

**THE INDIGENOUS LAW OF CONTRACT WITH
PARTICULAR REFERENCE TO THE SWAZI IN THE
KINGDOM OF SWAZILAND**

by

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TABLE OF CONTENTS

	Page
Acknowledgements	ii
Summary	iv
Key terms	v
Contents	1
Map of the studied people	10
Chapter 1 ORIENTATION	11
1.1 INTRODUCTION	11
1.2 STATEMENT OF THE PROBLEM	11
1.3 LEGAL PLURALISM IN THE KINGDOM OF SWAZILAND	14
1.4 PREMISES, PRINCIPLES AND PARAMETERS OF THE RESEARCH	16
1.4.1 The universal principles of the Swaziland Constitution are non-negotiable	16
1.4.2 Swazi law and custom is protected in the Constitution	17
1.4.3 The legal system of Swaziland is characterised by pluralism	18
1.4.4 Swazi law and custom is the living law of thousands of Swazi people	19
1.4.5 The development and modernisation of Swazi law and custom must be addressed	19
1.4.6 Certain inequalities as experienced by people in view of the Constitution	20
1.4.7 Swazi law and custom is not necessarily incompatible with fundamental rights	21
1.4.8 Swazi law and custom does not comprise immutable rules	23

1.5	METHODOLOGY AND STRATEGY	23
1.5.1	Control techniques	26
1.5.1.1	The cross-checking of information gathered from various legal officials, experts and panels of key respondents	26
1.5.1.2	The application of the <i>emic</i> and <i>etic</i> orientated approaches	27
1.5.1.3	The attendance of court cases/hearings	27
1.5.1.4	Legal maxims and proverbs	28
1.5.1.5	Falsification as a test instrument	29
1.5.1.6	Memoranda	30
1.5.1.7	Local experts	31
1.6	THE FIELD RESEARCH	31
1.7	THE SWAZI IN THE KINGDOM OF SWAZILAND	32
1.7.1	The Kingdom of Swaziland	32
1.7.2	The Swazi people	33
1.7.3	What is Swazi law and custom?	35
1.7.3.1	Custom and law	36
1.7.3.2	Enforcement of custom (<i>lisiko</i>)	38
1.8	CHARACTERISTICS OF SWAZI LAW AND CUSTOM	40
1.8.1	The unwritten nature of Swazi law and custom	41
1.8.2	The customary nature of Swazi law and custom	41
1.8.3	Swazi law and custom as an expression of community values	42
1.8.4	The influence of magico-religious conceptions and practices in Swazi law and custom	42

1.9	THE TRADITIONAL SWAZI SYSTEM OF GOVERNANCE	43
1.10	THE SWAZI SOCIAL ORDER	44
1.11	OUTLINE OF STUDY	46
1.12	CONCLUSION	47
Chapter 2	THE RECORDING AND CODIFICATION OF INDIGENOUS LEGAL	
2.1	INTRODUCTION	48
2.2	THE NEED FOR RECORDING	48
2.3	CODIFICATION OF INDIGENOUS LEGAL SYSTEMS	51
2.4	CONCLUSION	53
Chapter 3	CONTRACTS IN INDIGENOUS LEGAL SYSTEMS: A THEORETICAL PERSPECTIVE	55
3.1	INTRODUCTION	55
3.2	CONTRACTS IN TERMS OF INDIGENOUS LEGAL SYSTEMS	57
3.3	THE NATURE OF AN INDIGENOUS CONTRACT	61
3.4	THE CLASSIFICATION OF CONTRACTS	64
3.5	THE ROLE OF INDIGENOUS CONTRACTS	65
3.6	THE SOCIAL DIMENSION OF INDIGENOUS CONTRACTS	66
3.7	DISPUTE SETTLEMENTS	68
3.8	THE PRIMARY FUNCTION OF INDIGENOUS CONTRACTS	70
3.9	THE EFFECT OF CHANGE ON THE INDIGENOUS LAW OF CONTRACT	73
3.10	A HOLISTIC PERSPECTIVE ON CULTURAL ASPECTS	74
3.11	CONCLUSION	75
Chapter 4	THE REQUIREMENTS FOR ESTABLISHING A CONTRACT IN TERMS OF SWAZI LAW AND CUSTOM	77
4.1	INTRODUCTION	77
4.2	CONSENSUS	77

4.2.1	Consensus reached in an improper manner	80
4.2.1.1	Misrepresentation	81
4.2.1.2	Force and intimidation	83
4.2.1.3	Improper influencing	83
4.3	PERFORMANCE MUST BE POSSIBLE	84
4.4	PERFORMANCE MUST BE DETERMINABLE	85
4.5	THE TRANSACTION, PERFORMANCE AND PURPOSE MUST BE LAWFUL	86
4.6	PERFORMANCE OR PARTIAL PERFORMANCE MUST BE DELIVERED	89
4.7	THE PARTIES MUST HAVE CAPACITY	90
4.8	FORMALITIES REQUIRED TO BE FULFILLED	96
4.9	CONCLUSION	97
Chapter 5	BREACH OF CONTRACT	99
5.1	INTRODUCTION	99
5.2	DIFFERENT FORMS OF BREACH OF CONTRACT	101
5.2.1	Non-performance	101
5.2.2	Repudiation	104
5.2.3	Impossibility of performance	105
5.3	REMEDIES FOR BREACH OF CONTRACT	106
5.3.1	Specific performance	106
5.3.2	Damages	107
5.3.3	Withdrawal (<i>okuphuma esivumelwaneni</i>)	108
5.3.4	The right to withhold performance	109
5.4	CONCLUSION	109
Chapter 6	THE TERMINATION OF CONTRACTS	111
6.1	INTRODUCTION	111
6.2	PRESCRIPTION	111
6.3	SET-OFF	113

6.4	PERFORMANCE	114
6.5	RELEASE (<i>kukuhulula</i>)	116
6.6	NOVATION	117
6.7	SETTLEMENT	119
6.8	MERGER (<i>confusio</i>)	120
6.9	CONCLUSION	122
Chapter 7	SPECIFIC CONTRACTS	123
7.1	PERMANENT EXCHANGE OF GOODS AND SERVICES	123
7.1.1	Introduction	123
7.2	THE SALE AGREEMENT	125
7.2.1	Terms of the exchange of contract (<i>kuntjintjiselana</i>)	128
7.2.2	Remedies for breach of contract	130
7.3	RENDERING OF SERVICES	132
7.3.1	Renting and letting of services	132
7.3.2	Acceptance of services	137
7.3.3	Specific services	141
7.4	THE EXCHANGE AGREEMENT	145
7.5	GOODS GIVEN ON LOAN FOR CONSUMPTION	147
7.6	DONATION	148
7.7	MARRIAGE CONSIDERATION (<i>emalobolo</i>)	150
	• The significance of <i>emalobolo</i>	150
	• Time of delivery of <i>emalobolo</i>	152
	• The number of <i>emalobolo</i>	152
	• The source of <i>emalobolo</i>	154
	• Distribution of <i>emalobolo</i>	154
	• Return of <i>emalobolo</i>	155
7.8	CONCLUSION	155

Chapter 8	SPECIFIC CONTRACTS	157
8.1	NON-PERMANENT EXCHANGE OF GOODS, INCLUDING BAILMENT AND MANDATE	157
8.1.1	Introduction	157
8.1.2	Loan agreement	157
8.1.3	The lease agreement	160
8.1.4	Farming out (<i>kusisa</i>)	162
8.1.5	Bailment (<i>kubambisa</i>)	168
8.1.6	CONCLUSION	169
Chapter 9	SPECIFIC CONTRACTS	170
9.1	CONTRACTS WHICH INFLUENCE THE STATUS OF PARTIES	170
9.1.1	Introduction	170
9.1.2	Status	170
9.1.3	Marital status	172
9.1.3.1	Rank (<i>lizinga</i>)	174
9.1.3.1.1	Family rank (<i>lizinga lemuti</i>)	175
9.1.3.1.2	House rank (<i>lizinga lendlu</i>)	176
9.1.4	The engagement	177
9.1.4.1	To steal herself (<i>kutiba</i>)	178
9.1.4.2	A form of betrothal (<i>kuqabangula</i>)	178
9.1.4.3	Courtship (<i>kujuma</i>)	179
9.1.5	Contracting a marriage in terms of Swazi law and custom	180
9.1.5.1	Introduction	180
9.1.5.2	To ask for a girl's hand in marriage (<i>kucela</i>)	181
9.1.6	Features of an indigenous Swazi law of marriage	181
9.1.7	Impediments to marriage	182

9.1.7.1	Physical and mental defects	182
9.1.7.2	Infertility and impotence	182
9.1.7.3	Marital status	183
9.1.7.4	Persons of the same gender	183
9.1.7.5	Prohibited degrees of consanguinity	183
9.1.7.6	Consanguinity in the direct line	183
9.1.7.7	Consanguinity in the collateral line	184
9.1.7.8	Relationship by affinity	184
9.1.7.9	Other prohibited relationships	184
9.1.8	The Requirements of a marriage in terms of Swazi law and custom	185
9.1.8.1	Smearing with red ochre (<i>libovu</i>)	185
9.1.8.2	Marriage consideration (<i>emalobolo</i>) known to the Swazi as <i>emabheka</i>	187
9.1.8.3	The <i>lugege</i> beast must be slaughtered	188
9.1.8.4	The <i>insulamnyembeti</i> beast must be delivered	190
9.1.9	Capacity to marry	190
9.1.10	Consent (<i>kuvuma</i>)	191
9.1.11	The coming into being of a marriage in terms of Swazi law and custom	192
9.1.11.1	Courtship (<i>kugana</i>)	192
	• Beads (<i>kugana ngelicube lijuba/ingeje</i>)	193
9.1.11.2	Invitation of peers (<i>kugana ngekuhlela</i>)	193
9.1.12	The marriage ceremony (<i>umtsimba</i>)	195
9.1.12.1	The assembly of bridal goods (<i>kulungisa umhlambiso</i>)	195
	• A beast which must be paid by the woman's family (<i>inkhomo yemgano</i>)	195
	• Skin skirt (<i>sidwaba</i>)	196
	• A shawl made out of cattle tails (<i>sigeja</i>)	196

	• Gifts that the bride presents to some of her in-laws (<i>umhlambiso</i>)	196
9.1.12.2	The bridal party (<i>ludvwendvwe/umtsimba</i>)	197
9.1.12.3	The departure of the bridal party (<i>kuphuma kwentsimba</i>)	199
9.1.12.4	The groom's party (<i>bayeni</i>)	200
9.1.13	Subsidiary wife (<i>inhlanti</i>)	201
9.1.13.1	A subsidiary wife (<i>inhlanti</i>) in the case of barrenness	202
9.1.13.2	A subsidiary wife in the case of death	202
9.1.14	The consequences of a marriage in terms of Swazi law and custom	203
9.1.14.1	General consequences of marriage	203
9.1.14.2	Personal consequences	204
9.1.14.3	Relationships between husband and wife	205
9.1.14.4	Patrimonial consequences	206
9.1.15	Dissolution of a Swazi marriage	206
9.1.16	Death	208
9.1.17	Separation	209
9.1.17.1	Adultery (<i>kuphinga</i>)	210
9.1.17.2	Witchcraft (<i>kutsakatsa</i>)	210
9.1.17.3	Refusal of conjugal rights	211
9.1.17.4	Desertion (<i>kwemuka</i>)	212
9.1.17.5	Gross disobedience or disrespect	212
9.1.18	Consequences of the separation of spouses	213
9.1.18.1	Vis-à-vis the families	213
9.1.18.2	Vis-à-vis the spouses	213
9.1.19	CONCLUSION	214

Chapter 10	SUMMARY AND RECOMMENDATIONS	215
10.1	INTRODUCTION	215
10.2	THE ARTICULATION AND ENFORCEMENT OF A HUMAN RIGHTS CULTURE IN THE KINGDOM OF SWAZILAND	215
10.3	THE AFRICAN WAY OF ACKNOWLEDGING AND PROTECTING HUMAN RIGHTS	217
10.4	THE COMPATIBILITY OF SWAZI LAW AND CUSTOM WITH THE NORMS OF NATIONAL AND INTERNATIONAL LAW	221
10.5	THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS BY THE COURTS	222
10.6	THE ROLE OF THE LEGISLATOR AND COURTS	223
10.7	THE FUTURE OF SWAZI LAW AND CUSTOM	225
10.8	LEGAL DOMAINS TO BE ADDRESSED: ILLUSTRATIVE EXAMPLES	225
10.9	CHANGE AND LEGAL VALUES	227
10.10	THE DISTINCTIVENESS OF THE LAW OF CONTRACT OF THE SWAZI IN THE KINGDOM OF SWAZILAND	228
10.11	LEGAL PRINCIPLES AND PARADIGM	230
10.12	INDIGENOUS CONTRACT AND INDIVIDUALISM	232
10.13	RECORDING AND CODIFICATION	234
	BIBLIOGRAPHY	235
	GLOSSARY OF SWAZI LEGAL MAXIMS AND PROVERBS	251
	GLOSSARY OF SWAZI LEGAL TERMS	255
	TABLE OF CASES	265
MEMORANDA:	Annexure A - Swazi law of contract	266
	Annexure B – Swazi law of marriage	284

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SUMMARY

This study was undertaken to establish whether the legal phenomenon known as a contract exist in indigenous legal systems and in particular, among the Swazi. As the underlying aims and consequences of indigenous contracts differ not only between indigenous peoples but is also affected by the degree of westernisation that has taken place, a micro study has been done in semi-rural areas in the Kingdom of Swaziland to establish if the existing value systems are altered or replaced when western legal institutions are introduced.

Data was obtained by way of interviewing a panel of experts and compared with available literature. Through the process of gathering information, the legal principles were described and the functioning of social processes noted.

Different indigenous contracts and general principles were identified. It must, however, be noted that a contract is more than a device for establishing the economic and legal implications of a transaction. Most contractual disputes are resolved outside the courts through negotiated settlements to restore harmony in the community. Although the Swazi law of contract is showing clear signs of adapting to new developments, there is proof that established legal principles and Swazi values are being retained.

This study will not only be useful as a source of information for both Swazi courts and administration, but could also serve as a basis for codification

intended by the Swazi Government. For that purpose, a memorandum has been compiled for consideration by the Swazi authorities.

The compatibility of Swazi law and custom with a Bill of Rights was also evaluated and suggestions were made for possible law reform in the Kingdom of Swaziland.

Key terms:

Bill of Rights; dispute settlements; holistic approach; harmonization, unification and integration; indigenous contract; indigenous marriage; legal reform; legal values; living law; recording and codification; Swazi law and custom.

Chapter 1

ORIENTATION

1.1 INTRODUCTION

This research was a direct result of a number of Swazi Government initiatives which had as their main objective, striving for good governance and achieving sustainable development in the Kingdom of Swaziland.

A recommendation articulated as a priority objective by the Political Review Commission established in 1992, was to investigate and consider ways in which customary institutions and processes could, or should, be accommodated in the political system of Swaziland in view of their important constitutional and social role in terms of Swazi law and custom.

One of the central concerns raised by the people of Swaziland relates to the constraints impacting on the interface between the traditional and modern systems of governance. In this regard, the recording of Swazi law and custom and its integration into modern law became one of the major initiatives necessary to realise the transformation needed for the achievement of good governance.

1.2 STATEMENT OF THE PROBLEM

Although Swazi law and custom has been recorded (cf Whelpton 2005), only certain aspects of the Swazi law of contract have been attended to. The

Government of Swaziland now intends to codify Swazi law and custom and harmonise it with the Bill of Rights in the Constitution of the Kingdom of Swaziland. This study was therefore undertaken in order to give a proper exposition of the Swazi law of contract and to make suggestions for the legal reform envisaged in the Kingdom of Swaziland.

If law is an indispensable ingredient of organised society, it should be obvious that Swazi law and custom, too, stands to contribute to the future development of the Kingdom of Swaziland. The future of Swazi law and custom is important in the sense that a substantial part of it is still living law. The continued application thereof is also expressly guaranteed in the new Constitution (Sec. 252(2)).

It is therefore important that the living law and judicial values of the Swazi people should be taken into account in the legal development of Swaziland. Many legal values and principles are reflected in the Swazi law of contract among the Swazi, as this is more than an instrument for participating in the economic and legal life of the community. The researcher conducted a micro study in semi-rural areas in the Kingdom of Swaziland (see map) to establish what these legal values and principles are and whether they are being retained in the changing economic and social environment of Swaziland.

A large portion of African customary law has been recorded or codified. These recordings and codifications have been criticised in that they have intended to restate or codify traditional law rather than the living law of the people, and have created the impression that African customary law consists of immutable rules. Critics have, however, overlooked the fact that

customary law also consists of processes, and is quite capable of adapting to changing socio-economic circumstances (Dlamini 1990:84). Furthermore, a written exposition of those indigenous legal systems which are in accord with jurisprudence increase the status of indigenous law and promote certainty and consistency in its application and enforcement.

While the continued application of Swazi law and custom has been guaranteed in the Constitution of Swaziland, it will, as has been the case in the past, continue to undergo constant change. There is sufficient evidence that Swazi law and custom has the capacity to adapt to economic, social and environmental changes. Yet this adaptation should be in harmony with its underlying postulates and should not be initiated by a Bill of Rights (cf Whelpton 1997:145-151).

The legal reform envisaged in the Kingdom of Swaziland may include unification, integration and modernisation as experienced by other African countries. This should be done, however, with due regard to the values, norms, ideals and realities of the Swazi people which this study intends to emphasise (cf Spalding 1970:117).

Finally, this research of the Swazi law of contract, containing trusted and cherished Swazi values, envisages not only enhancing the standing of Swazi law and custom, but also promoting certainty and consistency in upholding the laws of the Swazi nation.

1.3 LEGAL PLURALISM IN THE KINGDOM OF SWAZILAND

Legal pluralism is generally found in countries of the Third World and also in quite a number of developed countries elsewhere on the globe (cf Prinsloo 1990:325). It often stems from the heterogeneous composition of the population of countries. Legal pluralism is also found in the Kingdom of Swaziland where both Roman Dutch Law, as the adopted colonial common law, and Swazi law and custom are officially recognised. Swazi law and custom apply predominantly to Swazi people and common law to Swazi citizens, including people of non-Swazi origin. The system of legal segregation furthermore resulted in a dual court system – Swazi law and custom may be applied only in Swazi courts and common law in magistrates' courts and the High Court. Since both these legal systems consist of rules that regulate relations between public authorities and Swazi subjects on the one hand, and the mutual relations between these subjects on the other, there is an urgent need for harmonisation, reconciliation and ultimately even unification of these two legal systems (cf Bennett 2004:74).

Unification of the different legal systems of a country is usually a gradual process to ensure legal certainty regarding the application of relevant legal values and rules, and is usually characterised by three phases, namely harmonisation, integration and unification (cf Prinsloo 1990:427). The unification of Swazi common law and Swazi law and custom by replacing them with a uniform legal system is currently not envisaged by the law-makers. It should be kept in mind that greater legal certainty by means of unification in a country cannot be achieved without the assent and co-operation of the communities involved. Moreover, the connection between a

legal system, the economy and other aspects of culture of a society should always be taken into account in the process of legal reform. A legal system that is too advanced and does not bear reference to the economic and social order and other spheres of life of a society is as ineffective as one that has become obsolete (cf Prinsloo 1990:329). A new reformed legal system containing values and rules that are foreign to the existing and living law will lead to legal uncertainty and will not be observed. The following examples can be mentioned in this regard:

- long after the acceptance of the Ethiopian Civil Code, the indigenous communities still adopt children in terms of the repealed indigenous law;
- in the cities of Nigeria the indigenous population give precedence to the unofficial tribunals for the speedy, simple and effective solution of their problems; and
- in certain indigenous communities of Ghana the administration of justice is still managed by traditional institutions, despite having been abolished by the central authority of the country (cf Prinsloo 1990:330).

In terms of the new Constitution of the Kingdom of Swaziland, the common law and Swazi law and custom are recognised and the aim is to integrate indigenous Swazi law and custom into a modern legal framework. This will, *inter alia*, entail the reconciliation of indigenous Swazi values and rules with human rights values such as equality, human dignity, non-sexism and non-racialism contained in the Bill of Rights in the Constitution of the Kingdom of Swaziland.

Such harmonisation involves the elimination of conflict and reconciliation of conflicting elements between the rules and their effect on the different legal systems while each is still in force as a separate legal system (cf Prinsloo 1990:325). An example of harmonisation and reconciliation is to regard both the indigenous marriage and the common law marriage as valid institutions in the Kingdom of Swaziland with due recognition of, and protection for, women and children. Law reform in the Kingdom of Swaziland should therefore take proper account not only of the provisions contained in the Bill of Rights but also of indigenous Swazi values, customs and legal rules.

1.4 PREMISES, PRINCIPLES AND PARAMETERS OF THE RESEARCH

Following the abovementioned rationale and theoretical orientation, the premises below are identified and listed and were taken into account as points of departure in the research of the Swazi law of contract, and secondly, to provide guidelines for the development and transformation of Swazi law and custom and which should facilitate its possible integration, harmonisation and reconciliation with the universal principles of the Constitution.

1.4.1 The universal principles of the Swaziland Constitution are non-negotiable

In terms of section 14(2) of the Constitution, fundamental rights are applicable to all legislation in force – thus also to Swazi law and custom –

and no fundamental right will be infringed by an obligation in common law or Swazi law and custom. Swazi law and custom is therefore now subject specifically to the provisions of a Bill of Rights in the Constitution. This implies that the principles and conditions of Swazi law and custom may be challenged by the guarantees of human rights such as equality and non-discrimination (Whelpton, n.d.; Grant 2006:23). In fact, in terms of section 268(1) of the Constitution, the existing law, after the promulgation of the Constitution, “shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.”

1.4.2 Swazi law and custom is protected in the Constitution

Most of the Swazi traditional institutions which were entrenched in the then existing Constitution when Swaziland became independent in 1968, have also been guaranteed and protected by the new Constitution (see section 227(1) of the Constitution) e.g. The king (*ngwenyama*); the queen mother (*ndlovukazi*); the princes of the realm (*lingunga*); the advisory council (*liqoqo*); the Swazi national council (*sibaya*); chiefs (*tikhulu*); senior prince (*umntfwanenkhozi lomkhula*); royal governors (*tinduna*) (Whelpton, n.d).

In terms of section 115(6) of the Constitution, the matters listed below furthermore continue to be regulated by Swazi law and custom.

These are: the status, powers or privileges, designation or recognition of the Ngwenyama, Ndlovukazi and Umntfwanenkhozi Lomkhulu; the designation, recognition, removal and powers of a chief or any other

traditional authority; the organisation, powers or administration of Swazi (customary) courts or chiefs' courts; Swazi law and custom, or the ascertainment or recording of Swazi law and custom; Swazi nation land; and the First Fruits Ceremony (*incwala*), Reed Dance (*umhlanga*), Regimental System (*libutfo*) or any similar cultural activity or organisation (Whelpton, n.d.).

1.4.3 The legal system of Swaziland is characterised by pluralism

The Constitution confirms the application of the principles and rules of the Roman-Dutch Common Law as applicable to Swaziland since 22 February 1907, as the common law of Swaziland, except where, and to the extent that, those principles or rules are inconsistent with the Constitution or a Statute of Swaziland (Section 252(1)). Subject to the provisions of the Constitution, the principles of Swazi law and custom are also recognised and adopted to be applied and enforced as part of the law of Swaziland (Section 252(2)).

As indicated in item 1.2 above, it can thus be said that Swaziland is practising a system of legal and judicial segregation. This implies that Swazi law and custom applies only to people of Swazi origin and the received common law applies to all Swazi citizens. This includes people of non-Swazi origin. As already mentioned (see Chapter 1.3), this system of legal separation has resulted in a dual court system i.e. Swazi law and custom may be applied only in Swazi courts, and common law in magistrates courts as well as the High Court. Where these different systems of personal law, namely Swazi law and custom, as well as common law continue to be in operation, it is a question of whether the adjudication of

Swazi law and custom should be confined to lower courts. This question becomes more pertinent now that the Constitution of Swaziland, which includes the protection of basic human rights, has been adopted.

1.4.4 Swazi law and custom is the living law of thousands of Swazi people

The contemporary reality is that the lives of vast numbers of Swazi people are still controlled and directed by Swazi law and custom on a daily basis. This fact has to be acknowledged and provision has to be made for its accommodation in the development of the Swazi legal system.

1.4.5 The development and modernisation of Swazi law and custom must be addressed

The Constitution has had the effect of placing Swazi law and custom squarely in the domain of public law. The Constitution guarantees every person's fundamental rights and freedoms, subject to respect for the rights and freedoms of others and for the public interest. This clearly poses a challenge for Swazi law and custom and suggests that the latter should be put under scrutiny. Adaptation or transformation of Swazi law and custom may thus be necessary. Rules which might be regarded as antiquated could require harmonisation or modernisation, e.g. some of those relating to contract, marriage, succession and land, in order to be consonant with contemporary and changing socio-economic conditions. This implies what is referred to elsewhere in Africa as the liberalisation of customary law (cf Prinsloo 1990:325). The process would be directed more specifically at the

removal of certain inequalities which people may experience as a result of gender and other related factors.

1.4.6 Certain inequalities as experienced by people in view of the Constitution

Potential areas of conflict between the two systems of law in the Kingdom of Swaziland should be thoroughly investigated and mitigated. This should be done through the development of procedures and guidelines that would facilitate appropriate and equitable solutions with due consideration for individualism characterised by Roman Dutch Common Law and communalism based on patrilineal principles that characterise Swazi indigenous law.

By recognising Swazi law and custom and at the same time prohibiting discrimination, the Constitution, among other things, creates a direct confrontation between the two conflicting principles, namely an individual's right to equal treatment and a group's right to observe the culture of its choice (cf Whelpton 1997:150).

The Bill of Rights, as contained in the Constitution, places strong emphasis on the rights of the individual, thus creating a possible conflict with Swazi law and customary values. This fact, in general terms, implies the following: with human rights the emphasis is on the individual, whereas with Swazi law and custom the emphasis is on the group or community, or the individual in group context; with human rights the emphasis is on rights, whereas Swazi law and custom maintains the principle of patriarchy, which

means that freedom of thought, speech, movement or association is qualified by the respect due to senior persons (cf Whelpton 1997:150).

The question is, therefore, how these divergent approaches can be reconciled and who will set the norm: the Bill of Rights or the community (Vorster 1993:552).

The Constitution does not contain any specific indications as to how to address this problem. The solution to conflicts between Swazi law and custom and fundamental rights must therefore be sought outside the parameters of the Constitution, and in this process factors such as the social implications of instituting fundamental rights should be explored (cf Whelpton 1997:594-601). Additional information gathered by thorough research is therefore required to address this issue.

1.4.7 Swazi law and custom is not necessarily incompatible with fundamental rights

Rights in Swaziland are mainly held by family groups, with each member sharing those rights, according to his or her rank within the family group concerned. In this context, no members, and this includes women, are without rights. All members are full, and equal, participants in these group rights (cf Dlamini 1990:84).

The family group specifically, and the community at large, therefore, constitute the framework within which individuals exercise their political, economic and social rights and freedoms. It may be argued that customary

law is essentially a right of groups that limits individual rights (Eze 1984:15). It would, however, be more correct to say that the rights of individuals are often limited by the rights of family groups and the community at large, since the individual forms part of a number of constituent bodies in Swazi society. Although individual rights are not ignored, the emphasis is not on the individual as such, since communal ethics is the first priority, and rights are understood within the context of the family group which functions as a corporate legal entity and which also underlies the group-orientatedness of Swazi life (cf Whelpton 1997:149).

A Bill of Rights is not unlimited in nature. It was originally devised to protect citizens in their relations with the state, that is, rights were applied vertically. Recently these rights were extended to the relationships between individuals, i.e. horizontal application, a development which presented the courts with the problem of having to determine when Chapter 3 of the Constitution, on fundamental rights, may be applied horizontally.

The equality principle *per se* does not always provide the courts with sufficient grounds to create rights that do not already exist, or give them a mandate to amend certain indigenous rules. Circumspection is the key and even the legislator will have to approach such matters with care as many practices, though changing, are embedded in Swazi culture. This implies that the different customs and institutions are integrated and an intervention affecting one will have repercussions for others. These matters require thorough investigation and choice of law and reform of the courts are but two of the possible considerations.

1.4.8 Swazi law and custom does not comprise immutable rules

Swazi law and custom is dynamic and consists of processes with the capacity to adapt constantly to changing socio-cultural, socio-political and socio-economic contexts. Swazi law and custom still comprises the very fabric of Swazi society. It is essentially still living law and stands to contribute significantly to the future development of the Kingdom of Swaziland. As is the case with customary law elsewhere in Africa, Swazi law and custom consist of processes and have the capacity of adapting to changing socio-economic and socio-political circumstances and will constantly undergo change. This change and adaptation should, however, not be initiated by a Bill of Rights in the sense of being an instrument to entrench western values. Law and custom should be adjusted in accord with their own inherent postulates and principles. It is possible to do this in conformity with the Bill of Rights by interpreting, where appropriate, the Bill of Rights in the cultural context of the Swazi people (cf Whelpton 1997:150). The harmonisation, integration, reconciliation and modernisation of the Swazi legal system can thus only be meaningfully accomplished with due regard to the values, norms, ideals and realities of the Swazi people themselves (cf Spalding 1970:117).

1.5 METHODOLOGY AND STRATEGY

The research strategy was comprehensive and multi-sited. This entailed adopting the ethnographic method for this research.

The emphasis was thus not the elicited social-survey type of data gathering, and hence not exclusively on the legal rules, but also on the processes as currently being enacted in the living law. To this end extensive use was made of:

- a study of the recorded Swazi Law and Custom document (Whelpton 2005) and the Constitution (2005) of the Kingdom of Swaziland, including the Bill of Rights; and
- discussions with various stakeholders such as the Project Coordinator for the recording and codification of Swazi law and custom, the Attorney General and his personnel, the Law Commission, Woman for Law and members of the Swazi national council;
- the gathering of information by means of ethnographic interviewing;

This entailed observing, participating in and listening to obtain firsthand information to record as much as possible of the legal values of the Swazi people. The emphasis was on unstructured in-depth interviewing. Such interviewing entailed observational interrogation.

Various respondents were identified and selected by the local chiefs (*tikhulu*) for interviews. These included key and casual respondents. The researcher relied on “large numbers of casual informants, but focused on a relatively small number of key informants upon whom they may become very dependant” (Ellen 1984:224).

The comprehensiveness of the research required panel discussions regarding the aspects to be covered in the research. Such panels of respondents were representative of the profile of the Swazi community with regards to variables such as seniority, age, gender, educational qualifications and occupational specialisation to mention the most important of these. If different views about an aspect of a specific manifestation of Swazi law of contract were held by members of the panel, they conferred to clarify the matter. Experience has shown that it is sometimes desirable for panel members to consult others in the community before feedback is given on an issue. In this way the Swazi community at large became indirectly involved in the research.

The tried and trusted genealogical method is an indispensable instrument in the recording and restatement of law where exactness is required. It is, for instance, an effective instrument for the reconstruction of history, to gain an understanding of social, legal and other relationships, the composition of family gatherings and agnatic reconciliatory bodies that play such an important role in resolving disputes in private law to restore harmony in society. The family ties obtained through the use of the genealogical method gave statistical verification of the oral information on the prevalence of exogamy, and the rules of preferential marriages as well as the dissolution of marriages. The employment of this method became the single most important verification of the oral information on the Swazi marriage law. The value of the genealogical method is perhaps best summarised in a publication of the Royal Anthropological Institute, "Notes and Queries on Anthropology" (1951). It states:

“The genealogical method has proved of such value in Anthropological research that it is now considered an essential technique in sociological investigations In collecting genealogies the investigator will find corroboration, or new information which he may not have expected, with regard to the remarriage of widows, special marriage customs among [chiefly] families, etc., etc. Thus both from the point of view of gaining exact information and as an actual introduction to the group with whom work is to be done, the collection of genealogical data affords a sound basis”

1.5.1 Control techniques

To ensure valid and reliable information about the legal rules and values of the Swazi people, various techniques and instruments were used to verify the recorded data. In the recording and restatement of law, as well as the reconciliation of legal rules and values deriving from different legal systems, the research methodology and techniques employed ensured valid and reliable information. These methods and techniques were employed in this regard are described below.

1.5.1.1 The cross-checking of information gathered from various legal officials, experts and panels of key respondents

After interrogating of key respondents regarding particular issues, the information gathered was cross-checked with other groups of knowledgeable respondents, as well as with the information that is already available in published and unpublished sources. In this way information acquired was

consistently checked and subjected to verification. Where differences and variations and seemingly irreconcilable values were identified, these issues were also workshopped in panel discussions (cf Prinsloo 1991:28).

1.5.1.2 The application of the *emic* and *etic* orientated approaches

In anthropological research it is important to see the people being studied as actors in their own cultural context, and to be aware of how they perceive and categorise the world, and what is humane and meaningful to them in the context within which they are living. This is known as the *emic* approach which is used to avoid the pitfalls of ethnocentricity i.e. that of judging others according to the researcher's own value system. The *emic* approach is the converse of the *etic* or researcher-orientated approach in which the focus shifts from native views, categorisation, explanations and interpretations to the perspective and analysis of the anthropologist as researcher. Anthropologists combine the *etic* and *emic* approaches in their fieldwork strategies because the interaction between these approaches usually presents the most objective view of the issue being investigated.

1.5.1.3 The attendance at court cases/hearings

These are regarded by anthropologists and jurists in particular as the most reliable mechanisms for the checking and verification of information (see Coertze 1987:92-236; De Clercq 1975:9; Prinsloo 1989:420-428). In the present study a significant number of court hearings, particularly in the courts of chiefs (*tikhulu*) were attended. It is contended that this method

provides reliable data because it eliminates prejudice with regard to ideal or real law (Hoebel 1954:42).

1.5.1.4 Legal maxims and proverbs

Studies by Schapera (1970), Campbell (1970:121-224,325-347) and De Beer (1984:4-9) among the Tswana and Northern Ndebele respectively have shown that proverbs and legal maxims play an indispensable role in the elucidation of prevailing legal rules and the confirmation of legal values. According to Campbell (1970:121):

“Proverbs are an integral part of the tradition and culture of the Batswana. Though not used much in straight conversation, they are used extensively both in explanations and in putting forward a point of view.... Most of them express right behavior, that is the behavior expected of a normal person under any given set of circumstances.”

The literal and metaphorical meaning of maxims can be illustrated from the research of De Beer (1984:9) among the Northern Ndebele, particularly in regard to the law of contract. The maxim: ‘*O ka se sekise mapele a letlabo*’ – literally, you cannot try the testicles or genitals of a rhebuck in court (*mapele*) is the euphemism for ‘*merete*’. This maxim indicates that you cannot conclude a contract with a minor, since he/she, according to Northern Ndebele respondents, knows as much of contracts as the genitals of a rhebuck – nothing. The Swazi say: ‘*akunasivumelwani nemtwana*’, meaning “you cannot conclude a contract with a minor”.

Maxims reflect the manner in which people perceive their culture in general, and their relations with kin and other people, and particularly the guidelines for acceptable and positive behaviour that are fundamental to an orderly and law-abiding society.

It is, therefore, evident that the information contained in the idiomatic expressions and maxims, which underlie indigenous Swazi legal values, was indispensable in the present study. Due to the fact that there is no well recognised dictionary available of siSwati words and terminology, the researcher compiled a glossary of Swazi terms, proverbs and legal maxims gathered during the interviews. Although some may not be relevant to the law of contract, the recording thereof remains valuable for future reference and research.

1.5.1.5 Falsification as a test instrument

Truly reliable and credible data are only finally gathered when the researcher places such data in jeopardy by setting up conditions or makes allegations whereby the data are exposed to falsification (see Pelto & Pelto 1978:35). This means that the researcher interviews the same respondents again and contradicts information that has already been gathered from respondents during the first round of interviews to try to prove them wrong. If their indignation is aroused and they immediately refute the statements and allegations of the researcher and confirm the accuracy and reliability of the information originally given, the credibility of such information is assured (cf Prinsloo 1991:29). Pelto and Pelto (1978:35-36) reckon that research

results are only completed after being tested and scrutinised by falsification as a test instrument.

These methodological techniques have proved to be valuable and indispensable mechanisms to distil legal rules from customs, explain legal values, rules and processes and also to ensure that criteria such as accuracy and reliability of information are constantly met during the research process.

Panel discussions have thus been conducted for the gathering of data during the research process, supplemented by attendance at informal dispute resolution discussions and or court cases, to ensure first-hand experience of Swazi Law in process.

1.5.1.6 Memoranda

Memoranda or guidelines for interviews on all the various topics were compiled beforehand. The purpose of the memoranda was to cover the research topics fully, to deal with various themes systematically without preventing the respondents from giving information voluntarily and to have sufficient examples available during the interviews (cf Prinsloo 1991:23). The memoranda merely provided an outline or checklist of topics and items to be covered, but no specific sequence of items or questions was prescribed. The objective was to prompt and encourage the respondents to furnish information on what they considered important. It also facilitated unification of existing information against information obtained during the interviews (cf Prinsloo 1991:51, 59).

1.5.1.7 Local experts

Local experts, who served as respondents, were selected in consultation with the chiefs, who are familiar with their people. Chiefs from the various chieftaincies were asked to nominate members from whom some were selected, after they had been interviewed. At each locality the respondents were interviewed in a panel on the basis of a memorandum prepared beforehand. In this way, the collective knowledge of the panel was obtained, after the members had corroborated and supplemented one another's knowledge. Questions were compiled to include easily appreciated facts and due allowance was made for variations in different regions of the country. The information given by the respondents was verified by cross-questions, information given by respondents from the other panels, examples of cases (hypothetical and real) and legal maxims and proverbs.

The panel consisted of twenty people (ten men and ten ladies) and facilitated the formation of a working group. All field data obtained through interviews were evaluated critically. The data were tested against the requirements of logic, the norms of justice, science in general and the norms of Swazi law and custom (cf Prinsloo 1991:6).

1.6 THE FIELD RESEARCH

The researcher was equipped with knowledge of the field research methods, the culture of the Swazi people and in particular the law of contract. It saved time and prevented difficulties in the field and gave a better insight into the research problem (cf Prinsloo 1991:13).

A memorandum for interviews in the field was compiled. It covered the research topic fully, and was amended in accordance with insight gained in the field. Information was recorded promptly during the interviews (cf Prinsloo 1991:14).

The researcher made use of a local interpreter who also acted as a research assistant. He assisted with the local arrangements and expedited the course of the interviews (cf Prinsloo 1991:21).

1.7 THE STUDIED PEOPLE: THE SWAZI IN THE KINGDOM OF SWAZILAND

Since a micro study was done on the Swazi of the Kingdom of Swaziland, a brief overview is necessary of the country itself, the Swazi people, some characteristics of Swazi law and custom, and its relevance for, and impact on, society, governance and the dual system of government in which the traditional and modern systems co-exist side by side.

1.7.1 The Kingdom of Swaziland

The Swazi nation was shaped by the early leaders and it is said that the leading Nkhosi – Dlamini family, who established the Swazi nation – either by peaceful incorporation or forcible absorption – entered the present-day Swaziland approximately 250 years ago (Whelpton 2005 Governance:4). Comprising 17,363sq kilometres, Swaziland is a landlocked country situated between Mozambique and the South African provinces of KwaZulu Natal and Mpumalanga, between the 20th and 27th latitudes south and the 31st and

32nd meridian east. In 1880 the boundaries were formally defined by the British, the Portuguese and the Transvaal Afrikaners, who decided that the Pongola Valley would form part of South Africa, even though it was an area historically occupied by Swazi people (Whelpton 2005 Governance: 16-17).

The Kingdom of Swaziland is the smallest country in the southern hemisphere. It consists of four topographical and climatic areas, which vary from 400 to 800 metres above sea level, each of which has its own climate and characteristics (Anspach 2004:42) (See the enclosed map of the Kingdom of Swaziland).

In 1903, Swaziland became a protectorate under British colonial rule and retained this status until it became a self-governing state in 1967, when Sobhuza II received international recognition as king and the country acquired its own flag. The country celebrated independence in 1968 and the monarchy has retained its position of strength since then (Anspach 2004:43).

1.7.2 The Swazi people

The current total population of Swaziland is estimated at approximately 1,2 million people. There are three main language groups absorbed in the Kingdom, namely, Nguni, Sotho and Tsonga. The clans representative of these language groups are 70% Nguni, 25% Sotho and 5% Tsonga. The integration of these three main groups brought with it a distinct legal perspective from each of the respective groupings, elements of which would have been incorporated into Swazi law and custom, making the Swazi an ideal focus for a holistic study of the topic.

From the Nkosi-Dlamini clan, the kingship is hereditary and all other clans rank in decreasing order thereafter. Every Swazi person acquires his/her father's name by birth. Although women retain their paternal clan name on marrying, they may never transmit it to their children. Clanship is of primary importance in regulating marriage and succession, in particular. With the exception of the king, marriage with a person of one's own clan is prohibited (Anspach 2004:43).

The Swazi people are a proud and peaceful nation. Approximately 77% live in rural areas and the remaining 23% within towns and cities. The average population density is only 5.2 people per square kilometre. Traditionally, the Swazi are a polygamous society, although today monogamous marriages are becoming more common due to western influence (Anspach 2004:44). The cultural heritage is deeply rooted and traditions are carefully protected and maintained.

The Swazi kinship (*bukhosi*) consists of the king (*ngwenyama*), currently Mswati III, the queen mother (*ndlovukazi*), the members of the royal house, chiefs (*tikhulu*) and headmen (*tindvuna*). The king stands at the apex of both the traditional and the modern systems of governance (Anspach 2004:45-46). The king has played a major role by initiating the legal and constitutional reform processes in the Kingdom of Swaziland. He also initiated the recording of Swazi law and custom.

1.7.3 What is Swazi law and custom?

Swazi law and custom is the product of age-old traditions and customs that in the course of time came to be classified as “law”. According to Marwick (1966:280), “.....the repository of these traditions is chiefly the old men, particularly those associated with the king’s village (*umuti weBukhosi*) where they are continually in attendance listening to and taking part in cases and making use of the code which is to them a living body of precepts.” Differences in human qualities are universally recognised and, in hierarchically ordered societies like that of the Swazi, the senior echelons will be assumed to be more, rather than less, generously endowed with wisdom, understanding and insight than other people.

When the Swazi speak of “our way of life” (*indlela yekuphila kwethu*) and of “our traditions” (*emihambo yetfu*), they are referring to the social relationships and social actions which have as their point of departure age-old customs validated by the ideology of traditionalism and legitimised by the king (Vilakazi 1977:227-228). The king, the royal family, chiefs and elders are the main custodians of Swazi law and custom. Announcements by the king become Swazi law when they are made known to the nation, usually at the cattle byre ‘*esibayeni*’ where all national meetings are held (WLSA 1994:24). The king is referred to as ‘*umlomo longacali manga*’, meaning “the mouth that never lies” essentially because he pronounces as “law” what the Swazi believe or accept as binding.

Swazi law and custom therefore emerge from what the Swazi people do, or – more accurately – from what they believe they ought to do (*lebakholelwa*

kutsi bangakwana), rather than from what a class of legal specialists considers they should do or believe. It is pre-eminently embodied in a set of concrete principles, the detailed application of which to particular cases is flexible and subject to change. The principle is unchanging, no doubt, but it is not always easy from a western perspective to establish when any given norm or rule is an authentic principle, or is nothing more than the practical application of a general norm to a particular case.

1.7.3.1 Custom and law

Although the Swazi vary in the details of their conduct, certain standardised patterns of behaviour are incumbent upon them, depending on their age (*umnyaka*), (*budzala*), gender (*bulili*) and rank (*lizinga*). All these patterns of behavior, or rules of conduct, collectively constitute what we conventionally term the “laws and customs” (*umtsetfo emasiko nemihambo yesiSwati*) of the Swazi.

The question is whether any distinction can or should be made between “custom” and “law”. The problem is complicated by the fact that the Swazi have no written codes setting aside legal rules apart from all other types of rules. A few rules are epitomised in proverbs (*sisho*) and kindred sayings, which can be quoted when the occasion arises. The vast majority, however, are inherent in the Swazi social system. They occur simply as established usages and observances which have developed over the course of time and become accepted by the people at large as binding and obligatory, as norms or correct standards of behaviour.

The Swazi themselves employ a variety of terms to denote all or certain of their rules of conduct. They speak, for example of '*umhambo*' (manners, etiquette, polite usages), '*lisiko lokuhlonishwako*' (traditional usage, custom) (taboo), and '*imisebenti*' (duties). Most frequently, however, they speak of them collectively as '*emasiko nemihambo esiSwati*'.

'*Umtsetfo*' may refer to a single "law of ordinance", to "the law" as a whole or, more rarely, to "an order or demand of a ruler". '*Umhambo*' in general applies to what we would term: manner, way, fashion, habit, usage, and '*lisiko*' to custom, traditional usage; and (always in the plural form) to: manners, customs, polite usages. The terms are not really precisely distinguished from each other in ordinary Swazi usage. The same rule of conduct for example be spoken of on one occasion as '*umtsetfo*' and at another occasion as '*umhambo*' or '*lisiko*'.

