1

s

CIVIL CASE NO. 1387/04

In the matter between:

THANDI FLORAH DLAMINI (NEE MYENI)	1ST APPLICANT
SIBONISO DLAMINI ZANELE DLAMINI	2ND APPLICANT
SICELO DLAMINI	3RD APPLICANT
	4th APPLICANT

AND

PHILILE DLAMINI (NEE CINDZI)	1ST RESPONDENT
NTFULO ELIAS DLAMINI	2ND RESPONDENT
SHONALANGA UNDERTAKERS	
PIGGS PEAK	3rd RESPONDENT

CORAM	K.P. NKAMBULE
FOR APPLICANTS	S.C. DLAMINI
FOR RESPONDENTS	S.V. MDLADLA

RULING 27/5/04

This application came before court under a certificate of urgency on the 21st May 2004. On this date the matter was postponed to the 26th May 2004 with an order that applicant who is one of the heirs of the deceased filed an affidavit. The respondents were ordered not to proceed with the burial until the matter was finalised.

Briefly^, the background is as follows:

The applicant Thandie F. Dlamini is the senior wife of the deceased. Second, third and fourth applicants are children belonging to applicant and the deceased who were born of a marriage contracted in terms of Swazi law and custom. The marriage was solemnised in 1976 at Herefords. The marriage produced six children some of whom are applicants in this matter.

It is common cause that in 2001 the deceased married first respondent at Herefords and no children were born of this marriage. The second respondent is the deceased brother. The deceased lived with the applicant from the day of their marriage until 2001 when he married first respondent and set up a home at Ekuthuleni.

The order sought by the applicant was as follows:

1. Dispensing with the usual time limits, forms and provisions of service as are required in terms of the rules of court and that the matter be heard as one of urgency.

2. Pending finalisation of the matter:-

   2.1 Declaring first applicant in collaboration with the second applicant to have the sole burial rights in respect of the deceased.

3. Respondent to hand over the body of the deceased to the applicants.

4. First and second respondent pay the costs of this application.

When the matter was heard on the 21st May 2004 Mr. Mdladla for respondent raised points *in limine* from the bar as follows:-

a) *Locus standi*

That second applicant cannot bring this matter before court and as such his affidavit should be struck out.

5. That the marriage between the deceased and first applicant was nullified after the deceased got married to the first respondent and as such she is not competent to seek the order of this nature.

6. That the applicant has not been able to satisfy the requirements of an interim interdict.

Locus standi

The first question which arises is whether the first applicant or second applicant has *locus standi* to claim the right to make the arrangements for the funeral of the deceased. As already stated in the background of this application that the first applicant is the senior wife of the deceased and that the second applicant is the first born son of the deceased AND first applicant, it therefore, goes without doubt that they are both heirs of the deceased.

It is common cause that the deceased died intestate. At the time ol his death he did not impose the duty of disposal of his remains to anyone.

In regard to the principles that apply, I wish to refer to a number of judgements and other relevant authorities. In **Saiid Vs Schatz and Another** 1972 (1) SA 491T Moll J quoted the following principle with approval at 494 B-C,

> "*It is taken for granted that the heir (or in the Modern Law the executor) must carry out all the terms of the will as far as possible. It therefore follows in our law that directions in the will as to the disposal of the body must, if possible and lawful, be followed.*"

The learned judge quoted the principle which was laid down by Voet as per Gane's translations at 494 of this judgement;

> "*If the deceased did not impose the duty of burial on anyone, the matter would affect those who have been named in the last will as heirs. If no one has been named, it affects the legitimate children or the blood relations, each in their order of succession. If they are also wanting, it is the duty of the magistracy to take care that the deceased is buried.*

This approach was followed in the subsequent cases such as **Human V Human and Others** 1975 (2) SA 251 (E) per Cloete AJP at 254 B. The learned judge referred to a discussion of Voet by Dr. Manfred Nathan which reads as follows:

> "*...That person ought to perform funeral rights whom the deceased has chosen for the purpose. If the person appointed does not carry out the wishes of the deceased, he forfeits whatever has been left to him by the deceased.*"

> "*If the deceased has appointed no one to perform them (that is the funeral rights) the duty falls to the heirs nominated by the will: If no heir is nominated the legitimate or cognate heirs who succeeded must do so. Failing these, the duty of burying the deceased falls on the civil authorities, at the expense of his estate.*"

At page 254 H the learned judge concluded:

It follows, therefore, and I come to the conclusion that the first respondent is to be regarded as the heir of the deceased and, that being so, it seems to me that I should follow in the absence of any authorities to the contrary, the statement of the law in Voet that it is the duty of the person named in the last will as heir to attend to the funeral rights of the deceased."

