



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1859/2017  
[Reportable]

In the matter between:

**MARGARET THINDWA**

**APPLICANT**

and

**ADELAIDE FIKILE NGCAMPHALALA**  
**THE MASTER OF THE HIGH COURT**  
**THE NATIONAL CIVIL REGISTRAR**  
**(MINISTRY OF HOME AFFAIRS**  
**THE REGISTRAR OF BIRTHS, MARRIAGES**  
**AND DEATHS**  
**THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**  
**3<sup>RD</sup> RESPONDENT**  
**4<sup>TH</sup> RESPONDENT**  
**5<sup>TH</sup> RESPONDENT**

Neutral Citation : Margaret Thindwa and Adelaide Fikile Ngcamphalala & 4  
Others (1859/17) [2019] SZHC 07 (19 FEBRUARY  
2019)

Coram : MABUZA – PJ

Heard : 31 JULY 2018

Delivered : 19 FEBRUARY 2019

## **SUMMARY**

*The deceased married Applicant in Malawi in terms of the African Marriage (Christian Rites) Registration Act 7/1923 – He later married 1<sup>st</sup> Respondent in terms of the customary marriage of Malawi (and of Eswatini) without terminating the marriage between himself and Applicant.*

**Held:** *Both marriages do not fall under the Civil Rites Marriage – In Malawi they are classified as traditional marriages.*

**Held further:** *Both women are legal and lawful wives of the deceased.*

## **JUDGMENT**

### **MABUZA -PJ**

[1] The Applicant seeks an order in the following terms:

- (a) Declaring the marriage between the late Owen Chitatata Thindwa and 1<sup>st</sup> Respondent (Adelaide Fikile Ngcamphalala) as bigamous, null and void.
- (b) Declaring the Applicant (Margaret Thindwa) as the legal and lawful wife of the late Owen Chitatata Thindwa at the time of his death.
- (c) Directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to expunge from its records Marriage Certificate number 14563.

(d) Costs of suit at attorney own client scale in the event of opposition thereto.

(e) Any further and/or alternate relief.

[2] The application is opposed by the 1<sup>st</sup> Respondent.

[3] The Applicant, Margaret Thindwa is an adult female and citizen of Malawi. She was married in terms of the laws of Malawi to one Owen Chitatata Thindwa on the 20<sup>th</sup> July 1977. Mr. Thindwa died on or about the 16<sup>th</sup> March 2017 in the Republic of South Africa (hereinafter referred to as the deceased).

[4] The 1<sup>st</sup> Respondent is Adelaide Fikile Ngcamphalala an adult Swati female of Mbabane. She too was married to the deceased. She married him on the 16<sup>th</sup> December 2004 through traditional structures in Malawi and later in terms of civil rites on the 6<sup>th</sup> November 2008 in terms of the marriages laws of eSwatini. The marriage certificate in respect of her civil rights marriage is annexure "MT 3".

[5] It is the marriage between the deceased and the 1<sup>st</sup> Respondent that the Applicant wants declared bigamous, null and void and that she be declared

the only legal and lawful wife of the deceased. She says that the marriage between the deceased and the 1<sup>st</sup> Respondent took place while she and the deceased were still married and that their marriage subsisted until his death.

[6] The marriage between the deceased and the 1<sup>st</sup> Respondent was registered with the 3<sup>rd</sup> and 4<sup>th</sup> Respondents hence the order sought by the Applicant that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents expunge from their records certificate number 14563 which is a record of the aforesaid marriage.

[7] The 2<sup>nd</sup> Respondent is The Master of the High Court, cited herein in his official capacity as the custodian of the administration of estates in Swaziland situated at 2<sup>nd</sup> Floor Millers Mansion Building Mbabane.

[8] The 3<sup>rd</sup> Respondent is the National Civil Registrar (Ministry of Home Affairs), cited herein in his official capacity as custodian of the National Civil Registry.

