IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 55/2014

In the appeal between:

ATTORNEY GENERAL	**APPLICANT**
AND	
THE MASTER OF THE HIGH COURT	**RESPONDENT**

In re:

ATTORNEY GENERAL	APPELLANT
AND	
TITSELO DODGE NDZIMANDZE &	
27 OTHERS	RESPONDENTS

Neutral citation: *Attorney General v. The Master of the High Court (55/2014) [2014] SZSC10 (30th June 2016)*

CORAM: **M.C.B. MAPHALALA, CJ**
DR B.J. ODOKI, JA
S.P. DLAMINI, JA
Z. MAGAGULA, AJA
M. LANGWENYA, AJA

Heard : 03rd May 2016
Delivered : 30th June 2016

Summary

Civil Procedure – review proceedings in terms of section 148 (2) of the Constitution of Swaziland – legal principles applicable considered – held that the review procedure under section 148 (2) of the Constitution is an exception to the principle of *res judicatae* – held further that the review is applicable in exceptional circumstances in order to correct a manifest injustice caused by an earlier order of the Court in the exercise of its appellate jurisdiction and for which there is no alternative remedy – held further that the review application should be brought within a reasonable period of time, and, that the test to what is reasonable in the circumstances of the particular case is objective – held further that the Constitution envisages one review application before the Supreme Court unless the existing judgment on review is substantively and legally incompetent and unenforceable and does not constitute an effective remedy which accords with justice and fairness.

With regard to the striking out of section 2 (3) of the Intestate Succession Act No. 3 of 1953 as being in contravention with section 34 (1) of the Constitution, the Court held that section 2 (3) of the Intestate Succession Act is not applicable to customary marriages in light of section 4 of the Intestate Succession Act as well as section 68 of the Administration of Estates Act No. 28 of 1902 which exclude customary marriages from the jurisdiction of the Master of the High Court – held further that both civil and customary marriages are lawfully recognised in the country with different legal principles applicable to the administration of estates.

Held further that the Supreme Court in its appellate jurisdiction had misdirected itself when interpreting section 34 (1) of the Constitution by equating civil rites marriages to customary marriages in the administration of deceased estates – held further that the judgment of the Supreme Court on appeal under Civil Appeal Case No. 55/2014 is hereby reviewed and set aside in its entirety, and, that the Minister of Justice in conjunction with Parliament are ordered to comply with section 34 (2) of the Constitution within twelve months of the order – held further that this judgment should be enforced without prejudice to any distribution consequent upon the Supreme Court's judgment on appeal – No order as to costs.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] This is an application in terms of section 148 (2) of the Constitution to review the judgment of this Court delivered on the 12th November 2014. This Court in its appellate jurisdiction confirmed the judgment of the Full Bench of the High Court.

[2] It is common cause that Chief Sibengwane Ndzimandze died intestate on the 17th June 2013. He was survived by three wives and twenty four children. Two other wives had predeceased him; he had five wives with whom he was married under Swazi Law and Custom.

[3] The death of the deceased was reported at the Master's Regional Office in Siteki, and, an estate file was registered. Accordingly, the three wives and twenty four children became beneficiaries of the deceased estate. The three wives were appointed as joint executrixes of the deceased estate in a meeting of the next of kin which was called by the Assistant Master at the regional office in Siteki.

[4] It is not disputed that the widows were initially allocated E30 000.00 (thirty thousand emalangeni) each by the Master of the High Court in the First Distribution Account; and, they were happy with this allocation. However, in the Second Distribution Account, they were allocated E10

000.00 (ten thousand emalangeni) each which represents a child's share, and, an additional E4 000.00 (four thousand emalangeni) each in respect of the cleansing ceremony; they were not happy with this allocation which was a child's share.

The Second Distribution Account was done in terms of section 2 (3) of the Intestate Succession Act which gave each of the widows a child's share plus the costs of the cleansing ceremony. The deceased estate had a cash amount of E405 078.75 (four hundred and five thousand and seventy eight emalangeni seventy five cents).

[5] The widows were not happy with the sharing formula which gave them a child's share, and, they lodged an appeal to the Minister of Justice and Constitutional Affairs. They refused to sign the Distribution Account. On the 14th July, 2014, the Minister of Justice and Constitutional Affairs unveiled the Estate Policy at the Master's Regional Office in Siteki pursuant to the complaint lodged by the widows. The Minister's contention was that the Estate Policy was formulated in accordance with section 34 (1) of the Constitution which states that the surviving spouse, whether married by civil or customary rites is entitled to a reasonable provision out of the estate of a deceased spouse. Consequently, the

Minister directed that the Master's office should distribute all deceased estates in terms of section 34 (1) of the Constitution.

[6] The Minister's Estate Policy provides the following:

> **". . . . The Supreme Law of the Land, section 75 (1) of our Constitution charges or gives the Minister the responsibility of policy, general direction and control over any department of government.**
>
> **In the Master's office I have been approached over issues of distribution to widows and widowers under Swazi Law and Custom. Our Constitution section 34 (1) states that a surviving spouse whether married by civil or customary rites is entitled to a reasonable provision out of the estate of a deceased spouse. The Intestate Succession Act No. 3 of 1953 puts it clearly that those married by civil rites inherit half plus child's share out of the Estate of their spouse.**
>
> **One would then ask himself or herself what is the interpretation of 'reasonable' where the law has not clearly put it out for those married by Swazi Law and Custom? Certainly, it would be just that they also benefit as those married by civil rites until Parliament complies with section 34 (2) of our Constitution. This is also for the simple reason that our Birth, Death and Marriages Act recognises both marriages equally in Swaziland. . ."**

[7] Subsequent to the Estate Policy Statement, seventeen children of the deceased instituted legal proceedings before the Full Bench of the High Court seeking an order declaring the Estate Policy invalid, irregular and liable to be set aside. They further sought an interdict restraining the Master of the High Court from using the Estate Policy in the administration and distribution of the deceased estate. They also sought an order directing the Master of the High Court to distribute the deceased estate in accordance with section 2 (3) of the Intestate Succession Act No. 3 of 1953. Lastly, they sought an order directing the Master of the High Court to remove the widows as executrixes of the deceased estate and to appoint a neutral person as the executor.

