



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil case No: 16/2014

In the matter between:

THEMBI MHLANGA

AND

ALFRED MHLANGA

FIRST RESPONDENT

HEMPY VILAKATI

SECOND RESPONDENT

CRUCIFIX FUNERAL DIRECTORS

THIRD RESPONDENT

NATIONAL COMMISSION OF POLICE NO

FOURTH RESPONDENT

ATTORNEY GENERAL

FIFTH RESPONDENT

Neutral citation:

*Thembi Mhlanga And Alfred Mhlanga & 4 Others
(16/2014) [2014] SZSC51 (03 December 2014)*

Coram:

**M.M. RAMODIBEDI CJ
M.C.B. MAPHALALA JA
P. LEVINSOHN JA**

HEARD : 10 NOVEMBER 2014

DELIVERED : 03 DECEMBER 2014

Summary

Civil Appeal – Duty to attend to the burial of the deceased – the principles governing the burial of deceased persons considered – 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 – the court found that the appellant was not a surviving spouse of the deceased but merely cohabiting with him – the court further found that the second respondent was a surviving spouse of the deceased duly married to him in accordance with Swazi Law and Custom – appeal accordingly dismissed. No order as to costs.

JUDGMENT

M.C.B. MAPHALALA JA

[1] The appellant lodged an urgent application before the court *a quo* on the 7th May 2014; and, the application was heard before court on the 14th May 2014. The appellant sought an order in the following terms:

1. Dispensing with the forms, service and time limits provided by the Rules of the above Honourable Court relating to applications and hearing this matter as one of urgency.
2. Condoning applicant's non-compliance with the Rules of the above Honourable Court.
3. Interdicting and restraining the first and second respondents and any other persons acting in cohorts and in concert with the second and third respondents from making any arrangements towards the burial of the

Late Mabhalane Aaron Mhlanga at Maphalaleni area and also from disturbing the applicant towards burying her deceased husband Mabhalane Aaron Mhlanga at his homestead at Msunduzi, Emncozini area.

4. Ordering and directing the third respondent, a funeral undertaking Parlour, not to release the corpse from the morgue to any other persons other than the applicant herein.
5. Ordering and directing that the late Mabhalane Aaron Mhlanga be buried by his wife, Thembi Mhlanga (nee Simelane), at his homestead at Msunduzi, in Mbabane in the Hhohho region.
6. Ordering and directing the fourth respondent, the Commissioner of Police, to command his subordinates of the Royal Swaziland Police Service, especially from Mbabane Police Station to make all that is necessary to keep peace during the burial arrangements and the actual burial of the late Mabhalane Aaron Mhlanga.
7. Costs of this application in the event of opposition.
8. Any further and/or alternative relief.

[2] The basis of the application was that the appellant was the only surviving spouse of the deceased, and, that she had the right to bury the deceased. She contended in her founding affidavit that she was married to the deceased in April 1995 in terms of Swazi Law and Custom, and, that

pursuant thereto, they had established their homestead with the deceased at Msunduzi in Mbabane in the early 1980s where they resided with their two children. She conceded that the deceased's parental homestead was at Maphalaleni; however, she argued that the deceased had never lived there all his life, and, that he did not have a homestead of his own at Maphalaleni. She further argued that the deceased had long cut ties with his family at Maphalaleni, and, that his death-wish was that he should not be buried at his parental homestead.

- [3] The deceased died on the 26th April 2014 at his homestead at Msunduzi in Mbabane. He was subsequently placed at the third respondent's funeral parlour by the appellant. Thereafter, she informed the deceased's family at Maphalaleni about his demise. A fierce dispute arose pursuant to the deceased's death pertaining to the duty to attend to his burial. His family including the first and second respondents wanted him to be buried at his ancestral home at Maphalaleni on the 4th May 2014, and, the appellant wanted him to be buried at his homestead at Msunduzi in Mbabane on the 11th May 2014. The deceased's family further introduced the second respondent to the appellant as the surviving spouse of the deceased. The appellant contends that she was seeing the second respondent for the first time, and, that she had never met her during the lifetime of the deceased. On the 30th April 2014 the deceased's family made an announcement over

the radio that the deceased would be buried at his ancestral home at Maphalaleni.

