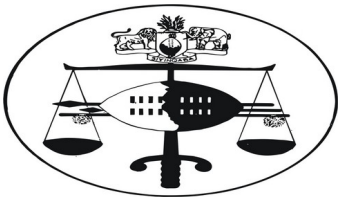


IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 23/2016

In the matter between:

MARTHA NOKUTHULA MAKHANYA	**1ST APPELLANT**
JENNETH THOLAKELE SIHLONGONYANE	**2ND APPELLANT**
CECELIA GCINAPHI MAKHANYA	**3RD APPELLANT**
ISAAC JIVA DLAMINI N.O	**4TH APPELLANT**

And

SARAH B DLAMINI	**RESPONDENT**

Neutral citation: *Martha Nokuthula Makhanya, Jenneth Tholakele Sihlongonyane, Cecelia Gcinaphi Makhanya, Isaac Jiva Dlamini N.O vs Sarah B Dlamini (53/16) [2017] SZHC 48 (2016)*

Coram : M.C.B. MAPHALALA, CJ
M. J. DLAMINI, JA
J. P. ANNANDALE, JA

Heard : 9TH AUGUST, 2017

Delivered : 30TH NOVEMBER, 2017

SUMMARY

Civil Appeal – Family Law – respondent lodged an application for a declaratory order that the marriages solemnized between the deceased husband and first , second and third respondents are bigamous and accordingly null and void – respondent further sought an order cancelling all entries in the marriage register in respect of the impugned marriages – respondent also sought an order staying the appointment of the executor of the deceased estate pending the finalization of the application – court a quo granted the orders sought;

On appeal held that the Superior Court of Judicature in Swaziland has jurisdiction to make declaratory orders, and, that the grant of the remedy is discretionary;

Held further that in making declaratory orders, two legal requirements must be met: First, that the applicant should be a person interested in an existing, future or contingent right or obligation; Secondly, that if satisfied on the first requirement, the Court should decide whether the case is a proper case for the exercise of the discretion conferred upon the Court;

Held that the appeal succeeds on the basis that the application was abstract, hypothetical and academic as well as the failure by the respondent to give all interested persons an opportunity to be heard;

Accordingly, the appeal is allowed with costs to be borne by the estate.

JUDGMENT

[1] The respondent instituted an application in the court a quo on the 27th May, 2014 seeking the following orders: Firstly, declaring the marriages solemnized between the deceased Richard Themba Dlamini to the First, Second and Third respondents null and void on the basis that the impugned marriages are bigamous and accordingly null and void ab initio. Secondly, directing that the Registrar of Births, Marriages and Deaths cancel all the entries in the marriage register in respect of the purported marriages solemnized between the deceased Richard Themba Dlamini and the respondents. Thirdly, directing the Master of the High Court to stay the appointment of the executor pending the finalization of the application. Fourthly, directing the payment of an order for costs only in the event that the application is opposed.

[2] The application was opposed, and, the first, second and third respondents filed opposing affidavits. In turn, the applicant filed a replying affidavit. For purposes of this judgment I will refer to the parties as applicant and respondents as cited in the court a quo.

[3] The court a quo after hearing submissions by Counsel granted the application and made the following order: Firstly, that the marriages between the deceased and the First, Second and Third respondents are null and void ab initio on the basis that they are bigamous in terms of Section 7 of the Marriages Act[1]. Secondly, that the Registrar of Births, Marriages and Deaths is directed to expunge all entries in the marriage register in respect of the marriage of the deceased to the First, Second and Third respondents. On the other hand the court a quo directed that the children born of the

[1] No. 47 of 1964

impugned marriages are legitimate in terms of Section 31 of the Constitution[2]. This legislative provision abolishes the status of illegitimacy. The Section provides as follows:[3]

> **"3.1 For the avoidance of doubt, the Common laws status of illegitimacy of persons born out of wedlock is abolished."**

[4] The first, second and third respondents have appealed the judgment of the court a quo on the following grounds: Firstly, that the court a quo erred in law and in fact in deciding the matter on the basis that the respondents had admitted that the applicant was married by civil rites. Secondly, that the court a quo erred in law and in fact in deciding that there were disputes of fact, but refusing to specify those disputes of fact and then changing and deciding

[2] No. 001 of 2005

[3] Section 31 of the Constitution Act No. 001 of 2005

the matter on the papers, without stating good reasons for doing so. Thirdly, the court a quo erred in law in finding that the impugned marriages were bigamous in light of the purported marriage of the applicant being alleged to be governed by Chapter 133 of 1871 which did not recognise marriages under Swazi law and Custom. Fourthly, that the court a quo erred in law in holding that the details that are not reflected in the marriage certificate of the applicant are inconsequential, being the law governing the marriage, the full name and designation of the marriage officer as well as the order of the marriage.

[5] It is common cause that the deceased died on the 23rd December, 2013, and, that during his lifetime he stayed together with the applicant as well as the respondents as his lawful wives. All the respondents have children with the deceased, and, each of them has a separate homestead where they lived with the deceased and their children. It is not

disputed that the applicant was the first wife of the deceased, followed by the first, second and third respondents respectively. During the lifetime of the deceased, the applicant was aware of the marriages of the deceased to the respondents and accepted them as his wives.