This particular distinction, although not consistently maintained by the people, suggests a possible line of approach to the problem of what should be regarded as Swazi law and what should not. '*Lisiko*' is stronger than '*umhambo*', as the latter generally means a usage. The Swazi employ various mechanisms to ensure that all members conform to the recognised norms of conduct. Children are carefully taught by their parents the difference between right and wrong conduct. At the formation of age-regiments (*emabutfo*), more formal instruction of the same nature is given, certain definite rules of behaviour being firmly impressed upon the minds of the young people concerned. Later, as an adult, everyone participates fully in Swazi society and learns by actual experience what may or should lawfully be done and what is forbidden or resentful.

The distinction drawn between law and custom may be illustrated by the following example: If a man cohabits with an unmarried woman and impregnates her, her parents are entitled to claim damages from him. Five beasts are paid by the boy's parents to the girl's parents. One of the beasts (a cow) known as '*umdzalaso*' is slaughtered just outside the homestead before the girl delivers the baby (*kuchitsa umhlolo*). This is done as a ritual to dispel the bad omen which might cause the girls of the homestead to fall pregnant before marriage. Damages are paid because less '*emalobolo*' will be received for such a girl (*usule sibaya sendvoldza*).

If a man cohabits with a woman married to someone else, her husband is entitled to damages, while if he violates a woman forcibly, he will be punished for rape (*kugagadlela*). His behaviour in all these instances is controlled by the law. On the other hand, there is nothing in law to prevent him from sleeping with a menstruating woman, particularly if she is his own wife. The action in itself will not bring him within the jurisdiction of the courts. Nevertheless, very few Swazi men will ever dare to sleep with such a woman as it is firmly believed that they will then become afflicted with a virulent form of sickness. In this particular instance the man's behaviour is controlled by custom, which in its own sphere may thus be no less effective than law.

1.7.3.2 Enforcement of custom (*lisiko*)

It is significant that the vast majority of the Swazi people generally observe most rules of living, including legal rules, faithfully on a daily basis, without any thought of being "forced" to comply. Such voluntary observance of a

rule often indicates that it is a rule of law, even though its nature has never been determined by a court (Vorster & Whelpton 1996:14).

According to Marwick (1966:283), public opinion is the primary means of enforcing customs. Breach of customary norms may result in deliberate ostracism and derisive songs being sung about the offender. Marwick also mentions what he calls a “moulding” force, which is spiritual and ritual in nature, as opposed to a sanction which demands or prohibits. A Swazi person needs the assistance of his or her family to ensure that good rains come, that crops are produced, that illnesses are properly treated and that his or her spirit rests in peace after death. These beliefs ensure that family members are reluctant to oppose the extended family clan in their actions (LWSA 1994:27).

Actual sanctions also play a role. There is, for example, a taboo against going to the king’s burial place. It is believed that anyone who does so will suffer immediate and permanent blindness (Marwick 1966:284).

Throughout life, therefore, one’s behaviour is either deliberately or unconsciously moulded into conformity with the social norms that create law and order. At every stage, moreover, pressure is brought to bear in the form of sanctions, which are forms of social control restraining one from violating established rules of conduct. Diligent adherence to community usage earns the approval and respect of one’s fellows. Failure to comply with community norms on the other hand, is penalised in various ways, according to the nature of the offence.

One may suffer loss of social esteem, or be treated with contempt, as when a girl is notoriously promiscuous, or a man recklessly squanders his wealth. Or if one breaks any of the numerous taboos (*kwephula loko lokuhlonishwako*) pervading Swazi life, one will, it is maintained, be afflicted with sickness or some misfortune by the offended ancestor spirits or some other supernatural agency. This is the supernatural sanction. There is also a penal sanction, in that the offender if discovered will be tried and punished by the chief, normally by a fine of one beast. In this case, the taboo is recognised as sufficiently important to be reinforced, not merely by the supernatural sanction, but also by the court.

1.8 CHARACTERISTICS OF SWAZI LAW AND CUSTOM

The indigenous legal systems of Southern Africa are related to the indigenous legal systems of the rest of Africa, especially those countries south of the Sahara. According to Allott (1965:165), the indigenous legal systems of Africa do not constitute a single system, but rather a “family of systems which share no traceable common parent”. Nevertheless, more fundamentally, indigenous African laws reveal sufficient similarity of procedure, principles, institutions and techniques for a common account to be given of them. Elements reflecting the characteristics of Swazi law and custom are discussed below.

1.8.1 The unwritten nature of Swazi law and custom

Like most indigenous legal systems in Africa, Swazi law and custom were never recorded in written legal sources such as statutes, law reports or textbooks. Court procedures were conducted orally, and the law was transmitted orally from one generation to the next. The process of legal transmission was furthered by the public participation of adult men, in particular, in the administration of law. The result, therefore, is that the community at large has a broad knowledge of the law (Marwick 1996:280).

The recording of Swazi law and custom (Whelpton 2005) therefore, recognised the status of Swazi law and custom as the people's living law, resulting in certainty and consistency in the application of law.

1.8.2 The customary nature of Swazi law and custom

Swazi law and custom have been distilled from those age old traditions and customs that in the course of time became compelling obligations (legal rules). According to Marwick (1996:280) the "repository of these traditions is mainly the old men in Swazi society, particularly those associated with the king's village where they are continually in attendance listening to and taking part in the hearing of and adjudication of cases and thus applying the legal heritage which is to them a living body of precepts". The king and the royal family are the main custodians of Swazi law and custom. Pronouncements by the king in council become Swazi law when they are made known to the nation, usually at the cattle kraal where all national meetings are held (cf Whelpton 1997:147).

1.8.3 Swazi law and custom as an expression of community values

Public participation in the process of adjudication results in Swazi law and custom which give expression to the prevalent values or the general moral behavioural code of the community. As values change over time, so does the law. Conflict between legal and moral values is therefore eliminated. This endorses the dynamic nature of Swazi law and custom.

In a dispute between parties, usually representing two different family groups, the emphasis is not only on the resolution of a dispute between individuals but also on its implications for the wider community, so that any decision regarding the dispute has to take into consideration future relations between whole family groups in the community. These relationships are extremely important for harmony within the wider community. Thus, the administration of justice does not primarily concern simple legal justice as such, but rather reconciliation between groups of people. Moreover, in Swazi law and custom there are many informal institutions of dispute resolution before it is taken to the courts. Therefore, formal court decisions are too restricted a source to determine the law of the community (Whelpton 1997:20).

1.8.4 The influence of magico-religious conceptions and practices in Swazi law and custom

According to Vilakazi (1977:227-8) the Swazi social order derives from the sacredness of tradition, the validity of which is reinforced socially and psychologically by fears that, if tradition is transgressed, the anger of the

ancestral spirits will result in magical evils. It is believed that rules for social conduct, and thus also Swazi law and custom, have been received from the ancestors and are protected by the ancestral spirits. Even today, misfortunes such as illness, drought, hail, floods and heat waves, are often experienced and interpreted as forms of supernatural punishment. The cause of such misfortune can therefore be correctly determined only through supernatural practices. Kasenene (1993:28) states that the most popular form of magical practice in the Kingdom of Swaziland is divination: The Swazi believe that some people, especially witchdoctors (*tinyanga*) are able to unveil the mysteries of nature and reveal the knowledge that is hidden from the ordinary people. They are consulted when people want to know, for example, the cause of sickness when someone is sick; who the thief is when something is stolen; or to find out why something has gone wrong.

1.9 THE TRADITIONAL SWAZI SYSTEM OF GOVERNANCE

Swaziland has a centralised system of government characterised by centralised institutions of authority, administrative systems and judicial institutions. As previously mentioned in this chapter, the Swazi kingship (*bukhosi*) consists of the king (*ngwenyama*), the queen mother (*ndlovukazi*), the members of the royal house, the chiefs (*tikhulu*) and headmen (*tindvuna*). The system of local government, in other words, the system of local chiefs and the inner councils (*bandlancane*), normally follows the pattern of the central authority of the country. Each chief (*sikhulu*) has his inner council as well as his headman (*indvuna*). Each has his own ‘*umphakatsi*’. ‘*Umphakatsi*’ therefore symbolises the spiritual unity of the nation. All these bodies are pillars of kinship (*bukhosi*). They share responsibilities with the

king, who rules through them. A Swazi can thus say: “A king is a king by his people”, or “a king rules through his people”, (*inkhosi ibusa ngebantfu*). The king is regarded as the mouthpiece of his people and is described as ‘*umlomo longacali manga*’, meaning “the mouth that tells no lies” (Anspach 2004:45).

Certain modern administrative structures of government have been integrated into the traditional Swazi system of governance. The structure incorporates the system known as ‘*tinkhundla*’ and provides for the people to elect parliamentary representatives for specific constituencies. The king is at the apex of both the traditional and the modern systems. The cabinet and the Swazi national council, which represents the full spectrum of the Swazi nation, including the country’s traditional leaders, advise the king (Anspach 2004:46).

1.10 THE SWAZI SOCIAL ORDER

The Swazi political structure which is typical of most countries in Africa before colonisation, allows no particular person or group absolute power. They are still dependent for their cohesion on bonds of kinship, without the organising potential of a centralised authority. Accordingly, at the heart of their socio-political order lay the family, a unit that was extended both vertically and horizontally to encompass a wide range of people who could be called ‘kin’.

In the Swazi society, the group provides for all. This includes the individual’s material, social and emotional needs. Loyalty to it is a cardinal

value. Individual interests are inevitably submerged in the community, and the normative system tends to stress an individual's duties instead of his or her rights. This can be ascribed to the fact that the family is the focus of social concern. To emphasise rights would be anti-social, rather, one is expected to compromise one's interests for the good of all. The legal relationships are, therefore, mostly those that arise out of a family's dealings with other families and not those flowing from one person's relations with another.

Among the Swazi, the lack of emphasis on rights is clearly evident in the situation of women and children. Swazi law and custom has no specific rules and procedures to secure a child's upbringing. The main social issue is the family's right to claim the child as a member. Women are in a similar position. Swazi law and custom have always coexisted alongside a family's rights to that of a woman's capacity for work and child-bearing rather than her rights to demand respect and support from her husband and her natal family. The powerful ethic of generosity within extended families towards all kinfolk, assures them of nurture and protection. It therefore does not follow from an absence of rights that women and children are abused, neglected or treated like objects.

The Swazi social order, like any other, is dynamic. In domestic relationships, change, rapid and disruptive, is clearly evident. Christianity, capitalism, individualisation and urbanisation have all had corrosive effects on the ties of kinship. Illegitimate births have proliferated; women have been forced to undertake the rearing of children alone, and many modern households lack the stabilisation influence of a patriarchal head.

1.11 OUTLINE OF THE STUDY

Chapter 1 introduces the study, states the problem and aim of the study, and describes the people studied, the research methodology and fieldwork techniques.

Chapter 2 considers the recording and codification of indigenous legal systems.

Chapter 3 investigates the indigenous contract as a legal phenomenon.

Chapter 4 evaluates the requirements for establishing a contract in terms of Swazi law and custom.

Chapter 5 discusses breach of contract in indigenous law.

Chapter 6 considers the termination of indigenous contracts.

Chapter 7 deals with specific indigenous contracts with regard to the permanent exchange of goods.

Chapter 8 reviews specific indigenous contracts with reference to non permanent exchange of goods, including bailment and mandate.

Chapter 9 discusses contracts that influence status.

Chapter 10 concludes and summarises the study and makes recommendations with regard to legal reform and codification.

1.12 CONCLUSION

In this chapter the purpose and aim of the study and, the methodology, as well as the premises, principles and parameters of the research were discussed. The Kingdom of Swaziland, and the traditional system of governance and its people were described. An explanation was also given of Swazi law and custom and the characteristics thereof.

Chapter 2

RECORDING AND CODIFICATION OF INDIGENOUS LEGAL SYSTEMS

2.1 INTRODUCTION

Recording of indigenous legal systems involves a systematic and comprehensive exposition of the law in order to ensure an authoritative source of information (cf Allott, Epstein & Gluckman 1969^b:13). It is mainly concerned with a written exposition of the unwritten law, but in some cases the collected material also includes legal rules from different written sources. The result is not a code, because the purpose of recording is not to change the content or nature of the law. The product of recording is rather a handbook or other document to be used by people involved in training, interpreting and applying the law; in other words, courts, executive officers, legal practitioners and law reformers (cf Prinsloo 1989:420). The basic objective is a precise exposition of the law as provided by local experts. The product of recording must be useful to the indigenous communities and should serve as a source of information for both the Swazi courts and administration (cf Prinsloo 1989:420). The written record would thus serve as a source in which the law of the people could easily be found.

2.2 THE NEED FOR RECORDING

Prinsloo (1989:421) states that there seems to be a general need for recording. There was already a general call for recording in 1959 at a

conference on the future of customary law in Africa. Since then several people have supported this call and customary law is strictly adhered to in many African countries. Negative criticism of, or contempt or even disregard for, customary law does not change this fact. Predictions that sooner or later western law will replace customary law have already been proven wrong. Even in countries where specific indigenous legal rules have been abolished or replaced with foreign ones against the will of the people, the indigenous rules are still adhered to (cf Prinsloo 1989:421). This can be explained by the fact that the law is part of people's culture and is continually adapted in accordance with changed circumstances (cf Whelpton 1991:59).

There is a tendency to regard customary law as lower than, or inferior to, western law. According to Prinsloo (1989:423), this tendency is not only due to the ethnocentricity of some western jurists, but can also be ascribed to the unwritten nature of customary law and ignorance thereof. This tendency is also to be found among some African jurists, officials and politicians. Consequently a written exposition of indigenous legal systems in accordance with jurisprudence and taking culture into account will increase the status of indigenous law and promote certainty and consistency in its application and implementation or enforcement (cf Whelpton 1991:62).

Moreover, recording can also be of great use to those governments considering the unification or integration of indigenous law and common law, since legal rules cannot be changed if the legal advisers, lawmakers and legislature are not familiar with the rules. Legal (juridical) reform must be done from a position of knowledge. The principle that new law cannot be

created without knowledge of the existing law applies to all legal systems. For this reason, then, it is important that a written source of information should be available before legislation on the specific indigenous legal rules (norms) is considered (cf Prinsloo 1989:422).

Even though in most cases the criticisms are not valid, the recording of indigenous legal systems is nevertheless not always above criticism. Since recording does not involve legislation, it is incorrect to refer to recording as if it changes the contents of the rules or deprives the peoples concerned of the power to amend or revise the rules. For the same reason, the argument that recording indigenous law would petrify it so that it became rigid without any possibility of development or adaptation to outdated circumstances does not hold. Recording is merely a written exposition of indigenous law that can still be amended by the people after the recording. The criticism is justified, however, if law enforcers do not take possible changes since recording into consideration (cf Whelpton 1991:61 & Prinsloo 1989:420).

Some anthropologists maintain that the people whose law has been recorded do not understand the written version of their law themselves because it is couched in western legal terminology (Verhelst 1968:21). However, although the report is written as an authoritative source for higher courts, it should also be practical for traditional courts. To achieve this objective, it is emphasised that the rules (customs) must be described simply and clearly and the western legal terms should also be explained with reference to the indigenous terms. Another reason for the incomprehensibility is that the laws are provided without an explanation of the cultural context. For a proper understanding, an indigenous regulation ought to be explained with

reference to the cultural practice (cf Whelpton 1991:61 & Prinsloo 1990:329).

2.3 CODIFICATION OF INDIGENOUS LEGAL SYSTEMS

Codification involves producing a statute book to serve as a comprehensive and exhaustive definition of the applicable law with regard to a given topic or area (cf Prinsloo 1990:426). While non-codified customary law has the authority of law because it is created by the people themselves, codified customary law derives the latter's authority from parliament or the latter's delegate, irrespective of what the subjects think of the law. Furthermore, non-codified customary law can be changed by the people concerned by custom, but a code can only be amended by the authority who created it (cf Whelpton 1991:61).

Although a code provides greater certainty about the content of the law and contributes to customary law being easier to determine, little success has been achieved with codes in African countries to date. According to Twining (1964:23) codification rather increases the resistance of customary law to culturally foreign influences. It is also argued that an indigenous norm is raised to a higher status by means of codification or other form of legislation. The same can basically be achieved, however, by recording (cf Prinsloo 1989:425).

Allott, Epstein and Gluckman (1969^b:33) write that codification can be regarded as a useful and powerful instrument in the hands of governments to direct the course of political, economic and social development and even

to change society completely. It can be used as a method of unification or at least integration of different legal systems.

Whelpton (1991:62) states that although a code can be of use for the unification of legal systems and other purposes, it runs the danger of being rejected by the community or society. A prerequisite for effective law is that the law should be known and generally be acceptable. A code runs the risk of not fulfilling either of the two requirements. Legislation that purports to solve problems, but is not observed and enforced is a common phenomenon in Africa. The Ethiopian Civil Code of 1960 is a good example of this. In a discussion of the Penal Code of Papua New Guinea, Weisbrot (1982:95) it was stated that one of the reasons for the faction fighting was the inability or failure of the official court system to do justice in the community's view and the consequent resistance to using the official courts to solve disputes(cf Prinsloo 1989:426).

A further consequence of unacceptable codes is, according to Hooker (1975:401), the increase or promotion of legal pluralism. This leads to a new uncertainty on the basis of the presence of regulations from officials and unofficial legal orders instead of the greater unification and certainty that was the initial aim. The envisioned unification of the different legal rules regarding land ownership in Kenya, Botswana and Nigeria and succession in Ghana has not been fully achieved by means of legislation. Customary law is still partly observed and enforced, with the consequent continuing complication and uncertainty that unification had hoped to eliminate (cf Prinsloo 1990:425).

Although the Government of the Kingdom of Swaziland was advised not to codify Swazi law and custom, they opted to codify it. The researcher therefore prepared memoranda for the codification of the Swazi law of contract and the law of marriage and intends submitting same to the Swaziland Government.

The disadvantage of codification is that it petrifies the law and makes it rigid. Codification would deprive Swazi law and custom which is mainly customary law, of its natural development. The local community will no longer play a role in the adaptation of the law to continually changed circumstances. Amendment of Swazi law and custom would rest with a political authority. It is mainly for these reasons that the Natal Code of Zulu Law is considered a failure. A code leaves little room for the development of the law by judicature because the court is bound by the stipulations of a code irrespective of whether it is just or in accordance with prevailing circumstances (cf Prinsloo 1990: 426-427).

2.4 CONCLUSION

In this chapter the advantages and disadvantages of recording and codification of customary law have been discussed. It would appear that there is a need for the recording of customary law, as such recording will increase the status of indigenous law and promote certainty and consistency in its application and implementation. The result of codification is a statute book which serves to assist jurists, politicians, legislature and parliament for economic development and could even also bring about change to the society in its entirety. Codification does, however, have its disadvantage in

that it may bring about stagnation and that it will result in the law becoming rigid. One must, however, bear in mind that, unlike common law, indigenous law is mostly unwritten and that it is a system of law that has been known to communities, practised and passed on from generation to generation. Furthermore, indigenous law has its own values and norms. Throughout the history of indigenous law it has evolved and developed to meet the changing needs of communities, and that it would continue to develop within the context of its values and norms consistent with a constitution.

Chapter 3

CONTRACTS IN INDIGENOUS LEGAL SYSTEMS: A THEORETICAL PERSPECTIVE

3.1 INTRODUCTION

The underlying aims and consequences of indigenous contracts differ from those in western legal systems. Writers such as Olivier (1989:544-549) even raise the question of whether indigenous contracts as a legal phenomenon, exist in indigenous law.

The word “contract” has a specific meaning in law. Collins English Dictionary (1991:347) defines a contract as “to enter into an agreement with (a person, company, etc.) to deliver (goods or services) or to do (something) on mutually agreed and binding terms, often in writing; a formal agreement between two or more parties; a document that states the terms of such an agreement; the branch of law treating of contracts”.

In its specialised meaning, a contract is thus an appointment or an agreement between people which results in an obligation, subject to certain requirements being met. Such an agreement has underlying aims and consequences, namely to demand performance against the obligation to deliver. Due to this meaningful content of an agreement, the application thereof is questioned in an unspecialised legal system. The underlying aims and consequences of a contract in terms of western law, differ from those of an indigenous contract, Mahoney (1977:58), points out that “perhaps the

argument which has been put with most force is that contracts are unusual and inappropriate where people's relationships with each other are multi-stranded and intense, where most transfers of property and services are made on the basis of people's social positions, and where obligations and generosity are held to be more important than a right".

A further definition of a contract in its less specialised meaning is provided by Maine (1917:99) as "the free agreements of individuals" in which the parties secure their respective rights and obligations. According to Maine (1917:179), people's social position within an unspecialised legal system is determined by birth and this leaves little possibility of entering into agreements. Pospisil (1978:150) maintains that, theoretically and *de iure*, various types of contracts are available by way of which rights and obligations may be acquired and through which service and matters can be exchanged.

According to Gluckman's (1967:29) reflections on the law of the Bemba of Zambia, strict contractual relations are irreconcilable with multi-stranded relationships due to the fact that most relationships "reside in relationships established by birth or marriage, or by political position". The nature of such obligations is therefore defined by the status of the parties involved. Furthermore, Gluckman points out that "all these relationships are marked, in the widest sense, by a stress on generous helpfulness and love and mutual give-and-take. No multiplex relationships can survive if the parties insist on their rights only and try to live by the letter of the law of contract." This view has also been expressed by researchers working elsewhere.

Mahoney (1977:58-62) working among the Birwa of Botswana, emphasises that entering into a contract results in acquiring rights and obligations. However, the social relationship between the parties determines their extent and content. Close relations even conclude contracts for the purpose of insulating that aspect of their relationship characterised by voluntary assistance without counting the cost from transactions that are potentially disruptive and a regular cause of complaint and dispute.

3.2 CONTRACTS IN TERMS OF INDIGENOUS LEGAL SYSTEMS

Allot, Epstein and Gluckman (1969^a:77) are of the opinion that it is only within western legal systems that mere promises are enforceable. Indigenous legal systems in general only give effect to real contracts, that is, contracts where one of the parties has performed or partially performed. According to Mahoney (1977:58-59), it is only in western legal systems where damages can be claimed when defaulting or where a mere promise is broken. Schapera (1965:142) on the other hand, maintains that a mere promise is enforceable in indigenous law and that damages can be claimed when a promise is broken. Schapera refers to case law *Goitumelang v Lekwee, Ngwaketse* 74/1913, where a husband was ordered to honour his promise to his wife that he would not practise polygamy.

According to Moore (1969:376) the enforceability of a contract by a court of law is of secondary importance because the most important place where legal rules and ideas operate is outside the courts. Enforceability should not only be sought by courts as it is apparent that most members of any

community or society usually abide by most legal rules and other rules without regarding these as being forced upon them. The voluntary following of the law often points to whether a specific rule is also a legal rule, even though the nature thereof has never been determined by a court.

Although Whelpton's work among the Bakwena ba Mogopa of Hebron, now known as the Bakwena of South Africa found that institutions such as courts enforce legal rules and promote compliance, the following factors are of greater importance in indigenous legal systems: the religious or magical element of the law; public opinion; the fact that, should someone's rights be threatened, they would take the necessary steps to protect or reinstate such rights; and the influence of leaders who ensure compliance with the law, even before legal findings can be made. In addition, traditional leaders are consulted before any important action is taken. This method ensures that others' interests and/or rights cannot be infringed in an unfair or unlawful manner. Furthermore, should a legal dispute arise at a later stage due to such conduct, the court would already have been informed and, in its capacity as mediator, would exercise its powers to protect established rights and prevent their violation or alternatively to ensure legal redress (Whelpton 1991:30).

It is clear that the consensus of recent research in the Southern African context agree that the obligation arising from agreements cannot always be interpreted as being part of a general and formal law of contract in indigenous societies. The way in which resulting disputes are interpreted and resolved requires a wider view than strict enforcement through formal legal procedures.

According to Myburgh (1981:233-234), only real contracts are known in indigenous law. Exchange, loan and usage of moveable and of immoveable property are known. Livestock is given as security for performance by way of delivery or notation of goods with the understanding that it will be returned afterwards. In the case of non-performance, the livestock is forfeited and creditors are liable for loss, alienation or damage to the goods.

Strydom (1985:429) states that the South Sotho of Qwaqwa is familiar with a variety of contracts, starting with collective contracts (*ditumellano*). Some contracts such as a sale, exchange/barter and loan agreements, as well as employment contracts, are more general. Other contracts are more specific, such as farming out (*mafisa*) contracts. Strydom also refers to quasi contracts, such as an agreement that a competent family member or friend may raise someone else's child, or the contribution of an uncle (*malome*) towards the maintenance and bridal gift of his sister's child and his resultant entitlement of a portion of her marriage goods (*bohadi*) received for her. According to Strydom (1985:252), contracts, their underlying principles and their requirements all form an integral part of the total culture.

Pauw (1985:118-135) differentiates between various contracts of the Imidushane and Amabhele of the Eastern Cape. According to him no contract comes into being without performance. All contracts are conditional and a party is only liable if the other party has performed. According to Pauw (1985:112) "contractual liability rests therein that when a party to such contract does not perform, he has to return that which he has already delivered (performed). If he has not performed, partial performance by one party does not make the other party liable to perform".

Giving a general view of the situation in Southern Africa, Bekker (1989:332) states that indigenous contracts are real contracts, and he maintains that there are no fundamental differences between indigenous and western contracts of purchasing, exchange or loan agreements. Olivier et al (1989:544-549) refer specifically to certain contracts such as an employment contract, but consider it more appropriate to use a wider term instead of contract or agreement “omdat die tradisionele gewoontereg verskeie gevalle onderskei waar die verpligting om ‘n skuld te delg of ‘n (teen) prestasie te lewer, nie voortvloei uit ‘n konsensuele kontrak nie, maar uit die toepassing of werking van bepaalde regsbeginsele” (because traditional customary law distinguishes several instances where the obligation to discharge a debt or deliver a (counter) performance does not stem from a consensual contract but from the application or effect of particular legal principles). It is not clear however, why the term “skuldreg” would be appropriate, especially where the law of delict is not a sub-section of “skuldreg”, as a debt does not only result from an obligation in terms of a contract. A contract is not the sole source of an obligation. An obligation can also result from an unlawful action. Olivier et al (1989:546) agree that there are various established forms of contracts in indigenous law that can be used on a daily basis, such as sales, purchase, exchange, lease, mandate and bailment.

The researcher is therefore in agreement with Whelpton (1991:34) that it can be accepted that the phenomenon of a contract is generally known in indigenous law and that it is not incorrect to refer to it as indigenous law of contract. The particular characteristics of each contract should nevertheless be kept in mind as each has its own specific requirements, which affect the rights and obligations of each party to such a contract. This was confirmed

in this study among the Swazi in the Kingdom of Swaziland. They refer to a contract as '*sivumelawano*', being a voluntary agreement between two parties, imposing obligations upon one or both and reciprocally conferring rights upon the other or both. According to the Swazi panel of experts, a Swazi contract primarily emphasises the relations between people rather than the object of performances (cf Whelpton 1991:66).

3.3 THE NATURE OF AN INDIGENOUS CONTRACT

It is generally accepted that an underlying aim of the law is to ensure people's happiness, which is attainable by giving effect to people's wishes at the highest executable level (Corbin 1963:1). In order to do so, the law protects social order and furthers justice, even if these are not irreconcilable. Indigenous law also gives effect to community values and, if the general moral code of the community changes, the law inevitably changes. However, in indigenous law, when a dispute arises between the parties about who is right or wrong, the dispute usually also involves the wider community. Consequently the outcome of the dispute must take into account the effect on the future relationship between the relevant parties. These relationships are important in order to maintain harmony within the wider community. The focus in indigenous law is in the first instance not on justice, but rather on reconciliation (Myburgh 1985:2-9).

According to Corbin (1963:2), the law of contract aims to realise a reasonable expectation that is created by making promises. This is not the only reason for the creation of the law of contract, but is generally considered the main underlying aim. It is accepted then, that this underlying

goal should be a prerequisite for understanding the legal rules or norms. Nevertheless, the law does not anticipate the realisation of each expectation created by a promise. The expectation must be one that most people would have and honour. This invariably leads to a complexity in law, which determines under what circumstances a promise will be honoured and become enforceable (Whelpton 1991:67).

Regarding the term 'reasonable', it cannot be assumed that contractual disputes can be resolved by the dictum that expectations must be 'reasonable' (Corbin 1963:2). Reasonableness is no longer absolute. Like morality and justice, reasonableness is an expression of people's values and practices, which are inconsistent in time and place.

The indigenous law of contract in general also gives expression to reasonable expectations, but the underlying aims and consequences are not the same as those in the western legal systems. Moreover, no legal consequences result from a mere promise or agreement (Whelpton 1991:71). In terms of the indigenous law of contract, the terms 'reasonable expectation' has no value other than that parties can expect to be rewarded for what they have performed. According to Walker (1969:66-67) "the mutual agreement, when it is used as a basis for economic exchange in the tribal setting, fulfils a different function than under western law. It does not, upon formation, offer a guarantee to each party that, provided he complies or stands ready to comply with its terms, he will receive the full measure of his bargain. What it does make certain is that any performance actually rendered will be justly compensated". The idea is to place the parties in the same position they would have been in before the contract was made, and not to

place them in the position they would have been in had the contract been performed.

In terms of indigenous law, a party can under no circumstances, whatsoever rely on expectations based on a promise. According to the Swazi, the reason for this is that a promise only becomes juridical once performance has taken place, as it is then accepted that there can no longer be a change of mind. This confirms the specific nature of the indigenous contract in that a mere promise or agreement as such, is not sufficient to establish contractual liability. Performance or partial performance must take place before it is seen to be a contract (cf Whelpton 1991:100).

Whelpton (1991:68) states that in order to understand the term 'promise' more fully, it must be noted that there are various motives which underpin the making of a promise, such as to commence negotiations or to make somebody happy. Furthermore, promises are not only made to establish contractual relationships, but also to strengthen family ties and relationships and to fulfil religious obligations. This was confirmed by the Swazi respondents.

To illustrate that the underlying aims and consequences differ from those of western legal systems, Walker (1969:66-67) states that a mutual agreement, when used as a basis for economic exchange in the tribal setting, does not guarantee the full measure of the bargain upon compliance with its terms.

3.4 THE CLASSIFICATION OF CONTRACTS

Given that the validity of a contract no longer depends on its classification, and that it is generally accepted that the different contracts are not *numerus clausus*, the question is why one should still have to deal with different types of contracts. According to Joubert (1991:251-252), the classification of a contract is an expression of the important contractual aims of a specific point in time. The classification of contracts also mirrors the most preventive and important contractual content existing in a society. Acknowledging different types of contracts thus expresses the need in the law of contract to distinguish between the different forms (Joubert 1991:254).

Joubert (1991:254-255) points out that the mere classification of a contract does not always depict the appropriate norm applicable to a concrete contract. Should a contract not fall into one of the acknowledged types of contracts, none of the known norms would be applicable to it. In such an instance, legal norms would have to be developed for the new type of contract.

This study has shown that various kinds of contracts are known in Swazi law and custom (see Chapters 7, 8 and 9). Agreements to exchange goods and services are widely used, including barter, sales, loans and employment agreements. The reasons for entering into agreements, however, vary from community to community. Often an agreement is negotiated as a result of economic hardship. A man, who finds himself with a shortage of grain for his family or no cattle to plough his fields, may seek to improve his lot by

exchanging certain of his excess goods or by borrowing from a neighbour, which results in a contract (cf Whelpton 1991:181).

3.5 THE ROLE OF INDIGENOUS CONTRACTS

In indigenous law, and in particular, Swazi law and custom, a contract is more than a mere instrument for participating in the economic and legal life of the community. Indigenous contracts essentially emphasise relations between people rather than objects of performances. One of the primary functions of the indigenous law of contract is to maintain harmonious relations between members of the community through speedy resolution of disputes (Anspach 2004:8). Any dispute is seen as potentially damaging to the fabric of the community, and accordingly, resolutions – effected either through negotiation and mediation or through the courts – give expression to community values and moral code (Whelpton 2005:292).

Indigenous contracts are generally made between kinsfolk and in-laws (viz. persons already related by status). Social processes and the maintenance of good social relations are important underlying fundamentals, functioning outside the strict parameters of the law, which direct the application of the indigenous law of contract and reflect the values and aspirations of the community. The indigenous law of contract has a broad-based orientation to ensure that disputes do not damage the fragile fabric of society and provoke potentially dangerous disharmony. In order to appreciate fully the nature and function of indigenous contracts, a holistic view of the topic has therefore been taken, which involved a multi-disciplinary approach, with particular emphasis on the disciplines of anthropology and sociology.

In remedying a breach of contract, the restoration of harmonious relations between not only the contracting parties but also the community at large, is of the utmost importance (Whelpton 1991:140). Whilst promises remain unperformed, no remedy is available on repudiation by one of the parties to the agreement. Accordingly, the concept of fair justice in the unspecialised legal systems, differs markedly from that in specialised western systems. It does not require that the parties receive the full measure of their bargain, but only that any performance rendered is justly compensated for (Whelpton n.d.).

3.6 THE SOCIAL DIMENSION OF INDIGENOUS CONTRACTS

According to Anspach (2004:10) indigenous contracts have to be examined in the context of the fabric of their indigenous social life: contractual liability has to be viewed against a backdrop of established community values and the perpetuation of harmony within the community. The indigenous community appreciates and understands that a contract fulfils an important role in the social environment. The parties to a contract are aware of, and have regard to, this wider dimension and to the possible social ramifications of their contractual relationships.

As in other indigenous legal systems, law amongst the Swazi is a cultural universal. The role of contracts of the Swazi must therefore be viewed in the context of the culture and way of life of the Swazi people. Swazi law and custom is an essential component of the community's social life and culture. Accordingly, Swazi law and custom and social change must be examined together to be incorporated into a living law in the indigenous Swazi

communities. Due to its flexible nature, the Swazi indigenous contract is liable to develop or adapt to reflect the changing lifestyle of their community. It is imbued with a distinctive character embracing both a complex combination of social processes and the realities of social life on the one hand, and incorporating cultural change and development on the other.

The indigenous Swazi contract functions within the community environment and takes account of community relations. Hence, whilst reasonable expectations are fulfilled, contractual justice lies mainly in the sphere of reciprocity or a *quid pro quo* basis. Contractual terms and conditions can be legally adapted to the “living” rules and values of the community, with all aspects of the contract conforming to, and taking account of, such community values (cf Whelpton 1991:42).

Swazi courts are cognisant of the important social dimension in the settlement of contractual disputes among the Swazi. They do not hesitate to apply considerations of a morally and ethically persuasive nature to adapt or modify strict legal principles in order to achieve “social justice”. Thus, for example, the realisation of profits is generally not considered a laudable objective at the expense of the economy. In reaching their decision, Swazi courts relate their society’s norms to the realities of social life by the application of “living” law through a flexible judicial process.

Since contracts among the Swazi are more than a device for establishing the economic and legal implications of a transaction, but also for social purposes and to control community relations, the real nature of the indigenous Swazi

contract become evident in that it is what people in the community do (and not what they meant) that is important. The manifestation of intention is thus the crucial factor and not merely the intent *per se*: contractual obligations result only from actions and dealings in the form of performance or part-performance. Since a mere promise or a mere agreement does not lead to contractual liability, such promises and agreements are considered and dealt with only in the realm of the social and moral environment and not the legal.

To establish contractual liability, indigenous contracts seek positive performance that is both evident and readily understood by members of the community. Hence, only performance or part-performance by one of the parties to an agreement meets such a requirement. Given the primary function of indigenous law to ensure the perpetuation of harmony in the community, performance as the practical rationale for the basis of contractual liability is both self-evident and readily appreciated.

3.7 DISPUTE SETTLEMENTS

Most contractual disputes in non-specialised legal systems are settled outside of a legal forum by negotiation, mediation and reconciliation, with recourse to the courts only if the parties have been unable to resolve the dispute among themselves (cf Whelpton 1991:72). In this way, the likelihood of disruption of communal harmony is also diminished as the dispute does not have to be aired publicly in court. Moreover, the social elements of such disputes are often better understood and more readily appreciated outside of court proceedings, and accordingly negotiated settlements and mediations are often utilised to resolve contractual disputes. In so doing, contractual

justice incorporates a measure of social justice by taking account of community expectations.

With indigenous courts, settling underlying social problems in the community, the courts endeavour to reconcile disputing parties within the community's social harmony. Individuals are persuaded to accept the community's *boni mores* - the standards of social behaviour and conformity (with the emphasis on extra-legal diverse traits such as friendliness and generosity). Contractual disputes, in addition to the legal issues, have further cultural, social and, to a lesser extent, psychological dimensions. Social tensions are relieved or diffused and the prevailing community moral code is applied and upheld.

In seeking out the broader issues underlying contractual disputes, the Swazi courts also act as custodians of the community's fundamental values – with value judgements being applied in an endeavour to maintain social harmony. Any prospective “deviant” behaviour on the part of one of the contracting parties is censured and the individuals are thereby helped to conform to accepted social norms for the good of the community in general. The aim of the indigenous Swazi law of contract is therefore to reconcile people – not only with each other but also with the community at large.

Solutions to contractual disputes can thus form a buttress of a traditional society's moral code – an instrument of moral reinforcement maintaining social stability at the expense of the individual's self-centred rights or demands. Holistic and acceptable solutions are sought to relieve social tension by removing potentially disruptive dispute problems. Universally

accepted principles of morality and humanity are invoked as part of the legal solution to a contractual dispute.

Moreover, the wealthy elements in the Swazi community cannot use the medium of contracts to further their own selfish interests and thereby increase their wealth. If hardship was engendered for the other contracting party in such a situation, or if any potential social harmony was envisaged, the indigenous Swazi courts would not hesitate to emasculate the wealthy contracting party's claim and apply human/community justice. Profit is not a worthy motive and no elitist protection exists – the greater good of the community will generally prevail in the indigenous Swazi legal system. Cultural perceptions of group (as against individual) importance are reinforced, with contracts being viewed in a family or community and cultural setting.

3.8 THE PRIMARY FUNCTION OF INDIGENOUS CONTRACTS

Like in most non-specialised legal systems, legal representation is not known in Swazi law and custom. No representation is deemed necessary, as members of the community are able to argue the merits of the case in simple, unequivocal and readily understood terms before the court. Every adult male has the capacity to appear in court, irrespective of whether he is well versed in the law of his community.

In deciding contract cases, indigenous Swazi courts are cognisant of the value of eliciting everyone's arguments because the general opinion of all those present is important. Moreover, these courts appreciate the persuasive

force of the moral value of the community and will strive to take account of such principles in reaching a decision. A “just” decision in the context of the indigenous Swazi contract thus involves a highly skilled selection and application of both legal and moral principles, which will be socially acceptable in terms of community conscience and group cohesion. To western jurists, trained in accordance with strict legal parameters, this may seem an anomaly. However, in the context of an indigenous contract context, such seemingly extraneous factors are overlooked at the expense of the maintenance of communal harmony. Contracts thus have to be viewed in terms of the broader perspective of their effect upon the social life of the community – with the legal decisions related to them ensuring that the persuasive force of communal *mores* is upheld. It is crucial to keep in mind that indigenous Swazi contracts essentially emphasise relations between people rather than objects of contractual performance. This was also found by Whelpton (1991:68) in his study of the law of contract of the Bakwena of South Africa.

When contractual disputes do reach the Swazi courts it would not simply enforce contracts. They would rather settle disputes arising out of contracts. More often than not, the courts will settle a dispute by cancelling the contract and will try to reinstate the parties in their original position where this is possible.

As was found by Walker (1969:71) among the Maletle, the primary function of indigenous contracts “is to ensure the perpetuation of harmony through the speedy resolution of disputes. There is concern for justice to the individual, but it must often yield to the greater interest of the community as

a whole in preserving harmonious relations between its members. This interest is not born solely of altruism, but reflects recognition that in a marginal economy, survival may depend upon sharing between friends and neighbours and upon the customary links between members which call for economic exchange. Any dispute, therefore, is thought to be of potential damage to the fabric of the community as a whole". This corresponds with the position among the Swazi.

This study has shown that the indigenous Swazi law of contract is not as well developed as the other divisions of the law, e.g. the law of marriage. Most transactions involving the production and the exchange of goods and services take place between kinsfolk and in-laws (viz. parties already related by status). Thus transactions involving strangers (outside status relationships) are both unusual and on the periphery of legal relationships. In such status-bound transactions, one can readily appreciate the appeal that the real and concrete nature of indigenous Swazi contracts has for the two parties involved. No obligation can be created through a third party. This position was confirmed by the panel of experts, who also stated that representation and stipulation are unknown among the Swazi. Of particular appeal would be the simplicity engendered by contractual liability being established by visible performance or part-performance of one of the parties to the agreement. This in turn, would enable contractual disputes to be settled speedily to restore communal harmony (cf Anspach 2004:80).

3.9 THE EFFECT OF CHANGE ON THE INDIGENOUS LAW OF CONTRACT

With regard to the effect of change in the sphere of the indigenous law of contract in general, Whelpton (1991:iv) states that, although indigenous law shows clear signs of adapting to new developments, there is also proof that established legal principles and human values are being retained. However, these changes are unique and are neither typically traditional nor western.

When the culture of a community changes, so must the law, which must be adapted to the new circumstances to reflect the new rules and values of the community. However, it should be borne in mind that the deep-rooted principles of the indigenous law of contract are so entwined with the emotions of the people, that people will be more resistant to change. It should nevertheless be noted that Swazi law and custom will be in a state of change to make it compatible with the new Constitution. This is especially true with regard to the rights of individuals, as opposed to group rights.

Swazi law of contract should thus not be regarded as stagnant, but should be viewed as a dynamic process of both adaptation and change. Moreover, legal rules only function effectively if they can be synchronised with the dynamic social and psycho-cultural environment in which they operate. Adaptations to the indigenous contract law will include those brought about by legal acculturation.

Given the above, any change affecting the basis of contractual liability is unlikely to be accepted into the Swazi indigenous law of contract, since that

would involve a fundamental departure from its very real and concrete nature (requiring performance or part-performance). It is therefore doubtful whether executory agreements or promises will be integrated into Swazi law and custom, since the principles upon which executory liability of the law of contract are based are completely foreign to, and at variance, with the basic tenets and concepts of the indigenous Swazi law of contract.

3.10 A HOLISTIC PERSPECTIVE ON CULTURAL ASPECTS

Enculturation imbues people with a certain world-view (derived from their own culture). Such a world-view clearly impacts on the perceptions and application of legal systems, both specialised and non-specialised. As a result of the increasing influence of westernisation, indigenous Swazi values are generally in a process of change and partial disintegration, with established social patterns slowly dissolving. The unspecialised law that operates in this changing indigenous environment thus has to be both flexible and adaptable in order to remain “living” law for the peoples concerned.

In contrasting western and indigenous cultures, the juxtaposition of individual rights and communal-based duties will always lead to difficulties in comparative analysis. It is important to bear in mind their main objective of maintaining communal harmony as this leads to a better understanding of the flexible nuances utilised by Swazi indigenous courts in achieving solutions to contractual disputes.

While the social environment is changing, (due to the modernising influences of western values), the deep-rooted elements of culture, which enforces Swazi indigenous values, remain strong and largely unchanged. Although the Swazi indigenous law of contract is showing signs of adapting to new developments and influences, such adaptations are to be regarded as relatively superficial in nature. The changes that do occur are unique, and are neither typically traditional nor western. Established legal principles and human values are being retained. The cultural values underpinning the indigenous world-view and way of life are sufficiently strong to remain resilient in the face of the partial disintegration of the social fabric, brought about by western influences. While some Swazi customs may have been partially modified by these influences, core fundamental cultural values are reflected largely unchanged in the application of the indigenous Swazi law of contract.

3.11 CONCLUSION

In this chapter it is shown that in accepting the existence of a law of contract as part of indigenous legal systems allowance must be made in respect of its different nature compared to western legal systems. A mere promise to which has been agreed is not enough. Performance or partial performance of one of the parties, is essential.

Contractual agreement is not, as in western systems of law, the main instrument through which individuals participate in the legal and economic of the community. The obligation arising from general social and especially family relations is more important.

The social dimension of indigenous contracts are as important as the legal obligations arising from contractual agreements. Indigenous courts are very much aware of this fact. Dispute settlement therefore very often involves the role of extra-judicial procedures in which the greater interest of the community at large and the status of the disputants become important.

Chapter 4

REQUIREMENTS FOR ESTABLISHING A CONTRACT IN TERMS OF SWAZI LAW AND CUSTOM

4.1 INTRODUCTION

The Swazi define a contract as a voluntary agreement between two parties, imposing obligations upon one or both, and reciprocally conferring rights upon the other or both. A contract is established once the contracting parties have reached an agreement known as '*sivumelawano*' and one of the parties has performed in terms of the agreement. Compare Whelpton (1991:81) for the position among the Bakwena of South Africa, and Prinsloo and Vorster (1990:6) for the position among the Batswana of the former Bophuthatswana, now known as the Batswana of the North West Province.

