

**IN THE HIGH COURT OF SWAZILAND**

**THEMBI NGWENYA (NEE NKAMBULE)**

**Applicant**

**And**

**THE REGISTRAR OF BIRTHS ,  
MARRIAGES AND DEATH**

**1<sup>st</sup> Respondent**

**THE MASTER OF THE HIGH COURT**

**2<sup>nd</sup> Respondent**

**THE ATTORNEY GENERAL**

**3<sup>rd</sup> Respondent**

**Civil Case No. 2987/2005**

**Coram**

**For the Applicant For  
the Respondents**

**S.B. MAPHALALA - J**

**MR. S. MASUKU**

**MR. MAMBA**

**JUDGMENT 17<sup>th</sup>**

**August 2007**

**[1] Serving before court is an application in terms of which the Applicant seeks an order declaring her as the wife of the late Zacharia Siphon Ngwenya who died on the 7<sup>th</sup> March 2005. The issues for determination in the present case are the following:**

- (1) Whether the Applicant was married to the late Zacharia Ngwenya during his lifetime;**
- (2) When was the marriage ceremony?**
- (3) Who officiated the marriage ceremony?**

**[2]The said application is for the following order:**

- (4) Declaring the Applicant as the lawful wife of the late Zacharia Siphon Ngwenya who died on the 7<sup>th</sup> March 2005;**
- (5) Costs of suit;**
- (6) Further and/or alternative relief.**

**[3] In view of a dispute of fact on the papers this court referred the matter to oral evidence following the statement of law by the learned author *Harms Civil Procedure in the Supreme Court* at page 200 where the following is stated:**

**"An application for the hearing of oral evidence must preferably be that the Applicant has failed to convince the court on the papers. The Applicant will not be permitted to lead evidence to supplement an omission in his founding affidavit nor will the court permit a fishing excursion".**

**[4] The Applicant has alleged that the said marriage was in terms of Swazi law and custom. The principles that govern marriages in terms of Swazi law and custom have been established in countless High Court cases including the case of *S vs***

*Fakudze and another 1970 - 76 S.L.R 423* where the following trite principle of law was stated:

"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".

[5] In *casu* Applicant ought to prove on a balance of probabilities that this is so. Applicant has led the evidence of three (3) witnesses to prove her case. Respondent also led the evidence of three (3) witnesses to support his argument that there was never a marriage between the Applicant and the deceased in terms of Swazi law and custom.

[6] The first witness for the Applicant was the Applicant herself. She deposed that she was "tekaed" in October 2002 by one Annan Malinga (Lomasontfo). She said that present when she was tekaed was one Khumbulani Ngwenya (PW2) and one N.J. Dlamini (DW3) who all testified. She deposed that she was smeared with red ochre (*libovu*) by Lomasontfo Malinga (DW1). She testified that it all happened at heir homestead at Mangwaneni. She testified that her husband, the late did not obtain a marriage certificate, as proof of her marriage is annexure "A1" an affidavit which appears in page 12 of the Book of Pleadings. She testified on how the affidavit was obtained and how the witnesses to the said affidavit got to append their signatures. It is not clear how they got to write that Annah Malinga as a witness but what is clear is that the other witnesses testified that Applicant was married to the deceased.

[7] DW2 Khumbulane Ngwenya was called as the second witness for the Applicant and he testified that he was present when Applicant was tekaed and that he performed the duties of being "umyeni". He testified that Applicant was smeared

with red ochre by one Lomasontfo Malinga in 2002. A fact that he confirmed by witnessing annexure "A1".

[8] The third witness for the Applicant was one DW3 Jeroth Khumalo who testified about what happened in the meeting called by *umphakatsi* at Mangwaneni.

[9] The first witness for the Respondents was one DW1 Stanley Ngwenya who told the court that he was not present when the Applicant was *tekaed* by Gogo Malinga. He stated that if it happened he would have known or rather there would be no reason for not being told. He stated that it is not clear why his brother would have told him to come and be a witness as there is no particular role that he would have played. This witness further said that he remembered all the names of the people at *umphakatsi* when the issue of the Applicant and deceased relationship was discussed. He testified that Applicant was never married to the deceased. He stated that the deceased lived with the Applicant as live-in-lovers and that they never any stage were married. He testified that since he had a good relationship with his brother and they never had any misunderstanding with the Applicant, there was no way he would miss the marriage. He stated further that since the alleged ceremony took place at Mangwaneni, there was no way he could miss the ceremony as he also stays in the same homestead.

[10] This witness was cross-examined searchingly by Counsel for the Applicant where it was *inter alia*, put to him that Applicant was *tekaed* during the cleansing ceremony of Nomkhosi and Shadrack and he denied such event taking place. He also denied under cross-examination that at a given point in time he left the homestead which might have been the reason for him not to witness the ceremony.

[11] The second witness for the Respondents was one DW2 Gogo Malinga. She testified that she never at any stage smeared the Applicant with red ochre. She stated that she stays at Mahlangatsha and that she hardly saw the Applicant. She also told the court that she was also troubled by the fact that the deceased did not have a wife and on numerous occasions she would ask him. When she was cross-examined she testified that she never smeared the Applicant with red ochre.

[12] The third and last witness for the Respondents was DW3 Make Nju Dlamini who is aunt to the late Zacharia. In her evidence she testified that she was present during the cleansing ceremony of Shadrack and Nomkhosi since that is her late sister's home. She stated further that she was a common feature whenever there was a ceremony at her sister's homestead. She stated that she would not expect to be left out since she holds a special position at her sister's home as the sister was now deceased. In her evidence she denied ever witnessing the Applicant being tekaed. She stated that there was no way she could miss the smearing of the Applicant with the red ochre.