[6] The applicant was married to the deceased in 1960; however, the respondents deny that the applicant's marriage was by civil rites; they contend that it was by Swazi law and Custom. The first respondent was married to the deceased in 1983, the second respondent in 1991 and, the third respondent in 2000. It is not disputed that the respondents were married to the deceased in terms of Swazi law and Custom.

[7] It is apparent from the evidence that the applicant, despite knowledge of the marriages of the respondents to the deceased did not challenge either the solemnization or legal validity of the said marriages during the lifetime of the

deceased. It is further apparent from the evidence that the applicant did not institute divorce proceedings against the deceased or laid any criminal charges of bigamy against the deceased. Furthermore, she did not institute similar legal proceedings to declare these marriages null and void ab initio on the basis that they were bigamous. The applicant waited earnestly for the death of the deceased before asserting her alleged legal rights of being the only lawful wife of the deceased. If her legal right was legally justified she could not have waited for the death of the deceased.

[8] The applicant has made serious allegations against the deceased in her founding affidavit that he was involved in extra-marital affairs with the respondents, that the deceased committed bigamy with the respondents, that she was the only lawful wife of the deceased, and that she openly confronted the deceased to desist from legalizing his extra marital affairs. However, these issues should have been

raised during the lifetime of the deceased in order to afford an opportunity to the deceased to defend himself in accordance with the doctrine of audi alteram partem.

[9] It is not disputed by the applicant that she was present during the marriage of the first respondent to the deceased. The first respondent contends that the applicant had personally welcomed her during the marriage ceremony typically as the senior wife. She annexed a photograph being Annexure "MNM1" taken with the applicant during the ceremony. She further attached another photograph annexure "MNM2" taken by the first respondent with the applicant's first born son during the wedding.

[10] The applicant further makes serious allegations that the deceased had chased her and their children from Mawawa Farm in 1984 in order to settle the second respondent and her children. She does not substantiate this allegation knowing

very well that the deceased cannot defend himself. There is no evidence of protestations in this regard to the unlawful eviction; and, no legal action was instituted by the applicant to interdict the deceased from evicting her and their children.

[11] From the evidence on the record, it is apparent that the second respondent contributed financially to the deceased estate. From 1984 she was involved in dairy farming and producing a lot of milk which was subsequently collected by the applicant and sold in Manzini and other convenient places. She was also involved in the production of vegetables and maize on the farm. The applicant would collect the vegetables for sale in various markets in the country; and, the maize would be packed in bags after shelling and transported to the Swaziland Milling Company to be sold. She further assisted the applicant in weeding her fields, harvesting and shelling of the maize in her homestead at Mahlanya. The applicant does not dispute this evidence.

[12] It is not disputed by the applicant that in 1991 the second respondent and the deceased performed umtsimba[4] ceremony at the applicant's homestead. The applicant and her children attended the ceremony. The second respondent presented gifts to the applicant and other members of the extended family. The applicant as did the other members of the family had accepted the gifts signifying their recognition and acknowledgement that the second respondent was the deceased's wife in accordance with Swazi law and Custom. There is no evidence that the applicant had instituted legal proceedings to interdict the deceased and the second respondent from conducting the ceremony. On the contrary the applicant had participated fully in the ceremony.

[13] It is common cause that in 2000 the deceased fell sick whilst he was at the applicant's homestead. I accept the evidence of the second respondent that she was invited by the applicant to

[4] Umtsimba is the traditional wedding

look after the deceased daily during daytime. She would travel from her place of residence in the morning to look after the deceased and return to her residence in the afternoon. Subsequently, the deceased moved to stay with the second respondent at her place of residence, and, she continued looking after him. In 2006 the second respondent moved from the farm to live in her new homestead at Mahlanya.

[14] I reject the evidence of the applicant that the second respondent came to her homestead daily as a visitor and not to look after the deceased. There is no evidence that the applicant had protested to the services of the second respondent in looking after the deceased. Furthermore, the applicant does not dispute the evidence of the second respondent that she had invited her to look after the deceased because she was busy and she could not look after him. Similarly, the applicant does not dispute the evidence of the second respondent that when the second respondent moved to

her new homestead at Mahlanya, the deceased moved with her, and, that she continued looking after him; and, it is apparent from the evidence that during this period, his health had deteriorated. The applicant does not dispute the evidence of the second respondent that she continued looking after the deceased until he died. The applicant averred that she was too busy to look after the deceased during daytime.

[15] The applicant does not dispute the evidence of the second respondent that upon the death of Thabitha Thwala who was a member of the family, the family resolved that the second respondent should wear the mourning jacket[5] and further carry her belongings during the funeral procession in accordance with Swazi Law and Custom. This gesture by the family was indicative of the recognition of the second respondent by the Dlamini family that she was a lawful wife of the deceased. The applicant did not object to the family's

[5] mourning jacket is worn by a close relative of the deceased for a fixed period of time

decision on the basis that she was not the lawful wife to the deceased. The applicant acquiesced and accepted that the second respondent as did the other respondents were lawfully married to the deceased.

