

IN THE HIGH COURT OF SWAZILAND

Civil Case No. 2766/2007

PAULOS MGCEBI MDLULI

Applicant

And

TOM NGWENYA

1st Respondent

DUPS HOLDING (PTY) LTD t/a

DUPS FUNERAL HOME

2nd Respondent 3rd

THE COMMISSIONER OF POLICE

Respondent 4th

THE MASTER OF HIGH COURT

Respondent 5th

THE ATTORNEY GENERAL

Respondent

Coram

S.B. MAPHALALA - J

For the Applicant For

MR. M. SIMELANE

the Respondents

MR. XABA

JUDGMENT

17th August 2007

[1] The Applicant who is the husband of the deceased who he married in terms of Swazi law and custom has moved before this court an urgent application for the following relief:

1. That the usual requirements of the rules regarding form notice and service of court processes in terms of the rules of this Honourable Court be dispensed with in view of the urgency of the matter.
2. That pending final determination of this application a rule *nisi* with immediate effect returnable on Friday the 10th August 2007 do issue calling upon the Respondent to show cause why the following should not be made final;
3. The 1st Respondent or anybody under his title be interdicted and restricted from burying the deceased, Ettie Cebile Mdluli (nee Ngwenya);
4. The 2nd Respondent be interdicted from releasing the corpse of Ettie Cebile Mdluli (nee Ngwenya) to anyone other than Applicant;
- 2.3. The Applicant be declared to be the lawful person to decide the place of burial of the deceased, Ettie Cebile (nee Ngwenya) Mdluli;
5. That the 4th Respondent be interdicted from releasing any funds for the burial of the deceased to anybody other than to the Applicant;
6. Authorizing the 3rd Respondent or his subordinates to assist the Deputy Sheriff to execute this order effectively;
7. Authorizing the Deputy Sheriff to retrieve the corpse of the deceased from wherever found if it is not kept by 2nd Respondent and place same in a mortuary chosen by Applicant;
8. That 1st Respondent be ordered to pay the costs of this application.
9. Granting the Applicant further and/or alternative relief.

[2] The application is founded on the affidavit of the Applicant who relates the background to the dispute. Maria B. Ngwenya who is the wife to the 1st Respondent has filed an Answering affidavit for the latter who is no longer fit to represent himself where she states all the pertinent facts in this matter.

[3] In arguments before me on Monday the 13th August 2007, Counsel for the Respondent advanced points of law as follows:

1. That the above Honourable Court has no jurisdiction to hear and finalise this matter, or, alternately, it has no jurisdiction at least for now, due to one or more of the following reasons:

10. The application touches upon a Swazi law and custom, and that usually the above Honourable court would expect that customary matters be taken before a Swazi National Court, or alternately, before Chiefs.

11. The matter has not been heard and finalized by the Umphakatsi for both the Applicant and the 1st Respondent. It was stated by the Indvuna (headman) of the area, Josiah Khumalo, that the matter was not finalized per se, but was referred to both families for reaching out an amicable solution. This was done prior to the death of the deceased. Therefore, the umphakatsi in particular the inner council, is still rightfully entitled to hear and finalise this matter, as it involves a matter of custom.

2. This application is clouded with numerous disputes of facts which cannot be dealt with on papers alone without the leading of oral evidence. It has been held on numerous occasions by this Honourable court that oral evidence should be led in order to prove that particular custom, if such matters were to be heard before this court.

[4] In arguments before me Counsel for the Respondent filed very comprehensive Heads of Arguments and also referred to relevant decided cases touching on the subject. On the first point that of jurisdiction he cited the High Court cases of *Getrude Sipiwe Magongo (born Buthelezi) and Patrick Mandlenkosi Magongo and Mpica Mtsetfwa and 5 others, unreported - High Court Case No. 1264/1994. On the second point that of disputes of fact he referred the court to what is stated by the learned authors Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 384 and the leading case in Room Hire Company (Pty) Limited vs Jeppe Street Mansions (Pty) Limited 1949 (3) S.A. 1155 (T) at pages 1162, 1168. The court was also referred to the Supreme Court judgment in the matter of Khalalempi Joseph Mndzebele vs Mfanawembango Mavimbela (unreported), Court of Appeal Case No. 10 of 2006.**

[5] Mr. Simelane for the Applicant argued against the above-cited arguments and on the issue of jurisdiction he cited the High Court case in the matter of *Dludlu vs*

Dludlu 1982 - 86 S.L.R. 228 at 230 to the legal proposition that it is important for the court to accept that a marriage under Swazi law and custom is valid and it stands on an equal footing with a marriage contracted under civil law. Furthermore Section 3 (2), 5 and 7(1) of the Marriage Act 1964 recognizes that the marriage under Swazi law and custom exists.

[6] *Mr. Simelane* further referred the court to the Constitution of Swaziland in Section 252 (1) (2) and (3) read against the General Administration Act No. 11 of 1905 which provides that Roman-Dutch law is the law which goes hand in hand with Swazi law and custom save where customary law is in conflict with the principles of Roman - Dutch common law, the common law will prevail.

[7] Furthermore, it is contended for the Applicant that from the affidavits filed by the Applicant and on behalf of the 1st Respondent there is nowhere, it is stated that the *umphakatsi* wanted to resolve an impasse between the parties. *Mr Simelane* further cited a number of legal authorities on Swazi law and custom including the authors Professor Hlapo and B.A. Marwick.

[8] I have considered the above arguments by the parties in this matter and I am inclined to agree with what has been suggested by Counsel for the Respondent that on the alternative I ought to either refer the dispute back to both families for amicable resolution and for the purpose of reaching an agreement thereof or failing which, the matter be referred to the *umphakatsi* of the area for determination and finalization.

[9] In the result, for the afore-going reasons I refer the matter back to both

families for an amicable resolution and for the purpose of reaching an

agreement thereof or failing which the matter be referred to the umphakatsi of the area for finalization.



S.B. MAPHALALA

JUDGE

I further wish to state that as time

is of the essence in this matter the above-cited directions by the court should be carried out as soon as possible. I further order that each party to pay his/her own costs.