

## HLOPHE v MAHLALELA AND ANOTHER 1998 (1) SA 449 (T)

### Headnote : Kopnota

The applicant claimed custody of his minor child, S, who had been living with her grandparents, the respondents, after the death of her mother, applicant's wife by Swazi customary and subsequently civil marriage. One of the main points of contention was what bearing the fact that applicant had not paid the lobolo in full at the time of his wife's death had on the issue of S's custody. The parties' experts on Swazi law and custom were in disagreement: applicant's expert stated that the father would always get the custody of the children, while according to respondents' expert the minor children went to the maternal grandmother if the lobolo had not been paid in full. As to the applicability of Swazi law and custom to the instant situation the Court referred to s 1(1) of the Law of Evidence Amendment Act 45 of 1988, which provides that '(a)ny court may take judicial notice of indigenous law insofar as such law can be ascertained readily and with sufficient clarity. . .' and pointed out that this did not preclude a party where indigenous law was not readily ascertainable with sufficient clarity to prove it by adducing expert evidence to establish it as a fact. (At 457E--F.)

The Court further held that while it was mindful of the fact that in trying to establish what indigenous law was it should not adopt a too positivistic approach, it could not be accepted that all cultural practices constituted indigenous law and vice versa. The failure of respondents' expert witness to appreciate the distinction between customary law and practice put such a question mark over the reliability of her evidence as an expert in Swazi law as to result in the respondents having failed to prove Swazi law on a preponderance of probabilities. (At 457H--I and 458B/C--D.)

The Court was itself unable to ascertain what Swazi law and custom provided in circumstances such as the present but pointed out that it was clear that the basic principles of indigenous law relating to the custody of children had to a certain extent been excluded in favour of the common law. It was not clear whether common law had been incorporated into customary law or whether customary law had simply been excluded in favour of the common law. What was clear was (1) that in custody matters the interests of the child had to take precedence; (2) that where parties concluded a marriage by civil rights after a customary marriage it imposed on the spouses a new personal status governed by the common law, with the result that the parent-child relationship was governed by the common law; and (3) that any arrangement that smacked of sale of or the trafficking in children would not be enforced. (At 458E/F--459C.)

Though counsel for applicant had during the course of the trial tendered the outstanding lobolo to respondent it was plain that issues relating to the custody of a minor child could not be determined by the mere delivery or non-delivery of a certain number of cattle. (At 459C/D--D/E.)

Any doubt as to the applicable legal principles that might have existed in this regard were effectively removed by s 30(3) of the Constitution of the Republic of South Africa Act 200 of 1993 which provided that 'in all matters concerning (children) his or her best interest shall be paramount'. (At 459D/E--G.) The Court then examined the evidence and came to the conclusion that it was in the best interest of S for her to be reunited with the applicant. (At 462A/B--B.) So ordered.