[16] It is apparent from the evidence that the status and legal validity of the marriages of the respondents were never disputed by anybody including the applicant during the lifetime of the deceased. The applicant as well as the respondents were recognized as lawful wives to the deceased, and, the applicant was considered as the senior wife to the deceased. It was only after the death of the deceased, and during the meeting of the next of kin at the Master's Office, that the applicant declared that she was the only lawful wife to the deceased on the basis that she was married by civil rites. It was her contention that the marriages of the respondents were bigamous and accordingly null and void ab initio.

[17] The meeting of the next of kin was held at the Master's Office on the 15th April 2014 pursuant to the death of the deceased on the 20th December 2013. The purpose of the meeting was to appoint an executor dative in accordance with the Administration of Estates Act No. 28 of 1902.

[18] During the meeting of the next of kin, it was evident that the applicant wanted to be appointed as the executor dative of the estate. She produced a marriage certificate which she contended was proof that she was married by civil rites. The certificate showed that she was married on the 5th August 1960; however, the certificate was issued on the 30th September, 1993, which was thirty-three years after the alleged marriage.

[19] The respondents as well as other family members were seeing the certificate for the first time, and, they disputed the validity of the certificate; and, they insisted that the applicant

was married by Swazi Law and Custom. Neither the Marriage Officer who appeared as S. Papini or the witnesses appearing as A. Kunene and C. Gama deposed to affidavits confirming the civil rites marriage.

[20] During the course of the meeting of the next of kin, the applicant called upon the Master to declare that she was the only lawful wife by virtue of her marriage, and, that the marriages of the respondents were bigamous and therefore null and void ab initio. The Master informed the family that it was only the High Court that could make such a declaration; hence, she asked that the appointment of the executor dative should be stayed pending the outcome of the present application.

[21] The founding affidavit deposed by the applicant gives the impression that she is challenging the legal validity of the impugned marriages because the deceased had died. The

applicant wants to be appointed as the executor of the deceased's estate; she also wants to deprive the respondents of inheritance from the estate. She says the following in her founding affidavit:[6]

> **"20. I submit that as my husband is now deceased, and it has come to my knowledge that the status of the marriage needs to be declared more so as it will greatly affect the distribution of his assets and my inheritance.**
>
> **21. By virtue of the above I humbly pray that the marriages contracted in terms of Swazi Law and Custom after the civil rites marriage be declared null and void ab initio, and, that the fourth respondent be directed to cancel the entries in the marriage register in respect of the purported marriages between the deceased and the first,**

[6] Paragraphs 20 – 22.2

second and third respondents.

22. Furthermore, the fourth respondent has not appointed an executive dative, it would be presumptuous of me to believe that on the three marriages being declared invalid for reasons of bigamy, she will not appoint me.

22.1 But in the event that she has appointed someone else, I pray that the said appointment be set aside.

22.2 For purposes of avoiding litigation on the appointments of the executor dative, I humbly pray that fourth respondent be directed to stay the appointment pending the outcome of this

application. No prejudice will be suffered."

[22] The desire by the applicant to be appointed an Executrix dative during the meeting of the next of kin caused the postponement of the meeting sine die pending the finalization of the application. However, it is trite that an executor is not necessarily a beneficiary in the estate. In the absence of a testamentary executor, the Master is required by law to appoint a fit and proper person to be the executor.[7]

The Act provides the following:

"23. If a deceased person has by will or codicil duly appointed any person to be his executor, the Master shall, upon the written application of such executor, forthwith grant him letters of administration as soon

[7] Sections 23, 24 and 25 of the Administration of Estates Act No. 28 of 1902

as such will or codicil has been registered in the office of the Master:

Provided that if it appears to the Master, or if any person by writing, lodged with the Master objects that any will or codicil by virtue whereof any person claims to be the testamentary executor to the estate of any deceased person is not in law sufficient to warrant and support such claim, Letters of Administration may be refused by the Master until the validity and legal effect of such will or codicil has been determined by some competent court, or until such objection, has been withdrawn by the person by whom it was made until such person has had sufficient time to apply to such court, for an order restraining the issue of letters of administration:

Provided further that Letters of Administration shall not be granted to any such executor who at the time of making such written application, avers or resides outside Swaziland, and that, if the Master has reason to believe that such executor, although he may at the time of making such application be within Swaziland, will not remain within Swaziland until he has finally liquidated and settled the estate to be administered by him, the Master may refuse to grant letters of administration to him until he finds sufficient security for the due and faithful administration by him of such estate.

24. (1) When any person has died without having by a valid will or codicil appointed a person to be his executor, or where a person duly appointed to be the executor has predeceased him, or refuses or becomes incapacitated to act as such, or within such

reasonable time as the Master deems sufficient, neglects or fails to obtain Letters of Administration, the Master shall cause to be published in the Gazette and in such other manner as to him seems fit, a notice, calling the surviving spouse, (if any), the next of kin, legatees and creditors of the deceased to attend at his office at the time therein specified to see Letters of Administration granted to such person as shall then be appointed by him, executor to the estate of such deceased person:

Provided that when it appears to the Master necessary or expedient so to do, he may in such notice call such persons to attend before any regional Administrator at such time and place as may be appointed for the purpose of proposing a person to be recommended by the

Regional Administrator to the Master as fit and proper to be appointed executor.

