

IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No. 968/18 A

In the matter between:

PITOLI SAMUEL SHABANGU

1st Applicant

NOMVUYO PATIENCE SHABANGU

2nd Applicant

And

**JOYCE SIBANDZE
UNIVERSITY OF SWAZILAND
DUPS FUNERAL HOME CREAMATORIUM
(PTY) LTD**

1st Respondent

2nd Respondent

3rd Respondent

**In Consolidation with
JOYCE SIBANDZE**

Case No: 968/18 B

And

**PITOLI SHABANGU
NOMVUYO SHABANGU (nee KUNENE)
DUPS FUNERAL HOME AND UNDERTAKERS
NATIONAL COMMISSIONER OF POLICE
ATTORNE GENERAL N.O**

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

Neutral citation: Pitoli S. Shabangu and Another v. Joyce Sibandze and other; and Joyce Sibandze v. Pitoli Shabangu and others (968/18 A & B) [2018] SZHC 152 [2018] (11th July 2018)

CORAM MAGAGULA J

HEARD: 6th July 2018

DELIVERED: 11th July 2018

Summary: *Process lending to dissolution of SiSwati law and custom marriage – stage at which such marriage is deemed to be dissolved party having better burial rights between spouse and parents of the deceased.*

[1] On the 28th June 2018 the Applicants in case No. 968/18A (SAMUEL PITOLI SHABANGU and NOMVUYO SHABANGU nee Kunene.) approached this court under certificate of urgency seeking against the Respondents in that case the following orders:

“ 3.1 Directing the 1st Respondent to deliver all personal effects of the deceased VICTOR MUSAWENKHOSI SHABANGU to the applicants ..

3.2 Directing the 2nd Respondent to process claims lodgd by 2nd Applicant NOMVUYO SHABANGU (NEE KUNENE) the deceased’s wife.

3.3 Directing the 3rd Respondent to release the corpse of Victor Musawenkhozi Shabangu to the applicants

3.4 Interdicting and restraining the 1st Respondent from removing the corpse from the 3rd Respondent pending finalisation of the matter.

3.5 Restraining and interdicting the 3rd Respondent from releasing the deceased's corpse to anyone until the finalisation of the matter;

4. That prayers 3.2, 3.3, 3.4, 3.5 hereinabove operate with interim and immediate effect pending the finalisation of this matter as preparations for the funeral need to be done,

5. Costs of suit if opposed.”

[2] On the same day the 1ST Respondent in case No.968/18 A filed her own application as Applicant in case No.968/18B (JOYCE SIBANDZE) seeking substantive relief as follows:

“ 2. A rule nisi is hereby issued calling upon the respondents to show cause on a date to be fixed by the court why the following orders should not be made final.

2.1 The first and second respondents and/or anyone acting on their behest is interdicted and restrained from proceeding with the burial of Victor Magengane Musawenkhosi Shabangu (the deceased) at Moneni below Umphakatsi on Sunday the 1st July 2018,

2.2 The first and second respondents and/or anyone acting on their behest is interdicted and restrained from proceeding with the memorial service for Victor Magengane Musawenkhosi Shabangu(the deceased) scheduled for the 29th June 2018 at the University of Swaziland Kwaluseni Campus at 12:00 noon.

2.3 The third respondent is ordered not to release the body of Victor Magengane Musawenkhozi Shabangu (the deceased) to anyone;

2.4 The first and second respondents and/or anyone acting on their behest are directed and ordered to arrange for the deceased's remains to be buried at deceased's homestead situate at Ngculwini area in the Manzini Region;

2.5 The fourth respondent represented by police officers from the Manzini Police Station, is ordered to provide security in the burial of the deceased in order to maintain law and order;

2.6 The first respondent is ordered to pay the costs of this application;

3. Pending finalisation of this matter, prayers 2.1, 2.2 and 2.3 are ordered to operate with immediate and interim effect.”

[3] When the matter was called on the 28th June 2018, counsel for both parties were in agreement that the matters should be consolidated and they were duly consolidated by consent. I also granted by consent an order effectively stopping the funeral and any arrangements in preparation of same pending finalisation of the consolidated matters. Timelines for the filing of further papers were also agreed and ordered by consent.

