IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **Case No. 1565/19(C)**

In the matter between:

SALOM SEYAMA DLAMINI **APPLICANT**

And

SIPHO MADZINANE N.O.	
(THE EXECUTOR OF THE ESTATE OF THE LATE	
SIKHAKHANE ALFRED DLAMINI)	**1st RESPONDENT**
THE MASTER OF THE HIGH COURT	**2nd RESPONDENT**
THEMBI ALLOYCE DLAMINI	**3rd RESPONDENT**
GLADYS GCINAPHI DLAMINI	**4th RESPONDENT**
FLORA SOLANI DLAMINI	**5th RESPONDENT**
THE ATTORNEY GENERAL	**6th RESPONDENT**

Neutral Citation : Salom Seyama Dlamini vs Sipho Madzinane N.O. (The Executor of the Estate of the Late Sikhakhane Alfred Dlamini) & 5 Others (1565/2019) SZHC [2019](71/2022).

Qoram: MAGAGULA J, MAPHANGA J et MASEKO J

Date Heard : 17th November 2021

Date Delivered : 29th April 2022

Summary: ***Civil Law – Application for a declaratory order – Applicant seeking the setting aside of a will – Deceaseds will containing a clause exclusive Applicant and other wives from receiving any benefit from the estate –***

Constitutional Law – interpretation section 34 of Constitution – Applicant contending the section confers a share upon her in the deceaseds estate – Meaning of 'reasonable provision' – Freedom of testation in law of succssion supported and protected in the constitution and common law –the legal system does not follow forced inheritance

Civil Law - Law of succession – Freedom of testation not absolute – subject to limitations in the common law on grounds of morality and public polity, or imposed by statutory and constitutional provisions; effect of limitations being a departure from freedom of testation or default intestacy succession rules;

Constitutional Law – Reasonable financial provision and marital proprietary consequences interrelated factors in determination of the financial security of surviving spouse upon termination of marriage by death; Section 34(2) envisioning enactment of a statutory system to enable reasonable provision claims under certain specified circumstances and upon defined conditions and criteria;

Held reasonable provision in the context of the constitution does not equate to a share in the estate of the first dying – concept of 'reasonable provision' in Section 34 (1) used in reference to financial security and a right to claim a financial provision to cater for claimants needs –

Held deceased's will falling short of making a reasonable provision for applicant and further that clause purporting to exclude Applicant from all benefit from the estate whatsoever incompatible with section 34(1) of the Constitution thus liable to be deleted ;

Held application to declare deceased's will 'unconstitutional' and of no legal effect declined ; no order as to the general legal status or efficacy of the deceased's will or as to its validity in law; such issues

or as to appropriate succession regime to stand over for adjudication in main application.

JUDGMENT

MAPHANGA J

Background

[1] This matter comes before us constituted as the full bench for the determination of a constitutional question to do with this courts jurisdiction in terms of section 35 (1) of the Constitution Act of Swaziland (eSwatini) No.1 of 2005 ('The constitution'). The constitutional issue has arisen in the context of motion proceedings brought by the applicant challenging the will of her late husband.

[2] The applicant is a widow and senior wife of the deceased, the late Sikhakhane Alfred Dlamini. The principal relief and issue arises on account of the applicant's prayer for a declaratory that a will executed by the deceased during his lifetime be declared unconstitutional for allegedly being inconsistent with section 34 (1) of the Constitution.

[3] Briefly the essential and admitted facts are that the deceased, was married by customary law rites to the applicant (i.e., under Swazi Law and Custom). As a matter of fact by the time of the deceased's demise the applicant was but one of four surviving spouses married in the same mode to the deceased. The other three spouses are cited and joined as the 3rd to the 5th respondents in these

proceedings. It is also common cause that during the lifetime of the deceased he executed a will in terms of which he directed the disposition of his estate.

[4] This matter involves the interpretation of section 34 of the Constitution of Eswatini.The nub of the present objection to the will, hence its alleged invalidity, is that it purports to preclude the applicant from benefitting in any manner whatsoever from the estate of the deceased. It is important to point out from the outset that the applicant does not attack the will on grounds of an internal defect, deficiency, inherent irregularity or flaw (e.g. as would be the case in an instance of non-compliance of its terms with the formal provisions of the Wills Act) but does so on the basis of the insertion therein of the disherison clause therein which it is alleged is repugnant and inconsistent with Section 34 of the Constitution in so far as it specifically excludes the applicant as the deceased spouse from deriving any benefit from the estate.

[5] The contentious provision in the will giving rise to this litigation is contained in clause 7.6 of the deceased's will which reads as follows:

> *"7.6. My wives Salom Meyama Seyama, Duduzile Ntombikayise Gina and Makhosazane Nkhambule and.....shall not get, inherit and or benefit anything from my estate either in my personal name, business name and/or Madubile Investments (Pty) Ltd"*

[6] Notably the Applicant does not isolate the above clause in the will in the declarator she seeks but on the contrary seeks a general declaratory order that the will be found to be 'unconstitutional' in its entirety on account of the above-cited clause by reason of the disherison of the applicant which, so it is contended by applicant, is contrary to the provisions of section 34(1) of the constitution. In this vein the

applicant premises her position on the proposition that the constitutional section relied on entitles a spouse to a share in the estate of the first dying.