(2) The Master shall, at the meeting at his office, or upon receiving the report of the Regional Administrator, appoint such person as to him seems fit and proper to be executor of the estate of the deceased and shall grant Letters of Administration accordingly, unless it appears to him necessary or expedient to postpone such appointment and to call any other such meeting.

Provided that when it appears to the Master that the estate of such deceased person is manifestly insolvent, it shall not be necessary for him to take any

proceeding for the appointment of an executor or executors.

25. In every case in which a competition shall take place for the office of executor dative, the surviving spouse failing whom the next of kin and failing whom a creditor, and failing whom a legatee shall be referred by the Master for such office:

Provided that nothing in this section contained shall prevent any one or more of the above-mentioned classes of persons from being conjoined in the said office with one or more of any of the other such classes and:

Provided further that if it appears to the Master or the High Court on reviewing the appointment made by the Master that any good reason exists against the appointment of all or any of the above-mentioned persons or classes of persons as executor or executors, any such person or class of persons may be passed by, and some other fit and proper person or persons may be, appointed and by the Master, or such court:

Provided further that every such appointment so made by the Master, shall, on the application of any person having an interest in such estate, be reviewed, and confirmed or set aside by the High Court, and such court by whom

such appointment is set aside, may appoint some fit and proper person."

[23] The respondents dispute the legal validity of the civil rites marriage by the applicant. The first respondent contend that a civil rites marriage allows for divorce even if the marriage was conducted in a Catholic Church, and, that it was open to the applicant to institute divorce proceedings if the deceased had committed adultery.[8] She contends further that the failure by the applicant to institute divorce proceedings in the circumstances implies that she waived her right to challenge the legal validity of the marriages and consequently the deceased's actions.[9] She concludes by emphasizing that according to the best of her knowledge and belief, the applicant was married to the deceased according to Swazi Law and Custom".[10]

[8] Paragraph 10 of the first respondent's answering affidavit

[9] Paragraph 17 of the first respondent's opposing affidavit

[10] Paragraph 20 of the first respondent's opposing affidavit

[24] The second respondent further denies that the applicant was married in terms of civil rites for the following reasons:[11] Firstly, that the deceased married her in 1983, and, the applicant did not object to the marriage either before or afterwards; Secondly, that when she was staying at the deceased's farm and engaged in dairy farming as well as agricultural production, the applicant would collect the produce consistently for sale at the Swaziland Milling Company in respect of maize and to the town of Manzini and other places in respect of the vegetables and dairy products. Thirdly, the applicant and her children attended the second respondent's umtsimba ceremony which was held at the applicant's homestead; accordingly, the applicant did not object to the umtsimba ceremony but she had participated fully to the extent that she had accepted bridal gifts from the first and second respondents. Fourthly, the applicant had invited her to look after the deceased at her homestead when

[11] Paragraphs 2 - 7

the deceased was sick because she was busy to look after the deceased herself.

[25] The second respondent further contends that when the deceased's health deteriorated, the applicant allowed her to look after the deceased at her homestead at Mahlanya until he died. She contends further that the applicant did not object when the family resolved that she should wear the mourning jacket on the death of Thabitha Thwala and further carry her belongings during the funeral procession.

[26] Consequently, the second respondent contends that the applicant had also participated and danced during her umtsimba ceremony, and, that of the first respondent and did not object to the holding of the umtsimba ceremony. In addition she contends that the applicant failed to institute divorce proceedings or lay a criminal charge of bigamy in respect of adultery. She concludes by stating that if the civil

rites marriage exists, she condoned the actions of the deceased and waived her legal rights to challenge the legal validity of the marriages of the respondents. The applicant admits that she did kuhlambisa[12] which is part of Swazi Law and Custom.

[27] The only sibling to the deceased, Linah Loziga Magagula (nee Dlamini) deposed to an affidavit in support of the respondents. According to her evidence, she was born on the 9th June 1930, and, she is older than the deceased. According to her evidence the deceased was born on the 14th February, 1933. She denies that the applicant was married by civil rites to the applicant, and, she confirms that the applicant was married to the deceased in terms of Swazi Law and Custom. She emphasized that the applicant was smeared with red ochre during the umtsimba ceremony performed at the homestead of Thabitha Thwala, who was the sister to their

[12] Kuhlambisa is the custom where the bride presents gifts to the family of the groom

mother. She corroborated the evidence of the second respondent that during the lifetime of the deceased neither the applicant nor the deceased had mentioned the existence of a civil rites marriage between themselves. She corroborated the evidence of the respondents that during the marriage of the first respondent the applicant had embraced Swazi Law and Custom by welcoming and dancing with her; and, that this was an acknowledgement that the first respondent was a lawful wife of the deceased.

[28] Linah Loziga Magagula (nee Dlamini) had a very strong worded statement directed to the applicant. She had this to say in her confirmatory affidavit:

> **"4. My late brother married applicant in terms of Swazi Law and Custom and applicant was smeared with red ochre during the umtsimba ceremony. There was no separate teka**

ceremony preceding the umtsimba. The umtsimba ceremony was performed at Thabitha Thwala's homestead.

. . . .

