CUSTOMARY LAW 171 CASE SUMMARIES

STUDY UNIT 4

MABUZAV MBATHA 2003 (4) SA 218 (CPD) ***(PRESCRIBED)***

- Facts of the case:

- 2 parties entered into a customary marriage according to siSwati customary law
- Lobolo of R2500 paid
- Moved in together and referred to each other as husband and wife (enter particulars of wife on forms)
- Child was born of marriage
- Plaintiff (wife) appeals for divorce, guardianship of child and maintenance to be paid by father
- Defendant (husband) argues that there was never a marriage to begin with since the *ukumekeza* custom was omitted from the marriage ceremony

- Legal question:

Were the parties married according to siSwati customary law?

- Ratio decidendi:

Prof de Villiers (second witness for plaintiff)

- Evidence as to evolution of African customary law
- Inconceivable that *ukumekeza* is so vital to the definition of valid siSwati customary marriage that it cannot be replaced by agreement between both parties
- Referred to ROCMA 120 of 1998, in terms of which consent of both parties is essential
- Also gave evidence regarding the essentials of a valid customary marriage: **consent** of both parties, **ilobolo agreement** and **handing over** of the bride.

Mr Shongwe (second defence witness)

- siSwati customary law never changes, part of culture and does not evolve
- Ukumekeza cannot be dispensed with
- If a bride does not do it, she is merely a girlfriend
- ilobolo does not change status from woman to wife
- For the purpose of a valid siSwati marriage, ALL one needs is ukumekeza
- Upon being asked how he could reconcile the practice of ukumekeza with the provisions of ROCMA 120 of 1998, particularly S3, 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

JP Hlophe

- Disregards evidence of Shongwe, cannot believe that there has been ZERO transformation in siSwati customary law

- Obiter dicta:

Issues of concern highlighted by JP Hlophe:

- After African customary law was formally recognised in terms of the Black Administration Act 38 of 1927, it was never allowed to develop and therefore take its rightful place in this country

- Section 11(1) of the BAA recognised African law provided that it was not opposed to the principles of public policy or natural justice
- New political, democratic dispensation in SA whereby Constitution is supreme law
- S2: 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. S9(1): 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
- Saying that African customary law should not oppose public policy/natural justice is flawed and unconstitutional

- Decision:

- Debate not whether or not customary law is repugnant, rather to accept supremacy of Constitution
- Divorce granted
- Custody to plaintiff
- Defendant pays maintenance with regards to: medical, school, tertiary education, cost of suit (R1800 per month until child is 21/self-sufficient)
- No order to expert fees

- Answer to legal question:

Parties were in a valid siSwati customary marriage

MABENA V LETSOALO 1998 (2) SA 1068 (T)

- Facts of the case:

The appellant (father of the deceased) lodged an appeal against the findings of the magistrate that a customary marriage had existed between his deceased son and the respondent. Appellants submitted that the absence of consent to the marriage by the respondent's father was fatal to the existence of a customary marriage. The respondent testified that she fell pregnant in 1988 and in accordance with customary law the deceased parents paid R200 'damages' in respect of the pregnancy to the family of the respondent. The respondent stated that an amount of R600 as lobolo was agreed upon. Prior to the death of the deceased, the respondent and the deceased as well as the child lived in the house purchased by the deceased in Mamelodi. The deceased arranged with two of his friends to go and pay the lobolo to the respondent's mother. The magistrate held that the deceased and the respondent had lived together and that a marriage existed.

- Legal question:

On appeal, the issue was whether the magistrate was correct in holding that a customary marriage existed between the respondent and the deceased.

- Ratio decidendi:

The court held that there is no reason to hold that an independent adult man is not entitled to negotiate for the payment of lobolo in respect of his chosen bride, nor is there any reason to hold that such a man needs the consent of his parents to marry. However, the court held that it was an essential requirement of a customary marriage that the bride must be handed over to the bridegroom. The rule that a woman who is head of her family may

not negotiate for and receive lobolo is not repugnant to the customary law of marriage. It must therefore be accepted that there are instances in practice where mothers negotiate for and receive lobolo, and consent to marriage of their daughters.

- Decision:

Thus, the present case was clearly not an isolated case. The appeal was dismissed.

Gumede v The President of the Republic of South Africa

- Constitutional Court confirmed that customary law "lives side by side with the common law and legislation".
- Difficult to determine the exact reach of customary law in a given situation.

SHILUBANA V NWAMITWA 2009 (2) SA 66 (CC).

This case concerned a woman's right to become a traditional leader, or *hosi*, of the Valoyi people. The royal family had decided to allow the oldest daughter to succeed to this office. The court accepted the family's decision as a valid instance of customary law-making, and, in doing so, distinguished customary law from the common-law concept of custom. The court said that custom is an exception to the general law of the land, and, as such, fills "normative gaps". Unlike customary law, it is not an "original source of law capable of independent development". It is rather a subsidiary source of rules, whose "validity is rooted in and depends on its unbroken antiquity". Court found that Van Breda's case was an inappropriate basis for dealing with customary law. Judge prescribed a new approach to ascertaining the rules. Henceforth, although the traditions of the community were to be taken into account, they were to be considered together with the community's right to develop its law. Considerations of flexibility and development are to be weighed against the need for legal certainty, protection of acquired rights and constitutional rights.

MAYELANE V NGWENYAMA (MM v MN) 2013 (4) SA 415 (CC) ***(PRESCRIBED)***

- Facts of the case:

In 1984, Mr Moyana married Ms Mayelane (applicant) in terms of Tsonga custom. In 2008, without his wife's knowledge or consent, he entered into a second customary marriage with Ms Ngwenyama (respondent) and died a month later. Both Ms Mayelane and Ms Ngwenyama subsequently sought to register their respective marriages ROCMA, with each of them denying the existence and validity of the other's marriage. In her founding papers in the High Court, the Applicant alleged that Xitsonga customary law mandated the husband in an existing customary marriage to seek his wives' consent before concluding a subsequent customary marriage and, further, that she had not given such consent to her husband when he married the Respondent. The Respondent argued that there was no proof that consent was currently required to conclude subsequent marriages in the Xitsonga custom. Both the High Court and the Supreme Court of Appeal had not decided on this issue, as they simply decided the dispute between the parties by focusing solely on section 7(6) of the RCMA. Both courts, therefore, did not consider consent within the Xitsonga customary law

- Legal questions:

- Should the consent issue have been determined by the SCA?