IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Case No. 56/2016**

In the matter between:

SAMUEL MYENI HLAWE **Appellant**

And

BEATRICE THOLAKELE SEYAMA **1st Respondent**

REGISTRAR of Births, Marriages & Deaths **2ND Respondent**

ATTORNEY GENERAL **3RD Respondent**

Neutral Citation: *Samuel Myeni Hlawe v Beatrice Tholakele Seyama and Two Others (56/2016) [2017] SZSC 41(09th October,2017).*

Coram: **MJ DLAMINI JA; RJ CLOETE JA; JP ANNANDALE JA**

Heard: **23rd August, 2017**

Delivered: **09th October, 2017**

Summary: Customary law – Swazi customary marriage – dissolution of customary marriage – deregistration of customary marriage – requirements for dissolution considered – dissolution improper – academic writers reviewed

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JUDGMENT

Introduction

[1] This is an appeal from the judgment of SB Maphalala PJ, as he then was, dismissing an application by appellant, as applicant, in which the applicant sought an order -

> "1. Directing the second respondent to delete or expunge entries in respect of the marriage under certificate number 28270 between the applicant and the 1st Respondent dated November 26, 1979, from her records as the parties are no longer married to each other."
>
> "2. Costs only in the event that the application is opposed.
>
> "3. Further and or alternative relief as the honourable court deems fit."

[2] The appellant's grounds of appeal are as follows -

> "1. That the learned judge ***a quo*** erred in law and in fact by holding that the appellant did not follow all the procedures for the dissolution of a marriage in terms of Swazi Law and Custom.
>
> "2. The court ***a quo*** erred in law and in fact in holding that the crucial meeting between the families did not take place in that the two

families did not meet to deliberate over the matter to find an amicable solution and/ or to terminate the marriage.

"3. The court ***a quo*** misdirected itself in law and in fact in holding that the decision to terminate the marriage was taken without involving the 1st respondent's family.

"4. The court ***a quo*** misdirected itself in holding that the adultery of the 1st respondent was condoned by the appellant.

"5. The court ***a quo*** misdirected itself in failing to hold that the reason for going to the Royal Kraal [was] to report the termination of the marriage as opposed to having a meeting of the families to deliberate on the marriage.

"6. The court **a quo** erred in failing to hold that the marriage was terminated properly in terms of Swazi Law and Custom.

"7. The court ***a quo*** erred in law and in fact by stating that the judgment appealed was delivered on the 3rd May 2016 as it was delivered on the 30th June 2016."

[3] In my view, the first three grounds of appeal may be combined with the sixth ground to reflect the main issue for determination in this appeal. At the hearing, counsel on both sides were of the same view as to the question for decision, that is, whether the marriage that is sought to be expunged from the official records in the custody of 2nd respondent had been terminated properly according to the tenets and procedures of Swazi law and custom (hereinafter also called 'Swazi customary law').

[4] The parties, that is, the appellant and 1st respondent (the respondent) were married by Swazi customary rites in November 1979. We do not know if there are children of the marriage and whether *lobola* was paid. The dysfunction in the marriage between the parties begins with an act of adultery committed and admitted by the respondent in May 1992. After the noting of the adultery, certain customary procedures and deliberations were undertaken between the families of the appellant and the respondent. The issue, as already indicated, for determination is whether the procedures and deliberations which allegedly took place between the two families culminated in a proper dissolution of the marriage of the parties as required by customary law. There is, inevitably, disagreement as to what happened as shown by the disputed dissolution of the marriage. Appellant argues that all that is required by custom was done to bring the marriage to an end and that therefore the registration of their marriage should be expunged from the official records; respondent denies this and argues to the contrary. Under normal circumstances the application to expunge the registration should be a joint application by the parties who have separated or at least be an unopposed application.

[5] Respondent considers herself as still married to appellant and accordingly opposes the application on the ground that the adultery was condoned and or that the customary procedures were not followed for the proper dissolution of the marriage. The appellant denies that the adultery was condoned. Whether the adultery was condoned or not is in my view not necessary to decide here. Suffice it however to point out that if

condonation had occurred the matter would not have come this far. I will therefore assume without deciding that in fact the adultery was not condoned.

The Facts and comments.

[6] Culled from the record of proceedings which, however, does not have the transcript, the story of what happened from the date of the adultery as told by appellant, excluding minor details, is as follows:-

1. "During the month of May 1992, the 1st respondent committed adultery with one **Matitila Hlawe** at the parties' matrimonial home at Sihhoye. **The adultery was witnessed by the applicant** and it was admitted by the 1st respondent together with the said Matitila Hlawe".

2. The adultery was reported to the **Hlawe** (appellant's) family as well as the **Seyama** (respondent's) family. (It is not clear how or when the report to the Seyama family was made).

3. The Hlawe family convened a meeting whereat the matter was deliberated and the said Matitila fined a cow for committing the offence.

4. "The 1st respondent, upon the matter being deliberated at the Hlawe family, then left the parties' matrimonial home without any trace of her whereabouts".

5. "Upon the 1st respondent desertion, the Hlawe family sent Makhosini Hlawe to report the disappearance of the 1st respondent at her family. …. *the 1st respondent disappeared before the Hlawe family met the Seyama family* to deliver her as she had committed adultery".