4.2 CONSENSUS

Although a mere agreement is not enforceable, consensus is a prerequisite for the conclusion of a contract among the Swazi. According to the panel of experts, the parties must expressly declare or make known their intent or will. A tacit announcement, such as nodding the head only, is not sufficient to express any desire or will (cf Whelpton 1991:81).

Consensus is reached in an informal manner in the course of a conversation through a process described as "to suggest or propose". The Swazi speak of

'kucela' which literally means "to ask". There is no specific word in siSwati for "offer" or "acceptance". No particular legal rules exist as a basis for reaching consensus. Usually, long discussions take place between the parties, questions are asked and suggestions are made until consensus is reached. A party is not held liable to a suggestion until one or other form of performance in terms thereof has taken place. Until then, any of the parties can change their mind. The Swazi say: *'umuntfu ulala agucuka'*, meaning "a person changes his/her mind" or *'litsemba alibulali umanga kudliwa bafati'* meaning "hope does not kill".

Once the parties have reached consensus, there is still time to reconsider the decision. The parties are first given an opportunity to reconsider the agreement and discuss it with their family members, and can at any time change their view or decision. However, should any of the parties already have performed, the other party is then also bound to perform in terms of his obligations. This was also found by Whelpton (1991:82) amongst the Bakwena of South Africa.

A mere agreement has no juridical meaning and is not meant to remain pending for an indefinite period. The proposer or undertaker obtains no personal rights in terms thereof and can therefore, until such time as performance or part performance has taken place, enter into the same agreement with anyone else (cf Whelpton 1991:82).

Whelpton (1991:82) found among the Bakwena of South Africa, that consensus can only be reached in the presence of the contracting parties. Consensus cannot be reached by mail or over the telephone. Due to the

concrete nature of the establishment of a contract, a contract comes into existence at the place where performance takes place, and not where consensus has been reached. This is also the position among the Swazi.

When an agreement between parties is transformed into a contract through performance, a relationship of debt is created between the contracting parties. A debt must be paid on demand, or at the time agreed upon, and always remains payable, no matter how long ago it was incurred. Prescription is therefore unknown in Swazi law and custom. The Swazi maxim in this regard is '*licala aliboli*', meaning "a debt does not decay".

With regard to the Tswana in the former Bophuthatswana, now known as North West Province, Prinsloo and Vorster (1990a:6) write that an agreement "comes about through an offer by one party and acceptance of the offer by another". According to the Swazi panel of experts, such an agreement will only be executed once one of the parties has performed in terms of the agreement. The panel reiterated that there are no general terms for "offer" and "acceptance" in siSwati.

Liability arises from real (executed) contracts; that is, contracts in which one party has partially or totally fulfilled his obligations (cf Prinsloo and Vorster (1990:10).

From this it is clear that in Swazi law and custom the emphasis is on the concrete. An agreement must be followed by actual and concrete performance in order to establish contractual liability.

4.2.1 Consensus reached in an improper manner

According to the Swazi panel of experts, an agreement only acquires juridical content once performance has taken place in terms thereof. Parties should be cautious during the negotiation phases not to express wishes with which they cannot comply. Should it appear after performance that their expressed wishes exceeded the limits of decency, the prejudiced party could have recourse to the law, which could have prejudicial consequences for the proposer (cf Whelpton 1991:84).

The literature on indigenous legal systems does not always differentiate clearly between conduct that causes the contract to become void or voidable. At the same time, different meanings are given to the content and consequences of notions such as fraud, misrepresentation, intimidation and improper influence. Coetzee et al (1985:142) state that factors such as fraud, intimidation and improper influencing cause a contract to be null and void. According to them, the Tswana distinguish clearly between intent (*ka bomo/ka maikalelo*) and negligence (*botlhaswa*). When negligence cannot be proven, no claim exists against a party. A contract can, however, be attacked on the basis of misrepresentation. Among the Southern Sotho of Qwaqwa, Strydom (1985:434) found that misrepresentation, force, intimidation and improper influencing have a negative impact on the validity of a purchase agreement. The prejudiced party will not be held liable in terms thereof and can repudiate the agreement. According to Pauw (1985:109), intentional misrepresentation does not influence the validity of a contract among the Imidushane and Amabhele.

Also, Prinsloo and Vorster (1990^a:6) do not distinguish between misrepresentation that excludes consensus, and misrepresentation that causes a contract to become null and void. According to Prinsloo and Vorster (1990^a:6), “if consensus is obtained by improper means, that is where a party has been misled through misrepresentation or coerced by threat (duress) to enter into a contract, the contract is voidable at the option of the prejudiced or threatened party”. The Swazi distinguishes between misrepresentation (*kuyenga*), force (*kusabisa*) and improper influencing as ways of obtaining consensus in an improper manner.

4.2.1.1 Misrepresentation (*Kugenga*)

According to Whelpton (1991:85), misrepresentation is known as ‘*reelelo*’ amongst the Bakwena of South Africa. The Swazi refers to it as ‘*kuyenga*’. Whelpton (1991:86) writes that the Bakwena of South Africa clearly distinguish between intentional misrepresentation and unintentional misrepresentation. Intentional misrepresentation is fraudulent. Among the Swazi, fraudulent misrepresentation is dealt with as a criminal matter and they refer to it as ‘*licebo lekuyenga*’.

Negligent misrepresentation (*budlapha kukhuluma lokubudlapha*) occurs when the misleading party was not aware of his misrepresentation or that it would have a negative impact on the party who was misled. Whelpton (1991:86) gives the following example: Should A sell grain pots to B, together with a beer pot, which happened to be in between the grain pots, B would be in a position to cancel the agreement on the basis that A was negligent. The responsibility rests with A to ensure that he sells the correct

goods. Misrepresentation is usually seen as unawareness of the inaccuracy of a proposal. According to the Bakwena of South Africa, it is possible for a contract to become null and void (Whelpton 1991:87). This means that no party to the contract is liable in terms of the contract. With both intentional and unintentional misrepresentation, the parties are obliged to return whatever they received in terms of the contract. The same example was put to the Swazi panel of experts and they agreed with the viewpoint of the Bakwena of South Africa. They refer to negligent misrepresentation as '*budlapha kukhuluma lokubudlapha*'.

Among the Tswana, if it is impossible for the prejudiced party to return the objects with which he had been misled, he cannot demand that the contract be set aside. The misled party cannot retain the object and claim damages. A party can only claim damages in cases of intentional and negligent misrepresentation. The claim for damages can also only be in respect of actual damages suffered. A party cannot demand to be placed in a position he would have been if the misrepresentation had not occurred. The damages claimed demand a comparison between the current patrimonial position of the misled and the patrimonial position he would have been in had the misrepresentation not taken place. Furthermore, besides the damages that the guilty party has to pay, a court can also order the payment of a fine (*mangangatlhaa*). It is understood that the fine payable is levied, because the Court's time has been wasted and does not relate to the misrepresentation (Van Blerk 1990^a:72).

Among the Swazi, the party who has been misled may withdraw from the transaction. The Swazi say: '*kuphuma*' or '*kuyekela*'. Both parties must then

restore what they have received under the contract. Alternatively, the prejudiced party may adhere to the transaction but limit its performance to the value of the object agreed upon, or insist that the object agreed upon be delivered instead of the misrepresented article. It is rare in Swazi law and custom to take something without verifying its true value and nature: The Swazi say: '*emaswati akamtsatsi kati asesakeni*', meaning "a Swazi does not buy a cat in a bag for himself".

4.2.1.2 Force and intimidation

According to Whelpton (1991:88), force or coercion (*tshosetso*) is known to the Bakwena of South Africa. They distinguish between two forms of force, namely mere physical overpowering, for example, where A grabs B, holds him and forces him to sign a document, and a threat where A points a firearm at B and orders him to sign a document. Force by physical overpowering does not result in a contract. In the case of a threat, a contract does exist, but is voidable on the basis that consensus was obtained in an improper manner. According to the Swazi force and intimidation used to conclude a contract, deserve to be punished.

4.2.1.3 Improper influencing

For the Batswana of the North West Province, improper influencing (*tlhotlheletso*) is not a ground for setting aside a contract (Prinsloo & Vorster 1990^a:7). They give the example of a medicine-man who "persuades a family to accept his offer of medicines they do not want in exchange for an ox. If the medicines are accepted by the family they cannot refuse to render

counter-performance on the ground of undue influence.” Whelpton (1991:89) questions whether any inference can be drawn from this example, as several factors could influence any or every situation. Whelpton also asks whether the concept of misrepresentation is not broad enough to include improper influencing.

The Swazi, however, agreed with the above mentioned finding of Prinsloo and Vorster. According to the Swazi, improper influencing seldom occurs because entering into a contract was formerly a matter between two families and it was not easy to influence the wishes of a family.

4.3 PERFORMANCE MUST BE POSSIBLE

Whelpton (1991:90) writes that performance must be possible at the time a contract is concluded, otherwise there is no contract. If performance was possible at the time of the conclusion of the contract, but becomes impossible at a later stage due to unforeseen circumstances or due to circumstances beyond the debtor’s control, the debtor will be released from the obligation to perform. No damages can however be claimed. The Bakwena of South Africa explained this with the maxim *‘o se ke wa sugela ngwana thari mpeng’*, meaning “don’t knit a shawl for a baby before it’s born”, in other words, “don’t count your chickens before they hatch”. The Swazi agree with this point of view. They have a saying *‘ungayibambi inhlwa ngenhloko isaphuma’* which means “do not catch an ant before it comes out of its hole by himself”.

According to the Swazi, performance must be possible when the agreement is concluded. If one of the reciprocal performances is impossible at the time the contract is entered into, the contract is void and no performance under the contract is due. Therefore, in the case of exchange, for example, if five sheep are delivered for a specific ox, which was dead when the agreement was entered into, then they must be returned. The position is the same as where the parties make the existence of the contract dependent on the assumption that the ox does exist.

Among the Swazi, no damages, referred to as '*umonakalo*', are claimable when the contract is void on the grounds of impossibility of performance, known as '*kungeke kwendeke*'. If the creditor has incurred expenses in building a kraal for the ox, he cannot sue for reimbursement in addition to the return of the five sheep, when the debtor had no means of knowing that the ox was dead. A party is not expected to incur such expenses before he is in possession of the object concerned. Prinsloo and Vorster (1990^a:8) concur, but state that, if the wrongdoer is responsible for the fact that performance was impossible, he should pay all costs incurred. However, only expenses directly related to the fulfilment of the contract are allowed.

4.4 PERFORMANCE MUST BE DETERMINABLE

Most of the available literature on indigenous legal systems does not give much detail on this aspect of performance. Among the Southern Sotho of Qwaqwa, Strydom (1985:517-518) states that "Informante het beweer dat kontrakte ondersteun word deur algemene regsbeginsele en dat dit nie nodig

is om die beginsel by die aangaan van 'n kontrak uitdruklik tot die voorwaardes van die kontrak by te voeg nie. Vaagheid in formulering of onduidelikheid oor verpligtinge kan in die verband nie as verweer aangevoer word vir die nie-lewering van kontraktuele prestasie nie” (informants asserted that contracts are supported by general legal principles and that it is not necessary to add these principles explicitly to the conditions of the contract when entering into it. Vagueness in formulation or obscurity in regard to obligations cannot be put forward in this regard for the non-delivery of contractual performance – [own translation])). The Swazi concurred with this viewpoint.

According to Whelpton (1991:91), this allegation would have been applicable in original indigenous law when exchange was the rule and goods of a similar quality were returned. The parties did not have to negotiate counter performance as this was determined by law (*ex lege*). An equally valuable counter performance was a *naturalia* of a contract. Uncertainty was also mostly excluded, as contracts were concluded between family groups.

4.5 THE TRANSACTION, PERFORMANCE AND PURPOSE MUST BE LAWFUL

It is clear from the available literature that this aspect of the indigenous law of contract has thus far not been fully investigated. Olivier et al (1989:631) simply state that courts sometimes used the maxim *contra bonos mores* as an equivalent of the maxim that an act should not be “strydig met staatsgedragslyn en natuurlike geregtigheid”. Bekker (1989:57) alleges that the trade in human beings (slaves) was in contravention of public interest

and that a daughter could not be offered in payment of a debt as this would boil down to human trafficking. The Bakwena of South Africa agreed with this statement (Whelpton 1991:93). According to them, a contract would be unlawful or *contra bonos mores* if it was prohibited by law, or if it was contrary to public interest or the morals of the community.

According to the Swazi, an unlawful transaction, referred to as '*lokungekho emtsetfweni*', is not recognised and no action is allowed. Moreover, where the transaction is unlawful, the parties may be punished for committing a public offence. For example, if a plaintiff delivered a bull in exchange for killing his enemy and the defendant later refused to adhere to his commitment and to return the bull, the plaintiff would have no action against the defendant. The Swazi have different categories of legal wrongs (offences) which could be regarded as being either against the person or family, their property, the authorities or other "unnatural offences". Since this section is only concerned with the unlawfulness of performance in terms of a contract, focusing on the offences individually is beyond its scope.

Among the Bakwena of South Africa, various contracts are forbidden *ex lege* (Whelpton 1991:94). The most important are contracts concluded on a Sunday, bribery, and contracts to commit a crime against the community's mores; in other words, contracts that are *contra bonos mores*. Among the Swazi, a contract may be concluded on a Sunday. It would, however, be an offence to buy off a crime. The siSwati term for bribery is '*kutsenga umuntfu*'.

No reference was found to wager agreements in the available literature. Whelpton (1991:96) attributes this to the fact that no study has been undertaken on the law of contract in urban areas. The Swazi people are familiar with the concept, but in the form of a game, and do not associate it with the law of contract. According to the Bakwena of South Africa, cattle herders often took a bet in the 'veld' to determine who was the strongest or could throw a 'kierie' (staff) the furthest. If a person lost the bet and refused to pay what he had bet, the other herder would ignore him to force him to do so (Whelpton 1991:96).

Nowadays, due to the influence of urbanisation, bets have taken on a juridical stature and relate to the law of contract. However, no differentiation is made between wager agreements and gambling. These concepts are linked to, or associated with, some sort of games contained in a contract and whereby parties could win or lose (Whelpton 1991:97). According to the Bakwena of South Africa, both betting and gambling are seen as unlawful forms of contracts, due to their negative social consequences. They distinguish between two forms of wager agreements, known as '*peelano*'. The first is a general wager agreement by which each party could win and gain something at the cost of the other. The other form does not reflect any reference to indecency (*thona*) and is not seen as unlawful. According to Whelpton (1991:97), this form of wager agreements shows a strong resemblance to the wager agreements, *super re honesta* found earlier in Roman law. The parties to these bets or agreements had a fair interest in the conclusion.

Wager agreements and gambling are generally seen as unlawful and unenforceable among the Swazi. According to the Swazi, wager agreements are not voidable but merely unenforceable. One can therefore not institute any legal action to recover a debt incurred by a wager agreement.

4.6 PERFORMANCE OF PARTIAL PERFORMANCE MUST BE DELIVERED

As already stated, a mere promise or agreement is not sufficient in Swazi law and custom for the conclusion of a contract. In other words, a contract does not come into being because of a mere promise. Performance or partial performance is required. Similarly to western legal systems, performance can be to do, to give, or not to do (*dare, facere, non facere*). Nevertheless, a promise remains a prerequisite for the conclusion of a valid agreement. Whelpton (1991:100) compares this position to a great extent to that of the earlier Roman period, when the question was always asked what legal consequences resulted from a promise. The reason for the validity of an agreement was referred to by the Romans as *causa obligationis*. Roman law was formalistic and the parties to a promise had to perform some pre-determined formality, such as uttering formal words or delivering an object, for the enforceability of the contract. A promise without a *causa obligationis* resulted in a *nudum pactum* and *ex nudo pacto non oritur actio*; that is to say, a mere promise or agreement does not give rise to any legal rights, obligations or consequences.

In terms of English law, a ‘simple contract’ requires a ‘valuable consideration’ before such contract comes into existence. According to

Whelpton (1991:100), the ‘consideration’ concept in terms of English law requires some *quid pro quo* between the parties, namely by the person who promised something to the person to whom it was promised. For example, before A could enforce a promise on B, A first had to deliver proof that he had given B something in exchange for what B delivered or had to deliver. Performance or partial performance is an indication of a serious intent by the parties to bind themselves legally. Such an intent cannot be established by any other means than performance or partial performance.

Whelpton (1991:101) investigated whether a promise of a donation has any legal meaning among the Bakwena of South Africa. According to them, no debt is incurred upon making a promise to donate something. Such a promise is merely a prerequisite for the establishment of a valid contract of donation. If the promise to donate something is honoured, then the beneficiary thereof can receive it without any obligation to exchange something in payment for this. A promise to donate something, therefore, does not create any debt. Yet Vorster and Prinsloo (1989:34) state that a mere promise does create a debt, but it does not result in any obligations as illustrated by the contract of donation. A contract of donation in terms of western legal systems, is unknown to the Swazi.

4.7 THE PARTIES MUST HAVE CAPACITY

A further requisite for the establishment of a valid contract in terms of indigenous law of contract, is that the parties to the contract should have the capacity to enter into an legal obligation. Regarding African law and the capacity of an individual, M’Baye (1975:143-144) states that it “would be an

exaggeration to believe that African law never considers the individual. Allot has shown that, while only the group counts as against third parties, the individual is far from being entirely deprived of rights within the group. However, even within the group, the role of the individual as such is relatively minor in Negro-African legal relations. Even those who hold that in the African system the group does not wholly absorb the individual, admit that this is true. The legal status of each individual, taken by himself, depends on his 'position' within the social group. Such positions can be schematically reduced to those of the 'personage', the woman, the stranger, the child, the sick man, and the slave." With regard to the Batswana of Botswana, Schapera (1965:146) states that women and unmarried children, in principle, cannot conclude or enter into contracts without the assistance of their guardians, although such persons could enter into contracts enforced by a court of law.

From the available literature, with the exception of a few variations, the position appears to be similar among most indigenous people regarding capacity in terms of indigenous law (cf Walker 1969:69; Pauw 1985:107 & Strydom 1985:511). According to Whelpton (1991:105), even though modern indigenous law strongly influences the status of the African person, by which means he or she obtains legal capacity, the role of the family group cannot be disregarded, especially in terms of contracts relating to engagement and marriage.

In Swazi law and custom, the head of the family (*inhloko yemuti*), in consultation with the members of his family, concludes a contract on behalf of, and in the interests of the family. He is liable for the fulfilment of the

obligations under contracts entered into by him or by a member of his family, with his consent. Although individuals are allowed to initiate agreements, they must consult certain categories of relatives like the grandmother (*bogogo*), paternal aunts and the head of the household or homestead. Swazi law and custom does not recognise absolute majority. For as long as there is an older male person in a homestead, all others are subject to his authority. The family head, therefore, possesses the greatest authority within the family. However, since consultation, referred to by the Swazi as '*kubukisana*' plays a major role in the Swazi way of life, the family head may not act arbitrarily and not disregard advice arising out of consultations. The extent of involvement and consultation with other family members depends on the nature of the contract, termed by the Swazi as '*luhlobo lwisivumelwapo*'. For instance, contracts involving the exchange of small stock and grain may not necessitate the same level of consultation as contracts involving the exchange of cattle.

According to Whelpton (1991:105), the Bakwena of South Africa acknowledge that an individual traditionally also shares his or her subjective rights with other members of the agnatic group. A member of the agnatic group shares that in relation to his or her status within the group. Such status is influenced by factors such as position within the family and household, age, gender and marital status. Due to such shared rights, majority is of no importance. The idea of a specific age at which a person becomes emancipated was formerly unknown to indigenous cultures. Individuals' capacities increased as and when their status changed, but they could never reach a position where, as individuals, they could act independently from the

agnatic group. Myburgh's findings confirm this point of view (1985:77-83, 110-111).

Whelpton (1991:106) writes that among the Bakwena of South Africa various persons have legal capacity, such as married men within the agnatic group and unmarried major persons within the agnatic group. Both are subordinate to the head of the agnatic group, when decisions impact on the family and the agnatic group itself. Furthermore, a widow within the agnatic group has full legal capacity, as a woman's marriage does not dissolve when her husband dies. The household continues and, as a member of her household, she shares in all the rights, obligations and capacities of the agnatic group. She has full capacity with regard to her personal property and retains her original capacity as a married woman in the household.

Among the Bakwena of South Africa, certain persons have no capacity to act or enter into any contract (Whelpton (1991:106-108). These people are listed below.

- A married woman within the agnatic group. She is subject to her husband's guardianship.
- Insane persons have no capacity even in circumstances where they only obtain rights, and no obligations. Therefore, an insane person cannot even accept a donation or gift. Such a person is permanently under the authority of the agnatic group.
- Drunkards - A drunk person who is unaware of the consequences of his or her acts, has no legal capacity.

- Minors - Traditionally, majority was not known to indigenous peoples. Age was, however, not without legal meaning, as a person under the age of puberty could not marry.

Myburgh (1985:77-83) confirms that age, as such, has no specific legal meaning and greater meaning was given “to puberty and the specific ceremonies generally known as initiation ceremonies”.

According to Whelpton (1991:109), because minors participate in certain economic activities outside the rural areas, they are allowed to obtain property, although their guardians are entitled to a reasonable share of their income. Should any dispute arise involving minors, whether within or outside the rural area, they continue to be assisted by their guardians.

Rights and duties are controlled and determined by the family according to the individual's evolving status and capacity. Traditionally, the head of the agnatic group, in collaboration with the members of the family, concluded contracts on behalf of the group and he would then be liable to meet all obligations in terms of such a contract. Individuals could not enter into or conclude any contracts as individuals. However, there is general consensus that nowadays adults can enter into contracts.

The concept of absolute majority is not recognised in Swazi law and custom. Consequently an individual is perpetually subordinate to the family. According to Swazi law and custom, even a married man (*indvodza letsetse*) is subordinate to his family. He has the responsibility and a degree of authority over his wife, children and household property. He does not act

independently and has to consult his wife in dealing with household property. Decisions on major issues are taken in consultation with the family head or successor (*inkhosana*) in his absence. Furthermore, unmarried adults (*labangakendzi/labangakatsatsi*) are subject to the family head (*inhloko yemuti*) in family affairs. Although they have legal and contractual capacity, they are precluded from taking certain major family decisions and may not establish their own household without the consent of the family head. Any property acquired by unmarried adults falls under the authority and control of the head of their household.

In Swazi law and custom, a married woman (*umfati*) is subordinate to her husband's family under the guardianship of her husband and has no legal or contractual capacity. Any property she may acquire belongs to her husband, who administers it in consultation with her. There are exceptions to this rule, namely instances where her husband has given her a milk cow (*inkhomo yelubisi*) and a 'liphakelo beast', which is a gift given to a married woman by her husband, or a beast, known as '*insulamnyembeti*', meaning to "wipe off the tears." These beasts do not form part of the general household property.

A married woman has the capacity to appear in court provided that she is accompanied by either her husband or any other member of the family delegated by the head of the family. However, she lacks the capacity to institute legal action in the absence of her husband or her husband's family representative.

In terms of Swazi law and custom, a widow (*umfelakati*) is considered married to her marital family. This is due to the fact that a marriage is not considered to be between the contracting parties alone, but between two families. When a man dies, his wife remains with his family and the late husband's brother is given to her as first choice partner (*uyangenwa*). He takes over the guardianship over her.

4.8 FORMALITIES REQUIRED TO BE FULFILLED

According to the Batswana of the North West Province, no specific formalities or ceremonies are required for the conclusion of a contract (Prinsloo & Vorster 1990a:6). Contracts are usually verbally concluded in the presence of witnesses, although the presence of witnesses is not essential for a contract to be valid. Nowadays the parties can agree that, once their contract is put in writing, it will take legal effect. All transactions relating to property and controlled by legislation must be in writing. In Botswana, the presence of witnesses only serves an evidential purpose. Their presence is not a requirement for the validity of a contract (Schapera 1965:145; Walker 1969:68).

According to Strydom (1985:515), the presence of witnesses is not a requirement for the validity of a contract amongst the Southern Sotho of Qwaqwa and only has an evidential value, should a dispute arise from or regarding the contract. Among the Imidushane and Amabhele of the Eastern Cape, Pauw (1985:114) found that a contract comes into existence if the parties have performed in the presence of witnesses. It can therefore be

concluded that the presence of witnesses is a requirement for the validity for the conclusion of a contract.

Among the Bakwena of South Africa, there are no formal requirements for the conclusion of a valid contract (Whelpton 1991:110). The presence of witnesses is not a requirement for the validity of a contract, although witnesses serve an important purpose in terms of the law of evidence. According to Whelpton (1991:111), two or more witnesses are preferable among the Bakwena of South Africa. The local court of the Bakwena people display their discontent and reluctance to hear a matter when the parties have no witnesses to the transaction.

Among the Swazi, no formal requirements are prescribed to ensure the validity of a contract. The parties, must, however, conclude their contracts in the presence of witnesses, known as '*bofakazi*'.

4.9 CONCLUSION

This chapter indicated that contracts are real in nature, which means a bare promise or mere agreement is not sufficient to establish contractual liability. Liabilities arise from real (executed) contracts; that is, contracts in which one party has partially or totally fulfilled his obligations. A contract is basically a voluntary agreement between two parties, imposing obligations upon one or both and reciprocally conferring rights upon the other (or both). It must be concluded directly between the parties themselves in the presence of each other. Among the Swazi, witnesses are not generally essential for the validity of the contract but they do serve an important purpose in terms of

the law of evidence. Most contracts are still concluded by oral agreement but are occasionally put in writing nowadays. Not all persons have legal or contractual capacity. The head of the family remains liable for all contractual obligations.

Chapter 5

BREACH OF CONTRACT

5.1 INTRODUCTION

The literature reviewed revealed no systematic references to breach of contract and the remedies in indigenous legal systems within a theoretical framework (cf Schapera 1965:150; Pauw 1985:114; Strydom 1985:520; Prinsloo & Vorster 1990^a:13; Whelpton 1991:139).

The Swazi view the consequences rather than the actual 'breach of contract' as the most important aspect thereof. The serious and detrimental effects for the whole community are regarded as a crime. For this reason, then, great importance is placed on the parties who enter into a contractual relationship and all efforts are made to resolve a dispute as soon as possible (cf Whelpton 1991:139).

The perpetuation of harmony through the speedy resolution of disputes is very important to the Swazi. Although there is concern for justice to the individual, it must yield to the greater interest of the group as a whole in preserving amicability between its members (cf Walker 1969:71). Consequently, in a case of breach of contract, the endeavoured is to restore each of the parties to the position they were in before entering into the contract, rather than the position they would have been in if the contract had been executed. When given a choice between awarding damages for lost expectations and damages to cover out-of-pocket losses, the Swazi courts

invariably choose the latter for the claimant will not be any worse off than before the contract was formed and will be compensated for any actual harm (cf Walker 1969:71).

According to Walker (1969:71), “this approach is thought to remove the claimant’s basis for complaint by restoring him to his pre-contract status while avoiding any lingering animosity on the part of the defendant which would result from a more excessive award.” The nature of contract remedies, therefore reflects the desire for amicable settlement. The Swazi consider an award of damage for lost expectation unnecessary, and perhaps harmfully excessive.

According to Whelpton (1991:140), the Bakwena of South Africa regard breach of contract as similar or equal to non-performance; in other words, to default on an undertaking to perform or to perform fully (negative and positive performance). Due to the concrete nature of the law of contract, both forms of performance would only be possible if a contract already existed; that is, if one of the parties had performed in terms of the contract.

In addition to non-performance, repudiation and impossibility of performance are also forms of breach of contract, referred to as *‘kwephula sivumelwano’* among the Swazi. Both these forms of breach of contract are known to the Bakwena of South Africa (Whelpton 1991:141). Repudiation occurs when a contracting party refuses to meet his contractual obligations. An example of impossibility of performance is when it is objectively or subjectively impossible for one of the parties to perform in terms of the agreement.

In the case of breach of contract, the aggrieved party may sue the debtor. The creditor does not need to act immediately if the debtor does not honour his obligations. He may continue to confirm his rightful claim to his obligatory rights by means of periodic demands. The debtor must be given a reasonable period to perform and great patience is to be shown. Should the debtor's failure to perform persist, the creditor may take him to the chief's court and institute an action for the rendering of the performance or, upon default, claim the return of the performance delivered. No consequential damage can be claimed. The aggrieved party may, however, be able to claim compensation for expenses incurred if that can be proven (cf Whelpton 1991:149-150).

Once a contract has been concluded amongst the Swazi, a relationship of debt is created between the contracting parties. A debt must be paid on demand, or at the time agreed upon, and remains payable, no matter how long ago it was incurred. Prescription is therefore unknown in Swazi law and custom. The Swazi say: '*licala aliboli*', meaning "a debt does not decay".

5.2 DIFFERENT FORMS OF BREACH OF CONTRACT

The various forms of breach of contract are discussed below.

5.2.1 Non-performance

Failure to perform among the Swazi can be compared to the form of breach of contract known in western legal systems as *mora debitoris*. According to

De Wet and Yeats (1978:142), *mora debitoris* is when a debtor drags his feet in meeting his obligations.

Prinsloo and Vorster (1990^a:14) give the following example among the Batswana of the North West Province: group A enters into an agreement with group B in terms of which group B undertakes to thatch group A's building with thatching grass in return for a heifer. The agreement requires that the work be done before the rains, which are almost at hand. If B fails to commence the work within a reasonable time after reaching agreement, then A can pull out of the agreement and advise B accordingly, as at that stage there was only an agreement from which no contractual liabilities ensued. The same example was put to the Swazi panel of experts and they agreed with this conclusion of the Tswana.

According to the Swazi panel of experts, the parties must perform simultaneously. They say: '*tandla tiyagezana*', meaning "hands wash each other". The Bakwena of South Africa refer to this requirement as '*mabogo dinku athebana*', meaning "the sheep wash each other's hands" (Whelpton 1991:142). The parties could also agree that one of them may perform at a later stage. Usually a specific day is determined for performance, although this need not be so. Should a party neglect to perform on the specifically agreed day, he is technically guilty of breach of contract. It is not customary for the creditor to act immediately. The creditor is expected first to remind the debtor of his obligation. The Swazi say: '*kukhumbuta*', meaning "to remind him". The Bakwena of South Africa refers to it as '*go gakolola*' (Whelpton 1991:142). A court will not give any relief to a creditor if he has not first demanded performance from the debtor, even though a specific day

was determined for performance. Should the debtor then continue to refuse to perform, the creditor can approach the court for assistance. Should no specific date be determined for performance, reasonable time must elapse before a party can demand performance (cf Whelpton 1991:142).

Schapera (1970:244) found that the Batswana of Botswana regard one year as a reasonable time. If performance has not taken place after a reasonable time, the creditor must then demand that the debtor perform (*gakolola*). Should the debtor continue to remain in default, the creditor, together with his family members must go to the debtor and, in the presence of the debtor's family, request that he meet his obligations. If, after this process, the debtor continues to be in default, the creditor may approach the court for relief. The Swazi concurred with this viewpoint of the Batswana.

Omission or failure to perform in terms of an agreement can be compared to what is understood as defective performance in western legal systems. In *Sweet v Ragereghara* ((1978) (1) SA 311 (D) 138c), performance in terms of an agreement is defined as follows: "Defective performance relates to timeous performance not in accordance with the terms of the agreement".

Prinsloo and Vorster (1990 a:14) give the following example with regard to the Tswana of the North West Province:

'Where group B completed the work but the workmanship was shoddy and the roof was not watertight, group A could demand specific performance that is proper performance, before they delivered the heifer to group B. If group B refused to perform properly, group A

could claim compensation for the cost of labour required to correct the defect. Inadequate performance might also entitle the creditor to withdraw from the contract in appropriate circumstances and demand return of his performance in addition to claiming any damages for any loss that resulted from the breach’.

A similar example was given to the Swazi panel of experts and they came to the same conclusion. It would thus appear that the Swazi also acknowledge defective or inadequate performance as a form of breach of contract. If the creditor is also in breach, he will not immediately take action against the debtor, but will first give the debtor the opportunity to remedy the inadequate performance.

5.2.2 Repudiation

This form of breach of contract can also be referred to as refusal or negation. Amongst the Bakwena of South Africa, breach of contract occurs if the existence of a contract is denied, or if the terms of a contract are disputed when the other party has already performed (Whelpton 1991:145).

Prinsloo and Vorster (1990a:14) also identified repudiation as a form of breach of contract among the Batswana of the North West Province, and point out that since contractual liability is not based on a mere agreement, repudiation of a promise before performance does not amount to breach of contract. The Swazi panel of experts was in agreement with this finding of Prinsloo and Vorster.

Among the Swazi, contractual obligations are based on an agreement between the parties, but liability arises only after performance by one of the parties, in accordance with the agreement. A mere agreement does not give rise to liability to perform. An agreement must be followed by actual and concrete performance in order to establish contractual liability. Until promises to perform are carried out, no remedy is available if one party repudiates the agreement, known to the Swazi as '*kuphuka sivumelwano*'. They say: '*Umntfu ulala agucuka*', meaning "a person changes his/her mind" or '*litsemba alibulali umganga kudliwa bafati*', meaning "hope does not kill".

5.2.3 Impossibility of performance

As already stated, performance must be possible when an agreement is concluded. Should performance become impossible after conclusion of the contract, due to the fault of any of the parties, the Swazi regard it as breach of contract. They refer to it as '*kungeke kwendeke*'. This was also found by Whelpton (1991:146) among the Bakwena of South Africa.

Prinsloo and Vorster (1990^a:14) made use of the following example to explain impossibility of performance: "in the event that group B arrives a few days after the agreement was reached with grass to begin thatching and group A pleads inconvenience and requires them to return later and this is repeated until the rains come and the thatching grass that was left at group A's site is damaged, group B might withdraw from the contract on the ground of group A's prevention of the work". They concluded that the impossibility performing due to the fault of any of the parties, is a form of

breach of contract. This was confirmed by the Swazi panel of experts with regard to the position among the Swazi.

5.3 REMEDIES IN BREACH OF CONTRACT

5.3.1 Specific performance

Western legal systems define specific performance as an order to perform a specified act or to pay money in pursuance of a contractual obligation (Christie 2006:522). Specific performance is known among the Swazi. It is, however, a prerequisite that the plaintiff should first ask for performance, or remind the defendant to perform, which is referred to in siSwati as '*kucela*', from the defendant before he can approach a court. Only then can a court order a defendant to comply with his obligation as per the contract. Should performance have become impossible, the court cannot order specific performance. This is also the situation among the Bakwena of South Africa (cf Whelpton 1991:148).

According to Walker (1969:19), the court has discretion to amend the terms of the agreement to ensure harmony in the community. Roberts (1970:63) disagrees, stating "provided the terms of the contract of exchange are clear, these must be strictly enforced".

According to the Swazi, a lesser performance than that which was agreed to would be acceptable in view of maintaining harmonious relationships. They say: '*akufanani nekuhlala*', meaning "half an egg is better than an empty

shell” (cf Whelpton 1991:148) for the position among the Bakwena of South Africa.

5.3.2 Damages

In terms of western legal systems, damages can be claimed when the aggrieved party cancels the contract due to non-performance and then institutes legal action for the financial loss that was suffered due to the breach of contract (Christie 2006:543). Damages for breach of contract are normally not intended to compensate the innocent party for his or her loss, but to put him or her in the position he or she would have been in if the contract had been properly performed. In the case of *Norrick v Benjamin* (1972(Z) SA 842(A)), the courts ruled that the test to determine whether the innocent party had suffered any loss was whether he or she had been placed in the position he or she would have been in if the other party had performed properly or timeously.

Among the Swazi, the purpose of claiming damages, known as *‘kucela sincenphetelo’* is not to place the debtor in the position in which he would have been if there had been no breach of contract but, under certain circumstances, to remunerate him for damages he had suffered due to the breach. Prinsloo and Vorster (1990^a:8) found that among the Batswana of the North West Province, no damages could be claimed as a general approach. In terms of Swazi law and custom, a court would also rather choose to award damages to cover out-of-pocket losses, than for lost expectations.

With regard to the Bakwena of South Africa, Whelpton (1991:149) states that a party who is guilty of misrepresentation, cannot claim damages for costs already incurred in anticipation of fulfilment of the contract or for directly related damages. For example, if A bought an ox from B and B is not in a position to deliver the ox, A would not be able to claim for costs already incurred for the appointment of a herdsman to collect the ox from B. Prinsloo and Vorster (1990^a:8), however, found that such a claim is possible among the Bakgatla of the North West Province. With regard to the Bamalete of Botswana, no such damages are payable (Walker 1969:71). Among the Swazi such a claim is not possible, as their desire is for amicable settlement. According to the experts, they do not want to damage the fabric of the community but rather to heal the community's wounds.

Among the Swazi, no damages are claimable when the contract is void on the grounds of impossibility of performance (*kungeke kwendeke*). A party is not expected to incur any expenses before the other party has performed. Nevertheless, expenses directly related to the fulfilment of the contract are allowed (cf Whelpton 1991:149).

5.3.3 Withdrawal (*okuphuma esivumelwaneni*)

Generally withdrawal is known as a legal action that dissolves the commitment of a contract. De Wet and Yeats (1978:194) maintain that it is not the contract per se that is dissolved, but the consequences of the contract that are rendered null and void.

According to Whelpton (1991:152), withdrawal is known to the Bakwena of South Africa, but only under exceptional circumstances. Exercising withdrawal creates the right to return whatever has been performed thus far. No duty of restoration or restitution is created.

According to the Swazi panel of experts, the Swazi would not easily use withdrawal (*okuphuma esivumelwaneni*) as a remedy in breach of contract in exceptional circumstances. A party must first demand performance (*kucela*) from the other party before he can withdraw. When a party withdraws, the contract dissolves as in the case of western legal systems, but so do the consequences.

5.3.4 The right to withhold performance

In western legal systems, the right to withhold performance is known as the reciprocal principle. According to Whelpton (1991:153), this remedy relates to a reciprocal performance that must not be confused with simultaneous performance as in sales agreements, where performance has to take place simultaneously. A consequence of this reciprocal principle is that a party can withhold his performance until such time as the other party has performed fully and properly. This is also the position among the Swazi.

5.4 CONCLUSION

Breach of contract is seen as non-performance among the Swazi. Repudiation and impossibility to perform are known to them. Breach of contract impacts negatively on a community. The disputing parties should

therefore resolve the dispute as soon (and as amicably) as possible. The Swazi believes that a debt does not decay. Courts may order specific performance, but often a reduced level of performance is recommended. Damages are generally not payable. A party can usually only expect to be placed in a similar position as before entering into the contract, and not in the position in which he would have been had the parties performed in terms of the contract.

Chapter 6

THE TERMINATION OF CONTRACTS

6.1 INTRODUCTION

There are distinct similarities with western legal systems in the way in which agreements are terminated among indigenous people. To understand the concept of the concrete nature of a contract in indigenous law, and particularly in Swazi law and custom, it is important to understand the manner in which agreements are terminated.

6.2 PRESCRIPTION

In western legal systems, the time which has elapsed since a contract was concluded, has a major influence on contracts. According to De Wet and Yeats (1978:255), prescription deals with the acquisition of rights or the exemption of debts after the expiry of a certain period of time, hence, the distinction between acquisitive and extinctive prescription. With acquisitive prescription, certain rights are obtained due to the lapse of time. By contrast, extinctive prescription deals with the decay of a debt after the lapse of a period of time.

In this chapter the extinctive prescription of debts which arise from a contract is discussed. A debtor can, in terms of western legal systems, after the lapse of three years, deny the existence of a debt. Differently stated, if he or she was liable for the debt and the specified period of time has lapsed,

the debtor can refuse to pay the debt because the debt has prescribed, based on the lapse of time.

A leading case regarding prescription in the indigenous law is *Lequoa v Sipamla* (1944 NAC (C + D) 85), where the court found prescription of a debt to be unknown, whether acknowledged or ordered by a court order. The court stated (85-86): “But where a debt, claim or liability is open to denial or dispute or is a matter where time is important in fixing an event, for example, a seduction, or the whereabouts of an individual, for example, a catch in an adultery case, delay in instituting action by report, demand or summons is regarded in Native law as prejudicing the defence if the delay is unreasonable” (cf Whelpton 1991:159).

Bekker (1989:65) is also of the opinion that prescription is unknown in indigenous law and that a delay in instituting an action does not deprive a person of any right to institute such action. According to him, the debt should, however, be kept ‘alive’ in that the claimant must remind the debtor of his debt from time to time.

Schapera (1970:286-287) writes the following with regard to the Batswana of Botswana: “It may be noted that there is no law of prescription among the Tswana. The saying by the Tswana is ‘*molato ga obole, go bola nama*’, meaning “a debt does not decay, it is meat that rots”. The Swazi refers to it as ‘*licala aliboli*’. Church (1990:92), Prinsloo and Vorster (1990^a:20) and van Blerk (1990^a:72) agree that this position also applies to the Batswana of the North West Province.

According to Whelpton (1991:159), the concept is known to the Bakwena of South Africa. The legal maxim '*molato ga obole, go bola nama*', meaning "a debt does not decay, it is meat that rots", also applies to them. According to them, performance does not have to be linked to a time period to have any meaning nor, can time replace the truth. As long as there is a debt, there is an obligation which must be met. In this, legal certainty is gained. An outstanding debt does not offer any room for manipulation by the creditor, as a debt is never payable immediately, even if a specific date had been determined to perform. In order to prove the existence of the debt after a long period of time has lapsed, it is necessary for the creditor to remind the debtor of the debt from time to time so that the debt can be kept alive.

According to the Swazi, a debt must be paid on demand, or at the time agreed upon, and always remains payable, no matter how long ago it was incurred. Prescription is therefore unknown in terms of Swazi law and custom: in other words, a debt does not decay. The Swazi say '*licala aliboli*'.

6.3 SET-OFF

In western legal systems, two persons who each owe the other a certain amount of money, can set-off their debts against one another. Should the amounts be equal in value, the debt is extinguished. If one amount is larger than the other, the smaller amount would be extinguished which would reduce the larger amount by means of the set-off (*SA Metropolitan Life Assurance Co. Ltd v Ferreira* 1962:4 SA 213(0)).

According to Whelpton (1991:160) set-off is known as '*tekatekanyo ya disuga*' among the Bakwena of South Africa, but is not a way in which an agreement can be terminated. He states that each debt establishes a separate commitment between the relevant parties with its own rights and obligations, and that each one of those obligations must be complied with in its own right. Prinsloo and Vorster (1990^a:19) state that set-off is unknown to the Tswana. A debtor's obligations under one contract can therefore not be terminated by an equal obligation by the creditor or in terms of another contract. Equal debts between the parties, but under different contracts are therefore not distinguished by way of set-off.

The Swazi panel of experts was also of the opinion that set-off, as known in western legal systems, is unknown to the Swazi.

6.4 PERFORMANCE

Writers on indigenous law do not express themselves directly on this form of juridical act. Prinsloo and Vorster (1990^a:18) write with regard to the Batswana of the North West Province, the following: "Contractual obligations are terminated by rendering performance, by entering into a new agreement and by supervening impossibility of performance. As soon as a debtor has performed properly he has filled his obligation".

Whelpton (1991:161) states, that according to the Bakwena of South Africa, performance is the most common manner in which both parties meet their contractual obligations and in terms of which agreements are terminated. Unlike the situation in western legal systems, performance can not be

rendered by a third party who is not a party to the agreement. The creditor can therefore refuse proper performance if offered by a third party without declining into *mora creditoris*. Performance by a third party is only possible if the original contract between the creditor and debtor terminates and a new agreement is established between the creditor and the third party. In such a case, one can no longer refer to performance by a third party. According to the Bakwena of South Africa, it is not customary for a third party to become involved in an existing agreement between two parties. Notwithstanding the subjectivity of a contractual relationship, it would leave room for dishonesty and would add no value to legal certainty. Furthermore, Whelpton (1991:162) writes that performance must be executed to the creditor himself and not to a proxy or a creditor of him. In addition, the parties can not agree that payment can be made to a third party, as a third party does not, in any way, form part of the legal relationship which exists between the creditor and the debtor. Nor can the debtor deliver something else as a substitute of the agreed and indebted performance unless the original agreement is first cancelled and a new agreement is entered into in its place. The performance in terms of the actual, real indebtedness must be delivered. The debtor must deliver full performance unless the debtor arranged with the creditor in advance that he will perform in tranches. The debtor must perform at the place where the parties agreed performance should take place. If the debtor delivers performance at another place, the creditor is not obliged to accept it (Whelpton 1991:162).

Among the Swazi, contractual obligations are terminated by rendering performance. They refer to it as '*kwenta umsebenti wakho nesivumelwano*'. As soon as a debtor has performed properly, he has fulfilled his obligations.

It is however, not necessary for the debtor to perform at the actual place where the parties agreed performance should take place.

6.5 RELEASE (*Kukhulula*)

Release is known in western legal systems as an agreement between a creditor and a debtor in terms of which the debtor is released from his obligations by the creditor in terms of the agreement. In western legal systems, a single offer by the creditor to the debtor to release him from his obligations can be revoked at any time until the debtor has agreed thereto (De Wet & Yeats 1978:239).

