

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2620/09

In the matter between:

**TITUS KHOZA
THANDI KHOZA**

**1st APPLICANT 2ND
APPLICANT**

and

**MIRRIAM THWALA
PHEPHILE KHOZA
DUPS FUNERAL UNDERTAKERS**

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

CORAM : Q.M. MABUZA -J
FOR THE APPLICANTS : MR. VILAKAZI OF VILAKAZI 8s
COMPANY
FOR THE RESPONDENT : MR. MADZINANE OF
MADZINANE ATTORNEYS

JUDGMENT 21/08/09

[1] The application herein came by way of urgency for an order in the following terms:

1.1 That the above Honourable Court dispenses with the normal and requirements of the rules of this Honourable court relating to service of process, notice and time limits and that the matter be heard as one of urgency.

1.2 That rule nisi do hereby issue to operate with immediate interim effect to be returnable on a date to be determined by this Honourable Court.

1.3 Declaring the 1st and 2nd Applicant's as the persons who have the sole burial rights in respect of Timothy Khoza (referred to as the deceased) and authorising the 1st and 2nd Applicants to remove the body of the deceased from the 3rd Respondent

1.4 Restraining the 1st and 2nd Respondents and any other person acting on their behalf from either directly or indirectly removing the body of the deceased from the 3rd Respondent, and from interring the remains of the deceased.

1.5 That the 1st and 2nd Applicants be allowed to bury the deceased at Ngculwini in the District of Manzini.

1.6 That the Respondents show cause, on the return date, why the orders set out above should not be made final.

1.7 Granting further and/or alternative relief.

[2] The Respondent's oppose the application.

[3] The deceased Timothy Khoza died on the 11th July 2009 at Manzini Clinic. Prior to his death he lived at a home he had built at Ngculwini. He lived with the 2nd Applicant Thandi Khoza (born Hlophe) to whom it is alleged that he was

married according to civil rites on the 30th May 2009. A marriage certificate was filed as proof of this marriage.

[4] The 1st Applicant is the deceased's biological father who resides in Breyten, Mpumalanga Province in the Republic of South Africa. The 1st and 2nd Applicant were making preparations for the burial of the deceased when they discovered that the Respondents were also making their own separate arrangements to bury the deceased. This dilemma necessitated that a court order be obtained, hence the present application.

[5] The 1st Respondent, Mirriam Thwala claims that she is also the deceased's wife and this entitles her to bury the deceased. The 2nd Respondent, Phephile Khoza is her daughter with the deceased. The 1st Respondent married the deceased by civil rites on the 7th December 1979 and by swazi law and custom on the 16th December 1979 at Breyten. She states that she was smeared with red ochre by Gogo Ndlandla and this ceremony was witnessed by the leader of Umtsimba delegation Mr. Zile Mdluli and the umyeni Jameson Mahlalela. Mrs Mdluli and Mr. Thulani Thwala have filed confirmatory affidavits attesting to the customary marriage. The 1st Applicant denies the existence the Swazi customary marriage or that it took place at his home in Breyten. His denial raises issues of dispute. A certificate was filed as proof of the existence of the civil rites marriage.

[6] Mr. Madzinane for the Respondent raised several points of law which are all material but academic. For purposes of this matter I shall confine myself to the point of law that is

most crucial to the burial of the deceased, namely, which of the two wives has right to bury the deceased.

[7] The 2nd Applicant has stated that when she married the deceased on the 30th of May 2009, the deceased and the 1st Respondent were divorced. The final decree of divorce was granted on the 27th June 2005. As proof of her allegation she has filed a court order issued by the clerk of court, Manzini on the 7th June 2007.

[8] The 1st Respondent denies that a final decree of divorce was granted on the 27th June 2005. She alleges that her marriage to the deceased was never dissolved and that the marriage of the 2nd Applicant to the deceased is void ***ab initio*** as it was contracted while there was already a valid existing civil rites marriage between the deceased and herself.

[9] I have perused the learned Magistrates file in civil case no. 222/04 in the matter between Timothy Khoza (Plaintiff) and Mirriam Siziwe Khoza (born Thwala), Defendant.

[10] The Plaintiff who is now deceased issued summons commencing divorce action during February 2004. The summons was signed by his attorney on the 12th February 2004 and issued by the clerk of court on the 16 February 2004.

[11] In the summons the Plaintiff after setting out grounds of constructive desertion sought inter alia:

1.7 **an order for the restoration of conjugal rights by the Defendant; failing which a decree of divorce;**

- 1.8 **forfeiture of the joint estate;**
 (c) costs of suit in the event of opposition;

 (d) further and or alternative relief.

[12] A return of service of the summons indicates that the Defendant was served therewith on the 22 February 2004. The return of service has no endorsement by the clerk of court.

