

IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No. 968/18A

In the matter between:

PITOLI SAMUEL SHABANGU

1st Applicant

NOMVUYO PATIENCE SHABANGU

(nee KUNENE)

2nd Applicant

JOYCE SIBANDZE

1st Respondent

UNIVERSITY OF SWAZILAND - KWALUSENI

2nd

Respondent

DUPS FUNERAL HOME CREMATORIUM (PTY)

LTD

3rd Respondent

XOLILE NTOMBIKAYISE ZWANE

4th Respondent

Neutral citation: Pitoli S. Shabangu & Another v. Joyce
Sibandze & 3 Others (968/18A)[2019] SZHC
....(29th November 2019)

Coram: Magagula J

Dates Heard: 19/8/19; 15/9/19; 17/9/19; 23/9/19& 7/11/19

Delivered: 29th November 2019

- [1] This matter first came before me under certificate of urgency on the 28th June 2018. The issue that I had to determine was basically who had the right to bury the deceased, Victor Musawenkosi Shabangu, between the 1st and 2nd applicant on the one hand and the 1st Respondent on the other hand. After considering the papers filed of record and arguments on behalf of the parties I determined that the 2nd applicant, being the surviving spouse of the deceased, had the requisite rights to bury him. I accordingly ordered that she is the one to direct the funeral of the deceased and that all claims in respect of funeral expenses lodged with the 3rd respondent were to be paid to her.
- [2] The 1st respondent noted an appeal to the Supreme court challenging my judgment. I was later informed by counsel for

all the parties that the 4th respondent filed an application to intervene before the Supreme Court and that such application was granted by that court. I was further shown an order of the same court remitting the matter back to this court for the hearing of further evidence. I enquired from the legal representatives of the parties what I was supposed to do with the evidence. I was then to collect and they informed me that I was to reconsider my earlier judgment after hearing the evidence .

[3] I was skeptical with the appropriateness of handling the case in this manner but I eventually heard it. I had a meeting in my chambers with all counsel for the parties where we agreed that the evidence to be led was to establish the following:

(1) Whether or not the 4th respondent (intervening party) was a wife to the deceased:

(2) Whether or not there is a hierarchy of authority under Swazi Law and Custom amongst the widows of a deceased person who had more than wife as regards burial rights of their deceased husband.

[4] As regards the latter point, the applicants were maintaining that even if the 4th respondent was proved to be one of the wives of the deceased the 2nd applicant would still be the one to direct the funeral as the senior wife. The applicants

intended to parade an expert on witness Swazi Law and Custom in this regard.

However as the case progressed counsel for the applicants informed the court that she was encountering some difficulties in securing the attendance of her expert witness. I then directed that the first point be disposed off in the meantime and should there be a need to pursue the point on hierarchy it shall be dealt with later. This judgment is therefore on the first point i.e whether or not 4th respondent was married to the deceased.

[5] As the person alleging that she was married to the deceased, the 4th respondent bears the onus to prove such. Indeed she was the first to testify. I do not intend repeating the record. I just note certain portions of her evidence which are of concern to the court.

[6] I wish to emphasize that the matter was referred to oral evidence on specified issues and not to trial. In other words the evidence led was to supplement or complement what was in the affidavits such that the oral evidence and the affidavits should all be taken into account as the whole evidence before court. There should be no contradictions or inconsistencies on the evidence of anyone witness in affidavit form and oral. Should such happen the same should impact on the credibility of that witness.

[7] In her answering affidavit the 4th respondent maintains that she was smeared with red ochre by one Dorah Gamedze on the 8th June 2014 and this marked her marriage to the deceased by customary rites. She further states that the chief's runner representing the umphakatsi was Enos Tsabedze. It is apposite at this point that I should mention that although in his affidavit filed of record in this matter the said chief's runner says he was present when the teka ceremony was conducted, when giving his evidence in court he said he was not present. In other words he contradicted the evidence of the 4th respondent and his own evidence in this regard.

[8] The 4th respondent further states in her affidavit that a herd of six (6) cattle was paid as lobola. She maintained this story when she appeared in court and it was corroborated by her uncle who appeared as her fourth witness. I noted however that her uncle said there was only one beast and the other five were in monetary form, something which was not alluded to by the 4th respondent.

