



## IN THE HIGH COURT OF SWAZILAND

### JUDGMENT

Case No. 165/2011

In the matter between:

<b>MUZI COSTA KUNENE</b>	<b>1<sup>st</sup></b>	<b>Applicant</b>
<b>ZODWA KUNENE</b>	<b>2<sup>nd</sup></b>	<b>Applicant</b>
<b>LINDIWE KUNENE</b>	<b>3<sup>rd</sup></b>	<b>Applicant</b>
<b>THULI KUNENE</b>	<b>4<sup>th</sup></b>	<b>Applicant</b>

And

**BUSISIWE THEMBI HLATSHWAYO**

<b>(nee Simelane)</b>	<b>1<sup>st</sup></b>	<b>Respondent</b>
<b>THE MASTER OF THE HIGH COURT</b>	<b>2<sup>nd</sup></b>	<b>Respondent</b>
<b>THE REGIGISTRAR OF BIRTHS, MARRIAGES AND DEATHS</b>	<b>3<sup>rd</sup></b>	<b>Respondent</b>
<b>THE ATTORNEY GENERAL</b>	<b>4<sup>th</sup></b>	<b>Respondent</b>

**Neutral citation:** *Muzi Costa Kunene & 3 Others v Busisiwe Thembi Hlatshwayo (nee Simelane) & 3 Others (2581/2011) [2013] SZHC 76 (3<sup>rd</sup> May 2013)*

**Coram:** **M. Dlamini J.**

**Heard:** **1<sup>st</sup> August 2012**

**Delivered:** **3<sup>rd</sup> May 2013**

*– application proceedings for removal of an executrix on the basis that marriage of executrix to the deceased was null and void –procedure to be*

*followed in dissolving Swazi law and custom marriage washing or cleansing off red ochre – and conditions necessitating washing off red ochre*

Summary: The applicants are beneficiaries of an estate where 1<sup>st</sup> respondent was appointed as an executrix owing to a civil rites marriage between the executrix and the deceased. The applicants seek for orders declaring the said marriage null and void *ab initio* and consequently removal of 1<sup>st</sup> respondent as an executrix. Their basis for having the said marriage null and void is that the 1<sup>st</sup> respondent was married to a third party prior and that the said marriage had not been dissolved at the time of contracting the second marriage. The 1<sup>st</sup> respondent vociferously contest the application on the ground that the said marriage with the third party was dissolved through the cleansing of red ochre ceremony. On the basis of this contention, the matter was referred to trial.

[1] The applicants led six witnesses in proving their case.

[2] The first witness, Tholiwe Ngozo on oath, informed the court that the 1<sup>st</sup> respondent was her sister-in-law as she was married to her brother Dan Hlatshwayo by Swazi law and custom. She was present during the marriage ceremony in which the 1<sup>st</sup> respondent was smeared with red ochre. Subsequently the special portion removed from the she-goat was sent to 1<sup>st</sup> respondent parental home as a means of informing and confirming that 1<sup>st</sup> respondent has been married under Swazi law and custom. She later, as custom would dictate, accompanied the 1<sup>st</sup> respondent to her parental home. The 1<sup>st</sup> respondent wore a pinafore, carried a spear and had a goat's bile on her head, a gear indicative of a recently married woman being taken to her parental home. They found 1<sup>st</sup> respondent's mother who welcomed them. The said marriage took place on 4<sup>th</sup> April 1998 and Belinah Ngozo smeared 1<sup>st</sup> respondent with red ochre. She stated that she never heard of any

dissolution of this marriage between 1<sup>st</sup> respondent and the said Dan Hlatshwayo.

[3] The next witness was Belinah Ngozo, an elderly of seventy years old. She identified the 1<sup>st</sup> respondent as her daughter-in-law who underwent Swazi law and custom marriage to Dan Hlatshwayo, her sister's child. She confirmed smearing 1<sup>st</sup> respondent with red ochre as stated by Tholiwe Ngozo. She also stated that she was not aware of any ceremony where the marriage between 1<sup>st</sup> respondent and Hlatshwayo was dissolved. She informed the court further that she was aware that 1<sup>st</sup> respondent was residing at Kunene's family. Her evidence on the merits was not challenged under cross-examination.

