

THE HIGH COURT OF SWAZILAND

THULILE TSABEDZE (nee MNISI)

Applicant

And

SISHOSHO TSABEDZE

1st Respondent

AMOS TSABEDZE

2nd Respondent

SIBONGILE TSABEDZE (nee DLAMINI)

3rd Respondent

DUPS HOLDINGS (PTY) LTD T/A DUPS FUNERAL HOME

4th Respondent

Civil Case No. 2300/2005

Coram: S.B. MAPHALALA - J

For the Applicant :MR. MADZINANE

For the Respondents:MISS DA SILVA

RULING

(On points of law in limine) (24th June 2005)

[1] The Applicant who is the eldest wife of the deceased married to him in terms of Swazi law and custom has moved an urgent application, for amongst other things, [1] The Applicant who is the eldest wife of the deceased married to him in terms of Swazi law and custom has moved an urgent application, for amongst other things, *interdicting and restraining the Respondents from going ahead with the funeral of the deceased* scheduled for the 26th June 2005 pending meaningful engagement or consultation with the Applicant. The deceased had two other wives both of them he had married under Swazi law and custom. The 1st Respondent is deceased's natural father and Applicant's father in-law. The 2nd Respondent is the brother to the deceased. The 3rd Respondent is one of the other two wives. The Applicant has filed her Founding affidavit outlining her case.

[2] Due to the fact that the attorney for the Respondent had only been instructed late no opposing affidavits have been filed of record. However, the Respondents have filed a Notice of Intention to Oppose. Miss Da Silva who appeared for the Respondents has also advanced three points of law in limine from the bar. The first point taken is that Applicant has no locus standi to launch these proceedings in that in terms of Swazi law and custom any female is regarded as a minor and takes second fiddle as it were, after her husband. She further mentioned a decision by Matsebula J delivered in 2003 propounding the principle that a female should be assisted by the husband. Mr. Madzinane took the view that a wife of a deceased husband does not need to be assisted as she already had an "interest" to bury her husband and therefore this fact suffices for purposes of establishing locus standi.

[3] The second point of law raised is that this court has no jurisdiction to entertain this matter regard being had to the provisions of Section 11 (a) of the Swazi Court Act No. 80 of 1950. The argument in this regard is that this issue involves Swazi law and custom where the parties were married in terms of Swazi law and custom. In any event, so the argument goes, in terms of the Swazi law and custom the father of the deceased has the right to determine a place of his son's burial over the rights of the wives married in terms of Swazi law and custom. Mr. Madzinane advanced *au contraire* arguments in this regard.

[4] The third point raised is that Applicant has created the urgency in this matter and therefore she cannot benefit by giving the Respondents short service in which to construct their defence.

[5] It appears to me that the first and second points of law in limine are intertwined in this case. The issue before court from the facts averred in the Applicant's Founding affidavit is governed by Swazi law and custom. The right to bury by a spouse married in terms of Swazi law and custom is different from the right to bury under the civil law regime. In the former regime it would appear to me that the proper forum to resolve this issue would be the customary law. In civil law, it is a settled principle that the surviving spouse, if she is an heir, has preference over other heirs if there are co-heirs (see *Tseola & another vs Maqutu & another* 1976 (2) S.A. 418 (TK) 3x 420 C - G - see also *Gonsalves vs Gonsalves* 1986 (2) S.A. 176 (TK) at 179 H - I). In this case on the basis of the provisions of the Act cited by Miss Da Silva, it is my considered view that this court does not have jurisdiction on the matter and this matter falls to be determine in terms of customary law.

[6] Further, on the issue of *loci standi* I agree with the submissions made on behalf of the Respondent. It is common cause that Applicant was married to the deceased in terms of Swazi law and custom. It is further common cause that deceased had two other wives who he married in terms of the customary law. It is also common cause that 1st Respondent's father has consented to the burial at 3rd Respondent's homestead. It also

appears that the second Respondent who is the brother to the deceased endorsed this arrangement. It would appear that the whole family save the Applicant are for the burial of the deceased at 3rd Respondent's homestead. On these facts I find the Applicant lacks the necessary locus standi in the circumstances.

[7] On the issue of urgency, I agree with the Respondents that Applicant sat on her rights and has created the urgency on which the application has been brought. The requirements of Rule 6 (25) (a) and (b) has not been met in the present case.

[8] In the result, on afore-going reasons the points of law in limine are upheld with costs.

S.B. MAPHALALA

J U D G E