In terms of English law, consideration was required for absolution but in terms of South African law, a mere intent of donation is sufficient. A 'free' release *ex liberalitate* must however, comply with the requirements of donations (*Coronel's Curator v Coronel's Estate* 191 AD 323).

Prinsloo and Vorster (1990^a:19) also refer to release. With regard to the Batswana of the North West Province, they write that a creditor may release this debtor from performing. The following example was put to the experts by them. Group A, who is poor, borrowed a large basket of corn from group B who is wealthy. The latter decide to forego their obligatory right and inform group A accordingly. Group B would have to notify group A of the release and group A would have to accept the offer to release in order to terminate the obligation. The obligation is not automatically terminated by an offer of release: acceptance is necessary. Because release is a contract between a creditor and a debtor, the question could be asked whether, in

view of the real, concrete nature of an indigenous contract, some form of performance is required to bring about a contract.

Among the Bakwena of South Africa, to whom release is known as '*golola*', mere offer and acceptance as discussed in the above example, are not sufficient to release a debtor of his obligations. Some form of performance by group B would be required. The question then is whether this is then still a release, as release can only take place once the parties agree that the debtor does not have to perform (Whelpton 1991:164).

The same example above of Prinsloo and Vorster was put to the Swazi panel of experts and they maintained that termination of an obligation by agreement, may entail release or novation from performing. Release is known to the Swazi as '*kukhulula*'.

6.6 NOVATION

According to De Wet and Yeats (1978:239) novation is the discharge of an old debt by the creation of a new debt. This can happen when a new debt is created between the same parties, which represents novation in the narrow sense of the word, or by substitution of one of the parties, by another. According to De Wet and Yeats, novation takes place by agreement between the relevant parties, with the intent to substitute the old debt with a new debt.

Whelpton (1991:164) writes that among the Bakwena of South Africa, novation is known, but in the sense that an old debt is discharged by a new debt. According to him, it is, however, doubtful whether this is novation as

understood in terms of western legal systems. An example given of novation by the Bakwena of South Africa was the following: “A and B agree that A will deliver a cow to B in exchange for an ox. At a later stage, A and B conclude a new agreement that A will give five buck to B instead of the cow”.

Before a new agreement can be concluded between A and B, performance in terms of the initial agreement must first take place. Both parties must then perform thereafter in terms of the new agreement. In this way the initial agreement is set aside and replaced by a new agreement. The initial agreement has then been replaced by the new agreement. As a contract only comes into existence by way of agreement plus performance, the parties can at a later stage refuse to continue with the new contract and cannot be kept liable in terms thereof.

The same example was put to the Swazi panel of experts, and they maintained that, before a new agreement can be concluded, the parties must first perform in terms of the initial agreement.

Prinsloo and Vorster (1990^a:19) write that novation is known to the Batswana of the North West Province. According to them, liability is based on the performance of the creditor in terms of the original agreement and the stipulated counter-performance of the debtor in terms of the new agreement.

According to the Swazi panel of experts, this is not possible, as, with novation, a new contract comes into existence, from which new liabilities,

known as '*umtwalo*' arise. The Swazi also maintained that liabilities could not arise from two different contracts.

6.7 SETTLEMENT

According to De Wet and Yeats (1978:239) a settlement, in terms of western legal systems, is a contract whereby a dispute between parties is resolved.

Prinsloo and Vorster (1990^a:19) state that with regard to the Batswana of the North West Province, the change in the original agreement can also be the result of a dispute between the parties. In the example given above under Release (6.5), it was, for instance required that group A should return the corn within two months, but group A failed to do so. To be reasonable, the parties compromised and determined that instead of returning the corn, group A would weed group B's gardens. This example creates the impression that the writers have settlement in mind, although they do not explicitly use this term. This can however not be seen as an example of settlement as there never was a dispute between A and B regarding the existence of a valid debt (cf Whelpton 1991:165-166).

It is important to differentiate between novation and settlement. Novation differs from settlement in that in the case of novation, the parties are in agreement that a valid debt exists, whereas with settlement, a dispute occurs as to whether such debt exists or not. To this extent De Wet and Yeats (1984:242) state that, for the validity of a settlement, it is essential that a dispute exist between the parties but not necessarily a lawsuit. The purpose of a settlement is to establish certainty (cf Whelpton 1991:166).

According to Whelpton (1991:166), the Bakwena of South Africa, agreed that if A alleges that B owes him R200,00 in terms of a wager agreement and B denies this, but A then, at a later stage agrees to accept R100,00 instead of the R200,00, a settlement has taken place between A and B. They describe it as ‘*gophumula diatla*’, which directly translated, means “to wipe the hands”. According to the Bakwena of South Africa, the debt has been wiped out and a new agreement has come into being in terms of the settlement.

Whelpton (1991:166) furthermore, writes with regard to the Bakwena of South Africa that it is doubtful if settlement, in the western sense of the word, could be possible among them. The Swazi panel of experts agreed with this view of the Bakwena of South Africa.

6.8 MERGER (*Confusio*)

According to Christie (2006:481), the nature and effect of merger is a method of discharging contractual obligations. He quotes the judgment of Innes CJ in *Grootschwaing Salt Works Ltd v Van Tonder* (1920 AD 492-497) to give a proper understanding of the concept: “now *confusio* in the sense with which we are here concerned is the concurrence of two qualities or capacities in the same person and in respect of the same obligation. The typical example of *confusio* and the one mainly dealt with in the books is the case of a creditor becoming heir to his debtor or vice versa. But the same position is established whenever the creditor steps into the shoes of his debtor by any title which renders him subject to his debt and it is common

cause that *confusio* takes place as between lessor and lessee when the latter acquires the leased property. As to the consequences of *confusio* there can be no doubt that speaking generally, it destroys the obligations in respect of which it operates. A person can neither be his own creditor nor his own debtor, and if there is no other debtor then the debt is extinguished.”

A phenomenon which resembles the definition given above of a merger, is referred to as ‘*kopanyo disuga*’, meaning “the meeting of debts”. This was established by Whelpton (1991:167) among the Bakwena of South Africa. According to him, the following example was put to the Bakwena of South Africa, namely: A owes B R200,00. B dies and bequeaths R300,00 to A. In terms of western legal systems it is understood that after B’s death, the capacity of the debtor and the creditor now resides in A. According to the Bakwena of South Africa, a form of ‘meeting’ of rights and obligations has taken place between A and B, but definitely not a merger. A would first have to pay the R200,00 to B’s estate before A could claim the R300,00 inheritance. This was confirmed by the Swazi panel of experts to be the custom among the Swazi.

Prinsloo and Vorster (1990^a:19) write with regard to the Batswana of the North West Province, that an obligation can also be terminated by way of merger. The following example was given to their panel of experts: ‘Group A borrowed a pack-ox (*pelesa*) from group B. Group A is so taken by the animal that they offer group B five sheep for it. Group B accepts the offer and the sheep are delivered, whereupon group A keeps the ox as their own.’

It is maintained that group B could not demand that the original contract of loan be honoured by group A, after group B had accepted the sheep. According to Whelpton (1991:168), the loan agreement should first be terminated by group A by returning the ox before a sale agreement of the sheep could take place, as no more than one obligation can flow from the same contract without the original contract having first been terminated.

The Swazi panel of experts agreed that only one obligation can flow from a contract.

6.9 CONCLUSION

Performance is a well known way in terms of which agreements are terminated. When an agreement is terminated, the contract from which such an obligation stems, is also terminated. Therefore, it is not possible for rights and obligations which have been created through a specific agreement to be amended or changed, without the initial agreement, from which those rights and obligations originated, first having been terminated. This is the reason why set-off is unknown among the Swazi. Furthermore, prescription is unknown, as the lapse of time cannot exempt anyone from his or her debts.

Chapter 7

SPECIFIC CONTRACTS

7.1 PERMANENT EXCHANGE OF GOODS AND SERVICES

7.1.1 Introduction

Regarding the classification of contracts in indigenous law, Walker, (1969:66) as quoted by Whelpton (1991:169) states that a major problem in dealing with customary law contracts is that of classification, not only to determine the scope of the subject matter *vis-à-vis* other areas of law, but also to present the subject matter in a meaningful way. According to Walker (1969:66), it is a matter of approach. He writes as follows: “Is there a law of contract among the Bamalete or are there many types of contracts, each with laws peculiar to it? While the anthropologist’s classification of tribal contracts would be according to subject matter, to the law the manner of classification should be dictated more by the nature of the rights and duties created by the legal acts”.

Walker identifies the groups of contracts:

- agreements calling for permanent exchange of goods or services, including contracts of barter, sale and employment, in the form of credit exchange as well as *quid pro quo* transfers; and
- agreements calling for temporary exchanges of goods, including loans and bailments (1969:66).

This study follows the same approach but has added contracts which have an influence on the status of persons, as a further category (See Chapters 7 and 9). Whelpton (1991:170) points out, that although it is possible to differentiate between different contracts, one must at all times keep in mind the distinctive nature of each contract. According to Strydom (1985:525), agreements are not only concluded to make provision for the material needs and requirements of life, but also to strengthen family relationships and religious obligations. This was specifically emphasised by the Swazi panel of experts.

Bekker (1989:332), discussing the various indigenous contracts, states: “In respect of the contracts of sale, exchange and loan for consumption, there is no substantial difference between the law of the land and customary law, except that no interest is ever stipulated for in the latter system, nor does it automatically run from the time the debtor is in *mora*”. According to Bekker it is not always possible to determine from pleadings under which legal system the above mentioned agreements were concluded, unless one of the parties pleads prescription.

One can agree with Bekker that there are major similarities between indigenous law contracts and that of western legal systems. In addition, the Western legal concept of prescription is only a defence and it cannot serve as a differential characteristic to an indigenous contract. It is also not correct to allege that interest is never contended in indigenous law of contracts as this is usually left to the discretion of the parties. There are incidence where parties claim interest, especially in modern times (cf Whelpton 1991:171). The difference between western and indigenous contracts are fundamental in

that the nature of an indigenous contract is concrete, where a contract in terms of western legal systems is based on consensus only. Important legal rules emanate from the fundamental differences which impact on the total spectrum of the indigenous law of contract (Whelpton 1991:171). This corresponds with the position among the Swazi in the Kingdom of Swaziland.

7.2 THE SALE AGREEMENT

With regard to the sale agreement Olivier and others (1989:544) allege in general that in the indigenous law of contract in Southern Africa, both the sale and exchange agreements are recognised. According to them, the sale agreements currently mostly exist in that the relevant parties agree that the specific subject matter should be delivered by the one against the payment of an amount of money to the other. They write that the use of money has only become a commercial medium since interaction with western culture. In earlier days, animals and products were offered as a medium which made it difficult to differentiate between sale and exchange. In traditional societies, the exchange trade was also not particularly comprehensive as each household was mostly self-sufficient (Olivier et al 1989:545).

Walker (1969:67) states the following with regard to the Bamalete of Botswana: “Traditionally the agreements for transactions amounting to a sale of goods were in the form of barter arrangements involving either *quid pro quo* exchange of goods or a transfer of goods by one of the parties in the agreed upon expectation of a corresponding transfer of the other party at a later time. With economic development and the accompanying introduction

of members of tribal society into the cash economy, barter transactions have been supplemented by transactions involving the transfer of goods in exchange for some medium of exchange, so that today the two types of transactions now exist side by side". Prinsloo (1990^b:35) agrees that this position coincides with that of the Batswana of the North West Province. Gluckman (1965:176-178, 181-182) and Schapera (1970:242-244) confirm this with regard to the Barotse of Zambia and in respect of the Batswana of Botswana respectively.

Among the Swazi, exchange is a contract whereby both parties undertake to deliver to each other a thing or things with the purpose of transferring ownership of those things. An example of this contract is where A gives B a beast in exchange for B's five sheep. The siSwati term for exchange is '*untjintjiselana*'; the reciprocal verb indicates a reciprocal obligation to deliver goods.

The features of the contract include performance and counter -performance, that both performances exist in delivering a thing or things, and that the intention with such delivery is to transfer ownership. In the absence of any one of the preceding elements, no contract of exchange comes into being. Thus, the following examples do not constitute a contract of exchange: where one party must render performance in giving a thing to another; or where a party must deliver a bull for the rendering of service. The term 'sale agreement' is not known to the Swazi. The process is rather seen as bartering.

In terms of western legal systems, any item can be an object of a sales agreement, that is to say, movable or immovable, incorporeal or corporal and even future goods (De Wet & Yeats 1978:278). According to the Batswana of Botswana only corporal moveable goods can be sold. Incorporeal and future goods cannot be sold. This corresponds with the view of other authors of indigenous law cf Schapera (1969:328; 1970:203-205); Vorster (1981^a:71); Coetzee et al (1985:136); Prinsloo (1990^b:29-30) and Whelpton (1991:174).

For a valid exchange (*kuntjintjiselana*) agreement among the Swazi, the parties must agree on the things to be exchanged. The property to be exchanged must therefore be adequately specified in the agreement. Where livestock forms the object of the agreement, the parties must agree on the type, size or age, sex and number of the animals. The parties cannot merely agree that counter-performance should be reasonable, or that it will be agreed upon at a future date. There must be certainty about the performance and counter-performance. There can be no agreement if there is a mistake about a material element of the agreement, for example, an ox instead of a heifer as the object of exchange. This corresponds with Whelpton's findings among the Bakwena of South Africa (1991:175).

According to the Swazi panel of experts, unlawful transactions are not recognised. Examples of unlawful contracts in terms of Swazi law and custom are the exchange of a field or residential site for livestock or movable items, or the exchange of a field for another field without permission of the chief (*sikhulu*). Fields and residential sites (*indzawo*

yokuhlala) are allocated to families for their exclusive use, but are not regarded as negotiable things.

7.2.1 Terms of the exchange of contract (*kuntjintjiselana*)

The Swazi panel of experts pointed out that in the case of exchange by the delivery of things, transfer of ownership (*kumenta umnikati*) is intended and it is therefore implied by law that each of the parties must be the owner of the thing concerned. It is always understood that nobody other than the transferor must have a better title to what is transferred, and that a party who knowingly exchanges another's property is considered to be a thief. If a party does not have a valid title, the true owner may claim his property from the transferee, and the latter may demand the return of his commodity from the other party.

Ownership of the animal or other moveable thing passes on delivery by one party to another pursuant to the contract of exchange. For the delivery to be perfect, it must be either a physical delivery of the thing or pointing out the thing with the intention to transfer ownership. Mere description of the thing (*kuichaza*) without showing it to the transferee is not sufficient for delivery. Before delivery of the thing, the risk relating to it remains with the debtor, for example, a beast that dies must be replaced by the debtor (cf Prinsloo 1990^b:30-31). Similarly, progeny of an animal or an increase of any other thing accrues to the debtor until delivery takes place. After delivery of the thing, its loss or other risks are borne by the transferee and any increase likewise accrues to the transferee. Should the creditor refuse to accept proper delivery by the debtor at or after the stipulated time, he bears the risk from

the time of his refusal (cf Whelpton 1991:176). As reported by Prinsloo (1990^b:31) regarding groups elsewhere in Africa, in the case of exchange or sale, the risk remains with the debtor or seller until delivery of the thing, but increment accrues to the creditor or purchaser if he has made counter-performance.

Things are exchanged without warranty against latent defects, irrespective of whether the creditor has inspected the thing or not. According to Prinsloo (1990^b:31), things are exchanged “voetstoots”, that is without warranty against latent defects, irrespective of whether the creditor has inspected the thing or has not done so. Prinsloo furthermore writes that “among the Bahurutshe, Bakwena and Bafokeng the parties can expressly agree to a warranty against a specific defect, for example that the cow concerned is without mastitis and if the defect is afterwards discovered, the thing must be replaced”. Such an agreement is unknown among other groups studied (cf Prinsloo 1990^b:31). A party who, being aware of a defect, denies it, may be held liable for replacement of the defective thing. Generally, according to the Swazi panel of experts, performance and counter-performance must take place simultaneously. According to Prinsloo (1990^b:32), it is implied or natural terms of barter that performance and counter-performance must take place simultaneously, and that the offeror takes his commodity to the place of the offeree where the exchange of the things concerned will take place. However, it will all depend on the terms of the contract and what the parties agreed upon. The parties may expressly agree that the things must be delivered at another place. However, a place other than the address of either party is considered very unusual. It may also be agreed that the counter-

performance will take place on a future date, for example, after the start of the ploughing season (cf Whelpton 1991:176).

Prinsloo (1990^b:32) writes that, although the Batswana of the North West Province do not have a standard medium of exchange, some groups have fixed equivalents, such as one beast and five sheep or a pot and the grain it holds.

A standard medium of exchange exists among the Swazi, for example, eleven goats for one cow (ten female, one male); six goats for one cow (five females, one male). However, it seems as if there is no established rule that restricts the parties to the established equivalent or in any other way with regard to the value of their performance (cf Prinsloo 1990^b:32).

7.2.2 Remedies for breach of contract

According to Prinsloo (1990^b:32), if a debtor fails or refuses to perform when he is liable to do so, he may be ordered in an ensuing case to deliver the thing concerned. An order for the return of what has been rendered by the creditor is the obvious one when the creditor asks for it or when the thing owed by the debtor is no longer available. Schapera (1938:239; 1965:151; 1969:327), Gluckman (1965:180) and Ghai (1969:342-343) as quoted by Prinsloo (1990^b:33), state that an order to implement the terms of the agreement and one for cancellation of the contract and the return of the creditor's goods, are also alternative remedies for breach of contract in Botswana, Zambia and Kenya.

Prinsloo (1990^b:32) furthermore states that whether the creditor chooses to insist on implementation of the contract or on rescission, he is not entitled to damages in the form of reimbursement for his expenses incurred in anticipation of counter-performance by the debtor, for example by building a kraal or obtaining fodder for the livestock to be delivered. The expression that one cannot make a kaross for the baby before the child is born is also used to explain that one should not incur expenses before one is in possession of the thing concerned. Among the Bakgatla, Bakwena and Batlhaping, expenses incurred by the creditor with regard to the counter-performance, such as hiring a herdsman to fetch the animal owed by the debtor, are recoverable. Damages for expected profit are, however, unknown. Among the Tswana of Botswana, damages or loss flowing from breach of contract are allowed and this fact is viewed by Gluckman (1969:77) as exceptional in Africa.

Prinsloo (1990^b:33) points out that it is reported for Botswana that the court can alter an agreement to avoid hardship by ordering a creditor to accept what is offered to him in full settlement of a debt, lest he may receive nothing. If the creditor is prevented from performing by the debtor, for example, if the debtor has received the five sheep as counter-performance but cannot deliver the ox because he has sold it to another person in the meantime, the creditor may either insist on the implementation of the contract or rescind the contract and ask for the return of his five sheep. The debtor is bound to the contract, if the creditor so chooses, because the impossibility of his performance is of his own making. This was also observed by Whelpton (1991:177) among the Bakwena of South Africa. Among the Batswana of the North West Province, the court cannot alter an

agreement but can advise the creditor to accept a reasonable offer where his claim would cause hardship to the debtor. The purpose thereof is to assist the parties in reaching a settlement (Prinsloo 1990^b:33).

According to the Swazi panel of experts, a similar approach is followed by the Swazi.

7.3 RENDERING OF SERVICES

This concept corresponds with the Roman law *locatio conductio operarum*, where the acceptance of work can be compare with the Roman law concept *locatio conductio operis*. The various forms of rendering services, which are known to the different indigenous peoples are discussed in this study as well as those in terms of Swazi law and custom.

7.3.1 Renting and letting of services

Vorster (1990^c:152) refers to this form of rendering of services, as supervision and management. According to him, this form of rendering of services is known among various Tswana tribes. Vorster points out that the Bakgatla ba Mosetlha refer to this service as '*go thapiwa*' and differentiate it from independent services which is known as '*boitiredi*'. According to him one can therefore assume that the service agreement is known among indigenous peoples and that the terminology used distinguishes the different forms of service rendering.

Types of services, discussed by Vorster (1990^c:152) are scuffle (*tlhagolo*) and housework (*tiro ya gae*). According to him, there are no formalities to be met when entering into a service contract. An individual could initially not bind himself independently to rendering a service whereby in the modern indigenous law certain categories of persons are now seen to have the capacity. According to Vorster (1990^c:154), no particular fee is specifically agreed to under the Batswana of the North West Province, but that in practice, forms of remuneration existed, for example, that a specific portion of a crop be given if the services related to work done in the fields. Schapera (1970:254) confirms this finding of Vorster. Vorster (1990^c:154) further states that an important principle applied in the original indigenous law is that the full remuneration or fee is given at the proper completion of the service or period of service. Should the renderer of services not complete the task or service period, he was not entitled to any payment. The western practice of a pro-rata portion of fees paid for partial work done, did not exist, even if the non-performance was due to the employer. An example Vorster gives is where the employer had to supply the goods to enable the worker to do the job, and he failed to do so, as the employer was only obliged to pay once the task is completed in its entirety. Vorster points out that the Batlhaping indicated that they know the practice of a pro-rata payment although other tribes mentioned that this was not an acknowledged principle with them. Furthermore, Vorster (1990^c:154) states that payment can be made partially in cash and partially in goods, or just by way of a cash payment.

Whelpton (1991:184) writes that, according to the Bakwena of South Africa, a service agreement terminates upon completion. It can also be terminated

by mutual agreement. According to Vorster (1990^c:155) the illness or death of the employer has no effect on the executability of the contract, as the agnatic group of the employer remain liable for any obligation and becomes a substitute of the employer. As contracts are nowadays, mostly concluded between individuals, death or illness will impact on the contract. If the parties do not specifically agree that a distinct person should do the work, the employee could then, in a case of illness, send a substitute (*moemedi*) to do the work on his behalf. However, such a person is not a party to the contract, but takes the place of the ill employee on a temporarily basis. This position was confirmed by the Swazi panel of experts.

According to Schapera (1970:250) servants are used on a great scale by the Tswana. They are in the service of the tribal chief, his family and other wealthy people. Persons serving as body and domestic servants are fed by their masters, dressed and given housing facilities. Sometimes gifts such as cattle or goats are given to them, and these become their property. Apparently, servants working on such basis do not have the capacity to enforce payment for their services and therefore one cannot refer to a contractual relationship between them. This position still to a greater extent also prevails among the Swazi in the Kingdom of Swaziland.

According to Whelpton (1991:185), the service of an individual or a group can be hired. An example of services rented by a group is known among the Bakwena of South Africa as '*go jaka*'. '*Go jaka*' refers to a situation where a number of workers from an area execute a specific task somewhere else, for example when a farmer requires the services of a group of persons during a specific period to assist with harvesting. Earlier, these people were paid from

the proceeds from the harvest with a few bags of corn or wheat, but nowadays, money has become the preferred method of payment.

'Go jaka' has gained a further meaning among the Bakwena of South Africa, as it now also refers to other types of tasks by individuals or groups of people in other areas, such as contracts concluded to work on mines in Gauteng or elsewhere. It is then also acceptable to refer to these people in their re-located working areas as *'ba ile majakong'*, meaning "people left to go and attend a specific task" (Whelpton 1991:186). This practice is unknown among the Swazi.

A further custom which does not comply with the requirements of a contract, but which could possibly be associated with the aforesaid practice, is the use of groups of people working together to execute a specific task for someone else. These customs are known as *'kutlwano'* among the Bakwena of South Africa and are characterised by the fact that no payment is made for work done (Whelpton 1991:186). Based on this, it can, according to Whelpton (1991:186), not be seen as a contract. These groups of people mostly exist of family, neighbours and friends and nowadays even strangers can participate. They are not referred to as employees, but guests *'balalediwa'*. This phenomenon was also confirmed by the Swazi panel of experts as to existing among the Swazi.

According to Schapera (1970:254), the custom of *'letsema'* is the clearing of trees and bushes from a field, weeding, and reaping, threshing corn, building the wall of a hut, fencing of a field or cutting rafters. Schapera states that this is a well known labour contract. Whelpton (1991:86) is of the opinion that

this is rather a form of aid which is given on a reciprocal basis to complete a major task as quickly as possible. According to Vorster (1990^b:53), it is a peculiar institution that serves to facilitate co-operation and goodwill within a community. The Swazi panel of experts agreed with Vorster's point of view.

Whelpton (1991:187) states that it is important that the person for whom the work is carried out is present whilst the work is done as it must be done in terms of his instructions. The Bakwena of South Africa refer to it as '*letsema le thatha ka mong wa lona*'.

The Swazi panel of experts confirmed that the person for whom the work is done must be present. They say: '*lilima liyaphekelwa*'. The person to whom the services are rendered, usually supplies food and drinks to the workers to show his hospitality and also to assist the workers to do their work comfortably. The Tswana refer to it as '*thatha ka moswang*'. This must, however, not be seen as remuneration for the work done. Strydom (1985:451) states that a similar custom applies with the Southern Sotho of Qwaqwa. Schapera (1970:254-255) states that a similar custom exists among the Tswana (*go tsaya letsema*) in terms of which a group of people are invited to come and share in meat with the understanding that they must then at a later stage assist in a specific task to be undertaken. The Bahurutshe of the North West Province know this custom and refer to it as '*go tsaya mogwang*' (Vorster 1990^b:52). The meaning of '*go tsaya mogwang*' according to the Tswana is to incur a debt and it does not relate to any form of '*letsema*'.

Among the Swazi, manual labour is known where one man may hire another to perform work for him (*kuncusa*), such as building, thatching the roof of a hut, clearing a field for cultivation, cutting rafters for a hut, digging a well, or fetching a load of firewood. Most of these activities are paid for at a standard rate, such as a heifer for clearing a new field or roofing a hut; but the nature and extent of the work to be done, and the payment to be made for it, must be specified before the commencement of the work. As a rule, payment is made when the work is done, and if it is delayed for too long, the workman may sue for it. He cannot claim it while the work is incomplete, or if he does, will receive less than they had agreed to. He must fulfill his contract before he is entitled to receive any payment.

There is a special form of labour contract among the Swazi, known as '*lilima*'. When a person has a big task on hand which he wishes to complete in a short time, such as clearing trees and bushes from a field, weeding, reaping, threshing corn, building a wall of a hut or fencing a field, he may invite his friends and neighbours to help him on an appointed day. All those coming to assist are paid for their labour, usually in beer or tobacco. If they finish their work on the same day, the payment is regarded as sufficient. If it is not completed, they may come again the next day if there is more beer or whatever commodity has been used as payment; but if there is nothing left, they are not bound to put in any more work.

7.3.2 Acceptance of services

There are very few scholars of indigenous law who have researched this form of service. With regard to the Batswana of the North West Province,

Vorster (1990^b:45-60) discusses it comprehensively and refers to it as an independent service. According to him, it is work that is not of a continuous nature. The most important characteristic of this service contract is, according to him, the fact that the person who executes the work, does it independently from the 'owner of the work'. The usual requirements for the validity of a contract are also applicable to this service contract. In addition, the parties must specifically agree to the nature and extent of the work. It is, however, not necessary for the work to be fully described, general terms are acceptable. Vorster (1990^b:46) gives, *inter alia*, as examples of independent service contracts, the building of a hut, fetching of wood, digging of a well and looking after live stock. Standard remuneration was known under the Batlhaping, whilst the Barolong, Batlharo, Bahurutshe, Bakgatla and Bafokeng indicated that the parties have to agree among themselves on the payment for such service.

Whelpton (1991:188) indicated that the Bakwena of South Africa doubted that the taking care of live stock at the cattle post of the owner could be referred to as an independent service. Vorster (1990^b:48) says in this regard that "the herdsman (*modisa*) is not under the constant control of the owner of the cattle, although he is bound to general instructions. He is left more or less to himself and may in this sense be regarded as an independent worker". According to him, the Bahurutse and the Bafokeng of the North West Province allege further that the contract usually lasts for one year, after which it is renewed.

According to Whelpton (1991:188) the Bakwena of South Africa was of the opinion that the herdsmen, due to practical reasons, are not under the

permanent control of the owner of the livestock. They act under specific instructions such as which sections of the pastures should be utilised, when the cattle should be dipped or when the calves should be separated from the cows. In addition the purpose is that the herdsmen out at pasture should be of a more permanent nature. To encourage this, they are often given some of the offspring of the live stock. The herdsman is in the same employment relationship as those in a hire and letting of services. Any damages caused by the animals of the owner is the responsibility of the owner, he is therefore liable. Should the damage be the result of negligence or intent by the herdsman, the owner can claim the damages from the herdsman.

The Batswana of the North West Province, according to Vorster (1990^b:49), hold the owner of the live stock liable for the damages by the livestock whilst under the supervision of the herdsman. It is a specific characteristic of an independent service contract that the acceptor of the work himself is liable for any damages which may flow from his activities and not the 'owner of the work'. Vorster (1990^b:50) mentions that there are variations in the different tribes and that there are tribes in the North West Province, who view this form of service rendering as an ordinary employment contract.

According to Whelpton (1991:189), it seems strange that Vorster (1990^b:51) discusses '*letsema*' under this type of service agreement. The Bakwena of South Africa say that, '*letsema*' is not a contract, but rather a form of service by friends, although it is also done under the supervision of the 'owner of the work' and no payment is made to the workers. Vorster (1990^b:52) states in this regard: "The participants work as a team according to the instructions of the principal (*mong 'a tiro*). They do not, however, work under his

supervision. This does not, however, imply that the work of the participants should be regarded as independent service. They are not invited for their particular skills but rather for their labour.” The Bakwena of Mogopa of Hebron, according to Whelpton (1991:190), do not agree with Vorster’s statement that the workers do not work under the supervision of the owner of the work. They rely on the legal maxim *‘letsema le thatha ka mong wa lona’*, meaning “the team is strong through the owner thereof”. According to them, the owner must be present whilst the work is done, which can be interpreted that the workmen work under the owner’s supervision.

The Swazi panel of experts agreed with this point of view. They refer to it as *‘lilima liyaphekelwa’*.

According to the Bakwena of South Africa, a notable characteristic of an independent service is specific knowledge or capacity which is required (Whelpton 1991:190). Examples of such independent services are the erection of a building, welding, plumbing and electrical works. They pointed out that the person who undertakes to do a specific piece of work is the lessee as he rents the work and the person who offers the work, is the lessor as he lets the work. The parties must reach consensus about the specific task to be done as well as payment for such services. The contract commences as soon as the workers begin their task, or if the parties (lessor) for whom the task/work is undertaken, has paid the workers, partially or in full. It is, however, not custom to make payment of the full amount upfront. The payment must be in money form, otherwise it is not a rental agreement. It is not conditional, but nowadays, it is the custom that the contract should be reduced to writing (Whelpton 1991:190).

The acceptor of the work is not entitled to payment if the work has not been completed in totality. Schapera (1965:149, 1969:324, 1970:245) confirmed this finding. Walker (1969:72) holds an opposing viewpoint. He states that in an exceptional case, where all moneys have been paid before completion of the work, the value of the money that exceeds the value of the work completed can be recovered. According to Vorster (1990^b:47), the Barolong and the Batlharo of the North West Province, are of the opinion that one can only insist on payment if the work has been altogether completed. Moneys paid in advance cannot be recovered.

According to the Swazi, one can insist on payment if the work has been altogether completed. Moneys paid in advance can be recovered if the work is done. The contract terminates as soon as the work has been satisfactorily completed, or if it becomes impossible to perform in terms thereof, due to death or *force majeure* (superior powers). If the work is only partially completed by the acceptor, and remains in default, he can be held liable for direct damages which the owner of the work as a result thereof, may suffer. The contract can be terminated by way of a demand in the presence of witnesses, should the acceptor remain in default.

7.3.3 Specific services

According to the Swazi panel of experts, this form of service embraces the services of a professional nature which are applicable to specific service relationships and which are not sought in the normal cause of business. An example is the acquisition of the services of a traditional healer, known as '*kubita inyanga*'.

Whelpton (1991:192) states that such services relate to services of '*dingaka*' and medicine people under the Tswana tribes. Various literature by authors Pauw (1985:130), Strydom (1985:432), Schapera (1970:255) and Vorster (1990^b:53) refers to the various tribal customs that relate to these services.

Schapera (1970:255) writes that these services are applied in the protection of people and homesteads as a protection against sorcery (*boloi*) and of fields, cattle and women for fertility.

The Swazi panel of experts confirmed that traditional healers undertake such work as divination, medical treatment, and the 'doctoring' of people and homesteads as a protection against sorcery, fields, cattle and woman for fertility, which confirms Schapera's (1970) view on other indigenous communities. Among the Swazi there are two types of agreements that may be concluded. The first one is with an '*inyanga yekubetsela likhaya*' (for protection of the home) for a period of five years. He performs these tasks and occasionally checks on his work. If the customer is satisfied, he will return to repeat the whole process. The second type of agreement is with the '*inyanga yemkhuhlane*' (for healing).

Among the Swazi, a traditional leader, when summonsed by a client, generally first 'throws the bones' to divine the nature of the sickness or other problem, he is required to remedy. The '*inyanga*' usually demands a fee called '*inkanyiso*' to begin the process. This must be paid immediately before the divination is performed, in order to 'make the bones speak'. The fee for the 'doctoring' itself varies according to the nature of the work to be

done. The fee is always paid after the doctoring has been done. It seems to be a universal rule, however, that no fee is payable if the treatment has not been successful. If it has been successful and the fee is not paid within a reasonable time, the traditional healer has the right to sue for it.

Olivier (1989:550-551) also mentions that the use of people such as a witch doctor or medicine doctor is a general practice among the indigenous people. They are paid for their services by way of skins, wheat or money and they can enforce such payment if the treatment or service is successful. According to Whelpton (1991:192), the services of a medicine doctor (*ngaka*) or a fortune teller (*maitseanape*) among the Tswana are often called for various purposes, for example, to heal a sick person, to protect a home, to ensure the successful and profitable trading of a business or to allocate lost goods. A contract is concluded as soon as an agreed amount of money has been paid to the '*ngaka*' to diagnose (*temogo*) the kind of service required. Once the diagnoses had been made, the '*ngaka*' will indicate if he can render the service and whether the client wants to make use of it. If the client decides that he wants to make use of the services, he must pay an additional amount of money (*go khunolola moraba*) cf Vorster (1990^b:54). Instead of money, sheep can also be given to open the bag. Medicine is then given to the client that he has to drink or to hide in his business, whatever the problem is that needs to be resolved. According to Vorster (1990^b:54), the commencement of such treatment is known among the Tswana as '*sethatho*' (desire).

Traditionally, among the Swazi an '*inyanga*' could not demand payment if the treatment did not produce the desired outcome, but in modern times he

can demand payment notwithstanding whether treatment was successful or not. Regarding the Batswana of the North West Province, Vorster (1990^b:55) states that failure to cure is looked upon as improper performance and therefore as non-performance and the '*ngaka*' is not entitled to any further payment. The experts for the Bafokeng maintained that in such circumstances the '*ngaka*' would not be entitled to the second payment, that is payment after the treatment. The further payment referred to is the payment to be made after the treatment and it is not clear whether this payment forms part of the agreed amount. If the latter payment is part of the agreed amount, it is payable, according to the Batswana of the North West Province, payable (Whelpton 1991:193).

With regard to the Bakwena of South Africa, Whelpton (1991:194) states that it is important to conclude such contract in the presence of witnesses, should a dispute arise at a later stage. These witnesses can be family or friends. Earlier, the presence of witnesses was linked to sorcery practices. The function of the witnesses was to ensure that the '*ngaka*' did not partake in such activities. This corresponds with the position among the Swazi in the Kingdom of Swaziland.

Another form of rendering services among the Swazi take the form of the magic services to protect homes, cars or livestock. For each service, a separate amount is first paid before the service is rendered. The parties agree beforehand for how long these services will be applicable. Usually it is only for a specific, fixed period, for example the transport of people to a specific place and back. If the service was not successful, one cannot demand a

refund. This was also recorded by Whelpton (1991:194) as being the position among the Bakwena of South Africa.

7.4 THE EXCHANGE AGREEMENT

As stated under 7.2, exchange among the Swazi is a contract entered into with the purpose of transferring the ownership of things. According to Whelpton (1991:1979), the Tswana tribes understand exchange as a contract by way of which each party delivers a subject matter to the other with the intent that ownership of the thing should pass (*tumelano ya kanayo*). Unless otherwise agreed, the parties must deliver the things simultaneously. The reciprocal principle can be deducted from the verb '*go anaya*', which means "for one another". The legal maxim which applies to this among the Tswana is '*mabogo dinku athebana*', meaning "the sheep washes the hands of one another." The exchange contract must comply with the requirements of a valid agreement. An exchange agreement comes into being once one of the parties delivers the agreed thing to the other party. The parties are entitled to change their mind without any legal consequences, at any time prior to any one of them performing in terms of the agreement. Consensus without any performance cannot force anyone of the parties to perform or to deliver (cf Prinsloo & Vorster 1990^a:10).

According to the Swazi, the parties must specifically agree on the things to be exchanged and must personally point it out to each other. The parties must be the owners of such things, and unless agreed otherwise, it is assumed that the exchange goods are free from any defects. The parties must however familiarise themselves with the condition of the things and if they

fail to do so, which is seen as being negligent, they will bear the consequences thereof. Intentional misrepresentation is seen as fraud, and the prejudiced party has the choice of setting (cancel) the agreement or demanding due performance. This is also the position among the Bakwena of South Africa (cf Whelpton 1991:180).

According to the Bakwena of South Africa, the following things cannot form part of an exchange contract: household goods, family goods, heritant goods, and moveable goods for immoveable goods (Whelpton 1991:181). Vorster (1981^a:71) and Coetzee et al (1985:136) state that other groups in the North West Province, may also not exchange land for moveable goods.

Schapera (1970:217) states that pots, baskets and skin rugs were exchanged for small stock (sheep and goats) and that small stock were exchanged for cattle. According to him, barter was traditionally not cumbersome as each household was self-sufficient. Contact with western lifestyles, however, brought about major changes in barter. In recent times it is not unknown for stock to be exchanged for a vehicle or tractor. The exchange contract where the subject matter is livestock, is however, the generally known contract. A book is kept especially for the purposes of exchange of livestock, where ownership thereof changes, which is completed before witnesses at the office of the tribal authority. Full details of the parties are inserted, the sex and colour of the animals and the date of the transaction as well as the brand mark of the animals. Theft of stock is seen as a very serious crime and therefore proper precaution is made to prevent this (Whelpton 1991:181). The Swazi panel of experts concurred that nowadays, proper records are kept of things exchanged.

7.5 GOODS GIVEN ON LOAN FOR CONSUMPTION

The available literature on indigenous law makes little reference to loan for consumption. Olivier (1989:548) only mentions in general that, under this agreement, goods are loaned to a person with the understanding that this person will use them and will then, at a later stage return the same goods in equal quantities. Strydom (1985:465) writes with regards to the Bakwena of Qwaqwa, that they acknowledge the principle of loan, namely the intention that equal quantities of a similar product must be returned. According to him, the goods so returned must be of the same, or approximately of a similar quality. This is in accordance with the Swazi in the Kingdom of Swaziland.

Whelpton (1991:195) states that, according to the Bakwena of South Africa, a loan is a contract which is generally used. The extent of the contract is where one party will loan to another party for example a bag of maize for consumption and that the other party would then, at a later stage, return a bag of similar quality and quantity. Ownership of the subject matter passes as the lessee must have the right to consume it. The subject matter is, therefore, a consumable but also a replaceable item. Money is also often given on loan.

Pauw (1985:125) mentions with regards to the Imidushane and Amabhele of the Eastern Cape that, where money is the subject matter of a loan, it depends on the parties whether interest will accrue. Whelpton (1991:195) confirmed that this practice is also prevalent under the Bakwena of South

Africa, and that the borrowing of money in certain areas, implies that interest will be paid.

Amongst the Swazi, a loan for consumption is a contract whereby one person delivers a fungible thing to another, who must return the same thing of the same kind, quantity and of similar quality. The Swazi refer to it as '*kwenanisa*'. There must be an obligation on the receiver to return an equivalent to what he had received. If it is agreed that it is not to be repaid, the transaction is not a loan. A fungible is something which can be measured, counted and weighed. Loans for consumption are used to meet economic emergencies and are an integral part of life. Thus, where a man suffers a poor yield of grain, it is usual for him to borrow his neighbour's surplus so that his family may be fed, and to re-deliver a similar amount of grain to the lender after the following harvest, or as soon as he is able.

7.6 DONATION

Generally a donation can be defined as an agreement in terms of which one person donates patrimonial goods to the other, without compensation, with the understanding that the person to whom it has been donated becomes the owner of the goods and has accepted such a donation. According to Whelpton (1991:196), a mere promise to give a gift among the Bakwena of South Africa, is not sufficient to enforce a valid contract: '*tsholofelo ga e tlhabise diithong*', meaning "a promise does not enlighten the heart" is the legal maxim used in this regard. Schapera (1970:142) writes that among the Batswana of Botswana a mere promise is sufficient to bind the parties and is a valid and enforceable contract.

According to Whelpton (1991:196), two kinds of gifts are distinguished among the Bakwena of South Africa, namely '*mpho*' (a gift) and '*etshwaelo*' (where a father chooses a certain animal to become his son's property). Schapera (1970:239) mentions that these forms are also known among the Batswana of Botswana. Van Niekerk (1990^a:37) came to a similar conclusion with regard to the Batswana of the North West Province. According to Whelpton (1991:196), there is a distinction between conditional and unconditional gifts. A gift can therefore be made subject to some or other condition. '*Mphi*' (a gift) among the Bakwena of South Africa is an example of an unconditional gift where proprietary rights immediately passes to the receiver thereof. With '*setshwaelo*', meaning "where a father chooses a certain animal to become his son's property", the ownership of this gift will only take place at a later stage, for example, the death of the father. Until such time, all rights and control remain vested in the father and the recipient will only receive these rights when the father dies.

A gift that has been given cannot be reclaimed back: '*seyamosateng ga se boe*', meaning "that which goes home, cannot come back", that is to say, a gift is a gift (Whelpton 1991:197).

According to Olivier (1989:547), the head of the family has a discretion to give family goods to another as a gift, and to this extent there are no specific differences between common law and customary law.

The Swazi could not conceptualise the concept of a donation, being a contract. They do however, donate things to each other, but do not regard this as a contract.

7.7 MARRIAGE CONSIDERATION (*EMALOBOLO*)

'*Emalobolo*' is one of the main requirements or elements for a marriage to come into being in terms of Swazi law and custom. The process and ceremony of delivery of *emalobolo*, or at least the negotiations which result in a guarantee of delivery of *emalobolo*, form part of the whole process of the marriage negotiations which initiate the creation of a marriage between two families. The Swazi refers to it as '*kuhlanganisa bukhoti*'.

Traditionally, several types of implement and livestock could be delivered as *emalobolo*. These include ploughing implements (*inkhubazana*), goats and cattle. '*Inkhubazana*' was a special valued hoe made of cast iron. Its value was equivalent to that of a cow. As a result of progress, however, the use of implements and goats has fallen into disuse, and cattle remain the dominant form of *emalobolo*. Some families use money as a form of *emalobolo*. This is an arrangement reached between the two families who also agree on the specific amount for each beast that has to be delivered.

- **The significance of *emalobolo***

The main purpose of *emalobolo* among the Swazi is to strengthen the relations between the family of the bride and that of the bridegroom (*kuhlanganisa bukhoti*). *Emalobolo* also vests guardianship of the children born of the marriage in the father's family. If a child is born without *emalobolo* having been delivered, or agreed on, it belongs to the family of the mother (cf Fannin 1967:13).

Nhlapo (1992:48) with regards to the Swazi, refers to '*lobola*' as a "factor in the settlement of disputes between man and wife". A husband who ill-treats his wife until she is compelled to return to her home may forfeit the *lobolo* cattle.

According to Fannin (1967:13), referring to the Swazi, '*lobolo*' means: "cattle (or their equivalent in money) which the bridegroom, his father or his guardian agrees to deliver to the father or guardian of the bride for the purpose of ratifying the matrimonial contract between the group of the bridegroom and the group of the bride and of ensuring that the children of the marriage adhere to the family of the bridegroom."

Nhlapo (1992:48) writes the following with regard to the Swazi: "It now appears fairly settled that an important rationale in the minds of those who practise the custom is that the cattle transferred to the woman's family compensate them for the loss of their daughter and her reproductive capacities." According to Nhlapo (1991:48), these cattle are then used to 'marry' a bride for one of her brothers, thus bringing in another 'reproductive unit' and keeping the groups in a state of equilibrium.

Conversely, if the woman is at fault, her father may have to return the cattle to the husband. According to Kuper (1963:16), the underlying assumption in all this is that no Swazi wants to part with cattle. Marwick (1966:133) referring to the Swazi, observes: "The whole question of divorce brings on the readiness and ability of the woman's father to repay the *lobolo* or portion of it".

