IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **CIVIL CASE NO: 85/2019**

In the matter between:

XOLILE NTOMBIKAYISE SHABANGU-ZWANE APPELLANT

And

PITOLI SHABANGU 1ST RESPONDENT

NOMVUYO SHABANGU (NEE KUNENE) 2ND RESPONDENT

DUPS FUNERAL UNDERTAKERS 3RD RESPONDENT

NATIONAL COMMISSIONER OF POLICE 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

JOYCE NSIBANDE 6TH RESPONDENT

Neutral Citation: *Xolile Shabangu-Zwane v Pitoli Shabangu & 6 Others (85/2019) [2020] SZSC 67 (03 March 2020)*

CORAM: **S.P. DLAMINI JA**

M.J. DLAMINI JA

R. J. CLOETE JA

DATE HEARD: 17 February 2020

DATE DELIVERD: 03 March 2020

SUMMARY: *Civil law – Sepulchral rights – dispute as to who has a right to bury the deceased – whether there is a distinction between the Common law and siSwati customary law and if so which is the applicable law – initially dispute between the mother and father of the deceased – now dispute between the* ***"wives"*** *of the deceased – Held that the application for condonation to file a transcript by the Appellant has no merit and must fail and that on this ground alone, the appeal stands to be dismissed – Held that the High Court in terms of the law required assessors to assist it regarding the applicable customary law – Held that the Appellant failed to present evidence that she was married to the deceased but that it is still open to her to seek a declaratory to determine that she was married to the deceased or not in another forum – Held that a dead person has neither rights nor obligations but the law provides for the protection of the deceased body and regulates for its disposal – Held that there are no hard and fast rules in relation to the burial of a deceased person but that each case must be decided on its peculiar circumstances taking into consideration both public and private interests namely health issues, feelings and dignity of the next of kin and the community of the deceased person - Held that the Appellant's grounds of appeal have no merit except the ground of appeal relating to whether the Court misdirected itself in finding that she is not a wife of the deceased, which partially succeeds otherwise the rest of the grounds of appeal are dismissed – Held that this being a family dispute the Court is inclined not to award costs - Held that the deceased must be buried in Moneni at the homestead within fourteen [14] days of this judgment and that such burial is to be preceded by all willing immediate family members to make an input as to the burial of the deceased.*

JUDGMENT

S.P. DLAMINI JA

PRELUDE

[1] The never ending scourge of disputes regarding burial rights resulting in delayed burial of deceased persons requires intervention. I cannot imagine the pain and suffering that the next of kin of a deceased person must endure sometimes for years waiting to bury the body of their departed loved one when these disputes arise.

[2] It must be admitted that these disputes are not peculiar to the Kingdom as they also frequently occur in the neighbouring states and, in varying degrees, abroad as well. (Some judgments are referred to below in this regard).

[3] MOAHLOKI AJ in the High Court of Lesotho case of **MALIAU RATIA AND LIAU RATIA v MAHOLI RATIA CIV/AP/329/14** quoted an article by R.M. Jansen entitled **"Multiple Marriages, burial rights and the role of Lobola at the dissolution of the marriage"** wherein the author stated that:-

> ***"As in most communities in the world, funerals are also significant events in [Lesotho]. In all cultural groups death***

is treated with reverence and grace [unfortunately] in a time when family members and friends should console one another, it has become not uncommon that funerals are marred by feuds about burial rights… These include the right and duty to bury the deceased, a corollary of which is the right to determine the place of burial and the right to determine the burial ceremony."

BACKGROUND

[4] This matter involves a dispute over burial rights of the deceased, one Victor Magengane Musawenkhosi Shabangu (the deceased).

[5] On one side of the dispute are the 1st and 2nd Respondents who are father and wife of the deceased respectively. On the other side of the dispute are Appellant and 6th Respondent who are the **"Wife"** and the mother of the deceased respectively. (The use of the inverted marks will become apparent in the judgment).

[6] On the 16th day of June 2018 the deceased suddenly collapsed and died in Manzini.

[7] The death certificate of the deceased was issued on 22 June 2018. The death certificate, *inter alia,* reflected that the cause of death of

the deceased was unknown and his death was reported by his wife Kunene Nomvuyo Patience (the 2nd Respondent).

[8] Due to the dispute between the parties, the body of the deceased is currently kept by the 3rd Respondent (an undertaker) and has been for a period of about 19 months since his death.

[9] The relevant parties to the matter are:

(a) 1st Respondent who is the father of the deceased who resides in Moneni in the Manzini Region and at whose place a grandchild of the deceased who was fathered by the firstborn son of the deceased and 2nd Respondent is buried.

(b) 6th Respondent who is the mother of the deceased who had a relationship with 1st Respondent as a result of which the deceased, the only son between them, was born.

(c) 2nd Respondent who was married to the deceased and three children were born during the marriage between them. However, they apparently had problems resulting in them living separately.

(d) Khanyisile Shabangu nee Mdluli who was allegedly married to the deceased as a second wife. It appears

that the deceased and Khanyisile separated and there is no mention of children between them. She has not participated in any of the proceedings. Therefore, she is not a party *per se* but she features in the papers before Court.

(e) Appellant whom it was alleged was married to the deceased and resided with him until his demise.

PROCEEDINGS BEFORE THE HIGH COURT

[10] The matter was heard and decided by the High Court on two occasions. Therefore, there are two proceedings and judgments by the High Court. For the sake of convenience, these will be referred to herein as Part I and Part II respectively.

