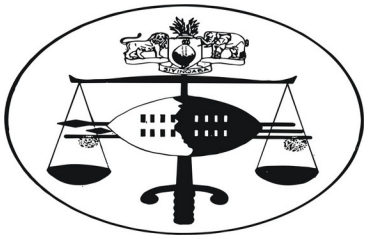

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 21/2011

In the matter between

ELIJAH MATSEBULA **1st Appellant**

SIBUSISO MATSEBULA **2nd Appellant**

and

CEBSILE MATSEBULA (Born Hlophe) **Respondent**

Neutral citation: *Elijah Matsebula v Cebsile Matsebula* (21/2011) [2012] SZSC 18 (31 May 2012)

Coram: RAMODIBEDI CJ, MOORE JA and DR. TWUM JA

Heard: **14 May 2012**

Delivered: **31 May 2012**

Summary: Marriage under Swazi law and custom, death of husband, respective rights of surviving spouse and family of deceased, grant of Letters of Administration to surviving spouse appointing her executrix dative, wilful refusal of deceased's father and brother to deliver part of deceased's movable assets to the surviving spouse, authority to control and administer such estate, liability of persons in wrongful possession of deceased's assets under s.41 of the Administration of the Estates Act 28/1902.

TWUM J.A.

[1] This is an appeal from the judgment of Ota J. sitting at the High Court, Mbabane, given on 3rd June 2011, whereby she ordered the appellants to deliver to the respondent the movable assets she enumerated in the motion paper reputed to form part or belonged to the estate of the deceased which they had wrongfully refused to deliver to her possession.

[2] By Notice of Motion filed in the High Court on 9th January 2010, the applicant, (hereinafter the "respondent") applied for an order of the Court directing the respondents (hereinafter "the appellants") to restore to her, possession of certain movable properties listed in the motion which she claimed they had wrongfully dispossessed her of and appropriated to their own use.

[3] In her founding affidavit, the respondent explained that she was the surviving spouse of one David Vini Matsebula, to whom she was married in May 2007 under Swazi law and custom. She stated further that her said husband died on 27th September 2007 and that the first and second appellants were her deceased husband's father and brother, respectively. There were no children of the marriage; she claimed she was the sole heir and beneficiary. In due course she said she was granted Letters of

Administration and appointed executrix of the estate of her deceased husband. When she embarked on the process of collecting the estate she came up against stiff opposition from her husband's family. She was harassed and intimidated by the appellants to share the deceased's estate with them. They also tried to withhold some of the assets from her. One of their main grievances was that she had been paid considerable sums of money in respect of the deceased's pension, gratuity and bank balance at the date of his death. She alleged that the appellants refused to account to her in respect of the deceased's cattle. When the appellants remained obdurate and she could no longer endure the machinations of the appellants, she went to court for appropriate relief.

[4] In their answering affidavit, the appellants denied that they had dispossessed the respondent of any movable assets belonging to her deceased husband. They claimed that whatever assets they had in their possession and control either did not belong to the deceased at all, or else, as in the case of the motor vehicles, some were purchased by the deceased but for the use and benefit of the Matsebula family. Further, they claimed that the deceased never owned the cattle which had always been kept at a different homestead managed under a sisa agreement. Finally, the appellants accused the respondent of failing to complete the performance of

her widowhood rites and presumably therefore she was not entitled to the deceased's estate.

[5] Judgment of the Court a quo

After a very careful and fair analysis of the affidavit evidence of the parties and the legal submissions contained in their respective heads of argument, the learned Judge gave judgment for the respondent and ordered the appellants to deliver to her the assets listed in the motion paper.

These were:

(i) Isuzu KB 280D car

(ii) Nissan 1996

(iii) Nissan 1984

(iv) Isuzu KB 280 L.D.V.

(v) Fassey Ferguson Tractor

(vi) Herd of 20 cattle

She also ordered the appellants to pay the costs of the respondent.