Under cross-examination she testified that she was present during the cleansing ceremony commenced in the afternoon and ended at dawn on the following day. She stated that she was at the Ngwenya homestead the whole day and left in the afternoon. She also stated that Stanley Ngwenya was present since that was his place of residence.

[13] She was also cross-examined searchingly by *Mr. Masuku* for the Applicant and I shall revert to her replies later on in the course of this judgment.

[14] In arguments before me both Counsel filed very comprehensive Heads of Arguments touching on the assessment of the evidence before court and I am grateful to both Counsel for their professionalism and industry.

[15] The question to be answered by the evidence adduced by the parties is whether the Applicant was married to the late Zacharia Ngwenya during his lifetime in terms of Swazi law and custom. In answering this question the court has to establish when the marriage ceremony took place and who officiated the marriage ceremony.

[16] In my assessment of the evidence brought before court it is my considered view that on a balance of probabilities the Applicant was tekaed by the deceased as she has alleged. In her evidence which was clear and remained unchallenged in cross-examination she testified that her husband, the late did not obtain a marriage certificate, as proof of her marriage in annexure "A1" an affidavit which appears in page 12 of the Book of Pleadings. She testified on how the affidavit was obtained and was open on how the witnesses got to append their signatures to the affidavit. It is not clear though how they got to write that Annah Malinga was a witness but what is clear is that the other witnesses testified that Applicant was married to the deceased. Her evidence is supported on material respects to what was said by the second witness for the Plaintiff Khumbulane Ngwenya who stated that he was present when the Applicant was tekaed and that he performed the duties of being umyeni. He testified that Applicant was smeared with red ochre by one Lomasontfo Malinga in the year 2002. A fact that he confirmed by witnessing annexure "A1". The defence tried to discredit this witness but to no avail. In this regard the defence introduced DW3 (Nju Dlamini) who testified that the Applicant and DW2 now stay together as husband and wife which Applicant objected to as being an opinion.

[17] It appears to me that the evidence of DW3 (Nju Dlamini) should be rejected as unreliable because firstly her evidence was contradictory to all defence witnesses and secondly, the evidence of the two staying together was never put or suggested to either AW1 or AW2 or AW3 the umphakatsi representative. It appears to me that Counsel for the Applicant is correct that it came as an afterthought, suggested or put

to DW3 Nju Dlamini. I agree with the proposition of the Applicant that the defence ought to have put those questions consistently to all the Applicant's witnesses. That evidence was also not corroborated by any of the defence witnesses. AW2 had no reason to tell lies.

[18] Coming to the evidence of the third witness for the Applicant AW3 Jeroth Khumalo. He was firm in his evidence, all witnesses confirmed the meeting he testified about and what was discussed. No witness challenged the minutes of the meeting and as such, it should be taken as a true record of what happened there. In this regard I again agree with the Applicant's position that the evidence led at that meeting cannot be conclusive of the facts but goes to prove that the umphakatsi was satisfied that the deceased had tekaed the Applicant.

[19] In the evidence of the defence on the other hand DW1 Stanley Ngwenya said he was not present when Applicant was tekaed by Gogo Malinga. He testified that if it happened he would have known or rather there would be no reason for not being told. DW1 however, cannot deny that Applicant was tekaed on the basis that he was not told. He said under cross-examination that he was not there when it happened. Under cross-examination he was evasive to answer specific questions on what questions were asked Gogo Malinga, Khumbulani and the Applicant choosing to say that he did not remember. It appears to me again that Applicant's Counsel is correct that this witness is the mastermind behind the defence as he made it clear that the deceased son should get his father's benefits because he had been deprived of other things. He also said he wanted his brother's son to be the executor. It also appeared in evidence that Applicant and DW1 were not in good terms even though he denied assaulting Applicant.

[20] The second witness for the Respondent was Gogo Malinga who is undisputedly a key witness for the court. She was a very strange witness in the witness box and showed mental failure to appreciate the proceedings. She could not remember a lot of things including the smearing of the red ochre to the Applicant. It appeared to me that this witness was scholed on

what to say in the witness stand. I agree with *Mr. Masuku* that Gogo Malinga failed to hide that she had been scholed on what to say, her outbursts as she entered the witness box by announcing that ("angati, angati, angati") that she did not know the Applicant shows that she could not hold herself but to deny from the onset.

[21] Coming to the last witness for the Respondent that of DW3 Nju Dlamini. She contradicted herself and the evidence of Stanley Ngwenya and Jeroth Khumalo on the proceedings at umphakatsi. She recalled the umphakatsi meeting, confirmed that Applicant's mother was there whilst Stanley Ngwenya said he did not know. She confirmed that Gogo Malinga was questioned yet Stanley Ngwenya said she was not. She made a lot of emphasis that umphakatsi discussed the Applicant's issue of being tekaed when they were not supposed to.

[22] On the totality of the evidence adduced for and against the parties I have come to the considered view that the Applicant has proved that she was smeared with red ochre on a balance of probabilities. The evidence of the defence does not come near dislodging the evidence of the Applicant.



**[23] In the result, for the afore-going reasons judgment is granted in favour of the Applicant in terms of prayer 1 and 2 of the Notice of Motion. '**

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**S.B. MAPHALALA**