[9] The 4th respondent also refers to letters written by the chief's kraal confirming her marriage to the deceased. The purpose of these letters was to assist 4th respondent to get her marriage registered posthumously. The Chiefs runner on whose word the Umphakatsi relied when issuing the letters told the court that he was not present when 4th respondent was tekaed. He conceded that the umphakatsi was not

represented when the alleged teka ceremony was conducted. In my view the letters from the umphakatsi do not therefore constitute any concrete evidence of the teka ceremony.

[10] The 4th respondent also refers to the affidavits of DORAH GLORY GAMEDZE, ENOS MALIMA TSABEDZE, SANDILE SHABANGU and ESAU ZWANE as people confirming her marriage to the deceased. Although the three people who deposed to affidavits in this regard appeared before court and were examined and cross - examined, Dorah Gamedze, who allegedly smeared the 4th respondent with red ochre, never appeared before court. No reason was given to the court for her non - appearance yet she was key witness in this regard. Neither did any witness appear who witnessed the smearing with red ochre.

[11] The evidence of Enos Malima Tsabedze is totally unreliable and in my view he deliberately lied to the court. In his affidavit he states **inter alia:**

“ In my capacity as the umgijimi, and as required by Swazi law and custom, I was present at the deceased’s homestead when the said marriage took place.”

However during cross examination by Miss Hlabangana he stated:

“ I was not present when she was tekaed. I was only informed by the deceased”.

He was further asked in cross - examination by Miss Hlabangana:

“ what would you say if I produce an audio where you say you are not aware that laZwane (4th respondent) had been tekaed and you only heard when deceased had died and the family wanted a certificate.”

This witness answered:

“ I am not aware if LaZwane was tekaed but when the Shabangu family came looking for a certificate I was called by umphakatsi to say if la-Zwane was tekaed. I said she was tekaed because deceased came to report that she had tekaed her.”

[12] I asked this witness if he received a formal report of the marriage and he answered in the negative. He said he just met the deceased at the umphakatsi and he just broke the news to him. He further conceded that the umphakatsi had no record of the deceased having married the 4th respondent.

I accordingly reject the evidence of this witness as constituting any proof of the marriage between the deceased and the 4th respondent.

[13] In any event the evidence of the umgijimi is totally unreliable as it is not true in some crucial aspects. When asked in cross - examination if it is possible to hear noise of a teka ceremony when one is at Betty Maphalala's (AW2) homestead, he said it would depend on how loud the noise is as there are hills in between the homesteads. When the court conducted an inspection in loco it was established that there were no hills in between the two homesteads.

[14] This witness was further asked to estimate the distance between Betty Maphalala's homestead and deceased's homestead and he said it is about three (3) kilometres. The inspection in loco established that the distance is not more than 1.5 kilometres.

In my view this was clearly a lying witness and I reject his evidence ***intoto***.

In so far as the evidence of Esaw Zwane is concerned, this witness testified that he did not witness the teka ceremony. Everything was reported to him in this regard as the partenal uncle of the 4th respondent. He stated that he was only present when lobola was paid.

[15] I take particular note that nowadays the payment of lobola does not necessarily mean that there has been marriage

since people do pay lobola before marriage. I also note that according to the authorities on Swazi law and custom the only proof of a Siswati customary marriage is smearing with red ochre. So a person who only received lobola is not a competent witness to the fact of the marriage unless he actually witnessed the smearing with red ochre.

[16] Coming to his evidence, this witness stated in his affidavit that the lobola constituted cattle. The 4th respondent actually refers to “ a herd of six (6) cattle.” This suggests that these were all beasts. However during evidence in court this witness, Mr Esau Zwane, mentioned that there was only one beast and the others were in the form of cash.

[17] I also note that the evidence of Esau Zwane is at variance with that of the 4th respondent in so far as the date of marriage is concerned. The 4th respondent says she got married to the deceased on the 8th June 2014. Mr Esau Zwane, who according to his own evidence is now considered the father of the 4th respondent says the marriage took place in 2015. He says this is the year the traditional meat (umsasane) was delivered at the parental home of the 4th respondent at Logoba. It is well known that this meat is normally delivered soon after the teka ceremony, usually the same day or the following day.

