IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1053/13

In the matter between

STEVEN NHLANGANISO GAMEDZE	**Applicant**
and	
JABU ZELIA DLAMINI	**1st Respondent**
DUPS FUNERAL UNDERTAKERS	**2nd Respondent**
COMMISSIONER OF POLICE	**3rd Respondent**

Neutral citation: *Steven Nhlanganiso Gamedze v Jabu Zelia Dlamini and others (1053/13*) [2013] SZHC 143 (15 July 2013)

Coram: **Mamba J**

Heard: **13 July, 2013**
Decided: **13 July, 2013**

Reasons for judgment delivered: **15 July, 2013**

Civil Law – Family law – Law of Marriage. Parties married in terms of Swazi law and Custom and living in separation for 23 years – marriage irretrievably broken down, dead. Wife dying before formal divorce – husband claiming right to bury her notwithstanding her wishes inter vivos and wishes of her aged mother and

siblings. This is a special case and the surviving husband failing to establish his right to bury the deceased. Application dismissed with costs.

[1] This application came before me on as an ex parte urgent basis at 1115 at night on 12th July 2013 wherein the applicant sought amongst others, the following orders:

> '2. Directing the 1st respondent to forthwith deliver to the applicant the mortuary receipts for Dups Funeral Undertakers.
>
> 3. Failing compliance, directing that the 2nd respondent release the body of Ntfonjana Albertina Gamedze (born Dlamini) to the applicant forthwith.'

[2] In view of the fact that the above orders are final in their nature and the fact also that the 1st respondent in particular had not been served with the notice of application, and further because the applicant alleged in his founding affidavit that he required these orders to conduct a funeral that was scheduled to take place in the morning the next day, I granted a rule nisi calling upon the 1st respondent to show cause, if any, why the said orders should not be granted and made final. The rule nisi was returnable at 400 a.m. the next day.

[3] At the appointed hour, the Registrar of this Court advised me that the 1st respondent had indicated to him that she was opposing the application and had instructed her attorneys to do so. Eventually her counsel appeared in court at 6.00 am and by consent the matter was stood down for three hours principally to allow the 1st respondent to appear and give sworn testimony in opposition to the application.

[4] The essential facts in this application are substantially common ground and they are these:

4.1 The applicant, a Swazi male adult of Gundvwini area, in the Manzini region got married to the late Ntfonjana Albertina Dlamini (hereinafter referred to as the deceased), on 27th August 1988 at Gundvwini. The marriage was in terms of Swazi law and custom. Seventeen cattle were provided as *Emalobolo* or *emabheka*.

4.2 The applicant and the deceased set up their marital home at Gundvwini at the home of the applicant and the deceased who was a teacher by profession actually went to live there.

4.3 Within two years of their marriage, the couple experienced very serious and difficult times in their marriage. One of such difficulties, it emerged, was that the deceased was unable to bear children and this

became a constant source of jibe or derision on her by the applicant. The said difficulties forced her to leave their matrimonial home and return to her parental home at Ntondozi. This was in 1990, just about two years into the marriage.

4.4 In or about 1995, the applicant came to the deceased's home and told her parents, that he, the applicant, was looking for the deceased who had disappeared from their matrimonial home. (This is a customary practice that is done in terms of Swazi customary law where a wife has deserted her husband. The so-called search is a formal report to her parents that she has unlawfully deserted her husband).

4.5 Following the applicant's reporting to the deceased's parents of her desertion, the father of the deceased sent her back to her marital home, accompanied by his representatives. The object of this delegation was to try and reconcile the couple. Again, this is a customary practice in terms of Swazi law and custom. However, when this delegation arrived at the applicant's home, the applicant, on seeing them, drove out of the homestead in his motor vehicle and did not speak to this delegation. No one attended to the said delegation and it was forced to return to the deceased's home with her. (I note

and observe here that it transpired sometime much later, that the applicant had actually not run away from or ignored the said delegation. He had infact gone to ask or gather some members of his family who were to participate in the talks with the deceased and her father's representatives).

4.6 About five years later, in or about 2000, the applicant came to the deceased's parental home on the request of the father of the deceased. There, the deceased told her father in the presence of the applicant that she had finally made up her mind, no doubt because of the difficulties she experienced in her marriage, to end her marriage to the applicant. She further told her father that she will take it upon herself to return whatever emalobolo were due and returnable to the applicant. She there and then asked the applicant to think about this and also consider or bear in mind that some of the cattle given as emabheka had been used in purchasing the *umhlambiso* gifts given to members of the applicant's family. (This court has not been told what was the applicant's response to this).

4.7 Since that meeting in 2000, nothing of any significance seems to have taken place between the couple or their immediate families until the deceased died on 18th June 2013. Her father had died sometime,

predeceasing her. The deceased is survived by her mother who is aged and at least two of her siblings.

[5] It is common cause that none of the events mentioned above had the legal effect of terminating the marriage between the applicant and the deceased. So, at the time of her death last month, she was lawfully married to the applicant.

[6] After the death of the deceased, her family informed the applicant of her death and talks about her burial began between the two families.

