IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NUMBER: 2839/01

In the matter between:

LINDIWE SARAH MABUZA **Plaintiff**

And

FRANK MPHUMENI MBATHA **Defendant**

JUDGMENT DELIVERED ON THIS 4th DAY OF MARCH 2003

HLOPHE, JP:

1. INTRODUCTION

[1] Plaintiff instituted a divorce action against defendant. In terms of the amended particulars of claim plaintiff sought a decree of divorce, custody of the minor child born of the marriage, an order directing defendant to pay maintenance in respect of the child born of the marriage and other ancillary relief.

[2] The defendant opposed the divorce action. In terms of the plea filed on behalf of the defendant, the gravamen of the defence was that no marriage existed between the parties. The defendant's position was simply that there was no valid customary marriage between the parties.

[3] The parties reached an agreement to separate the issues to be determined by the Court. The parties agreed that the constitutional challenge as set out in prayers (c) and (d) of the plaintiff's particulars of claim be dealt with separately. Prayer (c) relates to a declaration that subsection 7(1) of the Recognition of Customary Marriages Act No 120 of 1998 should be declared unconstitutional by reason of the fact that it conflicts with section 9 of the Constitution of the Republic of South Africa Act No 108 of 1996. Prayer (d) relates to a declaration that the customary marriage be regarded as a marriage in community of property as envisaged by section 7 (2) in the Recognition of Customary Marriages Act No 120 of 1998. In terms of the agreement between the parties which was subsequently made an order of Court in terms of Rule 33(4) of the Uniform Rules of Court, the issues relating to prayers (c) and (d) of the particulars of claim were left for later determination. Those issues will only become relevant once this Court has decided that there was a valid customary marriage between the parties.

2. COMMON CAUSE FACTS

[4] There was a further agreement between the parties regarding facts that are common cause. Parties agreed that the following facts are not in dispute - That siSwati customary law would be applicable in the dispute between the parties; the plaintiff and the defendant entered into a relationship in 1989; the plaintiff fell pregnant in September 1989; in or about November 1989 the defendant's family approached the plaintiff's family to start negotiations for the penalty (damages) and ilobolo payments; the penalty payment related

to the fact that the plaintiff fell pregnant out of wedlock, i.e. before the parties got married; agreement was reached with regard to the payment of ilobolo in the amount of R2500 which the defendant paid in full; plaintiff and defendant lived together as husband and wife since about 1992 when plaintiff moved into the house with the defendant; in 1992 the plaintiff decided not to go back to the University of the North and spent her time with the defendant as though they were married as husband and wife; in or about June 2000 and after the parties had relocated to the Western Cape, the relationship between them terminated; and that there was no reasonable prospect of their relationship being normalised.

[5] Furthermore, with reference to Bundle "A", being the plaintiff's documents, it was not disputed that the defendant indicated that he was married and referred to the plaintiff as his spouse (pages 12, 14 and 17 of Bundle "A"). It was common cause that the defendant filed an opposing affidavit under Case Number 1563/00 in the Bellville Magistrate's Court in which he stated that he "married" the plaintiff according to custom in 1990 (see pages 55 and 61 of Bundle "A"). Furthermore, the defendant tried to get "a divorce" in terms of customary law (page 61 of Bundle "A"). It was also not in dispute that the plaintiff maintained that she married the defendant in terms of African Customary Law, and that the defendant maintains that they were not so married. That much was common cause between the parties.

3. DISPUTED FACTS

[6] The only issue for determination by this Court is whether the parties were married according to siSwati Customary Law.

4. PLAINTIFF'S CASE

[7] The plaintiff, Ms Lindiwe Sarah Mabuza, gave evidence to the following effect. She is forty (40) years old. She met the defendant, Mr Frank Mphumeni Mbatha, in 1989 in Nelspruit. In 1992 the defendant sent his people to go and arrange that the plaintiff be handed over to him. Since then the plaintiff was called Mrs Mbatha. The defendant had paid the full amount of ilobolo in 1991. Plaintiff and defendant's family members were involved in the negotiations concerning the payment of ilobolo. When the defendant sent his delegation to the plaintiff's people in Nelspruit with a view to asking her to move in and live with him, the plaintiff's mother agreed that plaintiff could live together with defendant. She could not move in and live together with defendant, she said, without her mother's consent.