[7] The full text of section 34 of the Constitution bears consideration. It reads:

> *"Property rights of spouses*
>
> ***34.*** ***(1) A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.***
>
> ***(2) Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife."***

[8] As this matter concerns the construction to section 34(1), it is in consideration of this section that this opinion is primarily focused on. I do however also make reference to the second subsection to locate the provision contextually as I do to other constitutional provisions where the term 'reasonable provision' occurs to assist in the enquiry before us.

THE ISSUES

[9] The crisp issue for determination in this application is primarily whether the will can be said to be inconsistent, at variance with or repugnant to section 34 (1) of the constitution as contended by the applicant. If the answer is in the affirmative that would give rise to a second enquiry as to whether any inconsistency in the said will with the said section renders the testamentary instrument a nullity in its entirety or only in so far as the perceived inconsistency. I think closer still, the kernel of the issue and the problem to consider is whether the reference to 'a

reasonable provision' in the words of section 34 (1) ought to be construed to confer on a surviving spouse 'a share in the estate of the first dying"

[10] The contentions advanced by the applicant are crystallised in the heads of argument where she contends for the following propositions:

a) That the entire will of the deceased is unconstitutional and liable to be set aside on account of the purported disherison of the applicant and other wives in clause 7.6 of the will which, it is contended is contrary to the provision of section 34 (1) of the Constitution; and as a corollary;

b) That the said section 34 (1) invariably entitles a surviving spouse to a share in the estate of the first dying.

[11] On the other hand the first respondent takes a contrarian view and argues that it is not competent to invalidate the deceased will on the basis contended for by the applicant as that would amount to an unwarranted interference by this Court of the deceased's constitutionally protected right to freedom of testation.

Reasonable Provision

[12] The phrase 'reasonable provision' requires definitioin. It also calls for the interpretation of the section to construe what the framers of the Constitution meant by ' reasonable provision'. A purely textual or literal interpretation of the word in its ordinary grammatical meaning leads to no more than denoting some financial arrangement or the creation of a reserve to cater to some future eventuality, requirements or needs for the person concerned on whose behalf it is claimed out of the estate net assets.

[13] Our courts are yet to pronounce on a practical definition of the word. What is clear nonetheless is that in the section under consideration, 'provision' is not used as a term of art in the sense of a legal technical term nor can it be glibly read as synonymous with the word 'share' as has been suggested the applicant and the 5th Respondent.

[14] There are numerous reasons why the applicant's latter proposition is untenable. The first lies in the choice and use of the word 'provision' as opposed to 'share' in the section. In my view it is inconceivable, that what was intended was to prescribe the provision of a share and to write into the constitution precepts to regulate succession rights over the substantive rules of succession and consequently override the common law, customary law and statutory rules of succession in one fell sweep. The reason for this approach to the problem is set out more fully further in this judgement. Consideration of the provision has been given by the courts in a recent case.

[15] In the matter ***Attorney General v The Master of the High Court* (55/2014) [2014] SZSC 10 (30th June 2016),** the Supreme Court considered the wording in the phrase 'reasonable provision' as it appears in section 34 (1) of the Constitution but came short of venturing a definition of its meaning in the judgment. The Court went only so far as stating the following:

> ***"[32] Section 34(1) of the Constitution confers property rights of spouses. Accordingly the surviving spouse is entitled a reasonable provision out of the estate of the deceased spouse irrespective of whether or not the deceased died intestate or whether the marriage was by civil or customary rites. However this constitutional provision does not define 'a reasonable provision out of the estate of the other'"***
>
> ***[39] Similarly section 34 (1) of the Constitution does not revoke customary marriages; it does not repeal or override section 4 of the***

Intestate Succession Act or Section 68 of the Administration of Estates Act. Furthermore, it does not subject customary marriages to administration of the Master of the High Court. This provision seeks to afford the surviving spouse with a reasonable provision from the deceased's estate.

[40] ***The task of defining a 'reasonable provision' within the context of the recognised marriages in the country has been given to Parliament in terms of section 34 (2) of the Constitution. Parliament has been given the arduous task of enacting legislation regulating the property rights of spouses, including common law husband and wife. When interpreting the Constitution courts should not venture into the terrain of Parliament and legislate. The Constitution gives a mandate to Parliament to make laws"***

(Added emphasis)

[16] Further into the judgment the Court states:

"[41] The full bench as did the Supreme Court on appeal did encroach upon the legislative preserve of Parliament by determining 'a reasonable provision' in terms of section 34 (1) of the Constitution. It is Parliament which should give life to section 34 (1) of the Constitution by putting in motion the process out in section 34 (1) of the Constitution."

[17] The judgment of the Court in the *Attorney General v The Master the High Court* above eminently highlights the pitfalls and inherent risks of an expanded normative interpretation to section 34(1) of the Constitution that goes as far as to presume a rewrite of succession rules to confer inheritance rights to surviving

spouses regardless of the legal context and the applicable marital regime and the attendant marital consequences as would their respective rights upon death or dissolution of the marriage under the respective proprietary regimes. That assumption and approach would lead to untold risks and consequences in our jurisprudence in the application of the succession rules either in terms of the common law and the Wills Act or intestate succession where a deceased person dies withoult leaving a will.

[18] A question of immediate concern is whether the provision of Section 34(1) cannot be given any effect in the absence of legislation defining what a reasonable provision is or what the purport of the sub-section is.