PROCEEDINGS AT AND THE JUDGMENT BEFORE THE HIGH COURT

PART I

10.1 1st and 2nd Respondents herein were 1st and 2nd Applicants in Part I of the proceedings before the High Court under High Court Case NO. 968/18.

10.2 6th Respondent was 1st Respondent in that case and the Appellant was not party in Part I of the proceeding. For convenience sake, the parties will be referred to as their

appearance before the papers filed before this Court. There is only one caveat to this In that the parties agreed that the omission of the 2nd Respondent's marital name was an error and that the papers before Court must be adjusted accordingly. Therefore, the citation of 2nd Respondent is corrected to Nomvuyo Shabangu nee Kunene.

10.3 1st Respondent and 2nd Respondent are the father and wife of the deceased respectively. By way of urgent motion proceeding dated 27 June 2018, 1st and 2nd Respondents sought to be declared as the right persons to be in charge of and decide where the burial of the deceased will take place as opposed to the 6th Respondent who contended that the burial rights and the decision vested in her and/or her relatives.

10.4 The matter was slotted to be heard on 28 June 2018.

10.5 Before 1st and 2nd Respondents could be heard, 6th Respondent instituted her own urgent motion proceedings dated 28 June 2018 under what appears to be High Court case 969/18. 6th Respondent's prayers, *inter alia* were that the 1st and 2nd Respondents be interdicted from proceeding with the funeral arrangements as publicized in a newspaper recording that the deceased would be buried on 30 June 2018 at Moneni, Manzini Region and that:

> ***"The first and second respondents and/or anyone acting on their behest are directed and ordered to***

arrange for the deceased's remains to be buried at deceased's homestead situated at Ngculwini area in the Manzini Region."

10.6 There is no explanation by the parties why they elected to launch back to back essentially similar applications. This is not dealt with in the judgment of the High Court. However, the parties agreed to a consolidation of the matters before the High Court, High Court Case NO. 968/18 and High Court Case NO. 969/18 were assigned new case numbers namely 968 (A)/18 and 968/18 (B) respectively.

10.7 There were lot of allegations and counter-allegations including who was married to who and what are the dictates of customary law in the case.

10.8 After hearing the matter, the High Court came to the following conclusions:

(a) That the Supreme Court has on many occasions stated that where a person dies intestate the duty to attend to her or his burial lies with the surviving spouse. The Court relied on the cases of **THEMBI MHLANGA v ALFRED MHLANGA AND 4 OTHERS (16/2014) [2024] SZSC51 (03 December 2014)** per MCB Maphalala JA (now the Chief Justice), **DLUDLU v DLUDLU AND ANOTHER 1982-1986 SLR 225 at 230 and STEVEN GAMEDZE v JABU DLAMINI AND**

OTHERS CIVIL CASE NO. 1053/2013 [2013] SZHC 143 (15 July 2013)

(b) That the rule that the surviving spouse has the burial rights of a deceased spouse was not absolute and gave as an exception a declaration on which the couple were separated a long time ago and the marriage was virtually dead and had no hope of resuscitation.

(c) That notwithstanding these allegations by 6th Respondent that the marriage between the deceased and 2nd Respondent had been dissolved, the marriage subsisted and was valid at the death of the deceased as evidenced by a copy of the marriage certificate between them attached to the papers before Court.

(d) That while there were attempts by 2nd Respondent to dissolve the customary marriage between the deceased and her, the attempts did not meet the requirements for the dissolution of a customary marriage. (The Court relied on the cases of **KNOX MSHUMAYELI NXUMALO N.O. v WELILE SIPHIWE NDLOVU CIVIL APPEAL CASE NO. 42/2010 per Fox Croft JA on page 20, PATRICIA CEBISILE MNDZEBELE nee MSIBI v NOLWAZI MNDZEBELE AND 13 OTHERS (828) 2013 [2014] SZHC 52 (28 March 2014), MATRY NOMPUMELELO DLAMINI AND ANOTHER v MUSA**

(e) That the relationship between the deceased and the 2nd Respondent was not as bad as alleged by the 6th Respondent and they had children that created a bond between them as parents.

(f) That if the Court were to order that the burial takes place at Ngculwini as prayed for by 6th Respondent, 2nd Respondent would not feel at home but **"a total stranger to such a homestead."**

(g) That it was not possible to test the veracity of the allegations by 6th Respondent that the deceased wished to be buried at Ngculwini particularly because there was no testamentary evidence in support of such an allegation.

(h) That in view of the aforegoing it is ordered that:

"1. The 1st Respondent in case NO. 968/18 A is directed to deliver all personal effects of deceased (VICTOR MUSAWENKHOSI SHABANGU) to the 2nd Applicant or whoever may be authorised by the 2nd Applicant to collect them.

2. The 2nd Respondent is directed to process the claims lodged by the 2nd Applicant (NOMVUYO SHABANGU nee KUNENE) and have them paid to her.

3. The 3rd Respondent is directed to release the corpse of VICTOR MUSAWENKHOSI SHABANGU to the 2nd Applicant (NOMVUYO SHABANGU nee KUNENE).

4. The 1st Respondent is directed to pay the costs of the application in case NO. 968/18A."

10.9 There was an appeal to this Court against the above-mentioned judgment of the High Court Case NO. 968/18A per Magagula J. I presume the appeal was launched by the 6th Respondent because the Notice of Appeal in relation to that matter is not before Court.