[8] The plaintiff's evidence was further that after she moved in and lived with the defendant, she regarded herself as being the defendant's lawful wife, and her family members did not further involve themselves in the affairs of plaintiff and defendant. The defendant himself referred to the plaintiff as his wife. The plaintiff enjoyed all the rights of being the defendant's lawful wife. She never had any problems and she regarded herself as being lawfully married to the defendant. Her evidence was further that in August 1999 she relocated to the Western Cape at the request of the defendant. Nobody ever told her that there was any problem in their marriage. Nobody told the plaintiff that they were not properly married according to siSwati Customary Law.

[9] Mr Turley, who appeared for the defendant, cross-examined the plaintiff

at length. In cross-examination the plaintiff stated that according to her there were three requirements for a valid African marriage according to siSwati Customary Law. The first was payment of ilobolo, the second was ukumekeza (which means the formal integration of the bride into the bridegroom's family), and the third one was the formal handing over of the bride to the bridegroom's family. Her evidence was that the essentials of a valid African marriage were complied with, save the requirements relating to ukumekeza custom. Upon being asked why ukumekeza custom did not take place, the plaintiff's answer was that her husband, the defendant, said that he was happy with the kind of the marriage they had and that it was not necessary in his view that ukumekeza should take place. Her evidence was clear in this regard, namely, it was never an issue between the parties that they should solemnise their marriage according to siSwati Customary Law.

[10] It was put to the plaintiff in cross-examination that the defendant would say that he told the plaintiff that they needed to solemnise their marriage. The plaintiff denied this. Furthermore she said she believed that she was properly married to the defendant. This was so because both families were involved, she too consented to the marriage, ilobolo was paid and finally she was handed over to the defendant's family upon the request of the defendant through the defendant's delegation. As far as she was concerned, she said, she was properly married to the defendant according to siSwati African Customary Law.

[11] Despite lengthy cross-examination the plaintiff's evidence did not

change in any material respect. She emphatically stated that she was properly married to the defendant in accordance with siSwati Customary Law. The fact that ukumekeza did not take place, she said, could not affect the validity of their marriage which was properly concluded according to siSwati Customary Law.

[12] I got a firm impression that the plaintiff was an honest and reliable witness. She was truthful in her evidence and testified in a remarkably straightforward manner. She was not evasive at all. She answered questions fairly and honestly. I am satisfied that her evidence may be safely relied upon.

[13] The second witness for the plaintiff was Professor Francois de Villiers, an expert with some thirty-seven (37) years' experience as an academic at various universities in South Africa. He gave evidence as to the evolution of African Customary Law. His evidence was that traditionally the State did not get directly involved. Family groups had delegated powers. There was no insistence on consent of the parties in traditional African Law. In modern law, however, consent of the parties is paramount. He referred to the Recognition of Customary Marriages Act No 120 of 1998, in terms of which consent of both parties is essential. Professor de Villiers also gave evidence regarding the essentials of a valid customary marriage, namely consent of both parties intending to marry in terms of African Law, ilobolo agreement and thirdly the handing over of the bride. Concrete ceremonial rituals were held according to different African nationalities. However they could be

dispensed with in appropriate cases by agreement between the parties.

[14] It was Professor de Villiers' evidence that if the parties believed that they were married because the families were involved, there was formal handing over of the bride and ilobolo had been paid, that would constitute a valid African customary marriage. There is no reason, according to Professor de Villiers, why failure to observe some of the rituals or ceremonies cannot be waived or condoned by the parties in terms of an agreement between them. In casu nothing else was outstanding. Ilobolo had been paid and there was the formal handing over of the bride to the bridegroom's family.

[15] It was put to Professor de Villiers in cross-examination that the defendant's case was that ukumekeza is a vital component of customary marriages according to siSwati Customary Law. Ukumekeza cannot be waived or dispensed with by parties. The witness conceded that he is not an expert in siSwati Customary Law. He said, however, that he had done some reading on siSwati Customary Law. Furthermore, based on his knowledge of African Law in general and the research material available to him at his disposal, he was nevertheless of the view that it was inconceivable that ukumekeza was so vital such that it could not be dispensed with by agreement between the parties.

