



**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)**

**REPORTABLE
CASE NO. 16451/2007**

In the matter between:

GIDEON ZENZILE FANTI

APPLICANT

and

LESSIE BOTO

1ST RESPONDENT

MONELWA LUSIBA

2ND RESPONDENT

DOVES FUNERALS

3RD RESPONDENT

JUDGMENT DELIVERED ON 13 DECEMBER 2007

DLODLO, J

INTRODUCTION

[1] On Wednesday 7 November 2007 at about 14h10 Wendy Khunjuzwa Lusiba (“the deceased”), the daughter of the First Respondent, passed away at the home of the latter in 92 Jacaranda Street, Zwelihle Township, Hermanus, where she had resided since July 2007. Funeral arrangements were organised by the First Respondent and the deceased was to be buried on 17 November 2007 by the Third Respondent at Mount Pleasant Cemetery in Hermanus. On 16 November 2007, an urgent application was brought before this Court by the Applicant. In the Application the Applicant sought an order in the following terms:

- (a) Declaring that he is entitled to the custody and control of the body of the deceased and that he is the person qualified to determine where, when and under what circumstance the deceased shall be interred.
- (b) Interdicting the First and the Second Respondents from taking possession and control of the body of the deceased and from burying same at their place of choice. The Applicant also sought an order from this Court in terms whereof the costs of this application are borne by the First and the Second Respondent (presumably jointly and severally). In order to enable the Respondent an opportunity to file and serve their Answering Affidavits the parties entered into some arrangement which effectively stayed the funeral until the hearing of the opposed application. Ms Pratt and Mr. Kubukeli appeared before me for the Applicant and the Respondents respectively.

FOUNDING AFFIDAVIT

- [2] The Founding Affidavit deposed to by Gideon Zenzile Fanti, the Applicant (Mr. Fanti), contains an averment by the latter that he was widowed in that the deceased was his wife married to him by way of customary union (marriage). The customary celebration and rituals, according to Mr. Fanti, took place at his place of birth at Bulhoek, Whittlesea, Edutshwa, in the Eastern Cape in August 2005. According to Mr. Fanti he and the deceased lived together as man and wife for four (4) years prior to their marriage. Mr. Fanti hastened to mention that their marriage was preceded by the payment of *lobolo* which took place in June 2005. He stated that the ceremony was a full traditional affair which was complete in that there was a sheep slaughtered and other requisite ceremonies. Mr. Fanti attached to the Founding papers a photograph of the deceased in traditional attire worn by a married Xhosa woman evidencing the marriage. According to him any Xhosa tribesman or woman would immediately recognise the photo to be that of a married woman.
- [3] Mr. Fanti expanding on the relationship he had with the deceased averred that the *lobolo* was delivered to the First Respondent who was then in the company of one Siphso Boto and Debese by

three *oonozakuzaku* (emissaries) acting on his behalf. Mr. Fanti also stated that he looked after the deceased during her difficult moment as she suffered from the disease tuberculosis. She was only taken to her mother's home rather shortly before she died. Mr. Fanti mentioned that he started preparations for the funeral scheduled to take place at his ancestral home in the Eastern Cape. According to Mr. Fanti it was only then that he experienced some resistance from the First and Second Respondents. The two (2) Respondents pointed out that they would bury the deceased in Zwelihle, Hermanus. The Respondents, according to Mr. Fanti, alleged that the latter was not the deceased's real husband and consequently had no right to take the deceased "away from her mother". Concluding on this aspect, Mr. Fanti averred as follows:

"I want to bury my wife in accordance with the traditions of my people. Our custom is that on marriage, a woman leaves her parental family and becomes a member of her husband's family. It is proper for her body to be buried where the dead of her husband's family are buried."