10.10 When the matter came before the Supreme Court on the 8th October 2018, the appeal was not considered, apparently because Appellant had made an application to be granted leave to intervene in the proceedings. This Court ordered that the appeal was abandoned and Appellant was granted leave to intervene in the proceedings, and this Court referred the matter back to the High Court under Rule 18 for additional evidence and no order as to costs was made.

HIGH COURT PROCEEDINGS AND JUDGMENT PART II

[11] The additional evidence to be considered by the High Court was whether the Appellant was married to the deceased or not at the time of his (deceased) death. This evidence was to be oral and was led by the parties in support of their respective arguments.

11.1 Appellant filed her Answering Affidavit against the Founding Affidavit and Supporting Affidavit of the 1st and 2nd Respondents respectively. This I must say is a very unorthodox approach to say the least. The pleadings had long been closed, judgment delivered and matter referred to oral evidence as per the order of this Court.

11.2 The matter was again heard by His Lordship Magagula J. Upon hearing oral evidence, His Lordship Magagula J came to the conclusion that:

(a) The issues falling for consideration before him were (per paragraph [3] of the judgment at page 3:

"(1) Whether or not the 4th Respondent (intervening party) was a wife to the deceased.

(2) Whether or not there is a hierarchy of authority under Swazi Law and Custom amongst the widows of a deceased person who had more than one wife as regards burial rights of their deceased husband."

(b) That as a result of Appellant's inability to secure expert witnesses regarding the hierarchy of wives in a polygamous marriage when it comes to burial rights, the Court confined itself to the enquiry as to whether the deceased and Appellant were married or not.

(c) That since Appellant was the one alleging that she is married to the deceased, the legal burden to prove such rested with her.

(d) That since the matter was referred to oral evidence on specific issues and not to trial, oral evidence and affidavits were to supplement and complement each other hence both were to be considered by the Court.

(e) That there were contradictions between evidence adduced in support of Appellant.

(f) That the Chief's runner, Enos Tsabedze, was an unreliable witness and his testimony stood to be dismissed ***"in toto"*** as well as any other evidence based on his information such as the letter from the chiefdom confirming the marriage between the deceased and the Appellant.

(g) That the Appellant failed to call a key witness, the person who allegedly smeared her with red ochre, Dorah Gamedze, signifying her marriage between the deceased and her, without any explanation.

(h) That the payment of lobola and receiving same is not proof of marriage which is proved by the smearing of ochre.

(i) That deceased married Khanyisile Mdluli not the Appellant, after he (deceased) separated with the 2nd Respondent.

(j) That Appellant contradicted herself in her evidence before Court to the extent that her evidence **"ought to be rejected in its entirety."**

(k) That the Appellant was not a wife of the deceased when he died particularly because even the 6th Respondent did not mention her in her papers in Court but only mentioned Khanyisile Mdluli who long separated from the deceased yet Appellant claimed she was in the house in mourning hence her belated involvement in the matter.

(l) That the election by 6th Respondent not to give evidence to support Appellant's claim that she was married to the deceased is that she was not a wife of the deceased.

(m) That the Appellant joined the proceeding as an afterthought and that her testimony is a fabrication to support 6th Respondent.

(n) That the evidence of eNgculwini community that the Appellant was not a wife of the deceased is credible.

(o) That in view of the aforegoing, it is ordered that:

"28.1 The 4th respondent is not and was never a wife of the deceased Victor Musawenkhosi Shabangu.

28.2 My previous judgment on this matter accordingly stands.

28.3 Costs of the hearing are awarded to the applicants."

PROCEEDINGS AND JUDGMENTS BEFORE THE SUPREME COURT

[12] Like in the High Court, there are two proceedings and judgments before the Supreme Court which are divided into Part I and Part II namely the proceedings and the judgment before the Supreme Court resulting in the matter being referred High Court and the present proceedings and judgment referred herein as Part I and Part II respectively.

PROCEEDINGS AND JUDGMENT OF THE SUPREME COURT PART I

12.1 The proceeding arose with respect to the judgment of the High Court dated 29th November 2019. The appeal was apparently instituted by the 6th Respondent as already alluded to above. The Appeal was opposed by 1st and 2nd Respondents. However, the appeal could not be proceeded with in view of the fact that Appellant instituted proceedings before this Court seeking leave for her to intervene in the proceedings.

The Supreme Court granted Appellant leave to intervene in the proceedings and ordered that:

"1. The appeal is hereby abandoned;

2. The matter is referred to the High Court under Rule 18 for additional evidence.

3. The matter be enrolled forthwith.

4. No order as to costs."

The High Court heard the matter and found in favour of 1st and 2nd Respondents. The High Court issued an order as set out at paragraph 10.2 (o) *supra*.

PROCEEDINGS AND JUDGMENT BEFORE THIS COURT PART II

12.2 Appellant, being dissatisfied with the above-mentioned judgment of the High Court, launched the present appeal. In terms of a Notice of Appeal dated 14 December 2019, Appellant advanced the following grounds of appeal:

"1. The Court a quo erred in fact and in law in presiding over the matter under clear circumstances where the Learned Judge clearly told Counsel for the parties in his chambers that he was not going to review himself and change his earlier judgment he had made in the matter.