- **Time of delivery of *emalobolo***

There is no prescribed time for the delivery of *emalobolo* among the Swazi. Negotiations for the delivery of *emalobolo* start on the day the man's family comes to the woman's family to ask for her hand in marriage (*batomcela*). Usually *emalobolo* is delivered immediately after the marriage ceremony (*kugidvwa kwemtsimba*). That is why Swazi usually say: '*kulotjolwa umfati*' (you deliver *emalobolo* to a married woman). If the delivery of *emalobolo* is not affected as a result of the agreement between the families, the outstanding *emalobolo* becomes a debt against the groom's family. In fact, it may well be that the delivery of *emalobolo* is deliberately staggered because the Swazi believe that '*umfati akacedvwa*', meaning "that it is not proper to effect full delivery of *emalobolo* at once". It should be noted, however, that non-delivery of the full *emalobolo* has no bearing on the validity of the marriage.

- **The number of *emalobolo***

The number of beasts (cattle) required for *emalobolo* among the Swazi is prescribed by the parents of the woman when the prospective groom's family come to ask for her (*kucela*). This number will depend on the other variables such as the status and rank the woman holds in society and within the family. Thus, the following ranking described below is observed when prescribing the number of cattle to be delivered for *emalobolo*.

If the woman is a daughter of:

- a king, no fewer than 50 beasts are prescribed;
- a prince, no fewer than 30 beasts are prescribed;
- a chief, no fewer than 20 beasts are prescribed; or
- an ordinary person, no fewer than 15 beasts are prescribed.

The first-born girl (*inkhosatana*) and the last-born girl (*litfumbu lentfombatana*) are also ranked higher and more *emalobolo* will normally be rendered for them than for the other girls in the family.

In addition to the prescribed number of *emalobolo* mentioned above, the groom's family also delivers the '*lugege*' and '*insulamnyembeti*' beasts. The '*lugege*' beast is a beast given by the groom as a gift to the bride and the '*insulamnyembeti*', literally meaning "to wipe off the tears", is a beast given to the bride's mother. These beasts must be delivered, irrespective of whether or not there is an agreement regarding the delivery of *emalobolo* at a future date. The '*lugege*' beast will not be slaughtered if no agreement has been reached (Kuper 1963:22).

It is incumbent on a father to provide *emalobolo* to each son for his first wife. If the father dies, the obligation descends to his successor.

- **The source of *emalobolo***

The father of the groom may refuse to provide such cattle under certain circumstances, for example when he does not really like the daughter-in-law. However, he may be persuaded by the family to assist the son. Cattle for the wife of a son may be taken from cattle obtained from the marriage of daughters of that house (such as the son's uterine sisters). If a younger brother borrows cattle from his house to provide *emalobolo* for his wife, he is required to return these cattle when he receives *emalobolo* for his eldest daughter.

Since the delivery of *emalobolo* may be deferred, it may also be promised in respect of cattle not yet received as *emalobolo* of a daughter who is yet to be married. A mother may also provide *emalobolo* for one of her sons, using the offspring of her '*insulamnyembeti*' beast meaning "to wipe off the tears". This becomes a debt in the estate of the mother which the son must repay even if the mother is deceased. If the mother is deceased, the debt must be paid to the last-born son.

- **Distribution of *emalobolo***

Emalobolo received from the marriage of the eldest daughter of each house accrues to the estate of the head house '*indlunkhulu*'. *Emalobolo* received from the marriage of subsequent daughters of each house accrues to their respective mothers' houses.

- **Return of *emalobolo***

Emalobolo may be returned among the Swazi, but only under most exceptional circumstances. Reasons for the return of *emalobolo* include:

- where the wife dies without bearing children and her parents do not send someone in her place; and
- where the woman leaves her marital home (*kwemuka*), and, when confronted, refuses to go back to her husband.

The maxim goes: '*ukhiphe tinkhomo emlonyeni weyise*', meaning "she has taken the cattle out of her father's mouth." The exact number of cattle paid as *emalobolo* is returned even if the cattle had multiplied over the years (*tinkhomo temabheka atitali*).

7.8 CONCLUSION

It appears that most writers on the indigenous law agree on the principles of the sale, exchange and donation contracts. There are notable differences regarding the grouping of types of contracts within the service contract as well as some uses of these. Although different types of contracts are recognised, one must always bear in mind that the nature, formation and consequences differ. It is important to determine whether a contract is an exchange or a loan for consumption, as each one is distinct in what subject matter may be exchanged or loaned.

Progress has been made in indigenous law in distinguishing different forms of contracts. It is also interesting to note that certain contracts have undergone some changes to adjust to current circumstances, such as the '*lilima*' contract which now has a further meaning in that, other than in the past, it also now refers to individuals rendering their services in urban areas, such as in the mining industry. Although it is not a requirement, it is nowadays preferred that contracts be put to writing and interest has become part of the negotiations.

Chapter 8

SPECIFIC CONTRACTS

8.1 NON-PERMANENT EXCHANGE OF GOODS, INCLUDING BAILMENT AND MANDATE

8.1.1 Introduction

Generally, non-permanent exchange of goods occurs when transfer of ownership does not pass over to the other party. There is, however, a differentiation between situations where the exchange or loan for use, takes place either with or without remuneration.

8.1.2 Loan agreements

According to Whelpton (1991:200), a loan agreement is fairly well known under the Bakwena of South Africa and is called '*dikadimo*'. Although it would appear that a loan and certain lease agreements relate to one another, the difference between a loan and a lease agreement is that, with a loan, no payment is made. A party may, however, feel free to hand the other party something as a gesture of appreciation, especially where the subject matter has been on loan for a lengthy period of time. When a loan is required, the request will be addressed in the following words, namely '*ke a kopa*' (I ask). The request is not made in a manner of demand. The Swazi refer to it as '*ngiyacela*' (I ask).

A loan is usually arranged in respect of movables, such as animals, farming equipment and household items. Strydom (1985:465) writes that in respect of the Southern-Sotho of Qwaqwa, loans are entered into with a specific purpose of meeting certain obligations, e.g. the contribution (*ditsua*) that a uncle should make towards the maintenance of his niece or contributions made for the '*lobolo*' of a son of a family member or friend. Whelpton (1991:201) confirmed that these loans are also known to the Bakwena of South Africa. They made it clear however, that it is a loan, which had to be repaid. A specific date is usually agreed upon, on which the borrowed item should be returned. If no specific date is settled, the item must be returned by the borrower, as soon he has stopped making use of it. Schapera (1970:245) writes with regard to the Batswana that "if the borrower fails to return the article borrowed and it is of little value, the owner does not usually press the matter but will refrain from lending him anything more in future. If, however, the article is of some value, and the borrower after several requests, fails to return it, he can be sued. The court will then order him to return it, or else pay the owner what it is worth". According to Whelpton (1991:202) the Bakwena of South Africa follow the same procedure as stated above by Schapera.

Loan for use is whereby one person hands over something to another freely for the latter to use in a particular manner, after which the thing is returned to the lender (*kweboleka*) (Whelpton 1991:202). Loan for use is a contract which is gratuitous. If the lender is to receive any remuneration from the borrower, the contract is one of lease.

Loan contracts are also known among the Swazi. They refer to a loan as '*kusitana*'. The term is used to indicate the bilateral nature of the contract. Where no period for the return of the item has been agreed upon, the borrower may use the item for the purpose for which it was lent for as long as is deemed necessary. Such things as household utensils and cattle are the objects of a great deal of borrowing and lending. Farming out (*kusisa*) cattle, which will be discussed in 8.1.4, may not be lent.

Where an item which is known to be defective is borrowed from another, for example, where a sick animal is borrowed, the borrower has no recourse against the lender if the animal should die while in his possession. The lender likewise, has no action against the borrower, who is obliged to report to the lender if the property has been destroyed or damaged. The borrower must generally exercise the care of an owner over the thing lent to him. Where it is agreed that damage to, and destruction of, the thing will be made good by the borrower, the latter will be liable in terms of the agreement. Liability will also attach to the borrower if there was negligence involved. However, if the loss or damage was a mere accident, the two parties will negotiate the issue. If the owner is not satisfied, he will not take the meat and skin of the animal with him, signifying his anger.

Loans only bring benefits to the borrower. The lender does not enjoy any benefits. Should remuneration be part of the contract, it can be seen as a lease.

8.1.3 The lease agreement

The available literature makes little reference to this form of contract. According to Van Blerk (1990^b:73), a lease was initially unknown to the Batswana of the North West Province. Today leases are more frequently seen under the Barolong, Batlharo and Bakgatla, which compares to the position of the Bakgatla of Botswana, referred to by Schapera (1970:245-246). According to him, an ox wagon would be rented out for two baskets of grain.

Van Blerk (1990^b:73) mentions that the Tswana term for lease is '*go jaka*' and '*go hira*'. Van Blerk does not discuss the principles on which this form of contract is based, nor does he state specifically if it is seen as a contract per se. Whelpton (1991:203) states that the Bakwena of South Africa distinguished between these two terms and pointed out that '*go jaka*' could not be used for the lease of goods but rather for the renting of services.

Pauw (1985:121) mentions with regards to the Imidushane and Amabhele of the Eastern Cape that various goods can be leased, such as animals, farm equipment, cultivable fields, cars and tractors. According to Pauw, it depends on the parties whether it would be done in terms of a lease or whether as a loan. Pauw states that the lessee must maintain the leased goods, he must replace it or ensure that it is properly repaired. A lessee cannot claim damages if the lessor re-claims the thing leased before the end of the lease period. If he has already paid in full he can only claim back the balance relating to the unexpired period of the lease.

Whelpton (1991:203) writes that the Bakwena of South Africa could relate to Pauw's findings. According to them, the lessor is not entitled to reclaim his property before the lease expires unless otherwise agreed. If no specific agreement was reached, the lessor would be entitled to do so, but not without proper discussion, consultation and good reason. According to Whelpton (1991:204), various forms of lease agreements are known to the Bakwena of South Africa. Like to any other contract, a lease agreement is concluded once an appointment has been made and performance or partial performance by one party has taken place. The parties must reach consensus with regard to the following - what will be leased and the amount payable in terms of the lease. The lease agreement is a reciprocal agreement, that is to say that both parties have rights and obligations. Both have to perform.

According to the Swazi panel of experts, lease agreements are known to the Swazi. Various things may be hired or leased. These could be movable or immovable, as in the case of the Bakwena of South Africa (Whelpton 1991:204). Usually they are items used in daily life, such as cattle, equipment and ploughable lands. The lessor must, however, be the owner of the goods. If they belong to someone else a valid lease agreement cannot be concluded. The rental amount is usually payable at the end of the period. The parties can however agree that a portion of the payment can be made, for instance, where it is cultivated land, with the fruits delivered from the land. The parties must also agree to the period of the lease. If no fixed terms have been negotiated, either of the parties can cancel the lease after consultation and proper notice. A lessee will not be able to cancel a lease agreement before the crop has not been reaped off

by the lessor. A lessor may also not sell the leased item whilst it is leased to another until the expiration of the lease period. The agreement in terms of the contract must first end, before a new commitment can be entered into.

Among the Swazi, land can be “lent” without permission of the head house (*indlunkhulu*) if it is used for ploughing. If land is “lent” for building, even if it is a temporary structure, the permission of the head house (*indlunkhulu*) needs to be sought. A person may allow someone else to use his land if he is unable to use it himself. This is however, a temporary arrangement that does not require the permission of the chief (*sikhulu*). Swazi law and custom recognises the right of an individual to control the use of specific pieces of land, but there is also the implicit assumption that he will occupy and utilise that land, either in his own person or through his dependents. From this flows the rule that if a rights holder fails for an appreciable time to occupy or utilise land over which he has been granted rights, then any tenancy right he may have is automatically weakened.

8.1.4 Farming out (*kusisa*)

Farming out is well known as a contract in indigenous law under various terms. The Zulu refer to it as ‘*sis*’, the Xhosa as ‘*ngoma*’, the Tsonga as ‘*fuyira*’, the Sotho as ‘*mafisa*’ and the Swazi as ‘*kusisa*’ (Whelpton 1991:206).

Some writers state that this contract has the same characteristics as the English Law “agistment”. Walker (1980:4) writes that the contract is one whereby one man takes another’s cattle, horses or other animals, to graze on his land as a reward and to deliver them on demand. Nathan (1990^a:61) writes that if another thing is involved, it is seen as a loan.

Schapera (1970:246) writes with regards to this custom. “Lending out cattle in this way is a very common practice. The herdsman derives considerable benefit from the cattle thus entrusted into his care. The owner’s task of herding his cattle has been greatly simplified by placing the cattle under the care of a herdsman. The practice serves also to insure against total loss from disease or some other agency which might annihilate a man’s cattle should they all be concentrated in one kraal. It is also a means of disguising the full extent of his wealth, and by doing so, of escaping the jealousy and evil desires of less fortunate neighbours.

According to Whelpton (1991:207), this custom was earlier well known to the Bakwena of South Africa. Nowadays, due to the limitation on the amount of cattle they can keep, it is no longer practised. Younger people working in urban areas sometimes buy cattle with their income and then farms them out to relatives in the peri-urban and farming areas. These contracts have to be recorded at the local tribal office.

Bekker (1989:338) refers to this contract as a loan whereby the lender is entitled to a benefit for the use of the stock. Coetzee (1985:49) mentions that the loan agreement used to be an important form of the ‘*mafisa*’ custom, “om ‘n ander mens op te tel.” Pauw (1985:126) and Strydom

(1985:468) also write that '*mafisa*' is a loan contract. According to Whelpton (1991:207), the Bakwena of South Africa were uncertain about calling it a specific contract and pointed out that it should rather be seen as a distinctive kind of an agreement.

Whelpton (1991:208), with regard to the Bakwena of South Africa, states that farming out initially took place between family groups. Nowadays, individuals can also conclude such a contract, subject to their having contractual capacity. Women were initially not allowed to enter into '*mafisa*' (farming out) contracts but today exceptions are made in respect of widows and certain woman who earn an income in urban areas. Olivier (1989:569) confirms this principle that woman should not conclude mafisa-contracts. Bekker (1989:340) disagrees and states that there should be nothing to prevent a woman from receiving '*mafisa*' cattle and that a contract should be concluded with the approval, even if tacit, of the head of the family.

According to Schapera (1970:246) a '*mafisa*' contract can be terminated by any one of the parties, and at any time. Bekker (1989:340) mentions, however, that an owner would usually not terminate a contract shortly after its commencement, as '*mafisa*' contracts are usually concluded for several years. Nathan (1990^a:66-67) writes: "The usual form in Bophuthatswana is that no agreement is made as to the duration of the contract and it is then implied that it will last for a reasonable time, that is, a time that will allow for a reasonable benefit to pass to the keeper. Usually this is not less than a season or less than a year. The possibility

of an express and specific agreement as to the period is not excluded since there is no rule to exclude such an agreement.”

Whelpton (1991:211) writes that after a reasonable time, the owner will request that his cattle should be returned, whereupon the holder will do so. The death of the holder will only terminate the contract if the deceased's successor is unable to maintain the contract. Should the owner die, and the cattle must be divided between the heirs, the cattle will be collected.

Amongst the Swazi, farming out (*kusisa*) is a contract whereby the owner (*umsisi*) places certain animals under the control of another (*umsiselwa*) for an indefinite period. This is done on the understanding that the keeper will enjoy the use of the animals, but that the ownership will remain with, and accrue to, the depositor. It is clearly a specific contract in its own right, with its own characteristics. The underlying specific common intentions as to the nature of a transaction, are the animals involved, the right to use the animals and any proceeds flowing from such use. The terms, in other words, the implied rights and duties of the parties, are, for example the right to be rewarded, the duty to take care of the animals, to account for the animals, their progeny and the consequences of termination.

Both parties to the transaction may benefit from it, although the overriding sentiment is that the keeper should benefit. The keeper enjoys the use and proceeds of the animals, other than progeny, and the owner is relieved of the task of taking care of the animals. A domestic animal may

be farmed out, though commonly it is cattle that are farmed out. In the case of the farming out of cattle, the keeper approaches the owner (*umsisi*) and makes the offer to '*sis*a' the cattle. However, in the case of goats, it would be the owner who would make the offer to the keeper.

It is not necessary for '*kusisa*' cattle to be kept apart from any cattle the herdsman may possess himself. The keeper may use the oxen for ploughing, the cows for milk and generally use the animals in the same manner as if he was the owner. Whatever is earned from the produce of the cattle, for example from the sale of milk, belongs to the keeper. The keeper may not slaughter an animal or use it to pay for his marriage. Nor may he lend the cattle to a third party.

The idea that an owner retains ownership is firmly engrained in the value system of the people so that if the keeper has incurred debts, '*kusisa*' cattle cannot be attached to satisfy those debts. '*Kusisa*' animals may be seized from the keeper to satisfy the debts of their owner and the keeper cannot demand that the animals may be replaced. The keeper is responsible for the well-being of the animals while they are in his keeping. He must exercise the same degree of care and diligence in looking after '*kusisa*' animals as he would if they were his own.

When the owner (*umsisi*) visits the animals from time to time, the keeper must account to him satisfactorily for the condition of the animals. The keeper has a duty to restore the animals to the owner whenever they are claimed and he must diligently account for all losses not previously reported and also for all increases. Losses through death, theft or other

causes must be immediately reported to the owner and where an animal has died, the skin must be produced.

Failing to report a loss to an owner in the proper manner will render the keeper liable to make good the loss. In such circumstances he is therefore held strictly liable to replace the animals and he is generally allowed to keep the meat of the animal.

The keeper takes sole charge of the animals for an indefinite period that can be brought to an end at any time by either party. As a rule no agreement is made as to the duration of the contract and it is then implied that it will last for a reasonable time. The possibility of an express and specific agreement as to the period is not excluded, since there is no rule to excluding such an agreement.

Over and above the use of animals, the keeper is entitled to one of the progeny (*sisinga*) after a satisfactory end to the transaction. A calf may, however, be given as a token of appreciation (*kubonga*) at the end of the period. Where the animals farmed out are pigs, the owner must give the keeper a sow and a boar, so that the keeper may have his own pigs in future.

After a reasonable time has lapsed or after a longer period, the owner (*umsisi*) will claim his animals and once the claim had been made, the keeper must return them. The keeper may terminate the contract at any time, but he should first discuss this with the owner so that the owner can receive proper notice and make his arrangements accordingly. It is usual,

as a matter of courtesy, for the keeper to give the owner reasonable notice. Although it is not usual to stipulate a specific period, if such a specified period has been determined, the owner cannot terminate the contract at will. The owner may, however, terminate the contract prematurely without incurring any liability if he or she has good reason for doing so, that is, if the keeper is not taking proper care of the animals.

8.1.5 Bailment (*kubambisa*)

According to Whelpton (1991:211), bailment is known to the Bakwena of South Africa and the term used by them is '*go boloka*'. The contract is concluded when one person, the bailor, entrusts to the other person, the bailee, movables and the bailee undertakes to either keep it in bailment, either free of charge or against payment and to return it to the bailor when he is requested to do so.

The bailee is not entitled to use the item but must take proper care thereof and is liable if it is damaged or destroyed due to his negligence. This is also the position in western legal systems (cf Hosten et al 1980:460). According to Nathan (1990^b:74), this contract is also known to the Bafokeng, Bakwena and Batlhaping. She points out that with the Barolong, no remuneration is payable and that the bailee must take care of the item as if it were his own. The bailee is also liable for any losses whilst looking after it. According to Whelpton (1991:212) with regards to the Bakwena of South Africa, the forms of bailment known to them reflect comparisons to that known in Roman Law. Three types of a bailment contracts are known to them, namely bailment in distress,

bailment when a dispute arises as to ownership of a thing and bailment of money. According to Whelpton (1991:213), bailment must be distinguished from a loan, as the bailee is not entitled to use the item and also from consumption, as the identical item must be returned. The bailee must return the item in the condition it was received at bailment. Where the bailment is free of charge the bailee is only liable for damages caused by his intent or gross negligence. The bailee will be liable for ordinary damages if bailment was agreed to against the payment of remuneration.

Bailment, referred to by the Swazi, as '*kubambisa*' is known among the Swazi. An example is where persons working in urban areas, would leave money with family and friends to look after. The bailee does not become the owner of the money and may also not use it. No interest can be negotiated. The bailee can be remunerated for his services but only after all the money had been returned to the bailor.

8.2 CONCLUSION

From the literature it is clear that the writers mostly agree on the nature and substance of the respective indigenous contracts. It does however appear as if in most instances one can distinguish bailment from loan and loans for consumption. The individual character of each contract must always be kept in mind, such as farming out (*kusisa*), which is a well known contract peculiar to the Swazi.

Chapter 9

SPECIFIC CONTRACTS

9.1 CONTRACTS WHICH INFLUENCE THE STATUS OF PARTIES

9.1.1 Introduction

De Wet and Yeats (1978:4-5) write with regard to contracts in general that “’n kontrak waaruit verbintenisse voortvloei, moet onderskei word van ander kontrakte wat regsgevolge het. ‘n Huwelikskontrak het altyd vermoëns-regtelike gevolge en kan selfs verbintenisse in die lewe roep, soos verbintenisse tot wedersydse onderhoud, maar dit word gewoonlik nie gesluit met die oog op die skepping van verbintenisse nie, en word dan ook nie deurgaans beheer deur die beginsels wat op kontrakte van toepassing is nie”. An engagement is thus also a contract *sui generis* and differs in many aspects from other contracts. One should, therefore, not apply the general principles applicable to contracts and marriage.

9.1.2 Status

Status, known to the Swazi as ‘*sigaba*’ or ‘*sitfunti*’, is the condition of belonging to a family, to which is ascribed a set of rights, duties, powers, liabilities, privileges and disabilities. Unlike contractual rights and duties, which, in principle, are voluntarily chosen, the rights and duties associated with status are imposed by law (*ex lege*). Thus although a person may, by an

act of volition (such as marriage), acquire a certain status, the rights and duties attached to it are ascribed by law and do not vary. A person's status is derived from membership of a category of people, and the most common criteria for constituting these categories are age, gender and marriage. One status of a father is relative to that of a child, woman is relative to man and minor is relative to that of a major. In consequence, the rights attributed to status must find their correlative duties expressed in a complementary category. A person's status within his or her family, for example, is influenced by various factors and may either give or deny a person certain competencies; for example, young boys and girls may not marry, and a feeble-minded man may not succeed to a position of power (cf Whelpton 2005:169).

Marriage means a change of status to both man and woman. In all cases it means more capacity. A married woman can exercise her share of custody over her children. She can expect from her marital group to protect and care for her and her children, also after her husband's death. She holds an important share in the house property and her husband has to discuss any actions regarding the house property with her. She has to produce children to the marital group, even after her husband's death, if she can still bear children. Furthermore, she has to fulfil all household obligations and has to cultivate food for her household (cf Myburgh 1985:77-83).

A man's status is elevated through marriage, as he becomes head of the family and represents his family in legal actions and lawsuits. He exerts his power over his wife and children if necessary, by way of chastisement.

Furthermore, he has to maintain his wife and children *inter alia* by way of making available ploughable fields (Myburgh 1985:82-83).

9.1.3 Marital status

Vorster (1981^b:93) defines a marriage among indigenous peoples as an institution in terms of which a man and woman is united with the primary purpose or goal of producing children lawfully. Sexual intercourse is however not the most important social consequence of a marriage. It is indispensable for the existence and survival of a family and other social groups which are based on consanguinity. Vorster (1981^b:93) writes that, even though there are no legal restrictions preventing a man from marrying more than one woman, today one seldom finds polygamy obligations. According to him, the reason for this is primarily the fact that, in terms of Western legal systems, a man cannot be married to more than one woman, at any point in time. Woman nowadays also demand to get married either in church or before a magistrate. Furthermore, the disapproval and rejection of polygamy by churches, have virtually caused this custom to disappear (cf Whelpton 1991:21-232).

Among the Swazi the family (*umndeni*) is founded upon marriage (*kwendza*). Like any other social relationship, a marriage establishes special rights and duties among the people concerned. In terms of Swazi law and custom, a marriage is a relationship which concerns not only the husband and wife, but also their respective families. The formation of marriage creates a series of reciprocal rights and obligations between the spouses for which their respective families are collectively responsible. Thus, although

the personal relationships between the families form part of a Swazi marriage, in the broader sense the wife is, in fact, united to her husband's family. After his death, she continues to be part of his family. Marriage does not contemplate its termination – whether by death or divorce, and lastly a marriage is potentially polygynous (*sitsembu*).

Nhlapo (1992:71) defines a marriage in terms of Swazi law and custom as follows:

“A valid marriage by Swazi law and custom comes into being when a woman of marriageable age is anointed with red ochre (*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.”

Amongst the Swazi a marriage brings about a change in the legal and social status of both husband and wife. In all cases, it is accompanied by increased powers. Both of them are now seen as mature persons. The relationship of the spouses and their relationship with their children and families are governed by a code of customs, morals standards and beliefs, all of which serve to underwrite the principle of patriarchy. In general, the woman passes from the legal control of her parents into that of her husband's family, who now become her guardian and as such are responsible for her actions. However, in practice, the woman's family remains responsible for any serious marital offences she may commit against her husband or his family.

She cannot, as a rule, sue or be sued except through them (or in certain cases, such as divorce proceedings, through her father or his representative).

A married woman may exercise her share in the guardianship, referred to by the Swazi as '*kuphatfwa emndeni*' over her children among other things, by means of discipline. She can expect that her marital group will protect her and her children even after her husband's death. She has an important share in the property of her house and her husband must consult her in the disposal of house property. She may also acquire property by her own industry, for example, by making sleeping mats, or raising her own chickens.

In Swazi law and custom, a woman's status determines house rank. The Swazi refer to it as '*kudla umuti*'.

9.1.3.1 Rank (*lizinga*)

Rank (*lizinga*) plays a significant role in Swazi law and custom and may influence a person's status. Thus, each of the wives of a polygynist has a particular rank, as does each of their houses. Each member of the family also has a particular rank, in accordance with the order of seniority within the family.

The Swazi distinguish between "family rank" and "house rank". Family rank refers to the hierarchy of family members among themselves, while "house rank" refers to the hierarchy of the various houses in a household.

9.1.3.1.1 Family rank (*lizinga lemuti*)

The Swazi family forms an '*umndeni*'. The family comprises the eldest male member, his wives, his unmarried brothers and sisters, married sons and their wives and children, and unmarried daughters. However, when the family is larger than this, it forms a family council (*lusendvo*). These are family members of the same lineage (*intalelwane*). While they commonly build their homesteads in close proximity to each other, members of the family council (*lusendvo*) may actually be spread over a larger geographical area, coming together for issues affecting the lineage.

Males occupy a higher rank than females. This is because they are expected to perpetuate the family (*bavusa likhaya*) whereas daughters will leave the family upon marriage. Female are always under the authority of males, and only males can become family heads. Within the context of the family, a person's rank is determined by the principle of primogeniture. The eldest son has a higher rank than his younger brothers, and younger brothers therefore, rank below their elder brothers. The same principle applies to sisters.

Within the broader family, the rank of children is qualified by their father's rank within his family of origin. If the father is the eldest brother, his children hold a rank higher than that of any of his brother's children.

9.1.3.1.2 House rank (*lizinga lendlu*)

House rank determines family rank. House ranking is done through the social status of a woman when she joins her new family upon marriage. For example, a woman bearing the same surname as the family's head's grandmother is most likely to be the woman to bear the family's successor (*inkhosana*). Therefore, her household ranks highest and is referred to as 'indlunkhulu', meaning the household which bears the successor (*inkhosana*). The following are the house ranks among the Swazi; each of these bears the successor (*inkhosana*) in cases where they rank highest:

- a woman of Royal blood;
- a daughter of a chief (*sikhulu*);
- a woman who bears the same surname as the husband's paternal grandmother (*umfati longugogo*);
- a wife who has been negotiated for a man by his parents (*umfati lokhiwe*); this wife has the next highest rank in relation to other subsequent wives;
- a woman married following an arranged marriage where her parents would have approached the man's family and offered her as a wife to their son (*umfati lowendzisiwe*); and
- a woman married through the ordinary process of courtship (*umfati losingani*).

In order to avoid conflict, this combination of wives is not encouraged. The order of marriage is important only if the wives are all of the same social

status. However, it becomes irrelevant when the social status changes and the wife coming in with a higher social status is said to take seniority (*kudla umuti*) because for purpose of bearing the successor (*inkhosana*) she will rank higher than any other wives she finds in the marriage. Therefore, ranking of wives for purposes of determining succession becomes pertinent only upon the death of the family head.

The other highest rank household is that which produces the '*lisokanchanti*', who is the first-born son of the family head.

9.1.4 The engagement

Myburgh (1985:83-84) describes an engagement contract among indigenous peoples as a particular contract. The elements of this contract, are according to him, the contract plus performance or partial performance by the family of the man. This performance involves the delivery of all or some of the marriage goods plus other gifts.

In earlier years, a 'child engagement' was known among indigenous peoples. In terms of this engagement, a man and his wife's brother would conclude an agreement that their children, when marriageable, would get married, but currently this is no longer a known practise. Matthews (1940:19) and Schapera (1970:130) discuss this form of engagement in their writings. They also refer to engagements of unborn children. The last mentioned engagement is totally unknown to the Swazi or to the Bakwena of South Africa (cf Whelpton 1991:224).

Among the Swazi, an engagement (*kuqabangula*) is a contract concluded between the fathers of the man and girl, in terms of which they undertake to let their children marry. The right to dissolve such a contract is determined by the children. However, any legal action which may result due to the dissolution of the contract, resides with the fathers. Currently, more focus is placed on the individual choice of the man and woman. The community will not acknowledge an engagement where the consent thereto by the man and girl has not been obtained.

Among the Swazi people, there are various forms of engagements or ways of courtship. The most important are set out below.

9.1.4.1 To steal herself (*kutiba*)

In this instance, a young woman will, following an understanding between herself and her lover, invite several other girls to the lover's homestead (*bayogidza umtsimba*). The young woman will do this without her parent's knowledge. When this kind of betrothal is used, the man's family will not have to deliver a beast, known as a beast to ask (*inkhomo yekucela*) to the bride's family to ask for the hand of the bride.

9.1.4.2 A form of betrothal (*kuqabangula*)

Kuqabangula is also a form of betrothal, although not well known. The process is initiated by a young woman. She will go to the lover's homestead to ask for marriage goods (*emalobolo*) on behalf of her parents. The Swazi say '*ayocela umbhidvo*', meaning "she is going to ask for red ochre". This

indicates that she wants to get married. She is accompanied by several maidens from her area and an old woman from her homestead. Through the older woman accompanying her, she will inform the man's parents that her parents have sent her 'to ask for the red ochre' (*kutocela imbhidvo*). She will then produce a stick which has some markings on, it indicating the number of cattle to be delivered as *emalobolo*. After this, the process 'to ask' (*kucela*) will follow.

9.1.4.3 Courtship (*Kujuma*)

In terms of this form of courtship, the young woman has already accepted her suitor. Lovers may now visit each other's homesteads to spend a few days (not exceeding three) with the other's family. For these visits, a woman will be accompanied by another young woman from her area. During these visits, lovers may not sleep together, let alone have sexual intercourse.

The Swazi refer to it as '*akungenwa esibayeni sendvodza*', meaning you may not enter into the kraal of the man. These visits are so that the families may be informed of their respective children's intentions.

It is also during this courtship (*kujuma*) that the man's family may, when the woman returns to her family, put a porcupine quill (*injelwane*) on her head to indicate to her family that they are ready to have her married to their son. The porcupine quill signals to the woman's family that they should prepare her for marriage. This includes the shaping of her hair into a wig (head gear) (*sicholo*), then she becomes known as a grown woman (*ingcugce*). On a subsequent courtship (*kujuma*) visit, a second porcupine quill (*injelwane*)

will be put in the woman's headgear (*sicholo*) confirming beyond any doubt that the man's family approve of her as a potential member of their family.

9.1.5 Contracting a marriage in terms of Swazi law and custom

9.1.5.1 Introduction

According to Nhlapo (1992:59), there are four types of marriages in accordance with Swazi law and custom, though some categories may overlap. He mentions love marriages, preferential marriages, devised or arranged marriages and private marriages.

A love marriage can be initiated by either party and is the culmination of courtship in the ordinary way between two young people. Marriages within certain kinship categories are preferred in Swazi culture and confer a high status on the wife. These marriages are referred to as preferential marriages. Prominent among these is the marriage of a man to his grandmother (*gogo*), used in the sense to denote any woman who bears the same clan name as the husband's maternal or parental grandmother or grandfather (Kuper 1963:95). Private marriages are the most interesting of the various types of marriages. These cover all those situations where the woman is smeared with red ochre without the prior permission of her parents and, in some cases, without her own consent or that of the man (Nhlapo 1992:61).

9.1.5.2 To ask for a girl's hand in marriage (*kucela*)

This marks the beginning of formal negotiations between the bride's family and the groom's family regarding the marriage of their respective offspring. It is initiated by the groom's family, who sends a delegation to the bride's family to request her hand in marriage. To ensure that they are well received, the groom's family, represented by its delegation, may come bearing gifts of goodwill. These may include a beast referred to as 'a beast asking for the bride' (*inkhomo yekucela*).

9.1.6 Features of an indigenous Swazi marriage

The most important features of a Swazi marriage is that a marriage is a union between two people and their respective families. The Swazi refer to it as '*kuhlanganisa bukhoti*', meaning to bring two families together. The principle of continuing relationships is closely connected with the institution of marriage goods, known as '*emabheka*' or '*emalobolo*'. The procreation of children, both male and female, is of the greatest importance. Generally speaking, the legitimate birth of a child can take place only after a legally recognised marriage between the parties. Marriage sets up various relationships of authority between spouses, as well as between parents and children. Marriage is the culmination of a series of events, rather than a specific event. The conclusion of a marriage is therefore a lengthy process. It is usually accompanied by a variety of ceremonies. Some ceremonies are merely customs, but others have a specific legal meaning.

9.1.7 Impediments to marriage

9.1.7.1 Physical and mental defects (e.g. insanity, physical deformity, deafness, dumbness, blindness).

Generally, these are not a bar to a valid marriage among the Swazi. However, it is for the families of the spouses to determine whether or not a particular member can enter into a marital relationship. The family members of a disabled person will normally undertake to bear the responsibility for such a person. According to the Swazi, disability is the will of God and will therefore not be a factor in determining the number of *emalobolo* cattle to be delivered (cattle delivered to a bride's father and family by the groom and/or his family).

A person suffering from grave mental defectiveness (e.g. a person who strips naked publicly or who is violent), is not permitted to marry.

9.1.7.2 Infertility and impotence

Neither infertility nor impotence seems to be a bar to a marriage among the Swazi. Again, the families play an important role in determining and curing the defect with the use of mixture of herbs and roots used for traditional medicine (*timbita*). If this is not successful, the woman's family must send a subsidiary wife (*inhlanti*) to bear children for the husband. If a wife dies without bearing her husband any children, the cattle delivered as *emalobolo* may be returned. Therefore, if the woman's family wish to continue the

relationship with the husband's family, they will send a substitute. This will also allow them to keep the cattle.

9.1.7.3 Marital status

Among the Swazi, a woman may not enter into a subsequent marriage during the existence of her marriage, but a married man may do so.

9.1.7.4 Persons of the same gender

Persons of the same gender may not marry. However, the Swazi do have a practice whereby a woman will marry another woman and ask a male relative to relate sexually with her wife. Children born out of such a relationship belong to the woman.

9.1.7.5 Prohibited degrees of consanguinity (blood relationship) and affinity

Swazi law and custom contain certain impediments to a marriage between persons who are related to each other within certain degrees of consanguinity.

9.1.7.6 Consanguinity in the direct line

Persons who are ascendants or descendants of one another, for example, father and daughter, grandfather and granddaughter, may not marry.

9.1.7.7 Consanguinity in the collateral line

Blood relations who are related to one another by a common ancestor may not marry. A brother and sister, two cousins, an uncle and niece are all blood relations in the collateral line and may therefore not marry each other.

9.1.7.8 Relationship by affinity

Persons related to one another by affinity (the relationship that comes into being between a married person and the blood relations of his or her spouse, as a result of the marriage) may, in certain cases, not marry. Thus a man is not permitted to marry his wife's mother, grandmother or granddaughter. He may, however, marry his wife's sister. He may also marry his wife's brother's daughter after his father's death.

9.1.7.9 Other prohibited relationships

In addition to the above categories of persons, no person among the Swazi may marry anyone bearing the same clan name (*sibongo*) as he or she does. People who share common ancestors as indicated in their clan praises (*tinanatelo*) even if not sharing the same clan name, may also not intermarry, for example *Dlamini/Magogo*, *Simelane/Ntsingila*, *Shongwe/Kunene*, and *Mahlalela/Maziya*.

9.1.8 The requirements of a marriage in terms of Swazi law and custom

There are certain requirements for a marriage in terms of Swazi law and custom of which the following are the most important:

9.1.8.1 Smearing with red ochre (*libovu*)

The smearing of the bride with red ochre seems to be “the single most legally significant event in the formation of a marriage in accordance with Swazi law and custom” Nhlapo (1992:45). Engelbrecht (1931:17) who gives a detailed account of all the activities that take place during the wedding ceremonies up to the point when the bride distributes gifts to her in-laws, writes the following with regard to the Swazi:

“Immediately these presents have been handed over any old woman seizes the bride and puts her down on a mat already spread in the courtyard. A little girl is made to sit next to her and both are rubbed in with a mixture of fat and red clay. This is considered the final act necessary to make the marriage binding; and that the girl will from now on act as her helpmate”.

Nxumalo (n.d.), as quoted by Nhlapo (1992:45), writes as follows about the actual process of being anointed with red ochre:

“When a Swazi bride has been anointed her marriage is complete. The anointment ceremony called ‘*kugcotshiswa libovu*’ involves smearing the face and body of the bride with a red substance (*libovu*),

a type of clay mixed with fat. This substance is commonly smeared on the face in the form of a cross across the forehead and down the nose. Anointment marks the end of the marriage ceremony”.

According to the Swazi a woman can only be smeared with red ochre (*libovu*) once in her lifetime. In rare cases where she remarries, she is smeared with animal fat (*liphehla*) in stead of the red ochre (*libovu*). Immediately after the marriage gifts (*umhlambiso*) have been given, an old lady of the man’s family will lead the bride (*makoti*) to the kraal. She will make her sit on a small mat (*sihlantsi*) and smear her with red ochre (*libovu*) from head to toe. During this process, the bride is expected to cry. She is then given a small child, referred to as ‘*umntfwana welibovu*’ whom she in turn will smear with animal fat (*liphehla*). This is the child whom the new bride will send around on errands.

The principle contained in these accounts, has been confirmed in several decisions of the High Court and is thus now beyond dispute.

In *R v Fakudze and Another* (1970-76 SCR 422), the High Court, sitting with assessors, approved the above-mentioned rule. The court stated:

“There are a number of ceremonies performed at the wedding, but the legally significant one is the anointing of the bride with red ochre (*libovu*). Unless and until this has been done, she is not regarded as having been married.”

In *R v Timothy Mabaza and Another* (1979-81 SCR 8), the High Court again expressed itself on the issue. The court held that, if the smearing with red ochre has been done, though not at the proper place, the women smeared will nevertheless “be considered as married under Swazi customary law, even if no *lobolo* has been paid”.

The above-mentioned judicial authority has been of immense value in confirming the specific point at which a marriage in accordance with Swazi law and custom comes into existence.

According to the Swazi themselves, red ochre is their equivalent of the wedding ring and is infinitely more binding (Nhlapo 1992:47). They take pride in the fact that the red ochre ceremony is a once-in-a-lifetime affair. This is also the starting point for the argument that a divorce is unknown in Swazi law and custom.

9.1.8.2 Marriage consideration, (*emalobolo*) known to the Swazi as ‘*Emabhaka*’

The delivery of marriage goods seems to be the second most important feature of a marriage in terms of Swazi law and custom. According to Nhlapo (1992:47), some would even argue that it is the most important feature. The Swazi, however, say ‘*kulotjolwa umfati*’ meaning you deliver *emalobolo* only for a wife.

The process and ceremony of the delivery of *emalobolo*, or at least the negotiations which result in a guarantee for delivery of *emalobolo*, are part

of the whole process of marriage negotiations which initiates the creation of a marriage between two families (*kuhlanganisa bukhoti*).

Traditionally, several types of implements and livestock could be delivered as *emalobolo*. These include ploughing implements (*inkhubuzana*), goats and cattle.

9.1.8.3 The *lugege* beast must be slaughtered

There is apparent unanimity about the significance of the '*lugege*' beast (Nhlapo 1992:65). Its delivery and slaughter mark the conclusion of the affinitation agreement between the parties: from that point on, the two families are obliged to proceed to marriage. Nhlapo (1992:65) emphasises the fact that it is not a betrothal. According to him, it is a step deep into the marriage process itself through which the wife-givers indicate their satisfaction with the arrangements made by the wife-takers with regard to their daughter's passage into her new family, specially the question of *lobolo*.

The delivery and slaughter of the '*lugege*' beast thus mark the conclusion of the agreement between the parties. This indicates the wife's group's satisfaction with the arrangements regarding the question of *emalobolo* made by the husband's group.

As a sign of acceptance of the *emalobolo*, the bride's father will give the groom's people a beast referred to as '*sidvudvu semyeni*', which is slaughtered. The giving of this beast signifies that the ownership of the

emalobolo has passed to the bride's family. At the slaughtering of this beast, the '*lugege*' beast is also slaughtered.

The '*sidvudvu semyeni*' and '*lugege*' beasts are stabbed by the main male person co-ordinating a traditional marriage, known by the Swazi as '*gozolo*'. As he stabs the '*lugege*' beast, it is supposed to bellow, otherwise it is believed that its failure to do so indicates that the ancestors are not pleased with the marriage.

Early the next morning after the slaughtering of the two beasts, the two beasts are properly divided up in preparation for cooking. Several meat portions from the '*lugege*' and the '*sidvudvu semyeni*' carcasses are exchanged between the parties. The exchange of portions is done in such a way that each party ends up with a whole beast to signify the further cementing of relations. Some of the meat portions are important, and the exchange of these meat portions is significant, as they are to be eaten by certain persons of the families. Some of the meat portions exchanged are listed below.

- The stomachs (*sisu*) of the beasts are exchanged.
- The heads of the beasts are exchanged.
- A leg of one beast is exchanged for a leg of the other.
- Meat from the sides (*imihlubulo/tinhlangotsi*) of each of the beasts is exchanged.

- One forequarter portion of the *sidvudvu semyeni* meat is given to the bride to eat, since she cannot partake in the eating of the *lugege* meat.
- Hooves (*emasondvo*) of the beasts are exchanged.
- Special meat from the insides (*umsasane*) is given to the bride's grandmother and children who have not reached maturity to eat.
- The tail (*umsila*) is to be cooked and given to the bride's brothers to eat.
- A meat portion from the leg of the *lugege* beast (*sibumbu*) is exchanged.

9.1.8.4 The *insulamnyembeti* beast must be delivered

This is a beast that should be given to the bride's mother and means "to wipe off the tears".

9.1.9 Capacity to marry

In terms of Swazi law and custom, there is no fixed age for entering into a marriage. A person would be of marriageable age once he or she has reached puberty. This usually coincides with the incorporation into an age regiment. A male person should become a member of a regiment of young men (*libutfo lemajaha*), and a female person a member of the regiment of young women (*libutfo letintfombi*). If a person marries before his regiment

(*libutfo*) has received permission to marry, he is fined a beast known as '*inkhomo yemabhaca*'.

9.1.10 Consent (*kuvuma*)

The consent of all the parties is a necessary element of a marriage in terms of Swazi law and custom, and there are various ceremonies whereby consent is confirmed. The biting of a kind of stick referred to as '*umgoqo/umvalo*' signifies a woman's consent following her coming out of the hut and hitting the gate with a spear, or when she agrees that a goat they show her after the marriage ceremony (*teka*) be killed. Although a Swazi marriage is an agreement between two families, the consent of the bride and groom is not secondary to that of the two family groups. However, it is important that the spouses' families support their relationship. If the families do not support the relationship, it may not be successful.

It should be noted that in the process of when the girl's father makes the approach (*kwendzisa*), the girl may not always consent willingly but could be coerced in certain instances to consent.

When the girl's father makes the approach, it may arise from her parents' need for cattle. A girl may then be forced to consent, as one of the participants recounted: "I know a certain man whose daughter refused '*kuyokwendziswa*'. Her own brothers took her forcefully to the man's place and when they arrived there, they made sure that the *teka* ceremony was performed after which they left her there." In another incident the girl and

her mother were locked inside a hut. Leaves were burnt inside so that they had to inhale the smoke until they consented to the arranged marriage.

Nhlapo (1992:60) asserts that consent is an essential requirement for a marriage. He writes however, that not all the parties involved have the ability to render the proposed marriage null and void by withholding, or failing to signify their consent. According to Nhlapo (1992:67), consent is hierarchically ranked for purposes of determining whether or not its absence renders the marriage null and void. The only consent without which there cannot be a valid marriage is, according to Nhlapo (1992:67), that of the family of the bride.

9.1.11 The coming into being of a marriage in terms of Swazi law and custom

9.1.11.1 Courtship (*kugana*)

The formation of a marriage among the Swazi, begins with the courting of a young woman by a young man. The courting may extend for up to three years. There are several options open to a young woman to mark the end of a period of courtship. Generally speaking, a young man will court a young woman for a lengthy period (of between two to three years). When she consents to his proposal, she will make one of the things listed below to indicate her consent, which is called '*kugana*'.

