



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 02/2014

In the matter between:

MFANYANA DLAMINI

FIRST APPELLANT

ESTHER DLAMINI

SECOND APPELLANT

GCINA DLAMINI

THIRD APPELLANT

AND

**CETJIWE JABULILE DLAMINI
(NEE MDLULI**

RESPONDENT

Neutral citation: *Mfanyana Dlamini. & 2 Others vs Cetjiwe Jabulile Dlamini
(Nee Mdluli (02/2014) [2014] SZSC38 (30 May 2014)*

Coram:

**M.M. RAMODIBEDI, CJ
M.C.B. MAPHALALA, J.A
B.J. ODOKI, JA**

Heard

19 May 2014

Delivered

30 May 2014

Summary

Civil Appeal – Duty to attend to the burial of the deceased – held that where the deceased dies testate, the executor, surviving spouse or family member should bury the deceased in accordance with his wishes – held further that where the deceased dies intestate the duty to attend to the burial of the deceased lies with the surviving spouse – appeal dismissed with costs at attorney and own client scale.

JUDGMENT

M.C.B. MAPHALALA J.A.

- [1] The respondent instituted application proceedings in the court *a quo* for an order staying the burial of the deceased pending the determination of the right to bury the deceased between herself and her in-laws, the appellants. She further sought an order for costs at attorney and own client scale. This application was brought *ex parte* and on a certificate of urgency. The appellants were called upon to show cause why a rule nisi should not be issued with immediate and interim effect staying the funeral of the deceased pending finalisation of the matter; and, the rule nisi was accordingly issued.
- [2] It is common cause that the respondent is the only surviving spouse of the deceased. They were married on the 15th August 1980 in terms of Swazi Law and Custom. On the 17th July 1986 the deceased and his family relocated from his parental homestead at Mponono area in Mankayane and established their homestead at Esigangeni area in the Hhohho region. A supporting affidavit was deposed by the Chief's headman of Sigangeni area Charles Phazamisa Mhlanga confirming that the deceased was a resident of the area through the "kukhonta system"; he further confirmed that the deceased was residing in the area until his death.
- [3] Upon the death of the deceased the respondent prepared for his burial at their matrimonial home; however, the appellants informed her that they intended to bury

the deceased at his parental homestead. The Chief's headman further deposed in his supporting affidavit as follows:

- “2. I was already performing my duties as headman when the late Aaron Musa Dlamini commonly referred to as “JBS” in the community at large passed away.**
- 3. It came as a surprise to me when I was requested to attend a meeting at her residence pertaining the deceased's affairs, in particular that a delegation from her in-laws at Mponono had come to demand the corpse of her husband so that it be buried at Mponono his parental homestead.**
- 4. I duly attended the meeting as requested by the widow (applicant) in the main application wherein the applicant informed me that the in-laws had come to demand her husband's corpse with the aim of burying him at Mponono area.**

....
- 6. I then enquired whether she was happy about that and/or whether she wanted them to conduct her husband's burial to which she denied and said she wanted to bury her husband in their premises at Sigangeni area as they had khontaed in the area.**
- 7. I recall very well that the Dlaminis were represented by one Gcina Dlamini (3rd respondent) and a female whom I was advised was a senior family relative to the deceased.**

....

8. **I enquired and demanded answers from the Dlamini representative seeking to know whether by virtue of their plan, that of conducting the burial at Mponono area, were they intending to remove the homestead from the area as well as the deceased was a permanent resident of the area where he had earlier been seen even on the day of his demise. Further that by so doing was it an accusation made against the people and the Royal Kraal of Sigangeni for being responsible for the death of the deceased.**
9. **I was never accorded a response by the in-laws instead they arose and left the meeting for home.”**

[4] The appellants contended *in limine* that the respondent had not satisfied the legal requirements for an interdict; however, the appellants did not state the basis for their contention. Similarly, they argued *in limine* that the application was not urgent and that the respondent had not shown why she could not be granted adequate redress in due course; however, they did not support this contention. Notwithstanding their contention, the appellants conceded during the hearing of the appeal that the respondent was married to the deceased and that their marriage still subsisted at the time of his death; they further conceded that the deceased and the respondent had relocated from the deceased’s parental homestead at Mponono area to Sigangeni area where they built their matrimonial homestead. They contended that the deceased during his lifetime

always told them that he wanted to be buried at his parental homestead; however, no evidence was submitted to the court *a quo* in this regard.