7. When the deceased married first respondent by Swazi law and custom, applicant welcomed her and even danced at her umtsimba, and, this was a clear acknowledgement that first respondent was a wife to deceased and was welcome at the Dlamini home. Applicant did not protest to this marriage in light of the civil rites marriage, certificate which she now brandishes. It was incumbent upon Applicant to raise her objection to such marriage and brandish the certificate as an impediment to

the umtsimba and as sister to the deceased I would have been the first point of call. Instead she jovially partook in the proceedings and even had photographs of her, First Respondent and the deceased standing together taken."

[29] Mrs Loziga Magagula disclosed that applicant had protested to the marriage of the third respondent on the basis that she was a daughter of the deceased's cousin, and, that she was staying with them so that she could be assisted financially with her education. She emphasised that the protestation was not related to the alleged civil rites marriage. She corroborated the evidence of the first and second respondents in all material respects. She confirmed that applicant had participated in the umtsimba ceremony of the first and second respondents and further accepted bridal gifts from them as the senior wife. To that extent she denied that the applicant was married to the deceased by civil rites. She disclosed that

she was too close to the deceased as she was the only sibling to him and that neither the deceased nor the applicant had ever mentioned to her that there was a civil rites marriage during his lifetime. She also confirmed that the applicant did not lodge a suit for a decree of divorce or lay a criminal charge of bigamy against the deceased or the respondents.

[30] The evidence of the respondents and that of Mrs Magagula were further corroborated by the evidence of Justice Titus M. Mlangeni who was at the time an Attorney for the deceased. He deposed to a confirmatory affidavit on the 26th June 2014 in support of the second respondent, and, he had this to say:-

> **"2. I confirm that I know the late Richard Themba Dlamini of Mahlanya, he was a client of mine during his lifetime.**

3. One of the many instructions I had from him was to draft a will. At this stage I had become aware that there was a dispute regarding the marital regime of his first marriage. In one of the consultations we had at his home at Mahlanya, I specifically asked him whether his first marriage was by civil rites or in terms of Swazi Law and custom. He unequivocally stated that his first marriage was in Swazi Law and Custom. His first wife is the applicant."

[31] It is apparent from the evidence that the respondents dispute the evidence of the applicant that she was married by civil rites to the deceased. The applicant has admitted that during the lifetime of the deceased she did not challenge the validity of the marriages of the respondents when the deceased could have been afforded an opportunity to be heard on the matter. She waited for his death so that she could challenge the legal

status of the marriages of the respondents when the deceased could not be in a position to defend himself. Similarly, the applicant did not lay criminal charges against the deceased for bigamy which again could have afforded the deceased the opportunity to defend himself.

[32] In the preceding paragraphs, I have also dealt with the apparent challenges to the authenticity of the marriage certificate filed by the applicant; and the challenges and irregularities raised cannot properly be said to be inconsequential. This certificate does not advance the applicant's cause of action that she was married in terms of civil rites. It is common cause that the applicant seeks a declaratory order that the marriages between the deceased and the respondents are bigamous and therefore null and void ab initio; this is the basis of the cause of action. Admittedly there are consequential ancillary prayers sought by the applicant. The Roman Dutch Law sanctioned declaratory

orders only where there has been an interference with the right sought to be declared.[13]

[33] His lordship Innes CJ in the Geldenhuys and Neethling case delivered a unanimous judgment of the Court of Appeal and he had this to say:[14]

> **"As to the power of the court to grant declarations of right where such rights have been interfered with, there can be no manner of doubt …. There, however, consequential relief is also claimed; and, I have been unable to discover any Roman-Dutch authority sanctioning the issue of a declaratory order where there has been no interference with the right sought to be declared. Turning to the decisions of our own Courts, there is a weight of South African authority against the issue of such orders in**

[13] Geldenhuys and Neethling v Beuthin 1918 AD 426

[14] At 440 - 441

the absence of such interference. It was laid down by De Villiers, C.J in Colonial Government v. Stephen (17 SC 39) that a Plaintiff is not entitled to claim a declaration of rights merely because those rights have been disputed by the defendant; he must prove some infringement of them.

. . . . No doubt there is something to be said in favour of sanctioning the issue of declaratory orders even where there has been no infringement of rights. But on the other hand it would be very difficult to define the limits within which that jurisdiction should be confined. And its unregulated exercise would lead to great uncertainty of practice. After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however, important.

And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely, that a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.

[34] The full bench of the Court in Ex Parte Ginsberg[15] dealt with declaratory orders, and, Greenberg J giving a unanimous decision held as follows:

"The Common Law in South Africa as to declaratory orders was discussed in Geldenhuys and Neethling v Beuthin 1918 AD 426 by Innes CJ who said in the course of his judgment, that Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not