- **Beads (*kugana ngelicube/lijuba/ingeje*)** These are beads that a girl will make specifically to give to her suitor to wear around his neck. She will usually give these beads to a friend to give to her suitor.
- **'*lucube*'** This is a bead necklace made from a single string of an assortment of beads in red, white and black with '*lijuba*'. Only an even number of strings is used, because the use of uneven numbers reflects uneven love.
- **'*lijuba*'** This is a bead necklace made from a single string of blue beads with smaller white beads on the side and one heart bead in the position next to the man's heart.
- **'*ingeje*'** This is a bead necklace made from *lijuba* beads, brown and yellow, and two heart-shaped or egglike beads in the middle, also yellow. One view was that this is not worn around the neck, but tied to the man's lion skin (*emabhebha*).
- **'*luhlongwa*'** This is a grass bangle which is sometimes used instead of beads. Following this, the young man's family will initiate the process of asking for the young woman's hand in marriage (*kucela*).

9.1.11.2 Invitation of peers (*kugana ngekuhlehla*)

When a young woman reaches a decision to accept a suitor's proposal, she indicates this by inviting several peers from her area. These are young woman in her age group. They wear their traditional attire (*imvunulo*) and

will gather at the suitor's homestead to sing and dance, so that others who are watching know who the parties involved are. The women mention the suitor's name in their songs, inviting him to come (*batomgana*). In turn, the prospective bride breaks away from the formation of the other women and dances apart, singing in praise of all his attributes. After a while, the women leave and return to their various homesteads. After a few days, young men (*emajaha*) and young women (*tintfombi*) from the woman's and suitor's area meet at an agreed spot and acknowledge the acceptance of the proposal (*batobonga indzaba*). This process of asking for the bride's hand in marriage (*kucela*) will then follow.

As a general rule, a marriage is initiated following the above process. However, owing to factors other than the desire of lovers to marry, a marriage may result when the woman's father makes the approach (*kwendzisa*), or when the man's father makes the approach (*kukhiwa*). Such cases are very rare today, as most young women consent to men of their own choice.

Parents of a man may also choose the family and sometimes even the woman they wish their son to marry. They will then approach the parents of the woman and request her hand in marriage on behalf of their son. If the marriage takes place, this woman ranks high when it comes to the ranking of wives. She is the woman known as '*umfati wekukhiwa*' or '*umfati lowakhiwa*', meaning "the woman who was 'picked'".

When the woman's father makes the approach (*kwendiza*), it is usually to seek some economic advantage. A poor man may wish to secure his

daughter's future by marrying her into a wealthy family or may be seeking a loan of cattle, and will approach the man of his choice and offer his daughter in marriage. Marriage negotiations then proceed as above, except that the 'beast to ask' (*inkhomo yekucela*) is not delivered to the woman's family. This woman will rank first in the hierarchy of wives. She is the woman known as '*umfati lowendziswa*' or '*umfati wekwendziswa*' (an arranged marriage).

9.1.12 The marriage ceremony (*umtsimba*)

The marriage ceremony, known as '*kugidza umtsimba*' signifies the official entry of a woman into the home of her in-laws as a wife. As a rule the man's family will indicate that they are now ready to receive their bride and ask for the marriage ceremony (*umtsimba*). In some cases, the marriage (*umtsimba*) can take place after the woman has been smeared with red ochre (*libovu*) and is resident in her in-laws' homestead.

9.1.12.1 The assembly of bridal goods (*kulungisa umhlambiso*)

In preparation for the marriage ceremony (*umtsimba*), the family of the bride will assemble bridal goods which will include these objects listed below.

- **A beast which must be paid by the woman's family (*inkhomo yemgano*)**

This is a beast that the bride gives to her in-laws as a sign that she is willing to join the marital family. Ideally, the beast is delivered on the wedding day,

but if it is not available, it can be delivered on a later day. Once the ‘*umtsimba*’ ceremony is over, the ‘*umgano*’ beast is slaughtered. The only people to eat the meat of the slaughtered beast are the members of the man’s family, including the daughter-in-law. These people are referred to as ‘*bomakoti*’.

- **Skin skirt (*sidwaba*)**

This is a skirt made of cowhide which is worn by married women of marriageable age. As the bride is now entering womanhood, her family presents her with this skirt.

- **A shawl made out of cattle tails (*sigeja*)**

This is a shawl made of cattle tails worn by royalty. Thus, not every bride would wear this. Even a bride from a senior house does not wear a ‘*sigeja*’.

- **Gifts that the bride presents to various members of her in-laws (*umhlambiso*)**

The choice of those to receive gifts is left to the groom’s family, who will communicate this in advance to the bride’s family. Although there are variations, depending on individual families, the people who are to receive gifts will generally include the groom’s grandparents, parents, heads of certain houses within the family council (*lusendvo*), the wives of the heads, their first-born and last-born children (*umyeni*), the leader of the party bringing *emalobolo* (*umntfwana welibovu*), a young man who serves as a co-

ordinator during all the occasions that mark the marriage process (*gozolo*) and the groom (*umkhwenyana*).

Umhlambiso goods comprise general domestic wares, such as sleeping mats (*emacansi*), grass mats (*titsebe*), clay pots (*tindziwo*), traditional sieves (*tikhetfo*), strainers (*emahluto*), wooden meat platters (*imigcwembe*), dishes (*titja*) and brooms (*imitsanyelo*). Nowadays, there is a tendency to present modern goods, such as bedroom suites, blankets, beds and other such items.

9.1.12.2 The bridal party (*ludvwendvwe* / *umtsimba*)

A Swazi wedding ceremony is a communal activity. The families invite not only members of the family council (*lusendvo*), but also neighbours who join the bridal party. The persons who play an important role within the bridal party (*umtsimba*) are listed below.

- Representatives of a chief (*umphakatsi*)

Usually the chief of the bride's in-laws will send a messenger (*umgijimi*) to represent him. This presupposes notification of the marriage to the chief as well. The messenger's role is that of an independent witness. He will ensure that important ceremonies are performed. He may be called in case disputes arise later on in the marriage.

- **Leader of the bridal party (*umphatsi-mtsimba*)**

A respectable elderly man who is not a relative is chosen by the father of the bride to be the leader of the bridal party and his spokesperson. It is important to note that it is contrary to custom for parents of the bride to accompany their daughter and be part of the bridal party (*umtsimba*).

- **The woman who acts on behalf of the bride (*bomake bejudlalisela*)**

It is customary that the mother of the bride does not accompany her daughter, but chooses women who will act on her behalf. Their duties during the ceremony include dressing the bride, taking care of the bridal goods and ensuring proper behaviour by the maidens. They also play a significant role during discussions with the groom's family and when the bride is being told about the marriage etiquette (*ayalwa*). They also *ululate* and dance.

- **Young men who form part of the dancing party (*emajaha*)**

These are young men, including the brothers of the bride, who form part of the dancing party and who will assist in different tasks that are undertaken, such as slaughtering of beasts. In addition, particularly the bride's brothers, have a specific role in the special dance for their sister (*kugiyela dzadzewabo*).

- **Ladies who form the main bridal dancing party (*tintfombi*)**

These ladies, who include the bride's sisters, are divided into three groups, namely '*emachikiza*', '*ematjitji*' and '*tingcugce*'. Collectively, they are the main bridal dancing party. Their other important role is to assist the bride in the singing of bridal songs (*amekeza*) and carry marriage gifts (*umhlambiso*) and other bridal goods.

9.1.12.3 The departure of the bridal party (*kuphuma kwemtsimba*)

The bridal party departs early in the evening as it is expected to arrive at night. Before the departure, certain rituals are performed by the bride's father. They slaughter a goat or a cow from which a bile sac (*inyongo*) is put on the bride's forehead to show she has departed from her parents. The bride and the family council (*lusendvo*) enter the main house (*kagogo*) where she is counselled by the elders to be a good ambassador, in her new home. They then proceed to the kraal (*esibayeni*), where she is made to bath (naked) and is then dressed in her traditional gear (*avunule*). She is led to the entrance (*esangweni*) where her father or brother pins a feather (*lusiba*) on her. The bridal party then depart singing '*incangosi*', following each other in a straight line (*ludvwendvwe*).

There are several specific dances that are performed, including '*sigiyo*' which is a special dance where the bride dances with her sisters and brothers. It is during this time that the beast which must be paid by the bride's people (*inkhomo yekugana*) is shown to the man's family.

After the dancing, the members of the bridal party proceed to their hut and spend the second night there. The groom may invite the bride to spend the night with him. One girl in the bridal party accompanies her in order to identify the hut in case the bride is needed.

On this occasion, the bride gives gifts to certain members of her marital family. To start with, the bride must give gifts to the ancestors. These are left at the kraal gate (*enshungushwini*) and comprise a clay pot and sleeping mat (*imbata nelicansi*). Thereafter, the gifts are given to people in order of seniority, starting with the fathers, the father of the groom and his brothers, the mothers-in-law, starting with the groom's mother, and also to siblings of the groom. The last person to receive a gift is the groom.

9.1.12.4 The groom's party (*bayeni*)

A few days after the marriage ceremony, the husband's father, with the assistance of his relatives, assembles *emalobolo* and designates a man (*umyeni*) to take them into his care and to go and present them at the bride's homestead. On a date previously agreed to by both families, a small party accompanies them, carrying the groom's luggage.

The groom's party is supposed to arrive at the bride's homestead after sunset. On arrival at the bride's kraal, the groom shouts: "*Siyalobola gogo*" ("we have come to deliver *emalobolo* grandmother"). They mention the number of beasts including the '*lugege*' and '*insulamnyembeti*' beasts. Thereafter, a young maiden comes out to take the groom's luggage and lead the party to a hut prepared for them.

In the morning, the head of the family will inform all the relatives that the groom's party (*bayeni*) has arrived. The relatives will gather in the hut of the groom and greet the visitors.

After this exchange of greetings, the groom (*umyeni*) will inform the bride's family of the purpose of their visits, namely the delivery of *emalobolo*. The bride's people and the groom's party will proceed to the cattle kraal to view the *emalobolo*. As a sign of acceptance of the *emalobolo*, the bride's father will give the groom a beast referred to as '*sidvudvu semnyeni*' or '*inhlabisa-bayeni*' which is slaughtered. The giving of this beast to the groom's party signifies that the ownership of *emalobolo* has passed to the bride's family.

9.1.13 Subsidiary wife (*inhlanti*)

Since the Swazi's do not contemplate the possibility that a marriage may be dissolved, they put in place measures to prevent any events which may eventually lead to the dissolution of a marriage, namely the barrenness of a woman and her death.

On the day of the groom's party, the wife's family identify a potential subsidiary wife who is usually his wife's younger sister or a paternal niece. The potential subsidiary wife identified may also be the wife's younger brother or a paternal nephew. In this event, it is hoped that the actual subsidiary wife will be a female offspring of the brother and nephew. There seem to be very few cases where the subsidiary wife is still provided today. Where provided, a young boy rather than a girl is usually offered. This can be ascribed to the influence of women's rights organisations. Christianity

and education have also influenced most Swazi not to demand the subsidiary wife, as it is said to be against Christian principles. Another reason could be that most Swazi are now moving away from the polygynous families.

9.1.13.1 A subsidiary wife (*inhlanti*) in the case of barrenness

One of the major reasons for a couple to enter into marriage is the procreation of children. It is known, however, that the ability of a woman to bear children cannot be controlled by human beings. The Swazi therefore accept this possibility of barrenness and minimise its impact on the marriage by providing a subsidiary wife who, if the woman proves unable to bear children, steps into the shoes of that woman and fulfils that function. However, the subsidiary wife does not influence the status of the barren woman as a wife. Any children she bears are presumed to be the wife's.

9.1.13.2 A subsidiary wife in the case of death

In terms of Swazi law and custom, the death of one of the spouses does not necessarily terminate a marriage. If the woman predeceases her husband, a subsidiary wife is provided to levirate that woman and to occupy the position of wife to the widower and mother to any children of the deceased woman.

9.1.14 The consequences of a marriage in terms of Swazi law and custom

The consequences of a marriage in terms of Swazi law and custom concern interpersonal relationships and patrimonial relations. Interpersonal relationships refer to relationships between the parties involved in the marriage. In the first place, these relationships include relations between husband and wife, but later also the relationship between parents and children. A marital union, however, is not confined to the husband, wife and children. It extends much further, since it is the concern of the two family groups.

Moreover, the marital union creates a unit of assets and liabilities. These assets and liabilities are called the “family estate”. Through this marriage a series of reciprocal rights and obligations is created for which the respective families are responsible.

9.1.14.1 General consequences of a marriage in terms of Swazi law and custom

The legal consequences fall into various categories which are discussed below.

- A new and separate household comes into being, which in the course of time, together with related households, develops (through the husband) into a homestead.

- The rights of the bride's family in respect of guardianship over her are transferred to the husband and his family. Children born of the marriage fall under the guardianship of their father and his family. In her own house, the wife enjoys a considerable degree of independence, but she does have to consult her husband on important matters. The husband, as the head of the family, has particular rights. He represents his household in external matters, and is responsible for order and discipline within his household as well as for its needs and interests. The marital power of a husband, however, does not include the right to administer corporal punishment to his wife.

- The marital union results in the establishment of a new estate. Initially, this is controlled by the man's father, but the son's rights gradually increase. The overall control by the man's father means that the wife and her house are protected against possible mismanagement of household property by her husband.

9.1.14.2 Personal consequences

Each wife in a polygynous marital relationship occupies a particular rank within the greater composite homestead. Her rank influences her status, her relationship with her husband's other houses and her children's rights of succession.

9.1.14.3 Relationships between husband and wife

- The man and woman must live together as husband and wife. The wife must live wherever her husband establishes a household at the time of the marriage, and each wife is entitled to a separate house (*indlu*) in the homestead.
- The husband and wife have a mutual duty of support.
- The husband and wife have a mutual duty to afford each other conjugal rights. The man has to initiate sexual intercourse. A woman can never initiate sexual intercourse. This presumes that the man has more control over this process than the woman.
- Husband and wife have a mutual duty to procreate a family.
- The husband and wife share in the duty to care for their household.
- The wife is under the guardianship of her husband, but he has no right to administer corporal punishment to her. If he persists in doing so, she can report him to the family council or to the leader of the party bringing *emalobolo* (*umyeni*), who should then resolve the issue. If the husband's family fail to prevent him from administering corporal punishment, she can escape to her parental home or to any relative's place (*kwemuka*).

9.1.14.4 Patrimonial consequences

The marriage creates a separate household with its own household property which is shared by all members of that household. The members also have a duty to contribute to the property. The husband controls the property on behalf of the house.

One house may not be enriched at the expense of another house. The transfer of property between houses must be reasonable and for a just cause, for example:

- if a house has to repay a particular debt and does not have the necessary property to do so.
- if cattle of one house are used as *emalobolo* for a son from another house.

The transfer of a property from one house to another results in a debt which must be repaid.

9.1.15 Dissolution of a Swazi marriage

A marriage cannot easily be dissolved according to Swazi law and custom. A Swazi marriage, as mentioned above, involves a union, not merely between the spouses, but between groups of kin. Therefore, the death of one or both of the spouses will not terminate a marriage relationship (cf Nhlapo 1992:75). Consequently, Swazis when talking, will say '*akuqatjanwa*

ngekufa’, meaning “the family’s relationship will not be distinguished just because one of the spouses has passed away”.

A marriage may, however, be dissolved as a last resort. It is not a common practice, however, and is not encouraged by the Swazi. One view is that it may be dissolved even at family level. Another view is that it can only be dissolved in the chief’s court (*umphakatsi*). When either of the couple pronounces the words ‘*angisamfun*’ (I don’t want him/her any longer) before a council (*libandla*), the marriage is dissolved. The spouse who pronounced the word is said to lose the marriage, meaning the woman has deprived her family of *emalobolo* and children, or that the man has forfeited the *emalobolo* and the children (*ukhiphe tinkhomo emlonyeni*) (cf Nhlapo 1992:76).

Kuper (1963:90) also declared: “Divorce is extremely rare among the Swazi”. Nxumalo (n.d.) wrote: “Swazi tradition does not accept divorce in the Western sense”. By far the most often quoted is the statement by Marwick (1966:33): “Divorce is extremely difficult to obtain among the Swazis – it is difficult to separate from a wife”. Marwick (1966:33) also gives the reason:

“The Swazis have an almost illimitable capacity for compromise, and it will only be in the most stubborn case where there is grievous cause for complaint that the separation will be effected.”

These writers all assert that the marriage among the Swazi is a union of great stability, yet hint at the possibility of divorce in extreme or special cases.

9.1.16 Death

According to Swazi law and custom, death does not necessarily dissolve a marriage. The death of one spouse simply ushers in a new phase in the relationship between the families of the spouses who, after all, were the parties to the marriage contracts.

There are certain processes and expectations that apply when one of the spouses dies. When the husband dies, his wife is expected to remain with her in-laws, who take care of her. After the mourning period has elapsed, her marital family will settle the issue of whether the levirate custom (*kungena*) should be invoked, whereby a relative of the deceased, usually a younger brother or a male relative (cousin) of the deceased, is chosen to cohabit with the widow.

The consent of the widow must be sought for entering into that relationship, as well as concerning the identity of the man chosen for her. She may well refuse to engage in such a relationship with any of the suitors. Whatever the case, she still stays on as part of the family. If she accepts the man to engage in sexual relations with her, any children born to the wife as a result of this relationship belong to the deceased husband's family, not to the levirate partner. The latter receives a beast (*inkhomo yemadvolo*) for his exertions on behalf of the deceased.

When a wife dies, the relationship between the families of the spouses continues to exist. A subsidiary wife (*inhlanti*) may be provided by the wife's family. *Emalobolo* is also delivered for a subsidiary wife (*inhlanti*) that is, five cows if she has been sent by her family. If the husband has made a private arrangement with her, he has to deliver full *emalobolo* for her.

9.1.17 Separation

Separation of the spouses can happen, even though it is very rare and happens only in extreme or special cases. It has been held that this is more applicable, or more evident as far as women are concerned, because of the golden rule that "once smeared with red ochre, a Swazi wife remains obligated to perform certain duties towards her in-laws for the rest of her life". This is taken so far that even if she has been separated from her husband for a long period, she is still required to come back on the death of her husband to mourn him as his widow for as long as is required by custom. Even if a woman dies while separated from her marital family, her body is fetched by her in-laws to be buried by them.

The fact that a marriage cannot easily be terminated is further confirmed by the fact that a woman cannot legally get married and be smeared with red ochre again (*libovu aliphindvwa*).

The following factors are considered to be grounds that can lead to a separation of the spouses:

9.1.17.1 Adultery (*kuphinga*)

Adultery is committed when a married woman has sexual intercourse with a man other than her spouse or by a married man when he has sexual intercourse with a married woman other than his wife. Fannin (1967:32) gives a more comprehensive and more technically correct definition: “Adultery is the carnal connection of a male person with a married woman, during her husband’s life time or after his death while she is cohabiting with her levirate (*kungena*) consort”.

Where the woman is accused of committing adultery, it must be proved. An inquiry will be conducted by the family council (*lusendvo*). If found guilty of such a misdeed, she may be sent away to her parental home. However, it is expected that this will only be for a short while because her parents will send her back, requesting an explanation as to why she was sent to them. The matter may also be reported to the chief who, upon inquiry, will cause the man who committed adultery with the woman, to pay a fine. The fine referred to as ‘*siti*’ may amount to about five beasts. A further two beasts will be paid by the father of the woman to her in-laws as a fine “to clean the sleeping mats” (*tinkhomo tekugeza emacansi*) (cf Nhlapo 1992:79).

9.1.17.2 Witchcraft (*kutsakatsa*)

This involves the actual or suspected practice of sorcery by the wife. Where a wife is accused of witchcraft, the family may decide to approach traditional diviners who will conduct a witch hunt, known as ‘*kunuka*’. If it is confirmed that she is guilty of witchcraft, the family members will send

her back to her parental family. A meeting of the two families then convenes and her family may call for a second opinion. If a diviner of their own choosing again identifies the woman as the sorceress, the wife may be sent back to her parental home. This does not terminate the marriage relationship between the two families. Indeed, reconciliation may be negotiated between the families at some stage. However, if the woman is brought back to her in-laws, she will not be returned to the main homestead. A new house will then be built for her at some distance from the main homestead.

Both Rubin (1965:23) and Fannin (1967:10) assert that a divorce on the grounds of witchcraft can be obtained at the initiative of either spouse. This research, however, casts grave doubts on such an assertion (cf Nhlapo 1992:81).

9.1.17.3 Refusal of conjugal rights

This is according to Nhlapo (1992:86), ‘a potential ground whose effect is difficult to gauge with accuracy’.

In the Swazi way of life, the duty of both spouses to afford each other reasonable sexual privileges is taken very seriously. Nevertheless, refusal to render conjugal rights by either spouse will not lead to separation. There are certain situations where the wife’s refusal of conjugal rights to her husband would be regarded as reasonable, namely, when the woman is ill, is in an advance stage of pregnancy, is menstruating, is in mourning, or has given birth within six months (Nhlapo 1992:86).

Fannin (1967:8) does not mention these grounds at all, though he recognises that: “The husband has exclusive rights of sexual intercourse with his wife, who may not refuse to have connection with him except on reasonable grounds”.

9.1.17.4 Desertion (*kwemuka*)

This occurs when the husband leaves the household with no intention of returning, or where the wife returns to her father’s home also without intending to return (cf Nhlapo 1992:87). This does not necessarily end the marriage relationship, since the spouses may return at any time they choose. The woman may be returned by her husband’s family either to mourn her husband or to be buried at the marital home. This may happen even if she has in the meantime engaged in sexual relations with other men, and even if children have been born of such relationships. She will be fetched back together with any children she may have had subsequently. These children are said to belong to the marriage family, even if biologically they belong elsewhere.

9.1.17.5 Gross disobedience or disrespect

Nhlapo (1992:87) writes that “Swazi culture is based on respect. Respect for the king, for the chief, for older people, for society. A wife is expected to respect her husband and her in-laws, and to defer to the husband in all things”. Disobedience or disrespect is, however, not grounds for divorce, but may lead to desertion.

9.1.18 Consequences of Separation of Spouses

9.1.18.1 *Vis-à-vis* the families

As stated above, a marriage according to Swazi law and custom creates strong ties between the family groups of the spouses. These ties or bonds are so strong that everything is done to ensure that they are not shaken or dissolved until the death of every member of that family. Thus, even the death of either or both of the spouses will not terminate this relationship. The families will continue to aid and support each other at all times. That is why Swazi law and custom has put in place customs such as providing a subsidiary wife (*inhlanti*) when the woman in a marriage dies, or ‘*kungena*’ custom, to ensure the perpetuation of this relationship for the two groups.

Even desertion by one or both spouses merely means a separation of the spouses, which has little effect on the relationship between their respective families. The man may well disappear for the rest of his life, but that does not mean that the woman can leave her marital home. She will be encouraged to stay on, and another male relative may even be given to cohabit with her. Children may even be born from this relationship.

9.1.18.2 *Vis-à-vis* the spouses

As it may be held that a marriage relationship cannot be terminated according to Swazi law and custom, in practice a marriage relationship between spouses may indeed end. The separation between spouses may last for their whole lifetime and may even terminate all their marriage

expectations. Such expectations include the duty to support one another, as well as the duty to cohabit. The parties may even resume such duties with someone else, spending more than half of their lives with the other persons. Thus, even if their marriage is held to be indissoluble, it will survive in theory only, with very few, if any, obligations remaining as far as the parties to the marriage are concerned.

9.2 CONCLUSION

Among the Swazi people, the family is founded upon marriage which unites not only the man and woman but also the two family groups. Even though a Swazi marriage is a process that includes a series of events, certain requirements are essential for the validity of the marriage. One of the reasons for entering into a marriage is the procreation of children. A subsidiary wife is therefore provided if the wife is unable to bear children. A marriage is not dissolved by death or divorce. Adultery, witchcraft, refusal of conjugal rights and desertion are factors that may lead to the separation of spouses. The concept of a marriage in terms of Swazi law and custom is fundamentally different from its civil or Christian counterparts. It emerged to serve different social, economic and spiritual needs and is based on a different value system.

Chapter 10

SUMMARY AND RECOMMENDATIONS

10.1 INTRODUCTION

The purpose of this study was to give a proper exposition of the indigenous Swazi law of contract with specific reference to underlying values and legal principles. Particular attention was paid to how legal rules function in the social processes of the Swazi people and how these legal rules are sometimes manipulated by the various processes. This necessitated a contextual, holistic and comprehensive approach in which legal rules were distilled from customs.

10.2 THE ARTICULATION AND ENFORCEMENT OF A HUMAN RIGHTS CULTURE IN THE KINGDOM OF SWAZILAND

The promulgation of a new Constitution (Act 01 of 2005) in the Kingdom of Swaziland with a justifiable Bill of Rights brings Swazi law and custom into the domain of public law. It guarantees every person's fundamental rights and freedoms subject to respect for the rights and freedoms of others, and for the public interest (See Chapter 1.4.2).

In terms of the new Constitution, the existing law, shall as far as possible be continued with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. (See Chapter 1.4.3). Transformation of Swazi law and custom

may thus be necessary to adapt to antiquated rules, with regard to the law of contract and other aspects of the law. This includes what is known in other African countries as the liberalisation of customary law. In this regard it is directed more specifically at the elimination of certain inequalities which people experience on the basis of gender and other related factors. The Kingdom of Swaziland will, therefore, have to make a specific movement towards a Bill of Rights in order to articulate and enforce a human rights culture. This would also give to Swazi lawyers a potential for innovation, for creativity and for social engineering, which could bring for themselves and for the nation they seek to serve, new levels of energy and fulfillment. Constitutional law may come to occupy the centre stage of the jurisprudence in every relevant field of legal endeavour.

The first and preliminary question in the future construction of statutes in the Kingdom of Swaziland will therefore no longer be, what did parliament intend by the statute, but rather whether the statute is constitutional. The important question to be asked in the application of the laws of Swaziland will not be the content of the laws in its application to a relevant problem, but whether the laws of Swaziland in that respect are consistent with any applicable provision of the Bill of Rights enshrined in the Constitution. Equally, in any examination of whether the administrative action of the state official were legally assailable, the first question will not be whether the official exercised his or her discretion in good faith, or whether he or she properly applied his mind, but whether, assuming that he or she did so, he or she offended any fundamental rights contained in the Constitution. In every field of legal relevance, lawyers will have to be vigilant to ensure that

the Bill of Rights is not wittingly or subtly, directly or indirectly, transgressed in a manner not permitted by the Constitution of Swaziland.

Enforcement will call for the exercise of legal disciplines and social engineering on levels beyond the rigidity of the Swazi traditional roles of legal thinking. The interpretation of a constitution requires an approach which is qualified differently, and is more exact than the approach which traditional institutions adopt. This important difference is a necessary consequence of the special character of a constitution and more particularly of the fundamental rights therein (cf Whelpton).

10.3 THE AFRICAN WAY OF ACKNOWLEDGING AND PROTECTING HUMAN RIGHTS

According to Whelpton (1997:148), the African way of acknowledging and protecting human rights is not compatible with that of westerners, and there is a significant difference in the way they define the concept itself. This difference stems from the confusion resulting from two philosophies, namely the Western concept of “human rights” and the African concept of “human dignity”. The Africans’ concern for human dignity is central to a traditional view of life and they do not understand “human rights” in the same way as westerners do, namely that all human beings are entitled to these rights simply by being members of humankind. In this regard, Howard (1986:1879) comes to the following conclusion:

‘The so-called African concept of human rights is therefore, actually a concept of human dignity. The individual feels respect

and worthiness as a result of his or her fulfillment of the socially approved role. Any rights that might be held are dependent on one's status or contingent on one's behaviour. Such a society may well provide the individual with a great deal of security and protection, one may even argue that people may value such dignity more than their freedom to act as individuals. In relatively homogeneous static and small-scale societies these tendencies are likely to be stronger than the tendency towards individualism. In other words, those who claim the existence of a native system of human rights, confuse human dignity (the end) with human rights (the means) (Bennett 1999:4)'.

To discover what the most appropriate means are, is, however, more important than debating the problem of confusing ends and means. If it is accepted that ethical systems indigenous to Africa (including laws and customs) were designed to sustain human dignity, then the question should be asked whether the western instrument for achieving the same goal, that is formal legal rights, would be more effective. This question can be answered only if we appreciate the differences between the way in which the individual is perceived in Africa and in the West, and if we give some account of the differences (Bennett 1999:4).

Among the Swazi, as among other African peoples, "various principles can be distinguished within the organisation of their social life, emphasizing commitment to the group, uniformity and communality. The African philosophy of life is tempered by the principle of survival of the total community and a sense of cooperation, interdependence and collective

responsibility” (Whelpton 1997:148). It must be noted that each member of the extended family has a social function to perform and to conform with, to ensure that the family functions as a reproductive and economic unit. In this regard, Mbiti (1970:141) says the following: “For the African, a philosophy of existence can be summed up as: ‘I am because we are, and because we are, therefore I am’.” The Swazi put it this way: ‘*Umntfu ngumntfu ngebantfu*’ (literally: ‘a person through persons’), that is, a person is a person in relation to (other) people (Whelpton 1997:149).

The complexity of rights and duties in the Swazi community can be described in terms of three underlying principles, namely respect, commitment and responsibility. The Swazi refers to these principles as ‘*inhlonipo*’, ‘*kutinikela*’ and ‘*umtfalo*’ respectively (Whelpton 1997:149).

Respect is the most important principle. It governs behavior “in a family and societal context and bears no relation to any attributes other than a person’s seniority or place or rank in family within the context of the agnatic group” (Whelpton 1997:149).

Genealogical rank is of paramount importance in Swazi society and underlies their status consciousness. According to WLSA (1994:38) a form of class distinction is embodied in custom which does not apply to those holding high public office, such as the chiefs (*tikhulu*) or the king (*ngwenyama*), but which is extended to the descendants of the ruler. The respect rulers have in their communities is extended to their families. The principles of equality are seen to undermine the hierarchical ranks in rural

communities, and also the belief in ancestors who sanction the principle of seniority in which senior persons play an active role.

Commitment is the principle that makes it possible for commonality to exist within the context of the family and the wider community. This simply means that individuals are not separate from the group, and that individual rights should always be weighed against the needs and interests of the agnatic group. Marwick (1966:281) has written as follows:

‘In the Swazi society the individual is moulded so that his behaviour in everyday life is determined by habits of mind and body, and certain dispositions and sentiments which are the result of his training. The individual is taught certain norms of conduct towards members of his family and to people outside that family. In the same way he acquires sentiments in regard to the economic pursuits of horticulture, tending cattle, hunting, domestic work, religion and every sphere of national life.’

Rights are mainly held by family groups. Each member shares in those rights according to his or her rank within the family group concerned. Therefore no member (and also no woman), is without rights, and all members are full, but not equal, participants in these group rights (Whelpton 1997:148). Dlamini (1990:84) has the following to say in this regard:

‘Individualism is based on the false assumption that all people are equal or rather that they are equally self sufficient in all material and non-material respects. This assumption may arise

from a misinterpretation of the principle of equality of treatment. Equality of treatment should not be confused with the equality of people. But, people are not equal in many respects. Equality of treatment simply implies that no person should be subjected to an individual's discrimination on the ground of some involuntary attribute'.

One can thus conclude that the family group specifically, and the community at large, therefore, constitute the framework within which individuals exercise their political, economic and social rights and freedom (Whelpton 1997:149). It would, therefore, be correct to say that the rights of individuals are often limited by the rights of the community, since the individual forms part of Swazi society. The emphasis is, however, not on the individual as such, "since communal ethics is the first priority and rights are understood within the context of the agnatic group which functions as a corporate legal entity and which also underlies the group-directedness of Swazi life" (Whelpton 1997:141).

10.4 THE COMPATIBILITY OF SWAZI LAW AND CUSTOM WITH NORMS OF NATIONAL AND INTERNATIONAL LAW

This research has shown that there are certain rules in Swazi law and custom that are inconsistent with the norms of international law, and in particular, with accepted fundamental rights. Women, and certain category of individuals, have for example no capacity to enter into contracts (See Chapter 4.7). The principle of patriarchy, as reflected in Swazi law and custom, may also be regarded as constituting an infringement of various

fundamental rights, and especially the rights of women, such as the rights of dignity and equality, as well as the rights associated with participation in the economic sphere, social mobility and justice.,

The Constitution of Swaziland does not contain any specific indications as to how to address this problem. The solution to conflicts between Swazi law and custom and fundamental rights must therefore be sought outside the parameters of the Constitution, and in this process, factors such as the social implications of instituting fundamental rights could be explored (cf Vorster 1993:552 and Whelpton 1991:9).

10.5 THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS BY THE COURTS

Swazi law and custom are now subject throughout to the provisions of the Bill of Rights in the new Constitution. In terms of Section 14(21) of the Constitution, fundamental rights are applicable to all legislation in force, and also to Swazi law and custom, and no fundamental rights will be infringed by an obligation in common law or Swazi law and custom (See Chapter 1.4.7).

The usual understanding of a justifiable bill of rights is that the rights are applicable only to relationships between citizen and government, not to individuals in their private relationships. It is common knowledge that Swazi law and custom, being unspecialised in nature, contains but few formal rules governing the rights and obligations of members of the family group *inter se*. Since these rules are foreign or unknown to westerners, they are often

used out of context: a good example here, being women's rights to dispose of property under Swazi law and custom.

This position has changed with regards to modern indigenous law. Members of a household are now seen as individuals, each of them with specific rights and obligations. It could therefore be argued that the equality principle *per se* in the Constitution guarantees each person, notwithstanding his or her age or gender, comprehensive rights in respect of all and any goods he or she may acquire.

It would appear from the terms of the Swaziland Constitution, however, that constitutional norms are always to prevail. Article 14(2) of the Constitution of Swaziland could support this proposition, but its wording is somewhat ambiguous. It provides that: "the fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, the Legislature and Judiciary and other agencies of government and where applicable to them, all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided by the Constitution."

10.6 THE ROLE OF THE LEGISLATOR AND COURTS

As already mentioned (see Chapter 1.3) Swazi law and custom has been recognised in the new Constitution as part of the existing laws in the Kingdom of Swaziland. The result of this is that the courts are now bound, where applicable, to apply Swazi law and custom (sec 137). The Constitution must further be interpreted in accordance with the values of an open and democratic society, based on freedom and equality (sec 14).

Courts now have the difficult task not only of identifying and interpreting these values but also of harmonising existing and known rules of Swazi law and custom with these values.

The fact that Swazi law and custom has now been recorded may simplify the court's task. The recording could give clear guidelines to courts to assist them with problem related matters regarding Swazi law and custom. It could also play an important role in the further development of Swazi law and custom.

As the legislator bears the principal responsibility for advancing human rights, new legislation may have to be enacted in the Kingdom of Swaziland. In instances of controversy the legislator will even have to take the initiative to implement the bill of rights and it cannot only be left to the courts of the Kingdom of Swaziland. Polygyny and the transfer of marriage goods (*emabheka*) are relevant examples. Feminists maintain that both these institutions have helped to maintain the social inferiority of women. It is, however, impossible to prove empirically that such inferiority can be ascribed to polygamy and the transfer of marriage goods. Given the underlying philosophy of these institutions, the courts ought not to interfere. The legislator will have to approach such matters with particular circumspection, since these institutions cannot be separated from the belief in ancestors and the interest that the ancestors, as custodians of tradition, have in preserving these institutions (cf Whelpton 1997:147).

10.7 THE FUTURE OF SWAZI LAW AND CUSTOM

As it is an indispensable ingredient of the Swazi society, it should be obvious that Swazi law and custom, too, stands to contribute to the future development of the Kingdom of Swaziland. The future of Swazi law and custom is important in the sense that a substantial part of it is still living law (Whelpton 1997:20). The continued application of Swazi law and custom is therefore also guaranteed in the new Constitution of Swaziland (See Chapter 1.4.1).

Swazi law and custom will, however, as has been the case in the past, continue to undergo constant change as it has the capacity to adapt to changes in all spheres of life. Its adaptation should, however, not be initiated by a Bill of Rights as an instrument of entrenching western values, but should be adapted in harmony with its underlying principles (Whelpton 1997:150).

10.8 LEGAL DOMAINS TO BE ADDRESSED – ILLUSTRATIVE EXAMPLES

Although the Swazi Government can make use of legal reform to attain some of its objectives with regard to development, the law has certain limits. The efficacy of the law is dependent on the community's perception and acceptance of what the law should be and should accomplish. Examples of laws not expressing the people's values, but rather reflecting the developmental objectives of new African elite, abound in several African

countries. In this context a distinction can be made between ‘paper law’ and ‘living law’ or ‘the people’s law’ (cf Whelpton 1997:20).

The following are examples of legal domains that could possibly be addressed by the Government of Swaziland:

- the potential basic conflict between the individual rights orientation of the general common law and statute, and the communal rights and obligations orientation of Swazi law and custom;
- people’s dissatisfaction with the results of applying the general law’s individual orientation - given that their expectation is often in line with Swazi law and custom;
- the emphasis of the Bill of Rights on rights as opposed to Swazi law and custom principle of duties and patriarchy, which qualify such implied freedom by virtue of the respect paid to persons of high social and political rank;
- women’s rights to dispose of property;
- polygyny and the transfer of marriage goods (*emabheka*) with due recognition of the influence of the ancestral world in the marriage system of the Swazi people;
- the *locus standi in judicio* of Swazi women with due recognition of the fact that under Swazi law and custom she, after marriage, becomes a member of her husband’s family group with concomitant guardianship;
- the variation of legal values and norms in the urban areas as opposed to the law found in rural areas;

- choice of law – the possibility of obtaining equality by choice of law (common law or Swazi law and custom) rather than by the horizontal application of constitutional rights or legal reform; and
- reform and professionalisation of the Swazi National courts which implies the upgrading of courts and the training of court officials. The existing courts of first instance should be turned into magistrates' courts of a special class (cf Sanders 1986:128).

10.9 CHANGE AND LEGAL VALUES

The study has shown that Swazi law and custom has its own identity and has the capacity to adapt to changes in all spheres of life, as it has done in the past.

Although the Swazi law of contract shows signs of adjustment and change in new circumstances, there is evidence that proven legal principles and community values are kept intact. The changes and adjustments that take place are distinct and can be typified as either traditional or western. In some cases, the influence of western cultures has meant that traditional values are less adhered to. The influence of such western values has however, not replaced Swazi legal principles and values. In this regard, one can refer to bartering, the engagement and the marriage contract (See Chapter 7.4, 9.1.4 and 9.1.5).

10.10 THE DISTINCTIVENESS OF THE LAW OF CONTRACT OF THE SWAZI IN THE KINGDOM OF SWAZILAND

Although it is possible to identify general principles and different contracts among the Swazi, the individual character of each contract must always be borne in mind, since a contract is more than a device for establishing the economic and legal implications of a transaction. Contracts are real in nature which means that no contractual liability arises from a mere promise or an agreement (See Chapter 3.2). Among the Swazi, the emphasis is rather on what the parties do in stead of what they intended to do. The manifestation of the intention is important and not the intention itself. As a result, contractual liabilities are created through the performances of the parties. Contracts are not first concluded and then executed. Performance is rather the acknowledgement of an agreement as being the reason for the enforcement thereof. It is the performance that is of importance, and not the agreement itself (cf Whelpton 1991:253). Therefore, tacit agreements are not grouped separately. Performances that result from agreements must be performed personally. No obligations can be created through a third party. This explains the absence in Swazi law and custom of phenomena such as representation and stipulation in favour of a third party (See Chapter 3.8).

Notwithstanding the influence of cultural factors such as westernisation, modernisation and Christianity on the culture of the Swazi, they still use Swazi law and custom as their principle law. Social and economical changes have resulted in the traditional small scale economy being changed by a monetary system. Compensation and even '*emalobolo*' are nowadays

primarily given in cash. In spite of the abovementioned influences, the Swazi's legal values have not been replaced by western legal institutions but have given rise to distinctive value systems.

In some instances however, it was clear that the influence of western culture caused that certain contracts are concluded in its own distinctive way. The emancipation of unmarried Swazi's, which shifted the emphasis according to western values from the group to the individual, played a major role in this regard. The same emphasis is no longer placed on a group-orientated way of life, although it will never totally disappear because of the unity constantly created within the group.

The influence of western cultures has meant in some instances that traditional values are followed to a lesser extent without being replaced by or supported by western values. The western individualism has resulted in the watering down of family ties. This research clearly shows that the current Swazi law of contract still reflects certain characteristics of the traditional law of contract, although this may be in a pure, adjusted or reduced way. Examples of this are found throughout the whole spectrum of the law of contract, for example the real concrete nature of contracts, the informal way of concluding contracts, the fact that a contract can only be concluded in the presence of the parties (see Chapter 3.3), the unknown phenomena of prescription and set-off (see Chapter 6.1 and 6.2), the fact that interest is not negotiated in general, indigenous betrothal procedures and the delivery of '*emalobolo*' as such. In spite of the explicit adjustment on the ideal and concrete levels of organised systems, adjustments are also taking place on the conflict dispute settlements levels with a view to managing and solving personal dispute settlements (See Chapter 3.7).

Most of the contractual disputes are settled outside the official settlement mechanisms. For this purpose, use is made of negotiations and mediation. Because of the fact that the dispute resolution in these instances is rather related to people's perceptions and values, the adjustment is further perpetuated. Even if the parties can not reconcile their differences, and the matter takes its course, the traditional courts would still endeavour to settle the matter amicably by way of conciliation and mediation.

10.11 LEGAL PRINCIPLES AND PARADIGM

Swazi law and custom is recognised in the Constitution as part of the existing laws of the country and is still relevant in the lives of the Swazi nation. The social changes the Swazi people of the Kingdom of Swaziland are undergoing must be reflected therein. Their living law, legal principles and values must be taken into account.

Most aspects of the law of contract were addressed, while shortcomings and contradictions in the available literature have been identified and structured accordingly. A systematic exposition of the indigenous law of contract of the Swazi has been presented within a theoretical frame work which will facilitate further legal reform and development.

Although it is true that a contract in the first instance implies the concept of an obligation, and that non legal obligations can be discussed in general terms and their existence can be identified as moral and social phenomenon, it is not easy to separate its impact from the interaction of the legal and moral interpretation and understanding of a contract. One can therefore not

accept that the concept of contract would fall outside of the legal framework and that the law merely controls this legal phenomenon (See Chapter 3.8).

Only with the assistance of the law itself, can one determine what the law of contract involves and what a contract specifically is. One could most probably also argue that the concepts that relate generally to the law of contract, such as promises and agreements, could be identified without the assistance of the law, and then conclude that the law of contract deals with promises and agreements. This study has, however, shown that these concepts already exist as a substantial part of the law (See Chapter 4.2). When these concepts are more closely studied, various problems are identified. Not all promises and agreements can always serve as a valid basis for a contract. One must first establish whether the promises and agreements comply with the requirements which determine the legitimacy thereof. There are others who approach the question by first determining whether a promise or an agreement has come into being, and secondly whether those promises and agreements could juridically be acknowledged as promises and agreements which result in obligations. It would, however, appear that none of these conclusions are correct. A promise or an agreement cannot merely be identified as a fact. A promise or an agreement is a social, moral or legal construction and therefore already absorbed in social, moral and legal objectives. Besides, it is also not desirable to create an ethical or legal world in which the acknowledgement of a promise or an agreement is a mere formality (See Chapter 3.3). When one endeavours to describe contracts, one should not think of a contract as being one central paradigmatical type of action but rather of a situation with various possibilities.

10.12 INDIGENOUS CONTRACT AND INDIVIDUALISM

The major urbanisation of the Swazi has caused them to enter into a new period during which they have not only become aware of their values, but also one in which valid, social and economical changes have taken place. Many Swazi's find themselves nowadays in a social structure where the individual enjoys far more personal freedom than before. An individuals' status or rank is no longer the prominent social factor, although it still has an important role to play, specifically with regard to the marriage contract (See Chapter 9.1.3). Each person is seen to be equal and is not subordinate to another. This principle is also enshrined in the new Constitution by a Bill of Rights. Accordingly, an individual is free to bind him or herself legally and this ability is increasingly seen as a fundamental right. This means that parties are free to give any validated contents to their agreements and amend the living law to suit their personal circumstances. This also means that one cannot *ex post facto* interfere with a contractual relationship and that the agreement should be enforced as the parties had agreed.

The question, however, arises as to whether this new awareness of individual capacities and values is not giving rise to over-idealised self-image and confidence with the studied people, namely that each one will be capable, in a rational way to act in his or her own interest. The realities of the western economy and its trading activities that flow from these, contradict the idea of the individualistic, unattached, creative human being. Conclusion of contracts, which is the result of negotiations between two willing individuals have in the urban areas, to a greater extent, been replaced by mass contracting during which little or no negotiations have taken place. The

modern western view of a contract, namely that it is a result of consensus between parties, implies that each party has certain expectations regarding the contract and that each is satisfied with these expectations. If all parties enter into an agreement willingly and each party is able to take into account his or her own circumstances and needs, the contractual legitimacy comes to its rights if their reasonable expectations are fulfilled. Contractual legitimacy is however, dependent on the nature of the community in which it functions and the community's belief in this legitimacy.