[5] In their answering affidavit the appellants contended that the respondent and the deceased had long ceased to reside together as husband and wife at their matrimonial home and that the deceased was residing at Hilltop Township in Mbabane with his three children from his other deceased wife Lalukhele. They argued that a series of meetings were held between the two families and the Umphakatsi where the deceased had formally rejected the respondent as his wife in terms of Swazi Law and Custom.

[6] However, no evidence in this regard was furnished, and, they did not pursue this contention during the hearing of the appeal. Instead they conceded that the deceased and respondent had relocated from the deceased's parental home in 1986 and established their matrimonial homestead at Sigangeni area. They further conceded that the marriage between them had subsisted until his death; and, that they were residing together at their matrimonial homestead. This is also borne by the evidence of Charles Phazamisa Mhlanga, the Chief's headman of Sigangeni area. It is further not in dispute that all the deceased's belongings are at their matrimonial home. The very fact that the appellants came to their matrimonial homestead and requested the burial right of the deceased constitutes evidence that they recognise the respondent as the only surviving spouse of the deceased.

[7] The court *a quo* granted an order in favour of the respondent after analysing the evidence adduced. The trial court correctly made the finding that the deceased was a resident of Sigangeni area until the time of his death. His personal documents also reflected that he was under the Chief of Sigangeni area. The court *a quo* also made a correct finding that the respondent was the only surviving spouse of the deceased and rejected as unsubstantiated the appellants' evidence that the deceased had deserted the respondent.

[8] At para 23, 24 and 29 the court *a quo* her Ladyship correctly made the following findings:

“[23] From the totality of the pleadings, it is clear that the deceased did

khonta at Esigangeni and one takes judicial notice that Esigangeni is an area far distant from Mponono, Mankayane with a different chief. It is common cause between the parties that deceased did khonta and established his homestead there. He had two wives although the second wife pre-deceased the deceased.

[24] In the light of the common ground that the deceased had khontaed for both wives far away from his parental home area, a fully fledged adult with his own family, it is not clear on what basis third respondent who is said to have been “a kid” (see paragraph 3 of replying affidavit) when the marriage between applicant and deceased was solemnised can attest that:

‘The facts I deposed to herein this affidavit is to the best of my knowledge and belief and is true and correct.’

....

[29] **For all intent and purpose, the applicant is still a wife of the deceased and due to the presence of the feud between her and her in-laws, coupled with the manifest intention of the deceased to establish a domicile away from his parental home, the applicant is entitled to the body of the deceased. On the question on where a deceased's body of a husband could be buried, where the circumstances of the case show that the deceased changed his domicile and was resident in that new domicile, the likelihood that he wished to be buried in the place of his new domicile is high and therefore the court is bound to uphold his new domicile as a place of his burial."**

[9] Three grounds of appeal were made: firstly, that the court *a quo* erred both in fact and in law by granting an interim order and subsequently confirming that the deceased should be buried at Sigangeni. Secondly, and in the alternative, that the relief sought by the applicant was incompetent on the basis that the evidence presented in court did not warrant the granting of the said relief. Thirdly, that the court erred in fact and in law in confirming a fraudulently registered court order.

[10] The court *a quo* directed that the deceased should be buried at Sigangeni area where he had established a matrimonial home with the respondent since 1986. The issue for determination by this court is the duty to attend to the burial of the deceased in the absence of a testamentary document providing otherwise.

[11] In the South African case of *Saiid v. Schatz and Another* 1972 (1) TPD 491 (T), at p. 494, the deceased had died intestate. The deceased, a Moslem woman, had been married to the first respondent in community of property according to Christian rites. They had one son. When the deceased committed suicide, the applicant who was the deceased's brother, obtained a *rule nisi* calling upon the first respondent who was the deceased's husband as well as the second respondent to show cause why they should not be interdicted from burying the deceased other than according to Islamic rites, as the first respondent had arranged for her burial according to Christian rites. On the return day the court held that as the first respondent was the heir of the deceased, that the duty to attend to the burial evolved upon him. The *rule nisi* was accordingly discharged.

