IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1748/98

IN THE MATTER BETWEEN

ENOCK DLAMINI	FIRST APPLICANT
HARRY SIBHAHA DLAMINI	SECOND APPLICANT
VS	
THOKO SIZAKELE THWALA	FIRST RESPONDENT
THEMBA THWALA	SECOND RESPONDENT
CORAM	S.M. MAPHALALA - A J
FOR APPLICANTS	MR M. MAVUSO
FOR RESPONDENTS	MR B. SIGWANE

JUDGEMENT

(31/07/98)

Before court is an urgent application brought with a certificate of urgency for an order in the following terms:

1 Interdicting and restraining the respondents from conducting the cleansing ceremony of Victor Day Dlamini and Thoko Sizakele Thwala at the applicant's home at Hhelehhele.

2. That the respondents pay costs of this application.

3. That a rule nisi with immediate interim effect do issue in terms of 1 and 2 above, returnable on a date to be determined by the court.

4. Further and/or alternative relief.

The application is supported by the founding affidavit of Enock Dlamini and supported by that of Harry Sibhaha Dlamini with various annexes. The application is opposed by the respondents who in turn file their affidavits in terms of the rules.
The matter came up for arguments before me yesterday afternoon where the respondent's attorney raised two points in limine. thus:

(1) That no sufficient grounds have been set out entitling applicants to the remedy sought;

(2) That applicants have "ipso facto" defeated the very object of the application by commissioning a public announcement over the national radio service calling off the ceremony intended for the 31st July, 1998.

On the first ground Mr Sigwane argued that the requisites for a prohibitory interdict has not been met. To

buttress this view he cited the Appellate Division in the case of Setlogelo vs Setlogelo 1914 A. D. 221 where Innes J. A. accepted that the requisites for the right to claim an interdict were, first, a clear right, second, an injury actually committed on reasonably apprehended, and thirdly, the absence of similar protection by any ordinary remedy. In the case in casu Mr Sigwane contended that the second respondents has a better right than the applicant as she was married with the deceased in terms of the common law and she is also the executrix of the estate of the deceased as evidenced by the liquidation and distribution account annexed in applicant's papers. He argued further that a custom has been established in that the deceased last place before he was taken to his grave was his home at Hhelehhele and the cleansing ceremony was conducted there. Further the deceased together with the second respondent although they had a home in Mbabane also built a house at Hhelehhele where all these ceremonies took place. That second respondent has been in mourning for two years and four months and she has been looking forward with anticipation for this ceremony.

On the second requisite Mr Sigwane argued that the applicants have failed to establish this and on the third requisite that there is an ordinary remedy open to the applicants they can enlist the assistance of the police to see to it that public order is maintained.

Mr Mavuso argued or rather submitted that the announcement was made for purposes of the present on going registration that is going on in the country. I must say at this point that I am not convinced by this feeble explanation of trying to explain away a glaring anomaly in the applicant's case. The applicants have adopted a double-burrel approach with total disregard to the doctrine of clean hands. On one hand they make an announcement stopping the ceremony on the other hand they come to court to apply for the same thing. This is nothing else but fragrant abuse of the court process.

To go back to Mr Mavuso's submission he contended that in the event the ceremony is allowed to take place there is going to be blood shed between the children of the second applicant, as there have been allegation of witchcraft. Secondly the homestead in which the ceremony is to take place belongs to the applicants and in the event respondents proceed with the ceremony that will be tantamount to trespass.

These are the issues before me. I have carefully perused through the papers and considered the submission by counsel. I must first and foremost state that applicants have failed to prove a case on a balance of probabilities. I have already alluded to the

issue of the announcement and my views on the matter I can only repeat that this application is a total abuse of the court process. Applicants are trying to hoodwink the court that the stoppage of the announcement is because of registration. Does that mean as Mr Sigwane rightly pointed out that burial, church services and the like are to be stopped. For the court to accept this would be sheer stupidity. This function we are talking about is a private family ceremony which is to take place at night and will not at all interfere with the on going registration.

On the other requisites for a prohibitory interdict the applicants have failed to prove most of the elements and in fact Mr Mavuso conceded here in court. The applicants have no better right than the second respondents to conduct this ceremony in her own house within the family home at Hhelehhele where the deceased was before he was buried and where the cleansing ceremony took place. The second respondent has observed the two-year mourning period and even went an extra mile and waited for another four months. On the question of the violence which it was shown here in court yesterday that it is suspected that unknown third parties are suspected to join the fray and thus make this a public spectacle. I am not convinced by this line of reasoning.

In the result, I dismiss the application with costs and order that the ceremony proceeds today the 31st July, 1998. The Commissioner of Police is requested to deploy officers from the Piggs Peak Police Station to patrol the area at the material time. Further applicants are ordered to retract the announcement they have made in the radio forthwith.

S.B. MAPHALALA

ACTING JUDGE