In any principally capitalist society, an agreement remains the most important medium whereby legal relationships and the exchange of property can take place and, therefore one must define contractual legitimacy within these constraints (cf Whelpton). Among the Swazi, contractual obligations lies mostly in exchange (*quid pro quo*), although reasonable expectations are seen to be executed. Contractual freedom as a principle does not enjoy priority over contractual legitimacy (See Chapter 7.2.1).

It is clear from this study that, due to the fact that Swazi law and custom is now subject to the new Constitution and the Bill of Rights, further legal reform in Swazi law and custom can be expected. The Bill of Rights grants freedom of rights to the individual who previously, could not enter into negotiations with a view to concluding an agreement, e.g. woman, who also could not own property, and who could not in marriage determine her own destiny (See Chapter 1.4.5).

10.13 RECORDING AND CODIFICATION

Recordings and codifications of indigenous legal systems are often criticised as if the intent was to record or codify the traditional law of Africans, rather than an effort to reflect on the living law of the specific group studied at a given point in time. The critics have created the impression that customary law consists of immutable rules but have overlooked the fact that customary law also consists of processes and is quite capable of adapting to changing social-economic circumstances (cf Dlamini 1990:4).

Although the general point of view is against codification of indigenous legal systems, the Government of the Kingdom of Swaziland has opted to codify Swazi law and custom. The researcher has therefore taken the liberty of preparing memoranda for the codification of the Swazi law of contract and the law of marriage because those contracts that have an influence on a person's status are reflected in the law of marriage. It is intended to submit these memoranda to the Government of the Kingdom of Swaziland after this thesis has been submitted to and accepted by the examiners (see Annexure A and B).

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Coronel's Curator v. Coronel's Estate 1991 AD 323

Grootschwaing Salt Works Ltd v. Van Tonder 1920 AD 492-497

Lequoa v. Simpamla 1944 NAC (C and D) 85

Norvick v. Benjamin 1972 (2) SA 842 (A)

R. v. Fakudze and Another 1970-76 SCR 422

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Sweet v. Ragerehara 1978 (1) SA 311 (D) 138c

SWAZI LEGAL MAXIMS AND PROVERBS

<i>akunasivumelwani nemtwana</i>	you cannot conclude a contract with a minor
<i>akungenwa esibayeni sendvodza</i>	lovers may not sleep together let alone have sexual intercourse
<i>ayocela umbhidvo</i>	to ask for red ochre, meaning to ask for somebody's hand in marriage
<i>emaswati akamtsatsi kati asesakeni</i>	a Swazi does not buy a cat in a bag for himself
<i>indlela yekuphila kwethu</i>	our (the Swazi) way of life
<i>inhlamba iyagezwa</i>	literally, an insult should be washed, which means a person who has been insulted must be compensated
<i>inkhomo yelubisi/yeliphakelo</i>	a beast given to a woman by her husband which allows her to eat certain food at her in-laws, which otherwise she was not allowed to eat, such as milk and milk products
<i>inkhomo yemadvolo</i>	literally, the beast of the knees which means a man penetrating a woman from behind
<i>inkhosi ibusa ngebantfu</i>	the king rules by his people
<i>inkhosi iyabonya</i>	the king is sick, meaning the king is dead
<i>inkhosi ngiyo lenemukhwa wekusika live</i>	the king is the only one with powers to demarcate the boundaries of the country
<i>inkhosi yenthosi ngebandla</i>	a chief rules by way of his councils/a king is a king through his councils
<i>Ikhotsame</i>	the king has died
<i>kubika sisu</i>	an act of reporting a pregnancy to the family of the man responsible
<i>kuchitsa umhlolo</i>	literally, to chase the bad omen
<i>kudla umuti</i>	literally, "to eat the home"; stated with reference to a woman who ranks higher than other wives in a polygynous household
<i>kufakwa esiwini</i>	literally, to put a child in someone else's womb, which means to adopt a child
<i>kuhlanganisa bukhosi</i>	to strengthen the relations between the family of the bride and that of the bridegroom
<i>kukhotsama kweNgwenyama</i>	the death of a king
<i>kukhumbuta</i>	the creditor must first remind the debtor of this obligation

SWAZI LEGAL MAXIMS AND PROVERBS

<i>kulotjolwa umfati</i>	you may deliver emalobolo at a future date
<i>kumikisa umtfwana emshini</i>	a minor ritual performed to mark the end of the period of confinement of a newborn baby
<i>kumitsisa</i>	literally, to impregnate, but used in context to refer to the act of impregnating an unmarried woman
<i>kuncutsa</i>	taking samples of the person's possessions for the purpose of bewitching him or her
<i>kungcina inyongo</i>	a game on bayeni day
<i>kuphatwa emndeni</i>	a married woman may exercise her share in the guardianship
<i>kuphuka sivumelwano</i>	no remedy is available if one party repudiates an agreement
<i>kushone lilanga</i>	the king has died
<i>kutsebula</i>	turning a person into a zombie
<i>kuyekela</i>	the party that has been mislead may resile from a transaction
<i>kuyokwembula ingubo enkhosini</i>	an appeal to the king
<i>kwenta umsebenti wakho nesivumelwano</i>	contractual obligations are terminated by rendering performance
<i>kwephula loko lokuhlonishwako</i>	if one breaks any of the numerous taboos
<i>lebakholelwa kutsi Bangakwana</i>	from what the (the Swazi) believe they ought to do
<i>lelive lemaSwati ngawo emabutfo</i>	the pillars of authority in the kingdom
<i>libovu aliphindvwa</i>	a woman cannot legally get married and be smeared with red ochre again
<i>licala aliboli</i>	a debt does not decay
<i>licala litekwa ngalelinye</i>	a case is decided, based on another comparable one
<i>lilima liyaphekelwa</i>	the person for whom the work is performed should always be present
<i>liSwati liyatalwa</i>	a person is born as a Swazi by birth
<i>litfumbu lentfombatana</i>	the last born girl
<i>litsambo lemuntfu alidliwa</i>	literally, a person cannot chew somebody's bone, in context, the paternity of a child or person lies with one person – the father
<i>lubane</i>	bewitching a person – means a fire starts

SWAZI LEGAL MAXIMS AND PROVERBS

	spontaneously with no known source
<i>luswati</i>	a beast paid as a fine
<i>sikhulu Sikhulu ngebantfu</i>	a chief is a chief through his people
<i>sikhulu Sikhulu ngelibandla</i>	a chief is a chief through his councils
<i>sikhulu siyatalwa</i>	a chief assumes his position through hereditary right
<i>tinkhomo tekugeza emacansi</i>	beasts to wash the sleeping mats (adultery fine paid by the woman's family)
<i>tinkhomo temabheka atitali</i>	the exact number of cattle paid as emalobolo is returned even if the cattle have multiplied over the years
<i>ukhiphe tinkhomo emlonyeni weyise</i>	she has taken the cattle out of her father's mouth
<i>ulitfwala licala nobe ungakalenti</i>	he becomes responsible for offences which he himself did not commit
<i>umfati akacedvwa</i>	it is not proper to effect full delivery of emalobolo at once
<i>umfati longugogo</i>	a woman who bears the same surname as the husband's paternal grandmother
<i>umfati lokhiwe</i>	a wife who has been negotiated for a man by his parents
<i>umfati lowendzisiwe</i>	a woman married following an arranged marriage where her parents would have approached the man's family and offered her as a wife to their son
<i>umfati wekukhiwa</i>	an arranged marriage
<i>umhlamba ubitwa esibayeni</i>	summoning the nation to the cattle byre kraal
<i>umlomo longacali manga</i>	the mouth that never lies, referring to the king
<i>umonakalo</i>	no damages are claimable when the contract is void on the grounds of impossibility of performance
<i>umuntfu ngumuntfu angatalwa</i>	a person is only a human being once he or she has been born
<i>umuntfu ngumuntfu asesiswini</i>	a person's legal subjectivity begins at conception
<i>umuntfu ngumuntfu ngebantfu</i>	a person is a person through a person
<i>umuntfu ulala agucuka</i>	a clever man changes his mind

SWAZI LEGAL MAXIMS AND PROVERBS

<i>ungayibambi inhlwa ngenhloko isaphuma</i>	do not catch an ant before it comes out of its hole by itself
<i>usule sibaya sendvoldza</i>	damages are paid because less emalobolo will be received for a girl when she falls pregnant before marriage
<i>utawutsatsa impunzi utsatse licala</i>	he inherits his father's debts, as well as his assets
<i>uvule sibaya sendvodza</i>	literally, an act of having sex with an unmarried woman; in context it means impregnating a girl to the detriment of the father who is the girl's guardian
<i>uyabekwa</i>	he is placed in a position of authority

GLOSSARY OF SWAZI TERMS

<i>amekeza</i>	bridal songs
<i>ayalwa</i>	marriage etiquette
<i>babe lomsikati lomdzala</i>	a senior aunt
<i>bafati</i>	a married woman
<i>bandlancane</i>	a small council of the chiefdom; the committee functions as an executive committee of the chiefdom
<i>bandlakhulu</i>	a large council of the chiefdom involving all adults
<i>bantfwabenhosi</i>	princes/princesses
<i>bantfwabenhosi bendzawo</i>	princes of the chiefdom
<i>batobonga indzaba</i>	acceptance of a proposal
<i>batomcela</i>	to ask for the bride's hand in marriage
<i>batomgana</i>	inviting the man to participate in the women songs
<i>bayeni</i>	the groom's party
<i>bayogidza umtsimba</i>	the lover's homestead
<i>bavusa likhaya</i>	they perpetuate a family
<i>bofakazi</i>	witnesses
<i>bomakoti</i>	widows
<i>botlhaswa</i>	negligence
<i>bukhosi</i>	kingship
<i>budzala</i>	age or seniority
<i>bulili</i>	gender
<i>egumeni IeNdlunkhulu</i>	royal enclosure
<i>emabandla</i>	councils
<i>emabheka</i>	marriage goods (emalobolo)
<i>emabutfo</i>	regiments
<i>emacansi</i>	sleeping mats
<i>emadvuna</i>	leaders who are senior to <i>tikhulu</i> and have followers of their own; they organise their own <i>emabutfo</i> and have their own <i>inhlambelo</i> , such as the Mamba clan
<i>emahambate</i>	chiefdom where there are no chiefs (<i>tikhulu</i>)
<i>emajaha</i>	warriors or men's regiments
<i>emakhosatana</i>	princesses who are designated to perform important national duties
<i>emakhosi</i>	kings
<i>emalawini</i>	the regiment quarters at the royal

GLOSSARY OF SWAZI TERMS

	residence
<i>emalobolo</i>	cattle delivered as marriage goods to a bride's father and family by the groom and his family
<i>emalobolo</i>	marriage goods
<i>emalungelo</i>	rights
<i>emasondvo</i>	hooves
<i>emihambo yetfu</i>	our Swazi traditions
<i>emphakatsini</i>	chief's headquarters
<i>endlunkhulu</i>	at the head home
<i>eNgwenyameni</i>	at the king
<i>enshungushwini</i>	the side entrance of the kraal
<i>esangweni</i>	entrance
<i>esibayeni</i>	at/in the cattle byre
<i>esikhulwini</i>	at the chief's residence
<i>fakazi wemehlo</i>	an eyewitness
<i>gogo</i>	grandmother
<i>gozolo</i>	master of ceremonies at a traditional marriage
<i>imigcwembe</i>	wooden meat platters
<i>imihlubulo</i>	meat from the sides of each of the beasts that are exchanged
<i>imimango</i>	chiefdoms
<i>imiphakatsi</i>	residences of chiefs
<i>imisibenti</i>	duties
<i>imiti yebukhosi or tigodlo</i>	royal residences
<i>imitsanyelo</i>	brooms
<i>invulalisango</i>	a small gift preceding marriage goods
<i>imvunulo</i>	traditional attire
<i>incangosi</i>	singing (at a traditional marriage ceremony)
<i>incwala</i>	national ceremony of the first fruits
<i>indlu</i>	a hut
<i>indlunkhulu</i>	head home
<i>indlovukazi</i>	literally – elephant referring to the queen mother
<i>indvodza</i>	a man
<i>indvodza letsetse</i>	a married man
<i>indvuna</i>	headman
<i>indvuna yebafati</i>	a headman a who is a commander of

GLOSSARY OF SWAZI TERMS

	women's regiment
<i>indvuna yemabutfo</i>	a headman who is a commander of the regiments
<i>indvuna yemajaha</i>	a headman who is a commander of the warriors
<i>indvuna yemcuba</i>	the main headman in a chiefdom
<i>indvuna yesifundza yemutia webukhosi</i>	a regional headman
<i>indvuna yetintfombi</i>	a headman who is a commander of girls' regiments
<i>indvuna ye tinkhundla</i>	a supreme headman who is responsible for all the chief's centres
<i>indvuna ye sikhulu</i>	the main headman of a chief
<i>indzawo yokuhlala</i>	fields and residential sites
<i>ingcugce</i>	a grown woman
<i>ingece</i>	some form of skin bracelet worn on the right arm
<i>ingeje</i>	a traditional bangle made of grass
<i>ingwe</i>	a skirt made of leopard skin worn during the <i>incwala</i>
<i>ingwenyama</i>	literally lion referring to the king
<i>inhlambelo</i>	a sanctuary
<i>inhlanti</i>	a younger sister who joins a married sister in her marriage, either for the purpose of bearing children on her behalf or as a replacement on her death
<i>inhlawulo</i>	a fine
<i>inhloko yemuti</i>	head of the family
<i>inhlonipo</i>	respect
<i>inhloso</i>	intent or with intention
<i>injelwane</i>	porcupine quill
<i>injobo</i>	some kind of skin which differentiates regiments
<i>inkanyiso</i>	a fee paid to a traditional healer
<i>inkhomo (yinkhomo)</i>	a beast (is a beast)
<i>inkhomo yekucela</i>	the beast delivered to the bride's family by the man's family to ask for the hand of the bride
<i>inkhomo yekukhonta</i>	a beast given to the chief for granting land
<i>inkhomo yelisango</i>	a cow that is given as a fine and

GLOSSARY OF SWAZI TERMS

	which is kept by the chief
<i>inkhomo yembhaca</i>	the beast a man is fined with if he marries before informing his regiment
<i>inkhosi ibusa ngebantfu</i>	a king rules by his people
<i>inkhosi isebandla</i>	the king in council
<i>inkhonyane</i>	a skin belt across the chest
<i>inkhosana</i>	a family successor
<i>inkhosikati</i>	a wife to the king
<i>inkhubazana</i>	ploughing implements
<i>inkhundla/ plural tinkhundla</i>	the common delineated constituent area for both local and national government (originally the area in front of a cattle kraal)
<i>inqaba kanqofula</i>	the song that is sung at the end of the ceremony of the first fruits
<i>insulamnyembeti</i>	literally, “to wipe away tears”; a beast given to the mother when <i>emalobolo</i> is delivered for her daughter
<i>intalelwane</i>	family members of the same lineage
<i>intfombi</i>	a young woman
<i>inyanga</i>	a traditional medicine man or a diviner
<i>inyanga yemkhuhlane</i>	an agreement for healing by a diviner
<i>inyongo</i>	bile sack
<i>kuba</i>	to steal
<i>kuba ngumtsakatsi</i>	practising witchcraft
<i>kubambisa</i>	bailment
<i>kubeka</i>	to grant land
<i>kubita inyanga</i>	to acquire the services of a traditional healer
<i>kubonga</i>	to thank
<i>kucela</i>	to ask for a girl’s hand in marriage
<i>kucela sincenphetelo</i>	claiming damages
<i>kuchinsa</i>	to exchange
<i>kudiza/kudizela</i>	to bribe
<i>kugagadlela/kadlwengula</i>	to rape
<i>kugana</i>	courtship
<i>kugidvwa umtsimba</i>	traditional wedding ceremony
<i>kuhlambisa</i>	bridal gifts
<i>kuhlanganisa</i>	to reconcile

GLOSSARY OF SWAZI TERMS

<i>kuhumusha</i>	to defraud
<i>kuichaza</i>	thing
<i>kujuba emabutfo</i>	the creation of age regiments
<i>kujuma</i>	courtship
<i>kukhiwa</i>	when the man's father makes the approach for a marriage
<i>kukhonta</i>	to request for land in a chiefdom; to pay allegiance to a chief
<i>kukhontela sibhedlela</i>	to request another chiefdom to allow a sick cow to graze in its pastures, avoiding contact with disease in its own fields
<i>kukhulula</i>	release
<i>kulilelwa</i>	an offer of condolence
<i>kumenta umnikati</i>	transfer of ownership
<i>kuncusa</i>	a chief's request to his people to help build or repair a certain homestead
<i>kungeke kwendeke</i>	impossibility of performance
<i>kungena</i>	an act of marrying a widow
<i>kuntjintjiselana</i>	exchange
<i>kunuka</i>	to open a bag of bones
<i>kuphinga</i>	adultery
<i>kuphuma</i>	the party that has been misled
<i>kuqabangula</i>	an engagement
<i>kutsenga umuntfu</i>	to buy off a crime
<i>kusabisa</i>	to use 'force' in concluding a conflict
<i>kushaya</i>	to beat or assault
<i>kusisa</i>	farming out
<i>kusitana</i>	loan for use
<i>kutiba</i>	a form of betrothal
<i>kutinikela</i>	obligation
<i>kutsakatsa</i>	witchcraft
<i>kutsatsa</i>	to marry
<i>kuvuma</i>	consent
<i>kuvusa likhaya/umuti</i>	to perpetuate a family
<i>kuyenga</i>	misrepresentation
<i>kuyokwendziswa</i>	when a girl has refused the father's approach
<i>kwemuka</i>	desertion
<i>kwenanisa</i>	one must return a thing of the same

GLOSSARY OF SWAZI TERMS

	kind, quantity and of similar quality
<i>kwendza</i>	marital status
<i>kwendzisa</i>	the process of when the girl's father makes the approach
<i>kwephula sivumelwano</i>	breach of contract due to fault of one party
<i>labo labahlambisa</i>	a woman's in-laws who received bridal gifts
<i>labangakendzi/ labangakatsatsi</i>	unmarried adults
<i>libandla</i>	council
<i>libheshu</i>	loin skin
<i>libovu</i>	red ochre
<i>libutfo</i>	regiment
<i>libutfo labomake</i>	a women's regiment
<i>libutfo lemajaha</i>	regiment of young men
<i>libutfo letintfombi</i>	age regiment for young woman
<i>licansi</i>	sleeping mat
<i>licebo lekuyenga</i>	fraudulent misrepresentation
<i>licube</i>	traditional necklace made of beads
<i>lidvuna</i>	a headman who acts as a chief in a chiefdom where there is no chief
<i>lifuku</i>	sleeping hut
<i>ligunqa</i>	a council composed of senior princes and the headman of the royal residence; he lives with the king and acts as a close advisor
<i>lihawu</i>	a shield
<i>lijaha</i>	a young man
<i>lijuba</i>	a bead necklace made from a single string of blue beads with smaller white beads on the side and one heart bead in the position next to the man's heart
<i>lilima</i>	to request people to come and assist with small tasks
<i>lincusa</i>	an emissary
<i>lingunga</i>	princes of the realm
<i>liphakelo beast</i>	a milk cow
<i>liphehla</i>	animal fat
<i>liqoqo</i>	royal senior councillors chosen to oversee matters of the royal residences

GLOSSARY OF SWAZI TERMS

<i>lisiko</i>	custom
<i>lisiko lokuhlonishwako</i>	traditional usage, custom
<i>lisokanchanti</i>	the family head's firstborn son
<i>lizinga/sigaba/sitfunti</i>	rank/status
<i>lokungekho emtsetfweni</i>	an unlawful transaction
<i>lubandze</i>	to fetch wood
<i>ludvwendvwe</i>	the bridal party forming a straight line
<i>lugege</i>	the beast that marks the conclusion of the agreement for <i>emalobo</i> between the parties
<i>luhlobo lwisivumelwapo</i>	the extent of involvement and consultation with other family members depends on the nature of the contract
<i>luhlongwa</i>	a grass bangle
<i>lusendvo</i>	family council
<i>lusiba</i>	feather
<i>makoti</i>	brides
<i>ngenhloso</i>	with intention
<i>ngiyacela</i>	I ask
<i>okuphuma esivumelwaneni</i>	withdrawal (from a contract)
<i>sankhala</i>	a portion of meat given to a convicted adulterer
<i>sento/sento tsite</i>	an act
<i>sibaya</i>	a cattle kraal
<i>sibumbu</i>	a meat portion from the leg of the <i>lugege</i> beast
<i>sicholo/ticholo</i>	a beehive-hairdo
<i>sicheme</i>	a regiment
<i>sidvudvu semnyeni</i>	the beast given by the bride's father to the groom's people as a sign of acceptance of the <i>emalobolo</i>
<i>sidwaba</i>	skin skirt
<i>sidzandzane</i>	a young girl
<i>sigaba</i>	status
<i>sigeja</i>	a special shawl worn around the shoulders during the ceremony of the first fruits (<i>incwala</i>)
<i>sigiyo</i>	a special dance where the bride dances with her sisters and brothers
<i>sihlantsi</i>	smaller mat for seating

GLOSSARY OF SWAZI TERMS

<i>sikhulu</i>	chief
<i>siphandla</i>	a skin anklet/wristband
<i>sisa</i>	the cattle used for farming out purposes
<i>sisho</i>	proverbs
<i>sisinga</i>	progeny
<i>sitfunti</i>	dignity
<i>sisu</i>	stomachs
<i>sisulamsiti lesikhulu</i>	the king's first wife; she must be a Matsebula and has special national duties to perform
<i>sisulamsiti lesincane</i>	the king's second wife; she must be a Motsa and she has special national duties to perform
<i>sive</i>	the nation
<i>sivumelawano</i>	a voluntary agreement between two parties (a contract)
<i>tandla tiyagezana</i>	to wash each other's hands
<i>teka</i>	to marry
<i>tibi tendlu</i>	the family's dirty linen
<i>ticholo (kukhehla)</i>	a beehive-like hairstyle worn by Swazi women
<i>tifundza</i>	regions
<i>tigodlo</i>	the royal residences
<i>tigodzi</i>	wards
<i>tikhetfo</i>	traditional sieves
<i>tikhulu</i>	chiefs
<i>timbita</i>	traditional medicine
<i>tindvuna</i>	headmen
<i>tindziwo</i>	clay pots
<i>tinhlangotsi</i>	meat from the sides of each of the beasts that are exchanged
<i>tintfombi</i>	maidens
<i>titja</i>	dishes
<i>ululate</i>	praise singing
<i>umcwasho</i>	a woollen tassel worn by maidens to signify virginity
<i>umdzalaso</i>	a beast which is part of a fine for seduction
<i>umfana</i>	a young boy
<i>umfati</i>	a married woman
<i>umfati longugogo</i>	a wife who has the same surname as

GLOSSARY OF SWAZI TERMS

	the grandmother of the husband
<i>umfati losingani</i>	a wife whom a man has chosen for himself
<i>umfati wekukhiwa</i>	a wife who has been negotiated for a man by his parents
<i>umfati wekwendziswa</i>	a wife in an arranged marriage
<i>umfelakati</i>	a widow
<i>umganu</i>	a marula tree
<i>umgijimi</i>	a chief's runner
<i>umgoqo/umvalo</i>	signifies a woman's consent to be married following her coming out of the hut and hitting the gate with a spear or when she agrees that a goat they show her after the marriage ceremony be killed
<i>umhambo</i>	manners, etiquette, polite usages
<i>umhlaba</i>	land
<i>umhlaba wemaSwati</i>	land belonging to the Swazi
<i>umhlambiso</i>	marriage gifts, given by the bride to in-laws
<i>umhlandla</i>	a cowhide necklace
<i>umhlanga</i>	a reed, the type of grass collected by girls during the Reed Dance; a term also used to describe the Reed Dance
<i>umkhaya/emkhayeni</i>	a witch-hunt
<i>ummangali</i>	a complainant
<i>umndeni</i>	a family unit
<i>umndeni weSikhulu</i>	a chief's family council
<i>umntfwana</i>	a child
<i>umntfwana welibovu</i>	a small child given to the bride to send around on errands
<i>umntfwananeSikhulu</i>	the son or daughter of a chief
<i>umntfwanenkhosi</i>	a prince or princess
<i>umntfwanenkhosi lomkhula</i>	a senior prince
<i>umnyaka, budzala</i>	age
<i>umphakatsi bukhosi</i>	spiritual unity of the nation
<i>umsasane</i>	special meat from the insides
<i>umsebenti wababe</i>	the duties of the father
<i>umsebenti wamake</i>	the duties of the mother
<i>umsila</i>	a tail to be cooked and given to the bride's brothers to eat
<i>umsisi</i>	the owner of farming out (<i>sis</i> a) cattle

GLOSSARY OF SWAZI TERMS

<i>umsuka</i>	a particular type of hoe
<i>umtfalo</i>	responsibility
<i>umtsetfo</i>	a single law of ordinance
<i>umtsimba</i>	the marriage ceremony
<i>umuti weBukhosi</i>	the king's village
<i>umyeni</i>	the man in charge of a groom's party
<i>umzaca</i>	a straight stick
<i>uyangenwa</i>	late husband's brother given to the widow as first choice partner
<i>uyinhloko</i>	guardianship or authority over a person

Annexure A

LAW OF CONTRACT

CHAPTER 1

ELEMENTS OF A CONTRACT

Part 1: General principles

General nature of a contract

- (1) Legal or *quasi*-legal rules governing contracts respond to the needs of parties to ensure that fairness and justice attend their contractual arrangements.
- (2) When a mutual agreement is the basis for economic exchange in a community, it does not, upon conclusion of the contract, provide a guarantee to a party that, if he complies with its terms, he will receive the full measure of his side of the bargain.
- (3) Any performance actually rendered guarantees counter-performance.
- (4) The realisation of profits is not a laudable goal when measured against the economic hardship this might impose upon the compensating party.
- (5) Profit is not a valuable end in itself when the result of its attainment has created disharmony in the community.

Formalities

- (1) The conclusion of a contract is a public affair.
- (2) The subject matter of the agreement must be physically present at the time of the conclusion of the contract.
- (3) Publicity ensures that the parties intend to fulfill their undertaking and provides proof of the agreement and its terms, in the event of a dispute arising.

- (4) An agreement not concluded before witnesses is enforceable: provided that its existence and terms are capable of being proved.

Contractual obligations and liability

- (1)
- (a) Agreement does not give rise to liability to perform.
 - (b) Liability arises only after performance by a party in accordance with the agreement.
 - (c) An agreement must be followed by actual and concrete performance in order to establish contractual liability.
 - (d) Until promises to perform are carried out, no remedies available if one party repudiates the agreement: *umuntfu ulala agucuka* (a person changes his or her mind) or *litsemba alibulali umganga kudliwa bafati* (hope does not kill).
- (2)
- (a) Performance of an agreement creates a debt between the contracting parties.
 - (b) A debt must be paid on demand, or at the time agreed upon, and remains payable for an indefinite period.
 - (c) A debt is not extinguished by prescription: *licala aliboli* (a debt does not decay).
- (3)
- (a) In an instance where an agreement of sale or barter contemplates delivery of property which is physically present at the time of the agreement, or otherwise subject to inspection by the transferee, the transferor makes no warranties with respect to the condition of such property.
 - (b) When the transferee takes such property into his possession, he takes it "as is".
 - (c) The transferee is barred from any claim against the transferor if such property does not fulfill his expectations, even though such expectations were represented to him by the transferor.

Part 2: Essential requirements for a valid contract

Requirements

The requirements for a valid agreement are the following:

- (a) consensus between the parties;
- (b) the property must be the proper subject matter of the agreement;
- (c) both parties must have the capacity to enter into the agreement;
- (d) performance must be possible when the agreement is concluded; and
- (e) the agreement must be lawful.

Consensus

- (1)
 - (a) A valid agreement must be based on consensus between the parties with regard to the material elements of the contract.
 - (b) Consensus (*sivumelwano*) is reached through an offer (*kushengetisa*) by one party and an acceptance (*kwemukela*) of the offer by the other party.
 - (c) Consensus with regard to the performance and counter-performance is essential for a valid agreement.
- (2) No consensus is reached if there is a mistake regarding an essential element of the agreement.
- (3) If consensus is obtained by improper means, whereby a party has been misled through misrepresentation or coerced by threat (duress) to enter into a contract, the contract is voidable at the option of the aggrieved party.
- (4)
 - (a) In the case of misrepresentation, the aggrieved party may:
 - (i) resile from the transaction, in which event restitution must take place; or
 - (ii) adhere to the transaction but limit its performance to the value of the thing agreed upon or insist that the thing agreed upon be delivered instead of the misrepresented article.

- (b) Fraudulent misrepresentation is a criminal matter.

Proper subject matter

- (1) Property must be owned and controlled by the person obliged to transfer it.
- (2) Where an owner has loaned the subject matter of the contract under a long-term loan, he must first terminate the loan agreement before entering into such a contract.
- (3) A woman must not alienate property which is under the control of her husband or guardian, unless the latter consents to relinquish control to the woman for the purpose of the transaction.

Capacity to enter into an agreement

- (1)
 - (a) The head of a family, in consultation with the members of his family, must conclude a contract on behalf of, and in the interests of, the family.
 - (b) The family head is liable for the performance of the obligations under a contract entered into by him or by a member of his family with his consent.
- (2)
 - (a) Individual members of a family may initiate agreements: provided that such person must consult certain relatives including *bogogo*, paternal aunts and the head of a household or homestead.
 - (b) The extent of involvement and consultation with such other family members depends on the nature of the contract concerned; contracts involving the exchange of small stock or grain, do not require the same level of consultation as contracts involving the exchange of cattle.
- (3) The authority of a head of a family to represent his family or a father to represent his child arises by operation of law.
- (4)
 - (a) Authority to represent the head of a household or a homestead may arise from a contract.

- (b) A family head may give a mandate to another family head to enter into a contract as a representative of the former: provided that the representative will not acquire any rights or obligations under the resultant contract.
- (c) A representative may not be punished: *sitfunywa asibulawa*.

Possibility of performance

- (1)
 - (a) Performance must be possible when the agreement is concluded.
 - (b) If one of the reciprocal performances is impossible at the time when the contract is entered into, the contract is void and no performance under the contract is due.
- (2)
 - (a) Damages may not be claimed when the contract is void on the grounds of impossibility of performance.
 - (b) If the creditor has incurred expense in anticipation of receiving performance from the debtor, the creditor may not sue for reimbursement in addition to restitution, where the debtor had no means of knowing that performance on his part would become impossible.
 - (c) A party is not expected to incur such expenses before he is in possession of the object of performance: provided that expenses directly related to the fulfillment of the contract are permitted.
 - (d) Fraud is treated as a criminal matter and a court may order that compensation be paid to the deceived party.
- (3)
 - (a) If a debtor has assured a creditor that the object of his performance is available and the creditor has already rendered performance to the debtor, in the event of the debtor's performance subsequently becoming impossible, the creditor may claim the following -
 - (i) restitution;
 - (ii) delivery of a surrogate in place of the performance agreed upon by the debtor.
 - (b) Damages may not be claimed.

Transaction must be lawful

- (1) An unlawful transaction is not recognised and is unenforceable.
- (2) The parties to an unlawful transaction may be punished for committing an offence.

Part 3: Breach, remedies and termination**Breach of contract**

- (1)
 - (a) Breach of contract may occur as follows:
 - (i) delay in performing an obligation;
 - (ii) repudiation of the contract;
 - (iii) defective performance; or
 - (iv) prevention of performance.
 - (b) A creditor need not act immediately if the debtor does not perform his obligations.
 - (c) By means of periodic demands, a creditor may continue to confirm his rightful claim to performance.
 - (d) The debtor must be given reasonable time to perform, and great patience must be shown in this regard.

Remedies for breach

- (1)
 - (a) In the event of the debtor's persistent failure to perform, the creditor may institute an action for the rendering of the performance or, upon default, claim restitution.
 - (b) Consequential damages may not be claimed.
 - (c) An aggrieved party may claim compensation for damages which are capable of being proved.

- (2)
 - (a) When applying a remedy for breach of contract, a court must give effect to the principles of restorative justice in order to restore:
 - (i) the relationship between the disputants; and
 - (ii) harmony within the community as a whole.
 - (b) When given a choice between awarding consequential damages and damages to cover out-of-pocket losses, a court invariably ought to choose the latter for reasons as follows:
 - (i) the plaintiff will not be any worse off than before the contract was concluded and will be compensated for any actual harm;
 - (ii) the defendant will not suffer any excessive hardship;
 - (iii) out-of-pocket losses are easier to evaluate.

Termination of contracts

- (1) Contractual obligations are terminated as follows:
 - (a) by rendering performance;
 - (b) release;
 - (c) novation; and
 - (d) merger.

CHAPTER 2

CLASSIFICATION OF CONTRACTS

Contractual arrangements

- (1) Contracts may be classified according to subject matter according to the nature of the rights and duties created by the legal acts.
- (2) Contractual arrangements fall under the following heads:

- (a) agreements relating to non-permanent exchanges of goods, including loans; and
 - (b) agreements relating to complete exchanges of goods or services, including contracts of barter, sale and employment in the form of credit exchanges.
- (3) Such agreements
 - (a) relate to the bilateral exchange of goods or services;
 - (b) do not involve contracts affecting:
 - (i) the status of the parties;
 - (ii) incidents arising from *emalobolo*.

CHAPTER 3

AGREEMENT RELATING TO A NON-PERMANENT EXCHANGE OF GOODS

Part 1: *Kusisa* (farming out)

Nature of the contract

Sisa is a contract whereby the owner (*umsisi*) places certain animals under the control of another (*umsiselwa*) for an indefinite period, on the understanding that the keeper will enjoy the use of the animals, but that the ownership will remain with, and accrue to, the depositor.

Agreement

- (1) A *sis*a transaction is a specific contract having an underlying common intention in regard to the essentials as follows:
 - (a) the nature of the transaction;
 - (b) the animals involved;

- (c) the right to use the animals and any proceeds flowing from such use; and
- (d) the natural terms regarding (the implied rights and duties of the parties, in respect of the following -
 - (i) the right to be rewarded;
 - (ii) the duty to take care of the animals;
 - (iii) the duty to account for the animals and their progeny; and
 - (iv) the consequences of termination.
- (2) Farming out cattle is primarily for the benefit of the keeper (*umsiselwa*), although both parties should benefit as follows:
 - (a) the keeper (*umsiselwa*) enjoys the use and proceeds of the animals other than progeny; and
 - (b) the owner (*umsisi*) is relieved of the task of taking care of the animals.
- (3)
 - (a) In the case of the farming out of cattle, the keeper (*umsiselwa*) must approach the owner (*umsisi*) and make the offer to *sisa* the cattle.
 - (b) in respect of goats, the owner (*umsisi*) must make the offer to the keeper (*umsiselwa*).
- (4) A domestic animal may be farmed out.

Use of animals and proceeds

- (1)
 - (a) *Kusisa* cattle must be kept distinct from any cattle the keeper may possess himself.
 - (b) The keeper (*umsiselwa*) may use the animals in the same manner as if he were the owner (*umsisi*).
 - (c) Whatever is earned from such produce belongs to the keeper.
- (2)
 - (a) A keeper (*umsiselwa*) may not slaughter an animal or use it to pay for his marriage.

- (b) A keeper may not lend the cattle to a third party.
- (3)
 - (a) *Kusisa* cattle may not be attached to satisfy the keeper's debts.
 - (b) *Kusisa* animals may be seized from the keeper to satisfy the debts of their owner.
 - (c) The keeper may not demand that the animals be replaced, if they have been attached to satisfy the owner's debts.

Duty to care and to account

- (1)
 - (a) The keeper (*umsiselwa*) is responsible for the wellbeing of the animals while they are in his keeping.
 - (b) The keeper must exercise the same degree of care and diligence in looking after *kusisa* animals as he would if they were his own.
- (2)
 - (a) When the owner (*umisi*) visits the animals from time to time, the keeper must account to him satisfactorily for the condition of the animals.
 - (b) The keeper (*umsiselwa*) has a duty to restore the animals to the owner whenever they are claimed, and he must diligently account for all losses not previously reported and also for all increases.
 - (c) Losses through death, theft or other causes must be reported to the owner immediately.
 - (d) Where an animal has died, the skin must be produced.
- (3)
 - (a) Failure to report a loss to an owner in the proper manner, renders the keeper (*umsiselwa*) liable to make good the loss.
 - (b) In such circumstances the keeper is held strictly liable to replace the animal: provided that he is allowed to keep the meat of that animal.

Duration of the contract

- (1) The keeper takes sole charge of the animals for an indefinite period that may be terminated at any time by either party.

- (2) An implied term of the contract is that it will last for a reasonable period.

Remuneration

- (1) The keeper (*umsiselwa*) is entitled to one of the progeny after the transaction (*sisinga*) has been terminated.
- (2) In addition, a calf may be given as a token of appreciation (*kubonga*) at the end of such period.
- (3) Where the animals farmed out are pigs, the owner must give the keeper (*umsiselwa*) a sow and a boar, so that the keeper may have his own pigs in future.

Termination and restoration of *kusisa* animals

- (1)
 - (a) After a reasonable period has elapsed, the owner (*umsisi*) must claim his animals from the keeper.
 - (b) Once the claim is made, the keeper (*umsiselwa*) must return the animals.
- (2)
 - (a) The keeper (*umsiselwa*) may terminate the contract at any time: provided that the keeper must first discuss this matter with the owner (*umsisi*) so that the owner may receive proper notice and make the necessary arrangements.
 - (b) The keeper (*umsiselwa*) must give the owner a reasonable period of notice.
- (3) In an instance where a specified period has been determined between the parties, the owner (*umsisi*) may not terminate the contract.
- (4) The owner (*umsisi*) may terminate the contract prematurely without incurring any liability on reasonable grounds if the keeper (*umsiselwa*) is not taking proper care of the animals.

Part 2: *Kusitana* (loan for use)

Nature of the contract

- (1)
 - (a) Loan for use is a contract whereby one person hands over something to another person gratuitously for the latter to use in a particular manner, after which the thing must be returned to the lender (*kweboleka*).
 - (b) Loan for use is a contract which is gratuitous.
 - (c) If the lender is to receive any remuneration from the borrower, the contract is one of lease.
 - (d) *Kusitana* is a bilateral contract.

Duration

Where no period for the return of the thing has been agreed upon, the borrower may use the thing for the purpose for which it was lent, as long as is deemed necessary.

Objects on loan

Household utensils and cattle are the objects of borrowing and lending: provided that *kusisa* cattle may not be lent, referred to in section 328(2)(b).

Defects

- (1) Where a thing which is known to have a defect is borrowed, the borrower has no action against the lender if such object should die while in his possession.
- (2) A lender has no action against the borrower, but the borrower is obliged to report to the lender if the property has been destroyed or damaged.

Duty to care

- (1) The borrower must exercise the same degree of care as that of an owner over the thing lent to him.

- (2) Where it is agreed that damage to, and destruction of, the thing will be made good by the borrower, the latter will be liable in terms of the agreement.
- (3) Liability is incurred for negligence on the part of the borrower if there was negligence involved.
- (4)
 - (a) When loss or damage was caused by accident, the two parties must negotiate the matter.
 - (b) If the owner is not satisfied, he must leave behind the meat and skin of the animal instead of taking it, thereby signifying his anger.

CHAPTER 4

AGREEMENTS FOR THE PERMANENT EXCHANGE OF GOODS OR SERVICES

Part 1: *Kuntjintjiselena* (exchange)

Nature of the contract

- (1) This is a contract of exchange whereby both parties undertake to deliver to each other a thing with the purpose of transferring ownership of that thing.
- (2) Exchange is a reciprocal contract.
- (3) The essential elements of the contract are the following:
 - (a) performance and counter-performance;
 - (b) both performances exist in delivering a thing; and
 - (c) the intention of such delivery is the transfer of ownership.
- (4) In the absence of any one of the elements referred to in subsection (3), no contract of exchange comes into existence.
- (5) The following do not constitute a contract of exchange as follows:

- (a) where one party unilaterally renders performance; or
- (b) where a party must deliver a thing for the rendering of a service.

Formation of contract

- (1) For a valid agreement, the parties must agree on the thing to be exchanged.
- (2) Performance and counter-performance must be certain.
- (3) The parties may not agree that counter-performance should be reasonable or that it will be agreed upon at a future date.
- (4) The thing to be exchanged must be adequately specified in the agreement.
- (5) Where livestock forms the object of the agreement, the parties must agree on the type, size, age, sex and number of the animals.
- (6) No agreement is concluded if there is a mistake about a material element of the agreement.
- (7) Unlawful transactions are unenforceable, including the following:
 - (a) the exchange of a field or residential site for livestock or other movable things; or
 - (b) the exchange of a field for another field without the permission of *Sikhulu*.

Terms

- (1) Under a contract of exchange, transfer of ownership is intended.
- (2)
 - (a) Each of the parties must be the owner of the thing concerned.
 - (b) No person other than the transferor must have a better title to that which is transferred.
 - (c) A person who intentionally exchanges another person's property commits theft.

- (d) If a party does not have valid title, the true owner may claim his property from the transferee, and the latter may demand the return of his property from the other party.
- (3)
 - (a) Ownership of an animal or other moveable thing passes on delivery by one party to the other.
 - (b) For delivery to be completed, there must be either physical delivery of the thing or pointing out of the thing, with the intention of transferring ownership.
 - (c) a description of the thing without showing it to the transferee does not constitute delivery.
- (4)
 - (a) Before delivery, the risk relating to the thing remains with the debtor.
 - (b) Progeny of an animal or increase of any other thing accrues to the debtor until delivery has taken place.
 - (c) After delivery, loss or other risks are borne by the transferee and any increase likewise accrues to the transferee.
 - (d) If the creditor refuses to accept proper delivery by the debtor at or after the stipulated time, he bears the risk from the time of his refusal.
- (5)
 - (a) Things are exchanged without warranty against latent defects, irrespective of whether the creditor has inspected the thing or not.
 - (b) A party who, being aware of a defect, and denies it, may be held liable to replace the defective thing.
- (6)
 - (a) Performance and counter-performance must take place simultaneously.
 - (b) The parties may expressly agree that the thing must be delivered at another place or that counter-performance will take place on a future date.
- (7) A standard medium of exchange exists including the following:
 - (a) eleven goats for one cow (ten females, one male);
 - (b) six goats for one cow (five females, one male);

provided that there is no rule which restricts the parties to the fixed equivalents or in any other way with regard to the value of their performance.

Remedies for breach

- (1) If a debtor fails or refuses to perform when he is liable to do so, he may be ordered in an ensuing action to deliver the thing concerned.
- (2) Irrespective of whether a creditor elects specific performance or rescission, he is not entitled to damages in the form of reimbursement for the expenses he incurred in anticipation of counter-performance.
- (3) The court may alter an agreement to avoid hardship by ordering a creditor to accept what is offered to him in full settlement of a debt, in order to avoid him receiving no damages at all.
- (4)
 - (a) If a creditor is prevented from performing by the debtor, the creditor may either insist on specific performance or rescind the contract and claim restitution.
 - (b) The debtor is liable under the contract because the impossibility of his performance was of his own making.

Part 2: Loan for consumption

Nature of the contract

- (1) A loan for consumption is a contract whereby one person delivers some tangible thing to another, who must return to the former a thing of the same kind, quantity and of similar quality (*kwenanisa*).
- (2) A person who receives a fungible thing must return the equivalent to what he has received, failing which, the transaction is not a loan for consumption.

Part 3: Manual labour

Nature of the contract

- (1)
 - (a) A person may hire another person to perform certain special work for him (*kuncusa*).
 - (b) Such work is paid for at a standard rate: provided that the nature and extent of the work to be done, and the payment to be made for it, must be specified before the commencement of the work.

Reciprocal rights and duties

- (1) A workman must fulfill his instructions before he is entitled to payment.
- (2)
 - (a) Payment is due when the work is completed.
 - (b) If payment is delayed for an unreasonable period, the workman may sue for it.
- (3) A workman may not claim payment while the work is incomplete, or if he does so, he will receive less than the amount of payment agreed upon.

Special form

- (1) A special form of the labour contract is known as *lilima*.
- (2) When a person has a large amount of work that must be completed in a short period of time, he may invite his friends and neighbours to help him on an appointed day.
- (3) The persons who assist him are paid for their labour, usually in food, beer or tobacco.
- (4) If such persons complete their work on the same day, such payment is regarded as sufficient.
- (5) If the work is not completed, such persons may return the next day if there is more beer, or whatever commodity has been used as payment, provided that, if there is nothing left, they are not bound to do any more work.