- [4] What moved Mr. Fanti to proceed to lodge this application was that on 12 November 2007, Mr. Marius Meyer of the Third Respondent telephoned him and informed him that the First and Second Respondents had delivered an Affidavit to the former wherein they stated that they had the right to bury the body and that same must not be released to Mr. Fanti. In conclusion, the latter stated the following:

"I want this Honourable Court to order that I have the right to bury my wife's body where and in the manner I determine in accordance with the customs and traditions of my tribe, which to say (sic) that the deceased should be buried under my direction at Bulhoek. I also want the Court to order that the First and Second Respondents should not interfere with my arrangements, desist from meddling in my dealings with the Third Respondent, be interdicted from burying or causing to be buried the body of the deceased, and leave me to carry out my exclusive duty."

- [5] On 21 November 2007 the Applicant filed and served what is named Supplementary Affidavits deposed to by three (3) persons, namely Thembinkosi Tsibane, Vulile Lalo and Vusumuzi Ncontso. The three (3) persons averred in these Affidavits that in December 2005 being mandated by the

Applicant, they “delivered” *lobolo* for the deceased to the First Respondent. This *lobolo* consisted of an amount of three thousand rands (R3 000) and two (2) bottles of brandy. The averment is that the sum of three thousand rands (R3 000) represented the cattle and the brandy represented the whip used to drive them to the bride’s parental home. Lennox Fanti, one of the persons who deposed to Affidavits referred to *supra*, is the only deponent that averred that he attended the wedding ceremony in connection with this matter in August 2005. In Mr. Fanti’s assertion, all proper Xhosa traditional things were done including but not limited to “*the bride replacing her old clothes with the garb of a married woman of our people, complete with the head scarf and the cloth around the waist.*” The sheep was slaughtered. According to Mr. Lennox Fanti, one Lydia Fanti, whom he described as “senior clan member”, was present at the wedding. In Mr. Lennox Fanti’s averment, the Applicant herein was indeed married to the deceased in terms of the customary law. Concluding his assertions, Mr. Lennox Fanti remarked as follows:

“I can also say that our laws and customs give a man the right to bury his wife. In fact, this is a duty that he has to carry out, and if possible, his wife ought to be buried in the soil of the man’s traditional family home. It is right that the Applicant should want to bury the deceased in Bulhoek.”

THE ANSWERING AFFIDAVIT

- [6] This was deposed to by LESSIE NONTWAZIFANI BOTO, the First Respondent in this matter. She states that she is the mother of the deceased. All that the First Respondent knows is that the Applicant is known by herself and her family as having been the boyfriend of the deceased. The First Respondent is astounded that the existence of a customary marriage is alleged by the Applicant. She denied emphatically that *lobolo* was paid and that customary marriage was ever concluded between the Applicant and the deceased. She, however, conceded that in 2005, indeed a group of men came to her house at 92 Jacaranda Street, Zwelihle Township, Hermanus, and presented themselves as *oonozakuzaku* (emissaries – *abakhongi*). According to the First Respondent at that time the deceased who had been living in her own house at 408 New Sites, Zwelihle Township, Hermanus, had already moved in with the Applicant at 569 Phola Street, Zwelihle Township, Hermanus.

- [7] The group of men the First Respondent mentioned supra, offered an amount of three thousand rands (R3 000) as a gesture to open negotiations for the payment of *lobolo*. The person who represented the First Respondent's family in those "talks about talks" was Siphoh. According to the First Respondent Siphoh told the group of men (*oonozakuzaku*) to go back and work harder before he could advise them about the amount the deceased's family would fix representing *lobolo*. Explaining this further the First Respondent mentioned sending them back was a recognized and well-known way in tradition of stating that the elders will meet and consider the marriage offer and fix a *lobolo* amount in due course. The First Respondent attached to her Answering Affidavit Affidavits by Siphoh and Debese, the persons on the side of the First Respondent who talked to *oonozakuzaku*. In these attached Affidavits these two (2) persons fully corroborated and confirmed the First Respondent's assertion in this regard.
- [8] The First Respondent explained that it is and remains the customary practice to initiate negotiations for *lobolo* with a token amount traditionally known as "*invula mlomo*", interpreted literally, "the mouth-opener" for purposes of talking. Explaining customs in this regard the First Respondent asserted that the initial payment called "*invula mlomo*" is never taken nor understood to be the actual *lobolo*. The tender of such initial payment can either be accepted or rejected. Importantly, its acceptance signifies that the potential bride's family is willing to enter into real *lobolo* negotiations. The First Respondent continued to explain that this token offer can never qualify as *lobolo* because it is impossible for one to know how much *lobolo* will cost without it being preceded by negotiations. The First Respondent castrates the reliance on this initial offer by the Applicant as "lobolo" and labelled it as a deliberate misrepresentation of the custom as practised by the Xhosa people. Enlightening further on this aspect the First Respondent stated categorically that it is only when *oonozakuzaku* come back to talk with the bride's father or guardian (only where a father is absent) that the real *lobolo* negotiations begin.
- [9] The First Respondent pointed out that she as a single parent, having been predeceased by her husband,