[9] The 4<sup>th</sup> Respondent is The Registrar of Births, Marriages and Deaths, cited herein in his official capacity as the legal authority responsible for registering marriages in Swaziland.

- [10] The 5<sup>th</sup> Respondent is The Attorney General, cited herein in the official capacity as legal Counsel for all government departments.
- [11] No orders are sought against the 2<sup>nd</sup> and 5<sup>th</sup> Respondents.
- [12] In her answering affidavit, the 1<sup>st</sup> Respondent states that the Applicant was discarded as a wife through the traditional structures of Malawi during 2000. And to that end has submitted a confirmatory from the deceased younger brother, Maligzan Thindwa.
- [13] In the affidavit Maligzan Thindwa states that he is an adult male of Karonga in Malawi. Karonga is the family seat of the deceased as well. He states that the Applicant was no longer married to the deceased when he died as she had been discarded by the deceased the traditional way where he advised the whole family in a meeting held during 2000. In this meeting he informed the meeting that he did not want her any more. Mr. Maligzan Thindwa states further that in his culture this signified that the deceased no longer wanted the Applicant.

[14] He further states that The 1<sup>st</sup> Respondent was traditionally wedded to the deceased on 16<sup>th</sup> December 2004 and all customary practices were performed to make her a wife to the family. This took place at their home at Luwuchi in Malawi. The Thindwa family paid dowry to the Ngcamphalala family in Swaziland during November 2004 thus sealing the customary wedding.

He further states that the deceased left Malawi in 1978 to permanently stay in Swaziland. If he came back to Malawi, he did so as a visitor; even to date no

one has opened an estate file in Malawi since all the deceased's estate assets had been distributed by the deceased in a letter dated 8<sup>th</sup> October 2016.

[15] It is important to note that Mr. Maligzan Thindwa did not file an official **divorce certificate between the deceased and the Applicant.**

[16] The 1<sup>st</sup> Respondent has also submitted proof of her customary marriage to the deceased in the form of a letter from the Headsman of Mtomboloka, Malawi dated 12/7/2017 (Annexure A). Its contents are reproduced hereunder:

**“Principal Group Village Headman Mtomboloka  
Traditional Authority Nwamlowe  
Rumphi District  
Malawi**

**TO WHOM IT MAY CONCERN**

**This is to certify that Owen Chitatata Thindwa (now late) was married to  
Adelaide Fikile Ngcamphalala in a Tumbuka traditional marriage on  
16/12/20.....**

**The traditional wedding was celebrated at Luwuchi and officiated at  
Luwuchi CCAP Church, under the Livingstonia Synod – Rumphi District.**

**Yours sincerely**

**PRINCIPAL GROUP VILLAGE Headman Mntomboloka**

[17] The 1<sup>st</sup> Respondent says that the deceased paid dowry (lobola) to her family during November 2004. She further states that she met the deceased in the late 1990’s. She says that she even helped bring up some of his children from the Applicant namely Monica, Nipa and Mercy.

[18] In her replying affidavit the Applicant attached Annexure “OT3” whose contents refute the contents of Annexure A. The contents of Annexure “CT3” are reproduced hereunder:

**“I strongly write to condemn the letter written by Principal Group Village Head man Mtomboloka certifying the officiation of Owen Chitatata Thindwa and Fikile Ngcamphalala at Luwuchi CCAP Church under CCAP Synod of Lingstionia. As a Church we don’t have any record both written and oral of that marriage. If he (Mtomboloka) and the concerned parties are very sure of what they are writing, can they produce church documents to support that letter to stand as witness in the court of law.**

**I humbly write to ask the concerned parties to handle their issues traditionally without involving the church.”**

[19] The Court is inclined not to accept both Annexure “A” and Annexure “OT3” as they are not essential for the determination of the prayers sought. The Court takes the view that the marriages between the deceased and both women took place during his lifetime at different times.

[20] It appears *ex facie* the papers before me that the deceased lived in Eswatini for a long time from where he went to live in South Africa. He owned and ran businesses in both countries.