Part 4: *Kubita inyanga* (acquiring the services of a traditional healer)

Nature of the contract

- (1) Traditional healers (*tinyanga*) undertake work including divination, medical treatment, and the "doctoring" of people and homesteads as a protection against sorcery, and of fields, cattle and women for fertility.
- (2) Two types of agreement that may be concluded are as follows:
 - (a) with *inyanga yekubetsela likhaya* (for protecting the home);
 - (b) with the *inyanga yemkhuhlane* for healing.

Payment

- (1) A traditional healer, when summoned by a client, must first "throw the bones" to divine the nature of the sickness or other condition he is required to remedy.
- (2) The *Inyanga* may demand a fee called *inkhanyiso* to begin the process.
- (3) Such fee must be paid immediately before the divination is performed, in order to "make the bones speak".
- (4) The fee for the "doctoring" itself varies according to the nature of the work to be done.
- (5) Such fee is always paid after the doctoring has been done.
- (6) No fee is payable if the treatment has not been successful.
- (7) If the treatment has been successful and the fee is not paid within a reasonable time, the traditional healer may sue for it.

Annexure B

LAW OF MARRIAGE

CHAPTER 1

GENERAL PRINCIPLES

Family and marriage

- (1) The family (*umnden*) is founded upon marriage.
- (2) Marriage establishes special rights and duties among the persons concerned.
- (3) Marriage is a relationship which concerns not only the husband and wife, but also their respective families.
- (4) The formation of a marriage creates a series of reciprocal rights and obligations between the spouses for which their respective families are collectively responsible.
- (5) The most important features of marriage include those listed below.
 - (a) Marriage is a union between two people and their respective families (*kuhlanganisa bukhoti*).
 - (b) The principle of the continuing relationship is closely connected with the institution of marriage goods, known as *emabheka* or *emalobolo*.
 - (c) The procreation of children, both male and female, is of the greatest importance and the legitimate birth of children may take place only after a legally recognised marriage between the parties has been concluded.
 - (d) Marriage establishes various relationships of authority between spouses, as well as between parents and children.
 - (e) The conclusion of a marriage is the culmination of a series of events, rather than a specific event, accompanied by a variety of ceremonies, which have both a customary and a specific legal meaning.

- (f) Marriage does not contemplate its termination, whether by death or by divorce.
- (g) Marriage is potentially polygynous (*sitsembu*).

CHAPTER 2

CAPACITY AND CONSENT

Capacity

- (1) No fixed age is required for entering into a marriage.
- (2) A person is of marriageable age once he or she has reached puberty.
- (3)
 - (a) The age of puberty coincides with the incorporation into an age regiment.
 - (b) A male person must become a member of *libutfo lemajaha* (regiment of young men) and a female person a member of *libutfo letintfombi* (regiment of young women).
 - (c) If a person marries before informing his *libutfo* that he has received permission to marry, he must be fined a beast: *inkhomo yemabhaca*.

Kuvuma (consent)

- (1) The consent of all the parties is an essential element of a marriage.
- (2) Consent is confirmed by means of various ceremonies including the following:
 - (a) the biting of *umgoqo/umvalo* signifies a woman's consent after she comes out of the hut and hits the gate with a spear; or
 - (b) when she agrees that a goat they show her after the *teka* ceremony should be killed.
- (3) Although marriage is an agreement between two families, the consent of the bride and groom is not secondary to that of the two family groups.

- (4) A girl may not always give her consent willingly since she may be coerced into marriage by means of the process of *kwendzisa*.

CHAPTER 3

IMPEDIMENTS TO MARRIAGE

Physical and mental defects (e.g. insanity, physical deformity, deafness, dumbness, blindness)

- (1) Physical and mental defects are not an impediment to a valid marriage, provided that a person suffering from a serious mental defect is not permitted to marry.
- (2) The families of the spouses determine whether or not a particular member may enter into a marital relationship.
- (3) The family members of a disabled person must undertake to bear the responsibility for such a person.
- (4) Disability is not a factor in determining the number of *emalobolo* cattle to be delivered.

Infertility and impotence

- (1) Neither infertility nor impotence is an impediment to marriage.
- (2) The respective families play an important role in determining and curing the defect with the use of *timbita* (a mixture of herbs and roots used for traditional medicine).
- (3) If this treatment is not successful, the woman's family must send an *inhlanti* to bear children for the husband.
- (4) In the event of a wife dying without bearing her husband any children, the cattle delivered as *emalobolo* may be returned.

Marital status

A married woman may not enter into a subsequent marriage during the existence of her marriage, but a married man may do so.

Persons of the same gender

- (1) Persons of the same gender may not marry.
- (2) A woman may marry another woman and ask a male relative to relate sexually with her wife. The children born out of such a relation belong to that woman.

Prohibited degrees of consanguinity (blood relationship) and affinity

Persons who are related to each other within certain degrees of consanguinity are prohibited from marrying each other, as follows:

- (a) consanguinity in the direct line; or
- (b) consanguinity in the collateral line.

Consanguinity in the direct line

Persons who are ascendants or descendants may not marry.

Consanguinity in the collateral line

- (1) Blood relations who are related to one another by a common ancestor may not marry.
- (2) Cousins, an uncle and niece are all blood relations in the collateral line and may not marry each other.

Relationship by affinity

- (1) Persons related to one another by affinity may not marry.
- (2) A man is not permitted to marry his wife's mother, grandmother or granddaughter.
- (3) A man may marry his wife's sister.
- (4) A man may marry his wife's brother's daughter after the death of the latter's father.

Other prohibited relationships

- (1) A person may not marry any person bearing the same clan name (*sibongo*) as he or she does.
- (2) Persons who share a common ancestor, as indicated in their clan praises (*tinanatelo*), even if not sharing the same clan name, may also not intermarry.

CHAPTER 4

THE COMING INTO BEING OF A MARRIAGE

Kugana (courtship)

- (1)
 - (a) The formation of a marriage begins with the courting of a young woman by a young man.
 - (b) Several options are open to a young woman to mark the end of the period of courtship to indicate her consent, which is called *kugana*, as described as follows.
 - (i) *Kugana ngelicube/lijuba/ingeje* (beads) are beads that a girl will make specifically to give to her suitor to wear around his neck.
 - (ii) *Lucube* is a bead necklace made from a double string of an assortment of beads in red, white and black with *lijuba*.
 - (iii) *Lijuba* is a bead necklace made from a single string of blue beads with smaller white beads on the side and one heart bead in the position next to the man's heart.
 - (iv) *Ingeje* is a bead necklace made from *lijuba* beads, brown and yellow and two heart-shaped or egg like beads in the middle, also yellow.
 - (v) A grass bangle called *luhlongwa* may be used instead of beads.
 - (c) Following this, the young man's family must initiate the process of asking for the young woman's hand in marriage (*kucela*).

(2)

- (a) *Kugana ngekuhlehla* is when a young woman reaches a decision to accept a suitor's proposal, while she indicates by inviting several peers from her area who wear their traditional attire (*imvunulo*) and will gather at the suitor's homestead to sing and dance.
- (b) Others who watch will know who the parties involved are because the women mention the suitor's name in their songs, inviting him to come (*batomgana*).
- (c) In turn, the prospective bride breaks away from the formation of the other women and dances apart, singing in praise of all of the suitor's attributes.
- (d) After a while, the women leave and return to their various homesteads.
- (e) After a few days, *emajaha* (young men) and *tintfombi* (young women) from the woman's and suitor's area meet at an agreed place to confirm the acceptance of the proposal (*batobonga indzaba*).
- (f) The process of asking for the bride's hand in marriage (*kucela*) must then follow.

(3)

- (a) *Kugana ngekutiba* (betrothal) is a form of betrothal, not the acceptance of a proposal.
- (b) A young woman must, following an understanding between herself and her suitor, also invite several other girls to the suitor's homestead (*bayogidza umtsimba*).
- (c) The young woman must do this without her parents' knowledge, which means that the man's family will not have to deliver a beast to the bride's family to ask for the hand of the bride (*inkhomo yekucela*),

(4)

- (a) *Kuqabangula* (the betrothal) is an alternative form of betrothal.
- (b) The process is initiated by the young woman.
- (c) She must go to her suitor's homestead *ayocela umbhidvo* (to ask for *emalobolo*) on behalf of her parents.

- (d) She is accompanied by several maidens from her area and an old woman from her homestead.
- (e) Through the older woman accompanying her, she must inform the man's parents that her parents have sent her *kutocela umbhidvo*.
- (f) She must then produce a stick which has some markings on it, indicating the number of cattle to be delivered as *emalobolo*.
- (g) After this, the process of asking (*kucela*) will follow.

***Kujuma* (courtship)**

- (1)
 - (a) In this form of courtship, the young woman has already accepted her suitor.
 - (b) Both the man and the woman may now visit each other's homesteads to spend a few days (not exceeding three) with their respective families.
 - (c) During these visits, the woman must be accompanied by another young woman from her area and the couple may not sleep together, let alone have sexual intercourse (*akungenwa esibayeni sendvodza*).
 - (d) The purpose of these visits is to inform the families of their respective children's intentions.
- (2)
 - (a) During *kajuma* the man's family may, when the woman returns to her family, put a porcupine quill (*injelwane*) on her head to indicate to her family that they are ready to have her married to their son.
 - (b) The porcupine quill (*injelwane*) is a signal to the woman's family that they should prepare her for marriage.
 - (c) This includes the shaping of her hair into a *sicholo*, when she becomes known as *ingcugce*.
 - (d) On a subsequent *kujuma* visit, a second porcupine quill (*injelwane*) must be put in the woman's *sicholo* confirming beyond any doubt that the man's family approve of her as a potential member of their family.

***Kucela* (to ask for a girl's hand in marriage)**

- (1) *Kucela* marks the beginning of formal negotiations between the bride's family and the groom's family regarding the marriage of their respective offspring.
- (2) *Kucela* is initiated by the groom's family, which sends a delegation to the bride's family to request her hand in marriage.
- (3) To ensure that they are well received, the groom's family, represented by its delegation, may come bearing gifts of goodwill, which may include a beast called *inkhomo yekucela* (a beast to ask for the bride).

***Kwendzisa* (when the woman's father makes the approach) and *kukhiwa* ("to pick or pluck" - when the man's father makes the approach)**

- (1) Despite the provisions of sections 203 to 205, a marriage may result from the processes of *kwendzisa* and *kukhiwa*.
- (2)
 - (a) The parents of a man may choose the family and sometimes even the woman they wish their son to marry.
 - (b) The man's family must approach the parents of the woman and request her hand in marriage on behalf of their son.
 - (c) If the marriage is concluded, this woman ranks high when it comes to the ranking of wives and she is known as "*umfati wekukhiwa*" or "*umfati lowakhiwa*".
- (3)
 - (a) When the woman's father makes the approach, he selects in the manner contemplated in section 205, the man of his choice and offers his daughter in marriage.
 - (b) Marriage negotiations then proceed, except that *inkhomo yekucela* must not be delivered to the woman's family.
 - (c) This woman must rank first in the hierarchy of wives and is known as *umfati lowendziswa* or *umfati wekwendziswa* (an arranged marriage).

CHAPTER 5

UMTSIMBA (THE MARRIAGE CEREMONY)

Part 1: *Kulungisa umhlambiso* (the assembly of bridal goods)

***Inkhomo yemgano* (a beast which must be paid by the woman's family)**

- (1) *Inkhomo yemgano* must be given by the bride to her in-laws as a sign of her acceptance of joining the marital family.
- (2) The beast must be delivered on the wedding day but, if it is not available, it may be delivered on a later day.
- (3) Once the *umtsimba* ceremony is over and the *umtsimba* has departed, the *lusendvo* meets at a later date after which the *umgano* beast is slaughtered.
- (4) The only people permitted to eat the meat of the slaughtered beast are the members of the man's family, including daughters' in-law (*bomakoti*) whose *tinkhomo temgano* have been delivered.
- (5) The new bride and other daughters in-law (*bomakoti*) who have not delivered *tinkhomo temgano* may not be included in the feast.

Sidvwaba (skin skirt)

A skirt made of processed cowhide *sidvwaba* (skin skirt), which is worn by married women, is presented to the bride by her family.

***Sigeja* (a shawl made out of cattle tails)**

- (1) A shawl made of cattle tails (*emashoba*) is worn by royalty.
- (2) Not every bride may wear *sigeja*.
- (3) Even a bride from a senior house may not wear *sigeja*.

Umtfwalo wamakoti

- (1) *Umtfwalo wamakoti* includes *siphuku* that the bride must use for the duration of the ceremony.
- (2) The bride's younger sister carries a sleeping mat rolled together with *siphuku* (*umtfwalo*) and a wooden pillow (*sicamelo*) tied onto it.

***Umhlambiso* (gifts that the bride presents to various members of her in-laws)**

- (1) The choice of those to receive *umhlambiso* is left to the groom's family, who must communicate this in advance to the bride's family.
- (2) Subject to variations depending on individual families, the people who must receive *umhlambiso* include the following:
 - (a) the groom's grandparents and parents;
 - (b) heads of certain houses within the *lusendvo*;
 - (c) wives of the heads, their first-born and last-born children;
 - (d) *umyeni* (the leader of the party bringing *emalobolo*);
 - (e) *umntfwana welibovu*, *gozolo*; and
 - (f) the groom (*umkhwenyana*).
- (3) *Umhlambiso* goods comprise general domestic wares in the form of *emacansi* (sleeping mats), *titsebe* (grass mats), *tindziwo* (clay pots), *tikhetfo* (traditional sieves), *emahluto* (strainers), *imigcwembe* (wooden meat platters), *titja* (dishes) and *imitsanyelo* (brooms).

Part 2: *Ludvwendvwe/umtsimba* (the bridal party)**Roles within *umtsimba***

- (1)
 - (a) The wedding ceremony is a communal activity and the various persons play important roles within *umtsimba*.

- (b) *Umphakatsi* (representatives of *Sikhulu*) represent *Sikhulu* of the bride's in-laws.
 - (c) The *Sikhulu* must send a *umgijimi* (a messenger) to represent him.
 - (d) *Umgijimi*'s role is that of an independent witness.
 - (e) *Umgijimi* must ensure that important ceremonies are performed and may be called in case disputes arise later on in the marriage.
- (2)
- (a) *Ump hatsi- mtsimba* (the leader of the bridal party) is a respectable elderly man who is not a relative (*longesiso sihlobo*). He must be chosen by the father of the bride to be the leader of *umtsimba* and his spokesperson.
 - (b) The parents of the bride may not accompany their daughter or be part of *umtsimba*.
- (3)
- (a) *Bomake bekudlalisela* accompany the bride on behalf of her mother.
 - (b) Their duties during the ceremony include dressing the bride, taking care of the bridal goods and ensuring proper behaviour by the maidens.
 - (c) They also play a significant role during discussions with the groom's family and when the bride is being told about marriage etiquette (*ayalwa*).
- (4)
- (a) *Emajaha* are young men, including the brothers of the bride, who form part of the dancing party and who will assist in different tasks that are undertaken, such as slaughtering of beasts.
 - (b) *Emajaha*, particularly the bride's brothers, have a specific role in the *kugiyela dzadzewabo* (special dance for their sister).
- (5)
- (a) *Tintfombi* are ladies who include the bride's sisters, comprising three groups: *emachikiza*, *ematjitji* and *tingcugce*.
 - (b) Collectively, they are the main bridal dancing party.
 - (c) *Tintfombi* must assist the bride with *amekeza* (the singing of bridal songs) and must carry *umhlambiso* and other bridal goods.
- (6)
- Tingcugce* are older than *tintfombi* and are ready for marriage, or may even be newly wedded women, who must stay with the bride all the time

assisting her in performing all activities. They are accompanied by *tintfombi*.

Part 3: *Kuphuma kwemtsimba* (the departure of the bridal party)

Departure and associated rituals

- (1) The bridal party departs early in the evening because it must arrive at night at the prospective in-law's homestead.
- (2) Before the departure, certain rituals must be performed by the bride's father.
- (3) The bride's father must slaughter a goat or a cow from which a bile sac (*inyongo*) must be placed on the bride's forehead to show she has departed from her parents.
- (4) The bride and *lusendvo* must enter the main house (*kagogo*) where she must be counselled by the elders to be a good ambassador, in the place where she is headed.
- (5) The group then proceeds to the kraal (*esibayeni*), where the bride is made to bath, and must then be dressed in her traditional gear (*avunule*).
- (6) The bride must be led to the entrance (*esangweni*) where her father or brother must pin a feather (*lusiba*) onto her.
- (7) The bridal party must then depart singing "*incangosi*", following each other in a straight line (*ludvwendvwe*).
- (8) On arrival, *umtsimba* must sing and dance "*sicela inkhonto*".
- (9) The bride and *tingcugce* must then proceed to where the in-laws are assembled.
- (10) This may be outside (*emagumeni*) or inside (*kagogo*).
- (11) The bride must enter with beads around her neck and must then ask for acceptance (*ngitocela inkhonto*).
- (12) The groom's father's sister must reply "Who sent you?"

- (13) The bride must respond: "My father sent me", calling him by name.
- (14) The groom's family must inform her that she is accepted and thank her (*siyabonga*).
- (15) The bride and *tingcugce* must proceed to join *umtsimba* and dance until they are led into their hut.
- (16) A young girl must fetch them, carrying a sleeping mat on her head and lead them to their hut.
- (17) Early in the morning *umtsimba* leaves the hut and proceeds to the nearest river, where a goat or beast given to them by the man's family, known as *sahhukulu*, must be slaughtered.
- (18) The party spends time at the river preparing themselves for the day.

Part 4: *Kugidza* (marriage ceremony)

Ritual of the marriage ceremony

- (1) *Kugidza* comprises the activities on the second day.
- (2) The groom's family summons the bridal party from the river and they are invited to come back to the homestead.
- (3) The group to proceed first consist of *tintfombi*, *tincugce*, *emajaha*, and *make wekudlalisela*.
- (4) *Make wekudlalisela* dodges the men at the kraal gate and ululates inside the kraal.
- (5) One of *emajaha* (an adult man) must then sing the praises of the bride's father, the bride and others.
- (6) Afterwards they return to fetch the rest of the *umtsimba*.
- (7) They must leave *imvulalisango*, which started as beads (*buhlalu*) or *ludziwo*, *umgcwembe*, becoming money much later.
- (8) After that the dancing must start.
- (9) A number of specific dances must be performed, including *sigiyo* which is a special dance where the bride dances with her sisters and brothers.

- (10) During this period the beast which must be paid by the bride's people (*inkhomo yekugana*) must be shown to the man's family.
- (11) The bride must drive the beast into the cattle kraal with the assistance of *emajaha*.
- (12) If, on the other hand, the bridal party did not bring the beast with them, the bride must place cattle dung as an indication that *ugana ngenkhomo*.
- (13) At intervals during the dancing, the bride must rest on a mat made of dry grasses sewn together (*likhenya*), which is made for that specific purpose and must be burned afterwards.
- (14) After the dancing, the members of the bridal party proceed to their hut and spend the second night there.
- (15) The groom might invite the bride to spend the night with him.
- (16) One girl in the bridal party must accompany her in order to identify the hut in case the bride is needed.

Part 5: *Kuteka/kumekeza* (smearing of the bride)

Smearing

- (1) Early in the morning of the third day, the sisters of the groom must call out to the bride "*phuma* (the bride's name) *sesikutekile*" and proceed with her to *sibaya*.
- (2) Once inside, the bride is required to cry with a sharp voice (*kumekeza*) until dawn.
- (3) The bride's sisters must assist her until her brothers come and take her out.
- (4) The bride's brothers must not come peacefully, but must exhibit anger towards her in-laws.
- (5) They beat and kick everything in their path and take the bride back to *umtsimba* (river)
- (6) The bride's in-laws must follow them later to the river with a pot of brew *ludziwo*, to thank the bride for *kumekeza*.

Part 6: *Kuhlambisa* (bridal goods)

Exchanging gifts

- (1) On this occasion, the bride must give gifts to certain members of her marital family.
- (2) *Imvulalisango* is a small gift preceding *umhlambiso* placed at the kraal gate and comprises a clay pot and a sieve (*ludziwo nesikhetfo*).
- (3) To start with, the bride must give gifts to the ancestors.
- (4) These gifts must be left at the kraal gate (*enshungushwini*) and comprise a clay pot and sleeping mat (*imbitha nelicansi*).
- (5) Thereafter, the gifts must be given to people in order of seniority, starting with the fathers of the bride and groom and the fathers' brothers, the mothers-in-law, starting with the groom's mother, siblings of the groom, *umyeni* and *gozolo*.
- (6) The last person to receive *umhlambiso* is the *umkhwenyana* (the groom).
- (7) *Kuhasa* is the distribution of the remainder of the wedding gifts which must be given to the mother-in-law to distribute as she wishes.
- (8) *Kuhlanjiswa*, that is being a recipient of these gifts, is a legal right which attaches to a person because of the order of his or her birth.
- (9) The rule is that *kuhlanjiswa* attaches to the first- and last-born siblings of the groom in all the households.
- (10) After *kuhlambisa* is over and the bridal party are in their hut, *tintfombi* must go out to fetch wood (*lubandze*) and bring it back to the in-laws.

Part 7: *Kugcotjiswa kwelibovu* (smearing with red ochre)

Smearing with red ochre as an essential element for a valid marriage

- (1) The smearing of the bride with red ochre (*libovu*) sanctifies a marriage.
- (2) A woman may be smeared with *libovu* only once in her lifetime.

- (3) If she remarries, she is smeared with animal fat (*liphehla*) instead of *libovu*.
- (4) Immediately after *umhlambiso*, an old woman from the groom's family must lead *makoti* to the kraal.
- (5) This woman must make the bride sit on a small mat (*sihlantsi*) and smear the bride with *libovu* from head to toe.
- (6) During this process, she is expected to cry.
- (7) She is then given a small child, *umntfwana welibovu*, whom she in turn must smear with animal fat (*liphehla*).
- (8) She must also give the bride *umhlambiso*.
- (9) This is the child whom the new bride may send around on errands.
- (10) After this, the old woman and other women of the family must counsel the new bride.
- (11) The bride, with the child in hand, must run away and a cow is offered to get her back.
- (12) This cow is called either *insulamnyembeti* or *inkhomo yelibovu*.
- (13) The cow belongs to the bride's mother and must either be given to *umtsimba* to take it back with them, or must be delivered with the rest of *emalobolo*.
- (14) If the bride is smeared with red ochre and no *libovu* cow or *emalobolo* is delivered and she falls in love with another man, that man may marry and deliver *emalobolo* for her because there was no complete agreement in the previous encounter.
- (15) Before the bridal party departs, both families must hold general discussions.
- (16) At this stage, *umphatsi mtsimba* must formally present the bride to her in-laws, and thank them for the hospitality accorded to the bridal party.
- (17) *Bomake bekudlalisela* must inform the in-laws of any ailments that the bride may have.
- (18) The groom's family must be given a stick with lines indicating the number of *emalobolo* (*lukhalo*).

- (19) A date for the delivery of *emalobolo* must be announced at that stage.
- (20) A woman may be smeared with *libovu* while on a visit to the groom's home.
- (21) Although this is in breach of marriage procedure, it does not vitiate a marriage if the girl consented to it.
- (22) The groom's family is required to pay a beast to her family to atone for their having smeared her with *libovu* prior to her becoming their wife.

Part 8: *Emalobolo* (marriage consideration)

Significance of *emalobolo*

- (1) *Emalobolo* is one of the main elements for the conclusion of a valid marriage.
- (2) The process and ceremony of delivery of *emalobolo* forms part of the whole process of marriage negotiations which initiate the creation of a marriage between two families (*kuhlanganisa bukhoti*).
- (3) *Emalobolo* strengthens the relations between the family of the bride and that of the bridegroom (*kuhlanganisa bukhoti*).
- (4)
 - (a) By means of *emalobolo*, guardianship of the children born of the marriage vests in the father's family.
 - (b) If a child is born without *emalobolo* having been delivered, or agreed on, the child belongs to the family of the mother.

Time of delivery of *emalobolo*

- (1) No time is prescribed for the delivery of *emalobolo*.
- (2) Negotiations for the delivery of *emalobolo* start on the day the man's family comes to the woman's family to ask for her hand in marriage (*batomcela*).

- (3) *Emalobolo* must be delivered immediately after the marriage ceremony (*kugidvwa kwemtsimba*), in accordance with the maxim: '*kulotjolwa umfati*' (you deliver *emalobolo* only for a wife): provided that the families may agree that the delivery of *emalobolo* may be made at a future date.
- (4) If the delivery of *emalobolo* is not effected as a result of the agreement between the families, the outstanding *emalobolo* becomes a debt against the groom's family.
- (5) Non-delivery of the full *emalobolo* does not affect the validity of the marriage.

Number of *emalobolo*

- (1) The number of beasts required for *emalobolo* is prescribed by the parents of the woman when the prospective groom's family request her (*kumcela*).
- (2) The number of beasts depends on variables relating to the status and rank the woman holds in society and within the family.
- (3) The ranking observed when prescribing the number of cattle to be delivered for *emalobolo*, is as follows, if the woman is a daughter of:
 - (a) a King, not fewer than 50 beasts;
 - (b) a Prince, not fewer than 30 beasts;
 - (c) a *Sikhulu*, not fewer than 20 beasts; or
 - (d) an ordinary person, not fewer than 15 beasts.
- (4) The first-born daughter (*inkhosatana*) and the last-born daughter (*litfumbu lentfombatana*) are also ranked higher, and more *emalobolo* must be rendered for them than for the other daughters of the family.
- (5)
 - (a) In addition to the prescribed number of *emalobolo* contemplated in subsection (3), the groom's family must deliver *lugege* and *insulamnyembeti* beasts.
 - (b) Such beasts must be delivered irrespective of whether or not there is an agreement regarding the delivery of *emalobolo* at a future date.

- (6)
 - (a) The *insulamnyembeti* beasts, which are also known as *inkhomo yelibovu* or *inkhomo yeluhlanga*, must be delivered by the groom's family to the mother of the bride to acknowledge her contribution to the upbringing of the bride.
 - (b) The *insulamnyembeti* beast forms a part of the estate of the bride's mother.

Source of emalobolo

- (1)
 - (a) A father must provide *emalobolo* to each son for his first wife.
 - (b) If the father dies, the obligation falls upon his successor.
 - (c) The father of the groom may refuse to provide such cattle.
- (2)
 - (a) Cattle for the wife of a son may be taken from cattle obtained from the marriage of the daughters of that house.
 - (b) If a younger brother borrows cattle from his house to provide *emalobolo* for his wife, he is required to return these cattle when he receives *emalobolo* for his eldest daughter.
- (3)
 - (a) Because the delivery of *emalobolo* may be deferred in terms of section 219(4), it may be promised in respect of cattle not yet received as *emalobolo* of a daughter who is yet to be married.
 - (b) A mother may provide *emalobolo* for one of her sons, using the increase of her *insulamnyembeti* beasts.
 - (c) This becomes a debt in the estate of the mother which the son must repay even if the mother is deceased.
 - (d) If the mother dies, the debt must be paid to the last-born son.

Distribution of emalobolo

- (1) *Emalobolo* received from the marriage of the eldest daughter of each house must accrue to the estate of *indlunkhulu*.
- (2) *Emalobolo* received from the marriage of subsequent daughters of each house must accrue to their respective mothers' houses.

Return of *emalobolo*

- (1) *Emalobolo* may be returned in exceptional circumstances that include:
 - (a) the instance where the wife dies without bearing children and her parents do not send someone in her place in terms of section 234; and
 - (b) the instance where the woman leaves her marital home (*kwemuka*), and, when confronted, refuses to return to her husband, referred to in section 246.
- (2) The maxim is: *ukhiphe tinkhomo emlonyeni weyise* (she has taken the cattle out of her father's mouth).
- (3) The exact number of cattle paid as *emalobolo* must be returned even if the cattle have multiplied over the years: *tinkhomo temabheka atitali*.

Part 9: *Bayeni* (The groom's party)

Assembling *emalobolo*

- (1) A few days after the marriage ceremony, the groom's father, with the assistance of his relatives, must assemble *emalobolo* and designate a man (*umyeni*) to take *emalobolo* into his care and to present them at the bride's homestead.
- (2) On a date previously agreed upon by both families, a small party accompanying them must carry *umyeni*'s luggage.

Arrival at bride's homestead

- (1)
 - (a) *Bayeni* must arrive at the bride's homestead after sunset.
 - (b) On arrival at the bride's kraal, the *umyeni* shout: "*Siyalobola gogo*" ("we have come to deliver *emalobolo* grandmother")
 - (c) While he is shouting, the small boys of the homestead may throw stones at the group in jest, causing them to run away.

- (d) After a lapse of a few minutes, *umyeni* and his party return to the homestead and shout: “*siyalobola gogo!*”
 - (e) *Umyeni* and his party must then mention the number of cows. This includes *lugege* and *insulamnyembeti* beasts.
 - (f) Thereafter, a young maiden must come out to take *umyeni*’s luggage and lead the party to a hut prepared for the party.
- (2)
- (a) Once inside the hut, the *umyeni* must not sit down until the members of the bride’s family have provided him with a mate (*licansa*) to sit on.
 - (b) At this stage *gozolo* must engage in the process referred to as *kuhlamahlama* (moving from one place to another within a homestead).
 - (c) *Gozolo* must go into all the huts in the homestead to look for food for *bayeni*.
 - (d) *Gozolo* may take whatever he likes in the form of food for *bayeni*: in most instances, the bride’s people would have already prepared food and a goat for *bayeni* to slaughter.

Announcement of the *bayeni*

- (1)
- (a) On the morning of the next day, the head of the family must inform all the relatives that the *bayeni* have arrived.
 - (b) The relatives must gather in the hut of the *bayeni* and meet them.
 - (c) Greetings must be exchanged and the manner of greeting must be “*sanibonani bayeni*” by each member of the bride’s family, whereupon the whole party of *bayeni* must respond in the following manner: “*size sazi*”.
- (2)
- (a) After this exchange of greetings, the *umyeni* must inform the bride’s family about the purpose of their visit, being the delivery of *emalobolo*.
 - (b) The bride’s family and the *bayeni* must proceed to the cattle kraal to inspect *amalobolo*.

- (c) As a sign of acceptance of *emalobolo*, the bride's father must give the *umyeni* a beast, referred to as *sidvudvu semyeni* or *inhlabisa-bayeni*, which must be slaughtered.
 - (d) The giving of this beast to *bayeni* signifies that the ownership of *emalobolo* has passed to the bride's family.
- (3) The elderly members of both parties must then retire *endlini kagogo* where snuff is shared, signifying the cementing of relationships between the bride and the groom's family.

Slaughter of beasts

- (1)
 - (a) The *Inhlabisa-bayeni* and *lugege* beasts must be slaughtered.
 - (b) The *lugege* beast must be slaughtered as an essential element for the marriage, which marks the conclusion of the agreement between the parties.
 - (c) *Inhlabisa-bayeni* and *lugege* beasts must be stabbed by the *gozolo* using the spear that was used for killing *umtsimba* beast (*indlakudla*) and also used by the bride during *kumekeza*.
 - (d) When the *gozolo* stabs *lugege* beast, it should bellow, otherwise it is believed that its failure to do so indicates that the ancestors are not pleased about the marriage.
 - (e) When the *lugege* beast is stabbed, the two parties must fight for its first blood.
 - (f) The first blood must be taken to the bride to lick.
 - (g) This ritual is a game that has no legal significance.
- (2)
 - (a) All the girls who have accompanied the bride to *umtsimba* ceremony must stand next to the *sibaya* (kraal).
 - (b) The bride must in the meanwhile be standing inside her grandmother's hut, holding on to the pillar and standing with her feet crossed, which is supposed to prevent the beast from dying quickly.

- (c) The girls at *esibayeni* must clap their hands, singing and cheering, singing the following: “*ayilale phansi inkhomo yadzadze*” (let our sister’s beast lie down).
- (d) When the beast lies down, they must say “*ayivuke inkhomo yadzadze*” (let our sister’s beast not die).
- (e) The beast should not die until the bride has released her hold of the pillar and sat down: if the animal dies quickly, it is a bad omen, because it is likely that the bride will die quickly too.

Skinning of the beasts

- (1) While *inhlabisabayeni* is being skinned, the woman who was *Sikhulu* woman to *dlalisela umtsimba* must stand by with a stick on to which the skinners must put small pieces of meat from time to time.
- (2) The *lugege* beast must be skinned and none of the meat must be apportioned.
- (3) *Inhlabisabayeni* is divided into the customary portions as when a beast is slaughtered.
- (4) The *lugege* beast must then be lifted by both the *bayeni* and the members of the bride’s family in its skin to the hut.
- (5) While they are doing so, the parties must play tug of war with the carcass.
- (6) This is accompanied by a rhyme in which a leader shouts: “*yesibali*”; the group must enjoin: “*sibambu- mkhwenyewethu lolugege lugege*”.
- (7) For variety, the leader may even shout the name of the groom.
- (8) Eventually the carcass must be taken inside the hut of the *bayeni*.

Cooking and eating of beasts

- (1) Early the next morning, the two beasts must be properly cut up in preparation for cooking.
- (2) Several meat portions from the *lugege* carcass and the *inhlabisabayeni* carcass must be exchanged between the parties.
- (3) The exchange of portions must be done in such a manner that each party obtains a whole beast to signify the further cementing of relations.

- (4) Certain portions of meat are important and the exchange of these meat portions is significant because they are eaten by particular persons within the families.
- (5) The meat portions are as follows:
- (a) the stomach (*sisu*) of the beasts are exchanged;
 - (b) the heads of the beasts are exchanged;
 - (c) a leg of one beast is exchanged for a leg of the other;
 - (d) *siluba* of *lugege* beast, which is a meat portion from the breast of *lugege* beast;
 - (e) *umganga* of *lugege* beast is cooked and given to the groom to eat, sharing it with his *balamu*, that is sisters-in-law;
 - (f) meat from the sides (*imihlubulo/tinhlangothi*) of each of the beasts is exchanged;
 - (g) one “arm” portion of *inhlabisabayeni* meat is given to the bride to eat, since she may not participate in the eating of *lugege* meat;
 - (h) *emasondvo* (hooves) of the beasts are exchanged;
 - (i) *umsasane* is given to the bride’s grandmother as well as children who have not reached maturity to eat – it may also be given to the woman who ate *umsasane wemtsimba* to cook and eat with the children;
 - (j) the *umsila* (tail), to be cooked and given to the bride’s brothers to eat;
 - (k) *sibumbu*, a meat portion from the leg of *lugege* beast;
 - (l) meat stuffed into an intestine of a beast on *bayeni* day (*luhlanga lwabomake*) is made up of pieces of meat stuffed into one intestine of *inhlabisabayeni* beast;
 - (m) *inhlukuhla* is the portion of *umyeni* from the *lugege* beast (it is from the pelvis), the meat of which is scraped off the bone, and the bone is known as *galo*;

- (n) *galo* is the pelvic bone from *umyeni*'s meat portion *inhlukuhla*, it is cooked and taken out by *make wekudlalisela* ululating: "*alilitele*", for which young boys fight each other to retain it;
- (o) the intestines are exchanged for a full set that has not been cut; and
- (p) *tinhlangotsi* are not eaten, but dried; when *umtsimba* has departed, the groom eats these with his *balamu*, if he has not been given an *inhlanti*.

Part 10: *Kungcingcisa inyongo* (a game on *bayeni* day)

Game between young girls on *bayeni* day

- (1) A game must be played between the young girls of the *bayeni* party and the young girls of the bride's family.
- (2) A bile sac (*inyongo*) must be placed in a small container and delivered by the girls of the woman's family to the *bayeni* hut.
- (3) Upon receiving the bile sac, the girls of the *bayeni* party must take it back to the bride's family hut and, in so doing, pretend to throw it at them.
- (4) This turns into a running contest between the girls of the two groups, each snatching the bile sac to throw it at the doorsteps of the other's hut.
- (5) The game must continue until the bile sac ends up with the bride's family, who must return it to the groom's hut so that the sprinkling ceremony may be performed.

Part 11: *Kujojotela inyongo* (to sprinkle bile juice on each spouse)

Sprinkling of bile juice

- (1) Bile juice from *lugege* beast must be sprinkled on each spouse by the other as an exchange of marriage vows.
- (2) Thereafter, the whole bile sac must be prepared by the *gozolo* and made ready to be worn.

- (3) The *bayeni* must then request a subsidiary wife (*inhlanti*) from the bride's family.
- (4) If present, the *inhlanti* will be the one who will wear *inyongo* on the left wrist.

Part 12: *Inhlanti* (subsidiary wife)

Selection and purpose of *inhlanti*

- (1) Measures must be put into place to pre-empt the occurrence of events which may eventually lead to dissolution of a marriage, on account of the barrenness of the wife or her death.
- (2) As referred to in section 231(3), the wife's family must identify a potential *inhlanti* who is usually his wife's younger sister or a paternal niece.
- (3) The *inhlanti* so identified may also be the wife's younger brother or a paternal nephew.

***Inhlanti* in the case of barrenness**

- (1) An *inhlanti* is provided to fulfill the function of procreation, if a wife proves unable to bear children.
- (2) The *inhlanti* does not influence the status of the barren woman as a wife.
- (3) Any children the *inhlanti* bears are presumed to be the wife's.

***Inhlanti* in the case of death**

- (1) The death of one of the spouses does not terminate a marriage.
- (2) If the woman predeceases her husband, an *inhlanti* must be provided to levirate that woman and occupy the position of wife to the widower and mother to any children of the deceased woman.

Part 13: *Kuyadliwa* (feasting)

Ritual of feasting

- (1) During the other proceedings of the day, a big feast is prepared and food is consumed well throughout the day.
- (2) In-laws do not eat in each other's presence.
- (3) The groom's and bride's families must eat at separate intervals.
- (4) The *bayeni* must move out of the bride's homestead when the *galo* bone is served.
- (5) The *bayeni* must remain outside the bride's homestead while the bride's family eats.
- (6) When the bride's family have finished eating, the *bayeni* must be called in to eat.
- (7) At some point during the feasting, the groom must invite and share with his sisters-in-law the *umganga* meat.

Part 14: *Kuyavaleliswa* (official farewell)

End of the ceremony

- (1) To mark the end of this ceremony, the parties must gather at *endlini kagogo*, and a pot of beer must be shared while they sing a song: "*yokuvalelisa umuntu ohambayo*" (bidding farewell to the one who is leaving).
- (2) Thereafter, the *bayeni* must depart.

Part 15: The legal requirements of a marriage

Essential elements for a valid marriage

A marriage will not be valid unless it fulfills the requirements set out below.

- (a) The bride must be smeared with *libovu*.

- (b) *Emalobolo* must be negotiated.
- (c) The *lugege* beast must be slaughtered.
- (d) The *insulamnyembeti* beast must be delivered.

CHAPTER 6

CONSEQUENCE OF MARRIAGE

Legal consequences of marriage

- (1) A new and separate household is established, which in the course of time, together with related households, develops (through the husband) into a homestead.
- (2)
 - (a) The rights of the bride's family in respect of guardianship over her are transferred to the husband and his family.
 - (b) Children born of the marriage fall under the guardianship of their father and his family.
 - (c) In her own house, the wife enjoys a considerable degree of independence, subject to her consulting with her husband on important matters.
 - (d) The husband, who represents his household in external matters, is also responsible for order and discipline within his household, as well as for its needs and interests.
 - (e) The marital power of a husband does not include the right to administer corporal punishment to his wife.
- (3) The marital union results in the establishment of an independent estate.

Personal consequences

- (1) Each wife in a polygynous marital relationship must occupy a particular rank within the greater composite homestead.
- (2) The rank of a wife influences her status, her relationship with her husband's other houses and her children's rights of succession.

Relationship between husband and wife

- (1) The man and woman must live together as husband and wife.
- (2)
 - (a) The wife must live wherever her husband establishes a household at the time of the marriage.
 - (b) Each wife is entitled to a separate house (*indlu*) in the homestead.
 - (c) A husband and wife must fulfill the duty of mutual support.
- (3)
 - (a) A husband and wife must afford each other conjugal rights.
 - (b) The husband must initiate sexual intercourse.
- (4) A husband and wife must fulfill the duty to procreate a family.
- (5) A husband and wife must share in the duty to care for their household.
- (6)
 - (a) A wife must be under the guardianship of her husband, provided that the husband has no right to administer corporal punishment to her.
 - (b) If the husband persists in administering corporal punishment to his wife, she may report him to the family council (*lusendvo*) or to the leader of the party bringing *emalobolo* (*umyeni*), who must resolve the issue.
 - (c) If the husband's family fails to prevent him from administering corporal punishment, the wife may escape to her parental home or to any relative's home (*kwemuka*).

Patrimonial consequences

- (1)
 - (a) Marriage creates a separate household with its own household property which is shared by all members of that household.
- (2) One house may not be enriched at the expense of another house.
- (3) The transfer of property between houses must be reasonable and for a just cause, including the following:
 - (a) if a house has to repay a particular debt and does not have the necessary property to do so; or
 - (b) if the cattle of one house are used as *emalobolo* for a son from another house.
- (4) The transfer of property from one house to another results in a debt which must be repaid.

CHAPTER 7

DISSOLUTION OF MARRIAGE

Part 1: Death

Death does not dissolve a marriage

- (1) The death of one or both of the spouses will not terminate a marriage relationship: *akuqatjanwa ngekufa* (the families' relationship will not be extinguished just because one of the spouses has passed away).
- (2) When the husband dies, his wife must remain with her in-laws who must take care of her
- (3)
 - (a) After the mourning period has elapsed, the widow's marital family must settle the issue of whether *kungena* custom must be invoked.
 - (b) *Kungena* applies when a relative of the deceased, usually a younger brother or a male relative (cousin) of the deceased, is chosen to cohabit with the widow.

- (c) The consent of the widow must be sought for entering into *kungena* custom, as well as the identity of the man chosen for her.
 - (d) The widow may refuse to engage in such a relationship with any of the suitors.
 - (e) Despite her refusal, she remains part of the family.
 - (f) If the widow allows the man to engage in sexual relations with her, any children born to the wife as a result of this relationship belong to the deceased, and not to the *umngeni*.
 - (g) The man receives a beast (*inkhomo yemadvolo*) for his exertions on behalf of the deceased, such as cattle having been received for any of the widow's married daughters.
- (4)
- (a) In the event of the death of a wife, the relationship between the families of the spouses continues to exist.
 - (b) An *inhlanti* may be provided for the widower by the wife's family.
 - (c) *Emalobolo* of five cows must be delivered for an *inhlanti*.
 - (d) If the widower has made a private arrangement with an *inhlanti*, he must deliver full *emalobolo* for her.

Part 2: Separation

***Kuphinga* (adultery)**

- (1) Adultery (*kuphinga*) is committed when a married woman has sexual intercourse with a man other than her spouse or by a married man when he has sexual intercourse with a married woman other than his wife, referred to in section 98.
- (2)
 - (a) Where the woman is accused of committing adultery, it must be proved.
 - (b) An inquiry may be conducted by the *lusendvo*.
 - (c) If found guilty of adultery, the woman may be sent back to her parental home.

- (d) The woman's parents must send her back, requesting an explanation of why she was sent back to them.
- (3)
 - (a) The matter of adultery may be reported to *amphakatsi* who, upon inquiry, must cause the man who committed adultery with the woman, to pay a fine.
 - (b) The fine, referred to as *siti*, may amount to about five beasts.
 - (c) A further two beasts must be paid by the father of the woman to her in-laws as a fine to cleanse the misdeed (*tinkhomo tekugeza emacansi*).

***Kutsakatsa* (witchcraft)**

- (1) *Kutsakatsa* involves the actual or suspected practice of sorcery by a wife.
- (2) Where a wife is accused of witchcraft, the family may decide to approach traditional diviners who must conduct a *kunuka* (witch hunt).
- (3) A meeting of the two families must be convened and the wife's family may call for a second opinion.
- (4) If a diviner chosen by the wife's family again identifies the wife as the sorceress, she may be sent back to her parental home.
- (5) If it is confirmed that the wife is guilty of witchcraft, the family members must send her back to her parental family.
- (6) If the wife returns to her in-laws, she must not be attached to the main homestead; her new house must be built at some distance from the main homestead.

Refusal of conjugal rights

- (1) Both spouses must afford each other reasonable sexual privileges.
- (2) Refusal to render conjugal rights by either spouse will not lead to separation.
- (3) A wife may refuse conjugal rights to her husband on reasonable grounds including the following:
 - (a) the wife is in an advanced stage of pregnancy;

- (b) the wife is menstruating;
- (c) the wife is in mourning; or
- (d) the wife has given birth within six months.

***Kwemuka* (desertion)**

- (1) *Kwemuka* occurs when the husband leaves the household with no intention of returning, or where the wife returns to her father's home with no intention of returning to her husband's home.
- (2) Desertion does not end the marriage relationship.
- (3) Spouses may return at any time they choose.
- (4)
 - (a) The woman may return to mourn her husband.
 - (b) This may happen despite the fact that she has in the meantime engaged in sexual relations with other men and children were born of such relationships.
 - (c) The woman must be fetched back together with any children she may have had subsequently.
 - (d) Such children belong to the husband's family, even if biologically they belong elsewhere: *ubashayele tinyoni*.
- (5) A woman's body may be returned to be buried at her marital home.