1.1 As a clear sign of bias on the part of the Learned Judge, he made a comment to Counsel for the parties in chambers to the effect that, he asked the (sic) Appellant's Counsel who this 4th Respondent was and where was she all along. When Counsel for the Appellant explained that she was mourning under the blanket as per the

dictates of siSwati Law and Custom, the Learned Judge commented that she cannot claim she was not aware of the proceedings when the matter was published in the newspapers (something strange for a widow to read newspapers under the customary mourning blanket (phansi kwengubo).

2. ***The Court a quo erred in law in holding that the Appellant was not married to the deceased when there was evidence by the Umgijimi, confirmed by the affidavit of Dorah Gamedze who smeared the Appellant with red ochre, corroborated by the Gozolo who was the overseer of the ceremony, further affirmed by the same Gozolo who also delivered the umsasane, and lastly confirmed by the Appellant's paternal uncle (who raised the Appellant as his daughter) that he commissioned the sending back of the bride (kumchuba) back to the Shabangu family after the delivery of the umsasane. The evidence of Esau Zwane was further to the effect that lobola was paid and there was no cross-examination from the 1st and 2nd Respondents' attorney to this witness.***

   2.1 ***The evidence of all these witnesses holistically considered establishes a prima facie case of the Appellant being married to the deceased, and in the absence of evidence from the Respondents to rebut this prima facie case, the Court a quo ought to have found in favour of the Appellant.***

3. ***The Court a quo erred in rejecting the evidence of the witnesses of grounds which were never put to the witnesses in order for them to clarify or explain those issues raised by the Court. The whole purpose of referring a matter to oral evidence is to call upon the witnesses to explain their evidence and be subjected to cross-examination where there are certain***

inconsistencies between the oral evidence and the affidavits filed of record. The Court erred in law in not putting these questions raised in the judgment to the witnesses.

4. ***The Court erred in law in rejecting the evidence of Sandile Shabangu on the basis that he, at some point, denied having deposed to an affidavit. This witness was being asked by his attorney (Appellant's attorney) and was under the impression that it was said he signed an affidavit for the Respondent. Upon being properly guided by this attorney as to where, when and for what purpose he signed the affidavit, the witness eventually confirmed that he signed the affidavit. (The transcript of the evidence will readily reveal the complete evidence).***

    4.1 ***What happens in the judgment of the Court a quo, being evidence of bias on the part of the Learned Judge, is that Sandile Dlamini denied his own affidavit, yet the correct position is that at first he testified that he never deposed to any affidavit but upon being further led by Appellant's attorney, he confirmed that the affidavit was his, it was read to him by the Appellant's attorney and that he went to sign it before a Commissioner of Oaths, and that the purpose for which he signed the affidavit was that it was going to be used in Court.***

5. ***The Court a quo erred in law in holding that Betty Maphalala who testified on behalf of the Respondents was an independent witness who had no reason to lie. This witness was proven beyond doubt that she came to Court to lie and the reason for her to lie is because she was fighting her own political issues with the Umgijimi who she told the Court she does not recognize since he is not from her area. She told the***

Court that she is the "chief justice" of that particular area and that nothing ought to have happened without her knowledge and consent.

On the foregoing grounds the Appellant prays that the judgment of the Court a quo be set aside and that the Appellant be declared as a surviving spouse of the deceased and that she be allowed to bury her husband."

PRELIMINARY ISSUES

[13] Prior to the hearing of the appeal, this Court pronounced itself on the following preliminary issues:

(a) (i) Firstly, application for postponement pending filing of the transcript of the oral evidence led before the High Court.

(ii) The application was issued and served upon attorneys of the 1st and 2nd Respondents in less than 2 court days prior to the hearing of the matter. This was extremely short notice. Notwithstanding this, Counsel for 1st and 2nd Respondents prepared a notice to oppose the application for postponement and their Answering Affidavit.

(iii) Counsel for 1st and 2nd Respondent sought and was granted leave to hand over from the bar the opposing paper. The Court granted same in view of the lack of adequate notice afforded to 1st and 2nd Respondents because to hold otherwise

would have been unduly prejudicial to the 1st and 2nd Respondents. They were not at fault. However, the Court did emphasize that it was by no means creating a precedent by allowing papers to be handed over from the bar because its stand is that papers are not to be handed from the bar.

(iv) The Court heard the parties on the application for postponement and found it to be without merit and dismissed it. Appellant or her Counsel became aware of the problem in transcribing the record in December 2018. There is no evidence that there was an attempt to address the issue in consultation with Counsel of 1st and 2nd Respondents as envisaged in the Rules of this Court. The Court agrees with 1st and 2nd Respondents' contention that the evidence regarding the alleged difficulties in transcribing the oral evidence is hearsay.

(v) Neither the person supposed to transcribe the evidence nor the Registrar of the Supreme Court filed a confirmatory affidavit to the Founding Affidavit deposed to by Counsel for Appellant. Accordingly the Court ordered that the appeal be heard without delay particularly in view of the sensitivities associated with any further delay of the appeal.

(b) Secondly, it turned out that none of the parties had filed Heads of Arguments and bundle of authorities as envisaged in the Rules of this Court.

Again the Court, taking into consideration all the factors associated with this matter and in the interest of justice ordered that, notwithstanding the legal duty upon parties to file Heads of Argument and Bundle of Authorities for the benefit which these avail to the Court, the matter in the circumstances should proceed without the Heads of Argument and Bundle of Authorities. Again the Court emphasized that it was not creating any precedent at all.