would have been the correct person to handle *lobolo* negotiations, being assisted by other senior members of the immediate as well as the extended family. The First Respondent mentioned that upon the payment of the token to begin *lobolo* negotiations, she even informed her sister, Zelda Monelwa Lusiba because she then expected the negotiations to begin in earnest. It was the First Respondent's intention to ensure that Zelda would be part of the team in her family involved in the expected *lobolo* negotiations. The expectation which the First Respondent and her family had was that *oonozakuzaku* would again show up at least within a few months' time calculated as from the date of their first arrival. But when a year went by without hearing a word from them it became clear to the First Respondent that the Applicant was no longer interested. According to the First Respondent, at the time of the deceased's death already, two (2) years had gone by calculated as from the date when *oonozakuzaku* made their first approach. In any event, continued the First Respondent, the deceased whilst cohabitating with the Applicant, had involved herself in an abusive relationship.

[10] The First Respondent explaining the aspect of abuse made the following exposition:

"The deceased had continued to neglect my daughter even when she fell sick, take as an example the fact that in July 2007 when she fell ill and could no longer continue to work, the Applicant made it clear he did not want to live with her and treated her even worse to the point that she decided to come and live with me. She confided about this to her close friend of many years, Vuyelwa Margaret Nondala whose Affidavit is annexed hereto confirming the fact of the ill-treatment she had to endure. She lived with me under my care from July 2007 until she died on 7 November 2007."

[11] According to the First Respondent, during the deceased's illness the Applicant rarely visited her. On the day of her death, according to the First Respondent, despite a desperate call from Phumeza in which the Applicant was asked to arrange comfortable transport to take the deceased to Worcester Hospital, the Applicant refused and said that the First Respondent must do that herself. The First Respondent submitted that these actions on the part of the Applicant must really point to a man who never considered the deceased to be his wife. The First Respondent referred to an Affidavit by Phumeza (daughter of the deceased) stating that the deceased was at one stage confronted by her

(Phumeza) and asked if she was married to the Applicant. The deceased is said to have answered in the negative. The First Respondent referred the Court to Annexure “LB1”, the deceased’s death certificate issued by the Department of Home Affairs. The latter document indeed lists the deceased as ‘never married’. In the view of the First Respondent, facts and averments she has alluded to and canvassed patently establish that there was never a customary marriage concluded between the deceased and the Applicant.

[12] The First Respondent denied emphatically that the deceased lived together with the Applicant as man and wife. She re-iterated that there was never such a traditional marriage ceremony referred to in the Applicant’s Affidavit. In her view, it is inconceivable that she as the mother of the deceased would not have been party to such traditional affair and/or ceremony pertaining to her daughter, the deceased. She further pointed out that it is inconceivable that nobody from the deceased’s family or even friends attended the purported traditional marriage ceremony. The First Respondent cautioned that customary marriage in Xhosa custom amounts to the coming together of two (2) families. In her view, it is a glaring misrepresentation of custom to even suggest that there could ever be a customary marriage and the festivities that go with it, without the knowledge, attendance and thus approval of the bride’s family.

