

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 2507/2023

In the matter between:

SIKELELA MVUBU

FIRST APPLICANT

ALISON GAMEDZE

SECOND APPLICANT

SIMPHIWE GAMEDZE

THIRD APPLICANT

And

PHUMZILE BUSIE GAMEDZE

FIRST RESPONDENT

BONGANI GAMEDZE

SECOND RESPONDENT

BANELE GAMEDZE

THIRD RESPONDENT

SANI MACHAWE GAMEDZE

FOURTH RESPONDENT

SITHOBELA HEALTH CENTRE

FIFTH RESPONDENT

THE NATIONAL COMMISSIONER

OF POLICE

SIXTH RESPONDENT

ATTORNEY GENERAL

SEVENTH RESPONDENT

Neutral citation : *Sikelela Myubu & 2 Others v Phumzile Gamedze & 6 Others (250/2023) [2023] SZHC (11/12/2023)*

CORAM: B.S DLAMINI J

DATE HEARD: 23 November 2023

DATE DELIVERED 11 December 2023

Summary: *Declaratory and Interdict Relief-Parties contesting burial rights of deceased' relative. Dispute between parties centred around customary law-Family Council ought to resolve dispute failing which dispute must be referred to traditional authorities who are in charge of deceased and his family.*

Held; *Dispute referred to deceased's family council failing which matter must be reported to relevant Chieftdom for resolution.*

JUDGMENT

INTRODUCTION

- [1] At the heart of the dispute between the parties hereto is a determination of who, amongst the feuding parties, has the burial rights over the deceased, who passed away around the month of October 2023.
- [2] Applicant alleges in his Founding Affidavit that the deceased, one Julius Makhundu Gamedze is his brother and that the deceased passed away on the 1st October 2023 at Sithobela Health Centre in the Shiselweni Region.
- [3] It is Applicant's assertion that the deceased was married to the First Respondent in accordance with Swazi Law and Custom in the 1980's. The contention by Applicant is that First Respondent ill-treated the deceased immensely and further exiled him from his homestead at Ka-Mkhweli area around the year 2012. In exiling the deceased, the First Respondent is said to have been assisted by first, second and third Respondents who are the biological children of the couple (First Respondent and deceased).

[4] The allegation by Applicant is that having been ejected from his home by the Respondents, the deceased went to establish his second home at Lukhetseni area at Madlenya, under the same Chiefdom of Ka-Mkhweli. During this time, the deceased had gotten married to one Dumsile Mango who unfortunately died after one year of meeting her husband (“the deceased”).

[5] The allegation by Applicant is that the deceased had reported his matter (involving himself and the First Respondent) to the Ka-Mkhweli Chiefdom as well as the police but did not get any assistance from these two forums.

[6] In Applicant’s own words;

“[6.9] He [deceased] then made a vow and told me that he has given up about his homestead and the 1st Respondent. He told me that when he die [dies], he does not want the 1st Respondent next to his corpse and in actual fact does not want the 1st Respondent to attend his funeral and burial...

[6.12] My late brother told me that he wants to be buried next to his mother at Phuzumoya area at eDamu Ka-Mkhweli Royal Kraal.”

[7] In essence therefore, Applicant’s prayers before this Court are *inter alia* that;

(a) The deceased must be buried at Phuzumoya area at his maternal grandparents’ home, Ka-Dlamini and not at Ka-Mkhweli area where his first family home is based.

(b) The First to Fourth Respondents be restrained from interfering in anyway whatsoever with the burial arrangements of the deceased at Phuzumoya area.

(c) That the First to Fourth Respondents be interdicted from causing any violence or disruptions in the burial arrangements of the deceased.

[8] In answer to the relief sought by Applicants, the Respondents have raised preliminary points *in limine* and also replied to the merits of the matter. The points *in limine* are that;

(i) The Applicant has no *locus standi* to bring the application before Court because he is in no way related to the Gamedze family.

(ii) Applicant has failed to meet the requirements for the granting of an interdict.

[9] On the merits, First Respondent vehemently denies that she had been ill-treating her husband in anyway or that she chased him away. According to First Respondent;

“[16] The contents hereof [relating to the chasing away of deceased from his home] are vehemently denied and applicant is put to the strict proof thereof. It is specifically denied that my sons and I at any point in time resolved and resorted to chasing their father away. The late Babe Julius Gamedze, like any other traditionalist, fell in love and resorted to start another family as a polygamous man. In

terms of our customary law, such practices are allowable. In the main, men at the advanced age as my husband would spend most of their time with the younger wife as she is called "*indlu yekugugela*".

ANALYSIS AND FINDINGS

[10] Litigants that come before Court for dispute resolution ought to appreciate and understand that each and every matter that comes before Court is made up of (a) the admitted facts; (b) disputed facts and (c) the law applicable to the facts. Any legal remedy sought by an Applicant must be supported by the applicable law.

[11] The Respondents have raised an issue that Applicant is unknown to them and is not related to the Gamedze family. The Court also notes that Applicant has used a 'Mvubu' surname yet the deceased has a

'Gamedze' surname. The Court will assume that the Applicant is a

half-brother to the deceased, having been born of the same mother. It

may be for this reason that Applicant wishes that deceased be buried at his maternal grandparents' home at Phuzumoya. This assumption is

supported by paragraph (8) of Applicant's Founding Affidavit in which it is alleged that;

"It is mu [my] humble submission that in actual fact it had been agreed between the families that my brother be buried next to our late mother at our maternal grandmothers' place."