[19] I think what the present application calls for is a cautious approach that locates the enquiry or issue in the context or matrix of pertinent common law principles, the Constitution generally or tempered by the purport, spirit and object of the section in question. The enquiry necessarily entails an act of discerning the problem or mischief that the Constitutional provision sought to cure as well as the problems it was designed to address. Much of the interpretation also turns on the nature of the constitutional precept inherent in the provision. That is what I shall attempt to do in what follows.

[20] It is important to recognise firstly that the use of the phrase 'entitled to a reasonable provision' in regard to estates first occurs in Section 29 (7) (b) of the Constitution dealing with the Rights of the Child. It is not unique to the section that the applicant has invoked. The relavant portion of Section 29 reads:

" (7) Parliament shall enact laws necessary to ensure that-

(a) a child has the right to the same measure of special care.....;

(b) <u>a child is entitled to reasonable provision oiut of the estate of its parents"</u>

This is one reason that the present enquiry thus necessitates a contextual and textual interpretation of Section 34 (1).

[20] It appears to me that a very likely rationale for the insertion of section 34 (1) in the Constitution was the adverse position of spouses left bereft upon the death of the first dying under the common law where either they are left out of a will of the deceased spouse or ordinarily stand to receive a paltry or no benefit under the rules of succession peculiar to their marital regime with the deceased defining spousal rights. The problem manifests in two situations arising out of the state of the common law prior to the advent of the constitutional provision in consideration. It turns on the first principles in the law of wills.

[21] Firstly it is trite that under the common law a surviving spouse had no right to a claim for maintenance against the estate of the first dying spouse. Although spouses may owe each other a reciprocal duty of support, that obligation comes to an end upon the death of either of them. Secondly, compounding the above situation was the recognition of the right of an individual to freedom of testation. The black letter rule as regards the rights of a testator is that a person has a right to dispose of their assets upon death and that this included the right to nominate beneficiaries to his or her estate in a will to benefit whosoever he or she wishes and exclude or disinherit a family member or even a spouse in so doing.

Fredom of Testation

[22] Naturally this doctrine of freedom of testation and its implications has been a central feature of the parties submissions as advanced by their respective Counsel during the hearing of this application. It has its premis on the right to

protection and power to to deal with and dspose property entrenched in the Bill of Rights.The right to property and protection of its deprivation is guaranteed under section 19 of the constitution in the following terms:

"Protection from deprivation of property

19. (1) ***A person has a right to own property either alone or in association with others.***

(2) ***A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied -***

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; □

(b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for -

(i) prompt payment of fair and adequate compensation; and □

(ii) a right of access to a court of law by any person who has an interest in or right over the property; □

(c) the taking of possession or the acquisition is made under a court order. "□

[24] The cardinal principle on which freedom of testation has been articulated in ***Robertson v Robertson's Executors*** **1914 AD 503 (507)** where the it stated it as follows:

"Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so".

[25] It can be no question that the property clause in Section 19 of the constitution implies and thus entrenches the principle of freedom of testation. In effect it is an all-inclusive guarantee of the right of the person to dispose of his/her own property during that person's lifetime and equally upon his or her death.

Termination of Duty of Support

[26] Another dimension of the doctrine is that our law generally does not prescribe forced heirship or even preclude disherison. As an example, a spouse married by civil rights to another may by will either specifically insert conditions to exclude his or her spouse from benefitting from an estate or leave such spouse out from a list of nominated beneficiaries to the testator's estate or residue whether married in or out of community of property. Consequently where married in community of property the surviving spouse would only be entitled to her share of the joint marital estate. A bereft spouse in an adverse position as when married out of community of property but also excluded from any benefit by a will, had no right of recourse against an estate of the first dying to assert any claims be they for inheritance benefit, support or maintenance. (**See *Glazer v Glazer* 1963 (4) All SA 422 (A))**

[27] The common law position above as highlighted in the *Glazer* case as it applied in South Africa then is similar to our common law situation on the subject in the Kingdom prior to the Constitution. The net effect of the common law was that as no duty of support was owed by the estate of the first dying spouse to the surviving spouse, the latter could not derive any benefit out of the deceased's

estate where legally precluded by the deceased's will from a benefit in the estate even if she was left indigent.

[28] In South Africa the adverse effect of the common law situation was remedied by the promulgation of the ***Maintenance of Surviving Spouses Act of 1991.*** That legislation made for statutory intervention for spousal support in terms whereof such persons may lodge a claim against the deceased's estate for maintenance. This however is not unique to South Africa as that country has followed parallel comparative developments in other jurisdictions such as the example in England where the problem led to the passing of the Inheritance (Provision of Family and Maintenance Act of 1975.

[29] The right to freedom of testation is not absolute. However well entrenched it may be, there are permissible limitations to this right in so far at these may be sanctioned by law be it statutory or the common law as necessary in the interest or morality or where there exists a constitutional limitation or an adverse constitutional imperative which either derogates or impacts such right of power[1]. Of direct pertinence to this case is that Section 34(1) curtails freedom of testation in so far as in reference to the phrase "*whether the other spouse died having a valid will*" in the sense imposes an override to any incompatible provision in a will. It is thus a clear limitation but not exclusion of testamentary freedom.

With this background it is useful to explore the nature and origins of the concept of 'reasonable provision' in relation to estates to further contextualise the use of the term in the Consitution to discern the meaning and sense in which it is used in both the Sections 29 and 34 of the Constitution I have alluded to.

