

IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1857/21

HELD AT MBABANE

In the matter between:

BUSISIWE DLUDLU (BORN MAMBA)

Applicant

And

FIIKILE DLIJDLU

1st Respondent

MBABANE GOVERNMENT HOSPITAL

2nd Respondent

HOSPITAL ADMINISTRATOR

3rd Respondent

THE NATIONAL COMMISSIONER

4th Respondent

ATTORNEY GENERAL

5th Respondent

Neutral Citation: *Busisiwe Dlundu vs Fikile Dlundu and Others* (1857/21)
[2021J SZHC 217 (2021)]

Coram: **J.M MAVISO J**

Heard: 9th November, 2021

Delivered : 16th November, 2021

SUMMARY

Civil Law Contestation of burial rights(including the place at which to hold fitnera!) between mother and daughter over demised major sister - Unprecedented, rule confirmed with caveat.

JUDGMENT

- [1] The Applicant herein instituted legal proceedings, and under a certificate of urgency sought a rule *nisi* directing.
- 3.1 The pt Respondent or her associates to stop interfering with the funeral arrangements and or burial of the Applicant's child namely; Nokuphila Ter Dladlu.
- 3.2 Restraining the 1st Respondent from interfering with the process of releasing the deceased's body from the 2nd Respondent to the custody of the Applicant.
- 3.3 The 1st Respondent to forthwith release all the deceased's belongings in her possession to the custody of the Applicant, including the deceased's motor vehicle, to wit; a Mazda De1nio registered FSD 386 CH.

- 3.4 The 1st Respondent to forthwith vacate the deceased's house situated at Ngwane Park, Manzini.
- 3.5 The 4th Respondent or his officers to assist the Deputy Sheriff in the execution of this order.
4. That prayers 3.1, 3.2, 3.3, 3.4, and 3.5 to operate with immediate and interim effect pending the outcome of this matter.
5. Costs of suit in the event this application is unsuccessfully opposed.

[2] When the matter came before court, for the first time on the 29th October 2021, 1st Respondent did not oppose the matter resulting in a rule *nisi* being granted with interim effect and made returnable on the 3rd November 2021.

[3] By the return date, 1st Respondent had instructed a legal representative who, had in turn, filed an answering affidavit. In readiness for argument Applicant was afforded the opportunity to file her replying affidavit on or before the 1st November 2021. As above stated the rule *nisi* was returnable on the 3rd November 2021.

[4] On the 3rd November 2021, the matter was argued. Applicant argued that the duty to bury the deceased rested with her. On the other hand it was contended on behalf of the 1st Respondent who is the deceased's biological sister and a biological daughter to Applicant, that she had no problem with the burial of the deceased at Mafutseni at paragraph 21 of her answering affidavit, she state thus:

"I do not have a problem that my sister be buried at Mafutseni".

The only problem which the 1st Respondent seems to have had, was that of his deceased sister being cremated and to use her words:

"Especially in the absence of family members, her children and colleagues "

At paragraph 25 of her answering affidavit, 1st Respondent states:

"I re-iterate that the deceased should be given a decent funeral at her parental home in Mafutseni and with the presence of all family members, friends and relatives".

[5] When the matter was heard on the 3rd November 2021. It was submitted on behalf of the 1st Respondent that burial of the deceased was no longer possible at Mafutseni the reason being that Applicant was alleged to be paying allegiance to another faction of traditional leadership at Mafutseni and that the faction in which the burial, was to take place, was refusing Applicant the right to bury, the deceased.

- [6] At this juncture, having somewhat agreed on the burial taking place at Mafutseni, and in order to ascertain the truthfulness or otherwise of the allegation that, some difficulty would be occasioned in burying the deceased at Mafutseni, by consent the parties agreed to oral evidence being led on the possibility or otherwise, of conducting the funeral at Mafutseni. The court suggested that someone in authority be called from the Mafutseni Umphakatsi to assist it ascertain the position of the U1nphakatsi with regards to the burial of the deceased, there. To allow for the foregoing to take place, the matter was postponed to the 9th November 2021.
- [7] On the 9th November 2021 the Indvuna Ye1ncuba of Mafutseni Mamilela Fanukwente Maphosa testified and told the Court that sometime on or about the 25th October 2021 some people were brought to hi1n by the Umgijimi of the area (Chiefs Runner). The witness testified that he could not recall the names of the individuals. He however recalls their mission, which was to register a complaint against Applicant, for locking them out of her premises despite the fact that they were her relatives and needed to prepare for the funeral of her daughter and their child Nokuphila Ter Dladlu.
- [8] The Indvuna told the court that, in a bid to end-the impasse, and after consultation with the Chief, following the complaint, by the Dlundlus (Applicant's in-laws) and the Mambas (her clan people) he instructed the Runner (wngijin1i) assisted by members of the eSwatini Royal Police to sun1mon applicant.
- [9] When the Runner returned from summoning Applicant, the court was told that, she refused to open the gate and did not allow them into the premises. Despite not being allowed in, the witness testified

that a message was left for Applicant to report at the Indvuna's homestead. At this point, Applicant is said to have told the Runner to go back and that she would follow him. She never followed as promised, resulting in the complaint not being attended to.