[8] The Minister's reliance upon section 75 of the Constitution, when formulating the Estate Policy, is misconceived in the absence of compliance with the principle of Collective Responsibility applicable to the Executive Arm of Government. It is common cause that the Prime Minister subsequently revoked the Estate Policy on the basis that it had not been approved by the Cabinet.

Section 75 of the Constitution provides the following:

"75. (1) Where a Minister has been charged with the responsibility for any department of government, the Minister shall be responsible for the policy and general direction and control over such department.

(2) Two or more government departments may be placed under the responsibility of one Minister."

[9] On the 30th July 2014 His Excellency the Right Honourable Prime Minister Barnabas Sibusiso Dlamini withdrew the Estate Policy:

Government Press Statement No. 10 of 2014

Property Rights of Spouses

Section 34 (1) of the country's Constitution provides that "a surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites. Section 34 (2) provides that "Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife."

Cabinet at its weekly meeting on Tuesday, 29th July 2014 reviewed the policy/ directive of the Minister of Justice and Constitutional Affairs of the distribution of deceased spouses estate and resolved that the

policy/directive be withdrawn forthwith and the affected estates continue to be regulated by the current law pending the enactment by Parliament of suitable legislation as required by section 34 (2) of the Constitution.

[10] The exercise of the powers by the Minister of Justice under section 75 of the Constitution is subject to section 69 of the Constitution dealing with Cabinet's Collective Responsibility. Section 69 provides the following:

> **"69. (1) The Cabinet shall keep the King fully informed about the general conduct of the government of Swaziland and shall furnish the King with such information as the King may require in respect of any particular matter relating to the government of Swaziland.**
>
> **(2) The Cabinet shall be collectively responsible to Parliament for any advice given to the King by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of the office of Minister.**
>
> **(3) The Cabinet shall formulate and implement the policy of the Government in line with any national development strategy or plan and perform such other functions as may be conferred by this Constitution or any other law.**
>
> **70. The King may, after consultation with the Prime Minister, assign to the Prime Minister or any other Minister responsibility for the conduct of any business of the Government including the administration of any department of Government."**

[11] The children of the deceased who lodged the application before the Full Bench argued correctly that they were the beneficiaries of the deceased estate, and, that they had a clear right to the interdict sought. The children contended that the use of the Estate Policy in the distribution of the deceased estate was prejudicial to them to the extent that the widows would be given more money than allowed under section 2 (3) of the Intestate Succession Act No. 3 of 1953. Their contention was that section 2 (3) of the Intestate Succession Act was the law ordinarily used by the Master of the High Court when distributing deceased estates in respect of customary marriages. They also argued that they would suffer irreparable harm and would not be afforded substantial redress in due course on the basis that the widows would not be able financially to refund the money to the deceased estate in the event that the Estate Policy is subsequently revoked.

[12] The widows filed an Answering Affidavit contending that the deceased estate should be distributed in accordance with the Estate Policy which was based on section 34 (1) of the Constitution. They argued that they had contributed immensely to the development and acquisition of the deceased estate; hence, they were entitled to a reasonable provision out of

the deceased estate as envisaged by section 34 (1) of the Constitution. To that extent they lodged a counterclaim seeking an order dismissing the application with punitive costs, and, further declaring section 2 (3) of the Intestate Succession Act No. 3 of 1953 unconstitutional as being inconsistent with section 34 (1) of the Constitution.

[13] Furthermore, the widows contended that a child's share does not represent a reasonable provision in accordance with section 34 (1) of the Constitution. They argued that section 34 (1) of the Constitution should apply in the distribution of the deceased estate with the object of affording them a reasonable provision; to that extent, the widows objected to the application of section 2 (3) of the Intestate Succession Act No. 3 of 1953 on the basis that this law entitled them to a child's share.

[14] It is common cause that on the 25th July 2014, His Lordship the Learned Chief Justice Michael Ramodibedi, made an order referring the matter to the Constitutional Court, which is the Full Bench of the High Court. His Lordship further made an order that "by consent the parties agree that the real issue for determination is whether section 2 (3) of the Intestate Succession Act No. 3 of 1953 is valid or whether it is in contravention of section 34 (1) of the Constitution". The parties were put to terms to file opposing and replying affidavits as well as their heads of argument. The matter was set down for hearing on the 28th August, 2014 at 9.30 am.

[15] Pursuant to the withdrawal of the Estate Policy, the application which was lodged by the children of the deceased challenging the Estate Policy was withdrawn on the 6th August 2014 in terms of the Notice of Withdrawal of Application. The withdrawal of the application was justified on the basis that the Estate Policy which formed the basis of the cause of action in the matter had been withdrawn by the Prime Minister; hence, there was no basis in law to proceed with the matter. In addition the Notice of Withdrawal of Application was accompanied by an offer to pay costs of suit to the other party in accordance with Rule 41 of the High Court Rules.

[16] The Notice of Withdrawal of Application was followed by the filing of the Notice of Withdrawal As Attorneys of Record. No new attorneys were appointed to take over the matter. Notwithstanding these developments, the Learned Chief Justice subsequently called the attorneys who were involved in the matter to his chambers; this included the attorneys who had withdrawn their services. He made the following order in chambers:

Court Order

It is Ordered as follows:

The applicants' application to withdraw the matter is refused on the grounds that this is a matter of huge national importance. The Court is already seized with the matter and there is a need to interpret section 34 (1) of the Constitution as against section 2 (3) of the Intestate Succession Act 1953. Furthermore, the Court has taken into account the fact that Mr. Mamba for the first to the tenth respondents will be filing a counter-application on or before 15th August 2014."