[13] The First Respondent finds it strange that even in Lennox Fanti’s Affidavit purporting to support the Applicant’s allegation, there is no mention of the bride’s family. Even the persons who allege to have been *oonozakuzaku* do not testify to having attended what the First Respondent describes as the purported customary marriage celebrations. The First Respondent took issue with Annexure “GZF1”, the photo of the deceased purportedly showing her (the deceased) wearing what the Applicant alleged is a dress worn by a married Xhosa woman as a traditional attire. According to the First Respondent, on the photo the deceased is wearing *isishweshwe*, a simple and an ordinary attire which has no cultural significance worn around the house by females, married or not. Numerous supporting Affidavits mostly by persons who worked with the deceased, are attached to the Answering Affidavit.

Principally they also say that the deceased mentioned to them during her life time and particularly during those days when she was suffering from the illness, that upon her death she must be buried at her parental home situated at Hermanus. According to some of these Affidavits, the deceased merely cohabitated with the Applicant and the latter subjected her to an alarming extent of abuse during their stay together. Importantly, Phumeza, the deceased's daughter and the First Respondent's grandchild, confirmed that the deceased was, from what the child gathered from the deceased, never married to the Applicant.

- [14] Zelda Monelwa Lusiba in her Affidavit, (also filed in as Answering Affidavit) expressed surprise to her having been cited as the Second Respondent in this matter. She designated this as misjoinder. She fully corroborated the First Respondent (her sister) in her averments. She re-iterated that the deceased and the Applicant did not live together as man and wife very shortly before her death. As stated by the First Respondent, Zelda stated also that in the beginning of July 2007 the deceased moved back to her mother's house at 92 Jacaranda Street, Zwelihle Township, Hermanus, Western Cape. The deceased resided at that address until her death. Zelda mentioned that she visited her sister's house many times, especially when the deceased became sick and was cared for by the First Respondent. According to Zelda on 18 November 2007 the Applicant arrived at the First Respondent's house to pay respect in the traditional way and discussions about funeral arrangements were undertaken. Zelda stated as follows:

"I heard the Applicant state that the deceased and himself had discussed her burial and that it was her wish that should she die in Hermanus, she should be buried here and should it happen in Queenstown, Eastern Cape, she must be buried there. The Applicant then suggested that he wished for the All Saints Church of Zwelihle to handle the funeral arrangements and the burial of the deceased in Hermanus."

Concluding her Affidavit, Zelda asserted the following:

"I was never invited nor attended any marriage ceremony between the Applicant and the deceased, whether in Hermanus or in Queenstown. In our custom a marriage ceremony is a big event where two

families meet and unite. Both families are present when ceremonies are conducted. A bride usually gets a new family name from the husband's family and there are discussions between the family elders. No marriage can be concluded without all these things happening."

THE REPLYING AFFIDAVIT

[15] This was deposed to by Gideon Zenzile Fanti who merely stressed the assertion by the Applicant that there existed a customary marriage between him and the deceased. The Applicant insisted that the acceptance and retention of the sum of three thousand rands (R3 000) as well as the bottles of brandy signified that there should be no denial that he indeed paid *lobolo*. He totally denied that the payment was a "token" or *invula mlomo* as contended by the First Respondent. This, according to the Applicant, was "*a very realistic lobolo*" for the deceased who was a forty one year (41) old woman who had already mothered a child from a previous relationship. The Applicant emphasised that upon the payment mentioned above he was called "*Mkwenyana*" (sic), meaning son-in-law by the First Respondent.

[16] The Applicant further elucidating the custom practised by the Xhosa people made the following explanation:

"If lobolo has not been settled, yet a couple live together, it is customary, after an elapse of time without further progress on the matter, for a parent to summon the bride to the parental home, and there to detain her against payment of a sort of ransom or penalty by the man who wants her to be his wife. This is called uThelekwa. There was no such thing in our case."