This witness also says that the 4th respondent was sent back to her marital home in 2015. According to the 4th respondent

she stayed with the deceased from 2014 until he met his death (see para of 4th respondent's answering affidavit).

[18] The evidence of Esaw Zwane has a number of untruths and it therefore is of no assistance to the court in establishing whether or not the 4th respondent was married to the deceased. I of course also treat it with caution in light of his relationship with the 4th respondent who is her brother's daughter. By his own admission, he considers the 4th respondent as his daughter. He therefore has every reason to assist her obtain her wish.

[19] I now turn to the evidence of Sandile Shabangu. The evidence of this witness is straight forward in the main. He says he was gozolo (overseer of the teka ceremony) and was sent by the Shabangu family to deliver the traditional meat at the Zwane family. His evidence however has two problems firstly, he supposedly deposed to a confirmatory affidavit which is annexed to the answering affidavit of the 4th respondent. However when he appeared before court and during cross - examination he flatly denied ever deposing to an affidavit or signing any papers in relation to the matter before court.

On the face of it the affidavit appears quite regular and authentic having been signed before an officer of this court and obviously settled by another officer of this court. The only question that boggles the mind is why did this witness

deny his own affidavit. This says something about his credibility and his evidence.

[20] Secondly, this witness says soon after delivery of the traditional meat and on the following day thereafter, he made a report to the umgijimi that the teka ceremony did take place. The umgijimi told the court that he was only informally told by the deceased that he tekaed the 4th respondent long after the ceremony had taken place. That was the first time he got to know of the alleged marriage. This umgijimi never told the court that Sandile Shabangu had been sent to represent the umphakatsi and that he returned to make a report on the teka ceremony. One then wonders why Sandile Shabangu would go and report to the umgijimi soon after the ceremony. Further, if Sandile Shabangu had made a report to the umgijimi, it becomes a mystery why the umgijimi only refers to an informal report made to him by the deceased long after the ceremony had taken place.

I again reject the evidence of this witness as I am convinced that it is not the truth.

[21] The 4th respondent has also annexed the confirmatory affidavit of the 1st respondent, Joyce Sibandze to her answering affidavit. In this affidavit the 1st respondent states ***inter alia:***

“ I confirm that my son, the deceased did marry the 4th respondent by Swazi Law Custom and that the marriage subsisted until the deceased met his death.”

The very same first respondent deposed to an affidavit in Case No: 968/2018 B (consolidated with the present one). In paragraph 21 to 22 thereof she states ***interalia***:

“21. On the 19th July 2014, the second respondent [2nd applicant in the consolidated case] in the company of some three women and two men commissioned by the Ngcoseni umphakatsi, brought to my residence at Sicelwini, a cow, spear, throw (litjalo) apron (sidziya) and red ochre (Libovu). I enquired from the second respondent 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 is no longer a wife to the deceased. They left the items with me and I accepted them...”

22. The deceased continued with his life and married one Khanyisile Shabangu.....”[LaMdluli].

[22] Two issues come to the fore in these two statements by the 1st respondent. Firstly she says that the 2nd applicant purported to divorce the deceased on the 19th July, 2014. The deceased then moved on and married LaMdluli. The 4th

respondent told the court that she married the deceased on the 8th June 2014. This means that before the purported divorce took place, the deceased was already married to the 4th respondent in the previous month. However the 1st respondent says after the purported divorce the deceased married Khanyisile Mdluli. This is a convolution of facts. The evidence led in court suggests that LaMdluli is the one who was married by the deceased after he separated with the 2nd applicant. But the 1st respondent's averments again suggest that the deceased married 4th respondent before he married LaMdluli. The 4th respondent told the court that when she married the deceased he had long parted with LaMdluli and she never saw her but only heard about her.