[15] 1936 TPD 155 at 157 - 158

to pronounce upon abstract questions or to advise upon differing contentions, however important. This limitation of the functions of a Court of Law continues in force except to the extent to which it has been altered by Sec 102. In interpreting the section, this limitation, which has been fundamental in our conception of the function of the court, must be borne in mind and must not be held to be altered by the section unless its wording points clearly to such a conclusion. I find nothing in the section which entitled the court to pronounce upon abstract questions or to advice upon different contentions. In my opinion the words 'inquire into and determine' in Sec 102 do not confer separate powers to be exercised independently of each other, but confer the power of inquiring into for the purpose of determining and thereafter determining. The legislature must have been aware of the fact that

there is no dearth of Advocates and Attorneys competent to advice upon legal problems and there is no reason to think that it intended to set up the courts as consultative or advisory bodies, in competition with the members of these respected professions. On the other hand, the inconvenience that was caused by the inability of the court to settle a dispute between parties unless there was infringement of rights is obvious and was remedied in England to some extent as far back as 1852 by Act 15 and 16, Victoria, C. 86, Sec 50 and later by Order XXV, rule 5, of the Supreme Court rules. The desirability of such a power was referred to in Papert v Fresh Meat Supply Company, 1911 W. L. D. 164, at p. 168 and also by Innes, C. J., in Geldenhuys' case (supra) although the learned Chief Justice does not seem to have regarded it as an unmixed blessing. It seems to me, therefore, that the

object of the section was not to alter the fundamental characteristic of the court, i. e. the settlement between the parties of disputes by its decisions; the words of the section do not point clearly to any intention other than to remove the limitation imposed by the Common law on declaratory actions and to enable the court to determine questions not only as to existing rights but also as to future or contingent rights, whether consequential relief was presently claimable or not."

[35] The Geldenhuys case reflected the Roman-Dutch Common law as was applicable in this country prior to the enactment of the High Court Act[16]. The Act has changed the position of our law slightly with regard to declaratory orders to the extent espoused by His Lordship, Chief Justice Nathan in Ex

[16] No. 20 of 1954

Parte Special Tribunal Under Immigration Act 32 of 1964 where he had this to say with regard to declaratory orders:[17]

> **"S 2 (1) of the High Court Act 20 of 1954, which came into operation on 21 May 1954, provides as follows: 'The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa'.**
>
> **At that time, and, indeed up to the present date, there was no Swaziland statute empowering the Court to make declaratory orders; but S102 of the South African General Law Amendment Act 46 of 1935 provided: 'Any provincial or local division of**

[17] 1979 – 1981 SLR 107 (HC) at 109 - 110

the Supreme Court may, in its discretion, at any instance of any interested person inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination'. S102 of Act 46 of 1935 was replaced by S 19 (i) (a) (iii) of the South African Supreme Court Act 59 of 1959, which is in virtually the same terms.

. . . it is clear that the High Court of Swaziland has jurisdiction to make declaratory orders at least within the principles set out in S 102 of South African General Law Amendment Act 46 of 1935. The Court will have regard, at least as persuasive authority, to glosses upon those principles in South Africa subsequent to 1954 . . . .

The scope of S102 of South African General Law Amendment Act 46 of 1935 was considered by Greenberg J in Exparte Ginsberg 1936 TPD 155 at 157. The learned Judge said: 'The Common law in South Africa as to declaratory orders was discussed in Geldenhuys and Neethling v Beauthin (1918 AD 426) by Innes CJ who said, in the course of his judgment, that Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon different contentions, however important'. This limitation of the functions of a Court of Law continues in force except to the extent to which it has been altered by Sec 102. In interpreting the section, this limitation, which has been fundamental in our conception of the function of the court, must be borne in mind and must not be held to be altered by the section unless

its wording points clearly to such conclusion. I find nothing in the section which entitled the court 'to pronounce upon abstract questions or to advice upon differing contentions'. In my opinion the words 'inquire into and determine' in Sec 102 do not confer separate powers to be exercised independently of each other, but confer the power of inquiring into for the purpose of determining and thereafter determining. The legislature must have been aware of the fact that there is no dearth to Advocates and Attorneys competent to advice upon legal problems, and, there is no reason to think that it intended to set up the courts as consultative or advisory bodies, in competition with the members of these respected professions.

. . . .

Further guidance is to be obtained from the judgment in Reinecke v Incorporation General Insurances Ltd 1974 (2) SA 84 (A) at 93, in which Wessels JA said: 'Firstly, the Appellant must satisfy the court hearing the matter that he is a person interested in an existing, future or contingent right or obligation. If satisfied on that point, the court decides upon the further question, namely, whether the case is a proper one for the exercise of the discretion."

[36] What is important in our law as stated by His lordship Nathan CJ in Ex Parte Special Tribunal Under Immigration Act is that Courts of Law exist for the settlement of concrete controversies and actual infringements of rights and not to pronounce upon abstract questions or to advice upon differing contentions. This legal position of our law is in sharp contrast to the South African legal position that courts

should also inquire into and determine future or contingent rights or obligations.

[37] Watermeyer JA in Durban City Council v Association of Building Societies,[18] had this to say:

"The expression 'contingent right' as envisaged in Sec 102 connotes two things, a right and a contingency affecting it . . . .

The important point is that the right must be something which exists when the court enquires into and determines it . . . .

The question whether or not an order should be made under this section has to be examined in two stages. First, the court must be satisfied that the applicant is a person interested in an existing, future or contingent right or

[18] 1942 AD 27 at 31 - 34

obligation, and then, if satisfied on that point, the court must decide whether the case is a proper one for the exercise of the discretion conferred on it. Clearly, the interest of an applicant must be a real one, not merely an abstract or intellectual interest.

In the large and vague sense any right to which anybody may become entitled is contingent so far as that person is concerned, because events may occur which create the right and which may vest it in that person; but the word 'contingent' is also used in a narrow sense, contingent as opposed to 'vested', and then it is used to describe the conditional nature of someone's title to the right . . . .