[4] The deceased's eldest son Khulekani Mhlanga, born from a previous marriage between the deceased and the late LaZwane, deposed to a confirmatory affidavit in support of the appellant that the deceased should be buried at his homestead at Msunduzi in Mbabane. The deceased's son was not born at Maphalaleni and has never lived there; he lives at Emfeni area in the Hhohho region. He contends that his wish was that his father should be buried at his homestead at Msunduzi where he had lived all his life. However, he was not present at a meeting held at Maphalaleni when the deceased's family took a decision to bury the deceased at his ancestral home.

[5] The second respondent filed an Answering Affidavit opposing the appellant's application on the basis that the appellant was not married to the deceased. She contends that she was married to the deceased at Maphalaleni on the 1st January 1984 in accordance with Swazi Law and Custom. She further contends that she was smeared with red ochre by one Alvina Mhlanga, and, that dowry or lobolo was paid to her family in full by the deceased; the dowry included Lugege¹ (i.e. imphekeleteli) and

¹ "Lugege" is a cow or ox given to the bride's family during the lobolo ceremony. It should be big and fat because it is slaughtered by the "Gozolo" during the Lobolo ceremony to feed the people in attendance.

insulamnyembeti². She contends further that Fanyana Shabangu, who has since died was the “Umyeni”³, when lobolo was paid to her family.

- [6] The second respondent conceded that at the time of her marriage to the deceased, he was already married to LaZwane, the mother to Khulekani Mhlanga; LaZwane has died. She contends that after their marriage, the deceased’s family gave them a portion of land where they built their marital homestead at Maphalaleni; and, that three children were born of the marriage. They lived at their marital homestead with their children. She further contends that in 1992, the deceased obtained a piece of land at Msunduza where he built a house so that he could live closer to his place of employment in Mbabane. She conceded, however, that the appellant subsequently fell in love with the deceased after the house at Msunduza had been built, and, that two children were born of the relationship between the appellant and the deceased. She denied that the deceased did not have a homestead at Maphalaleni. Similarly, she denied that the deceased was married to the appellant.

² “Insulamnyembeti”, is a female cow given to the mother of the bride in appreciation for raising her from childhood. The cow should be young having not given birth. The cow is not slaughtered during the ceremony but is kept by the bride’s mother as her personal property.

³ “Umyeni” is the man who is the leader of the delegation sent to pay or deliver lobolo cattle to the man’s in-laws in accordance with Swazi Law and Custom.

[7] The second respondent denied that the deceased had cut ties with his family at Maphalaleni. She contends that the deceased attended all family gatherings at Maphalaleni as part of the family. This fact is also conceded by the appellant in her replying affidavit. To that extent the second respondent denied knowledge of any family in-fighting as alleged by the appellant.

[8] The second respondent is supported by the first respondent, Alfred Mhlanga, who is the deceased's uncle. He deposed to a confirmatory affidavit that the second respondent is the only surviving spouse of the deceased. He disclosed that the deceased first married LaZwane in accordance with Swazi Law and Custom before he married the second respondent under the same rites. He denied that the appellant was also married to the deceased during his lifetime. He further denied that the deceased had cut ties with his family or that there was in-fighting within the family which forced the deceased to desert his family at Maphalaleni. He contended that his family was peace-loving and that it has never fought within itself. He further confirmed that as a family, they met and resolved that the deceased would be buried at his homestead at Maphalaleni. The appellant was invited to attend the meeting but she declined the invitation notwithstanding that she was provided with transport.