The Applicant denied that any behaviour on his part was "abusive" or neglectful towards the deceased. He pointed out that such allegations are not only utterly false, but that they are harmful to him because he did everything he could for the deceased in her illness and importantly he loved her dearly. He denied emphatically that he refused and/or neglected to take the deceased to Worcester Hospital but that he intended asking his employer to allow him the use of the van owned by the former when he next received a call that the deceased had passed away.

[17] According to the Applicant it is not inconceivable that the First Respondent would not attend the ceremony to which he referred in his Founding papers. This ceremony, according to the Applicant, is known as *uTiki* and not the *uDuli* ceremony. The last mentioned ceremony, according to the assertion by the Applicant, is the much grander occasion which is attended by members of both families. It is in the last mentioned ceremony that cattle and sheep are slaughtered and it is sometimes only held after many years of marriage, after many children have been born to the couple. The Applicant re-iterated that at the ceremony he referred to in his Founding papers, the deceased took on the new name, namely "*Nosakhe*". The new name was given to her by the Applicant's family and clan members. The Applicant hastened to add that prior to their departure for Bulhoek and the *Utiki* celebration, he had written to the First Respondent informing her that they were going to engage in that ceremony and that her daughter would return as the Applicant's fully-fledged wife. The Applicant took issue with the First Respondent about the dress worn by the deceased in Annexure "GZF1". He described *isishweshwe* as a dress only worn on special occasions and denied that *isishweshwe* "is simple and ordinary attire" as contended by the First Respondent. In the Applicant's view *isishweshwe* attire is quite elaborate with skin pieces, beadwork and embroidery. He mentioned that true *isishweshwe* is rare today.

APPLICATION OF CUSTOMARY LEGAL PRINCIPLES

[18] It is trite that joinder of a party to proceedings is necessary only when such a party has a direct and substantial interest in any order the Court may make in the proceedings and/or when the orders sought cannot be sustained or carried into effect without prejudicing the other party. I will return to this aspect as far as it relates to this matter.

[19] It is actually relatively easy to prove the existence of a customary marriage in view of the fact that there are essential requirements that inescapably must be alleged and proved. These would be:

- (i) consent of the bride

- (ii) consent of the bride's father or guardian
- (iii) payment of *lobolo*
- (iv) the handing over of the bride.

See: *Mabuza v Mbatha* 2003 (4) SA 218 (C) at 223.

[20] The same requirements are set out as follows by Olivier, Bekker and Others in their work, **Indigenous Law** (LexisNexis):

- (i) a consensual agreement between two (2) family groups with respect to the two individuals who are to be married and the *lobolo* to be paid;
- (ii) the transfer of the bride by her family group to the family of the man.

Regard being had to the above requirements for the validity of a customary marriage, payment of *lobolo* remains merely as one of the essential requirements. In other words, even if payment of *lobolo* is properly alleged and proved that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements.

See: *Gidya v Yingwana* 1944 NAC (N&T) 4; *R v Mane* 1947 2 PH H 328 (GW); *Ziwande v Sibeko* 1948 NAC (C) 21; *Ngcongolo v Parkies* 1953 NAC (S) 103.

[21] These requirements have not vanished with the advent of the Constitutional democracy in this country. On the contrary, the Constitution of the Republic of South Africa enjoins the Courts to develop customary law and to marry it to the Constitutional order of the day. It is not even in terms of the Constitution envisaged that a person can be married and/or caused to be married to another against her will. The Applicant seemingly alleged that when he proceeded to the Eastern Cape for purposes of concluding what he termed customary marriage between himself and the deceased, he merely wrote a letter to inform the First Respondent (mother of the deceased) about what was to happen. The Applicant probably was of the view that the First Respondent merely because she is the mother and not the father had no *locus standi* in the contemplated customary marriage proceedings. I want to make it very clear that the mother of a girl whose father died or is for some other acceptable and