[6] Appeal to this Court

The appellants, being aggrieved and dissatisfied with the judgment of the court a quo, appealed to this Court on 3rd June 2011. They noted the following grounds of appeal:-

(i) The Court erred in making a finding that there was not (sic) possible dispute of fact on the question of ownership.

(ii) The Court erred in making a finding that the property in question belonged to the deceased estate in the light of the averments in the affidavit.

(iii) The trial Court did not consider certain submissions made during the hearing of the matter hence it erred in so doing.

In my view, the quintessential ground of appeal raised by the appellants is ground (1) one: ie "that the court erred in making a finding that there was no possible dispute of fact on the question of ownership".

[7] At the High Court, the appellants (then respondents) set out "Notice to Raise Points of Law", to be found at page 46 of Record of Proceedings. Under this rubric, the appellants stated that "there are serious disputes of facts arising from the papers filed herein which cannot be decided by way of affidavits which dispute of facts were known to the applicant at the

institution of these proceedings." The appellants' prayer was that the court should refer the proceedings to trial by taking oral evidence.

[8] It will be observed that the Notice did not particularize any disputes of fact which the appellants claimed could not be dealt with on affidavit evidence. Rule 33(4) of the High Court Rules provides:

> "If it appears to the court *mero motu* or on the application of any party that there is, in any pending action, a question of law or fact which it would be convenient to decide either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of."

It is trite that in such a situation, the judge has three (3) options available to him. He may dismiss the action on the ground that it ought not to have been commenced by motion proceedings; or he may proceed with the summary trial on affidavit evidence and give judgment or he may refer the action to trial.

In the South African case of *Minister of Agriculture v Tongaat Group Ltd* (1976) 2 SA 357, the court considered that the function of the court in an

application of this nature is to gauge to the best of its ability the nature and extent of the advantages and of the disadvantages which would flow from the grant of the order sought.

[9] In her judgment the learned trial judge dealt with the Notice and said that

> "having considered the totality of the depositions in the affidavits of the parties and their respective submissions, the only issue raised for determination was whether there existed disputes of fact in the matter relating to the ownership of the assets claimed by the respondent herein."

At page 52 of the record she reminded herself that motion proceedings were not appropriate for the purposes of deciding real and substantial disputes of fact, which properly call for decision by action and cited ***Daniel Didabantu Khumalo v Attorney General*** Civil Appeal No 31/2010 (unreported), in support.

At page 59 of the record, she dismissed the appellants' prayer that the matter be sent for trial thus:

> "having considered the totality of the facts stated, I must say straight-away that I see no real or substantial disputes of fact on the

question of ownership of the assets herein to require viva voce evidence."

[10] I have carefully considered and analysed the material evidence which was placed before the learned trial judge and I entirely agree with her conclusion. In my view, the Notice was a shallow and spurious defence conjured up by the appellants with the sole object of delaying an expeditious trial of the respondent's claim. No genuine or bona fide dispute of facts appeared on the record. I say this because, substantially all the material averments made by the respondent were admitted or "not denied". For example, it was not in dispute that the respondent was married to the deceased under Swazi law and custom and that she was the surviving spouse. It was not in dispute that the respondent was the sole heir and beneficiary of the deceased's estate. There were no children of the marriage. It was also not in dispute that at the next-of-kin meeting after the death of her husband, the appellants agreed with her that she should apply for Letters of Administration and that this was subsequently issued to her. As a matter of law, the Letters of Administration authorized her to collect and distribute the deceased's estate according to law. There was also no dispute that all the assets, particularly, the motor vehicles were registered in the name of the deceased and that in an inventory of assets, she had properly notified the Master that they formed part of the estate of the

deceased at the date of his death. Indeed, in recognition of her status as the heir and Executrix of the deceased's estate, the Master had authorized her to register the vehicles in her name. They also admitted that the said vehicles were plied as a source of their livelihood.