[9] George Mhlanga, the deceased's brother further deposed to an affidavit in support of the second respondent. He confirmed that the second respondent was the only surviving spouse to the deceased, and, that the appellant was not married to the deceased during his lifetime. He denied as alleged by the appellant that the deceased had cut ties with the family. He argued in support of the second respondent's averment in the Answering affidavit that the deceased had given him two pick-axes in September 2012, one of which had to be used during his funeral that should be held at Maphalaleni.

[10] Meshack Mhlanga, a brother to the deceased also deposed to an affidavit in support of the second respondent. He confirmed that the second respondent is the only surviving spouse of the deceased. He denied that the appellant was married to the deceased. He further contended that he was present when the appellant was offered transport to attend the family meeting at Maphalaleni to discuss the funeral arrangements of the deceased, and, she refused to board the motor vehicle.

[11] Khetsani Shabangu (nee Mhlanga), a sister to the deceased, deposed to an affidavit in support of the second respondent. She confirmed that the second respondent was the only surviving spouse of the deceased. She argued that the deceased never married the appellant during his lifetime. She further argued that she was present when the appellant was offered

transport to attend a family meeting at Maphalaleni to discuss the funeral arrangements of the deceased; however, she had refused to board the motor vehicle.

[12] Velaphi Shabangu, a resident of Maphalaleni deposed to an affidavit in support of the second respondent. He confirmed that he was “Gozolo⁴” at the lobolo ceremony of the second respondent and the deceased. He further confirmed that the deceased paid lobolo to the family of the second respondent at Nsenga inclusive of insulamnyembeti and imphekeleteli (or Lugege).

[13] The second respondent attached to the Answering affidavit Annexure AM1, being a formal affidavit designed by the Government to be completed by a surviving spouse married in accordance with Swazi Law and Custom in circumstances where the couple never registered their marriage during the lifetime of the deceased. This is done as proof of the marriage. In the said affidavit she stated that she was born on the 3rd February 1957 at Nsenga in the Manzini region under Chief Mandanda and Indvuna Mbhuduyi. She further stated that she was the legal wife of Aaron Mabhalane Mhlanga who was born on the 8th August 1949 at Maphalaleni

⁴ ‘Gozolo’ is the man who announces the number of cattle to the family of the bride upon their arrival at her homestead for the lobolo ceremony.

in the Hhohho region under Chief Mashila and Indvuna Nakane Maziya. She also stated that she was smeared with red ochre by Alvina Mhlanga in January 1984, and, that Lobolo was accordingly paid by the deceased to her family. Five people appeared in the affidavit as witnesses that she was legally married to the deceased; and, they are Sellinah Vilakati, George Mhlanga, Velaphi Shabangu, Alvina Mhlanga as well as Elias Nyamane, the Chief's runner. The affidavit specimen are kept by the Ministry of Tinkhundla; and, the Commissioner of Oaths who signs the affidavit has to be a designated senior officer in the Ministry such as the Senior Regional Officer or the Regional Officer.

[14] The Indvuna⁵ of Maphalaleni Royal Kraal Jeremiah Nakane Maziya has written a letter dated 7th May 2014, being Annexure 2 confirming that the deceased was a resident of the community, and, that he had two wives, LaZwane who has since died and LaVilakati, the second respondent. It is well-settled in this country that a marriage in terms of Swazi Law and Custom involves not only the individuals concerned but the two families. Furthermore, where the marriage takes place in a chiefdom, the chief is informed of such an event so that he could send a member of the Chief's Inner Council to represent him. This is done partly to provide proof of the

⁵ "Indvuna" is the Chief's headman who is responsible for the daily administration of the chiefdom and reports directly to the chief. In discharging his functions, he works with a committee called the Chief's Inner Council. Both the Indvuna as well as the committee are appointed by the Chief.

marriage having been solemnised and partly to ensure that peace prevails during the ceremony.

