



## IN THE HIGH COURT OF SWAZILAND

### JUDGMENT

Case No. 2210/2009

In the matter between:

**ZANELE XOLILE MBHAMALI**

**Plaintiff**

And

**MOSES MKISELANE KHUMALO  
REGISTRAR OF BIRTHS, MARIAGES  
AND DEATHS  
THE ATTORNEY GENERAL**

**1<sup>st</sup> Defendant**

**2<sup>nd</sup> Defendant**

**3<sup>rd</sup> Defendant**

**Neutral citation:** *Zanele Xolile Mbhamali v Moses Mkiselane Khumalo and 2 Others (2210/2009) [2014] SZHC 108 (13<sup>th</sup> June 2014)*

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

**Heard:** **9<sup>th</sup> May, 2014**

**Delivered:** **13<sup>th</sup> June, 2014**

*Delivering of herd of cattle and the purpose of slaughtering of cow for progeny (inkhomo yekujubela/kuvimbela and not yekuvimba) discussed. It has been accepted that the smearing with red ochre is the significant legal ceremony giving rise to a marriage in terms of Swazi law and custom. Where no prior request for hand in marriage and subsequent umtsimba ceremony, failure to send umsasane is construed that there was no smearing of red ochre and therefore no marriage.*

**Summary:** The plaintiff seeks for an order declaring a marriage certificate issued by 2<sup>nd</sup> defendant invalid.

### **Evidence**

[1] The plaintiff on oath informed the court that after falling in love with 1<sup>st</sup> defendant, 1<sup>st</sup> defendant proceeded to her parental home and paid nine herd of cattle. One cow referred to as cow for progeny (*inkhomo yekujubela*) was slaughtered.

[2] Subsequently, 1<sup>st</sup> defendant requested her to accompany him to Nhlangano where he would fix his motor vehicle. Upon arrival at Nhlangano, the 1<sup>st</sup> defendant asked her to go to 2<sup>nd</sup> defendant offices in order to register a marriage certificate. She resisted on the basis that 1<sup>st</sup> defendant had prior discussed the matter of a certificate with her. She had informed 1<sup>st</sup> defendant that a certificate would be registered after they have contracted a civil marriage and undergone a white wedding ceremony. However, 1<sup>st</sup> defendant informed her that as he was about to die, the certificate ought to be registered. This was for the good of plaintiff and their child. 1<sup>st</sup> defendant quickly called a Mbhamali gentleman who was running a taxi business in Nhlangano town to be plaintiff's witness. The certificate was then registered. It was her evidence that she did not undergo a marriage in terms of Swazi law and custom as borne by the certificate. It was her evidence that the 1<sup>st</sup> defendant coerced her into having the marriage certificate registered.

[3] Cross examination emphasised on that the plaintiff was not coerced into having the certificate registered, but that she initiated the registration by

going to 1st defendant's parental home and ferrying him to register the certificate. The plaintiff closed her case.

[4] The 1<sup>st</sup> defendant gave evidence to the effect that upon falling in love with plaintiff, he went to her parental homestead and paid nine herd of cattle, the tenth being *insulamnyembeti* (cow for bride's mother). This was in 2002.

[5] Later, plaintiff came to his parental home as he was on leave and requested that he register the marriage certificate. He did not have money and plaintiff undertook to pay transport costs. He then requested his brother who had a motor vehicle to accompany them to register the certificate. They brought along Annie Khumalo, his sister in law. When they reached 2<sup>nd</sup> defendant's offices, plaintiff brought Congo Mbhamali to be her witness. The certificate was duly registered.

[6] On cross examination, he stated that he was surprised that the plaintiff's evidence that she was not smeared with red ochre was not challenged. He acknowledged that the marriage was no longer effective as plaintiff rejected him in 2006.

[7] The second witness on behalf of 1<sup>st</sup> defendant was Daniel Mandiza Khumalo who on oath identified himself as 1<sup>st</sup> defendant's brother. He corroborated 1<sup>st</sup> defendant in regard to the payment of *lobolo* and informed court that he drove the parties to 2<sup>nd</sup> defendant's office for registering the certificate.