[7] The applicant says that as the husband of the deceased, despite the 23 years of separation, he has the unfettered right to decide where, when and how the deceased is to be buried. He says he has determined that the said burial shall take place at his home at Gundvwini on 13th July, 2013 and all the necessary preparations for the interment have been made. The applicant states further that he is supported in his plans by the senior family members of the deceased, amongst whom is Chief Masuku II of Ntondozi.

[8] It is common cause of course, that the said senior family members are not the biological members of the deceased. They are her uncles and aunts, cousins and nephews and the only or sole reason they do so is because the deceased was at the time of her death married to the applicant.

[9] The first respondent and her siblings and their aged mother are totally against the burial of the deceased at the applicant's home. They have stated that during her lifetime, the deceased made it absolutely plain to them and the Chief that because of the severe pain and humiliation she was subjected to by the applicant, she did not want to be buried at his home. She decreed that she may be buried anywhere else but not at the applicant's home.

[10] After the deceased died, her body was taken to second respondent's mortuary by her family, in particular the 1st respondent. The 1st respondent does not want to release the body of the deceased to the applicant. She has stated that her siblings and her, together with their mother are prepared to carry out their deceased sister's wishes and they have secured a burial place for her at the Manzini Cemetry. They

plan to bury her there on 20th July, 2013. It is this stand by them that has forced the applicant to file this application.

[11] It is generally accepted that under normal circumstances, the general rule is that, the surviving spouse has the primary right to decide or determine where the deceased spouse is to be buried. This is accepted by both parties herein. I do not think any authority is required for this elementary proposition.

[12] The instant case is, however, not your run-of-the mill or normal case in my judgment. The applicant has not shown that this is such a case.

[13] The applicant and the deceased separated about 23 years before the deceased met her death. The separation was due to the cruelty or abuse the deceased suffered at the hands of the applicant. When she left their matrimonial home she told the applicant why she was leaving. Later, she made it absolutely clear to him, in the presence of her father, that the separation was permanent and irreversible. She told him, the marriage was over and she was prepared to return to him whatever lobola cattle were returnable to him. But, as already stated,

these events and or declarations did not have the effect of terminating the marriage.

[14] For his part, the applicant never did anything significant to atone for his abuse of the deceased and thus pave the way for a reconciliation with her. The period of their separation, ie. 23 years is not a very short period. It is a long time for a married couple. This period was characterized, by a long period of inaction by both sides. The abuser, the applicant, being more guilty in this regard than the deceased. The couple clearly considered their marriage irretrievably broken down and they resigned themselves to this.

[15] The Chief, being the most senior person in the deceased's family, it has to be remembered, was persuaded to agree that the deceased should be buried by the applicant at Gundvwini simply and solely because she was married to him at the time of her death. The Chief however, was the first to remind the family of the deceased's wishes about her burial and the reasons thereof. So clearly, the Chief reluctantly conceded to the applicant's demands and or wishes. It was stated that the Chief noted that he did not want to be seen to be

imposing his will and power as a Chief in the matter; he did not want to be viewed as denying the applicant his marital rights.

[16] It is plain to me that the marriage between the applicant and the deceased was irretrievably broken down. It remained so for a long time; infact until the death of the deceased. It only existed in law or on paper. Factually, it died a long time ago. In a word, it was a sham. Recently, in *Vusizwe Mahlalela v Nonhlanhla Mahlalela (born Dlamini) case no. 1926/09* I had occasion to quote HR Hahlo, *The South African Law of Husband and Wife (5 ed) at 331* where the learned author says that a marriage that has irretrievably broken down is a dead marriage. The marriage under the spotlight herein was such a marriage.

[17] In view of the totality of the factual circumstances in this case and the legal conclusions stated above, can it be said that the applicant has established his right to bury the deceased? The answer is, in my judgment, a resounding no.

[18] People, dead or alive are human beings. They have a name,

reputation and dignity. They command and deserve to be treated humanely – with care, respect compassion and deference. They should not be treated as chattels or mere possessions to be had and disposed of at will.

[19] To hold that the applicant, who humiliated and grossly abused the deceased during her lifetime and forced her to leave her marital home; has the right to bury her in all the circumstances of this case, simply because he was married to her at her death, would be a travesity of the law and a grave insult to the dignity and humanity of the deceased. It would be nothing but a blind and dogmatic application of the law; a misapplication infact.

[20] In life, the deceased could not withstand the abuse by the applicant. She could not live with him. She removed herself from him. Now that she is dead, the law must not compel ‘her to live with him’; just because her powers of resistance have been taken away from her by death.

[21] The ultimate end or aim of the law is to do justice between Man.

Whilst this application may have been made honourably and in good faith and may well be within the letter of the law, it is not, in my judgment, in accordance with the spirit of the law. It also had to be, however.

[22] The above are my reasons for dismissing the application with costs.

[23] For the sake of completeness of this sorry and sad affair, I mention that after hearing the evidence of the 1st respondent but before hearing submissions on the application, I met with the parties and their counsel in my chambers in an attempt to resolve the matter in an amicable way and out of court. I did this in view of the nature of the application and its sensitivity. This was a low level ADR which failed. At the end the legal route was the only avenue available to the disputants.

MAMBA J

For Applicant : Mr. Z. Magagula

For 1st Respondent : Mr. Dlamini (of Nzima & Associates)