[17] When the application was withdrawn, the Learned Chief Justice had already allocated the 28th August 2014 as the date of hearing. However, there was no legal basis for His Lordship to compel the parties to proceed with the matter since the Executive Arm of Government had withdrawn the Estate Policy; and, accordingly, this matter had ceased to be of national importance, and had become academic. Similarly, there was compliance with the Rules of Court relating to withdrawals of legal proceedings.

Rule 41 of the High Court Rules provides the following:

"41. (1) (*a*) A person instituting any proceedings may at any time before the matter has been set down and thereafter by

consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the Taxing Master shall tax such costs on the request of the other party.

(*b*) A consent to pay costs referred to in paragraph (*a*), shall have the effect of an order of court for such costs."

[18] Notwithstanding the withdrawal of the application as well as the Attorneys of Record, the Full Bench proceeded *ex parte* and heard arguments from the attorneys representing the widows as well as the Attorney General. The matter proceeded in the absence of the seventeen children of the deceased and their attorneys notwithstanding that the Learned Chief Justice had declared that the matter was of national importance. It is not surprising that the judgment was in favour of the widows in particular and the Estate Policy in general. The other side was not heard contrary to the principle of natural justice, the "*audi alteram partem*".

[19] The Full Bench held that section 2 (3) of the Intestate Succession Act No. 3 of 1953 was "irreconcilable and in stark violation of section 34 (1) of the Constitution". The court further held that section 2 (3) of the Intestate Succession Act violates and undermines the rights of intestate spouses married under customary law on the basis that it relegates a wife

to a mere child in the distribution of a deceased estate. The court also held that a surviving spouse married under civil or customary rites is entitled to a reasonable provision out of the deceased estate as provided in section 34 (1) of the Constitution.

[20] Furthermore, the Full Bench also considered section 34 (2) of the Constitution which mandates Parliament to enact legislation regulating property rights of spouses including Common-law husband and wife. Ultimately, the Full Bench issued the following judgment:

a) In view of section 34(1) of the Constitution of the Kingdom of Swaziland Act of 2005, (Act 1 of 2005), Section 2 (3) of the Intestate Succession Act of 1953 (Act 3 of 1953) is hereby declared unconstitutional and struck down.

b) Until Parliament has enacted legislation to regulate property rights of spouses, including Common law husband and wife, the Master of the High Court (the 11th Respondent) is hereby ordered and directed to distribute and liquidate deceased's estates in accordance with the provisions of section 34(1) of the Constitution of Swaziland by equating customary law marriages to civil marriages in community of property.

(c) No adverse costs order is made; each litigant to pay his or her own legal costs.

[21] The Attorney General appealed the judgment of the Full Bench on the following grounds:

NOTICE OF APPEAL

Be Pleased To Take Notice That the Government hereby appeals against the judgment of the full bench in the civil case No. 981/2014 on the following grounds:

1. **The court *a quo* erred in law and in fact in holding/assuming that the Intestate Succession Act, 1953, applied to deceased estates regulated by Swazi customary law;**
2. **The court *a quo* erred in law and in fact in holding/assuming that the Master of the High Court (11th Respondent) has a role to play in deceased estates regulated by customary law.**
3. **The court *a quo* erred in law in holding and declaring that section 2 (3) of the Intestate Succession Act 1953 is inconsistent with the provisions of section 34 of the Constitution.**
4. **The court *a quo* erred in conferring the Master of the High Court (11th Respondent) by implication with (legislative) authority to determine**

and define 'reasonable provision' and 'common law' spouse in terms of section 34 of the Constitution.

5. **The court *a quo* erred in law and in fact in equating Swazi customary marriage with (civil) marriage out of community of property;**
6. **The court *a quo* erred in law and in fact in holding that the Intestate Succession Act 1953 is discriminatory (in fact or in effect) in that it makes a customary law widow to be a minor (and not a widower);**
7. **The court *a quo* erred in law and in fact in holding and declaring that section 34 the Constitution has abolished the distinction between civil and customary rites marriages;**
8. **The court *a quo* erred in law and in fact in holding that the Intestate Succession Act 1953 only gives to the surviving spouse (a widow) only a child's share limited to E1200.00 of the deceased estate;**
9. **The court *a quo* erred in law and in fact in holding that the provisions of section 2 (3) of the Intestate Succession Act, 1953 are necessarily in conflict with "reasonable provision" under section 34 (1) of the Constitution.**
10. **The court *a quo* erred in holding by implication that the provisions of Swazi Customary Succession are repugnant to general principles of humanity.**
11. **The court *a quo* erred in directing/ordering the Master of the High Court (11th Respondent) to distribute and liquidate deceased estates in accordance with section 34 (1) of the Constitution.**

12. The court *a quo* erred in not suspending the invalidity of section 2 (3) of the Intestate Succession Act 1953 and allowing Parliament to comply with section 34 (2) of the Constitution within a specified period.

[22] The Supreme Court on appeal issued an order dismissing the appeal with costs; and, the Court further confirmed the judgment of the Full Bench in its entirety. In so doing the Supreme Court misdirected itself in many respects rendering the judgment reviewable in terms of section 148 (2) of the Constitution. Section 2 (3) of the Intestate Succession Act No. 3 of 1953, in particular, and the Intestate Succession Act in general, do not apply to customary marriages but to civil rites marriages. Similarly, section 68 of the Administration of Estates Act excludes the administration and liquidation of deceased estates where the spouses were married by customary marriages.

The Intestate Succession Act provides the following:

> **". . . .**
>
> **2. (1) Subject to section 4 the surviving spouse of every person who dies after the commencement of this Act, either wholly or partly intestate, is hereby declared to be an intestate heir of the deceased spouse and this section shall apply.**

(2) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed ab *intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint estate, does not exceed one thousand two hundred emalangeni in value (whichever is the greater).