6. Respondent's disappearance was reported by Makhosini Hlawe (deceased since July, 2010) to her father, Lokhayiza Seyama. (True to custom), Lokhayiza told Makhosini that appellant had to look for, find and return respondent to him (Lukhayisa).

7. " … I started searching for 1st respondent and eventually found her… She agreed to being returned to her father. **I thereafter took her to her father** whom I found at 1st respondent's parental home. **I had come to deliver her as she had committed adultery**,…"*(It is worth noting that it is not the personal responsibility of the husband to take the errant wife to her father. This is disrespectful and could easily lead to a fight. The husband must always be represented before his in-laws in such delicate matters. Worse here, the adultery was committed with a person who appears to be a relative of the appellant)*

8. "… **I found 1st respondent's father in the company of 1st respondent's brothers … I duly explained to them that after the 1st respondent committed adultery she then deserted our matrimonial home** without informing me or any of my family members".

9. "I state that from the day I returned 1st respondent to her father she never returned to our matrimonial home. **I have all along been of the view that she had accepted that our marriage has been accordingly dissolved as per the dictates of Swazi Law and Custom".**

10. "In the year 2012 I started a process in the above honourable court [the High Court] wherein I sought that our marriage be expunged from the registry of the 2nd respondent. **I was surprised to learn that she believed the marriage still subsisted as she complained that the customary procedures have not been followed**. I was compelled to withdraw the matter…." (sic). And begin afresh.

11. "……On the 30th April 2014 a family meeting was held at the Hlawe family where the issue was deliberated. **In that meeting it was**

resolved that a team of family members be sent to the Seyama family to meet 1st respondent's family and deliberate on the dissolution of the marriage. This was for the purpose of making the dissolution formal". *(It is to be noted here that customary practice requires that the first meeting between the families seeks to find reconciliation by chastising the wife or her family if need be and not to seek dissolution of the marriage.)*

12. "On the 15th May, 2015, a team of the Hlawe family members was sent to meet the Seyama family and they met the Seyama … at Buseleni…."

13. **"On behalf of the Seyama family they were represented by Sicuku Seyama who advised that he was aware of the issue and he shall accordingly advise the other family members who were not present.** The Hlawe family [has] also brought with it all belongings of the 1st respondent ….. (umtfwalo).....which was accepted by Sicuku Seyema on behalf of the Seyama family".

NB. (a) We were told that Sicuku is 1st respondent's brother. But his age is unknown;

(b) Sicuku's authority to represent the Seyama family on such an occasion is not disclosed;

(c) Apparently, Sicuku was alone at this 'meeting'.

(d) It does not appear that umyeni was present at that meeting.

(e) It does not appear that the *umtfwalo* (wife's belongings) was duly packed and returned according to custom.

(f). Was 1st respondent herself present during that meeting?

14. "….Upon return from the Seyama family the matter was reported to the Thunzini Royal Kraal – applicant's royal kraal.

15. "On the 11th October 2014 **the Thunzini Royal Kraal summoned the Seyama family to appear before it to confirm the dissolution of the marriage**. **The Seyama family never appeared.** The report of the dissolution was, however, made to the Royal Kraal and the Royal Kraal accepted same and released [the applicant] to notify the District Commissioner about the dissolution".

General

[7] In light of the foregoing events, the question is: Did the marriage dissolve? On what date, occasion or point in time did the marriage become dissolved? There is no firm answer to this all important question. The applicant has been labouring under the impression that the marriage was dissolved. But it does not come out clearly when the dissolution happened. In para 7, above, all the applicant says is: "I have all along been of the view that she accepted that our marriage has been accordingly dissolved as per the dictates of Swazi law and custom". And he repeats this in para 8 where he says, in 2012 – twenty years since the adultery and separation - he "was surprised to learn that she believed the marriage still subsisted". It seems to me, applicant did not know what needed to be done to have the marriage dissolved. If I am correct in this, I cannot blame the applicant: the procedure to dissolution is by no means a clear path, without any potholes or blind rises, if there is a path at all. On the face of it, it does seem respondent was correct even in 2012 that 'customary procedures had not been followed to dissolve the marriage'.

[8] I cannot accept any reputed authority to the effect that the customary marriage dissolves and dissipates into thin air when, after adultery by the wife, the families cannot agree on reconciliation. In his heads of argument appellant cites the decision of ***Mkhatshwa Dlamini v Dumsile Elizabeth Dlamini*** case[1], para [6] thereof where the learned trial Judge held it 'well settled' that if the two families " do not succeed in resolving the dispute and the differences between the parties prove to be irreconcilable, the marriage is terminated". From this judgment it seems that the marriage terminates itself. According to this judgment it does not matter what the cause or reason for the non-resolution of the dispute is. Surely, if the Swazi customary marriage is worth anything - worth the paper on which it is registered, the tears the woman sheds at dawn before being smeared with the red ochre, the reputed 'power of the red ochre' itself - the marriage cannot dissolve so easily and of its own, with such minimum ceremony. Why, if death itself has no power to dissolve the Swazi marriage, how can mere failure to agree have that effect? That cannot be. Why even if the two families can agree to terminate and dissolve the marriage their authority to do that would have to be established.