[1] In *The Minister of Education and Another v Syfrets Trust Ltd N O* 2006 (4) SA 205 (C), a testamentary trust provision which set up an educational trust prescribing exclusive eligibility based on a racial and gender criteria was challenged on Constitutional and common law grounds as discriminatory and against public morality and policy. The Court granting the relief ordered the deletion of the words 'but of European descent only' thereby recognizing and limiting the grantors testatmentary freedom.

COMPARATIVE LAW

Reasonable Financial Provision in Estates – The UK and South African Statutory Systems

[30] Although left undefined, the introduction of the term reasonable provision in the Constitution is not unique to our jurisdiction. In the UK it has been integral to a statutory regime of 'family provision' and a recognized departure to testamentary freedom since 1938[2]. That concept as mentioned earlier is the central basis for the South African system of statutory family provision. Common to these systems is the power conferred on the courts, subject to certain conditions and in defined circumstances, to order financial provision in an estate for persons left in straitened financial circumstances; thus alter a testators will or intestacy succession rules to accommodate this remedy. The difference between the UK and South African enactments lies in the broader categories of person or beneficiaries in the former to include spouses or civil partners such as long-term cohabited, children of the deceased and former spouses or civil partners who had not entered into a new marriage or civil partnerships whereas the South African act reserves the remedy for surviving spouses. In both the rationale for reasonable provision derives from the notion that it is necessary that a reasonable financial provision is made in a will or estate of the first dying to cater for the needs of the spouse who has been financially dependent on the deceased at the time of his or her death.

[31] The idea of a reasonable 'family provision' appears to be embraced in the Constitution albeit under different conditions and by different wording in sections 29 and 34 of the Constitution; reference being made to provision for a child under s29 and for a surviving spouse in s34.

[2] The UK in the past enacted the Inheritance (Family Provision Act) 1938 which was subsequently superseded by the *Inheritance (Provision for Family and Dependants) Act 1975.* The latter Act is the one on which the South African Maintenance of Surviving Spouses Act 27 of 1990 was modeled (See Hahlo 327 n16)

[32] A useful and insightful background to the UK statutory system of family provision Is given in Lord Hughes opinion writing for the Court in ***Ilott v The Blue Cross and Others*** [3] in the opening paragraphs of that judgment when he said:

> ***"1. Unlike some other systems, English law recognises the freedom of individuals to dispose of their assets by will after death in whatever manner they wish. There are default succession rules in the event of intestacy, but by definition those only come into play if the deceased left no will. Otherwise the law knows of no rule of automatic succession or forced heirship. To this general rule, the statutory system of family provision imposes a qualification. It has provided since 1938 for the court to have power in defined circumstances to modify either the will or the intestacy rules if satisfied that they do not make reasonable financial provision for a limited class of persons. That power was first introduced by the Inheritance (Family Provision) Act 1938 ("the 1938 Act"). The present statute is the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act").***
>
> ***2. The key features of the operation of the 1975 Act are four. First, it stipulates no automatic provision; rather the will (or the intestacy rules) apply unless a specific application is made to, and acceded to by, the court and a specific order for provision is made. Second, only a limited class of persons may make such an application; they are confined to spouses and partners (civil or de facto), former spouses and partners, children, and those who were actually being maintained by the deceased at the time of death. Third, all but spouses and civil partners who were in that***

[3] *Ilott v The Blue Cross and Others* [2017] UKSC 17 Case ID UKSC 2015/0203.

relationship at the time of death can claim only what is needed for their maintenance; they cannot make a claim on the general basis that it was unfair that they did not receive any, or a larger, slice of the estate. Those three features are laid down expressly in the 1975 Act. The fourth feature is well established by case law both under this Act and its predecessor of 1938. The test of reasonable financial provision is objective; it is not simply whether the deceased behaved reasonably or otherwise in leaving the will he did, or in choosing to leave none. Although the reasonableness of his decisions may figure in the exercise, that is not the crucial test."

[33] The UK act defines reasonable financial provision in relation to two categories of persons: spouses or civil partners on the one hand and other family dependents on the other. Reasonable financial provision is defined by that Act as 'what is reasonable for the claimant to receive, either for maintenance in regard to the latter category of claimants or without that limitation in regard to spouses and civil partners. This makes for an expanded definition of the financial provision available to be claimed by spouses and civil partners to include more than mere maintenance. That expanded or enhanced definition came with legal reform from the 1938 which limited all family provision claims to maintenance.

[34] In ***Ilott*** Lord Hughes continued to explain this distinction thus:

"13. ***This limitation to maintenance provision represents a deliberate legislative choice and is important. Historically, when family provision was first introduced by the 1938 Act, all claims, including those of surviving unseparated spouses, were thus limited. That demonstrates the significance attached by English law to testamentary freedom. The change to the test in the case of surviving unseparated spouses was made***

by the 1975 Act, following a consultation and reports by the Law Commission: Law Com No 52 (22 May 1973) and Law Com No 61 (31 July 1974). The latter report made it clear that the recommendation was designed not to introduce, even in the case of surviving present spouses, a general power to re-write the testator's will, but rather to bring provision for such spouses into line with the developing approach of the family court. That court had by then relatively recently acquired expanded powers to make lump sum and property adjustment orders, which were not limited to maintenance provision but increasingly recognised other factors such as the length of the marriage, the contributions to the family and so on (see section 25 Matrimonial Causes Act 1973). The mischief to which the change was directed was the risk of a surviving spouse finding herself in a worse position than if the marriage had ended by divorce rather than by death. For claims by persons other than spouses the maintenance limitation was to remain, and has done so. See in particular paras 14, 16, 19 and 24."