(3) If the spouses were married out of community of property and the deceased spouse leaves any descendant who is entitled to succeed ab *intestato,* the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed one thousand two hundred emalangeni in value (whichever is the greater.)

(4) If the spouses were married either in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato* but leaves a parent or a brother or sister (whether of the full or half-blood) who is entitled to succeed the surviving spouse shall succeed to the extent of a half-share or so much as does not exceed one thousand two hundred emalangeni in value (whichever is the greater.)

(5) In any case not covered by subsections (2), (3) or (4), the surviving spouse shall be the sole intestate heir.

(6) For the purposes of this Act any relationships by adoption under the Adoption of children's Act No. 64 of 1952, or any other law governing the adoption of children shall be equivalent to blood relationship.

. . . .

4. This Act shall not apply to any African if the estate of such African is required to be administered and distributed according to the customs and usages of the tribe or people to which the African belonged by virtue of section 68 of the Administration of Estates Act No. 28 of 1902."

[23] Section 68 of the Administration of Estates Act No. 28 of 1902 provides the following:

"**68. (1) If any African who during his lifetime has not contracted a lawful marriage, or who, being unmarried is not the offspring of parents lawfully married, dies intestate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged; and, if any controversies or questions shall arise among his relatives regarding the distribution of the property left by him, such controversies or questions shall be determined by a Swazi court having jurisdiction.**

(2) The Master may not be called upon to interfere in the administration and distribution of the estate of any such African.

(3) For the purpose of this section, "African" shall mean any person belonging to any of the aboriginal races or tribes of Africa South of the Equator, or any person one of whose parents belongs to any such race or tribe."

[24] The Full Bench as well as the Supreme Court on appeal failed to appreciate that the Intestate Succession Act only applies to deceased estates where the spouses were married by civil rites; hence, the criticisms levelled against the Act for discriminating against women married under customary law, and, the allocation of a child's share to the surviving spouse are misconceived. The Act was further criticised for violating and undermining the rights of intestate spouses married under customary law. The Act was also criticised for relegating a surviving spouse married under customary law to a mere child in the distribution of a deceased estate, instead of being entitled to a reasonable provision out of the deceased estate. To that extent the Full Bench held that section 2 (3) of the Act was "irreconcilable and in stark violation of section 34 (1) of the Constitution". It is against this background that section 2 (3) of the Intestate Succession Act was declared unconstitutional and struck down.

The Full Bench held[1]:

[1] Paragraph 26 of the judgment of the Full Bench.

"[26] It is also abundantly clear that contrary to the expressed wishes of the Applicants, Section 2(3) of Intestate Succession Act of 1953 (Act 3 of 1953) is irreconcilable and in stark violation of Section 34(1) of the Constitution of Swaziland. It would be foolhardy, heartless and with callous disregard of its constitutional mandate, for the High Court to order its continued usage. It violates and undermines the rights of intestate spouses married under customary law, which relegates a wife to a mere child in the distribution of a deceased estate, instead of being entitled to a reasonable portion thereof, testate or intestate, married in whichever way permissible under the laws and customs in existence."

[25] Section 68 of the Administration of Estates Act specifically provides that deceased estates of African spouses married under custom shall be administered in terms of customary law. This Act further provides that the Master of the High Court is not mandated to interfere in the administration of such an estate if a dispute arises, and, that only Swazi Courts shall have jurisdiction to determine such a dispute. Clearly, the Master of the High Court has no jurisdiction to administer deceased estates where the spouses were married in terms of Swazi Law and Custom.

[26] The Supreme Court further misdirected itself by failing to appreciate that only civil rites marriages can either be in community or out of community of property. Customary marriages cannot be in community or out of community of property. These legal concepts are not known and have no

legal application to customary marriages. The judgment of the Full Bench equates a marriage in community of property to a customary marriage. The judgment specifically states that, "until Parliament has enacted legislation to regulate property rights of spouses including common law husband and wife, the Master is hereby ordered and directed to distribute deceased estates in accordance with the provisions of section 34 (1) of the Constitution of Swaziland by equating customary law marriages to civil rites marriages in community of property[2] ".

[27] This country has a dual legal system. This Court has consistently warned our courts that they should always make a proper choice of law in matters coming before them, whether to apply Roman-Dutch Common Law or Swazi Customary Law; and, that it is downright insensitive and wrong to apply Roman-Dutch Common Law in a case which cries out for Swazi Law and Custom[3].

[28] Accordingly, Swazi Law and Custom is applied and enforced as the Common law of this country except where and to the extent that those principles or rules of customary law are inconsistent with the Constitution or a statute or repugnant to natural justice or morality or the general

[2] Paragraph 78 of the judgment of the Full Bench. It was confirmed by the Supreme Court on appeal at paragraph 34 of its judgment.
[3] Commissioner of Police and Another v. Mkhondvo Aaron Maseko Civil Appeal No. 3/2011 at para 1 & 2.

principles of humanity.[4] The Full Bench as well as the Supreme Court on appeal were not called upon to make a finding whether the principles of customary law were inconsistent with the Constitution or a statute or repugnant to natural justice or the general principles of morality. Similarly, a finding was not made whether or not the principle of primogeniture contravenes section 34 (1) of the Constitution.

[29] The Constitution recognises both the Roman Dutch Common law as well as Swazi Law and Custom, and, it provides the following[5]:

> **"252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the Common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.**
>
> **(2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi Law and Custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.**

[4] Section 252 of the Constitution of Swaziland.
[5] Section 252 of the Constitution.

(3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.

(4) Parliament may -

(a) provide for the proof and pleading of the rule of custom for any purpose;

(b) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced; and

(c) provide for the resolution of conflicts of customs or conflicts of personal laws."

[30] The Supreme Court on appeal did not consider the principles of Swazi Law and Custom applicable to deceased estates where the spouses were married in terms of customary law. The principles of Swazi Law and Custom should have been analysed and assessed in order to ascertain whether they are in conformity with the provisions of section 34 (1) of the Constitution. The reference by the Supreme Court on appeal to the Intestate Succession Act is, with due respect, irrelevant and misconceived since the Act has no application to customary marriages. The real issue for determination was whether the principles of customary law of succession are in contravention of section 34 (1) of the Constitution.