[23] Manifestly, the evidence of the 1st respondent contradicts itself and ought to be rejected in its entirety. She is purely fabricating a story that the 4th respondent was ever married to the deceased. This observation finds support in the conduct of the 1st respondent in never mentioning that the 4th respondent was married to the deceased in her initial affidavits. She does not even mention her name at all. She only mentions Khanyisiele Shabangu (LaMdluli), who parted ways with the deceased a long time ago. She does not mention the 4th respondent, who says she was inside the homestead of the deceased already mourning her alleged husband when the initial applications were launched. The 1st respondent was supposedly with the 4th respondent at the

alleged deceased's homestead when the two applications were made. However the 1st respondent did not make mention of her and instead she chose to mention La - Mdluli who had left the deceased a long time ago.

This cannot lead me to any other conclusion except that the 4th respondent was not a wife of the deceased when he died. That is why the 1st respondent could mention her.

[24] During cross - examination Miss Hlabangani asked the 4th respondent if she had a good relationship with her alleged mother - in - law, the 1st respondent and she answered in the affirmative. The 4th respondent was then asked why the 1st respondent did not make mention of her in her papers but instead mentioned la- Mdluli. She first said that the reason was that 4th respondent did not have a marriage certificate. Being further quizzed by Miss Hlabangana on this point, the 4th respondent's final answer was that she thinks the 1st respondent was confused.

The 1st respondent herself conveniently elected not to give oral evidence. The explanation that she was confused coming from the 4th respondent is mere speculation. It is the 1st respondent who was in a position to explain her conduct and she chose not to do so. The only reasonable inference to be drawn from her conduct is that the 4th respondent was not a wife to the deceased. That is why the 1st respondent never mentioned her in her papers.

[25] In a nutshell in her evidence the 4th respondent contradicts herself in a number of issues. For instance she says she was present when the deceased died. However, in cross examination she says she was not there. She also says deceased died at RFM hospital and also changes to say he died at a filling station. Her evidence also contradicts that of the 1st respondent and there is no explanation of such contradiction. Asked why she did not participate in the matter at the initial stage, she said this is because she was mourning. But when she came to court she said she was still in mourning. The 4th respondent also told the court that there is a mountain between the place where he was tekaed (deceased's homestead) and that of Betty Maphalala. The inspection in loco established that there is no mountain there.

[26] I find it reasonable to conclude that the 4th respondent was brought by the 1st respondent as an after thought after my initial judgment which demonstrated that it is a spouse of the deceased who has better burial rights than anyone else. The allegation that the 4th respondent is a wife to the deceased is pure fabrication. It particularly cannot stand against that of Betty Maphalala, a community police woman who is a very close neighbour of the deceased. The inspection in loco established that she could hear a teka noise in deceased's homestead. She could also see if there were any people conducting such ceremony at the

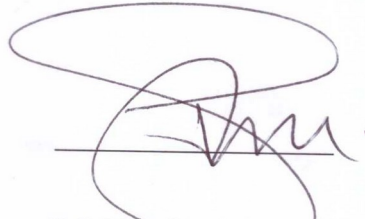
deceased's homestead. Mr Mavuso who appeared for the 4th respondent contended that the court should not accept that the teka ceremony never took place simply because Betty Maphalala did not witness it. His reason for this submission was that sometimes Betty Maphalala goes to funerals and also goes to her leased flats in Manzini. Betty Maphalala however stated that if she goes to Manzini she normally sleeps there one night and return the following day. In any event it seems to me to be highly speculative to assume that Betty Maphalala was not at home on the day the teka ceremony was allegedly conducted. She ordinarily stays at her home and anybody alleging that she was not home on this day would have to prove that. Betty Maphalala was a totally independently witness who had no reason to lie. She categorically stated that the 4th respondent was never tekaed and that had such an event taken place she would have been informed as the nearest community police and in charge of other community police in her area. I have not the slightest doubt about the truth of the evidence of this witness.

[28] For the foregoing reasons I have come to the conclusion that:

28.1 The 4th respondent is not and was never a wife of the deceased Victor Musawenkhozi Shabangu.

28.2 My previous judgment on this matter accordingly stands.

28.3 Costs of the hearing are awarded to the applicants.



J.S MAGAGULA J

For the Applicant : T. Hlabangana

For the 1st Respondent: M. Dlamini

For the 4th Respondent : T. Mavuso