## Issue

- [8] The issue on the plaintiff's case ought not to be whether there was coercion which led to the registration of the certificate, but whether there was any marriage before registering of the certificate.

## Legal principles

- [9] What constitutes a marriage in terms of Swazi law and custom? Discussing this subject, **Thandabantu Nhlapho** in **Marriage and Divorce in Swazi Law and Custom** page 44 writes:

*“According to Fannin three marriage formalities must be observed before customary marriage comes into existence:*

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

- [10] Describing what actually takes place during the smearing, the learned author at page 45 cites:

*“any old woman seizes the bride and puts her down on a mat already spread in the court yard. A little girl is made to sit next to her and both are rubbed in with a mixture of fat and red clay. This is considered the final act necessary to make the marriage binding, and that the little girl will from now on act as her helpmate...”*

- [11] The learned author refers to **R v Fakudze and Another 1970-76 SLR 422** where it was held on the three formalities observed in order to conclude a Swazi law and custom marriage:

*“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)*

### **Determination**

[12] *In casu*, plaintiff informed the court that the 1<sup>st</sup> defendant simply proceeded to her parental home and paid nine herd of cattle.

[13] When 1<sup>st</sup> defendant gave evidence, he too informed the court that they went to pay cattle to the family of the plaintiff. He further stated that a cow that was slaughtered was for *kuvimbela* or *yekuvimbela* and it must be differentiated from *inkhomo yekuvimba* or *invimba*. This (*inkhomo yekujubela/kuvimbela*) is referred to as progeny cow – one slaughtered indicating not payment of bride prize but that the in-laws should keep and look after the would-be bride prize and if they give birth, any calves would be added as *lobolo* (bride prize) when the actual *lobolo* ceremony takes place. Conversely, should any of the cattle die, it would **not** be subtracted from the number of *lobolo* cattle submitted by the groom. For instance, suppose the nine herd of cattle gave birth to four calve during the *lobolo* ceremony, the groom’s representative would on the eve of the *lobolo* ceremony announce that there are thirteen herd of cattle. However, if four out of the nine died, the representative would announce by shouting, as is customary, nine herd of cattle. They will not consider that the cattle died while in the premises or custody of the bride’s family. This addition and non-subtraction would however happen provided on the day when the herd of cattle were brought or delivered to the homestead of the bride, a cow for progeny (*inkhomo yekujubela* or *kuvimbela*) was slaughtered as was in

*casu*. This cow comes from the groom's family and is not counted as part of the *lobolo* cattle.

[14] From the evidence adduced by applicant and 1<sup>st</sup> respondent, it is common cause that during the *lobolo* ceremony both *lugege* and *inhlabisabayeni* were not slaughtered. *Lobolo* ceremony is signified by slaughtering of *lugege* and *inhlabisabayeni*. Two bulls, one from the groom's family (*lugege*) and one from the bride's family (*inhlabisabayeni*) are slaughtered and an exchange of specific parts of the meat from each bull takes place. This is where the "*union between the two families*," ( see **Nhlapho supra**) and not just the bride and groom only, is sealed.

[15] It is therefore common cause that no *lobolo* ceremony took place except that the 1<sup>st</sup> defendant's family took herd of cattle to plaintiff's family. Correctly so, because in our culture one pays *lobolo* not to a maiden but a wife. In the present case, it is common cause that plaintiff was not a wife by virtue of the absence of any form of marriage having taken place prior.

[16] The plaintiff in chief, informed the court that when they proceeded to 2<sup>nd</sup> defendant's offices to register the marriage certificate, she objected on the basis that she wanted a civil rites marriage. Further, no smearing of red ochre was done on her, signifying a Swazi law and customs marriage. This evidence was not challenged. In fact, when this witness had finished giving evidence, the court enquired from 1<sup>st</sup> defendant's attorney as to whether plaintiff was smeared with red ochre, the learned Counsel informed the court that it was not disputed that plaintiff was not smeared with red ochre. It is upon this basis that the plaintiff closed her case.

