



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 600/2014

In the matter between:

THEMBI MHLANGA

Applicant

vs

ALFRED MHLANGA

1st Respondent

HEMPY VILAKATI

2nd Respondent

CRUCIFIX FUNERAL DIRECTORS

3rd Respondent

NATIONAL COMMISSIONER OF POLICE NO

4th Respondent

ATTORNEY GENERAL

5th Respondent

Neutral citation: *Thembi Mhlanga vs Hemy Vilakati (600/2014) [2014]*
[SZHC 105] (27th May 2014)

Coram: **MAPHALALA PJ**

Heard: 14th May 2014

Delivered: 25th May 2014

For Applicant: Mr. M.L. Sithole
(with Mr. A. Lukhele of Dunseith attorneys)

For Respondent: Mr. W. Maseko
(Waring attorneys)

- Summary:
- (i) *Before court is an Application under a Certificate of Urgency where she seeks the right to bury her late husband Maphalane Aaron Mhlanga at his homestead at Msunduza, Emcozini area.*
 - (ii) *The 2nd Respondent opposes the Application stating that she is also married to the deceased in terms of Swazi Law and Custom.*
 - (iii) *A tug of war has arisen as to the competing interests of the deceased's wives.*
 - (iv) *This court has to assess the parties contentions to and fro and come to the view that 2nd Respondent on all accounts is the surviving spouse with the right to bury the deceased.*
 - (v) *The court grants an order in favour of the 2nd Respondents on the facts of this case.*

Legal authorities cited in the judgment

1. **Gonsalves and Another vs Gonsalves and Another 1985(3) SA 495.**
2. **Steven Nhlanganiso Gamedze, High Court Case No.1053/13.**

JUDGMENT

The Application

- [1] On the 7th May, 2014 the Applicant, Thembi Mhlanga filed an application under a Certificate of Urgency against the Respondents, more particularly the 2nd Respondent Hembie Vilakati for orders in the following terms:

- “1. Dispensing with the forms, service and time limits provided for by the Rules of the above Honourable Court relating to applications and hearing this matter as one of urgency.**
- 2. Condoning Applicant’s non-compliance with the Rules of the above Honourable Court.**
- 3. Interdicting and restraining the 1st and 2nd Respondents and any other persons acting in cohorts and in concert with the 1st and 2nd Respondents, from making any arrangements towards the burial of the LATE MABHALANE AARON MHLANGA at Maphalaleni area and also from disturbing the Applicant towards burying her deceased husband, Mabhalane Aaron Mhlanga at his homestead Msunduza, Emcozini area.**
- 4. Ordering and directing the 3rd Respondent, a funeral undertaking parlour not to release the corpse from the morgue to any other persons other than the Applicant herein.**
- 5. Ordering and directing that the late Mabhalane Aaron Mhlanga be buried by his wife, THEMBI MHLANGA (NEE SIMELANE), at his only homestead at Msunduza, Emcozini area, Mbabane in the Hhohho Region.**
- 6. Ordering and directing the 4th Respondent, THE COMMISSIONER OF POLICE N.O., to command his subordinates of the Royal Swaziland Police Service, especially from Mbabane Police Station to make all that is necessary to keep peace during the burial arrangements and the actual burial of the late Mabhalane Aaron Mhlanga.**

7. Costs of this application in the event of opposition.”

[2] The Applicant has filed a Founding Affidavit relating the background facts in this litigation between the parties. A confirmatory affidavit of one Khulekani Mhlanga is filed in support thereof.

The opposition

[3] The 2nd Respondent opposes the Application and has filed an Answering Affidavit to the averments of the Applicant in her Founding Affidavit. A number of confirmatory affidavits pertinent to the averments in the Answering Affidavit are also filed thereto. Furthermore, various annexures pertinent to the matter are also filed and I shall revert to them later on as I proceed with my analysis of the arguments of the parties.

[4] The Applicant then filed a Replying Affidavit answering to the averments in the Respondent’s Answering Affidavit.

[5] This Application came before this court on 14th May, 2014 where I heard the arguments of the attorneys of the parties spread over two days. It was agreed by the parties that the Respondent’s commence advancing arguments in view of the

preliminary points raised therein. These being that the Application to strike out and a Notice to raise points of law.