[31] The distribution of a deceased estate is unknown in customary marriages; hence, in Southern Africa, customary or indigenous law in general emphasises succession rather than inheritance. Accordingly, the successor does not inherit the family property but he succeeds the deceased by taking over the control of the family property; the successor or administrator administers the deceased estate in trust for the family. He does not inherit the property but merely administers the property on behalf of the family. He assumes the responsibility immediately after the cleansing ceremony, and, is appointed by the Family Council. Succession in customary law is governed by the principle of primogeniture; and, this principle is fundamental to the customary law of succession in Southern Africa[6].

[32] In the South African Constitutional case of Nontupheko Maretha Bhe and Two Others, His Lordship Langa DCJ who delivered the majority judgment of the court had this to say[7]:

> **"[75] It is important to examine the context in which the rules of customary law, particularly in relation to succession, operated and the kind of society served by them. The rules did not operate in**

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[6] The South African Constitutional case of *Nontupheko Maretha Bhe and Two Others v. Magistrate Khayelitsha and Three Others* together with *Commission for Gender Equality and Another v. Mantabeni Freddy Sithole and Two Others*; *South African Human Rights Commission and Another v. President of the Republic of South Africa and Another* case No. CCT 49/03, 50/03 and 69/03.

[7] At para 75-78 of the judgment.

isolation. They were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. This served various purposes, not least of which was the maintenance of discipline within the clan or extended family. Everyone, man, woman and child had a role and each role, directly or indirectly, was designed to contribute to the communal good and welfare.

[76] The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.

[77] Central to the customary law of succession is the rule of primogeniture, the main features of which are well established. The general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.

[78] The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family."

[33] Succession to deceased estates in this country is governed by the principle of primogeniture as illustrated by the above case of Nontupheko Bhe Maretha. Professor F.P. Van R. Whelpton, says the following[8]:

"13.7 The person who takes over the role of the deceased as the general administrator and acknowledged head of the family is called Inkhosana (which literally means a small king). The purpose of the appointment is to ensure that all members of the family are taken care of. He therefore takes charge of the estate and holds it in trust for the whole family. The iNkhosana (successor) is identified and appointed by the Lusendvo (Family Council)".

[8] The indigenous law and custom of the Kingdom of Swaziland, 2013, paragraph 13.7.

Professor Whelpton deals with customary marriage as follows[9]:

"12.4.3 The death of the husband does not terminate her marriage, because in technical terms, marriage is a union of two families. The wife's house continues to exist and she shares in all the rights and obligations of her house as she did during her husband's lifetime. She remains with her husband's family and brings up her deceased husband's children or bears more children by his brother through the custom of kungena[10]. When she dies, she should be buried at the house of her deceased husband. . .

13.1 For the Swazis succession relates purely to succession to the position of the deceased head of a family in accordance with well-established rules. Estates vest in the families who are not, in principle, susceptible to death and therefore exclude the notion of inheritance. The obligations of the appointed successor normally include taking over the ceremonial and advisory duties and support of a deceased person in the family network. Succession is of a universal nature which means that the successor acquires benefits and duties.

Although there is no division or distribution of the deceased estate, each house in a polygamous family will have accumulated property belonging to that particular house. The management of such property and the control of that house are entrusted to the successor of that house. . .

13.2 The words 'succession' and inheritance are often used as synonyms, but for analytical purposes they should be distinguished. Inheritance denotes rights to property only while succession implies

[9] Whelpton: The Indigenous law and custom of the Kingdom of Swaziland, paragraph 12.4.3, 13.1, 13.2 and 13.3
[10] The taking over of a deceased man's wife by his brother or other male relative.

the transmission of all the rights, duties, powers and privileges associated with status. The successor succeeds to the position of the deceased in regard to his control over the members of the household as well as over the estate of the house or household. Succession is therefore related to status and property. Succession in terms of Swazi Law and Custom is usually determined in accordance with the ranking of the houses of a deceased male person. This is in turn, determined by the ranking of his wives in a polygamous situation. However, the estate of a person is not distributed among members of the house.

The family head is succeeded by a general successor, but at the same time there is the question of succession to his position as head of his various houses. There is therefore, the matter of both a general successor and a successor in each house.

The family head does not individually own the property of any house; it belongs in communal ownership to the family of the house as a unit, subject to his supervision and control, and his death does not affect this position. The house continues to exist as a unit and its rights and property remain vested in the family collectively; the only change is in the person of the family head.

13.3 . . .

Although a woman cannot be permanently approved as a successor, she does have the right of access to certain property, such as insulamnyembeti[11] and liphakelo[12] beasts, and even some level of

[11] A beast given to the mother of the bride when emalobolo or cattle are delivered as the bride price to the bride's father by the groom and his family. Literally, it means "to wipe away tears". The cow is paid to thank the bride's mother for having looked after the bride since birth.

[12] A beast given by a husband to his wife to signify that she may eat certain food at her marital home which she would otherwise by customary law be prohibited from eating such as cow-milk and sour milk from the family cattle.

control over some kinds of property such as imihlambiso[13]. Thus the transfer of rights must be considered in terms of access to and control over property."

[34] Swazi Courts have jurisdiction to deal with any dispute arising from a deceased estate where the spouses were married in accordance with Swazi Law and Custom[14].

"9. Subject to any express provision conferring jurisdiction, no Swazi Court shall have jurisdiction to try —

(a) **cases in which a person is charged with an offence in consequence of which death is alleged to have occurred, or which is punishable under any law with death or imprisonment for life;**

(b) **cases in connection with marriage other than a marriage contracted under or in accordance with Swazi law or custom, except where and in so far as the case concerns the payment or return or disposal of dowry;**

(c) **cases relating to witchcraft, except with the approval of the Judicial Commissioner.**

. . . .