(my underscore)

[35] Conceptually the nature remedy availed to surviving spouses under the South African Maintenance of Surviving Spouses Act 27 of 1990 is such that it similarly limits testamentary freedom by enabling a claim for financial provision from the estate of the first dying. A notable difference between the UK and the South African situation lies firstly in that the latter confines the claims for the benefit of spouses and does not include civil partners. Secondly and significantly for the purposes presently, under the South African Act the claim is limited to maintenance. That said that only speak to the scope rather than the inherent principle of what constitutes a

'reasonable financial provision'. These differences are matters of evolving policy objectives that are considerations for the Legislature.

[36] Ultimately the premis of section 34 (1) read in context and with due regard to the origins and evolution of the concept reasonable provision as a recognised policy departure from or limitation to the testamentary freedom and intestacy succession rules has to be this – that in defined circumstances it is desirable that a surviving spouse or civil partner (in so called civil partnerships) has an enforceable right to claim an adequate financial provision or allowance from the estate of the first dying. The enforcement of that right would entail, as a consequence, the inevitable modification of either a will or applicable intestacy succession rules where either the will or those rules do not afford a reasonable financial provision to accommodate such a claim. In this sense is a constitutionally sanctioned departure from testation or intestacy rules and in this sense a permissible limitation to testamentary freedom.

[37] Plainly speaking by virtue of section 34 (1) the question posed by the Court in the Ilott case is ever more relevant. It involves a two-fold enquiry. You must ask whether (1) there has been a failure in the will or the rules of testation to make a reasonable provision; and if so (2) what order ought to be made in determining a reasonable provision.

THE WILL

[38] The deceased will purports to preclude the applicant from benefitting in any manner whatsoever from the Estate of the deceased. However this much is clear: the applicant does not attack the will on grounds of an internal defect deficiency or the irregularity (e.g. non compliance to the Wills Act) but by virtue of the insertion of an express clause therein which is repugnant and inconsistent with Section 34I(1) of the Constitution in so far as it specifically excludes the

applicant as the deceased's spouse from deriving any benefit from the Estate. By virtue of the applicant's purported disherison in the decesased's will, this application seeks the entire will be declared unconstitutional. I assume as I have stated that this is short hand for having it declared a nullity and accordingly set aside. A second part of the sought relief that the applicant presumes the net effect of the sought declarator is that, by direct application of the said section in the constitution, the applicant ought to be declared entitled to a reasonable share in the estate.

[39] Put in simpler terms the principal cause of complaint articulated in the Applicant's papers is her disherison from the estate by virtue of the identified offending clause in the will (Clause 7.6). It is this clause, it was argued is repugnant and inconsistent with the above-cited sub-section of the Constitution which, as is further contended, renders the will 'unconstitutional'. It is notable that the applicant does not isolate the complained-of clause in the will in the declarator she seeks. On the contrary she appears to seek a general declaratory order that the will be found unconstitutional in its entirety.

[40] Incidentally it is indeed anomalous in the manner the Notice of Application is formulated that the applicant makes no direct prayer for the setting aside of the will, although her Counsel - Mr. Magagula - submitted this was an implicit and necessary consequence of Prayer 2 in the Notice of Motion. I do not agree. Prayer 2 is qualified in that the primary ground for declaratory order is "*in so far as (the will) is not consistent with Section 34(1) of the Constitution*". But a declaration of inconsistency on its own can be no complete relief if no consequential remedy acompanies the declarator. This was not placed in contention by the Respondents counsel and for that reason I am prepared to

assume that the setting aside of the will is part of the desired relief implicit in the application.

[41] From the papers the focal offensive provision in the will seems to be specifically the said clause 7.6 thereof despite that the applicant is not seeking targeted relief e.g to have the identified offensive clause set aside, excised or declared as as if *pro-non-scripto* on account of its alleged inconsistency with the Constitution. This may appear the thin edge of the wedge but it is a point of significance for reasons as shall be examined further here in the remedial aspect of this judgment.

[42] From her founding papers it appears the upshot of the applicant's case is that by virtue of Clause 7.6 of the will it is rendered invalid in its entirety and consequently the object of the application is to declare the will a nullity with the effect that the deceased be deemed to have died intestate. I think this misconceives and overstates nature of the inconsistency or alleged 'violation'.

[43] This becomes self-evident in regard to paragraph 11 of the applicant's founding affidavit from which appears the principal basis for the *declarator* as described by in the applicant's own words; in it she states her propostion thus:

> "***11. A testator is enjoined to bequeath a reasonable share to survival spouses, so in case I am entitled to inherit and benefit from the deceased's estate by virtue of my capacity as a surviving spouse duly married in terms of Swazi Law & Custom. I am also entitled to benefit from the estate by virtue of my contribution on the establishment of the family businesses. The testator has no right to disinherit me and the other wives and his children from the estate.....***"

[44] Further at paragraph 17.1 again the applicant makes the following assertion on which the sought relief is firmly premised.

> "***17.1 it is trite law that a surviving spouse is entitled to inherit from the estate of the deceased. This is by virtue of being legal wife and biological children. This is a question of law and the court can determine same without further ado. <u>As a wife to the deceased, I am entitled to a reasonable share of the estate".</u>***

THE APPLICANTS CASE

[45] The crux of the application is whether the interpretation that the Applicant seeks to give to Section 34(1) of the Constitution, namely that by virtue of this section all surviving spouses are entitled to claim a share in the estate or inherit automatically from the estate of first dying is legally sound or sustainable.