For convenience's sake I shall refer to the parties as they appear in case NO. 968/18 A.

- [4] From a reading of the papers in their totality and submissions by counsel, it is clear to me that the dispute is about who has the duty to see to the burial of the deceased and therefore the corresponding right to direct the place and manner of his burial. Contending for this right is on the one hand the father of the deceased who happens to be supported by the surviving spouse and on the other hand is the mother of the deceased.
- [5] Much is said in the papers regarding the rightful family to which the deceased belonged between his paternal family and maternal family and therefore which of the two families has the right to control his funeral. In my view, so long as the deceased left a wife and children, the two families are misdirecting their efforts and they are misguided to enter this fight.
- [6] The Supreme Court of this country has, in at least more than one instance, pronounced that where the deceased dies intestate the duty to attend to the burial of the deceased lies with the surviving spouse.

In case of NTOMBI MHLANGA v. ALFRED MHLANGA and 4 others (16/2014) [2014] SZSC 51 (03 December 2014) MCB MAPHALALA JA, as he then was recalling what was stated by the same court in the case of MFANYANA DLAMINI and TWO OTHERS v. CETJIWE JABULILE DLAMINI states at page 15:

“ It is well settled law in this jurisdiction that the duty to attend to the burial of the deceased lies with the surviving spouse in the absence of a will providing otherwise. Where however the couple stay in separation, and, the deceased has

died intestate, in determining the right to bury, the court should be guided by what is fair in the circumstances of the particular case.”

(See also Dlodlu v. Dlodlu and Another 1982 -1986 SLR 225 at 230; Steven Gamedze v. Jabu Dlamini and others civil case No.1093/2013 para 11.)

- [7] From the authorities referred to above it seems quite clear that as a general rule a surviving spouse is endowed with the right to bury a deceased person. The rule is however not absolute since circumstances may dictate that the surviving spouse be stripped of such right. One circumstance would be for instance where the couple separated a long time ago and the marriage was virtually dead and had no hope of resuscitation.
- [8] Having outlined the exposition of the law I now have to decide whether or not the 2nd Applicant was married to the deceased at the time of his demise. The parties are in agreement that the deceased and 2nd Applicant did contract a customary marriage in 1998. The parties only part ways when the applicants maintain that the marriage was subsisting at the time of death of the deceased and the 1st Respondent contends that it was no longer subsisting.
- [9] In support of the contention that the marriage was subsisting the 2nd Applicant has annexed the copy of a marriage certificate to her affidavit. I may hasten to add that the validity of this marriage certificate has not been challenged directly. In response to the affidavit of the 2nd Applicant the 1st Respondent merely stated that she

denied that the 2nd Applicant deposes to true and correct facts. She also contended that she had dealt with the contents of this affidavit in her response to the main affidavit of the 1st Applicant.

- [10] Contending that the marriage between 2nd Applicant and the deceased was formally terminated the 1st Respondent states in paragraph 6.8 of her answering affidavit;

“ On the 19th July 2014 the second applicant in the company of some three women and two men commissioned by the Nsongweni Umphakatsi brought to my residence at Sicelwini, a cow, spear, throw(litjalo), apron (sidziya) and red ochre (libovu). I enquired form the second applicant what the items meant and she told me in the eyes that they were cleansing the red ochre we had smeared her with and also that she was no longer a wife to the deceased. They left the items with me and I accepted them.”

- [11] This court and the Supreme have on numerous occasions pronounced on how a SiSwati customary marriage is terminated. What the 1st Respondent alleges to have taken place on the 19th July 2014 is certainly not the way a customary marriage is terminated.

In the case of KNOX MSHUMAYELI NXUMALO N.O v. WELILE SIPHIWE NDLOVU (Civil Appeal No.42/2010) FOXCROFT JA stated at page 20 of the judgement:

“ ...there is consensus amongst the authors that for dissolution to take place there must be a meeting of the families and a serious attempt to resolve the matters by the

families. If this fails a divorce can then be arranged if the differences are irreconcilable and a refund of lobolo is made, after the talks have exhausted all possibilities of a reconciliation. It is only then that the matter can be taken to the relevant Chief so that the dissolution can be formalised before the Chief...'