[16] Professor de Villiers was not a bad witness. His evidence, however, was not particularly helpful to the Court. It could be gleaned from a mere

perusal of any basic textbook on African Customary Law. I got a firm impression that Professor de Villiers was called for the convenience of the legal representatives more than for the convenience of the Court. Accordingly it did not come as a surprise when Mr de La Rey, counsel for the plaintiff, conceded that he would not be seeking expert or qualifying fees in respect of Professor de Villiers. In my view this concession was properly made.

5. DEFENDANT'S CASE

[17] The defendant, Mr Frank Mphumeni Mbatha, ascended to the witness stand. His evidence-in-chief was that ukumekeza is an important component of siSwati customary marriages, so important such that it cannot be dispensed with by the parties. This is the custom according to which a woman is formally integrated into the bridegroom's family. Without ukumekeza and the rituals that go therewith, a woman would remain a girlfriend as she would not be properly married according to siSwati Customary Law. It was his evidence that they did not go through all the essentials of a valid siSwati marriage. This was because ukumekeza was not complied with. Without ukumekeza there was no marriage at all between them. He told the Court that it was his intention to get married to the plaintiff but due to certain problems that transpired between them they did not eventually get married to each other. The defendant did not take the Court into confidence as to exactly in what way the plaintiff did not co-operate with him other than merely denying that it was he, the defendant, who did not want ukumekeza to take place.

[18] With regard to questions relating to Bundle "A" of the plaintiff's documents, particularly pages 12, 14 and 17 thereof where the defendant stated that he was married to the plaintiff, his answer was that he stated that he was so married to the plaintiff because it was his quest to do something for the plaintiff as he intended marrying her. Despite having said in the documents referred to in Bundle "A" that he was married to the plaintiff, he denied emphatically that he was in fact married to the plaintiff.

[19] Mr de La Rey cross-examined the defendant with regard to the contents on pages 55 and 61 of Bundle "A" of the plaintiff's documents. On page 55 defendant said in an opposing affidavit filed in terms of the Domestic Violence Act No 116 of 1998, that: "I "married" the Applicant according to custom in 1990. However, I never married the Applicant in terms of the current laws of South Africa." … On page 61 ibid "I am not aware of any divorce proceedings that have been instituted. I confirm once again that we are not married in terms of the current laws of South Africa. I attempted to get a "divorce" in terms of our customary laws, but without any success purely because of the Applicant's unwillingness to co-operate in this regard." The defendant was unable to answer a simple question put to him in cross-examination by Mr de La Rey, namely why was it necessary for him to get "divorced" if at all he was not married to the plaintiff? The defendant was very evasive in this regard and was unable to proffer any sensible explanation save to say he did not regard himself as being married because ukumekeza was not complied with due to the fact that the plaintiff did not co-operate.

[20] The defendant also conceded in cross-examination that depending on the situation he introduced the plaintiff as his wife. He denied, however, that it was he who did not want ukumekeza to take place. The defendant conceded in cross-examination that they lived together with the plaintiff for some eight (8) years, that a child was born of the relationship between them, that he held the plaintiff out as his wife particularly with reference to Bundle "A" of the plaintiff's documents referred to above, all three being official documents. The first document on page 12, headed "Department of Finance – Personal Particulars" was signed by the defendant on the 21st December 1998 and at Nelspruit. The second document is headed "Application for continued membership of Medical Scheme". In this document the defendant stated that he was married and gave the particulars of the plaintiff as his wife. The document was signed by the defendant on the 24th December 1998. The third document which starts on page 16 of Bundle "A" is headed "Investment Application Form" (Old Mutual). In this document again the defendant gave the full names of the plaintiff as his wife. He stated clearly and unequivocally that the plaintiff was his wife. In all three documents he referred to the plaintiff as his wife. Upon being asked as to why he referred to the plaintiff as his wife in circumstances where on his own version he was not married to her, he was unable to proffer any sensible explanation. I got a firm impression that the defendant was being economical with the truth. He was visibly shaken in cross-examination and was being untruthful to the Court in material respects which have been alluded to above.