[21] It is equally clear that the Applicant also lived in Eswatini as evidenced by her the entry permit (Annexure “OT4” which allows her to reside in Eswatini from 07/07/1989 to 30/06/1992 as owner of the Speedway Secretarial Services (Pty) Ltd.



[22] When the deceased married the Applicant he was 30 years old and she was 20 years old (See Annexure “MT1”). When he married the 1<sup>st</sup> Respondent, he was 61 years old and she was 34 years old.

[23] It is not uncommon in Eswatini to marry a second wife (sincanakazana) while still married to the first wife and often denying the first wife or even finding impediments to a first marriage on the eagerness to marry a younger woman.

[24] He may or may not have acquired citizenship in this country but he was domiciled in Eswatini and the Applicant’s *locus standi* derives therefrom.

[25] No evidence has been placed before me that the deceased and the Applicant terminated the marriage that they entered into in Malawi. Annexure “MT1” equivocally proves that the deceased and the Applicant were married on the 20<sup>th</sup> July 1977. There is no evidence that they had divorced when he married the 1<sup>st</sup> Respondent in 2008; or when he died on 16<sup>th</sup> March 2017.

[26] The 1<sup>st</sup> Respondent took issue with regard to the authenticity of Annexure “MT4” whose contents state

**“Ref. No. RG/LL/ADMN/21**

**TO WHOM IT MAY CONCERN**

**Dear Sir/Madam,**

**We hereby write to certify that the deceased Owen Thindwa hailed from Village Traditional Authority Chikulamayembe in the District of Rumphi. The late Owen Thindwa did not get any clearance of his marital status under the Marriage Act, which was in force in 2008 but repealed by the Marriage, Divorce and Family Relations Act (No. 4 of 2015) of the Laws of Malawi which is administered by the office of the Registrar General.**

**Late Owen Thindwa was married to Margaret Thindwa under the African Marriages (Christian Rites Registration Act which marriage is recognized by the Marriage, Divorce and Family Relations Act (No. 4 of 2015) of the Laws of Malawi which currently governing all forms of marriages in Malawi. For the avoidance of any doubt, at the time of his death late Owen Thindwa, there existed a valid marriage between himself and Mrs Margaret. This was under Malawian law.**

**Ada Kasopa**

**FOR: REGISRAR GENERAL”**

Annexure “MT4” hails from the Ministry of Justice, Department of the Registrar General, Malawi.

[27] The answer to the 1<sup>st</sup> Respondent is found in section 11 of the Authentication of Documents Act 1965 of Eswatini which provides as follows:

**“Section 11 of the Authentication of Documents expresses that:**

**(11) Section 7 shall apply in respect of a document originating outside Swaziland which purports to bear the signature of a public officer government outside Swaziland, as it applies in respect of a document originating in Swaziland and purporting to bear the signature of a public officer.**

**The Authentication of Documents Act in Section 7 states that:**

**[7] In any criminal or civil proceedings, a document shall on its mere production without proof of the signature, seal or stamp, be presumed to have been signed by such person unless the contrary is proved, if it purports –**

**(a) to bear the signature of a public officer, and,**

**(b) in addition, bearing a seal or stamp which purports to be the seal or stamp of the department, or institution to which such public officer is attached.”**

[28] And section 15 thereof states:

**“[15] Notwithstanding the other provisions of this Act, a document signed in a country or territory shall be sufficiently authenticated if**

**authenticated by a suitable certificate under the signature and seal or stamp of office of -**

**(a) ...**

**(b) A person shown by the certificate of –**

**(i) ...**

**(ii) ...**

**(iii) A diplomatic or consular officer, of the country**

**or**

**territory, in Swaziland, Botswana, Lesotho or the Republic of South Africa.**

**To be duly authorized, by the law of such country or territory, to authenticate such document.”**

[29] The 1<sup>st</sup> Respondents arguments are that:

“4. It is common cause that the Applicant was married in terms of the African Marriage (Christian Rites) Registration Act 7/1923 to the deceased in 1977 which marriage is not monogamous by its very nature. In fact it is a celebration of some sort for it allows one already married to marry anyone customarily married to another save to anyone married under civil rites.

