

# **IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 899/07**

**In the matter between:**

**AARON SIFUNDZA**

**APPLICANT**

**AND**

**DUMISA CHARLES KHUMALO**

**1<sup>st</sup> RESPONDENT**

**GEORGE LUBANDZE KHUMALO**

**2<sup>nd</sup> RESPONDENT**

**CHIEF PRINCE GCOKOMA**

**DLAMINI (N.O)**

**3<sup>rd</sup> RESPONDENT**

**CORAM: MAMBA J**

**FOR APPLICANT: MS GWIJI**

**FOR RESPONDENTS: MR JUMA**

## **JUDGEMENT**

**14<sup>th</sup> November, 2007**

[1] This is not your run of the mill application. The relief sought is not uncommon. The reason for it is, however, bizarre.

[2] Fundisiwe Patience Sifundza, (hereinafter referred to as the deceased) died on the 3<sup>rd</sup> day of May 2007. During her lifetime she was married to the first respondent in terms of Swazi law and custom. The marriage ceremony was conducted at the home of the first respondent in 1993. After being anointed with red ochre, a red heifer was identified and pointed out to those present as the beast for her mother, *insulamnyembeti*, demanded by Swazi law and as a consequence of and not as an essential element of the marriage.

[3] The marriage aforesaid was immediately duly reported to the deceased's father, the applicant. The applicant and his family accepted this and sent the deceased back to her husband accompanied by the applicant's representatives, as per the dictates of custom.

[4] It is common cause that the first respondent did not give or deliver *emalobolo* to his in-laws and no demand for same was ever made by the applicant to the first respondent until the death of the deceased this year.

[5] It is common cause further that, five years into the marriage, the couple experienced some significant discord and the first respondent sent the deceased back to her people. This misunderstanding could not

be deliberated upon by the two families or the couple and as a sign of apology on behalf of his daughter, the applicant delivered a cow to the Respondent's family.

[6] The family feud remained unresolved and the couple remained separated until the death of the deceased as aforesaid.

[7] Upon the death of the deceased, the applicant duly reported that fact to the first respondent. The applicant did this in recognition of the fact that the deceased was at the time of her death still married to the first respondent.

[8] The first respondent requested the applicant to give him the body of the deceased for burial at his home. The applicant would not allow it. He wanted to bury his daughter and went ahead and made preparations for the internment or burial. The first respondent obtained an interdict from this court restraining the applicant from conducting the burial of the deceased, pending finalisation of the application.

[9] The protagonists were able to resolve the dispute. The first respondent was allowed to bury the deceased after giving an undertaking to the applicant that he shall deliver the necessary *emabheka* to the applicant in respect of the deceased. I refer herein to the applicant's Founding affidavit at page 15 of the Book of Pleadings where he states that:

"39. On the 13<sup>th</sup> May 2007, I sent a delegation to 1<sup>st</sup> respondent's extended family to emphasize that if they insist on burying the deceased they must pay lobolo to us. They agreed on that they know about it but if we can facilitate for the funeral we shall then discuss the

matter of lobolo. Emphasis was made that he should at least furnish us with a portion of the lobolo if indeed the deceased was his wife.

39.1 After the conclusion of the meeting the Sifundza party left. On the same day the Khumalo's returned the visit to the Sifundza's including 1<sup>st</sup> Respondent himself.

39.2 They came and affirmed that they still had the desire to take the responsibility of the deceased's burial.

39.3 They then said the issue of lobolo was to be referred to the Khumalo elders and shall bring back an answer.

39.4 The Sifundza's then said there was no problem and that they could take the body as long as they pay of the lobolo before the burial. They were further told that they should not be too enthusiastic about conducting the funeral without payment of lobolo. The Khumalo delegation have stated that they had no full power to conclude the matter on their own.