(c) The 6th Respondent did not participate in the appeal. The Court was informed by Counsel for Appellant that the attorneys of record for the 6th Respondent withdrew their services.

(d) Both parties agreed that now the contestation on appeal was essentially between the Appellant and 2nd Respondent.

(e) Both parties agreed that in view of the fact that this is a family dispute, it was not appropriate to award costs.

ARGUMENTS OF THE PARTIES REGARDING THE MAIN APPEAL

[14] Both parties were hamstrung in their arguments in view of the fact that there was no transcript of the proceedings in the High Court before us and neither filed Heads of Argument and Bundle of Authorities as already alluded to above.

APPELLANT'S CASE

[15] The Appellant's case was confined to merely repeating the grounds of appeal in her challenge of the impugned judgment of the High Court and the affidavit filed of record.

1ST AND 2ND RESPONDENTS' CASE

[16] 1st and 2nd Respondents' case was that the judgment of the High Court was correct and that His Lordship Magagula J did not misdirect himself in any way whatsoever in his findings, in particular, that the Appellant was not married to the deceased and that the surviving spouse is vested with the burial rights of a deceased spouse. (In this case the burial rights according to His Lordship Magagula J vested in 2nd Respondent).

INCOMPLETE RECORD

[17] The applicable Rule of the Rules of this Court in relation to the record is Rule 30 that provides as follows:-

(1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within 2 months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct.

(2) If the Registrar of the High Court declines so to certify the record he shall return it to the appellant for revision and amendment and the appellant shall relodge it for certification within 14 days after receipt thereof.

(3) Thereafter the record may not be relodged for certification without the leave of the Chief Justice or the Judge who presided at the hearing in the Court a quo.

(4) Subject to Rule 16 (1), if an appellant fails to note an appeal or to submit or resubmit the record for certification within the time provided by this rule, the appeal shall be deemed to have been abandoned.

(5) The appellant in preparing the record shall, in consultation with the opposite party, endeavor to exclude therefrom documents not relevant to the subject matter or the appeal and to reduce the bulk of the record so far as practicable. Documents which are purely formal shall be omitted and no document shall be set forth more than once. The record shall include a list of documents omitted. Where a document is included notwithstanding an objection to its inclusion by any party, the objection shall be noted in the index of the record.

[18] There is no dispute that the record before this Court is incomplete hence the application for the postponement of the matter by Appellant in order to file the record.

It is not helpful for the Appellant to argue as it was done on her behalf that the *dies* had not run out in view of the fact that the matter had been set down for hearing on the specified date namely 17 February 2020.

If it became clear to the Appellant that the record would not be ready for filing, Appellant ought to have had recourse to Rule 16 of the Rules of this Court that provides that:-

> ***16.(1)*** ***The Judge President or any judge of appeal designated by him may on application extend any time prescribed by these Rules:***
>
> ***Provided that the Judge President or such judge of appeal may if he thinks fit refer the application to the Court of Appeal for decision. (Amended L.N. 102/1976).***
>
> ***(2)*** ***An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted.***

[19] Appellant did not take advantage of Rule 16 instead chose to rely on the ill-conceived application for a postponement of the matter.

In view of the incomplete record before this Court, the appeal by the Appellant is totally defective and on this ground alone stands to be dismissed.

The issue of compliance with the Rules of Court with regard to the Court record has been addressed in various judgments of this Court.

[20] In **NHLANHLA MACINGWANE v FAMILY OF GOD CHURCH AND 2 OTHERS (60/2018) [2019] SZSC 56 (26/11/2019)** per Her Ladyship Currie AJA, the Court at page 12 stated that:

> ***"[14] It is not disputed that the notice of appeal was timeously filed but the appellant has not complied with the provisions of Rule 30 with regard to the filing of the record. The record ought to have been filed within two months of the date of the noting of the appeal, being the 28th November 2019 but nothing whatsoever was done.***
>
> ***[15] No application in terms of Rule 16 for an extension of the prescribed time within which to lodge the record was made and in terms of rule 30 (4) the appeal is deemed to hav been abandoned.***
>
> ***[16] Rule 16 provides a procedure for seeking an extension of time prescribed in the rules for carrying out of certain specified procedures. Rule 17, on the other hand, deals with an application for condonation for the failure to have compliance with the provisions of any rule including that laid down in rule 16. It is necessary, however in either case to furnish good and substantial reasons for the indulgence being sought.***
>
> ***[17] In the present case, there has been no application in terms of rule 16 and the explanation given in the application for condonation in terms of rule 17 is unsatisfactory. The appellant has laid the entire blame for the late filing of the record on Advocate***

Mabila which is not a reasonable explanation in that it is the attorney of record who is responsible, together with the appellant, for compiling the record and not an advocate."

Her Ladyship Currie AJA at pages 13-14 of the judgment further states that:

'[21] In the matter of Cleophas Sipho Dlamini versus Cynthia Mpho Dlamini (65/2018) [2019] SZSC 48, in a unanimous judgment penned by J.P. Annandale JA and agreed to by M.C.B. Maphalala CJ and J.M. Currie AJA, it was held that if an appeal is deemed to be abandoned it has the same effect of it having been dismissed. By specific reference to the provisions of Rule 30 (4), it is stated as follows at paragraph [26] thereof:

> ***"By operation of law, Rule 30 (4) provides for such closure when an Appeal is not prosecuted in accordance with the Rules of Court."***

In Thandie Motsa and 4 Others versus Richard Khanyile and Another (69/2018) [2019] SZSC 24, in another unanimous judgment penned by S.P. Dlamini JA and agreed to by M.J. Dlamini JA and S.J.K. Matsebula AJA, it was again held that the Appeal was deemed to have been abandoned and as such dismissed.