[13] The next document in the court file is a notice of set down for hearing on Monday the 14th February 2005 at 9.30 a.m. This notice is headed:

Timothy Khoza	Applicant
And	
Mirriam Khoza	Respondent

[14] It is not clear what the application was that was being set down. The notice of set down was served on the Respondents attorney on the 8th February 2005.

[15] On the 14th February 2005, the matter appeared before the learned Magistrate who postponed it to the 28/2/05 at Miss Da Silva's request. It is not indicated who Miss Da Silva was representing.

[16] On the 28th February 2005, Miss Msibi for the Applicant had the application removed. There is no reason stated for this removal.

[17] The next document that appears in the court file is a notice of set down for dismissal of application. The set down is for the 27th June 2005. It seeks an order in the following terms:

1.9 **Directing that the Respondents defence be dismissed.**

1.10 **Directing further that judgment be granted in terms of prayers (a), (b), (c) of summons.**

1.11 **Costs of suit;**

1.12 **Further and or alternative relief.**

[18] I have already set out prayers (a), (b) and (c) of the summons in paragraph 3 above.

[19] The notice of set down for the 27/6/2005 was not served on the Respondents attorneys nor on the Respondent.

[20] There is no notice to defend in the court file (**aquo**) nor is there a plea and or counterclaim, presumably what is being sought to be dismissed is a plea.

[21] On the 27/6/05 Miss Msibi applied for and obtained the order in the notice of set down. Miss Msibi filed a supporting affidavit on behalf of the Applicants in this court. She states therein as the then substantive attorney she applied for a divorce on behalf of the Applicant on the 27/6/2005. She does not state whether or not she led the Plaintiff in his evidence in chief prior to obtaining the restoration order. She does not state what happened on the return date. She does not state whether or not the Defendant offered to return. She does not state that if the Defendant did so offer what was the Plaintiffs response. She does not state whether or not she drew up an affidavit of non-return on behalf of the Plaintiff. Her affidavit does not assist the court in any way at all.

[22] The court order that was issued on the 29th June 2005 by the clerk of court following the application of the 27/6/05 was not what the court had ordered; That order states as follows:

- 1. The Respondents defence is dismissed.**
- 2. A judicial separation is hereby granted in favour of the Applicant**

[23] There is a handwritten acknowledgment of receipt by one Mirriam Thwala on the 26th August 2005 but there is no formal return of service filed by the messenger of court as provided for by the rules of court.

[24] Thereafter there is no indication as to what happened in the matter. The order for judicial separation does not state how long the separation should have been and its attendant terms and conditions. There ought to have been another formal action of divorce thereafter if the parties failed to reconcile completely. There is no such action. Instead there is a divorce order filed by the Applicants before this court and it was also obtained on the 27/6/2005 and states as follows:

"Having heard Counsel for the Applicant and there being no appearance for the Respondent, It is ordered:

1.13 **The Defendants defence is hereby dismissed.**

1.14 **A final decree of divorce is hereby entered and granted.**

1.15 **The Defendant is hereby ordered to vacate the matrimonial home at Zakhele.**

1.16 The custody of the minor children is hereby granted to the Plaintiff.

1.17 The Defendant is directed to pay the costs of suit.

The above order was issued by the Clerk of Court on the 12/6/2007 and is totally in contrast to the one issued by the Clerk of Court on the 29/6/2005 nor does it contain the prayers set out in the summons.

When Miss Msibi appeared before the learned Magistrate on the 27/6/2005 she should have caused the Applicant/Plaintiff to lead evidence of the parties marital breakdown and thereafter obtain the order for restoration of conjugal rights. This was not done. It is not clear upon what basis the order for judicial separation was obtained.

After obtaining the order for restoration of conjugal rights, the court order must inform the Defendant to restore conjugal rights on a stated date and upon failure to restore must show cause in court on the return date why a final decree of divorce should not be granted. The service of the order is effected by a messenger of court.

In the event the Defendant fails to restore conjugal rights on the stated date the Plaintiff files an affidavit setting out the Defendant's failure to return home. On the return date the Plaintiff is granted an order for a final decree of divorce

[29] In the event that the Defendant elects to restore conjugal rights and the Plaintiff rejects her, she is entitled to lead evidence on the return date whereupon she is examined for the court to decide whether or not the restoration was genuine.

[30] All these procedural steps set out above do not appear in the Magistrates file.

[31] Consequently, I find that there was no final decree of divorce granted to the deceased. The 1st Respondent remains married to the deceased. The civil marriage between the 2nd Applicant and the deceased is null and void ab initio.

[32] My finding does not in anyway affect the 2nd Applicant's rights to and ownership to her home at Ngculwini that she shared with the deceased. The law relating to the custom of kukhonta is governed by Swazi Law and Custom.

[33] The order of the court is as follows:

(a)The application is dismissed.

(b)Each party is ordered to pay its own costs.



1M. MABUZA -J