[4] The third witness was Muzi Costa Kunene, the 1<sup>st</sup> applicant. His evidence on oath revealed that he was the son of the late Absalom Kunene who died on 19<sup>th</sup> October 2010. After the death of his father, he saw a duplicate copy of a marriage certificate between his late father and the 1<sup>st</sup> respondent. He was not aware that the two had contracted a civil rites marriage. Prior to the demise of his father, a delegation came from the Hlatshwayo homestead. The 1<sup>st</sup> respondent was by then residing with his father at this witness's parental home. When the delegation arrived, they met up with the 1<sup>st</sup> respondent who chased it away. The reason for the delegation to proceed to his parental home was to fetch the 1<sup>st</sup> respondent on the basis that she was a wife to the Hlatshwayos. Upon the death of his father and 1<sup>st</sup> respondent having returned to her parental home, the Chief's runner was dispatched to 1<sup>st</sup> respondent's parental home to inform the 1<sup>st</sup> respondent and her relatives to report to the Kunene's family on a specified date for a meeting between the Hlatshwayos, Kunenes and 1<sup>st</sup> respondent's family. The issue to be discussed was the reason for the 1<sup>st</sup> respondent to reside at the Kunene family while lawfully wedded to the Hlatshwayos. This meeting never took place as 1<sup>st</sup> respondent and her family did not turn up.

[5] Under cross-examination, this witness was asked of an instance where his father invited him for a ceremony. He informed the court that there was never such instance. He revealed that he was not aware of how 1<sup>st</sup> respondent came to reside with his father and that 1<sup>st</sup> respondent resided with his father for a period of about nine months before his death. It was further his evidence under cross-examination that at the Master's office, they were simply informed that 1<sup>st</sup> respondent was the executrix. They were not given the opportunity to nominate an executor.

[6] Selinah Ntombizodwa Kunene gave evidence similar to that of Muzi Kunene in relation to a delegation that came to her parental homestead from the Hlatshwayo family to demand for the return of their wife, the 1<sup>st</sup> respondent. The delegation failed to get their wife as the very same wife chased them away before they could be seen by members of the Kunenes. Her father, Absalom Kunene was ill by then. It was her evidence that the delegation came again when her father had passed on and expressed shock on how they, the Kunenes, could allow their wife, 1<sup>st</sup> respondent, to sit next to the corpse, being their deceased father, during the mourning ceremony. It was her evidence further that a meeting was called after the burial of her father but the 1<sup>st</sup> respondent and her family failed to attend the meeting.

[7] The next witness was Dan Hlatshwayo, who under oath informed the court that he married 1<sup>st</sup> respondent in terms of Swazi law and custom in 1998 and that the said marriage was never dissolved.

[8] Under cross-examination his evidence was that he resided with 1<sup>st</sup> respondent for a long time until 2009. He was aware that 1<sup>st</sup> respondent lived as a lover with his uncle Absalom Kunene. He was about to confront his uncle about this matter but his uncle died shortly. He, however, had already sent a delegation to enquire on his behalf. He further revealed that

he did not have a marriage certificate. It was under cross-examination that he still wanted his wife back and would be pleased to have her soon. He maintained sanctioning a delegation to the Kunene's family to fetch his wife. He was not aware of any cleansing ceremony which dissolved their marriage.

[9] The last witness was one Johan Mgcibelo Masuku who identified himself as the Chief's runner of the area where the applicants and Dan Hlatshwayo reside since 1996. His evidence was that Dan Hlatshwayo married 1<sup>st</sup> respondent under Swazi law and custom in 1998. No dissolution of this marriage was reported to the Chief's kraal as custom would dictate. Under cross-examination, he stated that he was not aware of any ceremony between the 1<sup>st</sup> respondent and Absalom Kunene – although he was aware that they cohabited together. It was his evidence that even if a report to the Chief's kraal would be made, he would eventually receive the report as all reports must reach him.

[10] Three witnesses attended court on behalf of 1<sup>st</sup> respondent.