[15] The appellant deposed to a replying affidavit; however, the affidavit did not advance her case. She merely reiterated the averments made in the founding affidavit. She alleged that certain persons attended her marriage with the deceased; however, none of them have deposed to an affidavit in her support. She conceded that the deceased would occasionally give various gifts to the first respondent as his uncle; and, that they would often attend family functions with the deceased at Maphalaleni; this concession negates her contention that the deceased had deserted his family due to in-fighting, and, that he had cut all ties with his family. She further conceded that she attended a meeting held by the two families with the Piggs Peak Regional Officer in an attempt to resolve the burial dispute amicably. In that meeting her own family agreed that the deceased should be buried at his ancestral home at Maphalaleni.

[16] It is telling that neither the family of the deceased nor the appellant's family have deposed to any affidavit in support of her allegation that she was married to the deceased. Professor Thandabantu Nhlapho, an expert on

marriages solemnized in accordance with Swazi Law and Custom states the following⁶:

“Swazi marriage is as much a social process as it is a legal one. It seeks to create a strong relationship between two groups of kin and is characterized by the involvement of both families in negotiations leading up to the wedding itself, in the life of the spouses during the subsistence of the marriage, and at its dissolution. It also crucially involves the transfer of Lobolo, or some guarantee that same will be transferred at a later time. Ferraro lists six respects in which Swazi marriages differ from statutory marriages and summarizes them thus:

‘ . . . traditional marriages are more group oriented, tend to emphasize the patrilineal descent of children, involve the payment of Lobolo, encourage polygamy as an ideal, place primary emphasis on childbearing, and are very difficult to terminate.’ ”

[17] Professor Nhlapho further states the formalities of a marriage solemnized in accordance with Swazi Law and Custom as follows⁷:

“. . . three marriage formalities must be observed before a customary marriage comes into existence:

(i) the bride must be smeared with libovu (red ochre) during the marriage ceremony (umtsimba);

⁶ Marriage and Divorce in Swazi Law and Custom, Thandabantu Nhlapho, Websters (Pty) Ltd Mbabane Swaziland 1992 at pp 44-45.

⁷ Marriage and Divorce in Swazi Law and Custom (supra) at p.44

- (ii) **Lobolo (emabheka) cattle must be delivered in full or guaranteed;**
- (iii) **The “lugege” and “insulamnyembeti” beasts must be handed over, and, the “lugege” beast must be slaughtered.”**

Nathan CJ in *Rex v Fakudze and Another* 1970 – 1976 SLR 422 (HC) at 423 had this to say:

“There are a number of ceremonies performed at the wedding, but the legally significant one is the anointing of the bride with red ochre (libovu). Unless and until this has been done, she is not regarded as having been married.”

[18] In the circumstances, the trial court did not misdirect itself by finding that on the evidence, the second respondent had proved on a balance of probabilities that she is the surviving spouse of the deceased. She was smeared with red ochre as required by Swazi Law and Custom. Lobolo cattle were paid by the deceased to the family of the second respondent inclusive of “Lugege” (imphekeleteli) and “insulamnyembeti”. Various members of the deceased’s family as well as the “Indvuna” of Maphalaleni Royal Kraal Jeremiah Nakane Maziya, have deposed to affidavits confirming that the second respondent is the surviving spouse of the deceased.

[19] There is no evidence that the appellant was married to the deceased. It is not in dispute that the deceased was initially married to LaZwane who has since died. Thereafter, the deceased married the second respondent in accordance with Swazi Law and Custom, and, the deceased's family allocated to them a portion of land at Maphalaleni where they built their home and lived together with their three children. The deceased subsequently obtained employment in Mbabane; and, for purposes of accommodation, he built a house at Msunduzi in Mbabane so that he could stay closer to his workplace. Pursuant thereto, he met the appellant with whom they cohabited together at Msunduzi in Mbabane until his death. If the appellant was married to the deceased in accordance with Swazi Law and Custom, both families as well as the Maphalaleni Royal Kraal would have knowledge of the said marriage.

