affidavit.

[11] As stated above, before this court could consider to either grant or decline these applications, it needed to know how a marriage is dissolved in terms of Swazi law and custom; what are the legal formalities that have to be done in order to have such a marriage dissolved. This statement is of course premised or predicated on the assertion that divorce or dissolution of marriage is permissible under Swazi law and custom. That dissolution or divorce obtains under Swazi law and custom is, in my view, beyond doubt.

[12] "It seems fairly settled now that a customary marriage ... reasons and the procedures, however, are quite different from ... dissolution of a civil marriage. The main reason for the difference in approach appears to be the fact that a Swazi customary marriage creates a bond between two kinship groups, and not merely between two individuals." **(Thandabantli Nhlapo, Marriage and Divorce in Swazi law and custom, @ 52 53).** See also **Sishayi S. Nxumalo, Our Way of Life, at 17.** Divorce or dissolution of marriage in this context simply ... undoing or untying of the bonds of matrimony between two family groups and in a rather restricted sense, the couple. This ... or dissolution is not made by an independent court of law but by the concerned families; the 'joint family court', if you like.

[13] As to the grounds of divorce and the procedures to be followed in this exercise, the two expert witnesses that gave evidence in this case were substantially agreed that there are almost limitless grounds for dissolution of a marriage under Swazi law and custom, especially at the instance of the man. Adultery and witchcraft on the part of the wife seems to be the main grounds. In fact all other grounds tend to be loosely subsumed under one of the above two grounds. For example, where a woman is disrespectful of or to her husband or is generally wicked towards her in-laws or both she is said to have the heart or spirit of a witch or wizard. Adultery and or witchcraft properly so-called on the part of a man are no grounds for divorce at the instance of his wife. Desertion and gross or cruel treatment of the woman by her husband or in-laws are, however, good grounds for her.

"And even ...be exaggerated. Yha crouds may ... but perhaps because of what Fannin calls "the almost illimitable capacity (of the Swazi) for compromise" it is usually years before a final dissolution is

effected and only after all avenues of reaching a resolution have been exhausted. A family will always rally round to advise its errant member of his/her matrimonial duties, to urge tolerance or, failing all these, to pay whatever fines are levied for such member's wrongful conduct in his/her marriage. ...only in the most stubborn cases, such as the wife's **persistent adultery or allegations** of witchcraft against her, will the mediation procedures fail to secure a reconciliation."

[14] It would seem that the general or accepted view is that, where the dissolution is at the instance of the husband, after failing to reach a reconciliation with his wife, the husband would pack, most if not all, of the wife's personal belongings into a bundle and place them in the open - outside her hut. He would then place momentarily his penis covering (*umvunulo*) on the luggage and instruct a young girl to assist the woman carry her luggage and to accompany her to her parental home. Very often, where *emabheka* or part thereof have been given, the husband's representative (*umyeni*), in that transaction also accompanys the woman on her journey to her people. This sending off of the wife home under these circumstances does not constitute a divorce but it is perhaps the first formal step in the dissolution proceedings at the instance of the man. Where the divorce is at the instance of the woman, she simply packs her belongings and goes to her parental home.

[15] On arrival at her home the woman relates to her father or guardian the reasons for her return. Her guardian is expected to respond to this by taking her back to her in-laws, to allow the two families to formally deliberate on the matter. Where the matter is resolved without the marriage being dissolved, the Chiefs Kraal is not brought into the matter. However, where the decision is that the marriage should be terminated, the relevant Chief's Kraal's (*Umphakatsi*) representatives, if more than one, should be invited and be fully informed of the deliberations and decisions taken, e. g. pertaining to the issue of lobola, custody

of the children born of the marriage and such other issues ... following a dissolution of marriage.

[16] Both experts were in agreement that the placing and quick removal of his *umvunulo* by the husband on the wife's belongings symbolizes the man's unequivocal declaration that he shall no longer render conjugal rights to the woman, but both experts did not appear to be certain whether such symbolic gesture has to be done before or after the final decision to dissolve the marriage is taken. I am, however, satisfied that it is done as described above - before the dissolution of the marriage and it is not of itself the dissolution or the reason for the dissolution. I am fortified in this by the fact that the act in question is only a gesture that may or may not be performed by the man. Its non-performance may never be a bar to a divorce, the experts said. The joint family court decision is decisive and not an unilateral act by one of the protagonist before such decision is made.

[17] Another issue that bears mention and on which the experts were in agreement ... of the marriage usually takes place at the husband's home, it may also be held at any other place convenient to the parties to the discussions.

[18] Lastly, I was unable, despite some probing by me, to get a clear answer from the experts ...if a dissolution may be effective or valid even in the face of a disagreement by one family or party to the deliberations... although turns on this uncertainty in these two applications as there appears to have been, no disagreement on the final decision taken.

[19] In both these applications, all the persons who ought to have been party to the deliberations that resulted-in the dissolutions herein, did take part, save that

in the second application, a representative of the Respondent's Chief was not present. A report was, however, duly made, after the event, to the relevant *umphakatsi* and this appears to have been in order too. In any event, the *umphakatsi* plays an observer status or role and does not take part in the actual decision making. That is for the two families concerned. This is understandable and consistent with the role played by the *umphakatsi* during a marriage ceremony within its area or jurisdiction.

[20] Another point to note is that the divorce processes in the second application were initiated by the woman - the respondent who simply packed her belongings and left the Applicant at their matrimonial home. She was motivated by the persistent ill-treatment she suffered at this hands,

[21] From the foregoing facts and statement of the relevant law on the issues before me, I am satisfied that both Applicants have made out a case for their respective reliefs sought herein and I order as follows in each case :

1. The marriage contracted by and between the parties in terms of Swazi law and custom has been dissolved and the second Respondent being the Registrar of Births ... and Deaths is ordered to cancel the relevant Marriage Certificates from the Register of Marriages.

[22] Again, I wish to record my appreciation and indebtedness for the valuable assistance I received from the two Assessors herein who were very patient and over willing to guide and direct my not-so-perfect grasp of Swazi law and custom. My gratitude also goes to Mr. Simelane, Counsel for the Applicants and the two expert witnesses mr Musa Dlamini from the Manzini Swazi National Court and Mr Samson Mkhabela, also from the same court for their contributions herein. "*Kwandza kwaliwa batsakatsi.*"



MAMBA J