[9] The appellant also cited ***Matry Nompumelelo Dlamini v Musa Clement Nkambule*** and others[2]. This case also refers to a different procedure to be followed in dissolving the customary marriage. In this case the 'relevant chiefs Kraals' representatives are involved when the two families agree that

[1] [2014]SZHC] 163
[2] High Court Case No. 3046 / 2006 [2009] SZHC

the marriage should be terminated. The judgment says the chiefs representative(s) are 'invited' and 'fully informed of the deliberations and decision taken" by the two families.

The procedure stated in this case is difficult to understand: the chief's representative is invited to the family dispute and not the family appearing before the chief's representative. This is not customary. It is the litigant who approaches the chief's representative and not the other way round. The chief or indvuna may assign a representative like the local runner (**umgijimi or gojana**) to hear the parties and report back. The hearing will be at the representative's home or place like **inkhundla** where local cases are usually heard/tried – hardly ever at applicant's home. The representative is not just informed of the decision taken but he listens to the deliberations and intervenes where necessary. The representative would preside over the deliberations. If settlement is not reached the matter would move to the chief's kraal for a full hearing and determination. If the wife's family is from outside the chiefdom the deliberations must always take place at **umphakatsi** level and not at the husband's or husbands' fathers' place. The fear is that if fight broke out at the family deliberations who would be held responsible.

[10] In my view, the *Mkhatshwa Dlamini* and *Matry Nompumelelo Dlamini* cases are of no assistance to appellant here. The present case is different from both cases referred to by appellant. In the case at hand, the crucial two

families meeting did not happen since the wife's family was represented by Sicuku whose authority is not established and did not attend at the Thunzini royal kraal. In other words the two families **did not meet** as alleged by appellant. There is accordingly no evidence that the two families **failed to reconcile**. Even on this minimum requirement appellant cannot truthfully say 'all customary procedures' were followed to dissolve the marriage. Not even the woman's belongings (*umtfwalo*) were properly returned to her parents. She did not carry her own belongings to her parents. Instead it was the husband's family which carried the respondent's belongings to her parents. Quite unusual. In the result the alleged dissolution of the marriage *in casu* cannot have happened properly according to custom.

[11]. It has been said that the *"**umphakatsi** plays an observer status or role and does not take part in the actual decision making"*, which is left to the two families concerned. This purported "position of the law" is of doubtful authority. How can *umphakatsi* simply observe and not intervene even where things are going wrong? The *umphakatsi* **has** an interest in knowing the reason for the break down of the family and the party responsible for it. The *umphakatsi* must intervene where the husband wrongly accuses his wife of any offence likely to seriously disrupt the family. At the marriage ceremony, the chief's representative has the very important role of witnessing if the woman is a *consenting* party to the smearing with the red ochre. It cannot be that when the marriage is faced with disruptive problems the *umphakatsi* just observes and does no more. The Swazi

customary marriage may be easy to contract where there is no dispute or disagreement. But once the bond is tied severing it is very difficult.

[12] The *umphakatsi* may play an apparent observer role during the happy days of marriage ceremony but not during the unhappy days of dissolution – no matter what the reason. The *umphakatsi* would be failing in its paternal role if it agreed to a dissolution of marriage without good reason. So the so-called 'observer status' is more than just observing; it is not passive; it is active and could be decisive should the need arise. *Umphakatsi* has a manifest role during marriage, dissolution of customary marriage and death within the chiefdom. Society cannot be stable where marriage is 'easy come, easy go' – an entirely private affair. It is noted that section 26 of the *Births, Marriages and Deaths Act, 1983* makes it an offence for a chief, indvuna or umgijimi who fails to transmit the information necessary to register a customary law marriage that has taken place in the chief's area. The provision seems to anticipate the presence of the chief or indvuna or umgijimi at the marriage celebration as an official who has a specific role to play.

[13] The fifth ground of appeal is expanded in appellant's heads of argument as follows: "**12.1 The position of the law is that the** umphakatsi **plays an observer status or role and does not take part in the actual decision-making that is for the two families …"** The foregoing statement of the legal position is apparently sourced from the **Matry Nompumelelo Dlamini** case

(supra). The appellant goes on to state that the "**Thunzini royal kraal was properly informed of the decision of the two families and further representatives from the royal kraal were present when the meeting was held….**" The appellant's argument is that the Umphakatsi is only informed of the decision of the two families to the dispute. In my view in playing only an observer role in such occasions the umphakatsi would be failing in one of its primary functions as the guardian of the local community under its watch, that of nurturing its villagers by ensuring stable homes and families. Matters serious as the dissolution of a marriage must ordinarily proceed from the 'family court' to a Swazi court or from the family court to the chief's court and thence to a Swazi court. The umphakatsi cannot be expected to merely rubber-stamp a decision of the so-called family court, the composition of which is not even certain at any point in time. For instance, who acts as chairperson of the two-family meeting? In any case, appellant is also not clear in his reference to a 'meeting'. Is it the meeting at Thunzini royal kraal or the purported meeting at Seyama's where only Sicuku attended? Suffice it to point out that neither meeting decided anything relevant to these proceedings.