understandable reason absent and/or unable to discharge duties normally meant for the “kraalhead”, is quite entitled to act as the head of the family. Such mother becomes the “father” and legal guardian of the children of her family. I state categorically that such a mother would legitimately negotiate for and even receive *lobolo* paid in respect of her daughter. That would in no way be repugnant to the customary law of marriage as practised in this country. In my view if Courts do not recognize the role played or to be played by women in society, then that would indicate failure and/or reluctance on their part to participate in the development of the customary law which development is clearly in accordance with the ‘spirit, purport and object’ of our Constitution. See also: *Mabena v Letsoalo* 1998 (2) SA 1068. One does not merely inform the head of the family of the bride. The customary marriage must take place in his presence and/or the presence of those representing his family and who have been duly authorised to do so.

[22] From the Applicant’s own papers it is abundantly clear that there was no handing over of the bride to the Applicant and/or the latter’s family. All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom’s husband and her incorporation into his family is ordinarily accompanied by well known extensive ritual and ceremonies involving both families.

See: *Customary Law in Southern Africa* (5th edition) by *Seymor* revised by *Bekker*; *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (derde uitgawe) by *Olivier*.

[23] I am not told in the papers that such rituals and ceremonies took place and that if they did, they involved the participation by the First Respondent’s family. The importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary marriage is being contracted and that *lobolo* has been paid and/or the arrangements regarding the payment of *lobolo* has been made and that such arrangements are acceptable to the two families – particularly the

bride's family. I am in agreement with *Van Tromp's* views expressed in his work, *Xhosa Law of Persons* page 78, that these ceremonies must be viewed as a ceremonial and ritual process in which the essential legal requirements have been incorporated. What the Applicant would have me to accept is that whatever he and his family did alone must amount to correct and recognizable ceremonial rituals. It is totally inconceivable and in fact impossible for only one side of the two families to be involved in these ceremonies.

[24] The fact of the matter is that the customary marriage is and remains an agreement between two (2) families (the two family groups). Regard being had to the Respondent's case, clearly none of the relatives and close friends of the deceased and/or her clan for that matter have any knowledge of the existence of the customary marriage between the deceased and the Applicant in the instant matter. Strangely even the Applicant's case does not even make any allegation that any of the family members and friends of the deceased attended at the so-called celebration of the customary marriage. Lennox Fanti, a clan member of the Applicant, while supporting the latter in the assertion that there was customary marriage celebrations he attended, does not aver that any of the deceased' family members were in attendance as well. It is only surprising that even the persons who apparently acted as *oonozakuzaku* do not appear to be aware of the celebration the Applicant has alleged in his papers. If such celebrations took place and were not in conformity with the customs as demonstrated above, then they indeed amounted to nothing but a party devoid of customary recognition.

LOBOLO ALLEGEDLY PAID

[25] *Imvula mlomo* (opening of the mouths), once accepted by the bride's father or guardian, is not to be regarded as part payment of *lobolo*. It remains a once-off amount that signifies preparedness on the part of the girl's father or guardian to engage the bridegroom's representatives in *lobolo* negotiations. *Imvula mlomo* is correctly described by *Bennet* in his work *Application of Customary Law in South Africa* as an indication made by the potential bride's father that he will not open his mouth until gifts are paid. This is a practise done during the initial visit by *oonozakuzaku* to propose the marriage. It is

only after this initial approach that the real *lobolo* negotiations take place. In the instant matter from the Applicant's own case it is very clear that he last announced that he intended to become involved in the *lobolo* negotiations with the deceased's family and/or the First Respondent in particular. This he did by bringing during the first visit (which unfortunately for the Applicant was the last one as well) the sum of three thousand rands (R3 000) and some bottles of brandy. When this payment was received and accepted by the first Respondent's people, this was nothing more than "*yes we are prepared to engage you in lobolo talks*". How the Applicant can mistake this for the payment of *lobolo* is most certainly beyond my comprehension. In my view the Applicant is either totally mistaken or he is deliberately misrepresenting customary law for no aim other than to mislead this Court. It is abundantly clear that not even the very first step in *lobolo* negotiations was reached in this matter. Otherwise how on earth could *oonozakuzaku* have known how much is payable as *lobolo* for the deceased? It is indeed common cause that there is no uniformity regarding the size and/or amount of the *lobolo* payments. This is usually all determined in terms of cattle and the monetary value attached to each beast. This differs from one tribe to the other. The size is determined by negotiation and agreements reached between the parties. It is a give and take situation. It cannot be determined telephonically or through the exchange of SMS that have been brought by modern day technology. Hence the obligatory nature of the coming together and engagement in discussion. No party dictates terms as each party in the discussion is capable and is entitled to put its side of the story on the discussion table.