At paragraph 17 of the judgment Dlamini JA states that "The courts have had occasion to consider and pronounce themselves on the status of the Rules and consequences of failing to comply with the Rules" and at paragraph 18 made reference to a number of these judgments including The Pub and Grill (Pty) Limited

and Another versus the Gables (Pty) Limited (102/2018 [2018] SZSC 17."'

The Court held that the appeal was abandoned by operation of the law (see also ***CLEOPAS SIPHO DLAMINI v CYNTHIA MPHO DLAMINI (65/2018) [2019] SZSC 48 (24th October 2019) and THE PUB AND GRILL (PTY) LIMITED AND ANOTHER v THE GABLES (PTY) LIMITED (102/2018) [2019] SZSC 17 (20th May 2018).***

GROUNDS OF APPEAL

[21] The grounds of appeal can be classified as those relating to the alleged bias on the part of the Court and misdirection on the part of the Court on its evaluation of the evidence.

BIAS ON THE PART OF THE COURT

[22] Appellant's grounds of appeal based on utterances allegedly made by His Lordship Magagula J. in his chambers in the presence of both Counsel prior to the announcement of the hearing giving rise to the impugned judgment. The question that comes to the fore is, if there was a perception of bias now relied upon by Appellant, why did Appellant wait until the Court found against her to only then raise the alleged perception of bias? The question remains unanswered. There is no record from which the Court can evaluate this contention in the event it was inclined to do so. Therefore, all

the grounds of appeal based on the alleged perception of bias stand to be dismissed.

Appellant had plenty of opportunity to seek redress regarding the perceived bias on the part of His Lordship Magagula J but elected not to do so until after the adverse judgment against her.

[23] In the **SWAZI OBSERVER NEWSPAPER t/a OBSERVER ON SATURDAY AND 2 OTHER v DR. JOHANNES FUTHI DLAMINI (13/2018) [2019] SZSC 26, (31st May 2019)** per His Lordship Justice JP Annandale JA, the Court at page 9 states that:

> ***'[14] The matter between the impugned Justice and the first applicant of which the latter's counsel refers to in the present tense, as if it is a pending and unconcluded matter, was in fact withdrawn over one year before the hearing of the case at hand. This hearing was on the 20th August 2018 whereas a Notice of Withdrawal of Action was served on the applicant's attorney of record, then and now, on the 1st day of August 2017. Costs of the then defendants was also tendered. It is thus inconceivable that the attorney of record who appeared for the Appellants, being the applicants for condonation, could not have been aware of the past intended but withdrawn litigation between the learned Justice and the Swazi Observer at the time when the matter was heard in the Supreme Court.***
>
> ***[15] Yet, despite this being so, he did not move any application for recusal at the time when he could have done so, if indeed his client had any reasonable apprehension of bias by His Lordship. It is only now***

that his application for condonation was dismissed on the 19th September 2018 that a review application which is premised on such a stated belief of bias comes to the fore. The Notice to seek a review is dated the 16th October 2018, about one month after the judgment was handed down."

The Court proceeded to dismiss the challenge based on recusal against the impugned judgment (see also **THE WEEKEND OBSERVER (PTY) LTD 2 OTHERS v SIPHO MAKHABANE (100/2017) SZSC 39 (25/11/2019)**

MISDIRECTION OF THE COURT IN ITS EVALUATION OF THE EVIDENCE

[24] 1.The basis for Appellant's grounds of Appeal that the Court misdirected itself in evaluating the evidence relate to the Court findings on the credibility in otherwise of the witnesses leading to the conclusion reached by the Court that Appellant was not married to the deceased. The immediate difficulty facing the parties and the Court is that there is no transcript of the oral evidence led before the High Court as already mentioned above.

2. This Court is only limited to the affidavits filed of record. On the other hand, the High Court had the benefit to see and listen to the *viva voce* evidence by the witnesses when giving oral evidence. Notwithstanding the difficulties faced by this Court regarding the relevant grounds of appeal, in my evaluation of the evidence based

on the affidavits filed of record and not losing sight of the fact that there was no valid marriage certificate presented by Appellant before Court, it only shows that the Appellant failed to demonstrate that she was married to the deceased.

3. The matter was principally concerned with the enforcement of the burial rights of the parties. The issue of the existence and/or validity of a marriage was in my view a subsidiary issue.

4. Therefore, it is my humble view that it was quite a jump by the High Court to go beyond finding that the Appellant has failed to advance adequate evidence that she was married to the deceased and conclude as a matter of fact that she was not married to the deceased. This, more so because some of the issues in this regard related to siSwati Law and Custom that has to be proved by views of experts on such matters. Therefore, the appeal partially succeeds in this regard. Appellant merely failed to discharge the legal onus to prove that she was married to the deceased.

[25] It is my view that there are similarities and dissimilarities between the Common Law and the siSwati Law and Custom.

[26] The synopsis of the jurisprudence regarding burial rights in the Republic of South Africa in which the judgments of our Court are based is well articulated in the case of [S….] [E….] [w….], [M….]