Review of academic research

[14] Before finally deciding the issue of whether the Hlawe – Seyama Swazi customary marriage was properly dissolved it may be necessary to consider the character of the Swazi marriage itself and its susceptibility to dissolution. What should be noted from the outset is that the so-called

authorities or experts on Swazi customary law are not ***ad idem*** on the procedures to be followed in securing a dissolution. But these experts are agreed on at least one aspect of our customary marriage, namely, its enduring character, it being a union not of two persons but of two families. The immediate impact of this union is that the death of one spouse does not necessarily end the marriage. The older authorities are naturally criticised of lagging behind current times. In this regard it is argued that the changing times have weakened customs and with it the traditional family values and relations that it should not be surprising to witness many Swazi customary marriages undergoing dissolution process involving the non-traditional courts of law.

[15] The leading authorities on Swazi law and custom are unanimous that the Swazi customary marital bond is hard to break. The customary marriage is determined by the red ochre; and the red ochre cannot be easily washed away once smeared. That is why it can only be applied once in a woman's life-time. The flip-side of this feature is that 'divorce' is correspondingly hard to effect. Of the two grounds of 'divorce' usually cited, only witchcraft is not easy to compromise. In cases of adultery the first time is usually not made a big issue. The woman would be verbally chastised and without even involving her parental family. It is only when the offence seems to repeat that formalities are adopted such as informing her parents. But even then formal dissolution or separation need not result. What the husband may do is build the errant wife a separate home not far away from the main homestead where the wife lives with her children. Even though

the woman lives in semi widowhood, it is still known that she is married and no other man may freely 'visit' her. By this arrangement dissolution of marriage is totally avoided. So, dissolution where it occurs must be quite an exhaustive and exhausting process. In fact, even speaking of 'dissolution' is to some extent misleading if we accept that the red ochre cannot easily be washed off. Surely the deregistration of the marriage is not equivalent or substitute of washing off the red ochre. In other words, a proper dissolution of customary marriage must at some point in its process address the 'curse' or rather the power of the red ochre which binds without let-up. In many of the marriages that have purportedly been dissolved this issue of the unwashed red ochre has been ignored as if it is not important. Yet it ought to be obvious that the smeared red ochre must ultimately be washed off to effectively undo the marriage between the parties.

[16] Needless to highlight the importance of knowing what it is that unites husband and wife and husband's and wife's families in the marriage bond in order to know what it is that needs to be undone or unknotted to disentangle and dissolve the marital bond. Unfortunately, a judgment being a case-determination for the parties to it and not just a judicial discourse or excursion, a sufficient and necessary canvassing of the pertinent background material and information is not always possible or even desirable. However, a case may be presented making it necessary and desirable to undertake such an excursion to collect diverse and far-flung and barely accessible material into a single basket or forum not only for the

case at hand but for ease of access by other judges in other forums at other times. In this regard, to understand and appreciate the dissolution of the Swazi customary marriage must begin with an understanding of the solemnisation of the customary marriage itself. We must understand the beginning to understand the ending. Whether, *in casu*, this presumed subsidiary purpose has been achieved or not remains to be seen. Be that as it may, hopefully, the effort will not have been in vain. In this regard, JS Malan (1985) writes: *"Among the traditional Swazi, divorce is very rare because of the complex ritual, legal and social implications of the marriage contract, the exchange of* ***lobola****, etc. Even if it does occur, permission for the woman to marry a second time is extremely difficult to obtain"*[3]. This is so, it may be concluded, because even if admittedly separated or divorced, the woman may have to mourn her ex-husband for the sake of her children with the ex-husband. Where no children were born this requirement may be less compelling.

[17] Armstrong and Nhlapo (Undated) at p.52 write[4]: *"Under custom, it is widely acknowledged that 'divorce is extremely difficult to obtain among the Swazi'. There is even a school of thought which holds that a Swazi customary marriage cannot be dissolved at all, though this view appears not to be supported by authority. It seems fairly settled now that a customary marriage can be dissolved…."* It should be noted that there is a difference in saying customary marriage may be dissolved and that the two

[3] SWAZI CULTURE, 1985
[4] LAW and THE OTHER SEX: The legal position of women in Swaziland, Websters', Mbabane (undated)

families have accepted a purported dissolution of the marriage between them; there is a further difference in such 'accepted' dissolution passing muster by the standard of a Swazi court. In other words, many a purported dissolution of customary marriage would not pass muster when tested against the true (the ideal) requirement(s) for legal dissolution i.e. the final act being the cleansing or washing off the red ochre. This is so because the smearing of the woman with red ochre is the single cardinal act or element that defines a Swazi customary marriage. The Swazi pay l*obola* for a wife; not a girl-friend. Admitting that dissolution is possible, the elusive issue is at what point of the process does this event occur? Yet how often do we hear of the washing off of the 'red clay' to signify the end of a customary marriage: hardly ever. Armstrong and Nhlapo may have to modify their dismissal as unsupported by authority the "school of thought which holds that a Swazi customary marriage cannot be dissolved at all" and their assertion that "it seems fairly settled now that a customary marriage can be dissolved". No hard court cases are cited in support of these allegations.