11. Subject to the provisions of this Act a Swazi Court shall administer:

(a) The Swazi Law and Custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland;

[13] Marriage gifts given by the bride to in-laws including the father of the groom and his brothers, the mother-in-law starting with the groom's mother, siblings of the groom and the groom.
[14] Sections 9 and 11 of the Swazi Courts Act 80 of 1950

(b) The provisions of all rules or orders made by the Ngwenyama or a Chief under the Swazi Administration Act No. 79 of 1950 or any law repealing or replacing the same, and in force within the area of jurisdiction of the court;

(c) The provisions of any law which the court is by or under such law authorised to administer."

[35] It is apparent from section 68 of the Administration of Estates Act that a customary marriage was not considered as a lawful marriage by the Colonial Government in Swaziland. Only Africans who had abandoned their customs in favour of a European way of life, and, further married by civil rites were considered to have a lawful marriage. Accordingly, the deceased estate of Chief Sibengwane Ndzimandze, to the extent of his customary marriage, cannot be administered by the Master of the High Court but according to the principles of Swazi Law and Custom; and, all disputes relating to the deceased estate have to be determined by a Swazi Court[15]. The High Court has no original jurisdiction to entertain this matter, and, the Constitution provides the following[16].

"151. (3) Notwithstanding the provisions of subsection (1), the High Court –

(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;

[15] Section 4 of the Intestate Succession Act; section 68 of the Administration of Estates Act;
[16] Section 151 (3) (b) of the Constitution.

(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force."

[36] Accordingly, it is legally incompetent to equate customary marriages to civil rites marriages in the administration of deceased estates. It is the finding of this Court that section 2 (3) of the Intestate Succession Act does not find application in customary marriages, and, that it only applies to civil marriages out of community of property.

[37] Section 34 (1) of Constitution provides the following:

"34. (1) A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.

(2) Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife."

[38] Section 34 (1) of the Constitution confers property rights of spouses. Accordingly, the surviving spouse is entitled to a reasonable provision out of the estate of the deceased spouse irrespective of whether or not the deceased died intestate or whether the marriage was by civil or customary

rites. However, this constitutional provision does not define "a reasonable provision out of the estate of the other".

[39] Similarly, Section 34 (1) of the Constitution does not revoke customary marriages; it does not repeal or overrides section 4 of the Intestate Succession Act or section 68 of the Administration of Estates Act. Furthermore, it does not subject customary marriages to the administration of the Master of the High Court. This provision seeks to afford the surviving spouse with a reasonable provision from the deceased estate.

[40] The task of defining a reasonable provision within the context of the recognised marriages in this country has been given to Parliament in terms of section 34 (2) of the Constitution. Parliament has been given the arduous task of enacting legislation regulating the property rights of spouses including Common-Law husband and wife. When interpreting the Constitution, courts should not venture into the terrain of Parliament and legislate. The Constitution gives a mandate to Parliament to make laws[17]:

> **"106. Subject to the provisions of this Constitution -**
>
> **(a) the supreme legislative authority of Swaziland vests in the King-in- Parliament;**

[17] Sections 106-108 of the Constitution.

(b) the King and Parliament may make laws for the peace, order and good government of Swaziland.

107. Subject to the provisions of this Constitution, the power of the King and Parliament to make laws shall be exercised by bills –

(a) passed by both chambers of Parliament;

(b) passed by the House in the cases referred to in sections 112, 113, 114 and 116 (2);

(c) passed at a joint sitting of the Senate and the House, in the cases referred to in sections 115(3), 116 (1) 117, and Chapter XVII;

(d) passed by the Senate in the case referred to in section 115 and assented to by the King under his hand.

108. (1) A bill shall not become law unless the King has assented to it and signed it in token of that assent."

[41] The Full Bench as did the Supreme Court on appeal did encroach upon the legislative preserve of Parliament by determining a reasonable provision in terms of section 34 (1) of the Constitution. It is Parliament which should give life to section 34 (1) of the Constitution by putting in motion the process set out in section 34 (2) of the Constitution.

[42] The broad mandate given to Parliament by section 34 (2) of the Constitution requires a detailed analysis of the property rights of spouses married under both the civil and customary rites. With regard to civil rites marriages, a distinction should be drawn between marriages in

community of property and marriages out of community of property. Property rights of Common-Law husband and wife should be provided. Such an exercise does require extensive consultations with members of the general public with a view to come up with a law that will be accepted and recognised by the people.

[43] The Full Bench acted prematurely by equating customary marriages to civil rites marriages and further directing that the Master of the High Court should distribute and liquidate all deceased estates in terms of section 34 (1) of the Constitution when Parliament had not yet exercised its mandate under section 34 (2) of the Constitution. Legally, the Master is not entitled to distribute and liquidate deceased estates in customary marriages in the face of section 4 of the Intestate Succession Act as well as section 68 of the Administration of Estates Act. The Master of the High Court is precluded by law and cannot distribute and liquidate deceased estates in customary marriages pending the enactment of legislation to govern the property rights of spouses.

[44] It is common cause that the estate of Chief Sibengwane Ndzimandze was distributed immediately after the judgment of the Supreme Court on appeal had been delivered. Only cash found in the deceased estate was distributed. The other assets such as the three homesteads where the

widows reside and situated within the chiefdom on Swazi Nation Land could not be distributed as this practice is unknown in customary law; the cattle as well as the ploughing fields could also not be distributed since they formed part of "the house properties" of the three homesteads. The deceased estate was distributed as if the three widows were married by civil rites in community of property; they received their half-share plus a child's share, in addition to E4, 000.00 (four thousand emalangeni) each for the cleansing ceremony.

[45] The distribution of deceased estates in civil law marriages differs significantly depending upon whether the marriage was in community of property or out of community of property, and, whether or not the deceased died intestate. There is no single formula of distribution and liquidation of deceased estates where the spouses were married by civil rites.