[W….] AND [A….] [W….] and [Z….] [P….] [S….], **CASLYN BAILIE N.O. AND WESTERN CAPE DEPARTMENT OF HEALTH HIGH COURT CASE NO. 360/16 SA (WESTERN CAPE DIVISION).** His Lordship Mantame J at pages 9 and 10 of the judgment stated that:

> ***'[24] Mr. Newton for the applicants submitted that according to LAWSA, Volume 32 (2nd edition) at paragraph 221 General, it was stated:***
>
> > ***"The right to bury a deceased is sometimes controversial and the courts did not always follow a similar approach in solving the problem before the court. Some courts took customary law practice into account, while others applied the Roman – Dutch law principle that the heir has the right to decide on the issue of burial of the deceased. The Transvaal courts on the other hand, followed the principle of fairness."***
>
> ***It was submitted that the relevant authority in this matter is Trollip v Du Plessis 2002 (2) SA 242 (W), where the circumstances are similar. Applicant, the surviving spouse of the deceased applied to Court for an order terminating the involvement of the first respondent, the deceased eldest daughter and the applicant's stepchild in the deceased's funeral. The applicant's contention was that he as the deceased's spouse had the 'paramount right' to decide on the funeral. The applicant relied on the series of Eastern Cape decisions in which it was held that the heirs had the final say. This approach differed from the one that was followed in the Transvaal, where it was held that fairness in particular circumstances of the case was decisive, and that a claim could not be evaluated according to the mathematical proportions of heirship. It appeared from the evidence that an aunt of the deceased, and a brother, had been present at the time of the deceased's death, and that they had made***

the funeral arrangements without consulting the applicant, who had not been present at the time. The applicant intended to hold the funeral at his home and through a different church than the one to which the deceased and her family belonged. No last will was proved. The Court held that the approach adopted in the Transvaal had to be followed, which would have the effect of tilting the balance in the respondent's favour, since the applicant had not been present when the deceased died. Respondents had incurred expenses in preparation for the funeral. The court held that it was within the bounds of reasonable fairness to respect the wishes of the 10 deceased, whether expressed in a testament or not. If no such preference was expressed, resort could be had to the heirs. It was not necessary for the deceased to have expressed an instruction as opposed to a preference before it was decided what would have caused offence. In this context, it counted in respondent's favour that the deceased had been a member of the church from which they intended burying her. If applicant were to be successful the funeral would be held in an unfamiliar venue and church. The applicant also never averred that he would suffer emotional trauma in respect of the respondent's plans for the funeral. In the final analysis the court held that if regard were to be had to the numbers, it would become clear that the deceased's children were more numerous that the single person on the applicant's side. The application was accordingly dismissed.'

His Lordship Montane J further stated that:

'[25] So, according to applicants, given the set of circumstances in Trollip (supra) and the instant matter, the Transvaal approach which look at common sense and fairness should be adopted and the right to bury the deceased be afforded to the applicants. In Finlay and Another v Kutoane 1993 (4) SA 675 (W), it was held that:

"Also in deciding between competing persons, the law should ideally mirror what the community regards as proper and as fair. That perception will be partly the result of views on social structures, mainly of family relationships and marriage, and on the vesting of authority and the finality of decisions. There may be views about the impropriety of not complying with requests of the deceased. Religious views, cultural values and traditions may play a role." Besides, many of our courts have relied on Voet's approach when dealing with the right to bury which is directly linked to the Transvaal approach. Applicants referred this Court to an extract from "The Selective Voet being the Commentary on the Pandects [Paris Edition of 1829] by Johannes Voet [1647 – 1713] et al Translated by Percival Gane Volume Two, 1955" where it was stated in Section 7 –"

[27] In the jurisdiction of another neighbor, Kingdom of Lesotho,in the case of **MALIAU V RATIA** (SUPRA) at pages 16 and 17, His Lordship K.L. Moahloli AJ had this to say:

"[32] In the present case Maliau has a preferential right to bury the late Ntene, as the one closest to him in legal terms. She has proved this fundamental proximity in law to the deceased, and therefore has the colour of right of burial ahead of any other claimant, including their sons Liau and Maholi.

[33] The court is also guided by its sense of what is right in arriving at this conclusion. And in this context, sense of what is right means a feeling or good judgment of what

is considered fair, just or morally acceptable by most people.

[34] We also feel that in the circumstances of this case it is reasonable, fair and equitable to accord the widow the right to bury her husband, and not the children, for the following reasons:

a. It would be inhumane to expect such an elderly and sickly lady to make the long and difficult journey from Maseru to the remote village of Mantšonyane every time she wishes to visit her husband's grave to spiritually connect with him and tend his final resting place;

(b) The grave in Maseru will be more easily accessible, not only to her but also to her children and the rest of the family, who, ironically, are by their own admission all now living in Maseru.

(c) It will reinforce the widow's pre-eminent status as the person closest to the deceased.

(d) It gives acute expression to the binding character of marriage and the precedence that it attracts in family relations.

(e) It is a fulfilment of the Christian marriage vow "till death do us part."

(f) "In order to begin to cope with her loss, a widow needs control over the burial of her deceased husband."

[28] In the cases relied upon by the High Court to conclude that the burial rights generally vest in the surviving spouse although packaged as an application of siSwati Customary Law in my view the

Courts were applying the Common Law. In both the South African and Lesotho jurisdictions it appears that sometimes is hybrid of both Common Law and Customary Law is used in deciding the questions of right of burial of deceased person. Therefore, our Courts in relying on precedents coming from the South African jurisdiction are not applying siSiswati Law and Custom.