[10] The applicant submits further that at the time of the death of the deceased he, the applicant, no longer regarded the first respondent as his son-in-law. He states that:

"43. I only considered it necessary to inform 1<sup>st</sup> and 2<sup>nd</sup> respondent's family, about my daughter's death out of decency. This is moreso because my deceased's daughter and her 2 children were left outside my gate during 1998 up until her death on the 3<sup>rd</sup> may 2007, which clearly proved desertion of the deceased by 1<sup>st</sup> Respondent, thereby constituting a customary divorce must not implied that they should collect the body for burial.

44. Furthermore no "lugege or nsulamnyembeti" were handed over to me and my family and the lugege beast

was never slaughtered.

45. Lastly no arrangements were for the actual traditional wedding celebrations "umtsimba"

Applicant says he finds support for these assertions in THANDABANTU NHLAPO'S book, MARRIAGE AND DIVORCE IN SWAZI LAW AND CUSTOM, where the learned author states that:

"A valid marriage by Swazi law and custom comes into being when a woman of marriageable age is anointed with libovu by members of a man's family during an appropriate ceremony with the intention of making the woman the wife of such man; provided that negotiations for the transfer of lobolo by the man or his family to the guardian of the bride have been, or will subsequently be, completed to the satisfaction of both contracting parties."

[11] With due respect to the learned author, I find myself unable to agree with the proviso stated by him in the above-cited passage.

[12] In terms of Swazi Customary law, EMALOBOLO do not constitute an essential element of marriage. They are a consequence of a marriage. They become deliverable or are given in consequence of a marriage. The validity or otherwise of the marriage is not dependent on any negotiation or express undertaking by the man to deliver or provide *emalobolo* to the woman's legal guardian. It is in the very nature of the marriage contract that the man, by operation of law, unequivocally and irrevocably agrees to give *emabheka* in respect of his wife. Where for instance the man has no property with which to

provide *emalobolo* for his wife, Swazi law and custom stipulates that the *emalobolo* given for the eldest daughter of the woman in question shall accrue to the legal guardian of the said woman, failing which they shall be delivered by the man's heir. Often times the marriage ceremony is conducted before the woman's people are informed and they are informed after the event, when the ceremonial UMSASANE meat is presented to them, as in the present application.

[13] The applicant confusingly states that the LUGEGE was also not slaughtered. This beast is pointed out and slaughtered when *emabheka* are being delivered. Again, the INSULAMNYEMBETI is given following the marriage and not as an essential element of the marriage. So, with or without the delivery of the *insulamnyembeti* heifer or the slaughtering of the LUGEGE, the marriage is valid if its essential requirements have been complied with.

[14] Based on the above facts and allegations, the applicant has applied for an order for the exhumation of the body of the deceased and other ancillary relief.

[15] In response, the first respondent avers that the deceased was his wife and remained so until her death, inspite of the problems the couple experienced in the marriage.

[16] The applicant is clearly being disingenuous in his denial of the validity of the marriage. His real price or intention is that the first respondent should be ordered or pressured to deliver *lobolo* to him. At page 19 of the Book of Pleadings in his founding affidavit he states that:-

"...it was categorically stated that in the event that they were allowed to take the body for internment they should keep in mind the issue of payment of lobolo which was outstanding. The Khumalo party made a request to be afforded an opportunity to report to the Khumalo family elders on the latter requirement from my family. They left and never came back."

[17] Therein lies the applicant's case. I refer also to his assertions quoted in paragraph 9 above. He says the first respondent has reneged on his undertaking to deliver or given him *emalobolo* and therefore has revoked his permission or consent that the deceased be buried by the first respondent and consequently her corpse must be exhumed. If *lobolo* is given to him, he shall not pursue the exhumation.

[18] This is a rather crude or cruel way of trying to extract *emalobolo* from your son in law. In terms of Swazi law and custom *emalobolo* is deliverable or given on account of and or based on a marriage contract and not on account of anything else.

[19] In the circumstances, this court cannot order the exhumation of the body of the deceased simply to help the applicant to pressure the first respondent to deliver the necessary *emalobolo* to him. I therefore dismissed the application with costs.

**MAMBA J**