[18] Starting from the premise that under Swazi customary law 'divorce' is 'extremely difficult' to realise and that where it has been purportedly executed this is only as a 'last resort', it may fairly be asserted that even adultery is not a 'ground' for divorce. The principles governing the customary marriage do not envisage or even encourage divorce: the objective is the opposite, that is, perpetuity of the marriage. This is so because Swazi customary law, in general, is very accommodating and flexible: it does not allow a vacuum. Thus, for instance, even where a

woman is barren or has no child, the *sororate* (*inhlanti*) practice would kick-in or a child of the family would be 'put into her womb'. Even where the man is sterile that would not necessarily end the marriage. A plan could be concocted by his family to allow a male relative to 'enter' his wife to produce children without any noise or question asked about how that has happened, as Marwick writes[5]: "***If the man is at fault, ie is impotent, his brother might surreptitiously take on the responsibility of raising seed to him*** (*ukutalela*)": p. 136. This is the virtue and fidelity of the Swazi customary marriage. Any dissolution proceedings must accordingly be informed by the fact that custom frowns upon 'divorce' as culturally unSwazi, and permitted only as a last resort, when all else has failed to hold the marriage in place. Many of the cases that have been cited in support of divorce under custom, if genuine, should be seen in this light.

[19] As already intimated, in considering the vexed issue of dissolution of the Swazi customary marriage one may have to step backwards in time to have a broader view of the matter. Engelbrecht[6] considering the question of what happens when the woman leaves or is caused to leave her adopted (husband's) home, says at pp.11-12:

1. *"……..On this point even that very small body of well-informed old natives who continue to live in the long lost past will give varying answers, yet in essentials they mostly agree.* ***It is by weighing their evidence that we have come to the conclusion that originally as long as nothing calculated to injure either party to the contract had occurred, there was no case for a dissolution of the marriage bond…..The fact of the woman's having intercourse with other men***

[5] Brian Allan Marwick, THE SWAZI, (1940)
[6] J.A. Engelbrecht, *Swazi customs relating to marriage* (1930)

was not in itself regarded as a good reason for dissolving the marriage, even if the husband did not approve of this. *This indeed might be connived at for the sake of increasing the family…*
"If the separation between man and wife is only of a temporary nature, the contract is merely suspended: if this separation becomes permanent, the agreement automatically ceases".

(2) Engelbrecht does not tell us what happens in the course of dissolution of the marriage except for the return of ***lobola*** or a portion of it depending on whether enough children have been born or not. The learned author nevertheless pertinently observes: *"Native law and custom has its many pitfalls and lucky he who can always avoid them. There are general principles which stand out clearly enough; it is when these principles begin to ramify that even the native himself is liable to get entangled in their network"*.

[20] According to Marwick, (supra) pp. 123-134

1. *"… **A woman may once, and only once, be smeared with red clay**. It is an offence smear a woman with red clay without obtaining her parent's consent… If the marriage were not carried through, but the woman had been smeared, and she was subsequently married to someone else, she would not again be smeared. **It is clear that a woman who has not been smeared is not regarded as married.** The ritual significance of the use of red clay is obscure. …*

2. *"Adultery was formerly punishable by death for both parties if the couple were found **in flagrante delicto**. Now there is no hardened practice in regard to a fine and the only remedy is divorce… **Divorce is extremely difficult to obtain among the Swazi** – <u>kunzima kuhlukana nomfati</u> (it is difficult to separate from a wife). The three grounds recognised for divorce are adultery and witchcraft and sterility.*

"The Swazi have an almost illimitable capacity for compromise, and it will only be in the most stubborn cases or where there is grievous cause for complaint that the separation will be effected. *Divorce at the instance of the women is extremely rare.*

3. ***"Before a divorce can be effected the husband must call up his*** *lusendvo* ***(family council) and consult with them***. *If the matter is sufficiently serious it will be taken to the chief who will hear the case and give his decision detailing what cattle are to be restored to the husband. This is done only in extreme cases where all attempts at compromise have failed.*

4. "***When a dispute takes place between a man and his wife he may tie up her kit (***kubopha umtfwalo***) and send her away from his village. This does not mean that the man is relinquishing her altogether, but is merely a sign to her and her people that……he expects better behavior from her in the future.***

5. *"The woman's correct procedure when she has been chased away from her husband's village is to go to her father and report what has happened. The latter will then take up the matter with the husband…*

6. ***"…The first step, of course, is to discover who is at fault, and ` then to seek an amicable solution of the difficulty.*** *The wife's people are usually anxious to compromise, because failure to do so would mean that the lobola cattle would have to be returned; .."*

[21] Hilda Kuper (1963) writes[7], p 22ff:

1 "***Swazi marriage is essentially a linkage of two families rather than of two persons,*** *and the bearing of children is the essential consummation of wifehood.* ***Swazi marriage is of so enduring a nature that should the man himself die, the woman is inherited***

[7] THE SWAZI – A South African Kingdom, 1963

through the custom of the levirate by one of the male relatives of the_deceased to raise children in his name. Similarly, *since the production of children is the essential fulfilment of the woman's part of the contract,* ***should she prove barren her family must either return the cattle or following the custom of the sororate, provide her with a relative, preferably a younger full sister, as junior co-wife to bear children to 'put into her womb'…"***

2 From what Kuper says of the sororate (inhlanti) it is clear that even barrenness is not really a ground for divorce. The marriage being a union of two families rare must be the situation where there would be no suitable family relative to cover for her sister or aunt. Even then clearly divorce would not be the first option – only a last resort. Marwick does not explain this aspect of the sororate which is the counterpart of the levirate and very important in propping up and stabilizing the Swazi marriage. This all goes to ensure that divorce hardly becomes necessary.