In deciding the matter, Moll J quoted with approval an article by professor T.W. Price, under the heading "legal Rights and Duties in regard to Dead Bodies, Post-mortem and Dissections, which is to be found in the South African Law Journal, 1951, Vol. 68, p. 403 in which the learned author, referring, inter alia to Grotius indicated the importance to be attached to directions given by a testator as to his burial. At p. 405 the author states the following:

"Matters affecting the disposal of a corpse are rarely subjects of litigation, with the result that there is very little modern guidance on the subject as a whole. But, applying general legal principles, it would seem reasonably

clear that the primary duty of the executor, or failing him, the surviving spouse, child, parent or other near relative of the deceased in regard to his mortal remains is to dispose of them in accordance with the terms of his will, provided that this is not impossible, too expensive for the estate to bear, or unlawful.

It has been stated that in English law the executor is not bound to obey the terms of the will in this particular regard. Even if this proposition is correct for English law, it does not follow that it is correct for Roman-Dutch law.

Grotius specifically says that a will, besides disposing of the deceased's property, may deal with other matters such as the guardianship of his children and directions as to his burial. It is taken for granted that the heir (or in the modern law the executor) must carry out all the terms of the will as far as possible. It therefore follows that in our law directions in the will as to the disposal of the body must, if possible and lawful, be followed. . . .

In obeying the instructions of the deceased the executor cannot be influenced by the wishes of the surviving spouse or other interested relative. But if the deceased has left no instructions, then those wishes become paramount.”

- [12] In this jurisdiction the High Court dealt with the duty to attend to the burial of the deceased in the case of *Dludlu v. Dludlu and Another* 1982 -1986 SLR 225 (HC) at 230. The applicant was the surviving spouse of the deceased Roy Dludlu, and, the first respondent was her father in-law; the second respondent was the Mbabane Funeral undertakers. The applicant contended that her husband should be buried in Mbabane where they had established a

matrimonial home after the first respondent had allegedly chased them from the parental home at Ngololweni area in the Shiselweni region. She further contented that the deceased's wishes were that he should be buried in Mbabane in accordance with his Will.

However, the first respondent denied that the deceased and applicant were chased away from the parental homestead; and, the applicant did not file a replying affidavit to controvert this evidence. The first respondent further disputed the signature on the Will as being that of the deceased. One of the signatories to the Will, Zakes Nkambule, testified that he and the other witness were asked to sign below the testator's signature in the presence of each other, but they were not present when the testator signed the Will. The court found that the two witnesses did not sign the Will in the presence of the testator as required by section 3 (1) (a) of the Wills Act 12/1955; and, the will was declared invalid. To that extent the court held that the deceased had died intestate.

The first respondent further stated in his answering affidavit that he paid twelve head of cattle as Lobolo for the applicant on behalf of the deceased and that "it is in accordance with the custom and tradition of the Dlundu clan that sons be returned to their parental home for burial". The first respondent had denied the applicant's averment that the marriage between the deceased and applicant was by civil rites in the absence of evidence to that effect. The payment of lobolo

persuaded the court that the marriage between the parties was by Swazi Law and custom.

At page 230 of the judgment, Justice Ben Dunn had this to say:

“For purposes of this application the deceased must therefore be held to have died intestate, and it appears to me, on the authority of the case of *Saiid v. Schatz and Another* 1972 (1) SA 491 (T) with which I am in respectful agreement, that the duty to attend to the burial of the deceased would devolve upon the surviving spouse. In the present application, however, the applicant has not challenged the first respondent’s averment as to the custom of the Dlodlu clan with regard to the burial of its male members. The failure to challenge this averment is in my view fatal to the application as the applicant does not set out in her affidavit the type of marriage which was contracted by her and the deceased. An averment of a civil marriage in terms of the Marriage Act 47 of 1964 and a challenge of the alleged custom amongst the Dlodlu clan would in my view place the application in a different position from the present where she must be held to acknowledge the custom which in the absence of any directive to the contrary by the deceased, must be honoured.”