[11] The 1<sup>st</sup> respondent gave evidence under oath. She stated that she was married to Absalom Arthur Mshengu Kunene, the father of applicants in terms of civil rites. She handed the marriage certificate and was marked as exhibit “**DC 1**”. There were no children born out of the said marriage. It was her evidence further that she was introduced to the applicants by Absalom Kunene. She revealed that before the said marriage, she had contracted a marriage in terms of Swazi law and custom with Dan Hlatshwayo. After a long time, she separated from Dan Hlatshwayo. When she had a relationship with Absalom Kunene, her parents informed the said Mr. Kunene that she was married under Swazi law and custom. They suggested to Mr. Kunene that a goat must be purchased in order to cleanse the red ochre upon her. This was done. This was reported to the

Chief's kraal to PW6, Johan Masuku. After the cleansing ceremony, Mr. Kunene sent a delegation to ask for her hand in marriage. She lived with Mr. Kunene for a period of six to seven months before they were married. She was, however, chased by Mr. Kunene's children and relatives after Mr. Kunene's death. Before his demise, she lived peacefully with Mr. Kunene's family. She denied ever chasing a delegation from Hlatshwayo's homestead. The marriage between Mr. Kunene and herself was known to the community. The applicants knew about her civil rites marriage as Mr. Absalom Kunene informed them of the marriage. It was her evidence further that there was never any delegation from Hlatshwayo to fetch her before or after the death of Mr. Kunene.

[12] Under cross-examination, she revealed that only members of her family were present when the cleansing of red ochre was performed upon her. In her re-examination she confirmed that she was summoned to attend to a meeting where they would discuss her marriage to Mr. Hlatshwayo. She never attended because the Kunenes who summoned here were in a fighting mood.

[13] The next witness was Sibongile Eunice Mavimbela. This is the biological mother of 1<sup>st</sup> respondent who informed the court that her daughter was married under Swazi law and custom to the Hlatshwayos. Subsequently a delegation came to ask for her hand in marriage. It was suggested that she should be cleansed of the red ochre. A goat was slaughtered, mixed its blood with dung and she was cleansed with the concoction. Her evidence that Mr. Hlatshwayo's uncle, one Mr. Mdluli, was informed of the cleansing. Later, Mr. Kunene wedded 1<sup>st</sup> respondent in the presence of two of his sisters at Nhlangu District Commissioner's offices. Upon the death of Mr. Kunene, they went for mourning. The following day 2<sup>nd</sup> applicant chased them away with 1<sup>st</sup> respondent.

[14] This witness was cross-examined on whether she did at some point consider her daughter to be married to Dan Hlatshwayo. Her response was that 1<sup>st</sup> respondent was never married to the Hlatshwayo because marriage in terms of Swazi law and custom consisted of smearing with red ochre (*kutekwa*), payment of bride prize (*kulobola*) and dancing of bridal party (*kugidza umtsimba*). In the absence of any one of these, the woman cannot be held to be lawfully married, according to this witness.

#### Legal principles

[15] The question for determination is whether the 1<sup>st</sup> respondent was married to one Dan Hlatshwayo. If the answer is yes, the next question is whether the said marriage was dissolved so as to qualify the 1<sup>st</sup> respondent to remarry to another man.

[16] Our jurisdiction recognizes two types of marriages viz. civil or common law marriage and Swazi law and custom marriage. This can clearly be deduced from section 7 (1) of the marriage Act No.47 of 1964.

*“7. (1) No person already legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy:*

*Provided that nothing contained in this section shall prevent parties married in accordance with Swazi law and custom or other rites from re-marrying one another in terms of this Act.”*

[17] **His Lordship M. C. B. Maphalala J. in Sipiwe Magagula v Lindiwe Mabuza 4577/08** at page 8 writes:

*“There are two forms of marriages recognized in Swaziland: it is the marriage by Swazi Law and Custom and marriage by civil rites”*

[18] **Thandabantu Nhlapho, Marriage and Divorce in Swazi Law and Custom, page 75** writes:

*“...the characteristic features of Swazi marriage are libovu (red ochre), lobolo and procreation.”*

