

IN THE HIGH COURT OF SWAZILAND

THOLAKELE DLAMINI (BORN KHUMALO)

Applicant

And

MONTI ZIKALALA

1st Respondent

REGISTRAR OF BIRTHS, MARRIAGES AND DEATH

2nd Respondent

MASTER OF THE HIGH COURT

3rd Respondent

ATTORNEY GENERAL

4th Respondent

DUPS FUNERAL UNDERTAKERS

5th Respondent

Civil Case No. 494/2007

Coram: S.B. MAPHALALA – J

For the Applicant: MR. M. MKHWANAZI

For the Respondent: MR. BHEMBE

For the 2nd and 3rd Respondents

JUDGMENT

28th February 2007

[1] Serving before court is an application brought under a Certificate of Urgency in which the Applicant is seeking for an order in the following terms:

1. Dispensing with the usual requirements of course relating to services of document and notices in the

manner prescribed by the rules and hearing this matter as one of urgency.

2. That a rule *nisi* do hereby issue calling upon the Respondents to show cause on a date to be determined by the above Honourable Court why an order in the following terms should not be granted.

2.1. Declaring the purported civil rites marriage between the 1st Respondent and the late Vusi Sotsha Dlamini bigamous and null and void *ab initio*.

2.2. Interdicting and restraining the 5th Respondent from releasing to the 1st Applicant the corpse of the late Vusi Sotsha Dlamini and directing that the Applicant has the sole right of deciding where the deceased is to be buried.

2.3. Directing the 2nd respondent to cancel from the marriage register the entry of the purported marriage between the 1st Respondent and the deceased, Vusi Sotsha Dlamini from the marriage register.

3. That prayers 2.1, 2.2, 2.3 and 4 operate with immediate effect pending final determination of this application.

4. Costs of application.

5. Further and/or alternative relief.

[2] The application is founded on the affidavit of the Applicant where she also filed what is termed a "self sworn statement" regarding her marriage with the deceased Vusi Sotja Dlamini in terms of Swazi law and custom. Her Founding affidavit is also supported by the affidavit of one Msesi Manyatsi who states therein that on the 12th December 1988, she smeared the Applicant with red ochre, symbolizing her marriage to the deceased Vusi Sotja Dlamini. She also confirmed therein that a herd of eight (8) cattle were also paid as **lobola**. A further supporting affidavit of Applicant's mother-in-law Ntengenyane Irene Dlamini (born Mhlanga) is also filed averring and confirming that at the time of his death the deceased was married in terms of Swazi law and custom to the Applicant and she is not aware of any marriage between the deceased and the 1st Respondent.

[3] In opposition of this application the 1st Respondent has filed an answering affidavit where she answers point by point all the allegations raised by the Applicant in her Founding affidavit. The general averment made therein is that Applicant is not a wife to deceased and that she has no business in conducting burial arrangements of the deceased.

Applicant has no clear right to the burial of deceased. She challenges the Applicant's marriage with the deceased that the latter was never married to her. She claims that she is the only legally married wife of the deceased as shown by her marriage certificate in terms of civil rites filed in her papers. In her affidavit she also filed a number of annexures including her marriage certificate, a document from Hlalawati Burial Scheme and various other pertinent annexures. She further filed three supplementary affidavits.

[4] Both Counsel filed very useful Heads of Argument for which I am grateful. In argument it became clear that the court ought to adopt a two-pronged approach in deciding this matter. First to decide on the place of burial of the deceased on the affidavit evidence brought to court and secondly to decide the issue of the Applicant's marriage and if need be to call for *viva voce* evidence. I shall proceed to decide this matter following the above-mentioned sequence. I proceed thusly:

(i) The place of burial.

[5] After considering the facts as deposed in the various affidavits I have come to the considered view that a proper place for the burial of the deceased on the facts of the present matter is at Nsingweni where the deceased father and other family members are buried as *per* the deceased wishes. It appears to me also that this place is supported by the 1st respondent who deposed at paragraph 9 of her answering affidavit that this place will be in accordance with the wishes of the deceased. Further, it would appear to me that this place of burial will be accessible to both Applicant and the 1st Respondent. For these reasons I have come to the considered view that the deceased be buried at his parental home at Nsingweni in accordance with his wishes.

[6] In support of the above stated position I have adopted what was said in the South African case of *Sekeleni vs Sekeleni 1986 (2) S.A. 176 (TK) at 179H - I* where Lombard J took the view that if the deceased appoints or names somebody to attend to his funeral,

effect should be given thereto irrespective of whether such appointment is contained in his will or any other document or even verbally. This view, on the one hand, has been rejected to on the basis that a court cannot take cognizance of evidence purporting to convey **post mortem** the views of the deceased person during his Life time as to where he wished to be buried. It has, on the other hand, been accepted as being the correct approach and supported by authority. This court will follow the latter approach and adopt the *dictum* in *Sekeleni vs Sekeleni (supra)*. (See also *C.B. Prest S.C., The Law's Practice of Interdicts, Juta & Co. Ltd, 1996* at page 308 and the cases cited thereat)

[7] On the second aspect of the matter stated above I rule that it stands over and be referred to the Registrar of the court to allocate a date for *viva voce* evidence as to the validity of the Applicant's marriage in terms of Swazi law and custom.

[8] In the result, for the afore-going reasons deceased to be buried at his parental home at Nsingweni and the matter to stand over and referred to the Registrar of court to allocate two days to lead *viva voce* evidence on the validity of Applicant's marriage. No order as to costs.

S.B. MAPHALALA

JUDGE