A meeting of the attorneys in chambers

[6] I must also mention for the record that before the commencement of arguments of the parties the attorney for the Applicant Mr. Sithole requested that the court proceed to a meeting of the attorneys in Chambers in order to find ways to resolve the dispute out of court. In chambers Mr. Sithole proposed two methods in this regard. Firstly, that since there are disputes of fact that oral evidence be led by the parties. On the second point that dispute resolution methods be applied to resolve the dispute.

[7] However, Mr. Maseko contended on the first point that these disputes of fact are not material to the decision in this matter. He contended that in the present case it is only the credibility of the two wives to the deceased that is to be decided. That the only question is who is credible of the two women and nothing else. That on these arguments it is neither her nor there to employ any dispute resolution methods.

[8] In my assessment of the stated arguments in this regard I agreed with the arguments of the attorney for the 2nd Respondent and ordered that we proceed to court for the commencement of arguments of the dispute.

The arguments of the parties

(i) The 1st and 2nd Respondents' arguments

[9] The attorney for the Respondent's Mr. Maseko advanced arguments and filed Heads of Arguments for which I am grateful. On the Application to Strike out the attorney for the Applicant Mr. Sithole conceded the point and as a result the Application to Strike out was accordingly granted.

[10] On the point of law raised it is contended for the Respondents that Applicant has failed to allege a clear right in the Founding Affidavit. The argument in this regard is that the ***prima facie*** right averred by the Applicant is only alleged when a party is seeking an ***interim*** interdict not a final interdict.

[11] On the merits of the case the attorney for the Respondents in his Heads of Arguments dealt with the sustainability of the

Applicant's claim that it was not sustainable in law and in paragraphs 4.1 to 4.9 advanced the following legal proposition:

- “4.1 The 2nd Respondent was lawfully married by the deceased and she was smeared with red ochre in the year 1984 at Maphalaleni. This marriage still subsists. It is not for the Applicant to determine that this marriage is invalid. The Applicant is not an expert in Swazi Law and Custom.**
- 4.2 The Applicant does not state the place where their marriage with the deceased took place. This is fundamental since we are dealing with a Swazi Law and Custom marriage. This marriage concerns the two families.**
- 4.3 No documentary proof of marriage or confirmatory affidavit from a person who witnessed the marriage of the Applicant and the deceased has been provided.**
- 4.4 As per our law cohabitation does not amount to marriage. The fact that the Applicant and the deceased stayed together at the time of the demise of the deceased does not clothe the Applicant with marital status or burial rights.**
- 4.5 All the Mhlanga family is clueless about the alleged marriage between the Applicant and the deceased. Swazi Law and Custom marriage cannot take place without the involvement of the families.**
- 4.6 Despite alleging that the deceased cut ties with his family i.e. Mhlanga family, the Applicant has failed to**

state how does one cut ties. The facts show that the deceased has a good relationship with his family.

4.7 The Applicant has failed to state how the contribution caused in fighting among the Mhlanga family.

4.8 No confirmatory affidavit of Tamatisi Dlamini has been filed. This goes to show that the Applicant's case is made up of hearsay and speculation and the Court ought to censure such conduct on the part of the Applicant.

4.9 Applicant's founding affidavit is contradictory in the following ways:

(a) The application says the deceased had any other wives besides herself (page 10 of the book of pleadings paragraph 8.2) and somewhere in the same document (founding affidavit) she says the deceased had a wife, laZwane.

(b) The applicant says the deceased parental homestead is at Maphalaleni and on the other hand she says the deceased has not lived there. The mind-boggling question is where did the deceased's marriages with laZwane and the 2nd Respondent take place?

[12] The attorney of the Respondents then cited a *plethora* of decided cases pertinent to the Respondent's claims in paragraph 5.1 to 5.9 of his Heads of Arguments and I shall revert to relevant cases in my analysis of the issue for decision later on this judgment.

[13] The final argument of the Respondents is that for these reasons the Application ought to fail and instead that the court orders that the deceased be buried at a place contended for by the Respondents.