(See also PATRICIA CEBSILE MNDZEBELE nee MSIBI v. NOLWAZI MNDZEBELE & 13 OTHERS (828/2013[2014] SZHC 52 (28 March 2014); MATRY NOMPUMELELO DLAMINI And ANOTHER v. MUSA CLEMENT NKAMBULE (2046/06 & 3822/08)[2009] SZHC (28TH August 2009).

- [12] In *casu* there never was a meeting of the families to attempt a reconciliation of the couple, nor was any resolution to dissolve the marriage taken in a meeting of the two families. I accordingly find that the marriage between 2nd Applicant and the deceased subsisted at the time of demise of the deceased.
- [13] All that remains for me is to determine if it is fair and reasonable in the circumstances of the case that the 2nd Applicant should be the one who determines the place of burial of the deceased and the manner in which the funeral should be conducted.
- [14] One factor which the authorities suggest should be taken into account is the lives led by the couple at the time the deceased died. The 1st Respondent alleges that the deceased, the 1ST and 2nd Applicants were not in good terms and it was the deceased's wish that he should be

buried at his homestead in Ngculwini. The allegation is contained in paragraph 8.4 of the application initiated by the 1st Respondent. In her answering affidavit 2nd Applicant denies this and goes on to state in paragraph 16 thereof:

“ 16.1 It is not true that the deceased and I were not in good terms.

16.2 In fact the deceased and I were in good terms again since 2015 when he showed up at Maseyisini. The deceased even used to visit me and the children at Nhlangano as the children had been chased away from Ngculwini by the Applicant [1st Respondent]

16.3 The deceased was a hands on father who always ensured that he was in the children’s lives on a daily, weekly or monthly basis, and even choosing the schools the children should attend after discussing with me.”

To me it appears that there is no way the 1ST respondent can challenge these allegations. She cannot deny these allegations. She cannot deny that the deceased visited the 1st Applicant at Nhlangano where the children were, nor can she deny what kind of relationship the two had since 2015.


I accordingly accept that the relationship between 2nd Applicant and the deceased was not as bad as 1st Respondent describes it. This is particularly so because 2nd Applicant had the children of the two and children have a tendency of bringing parents together.

- [15] The 1ST Respondent has alleged that the deceased had a homestead at Ngculwini and he ought to be buried there. What comes out clear from the papers filed is that if deceased had a homestead at Ngculwini he did not Khonta or build such homestead with the 2nd Applicant. The 2nd Applicant would be a total stranger in such homestead and will not comfortably conduct her husband's funeral at such home.
- [16] Regarding deceased's wish to be buried in such home there is a sharp dispute with other affidavits including that of 2nd Applicant alleging that such homestead actually belongs to 1ST Respondent and is actually a Sibandze homestead. Other affidavits state that the deceased actually expressed a wish to be buried with other members of the Shabangu clan at Moneni. With the deceased having passed on without leaving any testamentary writing in this regard I am unable to determine whether or not either wish was expressed by the deceased. It therefore appears to me that the place of burial should be the one chosen by his surviving spouse who fortunately also has the support of the father of the deceased and other members of the Shabangu family.
- [17] For the foregoing reasons I am satisfied that it is fair and reasonable that the surviving spouse of the deceased should be the one responsible for the funeral and her wish should be granted.

The following order is accordingly made:

1. The 1st Respondent in case No.968/18 A is hereby directed to deliver all personal effects of the deceased (VICTOR

- MUSAWENKHOSI SHABANGU) to the 2nd Applicant or whoever may be authorized by the 2nd Applicant to collect them.
2. The 2nd Respondent is directed to process the claims lodged by the 2nd Applicant (NOMVUYO SHABANGU nee KUNENE) and have them paid to her.
 3. The 3rd Respondent is directed to release the corpse of VICTOR MUSAWENKHOSI SHABANGU to the 2nd Applicant (NOMVUYO SHABANGU nee KUNENE).
 4. The 1st Respondent is directed to pay the costs of the application in case No. 968/18A.



J.S MAGAGULA J

For the Applicant: Ms T. Hlabangana

For the Respondent: Mr M. Dlamini