Kuper continues:

3. ***"Divorce is rare in Swazi society and it is particularly difficult for woman to be legally permitted to marry a second time.*** *The reason for this is not to be sought in the amount of lobola but in the institutional complex and the power of the patrilineage expressed through such customs as the levirate and sororate. High lobola is a symbol, not a cause of the permanence of marriage…*

4. *"**The traditional marriage ceremony dramatizes** an underlying tension between the two intermarrying groups and* ***the necessity to create certain permanent bonds between them"…***

5. Indeed, underlying this marriage ceremony and the permanent union or association it seeks to establish between the husband and wife and the husband's and wife's families is the tenacity of the red ochre, central to the validity of the customary marriage as expressed in

Marwick's 'golden rule': *"A woman may once, and only once, be smeared with red clay"* (p123).

[22] FP Van R Whelpton[8] states:

1. "**11.12** *A marriage union cannot easily be dissolved, according to Swazi law and custom. A Swazi marriage….involves a union, not merely between the spouses, but between groups of kin. Therefore the death of one or both of the spouses will not terminate a marriage relationship….*

   "A marriage may, however, be dissolved as a last resort. *It is not a common practice, however, and is not encouraged by the Swazi.* ***One view is that it may be dissolved even at family level. Another view is that it can only be dissolved at umphakatsi.***

   When either of the couple pronounces the words **'angisamfuni'** *(I don't want him/her any longer) before* **libandla**, *the marriage is dissolved…."*

2. In para **11.12.2** Whelpton refers to what he calls the 'golden rule' to the effect that "*once smeared with red ochre, a Swazi wife remains obliged to perform certain duties towards her in-laws for the rest of her life"*. That death does not necessarily terminate the marriage and the 'golden rule' underscore the enduring character of the Swazi customary marriage. It would indeed be a rare phenomenon for an entire family and its extended relatives to die out.

[23] In para **11.12.2.1** Whelpton writes:

1. *"Where the woman is accused of committing adultery, it must be proved. An inquiry will be conducted by* ***lusendvo***. *It found guilty of*

[8]THE INDIGENOUS LAW AND CUSTOM OF THE KINGDOM OF SWAZILAND,2013

such a misdeed, she may be sent away to her parental home. However, this will be expected to be for a short while because her parents will send her back, requesting an explanation why she was sent to them. The matter may also be reported to ***emphakatsi*** *who, upon inquiry, will cause the man who committed adultery with the woman, to pay a fine".*

2. In the case of desertion (*kwemuka*) such as when the wife 'returns to her father's home with the intention not to return': *"**This does not necessarily end the marriage relationship,** since the spouses may return at any time they choose. **This may happen even if she has in the meantime engaged in sexual relations with other men** and even if children were born of such relationships. **She will be fetched back together with any children she may have had subsequently**. These children are said to belong the marriage family even if biologically they belong elsewhere…."*

[24]. Sibusiso B Kubheka, in his LLB Dissertation (1990) (UNISWA) entitled *"Marriage According to Swazi Law and Custom"* at p.21 refers to a passage in JMA Fannin's Preliminary Notes on Principles of Swazi Customary Law, Lozitha, 1967 at p 5, where Fannin writes, in connection with consent in customary marriages*: "Chiefs have been ordered to appoint an official messenger (umgijimi) whose duty is to attend the marriage ceremony and report back to the chief, inter alia, that the bride is a consenting party".* On p 41, of the Dissertation, Kubheka continues, referring to an interview he had with Dr. JMS Matsebula who said:

"There is no divorce according to Swazi law and custom. If a woman has committed adultery or is charged with witchcraft she is taken home to her parents where she is admonished to desist from such conduct. Her lineage would be fined. If life in common was rendered impossible she would continue living at her parental homestead. But

the marriage would not be dissolved. She is a wife in life and in death".

[25]. Kubheka, (supra, op cit), at p 40, on the topic of divorce, further writes:

> "The most confused picture in the marriage according to Swazi law and custom is found in the area of divorce. There is an on-going debate as to whether or not a divorce can be had under a purely customary marriage. Different writers, both legal and sociological, and both traditional and modern, express different opinions on the existence or otherwise of the concept of divorce in a customary marriage".

[26] In **chapter 8** of his book[9] under the title '**Dissolution of marriage**', Nhlapo writes with respect to *'Dissolution by divorce*': ***"The question of dissolution by divorce in customary law is complicated both by language and by the enduring Swazi belief that marriage is indissoluble***. *The language problem is raised by doubts about the appropriateness of using words and concepts such as 'divorce' or 'grounds' to describe the Swazi reality*". Drawing from the word 'dissolution' the learned writer observes: ***"This makes it clear that divorce relates to the undoing of something specific i.e. the merger (or bonding) which took place at the time the parties were said to be 'getting married'....In other words, we should be able to find divorce proved whenever we can detect this element of 'untying' which frees the parties from the obligation to remain within the relationship."*** By his reference to 'undoing' or 'untying' of the marital bond, Dr. Nhlapo is very

[9] Thandabantu Nhlapo, MARRIAGE and DIVORCE in Swazi Law and Custom 1992.

close to the crux of dissolution of customary marriage. Still, however, we must pin-point the 'untying' or 'undoing': something must let go and the relationship be completely severed.