(ii) The Applicant's arguments

[14] The Applicant's attorney Mr. M. Lukhele advanced arguments for the Applicant on the points *in limine* and the Application to strike out as well as fully fledged arguments on the merits of the dispute. Mr. Lukhele also filed very useful Heads of Arguments and cited relevant cases on the subject for which I am grateful.

[15] I must also mention that at the commencement of arguments of the parties the Applicant was represented by Mr. Sithole who participated in the arguments in Chambers until the Respondent advanced their arguments. The case was postponed to the following Monday where the court was informed that Mr. Sithole was indisposed. On the return date Mr. Lukhele then proceeded with the arguments of the

Applicant filing Heads of Arguments as stated in paragraph [14] above.

[16] I must mention that the Application to strike out was conceded by Mr. Sithole who initially represented the Applicant and therefore no further mention will be made in this regard.

[17] Coming to the second preliminary point the attorney for the Applicant directed the court to paragraph 17 of the Founding Affidavit where it is averred as follows:

“I am advised and verily belief that to be afforded such relief, I need to establish at the very least a *prima facie*. The facts as set out clearly indicate that I have a *prima facie* right to bury my husband.”

[18] I must mention that I will revert to this aspect of the matter in my analysis and conclusion later on in the judgment.

[19] Coming to the merits of the Application Mr. Lukhele for the Applicant contended that the issue for decision at paragraph 2 of his Heads of Arguments to be as follows:

3.1 Where should the deceased be buried?

3.2 By whom between the Applicant and the 2nd Respondent should be buried?

[20] Further it is contended for the Applicant on papers before court that the facts that are common cause to be the following:

- 3.1 Applicant is a wife to the deceased;**
- 3.2 2nd Respondent is also a wife to the deceased;**
- 3.3 There are competing interests between the Applicant and the 2nd Respondent.**

[21] It is contended for the Applicant that she has a right to bury the deceased for the following reasons:

- 4.1 She was staying with the deceased;**
- 4.2 Deceased has no matrimonial home at Maphalaleni;**
- 4.3 Deceased lost the children and they were buried at Msunduza;**
- 4.4 Wishes of the deceased:
Refer to: Steven Nhlanganiso Gamedze/Jabu Zelia Dlamini and two others (High Court Case No.1053/2013 Concalves and Another/Concalves and Another 1985 (3) 495-507.**

[22] The attorney for the Applicant then relied heavily on the **dicta** in the **Concalves case (supra)** and referred this court to

paragraph E to F at page 513 where **Kirk-Cohen J** stated the follows:

“If one takes into account such matters as Mr. Visser has mentioned such as public policy, a sense of what is right, convenience, reasonableness, the area where the deceased lived prior to his death, where the bulk of his friends and relatives live, the financial implication of removing the body to the Transvaal (which the applicants have tendered to pay) and the fact that no reason whatsoever has been put forward why the deceased should be buried in Frankfort, reasonableness appears to be on the side of the applicants.”

[23] Mr. Lukhele also relief heavily on what is held by **Mamba J**, in the High Court case of **Steven Nhlanganiso Gamedze vs Jabu Jellia Dlamini, Case No.1053/13.**

[24] All in all the court was urged to grant the order as sought for by the Applicant in her Notice of Motion with costs.

The court’s analysis and conclusions thereon

[25] I have considered the above arguments of the attorneys of the parties and I agree with the formulation of the issues for decision by Mr. Lukhele for the Applicant to be the following:

1. **where should the deceased be buried;**
2. **By whom between the Applicant and the 2nd Respondent should bury him?**

[26] I also agree with formulation of the facts that are common cause by the attorney for the Applicant to be –

1. **Applicant is a wife to the deceased;**
2. **2nd Respondent is also a wife to the deceased;**
3. **That there are competing interests between the Applicant and the 2nd Respondent.**

[27] Before getting into the examination of the merits of the case as formulations above I wish to first deal with the only point *in limine* that Applicant has not made the requirement for a permanent interdict and have considered the arguments of the attorneys to and fro as stated in the following paragraphs.