In Sec 102 the word 'contingent' is used in conjunction with the words 'existing' and 'future' to describe a right in which an applicant may be interested. The classification of rights as 'vested or contingent' is very

well known in jurisprudence, and vested rights again are divided into well recognised classes, viz those which are coupled with a present right of enjoyment and those in which the right of enjoyment is postponed to a future time (see Voet, 36.2). This classification of rights into vested and contingent is usually made for the purpose of describing the nature of someone's title to the rights question, and it seems reasonably probable that Parliament enacted Sec 102 with that classification in mind. If this be so, then the words 'existing, future or contingent' are used for the purpose of describing the nature of an applicant's title to the right which he is asking the court to investigate, and the word 'contingent' is used, not in the large and vague sense, but in the more limited sense indicated above."

[38] Wessels, JA in Reinecke v Incorporated General Insurances[19] Ltd had this to say:

> **"The question whether or not an order should be made in terms of the provisions of the above mentioned Sec 19 (1) (a) (iii) of the Act has to be examined in two stages. Firstly, the appellant must satisfy the court hearing the matter that he is a person 'interested' in an existing, future or contingent right or obligation'. If satisfied on that point, the court decides upon the further question namely, whether the case is a proper one for the exercise of the discretion conferred on it.**
>
> . . . .

[19] 1974 (2) SA 84 (A) at 93 and 95

As to this, it must be borne in mind that, though it might be competent for a court to make a declaratory order in any particular case, the grant thereof is dependent upon the judiciary exercise by that court of its discretion with due regard to the circumstances of the matter before it."

[39] From the authorities cited above, it is apparent that the Superior Court of Judicature in this country comprising the Supreme Court and the High Court have jurisdiction to make declaratory orders.[20] In the exercise of their jurisdiction, the courts invoke their judicial discretion guided by the surrounding circumstances of the particular matter. It is a trite principle of our law that the courts in exercising their jurisdiction to determine declaratory orders should have regard to two factors:[21] Firstly, the applicant should be a

[20] Section 2 (1) of the High Court Act No. 20 of 1954; Ex Parte Special Tribunal under Immigration Act of 1964 (supra)

[21] Cordiant Trading CC v. Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) at 231 Murder and Robbery Unit, Pietermaritzburg 1995 (4) SA 1 (A) at 14

person interested in an existing, future or contingent right or obligation; Secondly, the particular case before court should be a proper one for the exercise of the judicial discretion.

[40] Whatever the position of the law in South Africa may be, it is clear that in this country that Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, and, not to pronounce upon questions which are abstract, hypothetical or academic or to advise upon differing contentions of law.[22]

[41] It should be borne in mind that this application was lodged with a view to bolster the applicant's resolve to be appointed the executrix dative of the estate of the late Richard Themba Dlamini; hence, the appointment of the executor of the estate was stayed pending the finalization of this application. It is trite, as discussed in the preceding paragraphs, that in the

[22] Ex Parte Special Tribunal under Immigration Act 32 of 1964 (supra); Ex Parte Van Schalkwyk NO Hay NO 1952 (2) SA 407 (A) at 411; Ex Parte Mouton 1955 (4) SA 460 (A) at 464 and 466; SA Mutual Life Assurance Society v. Anglo Transvaal Collieries Ltd 1977 (3) SA 642 (A) at 658 Ex Parte Chief Immigration Officer, Zimbabwe 1994 (1) SA 370 (ZS) at 376 and 377; Munn Publishing (PVT) Ltd v Zimbabwe Broadcasting Corporation 1995 (4) SA 675 (ZS) at 680 and Maphanga v Officer Commanding, SA Police

absence of a testamentary executor, the Master of the High Court is mandated by law to appoint a fit and proper person to be the executor. Similarly, it is trite that an executor is not necessarily the beneficiary in the estate. To that extent the application is abstract, hypothetical and academic. It is common cause as well that the applicant died before this appeal was heard; this further fortifies my conclusion that the application is raising abstract, hypothetical and academic questions. For this reason the court a quo failed to exercise its jurisdiction jurisdicioulsy.

[42] It is well-settled in our law that all interested parties should be joined in an application for a declaration of rights; and, the basis for this principle is that a declaratory order cannot affect the rights of persons who are not parties to the proceedings. Colman J. in Anglo-Transvaal Collieries v. S.

A. African Mutual Life Assurance Society[23] had to this to say:

> **"Another point made in Ex Parte Nell, Supra, echoing what had been laid down by the Appellate Division in the earlier case of Ex Parte Van Schalkwyk, N. O. and Hay, N. O. 1952 (2) SA 407 (AD), was that a court would not make a declaration of rights unless there were interested persons upon whom the declaration would be binding. What was not expressly reaffirmed in Nel's case but was not disaffirmed, was the statement in Van Schalkwyk's case that interested persons, against, or in whose favour, the declaration will operate must be identifiable and must have had an opportunity of being heard in the matter."**

[23] 1977 (3) SA 631 (1) at 636; Van der Walt v. Saffy 1950 (2) SA 578 (O); Webb v Beaver Investments (Pty) Ltd 1950 (1) SA 491 (T). Ex Parte Van Schalkwyk NO and Hay NO (supra) at 411