Other than the characterization, in my view there is nothing wrong with the approach of the Courts particularly because both the Common Law and the siSwati Law and Custom are based on principles fostering orderly and dignified burials of deceased persons. The Courts ought not to sacrifice in such sensitive matters what is in the interest of justice at the altar of form. In my view, whether the Courts apply siSwati Law and Custom or the Common Law or a hybrid of the two, the Court must be guided by what is fair and just.

[29] It seems that the judgments under both Civil Law and the siSwati Law and Custom accept that the surviving spouse has a role to play in the burial of a deceased spouse.

[30] In the absence of conclusive expert testimony on the applicable siSwati Law and Custom, the Court has to consider what is fair and just. In the circumstances of this particular matter, the evidence

before this Court strongly persuade me to conclude that 1st Respondent should take charge of preparations for and the actual burial of the deceased. The Affidavit of one Eric Mfana Mhlanga presented in support of 1st and 2nd Respondents is presented as expert testimony is both unlawful as it was never tested by either cross-examination or testimony of other experts.

[31] It has to be recorded that an analysis of the averments contained in the affidavits filed of record shows a lot of untruths as well as a lot of irrelevant accusations and counter accusations. It is hoped that all the concerned parties could reach some cordial and respectful disposition if only for the sake of the dignified burial of the deceased.

[32] The correct test seems to me to be the way of life chosen by the parties as opposed to whether a party died intestate or not.

[33] It is without any doubt that while the surviving spouse and/or children have and are entitled to have a say, the responsibility of the burial of the deceased rests with the elders of the paternal, maternal and where married, the elders of wife(s) side.

[34] As already stated above in coming to a conclusion as to how and where the deceased is to be buried, factors such as reasonableness, general convenience, feelings of the next of kin i.e. the wife(s) and children, the interest of the deceased's community and society at large are paramount.

[35] In the circumstances of this case, in my view the balance of convenience favours the side of 1st and 2nd Respondents, a grandchild of the deceased was buried while he was alive at Moneni, the 2nd Respondent is a guardian of the 3 children that were born between her and the deceased and 1st Respondent has made efforts for all the affected parties to meet and discuss the burial but his efforts were thwarted by 6th Respondent. On the other hand, while it is admitted that the decision to spend his last years residing with her at his marital situation was very complicated. What of the alleged 2nd wife? In view of the obvious dislike between 6th Respondent and 2nd Respondent and between Appellant and 2nd Respondent, how can it be reasonably expected that a dignified burial of the deceased would take place at the place of choice of Appellant and 6th Respondent.

[36] In addition, 6th Respondent by not participating in the appeal clearly demonstrates that she has conciled herself with the judgment of the

High Court. Even Appellant in her Supplementary Affidavit in High Court Case NO. 968/18 (A) under oath, inter alia, at paragraph 21.3 states that:

> ***"21.3 <u>It is further denied as a "third" wife I have absolutely no say. In terms of Swazi Law and Custom the burial is determined by the family of the deceased not his wives. The above Honourable Court in its plethora of decisions applies the rules of intestate succession and not customary law. Otherwise, in siSwati a wife cannot even go to the family graveyard to point where the grave has to be dug</u>"***. (my underlining).

If this is a *bona fide* position held by Appellant then on what basis is she seeking the relief she prayed for before this Court? In the judgment of the High Court, Appellant reportedly failed to secure an expert in siSwati Law and Custom to give evidence in support of her case.

[37] Additionally the Courts and the legislature are enjoined to explore mechanisms that at least curtail the delay of the burial of deceased persons due to family fights. In particular the legislature may consider introducing a provision where leave ought to be sought and granted by the High Court, before an appeal is brought before this Court. Accordingly, the Registrar of the Supreme Court is directed to deliver a copy of this judgment upon the 5th Respondent.

COURT ORDER

[38] In view of the facts that the appeal partially succeeds, the order of the High Court is substituted and replaced by the order of this Court below. Accordingly, it is ordered that:

1. The appeal partially succeeds:

   1.1 the evidence as to whether Appellant is a wife of the deceased is inconclusive and,

   1.2 the award of costs is set aside.

2. Appellant, having failed to prove to this Court that she was married to the deceased, she may not have any role in his burial.

3. Next of kin willing to participate in the burial of the deceased are ordered to meet in order to endeavor to reach a consensus on the arrangements of the burial of the deceased.

4. 1st Respondent, the biological father of the deceased, must convene the meeting referred to in paragraph 3 above and if no consensus is reached he has to oversee the burial of the deceased.

5. 3rd Respondent to release the body of the deceased to 1st Respondent or any person acting on his behalf.

6. 6th Respondent is directed to deliver all personal effects of the deceased that may be required for his burial to the 1st Respondent or any person acting on his behalf.

7. 4th Respondent to ensure that law and order is monitored in the preparatory activities and the actual burial of the deceased.

8. No order as to costs in relation to the proceedings before this Court and the High Court.

9. It is ordered that the deceased is to be buried within 14 days of this judgment.

_____

S.P. DLAMINI JA

I agree _____

M.J. DLAMINI JA

I agree _____

R.J. CLOETE JA

FOR THE APPELLANT: **T. MAVUS0**

(Motsa Mavuso Attorneys)

FOR THE RESPONDENT: **T. HLABANGANA**

(Hlabangana Attorneys)