[46] The present application has been brought in terms of section 148 (2) of the Constitution; and, the applicant seeks the following relief:

(a) Reviewing and setting aside the majority decision of the Appeal Court under Civil Appeal Case No. 55/2014.

(b) Reviewing and setting aside the majority judgment of the Appeal Court confirming the orders of the Full Court under civil case No. 981/2014.

(c) Directing the Minister of Justice and/or Parliament to expedite the enactment of legislation to regulate property rights of spouses as envisaged under section 34 (2) of the Constitution.

(d) Directing that the Order of this Court reviewing and setting aside the judgement under Appeal Case No. 55 of 2014 shall be without prejudice to any distribution consequent upon the said judgment.

(e) Setting aside the minority decision of this Court in case No. 55/2014.

(f) Further and/or alternative relief as the Honourable court may deem meet.

[47] This application is unopposed, and, the Master of the High Court who is ordinarily represented by the Attorney General is not legally represented; hence, the application proceeded *ex parte*. The Attorney General seeks to review the judgement of the Supreme Court on appeal on the basis that it is flawed and not in the public interest. Generally, an appeal or review is brought only against a majority or unanimous judgment of the High Court or Supreme Court and not against a minority judgment. However, in this application the review is being sought against both the majority

and minority judgements of the Supreme Court on appeal, which in my humble view, it is misconceived.

[48] Section 148 (2) of the Constitution provides the following:

> **"148 (2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court."**

[49] The review procedure provided in section 148 (2) of the Constitution constitutes an exception to the doctrine of *res judicatae*. In *Bertram v Wood*[18], the Supreme Court of the Cape of Good Hope dealt with the doctrine in the following manner:

> **"The meaning of the rule is that the authority of res judicata includes a presumption that the judgment upon any claim submitted to a competent court is correct and this presumption being *juris et de jure*, excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless, and upon the requirements of good faith which, as said by Gaius, does not permit of the same thing being demanded more than once. On the other hand a presumption of this nature unless carefully circumscribed, is capable of producing great hardship and even positive injustice to individuals.**

[18] 1893) 10 SC 177 at 180.

It is in order to prevent such injustice that the Roman law laid down the exact conditions giving rise to the *exceptio rei judicatae*."

[50] The South African Constitutional Court in *Thembekile Molaudzi v The State*[19] had this to:

"16. The underlying rationale of the doctrine of *res judicata* is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts."

[51] His Lordship M.J. Dlamini AJA in *President Street Properties (Pty) Ltd v Maxwell Uchechukwu and Four Others*[20], delivering a unanimous judgment of the full bench of the Supreme Court of Swaziland had this to say:

"In its appellate jurisdiction the role of the Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and, in its newly endowed review jurisdiction this Court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this

[19] CCT 42/2015 at para 16; (2015) ZACC 20.
[20] Appeal case No. 11/2014 at para 26 and 27

Court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this Court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is *functus officio* or that the matter is res judicata or that finality in litigation stops it from further intervention. Surely, the quest for superior justice among fallible beings is a never ending pursuit for our court of the last resort.

It is true that a litigant should not ordinarily have a 'second bite at the cherry', in the sense of another opportunity of appeal or hearing at the court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a flood gate of reappraisal of cases otherwise res judicata. As such this review power is to be invoked in a rare and compelling or exceptional circumstances . . . It is not review in the ordinary sense."

[52] The South African Constitutional Court in *Sizwe Lindelo Snail KaMtuze v Bytes Technology Group South Africa (Pty) Ltd and Four Others*[21].

"18. . . . this Court has reiterated the well-known general principle that, once a court has made a final decision in a matter, it becomes *functus officio* and has no power thereafter to reconsider its decision other than under provisions such as those relating to rescission or variation of judgments. The rationale behind this principle is, in

[21] CCT 53/2013 at para 18; [2013] ZACC 31

part, that there should be both certainty and finality on matters that have been decided by a court. This is because it would be untenable if a court were free to reconsider and change its decisions as it pleases and if parties to disputes do not have the finality necessary for them to arrange their affairs appropriately.

19. If the position were to be that this Court does have power outside of Rule 29 read with Rule 42 to reconsider and, in an appropriate case, change a final decision that it had already made, one can only think that that would be in a case where it would be in accordance with the interests of justice to re-open a matter in that way. The interests of justice would require that that be done in very exceptional circumstances."

[53] His Lordship Justice S.B. Maphalala AJA delivered a unanimous judgment of the full bench of the Supreme Court in the case of *Mntjintjwa Mamba and Two Others v Madlenya Irrigation Scheme*[22]:

"16. Section 148 (2) of the Constitution provides that "the Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court'. As yet, no statute or rules of court have been enacted to regulate reviews under section 148 (2) of the Constitution.

17. The Common Law provides for a special form of review, which is an exception to the generally applicable principle of res judicata and the need for finality in litigation. As such it allows for a review in exceptional circumstances only where necessary to correct a manifest significant injustice caused by an earlier order for which

[22] Civil Appeal case No. 37/2014 at para 16 and 17; 37/2014 [2015] SZSC 22

there is no alternative remedy. The fact that a party to an appeal is dissatisfied with the result does not suffice."

[54] Theron AJ in the South African Constitutional case of *Thembekile Molaudzi v. The State*[23].

"37. The incremental and conservative ways that exceptions have been developed to the *res judicata* doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicatae*.

. . . .

45. Where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner that permits this Court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to *res judicata*. The present case demonstrates exceptional circumstances that cry out for flexibility

[23] At para 37 and 45. This case was subsequently quoted with approval by the Supreme Court of Swaziland in the case of *Siboniso Clement Dlamini NO v Phindile Ndzinisa and Two Others* Appeal case No. 67/2014 at para 7.

on the part of this Court in fashioning a remedy to protect the rights of an applicant in the position of Mr. Molaudzi."