[13] Ramodibedi JA as he then was, sitting in the court of appeal of Lesotho in the case of *Ntloana and Another v. Rafiri* Civil Appeal No. 42/2000 at pp 284-285 dealt with the duty to attend to the burial of the deceased by quoting from his previous judgment in *Lebohana Sello v. Mamotlatsi Semamola and Others* in Civ/APN/319/96 Lesotho HC at p. 9:

“ . . . 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. It is true the heir must always be

given first preference whenever it is just to do so but there may well be cases where even the heir himself is unsuited to bury, the deceased such as for example where he has not lived with the deceased for a very inordinate length of time and has actually killed the latter in circumstances repugnant to public morality such as for ritual purposes. 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.”

His Lordship proceeded and stated at p. 285 of the judgment as follows:

“This court adopts the principles laid down above and wishes to emphasise that consideration of the question of the right to bury cannot be divorced from equity and policy. A sense of what is right in each particular case should prevail. This include the need for proper consultation with the deceased’s family members (including the person on whom the right to bury primary lies) aimed at giving deceased persons decent burials.”

[14] In the case of *Steven Gamedze v. Jabu Dlamini and Others* Civil case No. 1093/2013 H.C., the court had another opportunity of dealing with the duty to attend to the burial of the deceased. The deceased and the applicant were married to each other in terms of Swazi Law and Custom and seventeen herd of cattle were paid as Lobolo. The deceased was unable to bear children within the first two years of the marriage and the applicant constantly abused, ridiculed and tormented her because of this inability. She couldn’t bear the abuse and derision for long, and, she was forced by these circumstances to leave her matrimonial home and return to her parental home. Attempts to resolve the dispute by the two families bore no fruit since the applicant was not

availing himself for talks. Five years after the separation, the applicant came to the deceased's parental homestead, and, the deceased told her father in the presence of the applicant that she had decided to terminate the marriage because of the abuse she was encountering. She further told her father that she would take upon herself to return whatever Lobolo was due and returnable to the applicant.

The deceased died on the 18th June 2013, twenty-three years after the separation. Notwithstanding this period, the applicant contended that he had the right to bury the deceased on the ground that she was legally married to her. It transpired during the hearing in the court *a quo* that prior to her death, the deceased had made it clear to her family as well as to her Chief that she did not wish to be buried at her matrimonial home because of the abuse and humiliation she suffered at the hands of the applicant.

His Lordship Justice Mbutfo Mamba at para 11-17 held that it is accepted that under normal circumstances the surviving spouse has the primary right to bury the deceased spouse; however, his Lordship found that the marriage between the parties was dead in view of the long period of separation. Accordingly, he dismissed the application. At para 11, 16 and 17, His Lordship made the following conclusions:

“[11] It is generally accepted that under normal circumstances, the general rule is that the surviving spouse has the primary right to decide or determine where the deceased spouse is to be buried

[16] It is plain to me that the marriage between the applicant and the deceased was irretrievably broken down. It remained so for a long time; in fact until death of the deceased. It only existed in law or on paper. Factually, it died a long time ago.”

[15] It is well-settled law in this jurisdiction that the duty to attend to the burial of the deceased lies with the surviving spouse in the absence of a Will providing otherwise. Where, however, the couple stays in separation, and the deceased has died intestate, in determining the right to bury the court should be guided by what is just in the circumstances of the particular case.

In the present case the respondent and the deceased were lawfully married to each other and residing together at their matrimonial home until the deceased died. It is common cause that the deceased and respondent relocated from the deceased’s parental homestead and established their matrimonial home in 1986 at Sigangeni area, twenty eight years ago. Their marriage subsisted at the time of death. The deceased died intestate, and, the general principle regarding the duty to attend to the burial of the deceased is in the circumstances applicable.

[16] Accordingly, the following order is made:

- (a) The appeal is dismissed with costs at attorney and client scale.
- (b) The rule nisi issued in the court *a quo* is hereby confirmed.

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		M.C.B. MAPHALALA JUSTICE OF APPEAL
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I agree		M.M. RAMODIBEDI CHIEF JUSTICE
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I agree		B.J. ODOKI JUSTICE OF APPEAL
For Appellants		Attorney Lindiwe Simelane
For Respondent		Attorney Ncamiso Manana

DELIVERED IN OPEN COURT ON 30 MAY 2014