

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Civil Appeal No.46/2003

In the matter between

JABULILE THOBHI DLAMINI Appellant

Vs

SIPHO DLAMINI Respondent

Coram LEON, JP

STEYN, JA

ZIETSMAN, JA

JUDGMENT

STEYN, JA

This matter came to us on appeal from the High Court - Shabangu, A.J. presiding. That Court had granted the respondent an order in the form of a permanent interdict in the following terms:

"Directing the 2nd respondent to exclude the 1st respondent from benefiting from the estate of the late Mpendulo Nicholus Dlammi,"

2

When the matter was called, the respondent who appeared in person, asked for a postponement so that he could obtain legal representation. (He had also been unrepresented at the hearing in the Court a quo.)

We were prima facie of the view that there were disputes of fact which were not capable of resolution on the papers. It was also clear that the Judge a quo had made factual findings not justified on the papers before him. He had moreover made findings on most important questions of Swazi Law and Custom without the benefit of expert evidence or any submissions on the law by either party. We therefore suggested that the matter should be referred to the High Court for oral evidence and, in so far as necessary, legal argument.

Both parties readily agreed that such an order should be made. Indeed, we are satisfied that if justice is to be done to both parties, evidence should be adduced at least on the following issues raised on the papers before us; viz:

- 1.1 Does the applicant have locus standi to institute these proceedings?
- 1.2 What is the marital status of the appellant?
- 1.3 Does Swazi Law and Custom apply in determining the issue raised under par. 1,2 above?
- 1.4 If so, what are the relevant provisions of Swazi Law and Custom that apply to the resolution of the disputed issue.
- 1.5 Any other issues of fact which the parties wish to submit to the Court in amplification of, or additional to the above. Notice of such additional issue(s) is to be furnished by the party concerned

within 6 weeks of the delivery of this judgment by filing these with the Registrar and by service on the other party.

2. Should it be contended by the respondent (the applicant in the Court below) that the Administration of Estates Act 1902 does not apply to the administration of this estate, legal argument on this matter should be presented to the Court hearing the matter. The Master should also be called upon to submit his views on this issue to the Court.

3. The matter is to be heard by a Judge of the High Court other than the Judge who heard and decided the application in the Court below. I say this because of the decisions the Judge a quo made on most of these issues without the benefit of undisputed evidence or legal argument.

4. The costs of the hearing in the Court a quo and on appeal are reserved for determination by the High Court.

5. It is ordered that the appeal is upheld. The order of the High Court is set aside and the above orders substituted therefor.

DELIVERED IN OPEN COURT THIS...18th .DAY OF MARCH, 2005

J.H STEYN, JA

I AGREE

R.N. LEON, JP

I AGREE

N.W. ZIETSMAN, JA