[55] Lord Woolf CJ, the Lordship Chief Justice of England and Wales in *Taylor v Lawrence*[24]:

> **"55. . . . The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will be important considerations."**

[56] The review proceedings under section 148 (2) of the Constitution should be brought within a reasonable period of time pursuant to the delivery of the impugned judgment. The test in determining what is reasonable is objective. The Constitution envisages one review application before the Supreme Court unless the existing judgement on review is substantively and legally incompetent and unenforceable and does not constitute an effective remedy which accords with justice and fairness.

[24] (2003) QB528 (CA) at para 55

[57] The reason for the restrictive interpretation of section 148 (2) of the Constitution is the existence of a general principle of law that once a court has made a final decision in a particular matter, it becomes *functus officio* and has no jurisdiction to reconsider its decision. The rationale behind this principle is that there should be an end to litigation in order to achieve legal certainty and finality in litigation. Furthermore, in the subsequent review proceedings, the aggrieved litigant should, in addition, show that he is liable to suffer substantial hardship and injustice if the existing judgment on review is allowed to stand, and, that there is no effective alternative remedy. The administration of justice and indeed the Rule of Law will fall into disrepute and further cause anarchy, if floodgates of subsequent reviews are allowed before the Supreme Court. There would be no end to litigation; and, there would be no final judgment.

[58] The judgment of the Supreme Court on appeal confirming the judgment of the Full Bench is reviewable in terms of section 148 (2) of the Constitution. The Supreme Court on appeal struck down and declared unconstitutional section 2 (3) of the Intestate Succession Act No. 3 of 1953 on the basis that it contravenes section 34 (1) of the Constitution. The underlying basis for this decision is that section 2 (3) of the Intestate Succession Act entitles a surviving spouse married under customary law

to a child's share. The court reasoned that such a portion does not constitute a reasonable provision out of the deceased estate.

[59] However, it is apparent in the preceding paragraphs that section 2 (3) of the Intestate Succession Act is only applicable to surviving spouses married under civil rites out of community of property in circumstances where the deceased died intestate. This legislative provision has no application to deceased estates where the spouses were married under Swazi Law and Custom.

[60] The issue for decision before the Full Bench on appeal as well as the Supreme Court on appeal was whether section 2 (3) of the Intestate Succession Act was in conflict with section 34 (1) of the Constitution in relation to surviving spouses married under customary law. The issue for decision was not whether the principles of Swazi Law and Custom are valid or whether they are in contravention of section 34 (1) of the Constitution. Accordingly, section 2 (3) of the Intestate Succession Act was irrelevant and not determinative of the matter before court.

[61] Lastly, section 34 (1) of the Constitution provides for the property rights of surviving spouses and entitles them to a reasonable provision out of the estate of the deceased spouse who died intestate irrespective of

whether their marriage was by civil or customary rites. However, the Constitution gives a mandate to Parliament in terms of section 34 (2) of the Constitution to enact legislation regulating the property rights of spouses including common law husband and wife. This is an arduous task which requires extensive consultations with the nation at large in light of the existence of the dual legal system. There are Swazis who are married by customary rites and live according to the principles of Swazi Law and Custom. Similarly, there are Swazis who are married by civil rites and live in accordance with the western culture. The legislation which is envisaged by section 34 (2) of the Constitution should balance the property rights of spouses taking into account the dual legal system and the Constitution as the Supreme law of the land.

[62] Accordingly, the orders made by the Full Bench, and confirmed by the Supreme Court on appeal are legally incompetent in the absence of legislation enacted by Parliament in terms of section 34 (2) of the Constitution. The courts should not interfere with the Constitutional mandate of Parliament. The Supreme legislative authority of Swaziland vests in the King-in-Parliament; it is the King and Parliament who have the authority to make laws for the peace, order and the good government of Swaziland.[25]

[25] Ibid footnote No. 11.

[63] Section 34 (2) of the Constitution provides that "Parliament shall, as soon as practicable, after the commencement of the Constitution, enact legislation regulating the property rights of spouses including Common-Law husband and wife". The Constitution was signed into Law on the 26th July 2005; hence, the delay in enacting this legislation has been inordinately long. However, that is not a justification for the courts to usurp the function of Parliament. The least that courts could do in the circumstances is to remind Parliament of its Constitutional obligation as mandated by section 34 (2) of the Constitution, and, to set time limits within which Parliament should comply with its Constitutional mandate.

[64] This Court is alive to the fact that the deceased estate of Chief Sibengwane Ndzimandze was distributed in accordance with the judgement of the Supreme Court on appeal delivered on the 3rd December 2014; hence, the order of this Court shall be enforced without prejudice to the liquidation and distribution consequent upon the said judgment.

[65] Accordingly, the following order is made:

1. The judgement of the Supreme Court on appeal under Civil Appeal Case No. 55/2014 delivered on the 3rd December 2014 confirming

the judgment of the Full Bench under Civil Appeal Case No. 981/2010 delivered on the 23rd September 2014 is hereby reviewed and set aside in its entirety in accordance with section 148 (2) of the Constitution of Swaziland.

2. The Minister of Justice and Constitutional Affairs in conjunction with Parliament are hereby directed to expedite the enactment of legislation regulating the property rights of spouses including the Common-Law husband and wife as required by section 34 (2) of the Constitution of Swaziland within a period of twelve months from the date of this order.

3. The order of this Court reviewing and setting aside the judgment of the Supreme Court on appeal under Civil Appeal Case No. 55/2014 shall be enforced without prejudice to any distribution consequent upon the said judgment.

4. No order as to costs of suit.

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

DR. B. ODOKI
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

Z. MAGAGULA
ACTING JUSTICE OF APPEAL

I agree

M. LANGWENYA
ACTING JUSTICE OF APPEAL

For Applicant

Attorney General
Mr. M.J. Dlamini

No Appearance for respondent

DELIVERED IN OPEN COURT ON 30 JUNE 2016