

IN THE HIGH COURT OF SWAZILAND

CASE NO. 2657/06

IN THE MATTER BETWEEN

ALTON MPANGELE ZWANE

1ST APPLICANT

NOKWAZI KUNENE

2ND APPLICANT

BONGINKHOSI ZWANE

3RD APPLICANT

AND

LOMATHEMBA MBHAMALI

1ST RESPONDENT

THE REGISTRAR OF BIRTHS

MARRIAGE AND DEATHS

2ND RESPONDENT 3RD

THE MASTER OF THE HIGH COURT

RESPONDENT 4TH

THE ATTORNEY GENERAL

RESPONDENT

CORAM

MAMBA J

FOR APPLICANTS FOR 1ST

MR. NGCAMPHALALA

RESPONDENT

MR. M.E. SIMELANE

JUDGEMENT 13TH
JULY, 2007

[1] The first Applicant, Alton Mpangele Zwane, an adult Swazi male of eTidulini area in the District of Shiselweni, is a brother to the late John Pikinini Zwane (hereinafter referred to as the deceased), who died on the 12th day of September 2004.

[2] The second and third Applicants are some of the ten children of the deceased.

[3] The first Respondent is Lomathemba Mbhamali an adult major spinster employed as a teacher at Ndzevane Primary School in the Lubombo Region.

[4] The second Respondent is the Registrar of Births Marriages and Deaths situated at the Ministry of Justice Building in Mbabane in the Hhohho Region.

[5] The 3rd Respondent is the Master of the High Court situated at Millers Mansion along Mdada Street in Mbabane in the Hhohho Region.

[6] The fourth Respondent is the Attorney General situated at the 4th Floor in the Ministry of Justice Building in Mbabane in the Hhohho Region cited herein in his capacity as the legal representative of the 2nd and 3rd Respondents.

[7] The Applicants have applied for an order:

2.2 Declaring the marriage Affidavit or Certificate that purports to capture Lomathemba Mbhamali as married to be void ab initio.

2.3. Declaring the 1st Respondent as not being the wife of the Late John Pikinini Zwane who died on the 12th September 2005

Deceased's Kombis.

2.5. Directing the 2nd Respondent to expunge all records that purport to show the 1st Respondent as married to the deceased.

2.6. Interdicting the 1st Respondent from collecting any monies from the deceased's Kombis and that such monies be collected by the Applicants pending finalization of this matter.

2.7. Directing the 3rd Respondent not to recognize the 1st Respondent as married to the deceased.

2.8. Costs at Attorney and own client scale against the 1st Respondent.

2.9. Alternatively costs jointly and severally against all Respondents in event of opposition by the 2nd, 3rd and 4th Respondent.

[8] The essential facts or features of this application may be conveniently confined to a very narrow campus.

[9] The deceased was married in terms of civil rites to Doreen Phakathi on the 7th day of August 1989. Doreen died on the 14th day of December 2004 and the deceased followed on the 12th day of September 2005. At the time of his death the deceased was cohabiting with the first respondent and was operating a public transport business.

[10] On the 15th day of September 2005, three days after the death of the deceased, the family of the deceased, including Cecilia Zwane, caused the first respondent to go through a marriage ceremony with the deceased, posthumously, in terms of Swazi Law and Custom. This is of course not impermissible in terms of that legal regime, if certain factors, such as the intention to contract a marriage, exist.

[11] In the present case, according to the first applicant, the declared reason for the said marriage ceremony was to enable the first respondent "to get a marriage certificate in order for her to be able to get some money from her work place organizations and policies" so that she could contribute towards the funeral expenses of the deceased. This is substantially confirmed by the first respondent who states that "nobody from his [deceased] family wanted to bury the deceased and I could not help them either. It was the deceased's mother and the first applicant who said I must be tekaed so that I could process payments from my savings." (see paragraph 3 page 91 of the Book of Pleadings).

[12] The marriage certificate states, falsely, that the marriage, was solemnized on the 2nd day of February 2004. An affidavit, in apparent support of the marriage by the first applicant was fraudulently signed, purportedly by him, by Mzingeli Phakathi.

[13] From these facts it is clear and I think it is common cause between the parties that there was never any intention of contracting a marriage between the first respondent and the deceased. The marriage ceremony (i.e. the anointing with red ochre) and the marriage certificate that followed, were made as a means or vehicle to enable the first respondent to get money from her savings connected or related to her employment. Presumably she had to convince her prospective financiers that her husband had just died, and her marriage certificate would be the vital evidence.

[14] The purported marriage between the deceased and the first respondent is therefore declared a nullity ab initio. That the first respondent is wearing a widow's robes in respect of or in recognition of the death of the deceased, cannot, in my view give legitimacy to the purported marriage.

[15] As a result of this finding or naling, prayers 2.2, **2.3**, 2.5 and 2.7 must succeed. As to the balance of the applicant's claim, namely prayers 2.4 and 2.6 of the Notice of Motion, which pertains to the collection of the daily business takings from the transportation business, there exists a genuine dispute of fact. There are two mini buses (kombis) involved. The Applicants say they both belong to the estate of the deceased. The first respondent says one of them is hers and she is therefore entitled to the income generated by that minibus

[16] The first respondent has indicated that, like any other claimant against the estate of the deceased, she shall file her claim when the time for such comes. She shall have her wishes.

[17] In the result the following order is made;

2.10. Prayers 2.2, 2.3, 2.5 and 2.7 are granted.

2.11. Prayers 2.4 and 2.6 are refused. These are issues to be dealt with by the Curator bonis or Executor if and when appointed by the third respondent.

2.12. The first applicant and first respondent are both equally to blame for the events that gave rise to-this application and they should both bear their own costs.