[20] Accordingly, the court *a quo* acted properly when it dismissed the application and held that the second respondent as the surviving spouse of the deceased had the right to bury the deceased at Maphalaleni. It is apparent from the evidence that Maphalaleni is not only his ancestral home but the deceased had a homestead in the area with the second respondent.

[21] The appellant filed four grounds of appeal. Firstly, that the court *a quo* erred in fact and in law in finding that the appellant was cohabiting with the

deceased. I have already dealt with this ground of appeal in the preceding paragraphs. The second ground of appeal is that the court *a quo* erred in fact and in law in finding that the second respondent had a right to bury the deceased. This ground of appeal is associated with the third and fourth grounds of appeal, and, I will deal with all three grounds below. The third ground of appeal is that the court *a quo* erred in fact and in law in finding and ordering that the body of the deceased should be buried at Maphalaleni instead of Msunduza. The fourth ground of appeal is that the court *a quo* erred in fact and in law in dismissing the application with costs.

[22] The general principle of our law is that in the absence of a will providing otherwise, the surviving spouse has a right to bury the deceased. However, where deceased dies testate, the executor, the surviving spouse or family should bury the deceased according to his wishes. In the case of *Mfanyana Dlamini and Two Others v Cetjiwe Jabulile Dlamini*, Civil Appeal case No. 2/2014 at para 15, I had occasion to say the following:

“[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.”

[23] In coming to this conclusion, the court quoted with approval the judgment of Justice Ben Dunn in the case of *Dludlu v Dludlu and Another* 1982 – 1986 SLR 225 (HC) at 230 where His Lordship confirmed the principle of our law that where the deceased dies intestate, the duty to attend to the burial of the deceased devolves upon the surviving spouse. In coming to this conclusion, His Lordship followed the decision of Moll J in the South African case of *Saiid v Schatz and Another* 1972 (1) TPD 491 (T).

[24] The Supreme Court in the case of *Mfanyana Dlamini and Two Others v Cetjiwe Jabulile Dlamini* (supra) further quoted with approval the case of *Saiid v Schatz and Another* (supra) at p.494 where Moll J upheld the principle of the law with regard to the duty to attend to the burial of the deceased where he dies intestate.

[25] In coming to this conclusion, Justice Moll further quoted with approval an article by Professor T.W. Price⁸, at p.405 of the Article where the learned author, referring to Grotius stated 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

⁸ Professor T.W. Price, Legal Rights and Duties in Regard to Dead Bodies, Post-Mortem and dissections, SALJ, 1951 Vol. 68 at p.403

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 are paramount.”

[26] During the hearing of this appeal, the appellant's counsel conceded to the general principle that in the absence of a will providing otherwise, the surviving spouse has a right to bury the deceased; however, he urged the court to consider applying public policy, public morality and a sense of what is right when determining the duty to attend to the burial of the

deceased. This position was adopted by 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 case No. 42/2000, reported in LAC (2000-2004) 279 at pp 284-285 where His Lordship said the following:

“ . . . 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.

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.”

[27] In the case of *Mfanyana Dlamini and Two Others v Cetjiwe Jabulile Dlamini (nee Mdluli)* (supra) at para 15, the Supreme Court emphasized the general principle applicable 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. However, the Court held that where the couple stayed in separation prior to the demise of the deceased in circumstances where he died intestate, the court should be guided by what is just in the circumstances of the particular case. The court avoided issues of public policy and public morality in the face of the existing principle of law on the understanding that a principle of law cannot generally be overridden by public policy.

[28] Appellant's counsel further advised the court during the hearing of the appeal that he was not pursuing the question of costs; and, this court feels that such a concession was properly made on the basis that the appeal relates to a family dispute, and, it is just and equitable that each party should bear their own costs.

[29] Accordingly, the appeal is dismissed. No order as to costs.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree:

P. LEVINSOHN
JUSTICE OF APPEAL

FOR APPELLANT : Attorney A.M. Lukhele

FOR RESPONDENTS : Attorney W. Maseko

DELIVERED IN OPEN COURT ON 3 DECEMBER 2014