The next judgement in line in this point is **Tseola and Another Vs Maqutu** 1976 (2) SA 418. This was a judgement by MUNNIK CJ. In this judgement the learned Chief Justice referred to the above mentioned judgements (Saiid Vs Schatz and Human Vs Human) and quoted the principles laid down in those judgements with approval:

> "*Now from these two cases it is quite clear that it is the duty and therefore the right of the heir to bury the deceased and to use his discretion in doing so where no testamentary directions have been given.*"

In the case of **Mbanjwa Vs Mona** 1977 (4) SA 403 the same judge was dealing with a case of a deceased who died intestate. He stated as follows in his conclusion:

> "*This has two consequences. Firstly, it means that she left no discretions as to her burial. Secondly, it means that it is the duty and , therefore, the right of her intestate heirs to bury her and such includes the choice of the place of burial as was said by Cloete J. in Human's case supra*".

Under circumstances it seems to me to be settled law that it is the heirs of the deceased person who are entitled to decide upon burial arrangements and in particular as to where and when the body is to be buried. For the above reasons and conclusions it is my opinion that the point of *Locus standi* as far as applicant No. 2 is concerned has no basis in law and should fail.

The second point that the deceased's marriage with First applicant was nullified cannot stand because respondent has only alleged. No documentation has been tendered to support this point. This point cannot succeed.

The last point is that the applicant has failed to satisfy the requirements of an interim relief. It is clear from the submissions made regarding this point that the objection is ill conceived. The order sought by the applicant cannot be classified as an interim relief. The order seeks a final interdict. I am not prepared to exert my attention to the drafting of papers to this effect because they are clear.

The requisites for a final interdict are clear. They have been dealt with in numerous cases before this court. They are as follows:

i) A clear right;
ii) An injury actually committed or reasonable apprehended or an actual or threatened invasion of that right; and

iii) the absence of similar protection by any other ordinary or suitable legal remedy.

Regarding the first requisite, that of a clear right has been satisfied. When dealing with the second point in these points of law I mentioned that the applicants have established that Applicant No. 1 was married to the deceased in 1976 through Swazi law and custom. There is no evidence to the contrary or any evidence which proves that at some point in time the marriage was nullified.

The wife as the senior wife of the deceased has a right as already pointed out that as the intestate heir of the deceased she has the right to bury the deceased. This is a right shared by all the applicants as the heirs of the deceased.

Regarding the second requisite the applicants aver on page 4 of their founding affidavit that;

> "The *first and second respondents have made funeral arrangement with the distant relatives which is unlawful in terms of the Swazi law and custom.*"

From the above it is clear that the respondents are intending to go ahead and bury the deceased without consulting the applicants who are the core of the applicant's family and who are by law entitled to get First preference in terms of the seniority in the family.

Regarding the third and final requisites the applicant stated on page 5 paragraph 24 of the founding affidavit that he has no other satisfactory remedy apart from the relief that he is seeking.

The court stepped in during argument and asked whether exhuming the body cannot be said to be an alternative remedy. Mr. Dlamini for the applicant stated that though this might look as an alternative remedy, it however, is not a satisfactory remedy because by the time the body would be exhumed it would be in a serious state of decomposition and such remedy cannot be said to be a satisfactory one or suitable one under circumstances.

From the foregoing it is the opinion of this court that the applicant has been able to satisfy the requirements of a final interdict which is the remedy they were seeking.

It is therefore, ordered as follows:

7. it is hereby declared that 1st Applicant and 2nd Applicant are granted sole burial rights in respect of the deceased.

8. The respondents to hand over the body of the deceased to the applicants on or before 12.00 noon on Friday the 28th May 2004.

First and second respondents to pay the costs of this application.

K.P. NKAMBULE

JUDGE