[27] This judgment represents a search for that Gordian knot, the undoing or cutting of which frees the woman from any relationship with her former husband, once for all. A large part of the search is due to what we must now be familiar with, as Nhlapo puts it: *"These writers all assert that the Swazi marriage is a union of high stability, yet hint at the possibility of divorce in extreme or special cases"*; and: *"By contrast"*, Nhlapo underlines, *"our interviews elicited a total denial of the possibility, and an insistence that the golden rule was 'once a wife, always a wife'. It was stressed that once smeared with red ochre a Swazi wife remains obligated to perform certain duties at her in-laws' for the rest of her life. The most dramatic of these is the requirement that she come back, on the death of her husband, to mourn him as widow for a long as is required by custom. It is immaterial that at the time she may be living with another man as his wife. The obligation is a very strong one and has been known to be enforced by physical compulsion…."* Nhlapo aptly observes: "***The duty to mourn provides dramatic proof of the tenacity of the customary marriage or the 'power of the red ochre'. But is it conclusive of the issue of whether or not divorce is recognised in customary law?"*** Nhlapo, however, doubts the 'soundness of the argument' that the duty to continue performing certain residual functions means that marriages do not end in Swazi law and custom. Further, interrogation of the matter by Nhlapo, however, revealed

that the Swazi marriage ***"was never meant to be easy and a great deal of patience is required from both parties to make it work"***. Hence the Swazi character of an 'almost illimitable capacity for compromise'.

[28] Conceding that dissolution of the customary marriage is possible, if only as a last resort, Nhlapo further writes: ***"To form the basis for a dissolution of the marriage in question in customary law adultery must be PERSISTED IN. This is very important. Repeated adultery by the wife is viewed in a very serious light…"*** Mere persistence, per se, does not ground divorce. Certain procedures must first be followed after adultery has been proved. Nhlapo continues: "… *The woman, having been reported to her family on all previous occasions, is expelled from the homestead. Her parents are once again informed.* ***Divorce dates from the time when talks between the two families result in agreement that the husband would be given back his*** lobolo ***cattle"***.*(p 80)* Nhlapo concludes the heading on dissolution by adultery by noting that cases *serious enough* may be referred to the chief for decision, while *complicated cases* would be referred to a Swazi Court.

[29]. Nhla po does not tell, however, which cases are 'serious enough' or 'complicated'. Also, Nhlapo does not say how exactly the severing of the marriage bond occurs. The learned author only says 'divorce dates' from the time when the two families agree that ***lobolo*** should be returned, and that where this return is not an issue the husband can ***'put the woman aside'*** by building her a hut away from the main homestead, where she and

her children will live in 'disgrace', even though 'the marriage tie' continues. What Nhlapo does not address, like the other writers on the subject, is how the red ochre is washed off to liberate the woman from her former husband. The author rests his case on the return of the ***lobolo***: he also does not explain whether all or some of the lobolo are returned. Dr. Nhlapo has not tackled the golden rule 'once a wife, always a wife'; once smeared with red ochre never to be smeared again. The result is that the 'Gordian knot' remains uncut requiring the 'divorced' woman to 'perform certain residual functions' at her ex-husband's homestead.

[30] ***In casu*****,** the answer to our question must now be very clear. The respondent, as we know, denies that 'divorce' under customary law has occurred and that notwithstanding the many years of separation she is still wife to appellant, notwithstanding his disavowal. What this attests to is that a man cannot just wake up one day and declare that a woman he legally smeared with red ochre is no longer his wife, be she a witch or an adulterer. The fact that the appellant and respondent are not ***ad idem*** on the question of dissolution requires the court to review what is alleged to have happened or not happened. Under normal circumstances a matter like the present would be sent back to the appropriate court structure for a determination of the issue of dissolution – a determination which would be binding on the parties. For the present proceedings it would be tedious to nit-pick the things or events appellant says have happened in support of his case for dissolution. Rather, it would be neat only to indicate what has not happened resulting in dissolution being incomplete. The issue before court

is deregistration of the customary marriage of the parties not dissolution of their marriage, which latter issue, however, has taken the front seat. And rightly so too because without dissolution deregistration cannot occur. An appeal on the question of dissolution from the 'family court' (for lack of a better expression) or the chief's court is not to the High Court but to a Swazi court of appropriate jurisdiction.

[31]. Whether a customary marriage subsists or is dissolved is a matter for a Swazi court or equivalent traditional council. The shortcoming faced by this Court in appeals such as the present is that the researchers and writers have largely relied on oral accounts by informers and not on hard cases decided by the appropriate courts and councils. The common law courts should mainly rely of evidence generated by the traditional authorities exercising jurisdiction in customary matters, of which the 'family court' is none. The Judicial Commissioner can assist guide litigants where to go for the appropriate decision. Litigants should not come before the High Court on their own unsupported evidence regarding the dissolution of their marriages. This is to avoid instances such as the present where the husband is pitted against his wife (possibly in the full glare of their children). Litigants applying for de-registration of their marriage should come with independent evidence or proof by an appropriate authority having jurisdiction in the matter.

[32] In casu, the parties have been in separation for a period in excess of two decades: there must be some authority out there competent to cut the marital cord by a suitable ritual or some other accepted means having the effect of nullifying the marital bond. It is not enough that the marriage has as a matter of fact broken down, even irretrievably so, and exists only on paper: it must still be dissolved in a proper manner. Until then, the marriage continues beyond the grave of one or both of the parties. The courts should be astute in understanding and interpreting the certificate of registration of customary marriage: it may not mean what it purports to represent.