[12] In applying to Court to have the deceased buried at his maternal grandparents' home at Phuzumoya, it was incumbent upon Applicant to assist the Court with the relevant law, be it civil law or customary law, upon which the relief sought is founded.

[13] In the Court's view, this matter or dispute requires a strict application of customary law. Customary law dictates that in matters of this nature, the families involved must, as a matter of principle and practice, convene a meeting in which all the elders of the families will be present and whose mandate is the giving of guidance and advices in the resolution of the dispute. This meeting, usually held at the traditional family Parliament (Endlini ka-Gogo) is compulsory and must be convened by the families' even before taking the matter to external dispute resolution structures.

[14] The practice of rushing to Court without properly following internal family dispute resolution mechanisms must be emphatically discouraged and rejected. This is purely a private family dispute. How is this Court expected to intrude or poke its nose in this matter and give directions to the family on how and where their loved one is to be buried? The mere fact that the family members are not on talking terms or failing to reason with each other must not be used as leverage to bring the Court into the private affairs of the family.

[15] The Court notes that according to Applicant, a family meeting was held and it was agreed between the families that deceased be buried next to his maternal grandmothers' place at Phuzumoya. This allegation is denied by the Respondents. The Court is also not convinced that such meeting was properly convened or that such meeting was attended by all relevant stakeholders, especially the elders in the family. The meeting must be properly convened and, if need be, must have minutes which spells out the date, place of meeting, names of attendees, discussions and resolutions taken.

[16] This being a matter involving customary law, it is only once the family council has deliberated on same and having failed to come to a general consensus that the matter can then be taken to the relevant Chiefdom to be deliberated upon by the Inner Council or *Bandlancane*. The deceased had a Chiefdom which he was falling under. Every Liswati has a Chiefdom and the deceased is not an exception. It is the Chiefdom which the deceased was falling under that has an obligation to resolve this dispute, that is, if the family is unable to resolve same on its own and needs outside help.

[17] In **Michael Cindzi & Another v The Ministry of Housing & Urban Development & 9 Others (925/2016) [2017] SZHC 227 (30 October 2017)**, Mamba J (as he then was) stated that;

“[3] This is essentially a family dispute. It involves compensation that is due to the family over fixed property or land situate on Swazi Nation Land...

[9] In a long line of cases before our Supreme Court and this Court, the courts have consistently held that these courts have no jurisdiction over matters pertaining to the rights of

persons over Swazi Nation Land. Such jurisdiction rests with the applicable local or traditional authority. In this case, that authority is the Masundvini Royal Residence.

(See the case of Phildah Khumalo v Mashovane Khumalo, Civil Case 2023/2007, which was cited with approval by Mlangeni J in Case 1523/2015 above).”

[18] In another case of Elcan Dlamini v Dan Dlamini and Others (4209/09) [2012] SZHC 69 (13th 2012), (dealing with a family dispute over use of land situate on Swazi Nation Land), the Court stated that;

“[22] Whatever the motives of his purported distribution, it is certain that the reasons he put forth as entitling him to distribute the fields are not good enough. The family Council had specifically directed that the situation as had prevailed under their mother had to be maintained until

such time they had appointed an heir or *inkhosana*, which they undertook to do at the right time whatever that meant.

[23] In my view it was incumbent upon the 1st Respondent to report whatever developments he was observing which he

considered to be threatening or to be against the decision of the Family Council. It certainly was not open to him to act in the manner he did and I have no hesitation that his actions have only worsened the situation as opposed to resolving it.

[24] It could be that the Family Council took a long time to resolve the matter but again it did not authorize him doing what he did as it was unlawful. If the Family Council was itself failing in its duties, I am advised that should have been reported to the next level which is the Umphakatsi. The assessors inform me that the latter structure has the power to order or direct the Family Council on what to do.”

[19] The issues of whether the deceased deserted his first family and the

determination of where he is to be laid to rest are all matters resting

squarely within the family council. This is so because a determination

of rights enjoyed by persons married in terms of customary law and

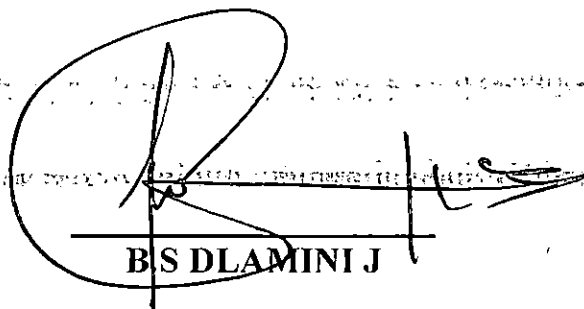
living in a Chiefdom falls under a traditional system of dispute

resolution.

[20] To avoid any confusion, Applicant is part of the Gamedze family because the deceased and Applicant share the same biological mother. All the affected family members must avoid raising issues that will stifle resolution of the matter even further.

[21] In the circumstances, the Court hereby issues orders as follows;

- (a) **The dispute between the parties is hereby referred to the Family Council for urgent resolution.**
- (b) **In the event that the Family Council is unable to reach consensus, the matter is to be immediately reported to the relevant Chiefdom for resolution.**
- (c) **Each party shall pay his or her own costs.**



BS DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicant:

Attorney Mr. O. J Nzima

(Nzima & Associates)

For 1st-4th Respondents:

Attorney Mr. M.T.M Ndlovu

(MTM Ndlovu Attorneys)