[11] The appellants made a pathetic attempt to claim some of the vehicles by saying that even though the deceased bought them, he bought them for the use of the entire Matsebula family. There was not a shred of evidence to support that claim. It was also agreed by the appellants that with respect to the cattle they had all the time been kept at a Mbhamali homestead under a sisa agreement. As I understand it, a sisa agreement is a caretakership agreement whereby an owner of cattle entrusts them to another person to look after in consideration of payment in cash or kind – some of the progeny. The specific allegation that they were owned by her deceased husband and that even though they were 15, since the death they had multiplied to 20, was not addressed by the appellants.

[12] In my judgment, the appellant's real grievance stemmed from the fact that after barely 4 months of marriage to the deceased the respondent should come into all that wealth. This is understandable human frailty, but it was no defence to the respondent's legal status as the sole heir and executrix of her husband's estate. It may well be that they genuinely believed that they

were entitled to some share of the deceased's estate, hence the claim that the deceased's estate was legally liable to maintain the deceased's parents during their respective lives. That is admittedly, a reasonable expectation, but not sufficient to derogate from her legal right as heir and sole beneficiary.

[13] Matters turned even more sour for the respondent when the appellants realized that she had received the deceased's gratuity from Illovo Sugar Company; the Swaziland National Pension Fund and the credit balance in the deceased banking account at Standard Bank at the time of his death. Admittedly, the appellants were aggrieved about the alleged failure or refusal of the respondent to complete the widowhood rites for her deceased husband in his family homestead. The respondent's explanation was apparently accepted by the appellants. It had been resurrected, in my view, to justify their claim to the deceased's estate. I say so because the respondent's claim was really in her capacity as heir and executrix of her deceased husband's estate. By law she alone had legal authority to gather in the estate. The appellants are bound to deliver all assets in their possession to her.

[14] The appellants repeatedly stated in their answering affidavit that the respondent had never had the items she claimed in the action in her

possession and therefore they could not have dispossessed her of same. It may well be that in the circumstances of that acrimonious litigation, the choice of the word "dispossessed" was unfortunate in that it enabled the appellants to play on the word and give facetious answers to the respondent's founding affidavit. They were able, for a time, to trivialize the respondent's legitimate claims. It is true that the items were originally in possession of the deceased husband. "Dispossessed" in this context, in my view, meant the wilful refusal to recognize the status of the respondent to have dominium and/or control over the assets she had enumerated in the inventory of the deceased's assets, to the exclusion of all others. In short, it meant *title*, a concomitant attribute of which is the right to possess and have the items under her control and dispose of them as she wished.

[15] I have no doubt, therefore, that by putting her claim on "dispossession" by the appellants, the respondent meant and must be understood to have meant that after her husband's death, particularly after she had obtained the Letters of Administration, the refusal of the appellants to recognize her status as executrix and continue to withhold the items from her dominium could be properly be described as she having been dispossessed of them wrongfully. This is what the appellants were answerable for and the learned judge, correctly in my opinion, made appropriate orders calculated to abate that contumacy.

This liability is reinforced by S.41 of the Administration of Estates Act 28/1902 which compels all persons in possession of any assets belonging to the estate of a deceased person to deliver same to the Executor; in default of which such persons may be liable to pay all duties payable in respect of such property to the Government; apart from other civil claims which the executor may bring against them.

[16] In conclusion, I hold that the learned trial judge was justified by the evidence on record to come to the conclusions she came to. She was right in dismissing the Notice to Raise Legal Points as I have discussed above. In conclusion I also dismiss the appeal. I confirm the order that the appellants should deliver up to the respondent the assets enumerated in the judgment of the court a quo. They are also liable to pay the respondent's costs, in the court a quo if not paid, and in this appeal.

_____
DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

_____
M.M. RAMODIBEDI
CHIEF JUSTICE

I also agree.

S.A. MOORE
JUSTICE OF APPEAL

COUNSEL:

For Appellant: **Mr. S.Magongo**

For Respondents: **Mr. M.Z. Mkhwanazi**