[43] Greenberg J delivering the decision of the full bench in Ex Parte Ginsberg[24] (supra) had this to say:

> **"The jurisdiction of the court to act under the section is limited to cases where it is asked, and has the power, to give a decision which is binding on the persons concerned, i. e. as**
>
> **binding as if the dispute had been one in which the right was an existing right which authorised the granting of relief at the time of the institution of proceedings. This presupposes that the person approaching the court has some right and that the persons who are subject to the reciprocal obligation are given an opportunity to be heard."**

[24] At 158

[44] It is common cause that the decision sought by the applicant is intended to be binding not only upon the respondents but against the deceased's estate notwithstanding that the application was brought after the demise of the deceased Richard Themba Dlamini. As previously discussed in the preceding paragraphs, the deceased was not given an opportunity to be heard in the matter. The applicant waited for decades for the deceased to die before she instituted the proceedings. The applicant was in the circumstances obliged to lodge such an application during the lifetime of the deceased so that he could have the opportunity to be heard. For this reason the court a quo failed to exercise its discretion jurisdicioulsy.

[45] Lastly, it is trite that a declaratory order should not be sought where there is a real and bona fide dispute of fact.[25] It is common cause that real and bona fide disputes of fact were

[25] Per Hofmeyer J in Hattingh v. Ngake 1966 (1) SA 64 (0)

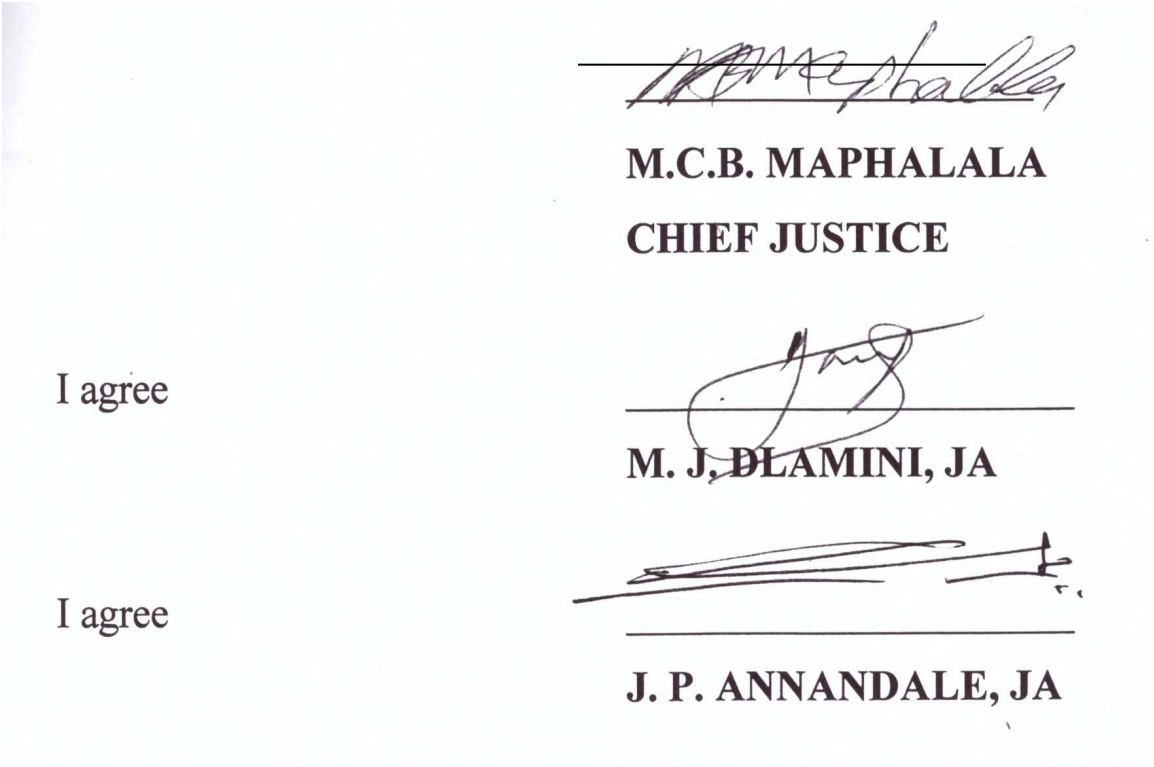
apparent during the hearing of the matter in the court a quo as highlighted in the preceding paragraphs of the judgment. This matter should have been brought in terms of action proceedings; however, even if it was, the outcome would still have suffered two defects: Firstly, the matter is abstract, hypothetical and academic. Secondly, that not all interested persons were heard and joined in the proceedings in as much as the judgment seeks to bind not only the respondents but the deceased estate; and, the deceased Richard Themba Dlamini was denied the opportunity to be heard.

[46] Accordingly, the following order is made:-

(a) The appeal is allowed with costs to be borne by the estate

(b) The judgment of the court a quo is set aside and substituted with the following judgment:

The application is dismissed with costs to be borne by the estate.



M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

M. J. DLAMINI, JA

I agree

J. P. ANNANDALE, JA

For Appellants : Attorney Ben Simelane

For Respondent : Advocate Patrick Flynn instructed by Attorney Thandeka Hlabangana