[21] The second defence witness was Mr Masosoti Samuel Shongwe, who is an expert and chief advisor to the Matsamo Tribal Authority Council in Mpumalanga Province. His evidence was that he has been practising siSwati Customary Law for some twenty-two (22) years. He is now attached to the Matsamo Tribal Authority in the Nelspruit Region. He is also serving as an advisor on siSwati indigenous law to the Nkomazi Magistrate's Court in Mpumalanga. He told the Court that siSwati Customary Law never changes, it is part of the siSwati culture and does not evolve. With reference to ukumekeza Mr Shongwe's evidence was that the parties cannot dispense with this vital component of an African marriage. Ukumekeza is vital because it makes a woman a wife. If a bride did not go through ukumekeza she would be no more than a mere girlfriend even if ilobolo was paid for her. Ilobolo does not change the status of a woman to that of a wife. It is only ukumekeza custom, according to the Swati people, which makes a woman a wife.

[22] Mr Shongwe explained to the Court the rituals that ukumekeza custom would entail in any given situation. He said a woman cannot refuse to undergo ukumekeza as this was a surprise ritual. A woman's consent was not sought; it was irrelevant. Mr Shongwe's evidence was clearly that the bride would have no say whatsoever in the ukumekeza custom, and that she was expected to cry when the custom took place as an indication that she was prepared to sever her links with her own family and be formally integrated into the family of her husband. If the woman refused to cry, she could be physically assaulted until she cried, which would be an indication

that she was indeed accepting her husband's family as her own. A woman would also have to appear semi-naked in front of her prospective husband's family when ukumekeza custom was being practised.

[23] The gist of Mr Shongwe's evidence was that for purposes of valid marriages according to siSwati Customary Law all that one needed was simply ukumekeza custom. The other requirements such as payment of ilobolo and consent of the parties were not so material for purposes of siSwati Customary Law. Upon being asked how Mr Shongwe could reconcile the practice of ukumekeza in the sense in which he described to Court with the provisions of the Recognition of Customary Marriages Act No 120 of 1998, particularly section 3 thereof which provides that consent of both parties is essential for a valid customary marriage, his answer was that they (the Swatis) are not yet aware of that piece of legislation! Mr Shongwe also testified that according to the Swati people cohabitation was unacceptable.

[24] It is impossible to believe Mr Shongwe's evidence that all one needs to be a wife according to siSwati Customary Law is ukumekeza, and that it was so vital that if ukumekeza had not taken place despite other essentials such as payment of ilobolo and consent of the parties concerned, the marriage would nevertheless not be a valid marriage. Mr Shongwe was not even prepared to concede in-chief that African Customary Law, including siSwati Law, has evolved largely due to European influence. He was driven to concede ultimately that there has been some degree of evolution of siSwati

customs. Upon being asked to explain to the Court how ilobolo is paid according to siSwati customs, he conceded that in the good old days when Swati people had cattle, ilobolo was paid in the form of cattle. Nowadays as the majority of African people do not have cattle any longer, ilobolo is largely paid in cash. (Cash is often spent soon after its receipt. See JM Hlophe "The Kwazulu Act on the Code of Zulu Law, 6 of 1981 – a guide to intending spouses and some comments on the custom of lobolo"[1984] CILSA 163 at 168).

[25] In my judgement there is no doubt that ukumekeza, like so many other customs, has somehow evolved so much so that it is probably practised differently than it was centuries ago. I got a firm impression that Mr Shongwe was not being truthful to the Court insofar as he attempted to elevate ukumekeza into something so indispensable that without it there could be no valid siSwati marriage. It is my view that his evidence in that regard cannot be safely relied upon. As Professor de Villiers testified, it is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.

[26] Further support for the view that African Customary Law has evolved and was always flexible in application is to be found in TW Bennett A Sourcebook of African Customary Law for Southern Africa. Professor Bennett has quite forcefully argued that: "In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a

man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters." (at 194).

[27] In my judgement there was a valid siSwati customary marriage between plaintiff and defendant. It follows, therefore, that the defendant's contention that there was no such marriage between the parties is entirely without substance. That, in my view, should dispose of this matter, but for the fact that the case raises a number of important issues of principle. I shall deal with some of them.