- [26] It is common cause that the Applicant and the deceased lived together for some time before any approach to propose marriage and to deal with the *lobolo* issue was made. Even though cohabitation as such is frowned upon by custom, I am of the view that very little can be done by families to eradicate this new phenomenon. It gradually has become a reality and a rather condemnable feature of present day societies. The Applicant seemingly maintains that if the First Respondent needed more *lobolo*, she should have practised the custom called "*Theleka*". What is strange about this suggestion is that the *Theleka* custom only applies in instances where there has been an agreement as to the

amount of the *lobolo* and when same has indeed been partially paid. In the instant matter no agreement as to how much *lobolo* would be, had been reached. According to the First Respondent's case (which is the version I accept), no partial payment of *lobolo* had been made.

[27] In terms of *Theleka* custom, the woman's father/guardian is entitled to "impound" the wife and her children if there are any until the husband makes a further payment. As there was no agreement as to *lobolo* and no payment made the *Theleka* custom finds no relevance in the circumstances of this case. The *Utsiki* custom which the Applicant refers to in his Replying Affidavit is the ritual that only takes place when *lobolo* negotiations have been undertaken and the initial *lobolo* payments have been made to the satisfaction of the bride's family and the plans for the ceremony are in full swing. This is when the bride together with a close female friend visit the groom's family for the purpose of eating *Utsiki* which is the foreleg of a sheep. This is followed by the giving of a name to the bride by the groom's family. I find it very strange that the Applicant only gives the name of the deceased allegedly given to her by way of *Utsiki* custom in reply. It hardly appears that such name is known to anyone of the family members of the deceased. It has been demonstrated above that even *Utsiki* custom could not have been validly observed in that in the first instance no *lobolo* negotiations had been undertaken and in the second instance, no partial payment of *lobolo* had been done.

[28] On behalf of the Applicant Ms Pratt submitted that although the general rule is that the consent of a girl's father or guardian is essential, consent can be deduced or assumed, for example, by retention of the *lobolo* paid or by allowing the two (2) to live as husband and wife. Counsel cites *Indigenous Law* by *NJJ Oliver, JC Bekker, NJJ Olivier (Jur) and WH Olivier*, in support of her submission. This submission cannot be sustained because in the circumstances of this matter no *lobolo* was ever paid. Ms Pratt made another submission which deserves my attention. She submitted that central though *lobolo* may be to customary marriage, full payment thereof is seldom necessary since payment is often deferred. She referred to *TW Bennet – Customary Law in Southern Africa*. I also have no quarrel with this submission save to mention that it does not help the Applicant's case because one

cannot even start to refer to full payment when there was not even partial payment.

[29] In conclusion I hold that the Second Respondent was wrongly joined in these proceedings. There was no justification whatsoever to have joined her. Importantly the Applicant has failed to make out a case which entitles him to the relief sought. It was for the aforementioned reasons that on 10 December 2007 I made an order the terms of which I, for the sake of certainty, repeat hereunder:

- (a) The *Rule Nisi* granted by Van Riet, AJ on 16 November 2007, is hereby discharged.
- (b) The Application is hereby dismissed with costs.
- (c) The First Respondent (mother of the deceased) is hereby declared as the person entitled to undertake funeral arrangements and to bury the deceased at the latter's place of choice and/or the place decided upon by the First Respondent.

DLODLO, J