[46] As stated the contesting positions between the applicant and the 1st Respondent are that the former contends that the proper construction to be given to Section 34(1) is that it confers a right on a surviving spouse to claim a share in the estate of the first dying and that in effect it is an override to any testamentary disposition of any default intestacy rules of succession. It was therefore contended by her Counsel that ensuring a 'reasonable provision' should be construed as granting the surviving spouse a right to a share in the estate of the first dying.

[46] On the On other hand the 1st Respondent contends that the wording of Section 34(1) cannot be given such a overeaching and broad interpretation in that such a construction would adversely detract on a constitutionally protected right to freedom of testation and protection of rights enshrined in the constitution.

[47] For the reasons I shall set I am not persuaded that the applicant has demonstrated any rational basis, nor is her proposition apparent from a proper consideration of Section 34(1) in supporting of the interpretation to the effect that by "*reasonable provision*" is meant a share or inheritance.

[48] The first reason is as stated earlier is that in fact the use of the phrase "*reasonable provision*" in the constitution is not unique or confined to Section 34 in so far as it also appears under Section 29 (7)(b) in reference to protection of the rights of the child. The only distinction is that Section 29 (7) is merely prospective in that it is only a directive to Parliament to enact laws necessary to give effect to that policy directive as opposed to an outright and affirmative declaration, or guarantee of a right to such "*reasonable provision*" as expressed in Section 34 (1) (b). What is clear in both provisions is that the framers of the constitution were directing their minds to the notion of a statutory system for financial provision to cater for the needs of the identified categories of persons in estates of a deceased person on whom the claimants were dependant. These interventions are aimed at constitute modifying to the rules of testate and intestate succession to the stated ends.

[49] With the contextual background, I deal with elsewhere my considered view is that the only reasonable construction to the provisions of Section 34(1) is that it confers or considers a right on a spouse in adverse circumstances to claim maintenance or support against the estate of the deceased or first dying spouse – thus altering the common law position precluding a spousal maintenance claim upon death.

[50] I must add that within the scheme and wording of the section it becomes clear that Subsection 2 is of general application and as opposed to the specific wording and purport of the first subsection in that it envisages Parliament enacting a law prescribing the parameters of what a reasonable provision or allowance would be as apart from the more articulate provision for legislation to regulate proprietary

consequences of spouses or partners in unmarried long-term co-habitation relationships (or life partnerships).

[51] Is the invoked section susceptible to direct application? In my view the answer to the question as to the Courts jurisdiction to grant relief and give effect to Section 34(1) (as a provision conferring a justiciable right) is affirmative. I think there is a material distinction in the form of the nature of the declaration of the right conferred in Section 34(1) of the Constitution in so far as it gives rise to an expectation of a justiciable right capable of vertical and horizontal direct application at the disposal of the surviving spouse. I incline towards the view that the purport and effect of that subsection stands on a different footing in its wording to that of Section 29 (7) (b) in the Constitution delaing with the rights of the child. In its formulation Section 29(7) (b) merely gives a directive to Parliament 'to enact laws necessary to ensure that a childs is entitled to reasonable out of the estate if its parents. In contrast the language of S34 (1) is more robust is so far as it expressly affirms a right for the surviving spouse to a reasonable provision in the estate of the first dying. The difference in the language and effect could not be more stark. That is the reason I also incline towards the view that s34(1) creates a justiciable right susceptible to direct application not contingent on the enactment of legislation for its existence. There lies the critical difference.

[52] That said it is desirable that Parliament enact comprehensive legislation for the realisation of the objectives and directives of both sections 29 and 34 to facilitate these ends; to create an enabling legilsative framework and in that way comply with the constitutional directives. The evolution of the English system that enables 'family financial provisions' in estates is an example or model of a broader statutory regime. However that is the exclusive reserve for Parliament. For purposes presently I am of the view that in the interim the language of section 34 (1) confers and gives rise to an expectation of an enforceable. To that end pending the enactiment of the expected legislation surviving spouses should be enabled, in appropriate

circumstances, to bring claims for a reasonable financial provision for their maintenance from the estate of the first dying spouse.

[53] As stated earlier, this is not a matter concerning the validity of the will. It is conceivable that a will may be legally valid, but still be deficient insofar as it does not accommodate a reasonable financial provision for the surviving spouse[4].

[54] Regardless of the offensive clause 7.6 that purports to exclude any but all benefit to the applicant and the other wives from the estate, the deceased's will would still suffer from a similar deficiency and would run still afoul of section 34(1) of the Constitution. It stands to reason therefore that even if in the final analysis, it is found to be valid, it would have to yield to the applicants right, as the surviving spouse, to assert a claim for a reasonable financial provision out of the deceased estate.

[55] A comparable scenario is where the deceased dies intestate (without a leaving a will) and when the application of the rules of intestate succession under the relevant marital proprietary regime adopted by the spouses, would result in an expectation of a benefit that does not adequately meet the surviving spouse's financial needs. In that situation concept of a reasonable financial provision may give rise to a claim by the surviving spouse to augment his or her means. In such instances the application of the default succession rules would also fall short of providing a reasonable provision. That is precisely the circumstances when on a proper interpretation of section 34 (1) necessitates a modification of the rules of intestate succession. [footnote S34 (1)]. That however, is by way of slight digression from the issues before.