6. ISSUES OF CONCERN

[28] The first issue is that after African Customary Law was formally recognised in terms of the Black Administration Act No 38 of 1927, it was never allowed to develop and therefore take its rightful place in this country. Section 11(1) of the Black Administration Act recognised African Law provided that it was not opposed to the principles of public policy or natural justice. Section 11(1) provides as follows:

"Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to the native law applying to such customs except insofar as it shall be repealed or modified: Provided that such native law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles." Section 11(1) was deleted by section 2 of the Special Courts for Blacks Abolition Act No 34 of 1986. This was the notorious repugnancy clause in terms of which African Law was only recognised if it did not conflict with "the law of the land". In line with this approach, African Law was obviously not on a par with South African common law. It was never allowed to compete with South African common law. It could only be recognised when it did not conflict with public policy or natural justice and common law principles in general. The leading case in this regard is ***Ex Parte Minister of Native Affairs in re Yako v Beyi 1948 AD 338.***

[29] Secondly, since 1994 there has been a new political, democratic dispensation for the first time in this country. As a result thereof we have the Constitution of the Republic of South Africa Act No 108 of 1996 ("the Constitution"). Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. In terms of section 9(1) of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) provides that the State may not unfairly discriminate directly or indirectly against anyone, on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (My emphasis). Furthermore, customary marriages have been given constitutional recognition and protection by section 15 of the Constitution. Section 15(3) (a) of the Constitution provides "This section does not prevent legislation recognising –

i) marriages concluded under any tradition, or a system of religious, personal or family law; or

ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."

Further constitutional protection of customary marriages is provided by section 30 of the Constitution which enshrines language and cultural rights. Furthermore section 31 protects cultural, religious and language communities and the practice of such culture and religion. As Bertelsmann, J pointed out in ***Thembisile & another v Thembisile & another 2002 (2) SA***

209 (T) the core values of the Constitution, namely human dignity, non-racialism and the equal protection afforded to individuals and communities, underscore this fact. (at 214).

[30] Thirdly, if one accepts that African Customary Law is recognised in terms of the Constitution and relevant legislation passed thereunder, such as the Recognition of Customary Marriages Act No 120 of 1998 referred to above, there is no reason, in my view, why the courts should be slow at developing African Customary Law. Unfortunately one still finds dicta referring to the notorious repugnancy clause as though one were still dealing with a pre-1994 situation. Such dicta, in my view, are unfortunate. The proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say African Customary Law should not be opposed to the principles of public policy or natural justice. To say that is fundamentally flawed as it reduces African Law (which is practised by the vast majority in this country) to foreign law – in Africa!

[31] The approach whereby African Law is recognised only when it does not conflict with the principles of public policy or natural justice leads to an absurd situation whereby it is continuously being

undermined and not properly developed by the courts which rely largely on "experts". This is untenable. The courts have a constitutional obligation to develop African Customary Law particularly given the historical background referred to above. Furthermore, and in any event, section 39(2) of the Constitution enjoins the Judiciary when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

[32] In conclusion the test is not, in my view, whether or not African Customary Law is repugnant to the principles of public policy or natural justice in any given case. The starting point it to accept the supremacy of the Constitution, and that law and/or conduct inconsistent therewith is invalid. Should the Court in any given case come to the conclusion that the customary practice or conduct in question cannot withstand constitutional scrutiny, an appropriate order in that regard would be made. The former approach which only recognises African Law to the extent that it is not repugnant to the principles of public policy or natural justice is flawed. It is unconstitutional.

7. CONCLUSION

[33] I therefore make the following order:

- A decree of divorce is accordingly granted.

- The custody of the minor child born of the marriage, Nhlanhla, who continues to live with the plaintiff, is awarded to the plaintiff subject to the defendant's right of reasonable access to the child.
- The defendant is ordered to pay maintenance in the amount of R1800 per month in respect of the child, Nhlanhla, born of the marriage between the parties until such time as the child attains the age of twenty-one (21) or becomes self-sufficient, whichever event occurs first.
- Defendant shall be liable for all reasonable medical expenses relating to the plaintiff and the minor child, including but not limited to costs of hospital, dental, optometry and pharmaceutical expenses.
- Defendant shall be liable for all school and school related expenses, including but not limited to school fees, school uniform, textbooks and stationery, sports clothing and equipment as well the costs of all extramural activities related to the minor child's schooling.
- Defendant shall be liable for the costs of all tertiary education of the minor child together with related expenses, insofar as the minor child is desirous to continue with tertiary education and to such extent as good progress is made with regard thereto.
- Defendant is ordered to pay the costs of the suit, including the costs of Rule 43 Applications under case numbers 4780/01 and 1321/02 as well as the costs necessitated by the two previous postponements of the trial.

- There shall be no order as to expert fees.

Hlophe, JP