[10] When asked if the deceased could still be buried at Mafutseni, the Indvuna's unwavering answer, was:

"The deceased can be buried at A1/afi.1tse11i if the family so desz' res"

[11] After the Indvuna had testified, pt Respondent, called Peter Majazi Dlundlu who introduced himself as the current head of the Dlundlu extended family. He testified that Applicant was the wife of his late brother Joshua Dlundlu. The gist of his evidence was that as a Dlundlu family they are unable to access their late brother's homestead at Mafutseni, to discuss and prepare for the burial of the deceased. He informed the court, that even Applicant relatives from the Mamba clan have also been denied access. His suggestion was that the deceased be buried at Lavumisa where her father is also buried. He told the court that his brother, the late Joshua was buried at Lavumnisa because of a somewhat similar incident. Upon the demise of their brother, the court was told that Applicant, refused her mother-in-law access to the premises in question resulting in the family deciding on burying the late Joshua at Lavumisa, his parental home.

[12] This case is unprecedented, I have looked for legal authority on the contestation of burial rights between mother and daughter and have found none. What is prevalent is a contestation of such rights by

surviving spouses of deceased persons. What complicates this matter is that the court has not been told of the type of marriage, contracted by and between the late Joshua with Applicant, during his life time. That could have at least helped the court, in case of a marriage, in terms of Swazi Law and Custom, view the matter in a customary perspective.

- [13] Ramondibedi, CJ stated at page 8 of the Judgment of the Supreme Court case of **Mfanyana Dia mini and Zethu vs Cetjiwc Dia mini, case No. 02/14** that:

"In my view each case must be decided on its own merits and the Court must not be bound by any inflexible rules when determining the question as to who has the right to bury".

He ended his view by stating that:

"This Court subscribes to the view that in determining the duty to bury, the Court must be guided by a sense of what is right as well as public policy".

- [14] The issue of Lavumisa, being an alternative suitable place for the burial of the deceased in this matter, was not pleaded. It is the testimony of Peter Majazi Dlundlu which brought to light this possibility and support thereof.

- [15] Be that as it may and based on fairness and public policy considerations, Mafutseni, with sufficient safeguards being put in place, in the circumstances of this case, appears to be a better choice for the following reasons:

- (i) The Mafutseni Umphakatsi has no objection to the burial of the deceased there. If there are factions, certainly the one under Indvuna Yemcuba Mamilile Fanukwente Maphosa has no objection to the funeral being held there.
- (ii) In principle, Applicant and Ist Respondent were agreed on the funeral of the deceased taking place at Mafutseni. An order directing, an alternative place of burial would further the rift between another and child, Applicant and Ist Respondent in this matter.

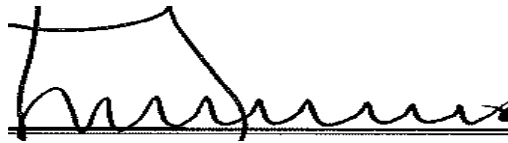
[16] Before handing down any order, it is apposite for the court to state that it is riled by the Applicant's conduct to lock out her relatives whose contributions, at least, moral, are necessary for the deceased children and even more importantly, in the funeral arrangements themselves. Had she not conducted herself in the manner in which she did (denied relatives access to her premises and failed and or neglected to heed the Indvuna's summons) the matter would not have been in court today. To show disapproval of Applicant's conducts the court is inclined to award an adverse order of costs against her.

[17] Based on public policy and considerations of fairness, the following order is hereby made;

- (i) The rule nisi granted by the honourable cowi on the 22nd October 2021 is confirmed.
- (ii) Applicant is ordered to pay costs.

Under further and alternative relief. Applicant is ordered to:

- (iii) Grant the 1st Respondent, Peter Majazi Dlodlu and other close 1members of the family and friends as determined by Applicant, 1st Respondent and Majazi Dlodlu; access to her premises and the place of burial.
- (iv) Applicant is to consult with Peter Majazi Dlodlu pertaining all funeral arrangements.
- (v) The National Commissioner of Police or his officers, are ordered to assist in the enforcement of this order



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HIGH COURT OF ESWATINI

For the Applicant:

M. MASILELA

For the 1st Respondent:

M. MATSHALI