[17] However, when 1<sup>st</sup> defendant took the witness stand, he informed the court that plaintiff was smeared with red ochre. On cross examination, he informed the court that he was surprised that such was not challenged. He was pressed further on the point of plaintiff having been smeared with red ochre as follows:

*Plaintiff's Attorney:* "Did you tell the court the name of the person who was sent to send 'umsasane' (special goat meat slaughtered during smearing red ochre ceremony)"

*1<sup>st</sup> defendant:* "We didn't send umsasane with her as she was already a wife."

[18] I have already demonstrated that when 1<sup>st</sup> defendant went to plaintiff's family it was not for purposes of paying *lobolo* for a wife. Even 1<sup>st</sup> defendant witness, DW2 informed the court that they went to pay *lobolo* to 1<sup>st</sup> defendant's girlfriend and not wife. At any rate, all the witnesses who gave evidence were at *ad idem* that on the day they delivered the nine heard of cattle, they slaughtered not *lugege* but cow for progeny (*inkhomo yekujubela*). This signifies that the plaintiff was still a maiden then and not a wife as they did not slaughter *lugege*. Further the 1<sup>st</sup> defendant was pressed further on this point of having smeared plaintiff with red ochre as follows:

*Plaintiff's Attorney:* "No red ochre was ever smeared to plaintiff by your family."

He responded:

*1<sup>st</sup> defendant:* "Even if so, we the Khumalo's paid *insulamnyembeti*. We were not obliged to complete the ceremony." (my emphasis)

[19] Under Swazi law and custom, the smearing of red ochre goes hand in glove with slaughtering of a goat for purposes of extracting ‘*umsasane*’ (a certain part of the goat’s meat) and this is then taken usually by a youth boy, strong enough to outrun the bride’s family as he is expected to throw it at the inner entrance (*esibuyeni*) of the bride’s home. As he literally throws this meat, he shouts, “ *We have tekaed (traditionally marrried), Nomsa ( the name of the bride)*”. The bride’s family would run after this young man with the intention of assaulting him indicating their disapproval at the manner in which their daughter or sister has been taken into marriage. This is because in the original culture of Swazi law and customs marriage, a bride is to be smeared with red ochre during “*umtsimba*” ceremony which takes place after the groom’s family has asked for the maiden’s hand in marriage from her family. The sending of the *umsasane* is the only means by which the family of the bride is informed that their daughter has been turned into a wife. Where therefore there was no request for hand in marriage and subsequent *umtsimba* ceremony, failure to send *umsasane* is to be construed that there was no smearing with red ochre and therefore no marriage. The evidence that the plaintiff was smeared with red ochre is therefore an afterthought as by 1st defendant’s own showing, there was neither *umsasane* taken to the family of plaintiff nor *umtsimba*. That there were nine herd of cattle taken before, is neither here nor there. This is because it has been accepted that the smearing with red ochre is the significant legal ceremony giving rise to a marriage under Swazi law and custom, see **Nhlapho** *op. cit.*

[20] In the final analysis, I find that the plaintiff was not smeared with red ochre and therefore no marriage ever existed between the plaintiff and 1<sup>st</sup> defendant. Registration of the certificate, exhibit A herein was erroneous. Having found this, there remains for 1<sup>st</sup> defendant to be given back his



cattle. This however, is subject to the customary practice of *kutsengumntfwana* and penalty for impregnating a maiden.

[21] The following orders are therefore entered:

1. It is hereby declared that no marriage ever existed between plaintiff and 1<sup>st</sup> defendant;
2. The marriage certificate between the plaintiff and 1<sup>st</sup> defendant is hereby declared cancelled;
3. The 2<sup>nd</sup> defendant is hereby ordered to expunge all entries from its records pertaining to plaintiff and 1<sup>st</sup> defendant's marriage;
4. Each party to bear his/her own costs of suit.

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

**For Plaintiff** : **M. N. Manana**  
**For Defendants** : **I. Du Pont**