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[4] This is implied by the wording of S34(1) in the use of the phrase "whether the spouse died having made a valid will or not"

[56] As the present enquiry arises in consideration of the deceased will, the proper approach defines the issue as an interpretation of section 34 of the Constitution to discern the extent to which it may or not address the mischief contemplated by the provision. In this regard the will's deficiency in failing to accommodate the applicants reasonable financial provision is obvious. This is on account of the the express exclusion of any benefit to the applicant in clause 7.6 and inevitably in leaving out the applicant as a beneficiary in the said estate, That is the heart of the problem before us.

[57] In sum I am of the firm view the effect of Section 34(1) is to render a claim for maintenance permissible under the constitution provided the bereft spouse brings such an application and can show the existence of need for such support – thus the constitutional provison it would provide an override to and the setting aside of any clause in the will of the first dying that purports to make a blanket exclusion of the applicant from receiving any benefit under the will as it purports to. It therefore creates a right to the surviving spouse to seek a 'reasonable provision' for his or her upkeep from the estate of the first dying.

[58] In the absence of definitive legislation directly addressing the modalities and criteria to guide what is a reasonable provision in spousal maintenance in my view such legislation would seem to only have regulation utility. Had surviving spouse's right to maintenance been availed by the common law, it would only be a matter of procedure and how such claims would be brought and dealt with by the courts. The absence of specific legislation should not therefore leave spouses in need of support without a remedy in the face of the right being protected and afforded by the Constitution. It is for the courts to seek to give effect to the right to a reasonable provision in estates of the first dying spouses for the surviving spouses. There is no reason why such persons cannot merely lodge their claims against an estate on a

demonstrable need and means test considered against what is reasonable possible to be catered for from the resources of the deceased's estate.

THE REMEDY

[59] In effect, is my considered view therefore that in the contestation of interests, that of the surviving spouses in the form of their claim for a reasonable financial provision in the estate ranks with that of the heirs and legatees nominated in the will; provided the will is valid or viable at all once that reasonable provision is determined and put aside for the claimants. It may well be that in the end the latter part of the enquiry to do with the status of the will as to its efficacy in practical terms, are matters that the court might have to determine in the conduct of the main application.

[60] A possible scenario may arise where the settlement of the status issue would yield the result that the will is either invalid or ineffectual or fails in the sense that it is impossible to execute the bequests in respect of specific assets and or benefits when taking into account the reasonable provision allowance – in either case it may well be that the default position would be the application of intestate succession rules. In the latter scenario where the surviving spouses would be entitled to a share in the estate in terms of the marital regime and this constitutes sufficient own resources or means for her financial needs, then in my view the need for a 'reasonable provision' could in that case fall away depending on the expected benefit – thus the question may become moot and there would be no need to invoke or apply the section[5]. However I must hasten to add that these are not matters that fall for adjudication before this court hence they remain extant in the main application.

[61] All said ,it is clear that although the right to claim a reasonable financial provision is not contingent upon the enactment of legislation, it is clear that the drafters of the Constitution envisaged Parliament passing appropriate legislation creating a statory

[5] A claim for reasonable provision implies not only that the applicant was dependent on the first dying spouse for his or her financial security but also on a proven need on account of insufficient means.

framework addressing the appropriate mechanism or system to set out the criteria and procedures for the determination of such claims. Within the fold of section 34(2) it is evident also that the Constitution left open the scope of such legislation to cover various categories of claimants including what is termed common-law husband and wives[6].

[62] That right to assert a claim for maintencance is however is not what we are called to do in this matter nor are we called in that regard to declare the offending clause inconsistent with the Constitution and specifically set it asde; i.e., to declare Clause 7.6 incompatible or repugnant to Section 34(1); but to set aside the whole will in its entirety. In my view that is not a competent outcome and for that reason the application as presently framed is flawed. In this regard I find the relief claimed is misconceived.

[63] I am mindful that the specific general relief Applicant prays for is the setting aside of the will as a whole, however one cannot be oblivious of the essence or the nub of the matter. The situtation requires taking into account the real cause of the complaint that has led to these proceedings and also that the applicant has prayed for any 'further or alternative relief the court deems meet in the circumstances. This can only be on certain conditions where further relief is warranted. The principle which is equally recognised in this jurisdiction is that a prayer for further and alternative relief which is often stated as a default position by a party to justify an order in such terms that have not been set out in the notice of motion, will only be granted only where the basis for that alternative relief is well established on the papers.

[64] In ***Geza v Minister of Home Affairs and Ano.*** **[2010] ZAEGHC 15 (22 February** 2010) at para [12] held:

[6] This is reference to the vexed question involving co-habiting civil partners who otherwise have had to resort to remedies such as the doctrine of tacit universal partnership to secure their proprietary interest in the event of termination of their relationships upon death of their partners.

"...whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the applicant in her founding affidavit and is consistent with the primary relief claimed.4 In Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd, Coetzee J described the prayer for alternative relief as being 'redundant and mere verbiage' in modern practice adding that whatever a court 'can validly be asked to order on papers as framed, can still be asked without its presence' and that it 'does not enlarge in any way "the terms of the express claim" as pointed out by Trindall JA' in Queensland Insurance Co Ltd v Banque Commercial Africaine."