[19] **M. C. B. Maphalala J. in the case of Sipiwe Magagula v Lindiwe Mabuza and Others 4577/08** at page 7 on the question on the procedure which constitute Swazi law and custom cites his **Lordship Chief Justice Nathan in R. v Fakudze and Another 1970-1976 S. L. R. 422** at 423 as follows:

*“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.*

[20] The learned Judge continues to quote **R. v Timothy Mabuza 1979-1981 S. L. R. 8** at 9:

*“...the smearing with red-ochre was an essential part of a Swazi marriage ceremony..... it is usually done outside the cattle byre but at the upper end of the cattle byre, that is immediately below the main hut....even if the smearing was not done at the proper place the person smeared in the*



*circumstance of this case would be considered as a married woman, and this would be so even if no lobola at all has been paid ...*” (my emphasis)

[21] The honourable Judge then wisely concludes at paragraph 10:

*“It is common cause that the first respondent was married to the deceased in terms of Swazi law and custom and, she was smeared with red ochre which is the essential requirement of a Swazi marriage ceremony.”* (my emphasis)

[22] In *casu*, the applicants and 1<sup>st</sup> respondent are at *ad idem* that the 1<sup>st</sup> respondent was smeared with red ochre. The evidence shows that the 1<sup>st</sup> respondent cohabited with the said Dan Hlatshwayo for a considerably long period before she was smeared with red-ochre. It is understandably on that basis that there were no allegations of “*forcibly smearing*”. From the preceding authorities it is clear that the 1<sup>st</sup> respondent therefore became wife upon smearing with red ochre.

[23] That there was no subsequent *lobola* or dowry paid is inconsequential to the question of the validity of the marriage. For the said reason I find that the 1<sup>st</sup> respondent was a wife to the said Dan Hlatshwayo.

[24] The second question is whether there was a dissolution of the said marriage by virtue of the cleansing ceremony that was performed upon 1<sup>st</sup> respondent before she contracted the civil rites marriage with the deceased.

[25] The learned author, **Thandabantu Nhlapho**, *supra* at page 77 states on the subject of divorce under Swazi law and custom:

*“The Swazis have an almost illimitable capacity for compromise, and it will only be in the most stubborn cases where there is grievous cause for complaint that the separation will be effected”*

[26] He propounds further at page 53:

*“At any rate there is agreement that adultery and witchcraft are grounds for divorce at the instance of the husband (but not of the wife) in custom. Neglect of duty, desertion and/or gross ill treatment by a husband appear to be the only grounds available to a wife to end a customary marriage.”*

[27] In *casu* the 1<sup>st</sup> respondent has not alleged any of the grounds stated by **Nhlapo** which are available to her to precipitate divorce under Swazi law and custom. All she states is that the deceased wanted to marry her and upon discovery that she was married to Dan Hlatshwayo it was suggested that there should be “*washing off the red ochre*” as **Nhlapo** refers to the cleansing ceremony.

[28] In order to ascertain the effects of the washing off red ochre, this court invited as a witness who was an expert in Swazi law and custom, one Mr. Msweli Mdluli. Mr. Mdluli sits at Nhlanguano Swazi Court as an assessor. He informed the court that in the cleansing of red ochre, the parent of the woman who has been smeared with red ochre, sends a cow to the family which smeared the daughter with red ochre. This procedure is not available to one who upon smearing with red ochre assumed and discharged duties as a wife. It is, I may add, done in instances where the special goat portion (*umsasane*) has not been accepted by the woman’s family from the onset. This practice according to Mr. Mdluli, is carried out where the “*husband*” is considered by the family and community general as a lunatic (*luhlanya*). Lunatic, in the sense that by his conduct, the man cannot be viewed as

having any serious intention or capabilities of establishing a concrete relationship with a woman.

[29] **Mr. Nhlapho**, *op. cit.* at page 92 on the washing off the red ochre writes on when and how this process could be evoked:

*“A forcibly smears X but does not pay lobolo. B comes along and offers X’s parents lobolo for her. They accept the cattle and pay one to A’s family to clean off the red ochre. Then when X is subsequently smeared with liphehla (animal fat) at B’s place it has more weight – but she cannot bear the heir.”*

[308] From the above, it is clear that the learned author yet defines another scenario where cleansing of red-ochre can take place.