If this submission is correct, then the 1<sup>st</sup> Respondent is a lawful wife in terms of the Malawi laws and I have not been asked to declare her customary marriage contracted in Malawi to be invalid. The submission herein finds support in section 3 of the said Act namely [Ch25002s3]3. Celebration of marriage Status which states that:

**“Notwithstanding anything contained in the Marriage Act it shall be permissible for any minister and at any place to celebrate marriage according to the rites of the Church, Denomination or Body to which he belongs between any two Africans: cap 25:01**

**Provided that the celebration of marriage under this Act shall not as regards the parties thereto alter or affect their status or the consequences of any prior marriage entered into by either party according to customary law or involve any other legal consequences whatever.”” (underlining added)**

[30] It would seem therefore that the marriage regime between the Applicant and the deceased does not equate to a civil rites marriage in that country and in Eswatini where only one wife is allowed. By being dubbed a Christian Rites marriage does not make it a civil rites marriage. It does however recognize and allow polygamy.

[31] A new act the Marriage, Divorce and Family Relations Act 4/2015 was promulgated in Malawi. Section 114 of that Act repealed the African Marriage (Christian Rites) Registration Act 7/1923. Section 114 provides that:

**(1) The Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act are hereby repealed.**

**(2) A licence or certificate issued, notice published, registration effected, caveat entered or other thing done under the Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act**

**and the Maintenance Orders (Enforcement) Act repealed by subsection (1) shall, if in force at the commencement of this Act, continue in force, and have effect as if issued, published, effected, entered or done under the corresponding provisions of this Act”**

[32] Section 12 of the new Act provides as follows

**“(1) A marriage recognized under this Act shall be either –**

- (a) a civil marriage;**
- (b) a customary marriage;**
- (c) a religious marriage; or**
- (d) a marriage by repute or permanent cohabitation.”**

[33] The 1<sup>st</sup> Respondent makes the argument that the law in Malawi recognizes the traditional marriage between the deceased and herself which took place in Malawi. And that therefore that law should apply and her marriage be recognized under that law of which the deceased was a national. And that the Court should not concentrate on the status of her civil rites marriage contracted in Eswatini. I am persuaded by this argument.

[34] I am equally baffled as to why the Applicant ignored the marriage(s) between the deceased and the 1<sup>st</sup> Respondent by not challenging them until now. Surely there is condonation there.

[35] The 1<sup>st</sup> Respondents argument is further based on the fact that the new Act clearly states at section 18 that “a person who contracts a civil marriage shall be married to one spouse only” and does not make a similar provision for a customary marriage nor a religious marriage. The new act sets out the different regimes that existed prior to its promulgation. The religious marriage is not the same as the civil rites marriage.

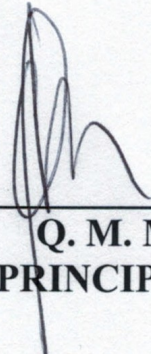
[36] In view of the customary marriage of the 1<sup>st</sup> Respondent and deceased contracted in Malawi and in Eswatini I cannot declare the Applicant as the only legal and lawful wife of the deceased at the time of his death because the 1<sup>st</sup> Respondent is also a legal and lawful wife to the deceased. Both women are his wives. There is no bigamous marriage. The Malawi law recognizes both of them as wives. Swazi customary law also recognizes both of them as wives.

[37] Consequently the application fails.

**Costs**

[38] As correctly pointed out by Mr. Simelane the Applicant did not make out a case for the award of costs on a punitive scale. And as I recognize both women as wives to the deceased, the costs for both spouses should have been directed to the deceased's estate. I shall for that reason order that each party pay her own costs.

[39] The Application is dismissed. Each party is ordered to pay their costs.



ATMBABANE  
Crim. Case No: 252/2

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**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Applicant : Mr. Tengbeh  
For the Respondent : Mr. M.E. Simelane