IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2721/98

In the matter between

ENOCK JABULANE DLAMINI	1st APPLICANT
HARRY SIBHAHA DLAMINI	2nd APPLICANT
IRENE THOKO DLAMINI (BORN NDZIMANDZE)	3rd APPLICANT
ERASMUS MENDI DLAMINI	4th APPLICANT
And	
THOKOZILE SIZAKELE DLAMINI	RESPONDENT
Coram	S.B. MAPHALALA – J
For Applicants	MR. S.C. DLAMINI
For Respondent	MR. MANZINI

JUDGEMENT

(21/05/99

Maphalala J:

This is an application brought by notice of motion for an order declaring the civil rites marriage between the respondent and the late Victor Day Dlamini void ab initio, declaring that the estate of the late Victor Day Dlamini fails to be administered and distributed according to Swazi Law and Custom, costs and further and/or alternative relief.

The 1st and 2nd applicants are brothers to the deceased. The 3rd respondent as alleged by the 1st and 2nd applicant was married to the deceased during his lifetime according to Swazi Law and Custom. The 4th applicant is the illegitimate son of the deceased who the 1st and 2nd applicants alleged was adopted in terms of the Swazi Law and Custom and the family council appointed him to be the heir of the estate in terms of the Swazi Law and Custom.

The respondent is the wife of the deceased married to him in terms of the civil rites and was appointed in the presence of the 1st and 2nd applicants as executrix dative of

the deceased estate in a next of kin meeting called by the Master of the High Court in accordance with the provisions of The Administrative of Estates Act of 1902.

The application is supported by the founding affidavit of the 1st applicant and supported by affidavits by the 2nd, 3rd and 4th applicants with various annexures pertinent to the applicants' case.

The respondent in turn joined issue with the applicants and filed her opposing affidavit where she raised three points in limine, thus:

2.1 That 1st and 2nd applicants do not have locus standi to bring the present proceedings. 1st and 2nd applicants are brothers of the deceased and are not entitled to inherit from his estate, whether it is administered in terms of Swazi Law and Custom or common law. Consequently, they do not have any vested interest in the validity or otherwise of the civil rites marriage between the deceased and the applicant.

2.2 That the 4th applicant does not have locus standi to bring the present proceedings;

a) 4th applicant is an illegitimate child of the deceased and as such is not entitled to inherit from the estate of the deceased, whether it is administered in terms of Swazi Law and Custom or the common law.
b) 4th applicant's bald claim that he was advised (which is specifically denied) and therefore entitled to inherit from the estate of the deceased is based on controversial principles of Swazi Law and Custom which have to be proved by expert evidence in order to establish his locus standi to bring the present proceedings.

2.3. That in respect of prayer 2 of the notice of motion the present application is not properly before court and that this court has no jurisdiction to make the declaration sought by applicant's, in as much as the provision of Section 51 (bis) of The Administration of Estates Act, 1902 has not been complied with

a) By letter dated 7th August 1998 an objection (on behalf of 4th applicant and one Azaria Ndzimandze) was made to the liquidation and distribution account.
b) The Master of the High Court has not indicated whether the objection are upheld or dismissed.

Respondent's answering affidavit is confirmed by the affidavit of one Mlomo Simelane who deposed that he is the chief's runner/umgijimi/messenger for Herefords area under chief Mkikwa (sic) Dlamini and was appointed as such in 1982. That he disputes that Jevane Mavuso was appointed as a chief's runner of the area in the

period 1964 to 1976 in that he succeeded his father one Lubhelu Johannes Simelane as a chief's runner of the area.

The points in limine were argued in the contested roll of the 27th April 1998.

Mr. Manzini referred the court to page 55 of Harms on Civil Procedure in the Supreme Court that the applicants have failed to prove locus standi in that they do not have any "right" in dealing with the deceased estate. The applicant does not bother in their affidavits to describe their "interest" in this matter. This concerns 1st and 2nd applicant. Mr. Manzini contended further that in terms of paragraph 2 of the applicant's affidavit the deceased had other children who were born out of wedlock and are majors and are capable of suing for themselves. There is no power of attorney from them empowering 1st applicant and 2nd applicant to sue on their behalf. Mr. Manzini further challenged the locus standi of the 4th applicant in that in terms of our law an illegitimate child does not have any right or interest to inherit in interstate succession. No affidavit from an authority has been filed by the applicant to show how the purported adoption was effected.

Mr. Manzini further more referred the court to Section 6 of The Administration of Estate Act, 1902 and the decisions of this court in the cases of Joseph Jabulane Dube vs R 1970 - 76 S. L. R. 93 and the case of Dudu Dorothy Dlamini vs Master of the High Court Civil Case No. 367/87 (unreported) which he submits is at fours with the case in casu. Mr. Manzini argued that if the proposition in the latter case is accepted the matter ought to be referred to oral evidence. That the issue raised in the papers as they stand that a marriage was contracted between the deceased and the 3rd applicant has raised a material dispute of fact and the matter has to go to oral evidence. He referred the court to the court to the often-cited case of Room Hire (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T) which is regarded as the locus classicus on this aspect.

Mr. Dlamini for the applicants on the other hand is of the view that Section 68 (2) of the Act oust the Master's jurisdiction in this estate. He further submitted that the 3rd applicant's affidavit need not be supported by the affidavit of the other applicants. To this effect he referred the court to Erasmus on Superior Court Practice at B1 -37 where the learned author was discussing a sub-rule to Rule 6 (5 A) which is the same as our sub-rule both in form and in substance and said that the sub-rule requires a

notice of motion to be accompanied by at least one affidavit. It is not necessary for the applicant to file an affidavit. A notice of motion can be supported by any person who is in a position to provide the necessary material to support the claim (see Leith No and Heath No vs Fraser 1952 (2) S.A. 33 (o) at 36B). Any person who can lawfully be a witness can execute an affidavit (see Chairmoritz v Chairmoritz 1960 (4) S.A. 818 ©).

He argued finally that in the present case there is no real dispute of fact. These are the issues for determination.

I agree entirely with Mr. Manzini that in the instant case the issue of the marriage between the deceased and the 3rd applicant should be referred to oral evidence, as it is

a material dispute of fact between the disputants. In arriving at this conclusion I am fortified by the ratio decidendi in the Room Hire case (supra).

I am further of the view that the alleged adoption of the 4th applicant in terms of Swazi Law and Custom is a controversial issue that will require expert evidence, Mr. Manzini is correct in this connection.

In the result, I rule that the matter be referred to oral evidence to determine these issues.

Costs to be costs in the course.

S.B. MAPHALALA

JUDGE