(sans footnotes)

This is one matter that cries out for this Court to apply these principles to grant the sort of relief that will yield a just outcome and give succour to the Applicants underlying cause of complaint. On the face of it the will creates the very mischief the Constitutioin sought to avert. Its purported exclusion of the deceased's wives from benefitting from the estate whatsoever and deliberate disherison from the estate offends against the provisions of Section 34 of the Constitution in a manner that warrants to intervene. Otherwise the Applicant would be left without due recourse.

SUMMARY AND DISPOSITION

[65] In summary the main consideration before us has to be that the term 'reasonable provision' is a concept related to financial security and may be defined as the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future. This concept is discrete from an inheritance benefit that derives either from a will, or the application of the default intestate

succession rules relative to the existing spouses' marital regime leading to the death of the first dying.

[66] A direct application of section 34 of the Constitution involves an inquiry as to whether the will (where applicable as in this case) or where the deceased died intestate, the intestate succession rules, leaves or permits a reasonable provision for the financial needs of the applicant. In the instant case, it goes without saying that the deceased's will purports to expressly exclude the Applicant and the other wives from any benefit from the estate and in effect to deny her the right to a reasonable provision claim as conferred by the section. Even without the express exclusion posed by Clause 7.6 of the will it fails to meet the test in that it fails to make a reasonable provision for them.

[67] In such circumstances, it should be competent and necessary for the court in the main matter to intervene and make an appropriate order giving substance to the rights conferred in terms of section 34. That will depend to some extent on the status of the will, and consequently, the application of the default intestate succession rules in the event the will is found to be invalid.

[68] In my view the appropriate remedy that this Court can and ought to make as a direct application of the rights conferred by Section 34 of the Constitution translates to a declaration that - regardless of the devolution of the assets in the estate (either under the will if it is found to be valid, or legally ineffectual and therefore not capable of performance) or by default intestate succession - she is entitled to claim a reasonable financial provision from the estate. In the final analysis that claim will entail demonstration of financial need and the computation of a reasonable maintenance to cater for her immediate and future needs. This aspect, much like the status of the deceaseds will under consideration, involves issues which fall for adjudication by the Court in the main application. For this Court as presently constituted it would be both premature and inappropriate to pronounce upon these questions.

[69] The stated object of the application is to defeat the offensive consequence of clause 7.6 of the will purporting to preclude her from benefiting from the estate but that is not all. It is also quite clear that main intent is to give effect to the invoked constitutional clause. No doubt having considered the relief she has sought and for the reasons I have given, I am equally satisfied that the construction of the invoked constitutional provision that she seeks to rely on has no merit. At best the provision enables or entitles her as a surviving spouse to bring a reasonable provision claim against the estate of the first dying and to have the clause contained in the will set aside by virtue of its repugnance to Section 34(1) of the Constitution. As I have said I do not think the effect of that provision is to render the will liable to be set aside in its entirety but rather the offending clause for its incompatibility with section 34(1). That is an order consistent with the pith of the dispute that has been referred to this court for consideration.

[70] In the result and in the peculiar circumstances of this matter an appropriate order that this court ought to make is the deletion and setting aside of the said clause 7.6 of the will as *pro-non scripto* and for a declaratory order that the applicant is entitled to bring a claim against the estate for a reasonable allowance for her maintenance from the deceased's estate and unequivocally declare the will to be deficient in that it fails to make reasonble provision for the surviving spuses of the deceased. The validity or efficacy of the will and or the applicatioin of the appropriate succession rules are matters for adjudication of the Court in the main application or litigation between the parties. In the result it is therefore ordered as follows:

Order

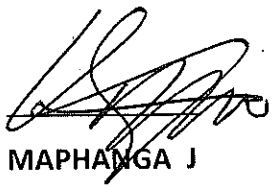
Appearances:

For the Applicant:	**Mr. K..Q. Magagula** Sithole & Magagula Attorneys 6th Floor Office No. 66 Mbandzeni House, Libandla St. MBABANE.
For First Respondent:	**Mr M. Magagula** Zonke Magagula & Co. c/o Dunseith Attorneys 1st Floor Lansdowne Hse Dabede St. MBABANE
For 3rd and 4th Respondent:	**Mr. M. Khumalo** Khumalo Attorneys Madlenuya House Cnr Mdada & Gwamile Sts MBABANE.
For 5th Respondent:	**Ms T. Hlabangana** Hlabangana & Associates c/o M.P. Simelane Attorneys Lot 465 Samora Machel St, MBABANE.

1. **Clause 7.6 of the will of the Late Sikhakhane Alfred Dlamini purporting to preclude the applicant and the other named spouses from deriving any benefit from the estate, is hereby declared incompatible with Section 34(1) of the Constitution and accordingly set aside as being of no legal force and effect; It is further declared the will fails to make reasonable provision for the surviving spouses.**

2. **The applicant is entitled to claim reasonable provision for her maintenance as a surving spouse of the deceased from the estate;**

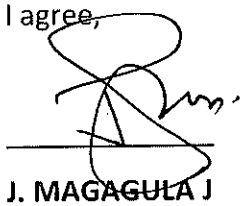
3. **Costs of this application shall be borne by the deceased's estate.**



MAPHANGA J

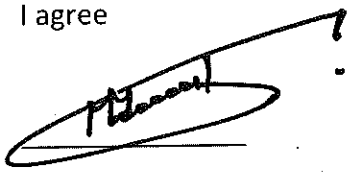
JUDGE OF THE HIGH COURT

I agree,



J. MAGAGULA J

I agree



N MASEKO J

JUDGE OF THE HIGH COURT