[31] However, what is common between **Mr. Nhlapho** and **Mr. Mdluli’s** explanation is the procedure that the family of the girl has to send a cow to the family where the girl was smeared with red ochre.

[32] In *casu*, it is clear that although the 1<sup>st</sup> respondent sought to cleanse herself off the red-ochre, the appropriate procedure was not followed. All they did, according to 1<sup>st</sup> respondent and her witnesses, was to wash her with the goat’s concoction of dung and blood. The family of Dan Hlatshwayo were never informed. This is clearly demonstrated by Dan Hlatshwayo who in his evidence revealed that he sent a delegation before and after the death of Absalom Kunene to demand for his wife, 1<sup>st</sup> respondent. In fact, the said Dan Hlatshwayo adamantly informed this court that he still wanted his wife back.

[33] In the result, the red ochre was not cleansed.

[34] I am very much aware of the *dictum* in **Siphiwe Magagula** *op. cit.* at page 10 where his Lordship **M. C. B. Maphalala J.** states:

*“where the wife deserts her husband and marries another man during the lifetime of the husband, the marriage automatically comes to an end whether or not a family meeting is held; she cannot be said to be still legally married to the first husband.”*

[35] I agree with the learned judge on the above laid down principle. However, it is trite law that there are exceptions to every general rule and that each case should be determined according to its own peculiar circumstances. The **Siphiwe Magagula** and the present case’s circumstances are very much distinguishable.

[36] In **Siphiwe Magagula**’s case the applicant had been married to the deceased before contracting another marriage with a different man. The second man died. She became the beneficiary. Later the first husband died. She proceeded to lay a claim against the estate of the first husband. It is upon this basis that the honourable court correctly held that the marriage was dissolved when she was married to the second man.

[37] In *casu*, the first husband, Dan Hlatshwayo has sent delegations on various occasions calling upon the return of his wife. While in the **Siphiwe**’s case no allegations that the first husband persisted in having his wife returned. In other words, in **Siphiwe Magagula**’s case there was tacit agreement between the parties to have the marriage contract terminated while in *casu* the sending of delegation within a short space of time, being nine months, clearly demonstrate that the other party was contesting the end of the marriage.

[38] **Smit J. A. in Dladla v Dlamini 1977-1978 S. L. R. 15** at 16 clarifies:

*“A marriage in terms of Swazi law is not dissolved by a subsequent marriage in terms of statute law.... The customary law marriage is a valid marriage contract when entered into and there is no law which provides for its dissolution when it is followed by a civil rites marriage.”*

[39] In the premises I find that the marriage between 1<sup>st</sup> respondent and Mr. Dan Hlatshwayo still subsists. The marriage therefore between 1<sup>st</sup> respondent and Mr. Absalom Kunene is invalid and therefore void *ab initio*.

[40] Without necessarily setting a precedent, I am not inclined to grant the applicants costs of suit for the reason that 1<sup>st</sup> respondent believed that the procedure taken was not irregular in cleansing of red ochre and therefore was justified in defending the matter.

[41] In light of the foregoing I make the following orders:

1. The marriage between the 1<sup>st</sup> respondent and Absalom Arthur Mshengu Kunene is hereby declared null and void *ab initio*;
2. 1<sup>st</sup> respondent is hereby removed from being the executrix of the estate of the late Absalom Arthur Mshengu Kunene under file ES 133/2010;
3. Letters of Administration given to 1<sup>st</sup> respondent by 2<sup>nd</sup> respondent are hereby cancelled;
4. The 3<sup>rd</sup> respondent is hereby ordered to:

4.1 cancel the marriage certificate number 18794 issued in favour of 1<sup>st</sup> respondent;

4.2 Expunge from its registry the entry under certificate number 18794;

5. Each party to bear his or her own costs.

---

**M. DLAMINI**  
**JUDGE**

**For Applicants : Mr. M. Dlamini**

**For Respondents : Mr. M. E. Nkambule**