[28] It is trite law that for a party to succeed in abstaining a final interdict all the requirements of an interdict must be proved **ad seriatim** and failure to prove one may lead the court to refuse to grant the relief, which after all relief of which lies within the discretion, depending on the peculiar facts of the case at hand. In this regard I refer to **Madlenya Farmers Irrigation Scheme vs Mamba, High Court Case**

No.2624/01 at page 33. I have considered the peculiar facts of this case and in exercise of my discretion allow what is averred in the Founding Affidavit in order to deal with the very important question as to who has the legal right to bury the deceased on the facts of this case.

[29] Coming to the merits of the Application on the status of her marriage the Applicant states the following at paragraph 8 of her Founding Affidavit:

“8.1 I am the lawful wife of the late Mabhalane Aaron Mhlanga who died on the 26th April 2014.

8.2 I was married to the deceased on or around April 1995 by Swazi Law and Custom. I have lived with the deceased as husband and wife since then and the deceased had no any other wife besides myself.”

[30] The Applicant filed a Replying Affidavit on the 13th May 2014 at paragraph 4 thereof stated the following:

“I aver that I am lawful wife of the deceased. I was tekaed on or around April 1995 at his homestead wherein one late Johannes Mhlanga, my in-law, the late Norah Bhembe (who smeared me with red ochre), Attalia (who is a resident of Msunduza and who offered sidwaba) were present during the ceremony. The marriage was not registered with the

Births, Marriages and Deaths Registry. However, that does not mean I was not married to the deceased.”

[31] The 2nd Respondent answers to the above at paragraph 6 of her Answering Affidavit where she states the following:

“AD PARAGRAPH 6.2

6.1 The allegations contained herein are emphatically denied and the Applicant is put to the strict proof thereof of each and every allegation.

6.2 At no time was the Applicant married by the deceased. Furthermore, they have not lived as husband and wife.

6.3 I reiterate the allegations contained in paragraph 3 above.”

[32] In my assessment of the averments the parties in the affidavits it is not clear whether Applicant was smeared with the red ochre as required by customary law for her marriage to be considered under that regime. In any event the attorney for Applicant Mr. S. Sithole informed the court in Chambers that it was not clear whether his client fulfilled the requirements of customary law thus the need for calling *viva voce* evidence on this point.

[33] It would appear to me that the parties went to elaborate meetings with various persons to find a solution to the impasse. This state of affairs is related in the 2nd Respondent's Answering Affidavit at paragraph 16.2 to 16.4 to the following:

“16.2 The District Commissioner was David Mamba. The family of the Applicant was in attendance. This consisted of the Applicant, Girly Sibongile Simelane and Mpendulo Simelane. After a brief deliberation the family of the Applicant was excused to have a caucus.

16.3 The family met outside and Mpendulo Simelane was sent to relate that they agree that the deceased must be buried at Maphalaleni.

16.4 Thereafter an affidavit was prepared to capture the consensus of the families. The Applicant provided her details and identity number. After the affidavit was typed, the representatives of the two families signed it. It was only the Applicant who refused to sign. Annexed hereto and marked “AM3” is a copy of the said purported affidavit.

16.5 As a result of the deliberations the Commissioner issued a decision that the deceased must be buried at Maphalaleni.”

[34] It would appear to me that on these facts what had not been disputed by the Applicant is that the 2nd Respondent is a surviving spouse as defined by the law and as such has a right

to decide or determine where the deceased is to be buried. In this regard I cite the cases of **Steven Nhlanganiso Gamedze vs Jabu, High Court Case No.1053/2013, Gertrude Samal Magongo & Another vs Mphilo Mtsetfwa & Other, High Court Case No.1264/96** to be apposite.

[35] I have considered the **dicta** in **Concalves (supra)** and have come to the considered view that the marriage between the 2nd Respondent and the deceased in terms of Swazi Law and Custom ought to hold sway against the mere cohabitation of the Applicant with the deceased.

[36] On the level of legal principle it would be unjust to hold that a person who has a right to bury her husband cannot do so on account of convenience of the other woman who was cohabitating with the deceased.

[37] For the above reasons the Application is dismissed with costs at the ordinary scale and the 3rd Respondent is ordered to release the body of the deceased Mabhalane Aaron Mhlanga to the 1st and 2nd Respondents forthwith.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE