

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 786/08

In the matter between:

DORIS NTOMBI MAMBA (Born Matsebula)

APPLICANT

and

**REGISTRAR OF BIRTHS, MARRIAGES AND
DEATHS
MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL
RESPONDENT
DOREEN ELLA VENTER**

**1st RESPONDENT
2nd RESPONDENT
3rd**

4th RESPONDENT

CORAM: Q.M. MABUZA -J

FOR THE APPLICANTS: MISS HLATSHWAYO

FOR THE RESPONDENTS: MS. N. GWIJI

RULING 17/10/08

[1] The background hereto is that the deceased Petros Mlungisi Mamba died on the 13 December 2007 at the Mbabane Government Hospital after a long illness. That during his last days he was easily confused and talked contradictory things and hardly recognised the Applicant. The bone of contention herein is that the deceased executed a will in which he named the 4th

Respondent as a beneficiary. Clause 7 of the will reads thus:

"I appoint and nominate my wife Doreen Ella Mamba (nee Venter) to be the as a 50% beneficiary from my gratuity."

[2] At the time of his death he was married by Swazi law and custom to the Applicant Doris Ntombi Mamba (born Matsebula). During his lifetime he had married two other women who had pre-deceased him. These are Elizabeth Tsiwane Ntshalintshali and Ncane Liphlina Kakaka Ndzimandze. He had married these women in accordance with Swazi law and custom. That he was married to the Applicant is borne out by the confirmatory affidavit of the deceased mother Jane Ncineleni Mamba (born Kunene). This is what she states:

"3.1 That I am the deceased's mother hence I am Applicant's mother in law.

3.2. That Applicant was married to my late son in terms of Swazi Law and Custom at my home at Luyengo.

3.3. That Applicant was my late son's second wife and I was present when she was tekwaed.

3.4. That both the other wives of my late son predeceased him.

3.5. That I am not aware that my son married the Fourth

Respondent in terms of civil rites.

3.6. The fourth Respondent was never tekwaed by my late son.

[3] The deceased's mother further confirms that on his deathbed the deceased was sometimes confused and once he could not recognise his own cousin, Timothy Dlamini. Glory Thandi Makhubu (born Dlamini) a cousin to the deceased confirms that indeed the Applicant is the second wife to the deceased. This is what she states at the following paragraphs of her confirmatory affidavit:

"3.1. That I am the deceased's cousin.

3.2. That I was present on the 13th December, 2007 when deceased passed on, at the Mbabane Government Hospital.

3.3. That I was also present when Applicant was tekwaed in 1995 at Luyengo.

3.4. That I was present when LaNdzimandze the third wife was tekwaed.

3.5. That both the other wives predeceased my late cousin.

3.6. That Applicant indeed is the second wife of the deceased.

3.7. That no other wife was tekwaed other than the three wives, the two being deceased leaving only Applicant as my late cousin's widow.

[4] I am satisfied that the Applicant is indeed a wife to the deceased and that she was legally married to the deceased in terms of Swazi Law and Custom.

[5] The next issue that arises is: Did the deceased marry the 4th Respondent, Doreen Ella Venter. It would seem from the contents of Annexure "C" that he was not able to. The 4th respondent has not produced a "Civil" marriage certificate to prove that the marriage took place.

It is clear to me that she is therefore not married to the deceased either by civil rites nor under Swazi Law and Custom. Even if she had contracted a marriage with the deceased she could only do so according to Swazi Law and Custom for it to be recognised because that is the only law in the country that recognise multiple marriages. Any marriage contracted under civil law would not be recognised.

Section 7 (1), (2), (3) of the marriage Act 1964 provides that:

(1) No person already legally married may marry in+ terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with

Swazi law and custom or civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy

Provided that nothing contained in this section shall prevent parties married in accordance with Swazi law or custom or other rites from remarrying one another in terms of this Act.

(2) No person married in terms of this Act shall, during the subsistence of the marriage, purport to contract a legally recognised ceremony of marriage with any person other than the lawful spouse of the first-named person.

(3) Any person who contravenes sub-section (2) shall be deemed to have committed the offence of bigamy.

Having found that the 4th Respondent is not "his wife" and the bequest is to "his wife", the bequest to the 4th Respondent must fall away **and it is so ordered.**

[6] The next issue to decide is whether the will is valid. Miss Gwiji has stated that she was instructed to draw up the will much earlier than the date on which it was signed. The will that is attached to the Applicant's founding affidavit is not dated. It only has an endorsement of the Master of the High Court that it was registered on the 12/12/2007 as no. 401 folio 71. If it was prepared long before hand it would bear a date as to when it was signed and the deceased would have appended his signature as

he was a police officer and literate. It would not bear a thumbprint.

[7] Miss Hlatshwayo has very ably argued that the will does not conform to the provisions of the Will's Act 1955. I agree with her. Section 3 (1) (c) provides:

"if the Will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the Testator, an Administrative Officer, Justice of the peace, Commissioner of Oaths, or Notary Public certifies at the end thereof that the testator is known to him and that he has satisfied himself that the Will so signed is the will of the testator, and if the will consists of more than one page, each page is signed by the administrative officer, justice of the peace, commissioner of oaths, or notary public who so certifies

[8] Miss Gwiji is an attorney of this Court and is therefore a Commissioner of Oaths. She failed to sign all the pages of the will, to certify that she knew the testator and to certify that she has satisfied herself that the will so signed is the will of the testator. See Ex parte Goldman and Kalmer N.O. 1965 (1) 464 at 467 D.

[9] Miss Hlatshwayo has correctly pointed out the deceased's signature on page 15 of the Book of Pleadings and that the thumbprint is not the ordinary signature of the deceased.

Consequently I accept the thumbprint as a mark and that being so it should have been certified by the Commissioner of oaths. Otherwise there is no way of knowing whether or not the thumbprint belongs to the deceased or to someone else who wished to impersonate him especially because at the end he was very ill.

[10] Section 10 of the Wills Act 1955 states that:

"any person of the age of sixteen years or more may make a Will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same".

[11] The founding affidavit of the Applicant (para 7) states that the deceased passed away after being ill for a long time. She further states that at the time the deceased passed away he was easily confused and talked contradictory things and hardly recognised her (paragraph 8). The 4th Respondent in her answering affidavit at paragraph 6 confirms that the deceased passed on after a long illness. The mother of deceased in her confirmatory affidavit at paragraph 3.8 states that the deceased was often confused and once he could not even recognise his cousin Timothy Dlamini. Consequently I find that the will is ***void ab initio***.

[12] The points *in limine* are dismissed and the application is granted with costs.

Q.M. MABUZA-J