[33] Notwithstanding the many apparent shortcomings attending this matter at the customary level, even if the parties had been in agreement the court would have had to be satisfied that there was proper dissolution of the marriage to avoid it being used to justify an irregularity. Evidence on record is that the two families did not meet as required to deal with the issue of the adultery by the respondent. The respondent's family (and not respondent per se as appellant seems to believe) did not appear before the Thunzini *umphakatsi* as invited. It is enough that the Thunzini royal kraal made no determination of the issue. Since the parties did not agree a binding determination by the royal kraal was needed. The evidence of record does not state that *lobola* has been returned or otherwise settled. As Nhlapo says in this regard, respondent could be 'put aside' and built a separate homestead with the marriage continuing to subsist. Lastly but

importantly and critically, the red ochre has not been washed off by any relevant ritual. Without the red ochre being *removed* the marital bond continues. This is not surprising considering the undisputed account that the Swazi customary marriage is virtually indissoluble.

Conclusion

[34]. To the extent that none of the main writers on the subject ventures into the issue and Dr. Nhlapo also leaves the question of dissolution open, I would say that it is customary law and its structures, courts and councils, that must first provide the definitive answer to the question. As it is and what has so far happened, is that we have inconclusive research and no Swazi court decided case on the issue of dissolution. It is true that customary marriages do fall apart now and again. In that regard these marriages do go through a process of dissolution, but whether they completely dissolve remains unanswered. In my view the effect of this uncertainty is to sustain the continuing basic premise and starting point that the Swazi customary marriage is indissoluble as a general rule: its complete dissolution would be rare and exceptional. The 'school of thought which holds that a Swazi customary marriage cannot be dissolved at all' is probably closer to the truth than the opposite view.

[35] Even though appellant says that he "followed all the procedures for the dissolution of a marriage in terms of Swazi Law and Custom"(para 6 of his heads of argument), it is apparent that this is not correct even by his own

argument as set out in para 5 of his heads of argument in that he did not "pack, most if not all of his wife's personal belongings into a bundle and place them in the open, outside her hut … and instruct a young girl to assist the woman carry her luggage and accompany her to her parental home." By appellant's own account the above did not happen because respondent left without warning and without the knowledge of appellant or his family. And it took about twenty years to locate her. Further, appellant does not tell the court what "all the procedures for the dissolution of a marriage in terms of Swazi Law and Custom" are other than that "the two families (….) met to deliberate on the issue …", presumably on the 15th May, 2014.

[36] In para 9.1 of his **Founding Affidavit** (p. 14 of the record of proceedings), the appellant states, inter alia: "… I also followed all the due process of bringing the marriage to an end. In particular the matter was deliberated by both families …" In para 6.4 of his Affidavit the appellant alleges that after finding respondent he, appellant, took her to her father's home. What appellant describes in the said paragraph 6.4 is clearly not in accordance with customary procedure. The husband does not personally take or accompany the wife to her parents: some other person is usually assigned this task. And we are not told that her belongings had been packed, placed outside her hut at her matrimonial home. In para 7.2 appellant concedes that he had not followed customary procedure and had to withdraw the initial application and begin the process afresh. That was during 2012.

[37] On 30th April, 2014, the appellant's family met to deliberate the respondent's adultery of 1992. On 15th May, 2014 a team of the appellant's family was sent to meet the respondent's family. Appellant's team consisted of three members plus appellant. Respondent's family team consisted of "Sicuku Seyama who advised that he (would) accordingly advise the other family members who were not present", (p. 8.3 of **Founding Affidavit**). On that occasion the "Hlawe family (had) also brought with it all the belongings of the 1st respondent …" Clearly, again, it is not the responsibility of the husband's family to carry the woman's belongings to her parents' home. That is not what custom prescribes. On this point again appellant had defaulted on the procedure. But worse still: the respondent's family was only represented by Sicuku, a brother of respondent. Even if Sicuku had been mandated by his family, he could not **alone** meet the Hlawe family and deliberate on the issue of his sister's adultery. Seemingly, respondent was also not present at that meeting. In my view that meeting was a complete failure for its purpose. The subsequent report to the Thunzini royal kraal could not change anything or in any way absolve the procedural defects. And in any event the respondent's family – not just the respondent, as appellant would seem to believe - did not attend at the Thunzini royal kraal; and wisely enough, the royal kraal did not pretend to determine any aspect of the matter but referred it to the 'District Commissioner' (presumably, the Judicial Commissioner).

[38]. In my opinion, even without entering into the issue of the possible washing off of the red ochre, respondent was correct in taking the view that all that

was alleged to have been done by appellant and his family in pursuit of dissolution did not meet with the requirements of Swazi customary law for the dissolution of the customary marriage between the parties and the court **a quo** cannot be faulted in its finding in this respect. The appellant is of course free to further pursue the matter of dissolution of the marriage before an appropriate authority competent to give a binding decision.

[39] In the result and for the foregoing, I make the following order:

(a) The appeal is dismissed;

(b) Judgment of the court **a quo** is upheld;

(c) Costs to follow the result.

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MJ DLAMINI JA

I Agree

_____
RJ CLOETE JA

I Agree

_____
JP ANNANDALE JA

For Appellant Mr. MS Dlamini

For 1st Respondent Mr. L Malinga