IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 72/2020**

In the matter between:

NOBUHLE DLAMINI (NEE NXUMALO)	**Appellant**
And	
WILSON ALFRED DLAMINI	**1st Respondent**
THE MASTER OF THE HIGH COURT	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral Citation: *Nobuhle Dlamini (Nee Nxumalo) vs Wilson Alfred Dlamini and 2 Others* (72/2020) [2022] *SZSC* 54 (28/11/2022)

Coram: **S.P. DLAMINI JA, M.J. DLAMINI JA AND J.M. CURRIE JA.**

Heard: 17 September, 2022.

Delivered: 28 November, 2022.

SUMMARY : *Customary law – Distribution of estate of deceased person married according to Swazi Law and Custom – Dissolution of marriage disputed – Jurisdiction of High Court disputed to determine distribution of the estate of deceased person as status of marriage unresolved by traditional authorities – Requirements for grant of an interdict considered – Judgment of court a quo set aside – Matter referred back to Swazi Court of appropriate jurisdiction through the Judicial Commissioner.*

JUDGMENT

J.M. CURRIE – JA

INTRODUCTION

[1] This appeal emanates from a judgment of the court *a quo* delivered on 23 October 2020.

[2] The court *a quo* interdicted the appellant from participating as a beneficiary in the distribution of the estate of the late Bongani Timothy Dlamini ("Bongani") to whom she was married according to Swazi Law and Custom.

BACKGROUND

[3] The parties to this dispute are the appellant, who alleges that she remains a wife to Bongani. She was married to Bongani on 3 March 1990, her marriage was registered with the Registrar of Births, Marriage and Death on 6 February 2018 and a marriage certificate issued. Two children were born of the marriage, Mzwandile Dlamini and Mehluko Dlamini, who had both attained the age of majority at the time of the institution of the proceedings.

[4] The 1st respondent is the biological father of Bongani and his wife is Takhona Esther Dlamini, ("Esther"). Neither the 2nd respondent who is the Master of the High Court nor the 3rd respondent, the Attorney General, actively participated in the matter in the court *a quo* and appear to have taken the view that they will abide by the orders of the courts.

[5] It is common cause that appellant tore up her marriage certificate and left the marital home in 1996 and went to reside in a flat. She left her two children at her marital home in the care of the Bongani's parents.

[6] After vacating the marital home the appellant formed a love relationship with a certain Dumisa Dlamini and a baby girl, Temangwane, was born of the union. She resided with him until his death in July 2003.

[7] In 2004 appellant returned to her husband, Bongani, together with her daughter after Bongani had allegedly forgiven her of her infidelity and they resided together until 2009.

[8] In 2009 Bongani suspected that appellant was in another adulterous relationship with a certain Zama. A meeting was held between his family and that of the appellant, as a result of which the appellant left the marital home, once again.

[9] A second meeting of the families took place at uMzimnene Royal Kraal. The Inner Council ordered that the two families should meet alone at the homestead of 1st respondent which duly took place. Bongani had invited Zama's girlfriend Dolly to join the meeting. At the meeting she confirmed that appellant was in a love triangle relationship with her "husband" and

boyfriend. Bongani was extremely angry as a result of the revelation and at the meeting appellant's uncle resolved to take appellant away for counselling. Bongani refused to accept his wife back and stated that she should never return to his homestead.

[10] On 18 May 2017 appellant was informed by her daughter that Bongani had been shot dead. She went to her parental home and informed them of Bongani's death. The family sent a delegation to Bongani's family requesting that appellant return to mourn the death of her husband. 1st respondent refused and asked them to leave. They went to the Royal Kraal whereupon the traditional authority ordered that appellant could return to her marital home as a wife and mourn the death of her husband against the wishes of the relatives of the deceased.

[11] On Saturday 20 May 2017 both families attended a meeting before the Umphakatsi. 1st Respondent's family advised the Umphakatsi that the deceased and the Appellant had been separated since 2009 and that the Umphakatsi had always been aware of the separation. The Umphakatsi's Bandlancane dismissed the families and advised them to resolve the issue at

family level. They did not resolve the issue but appellant returned to the marital homestead to mourn the death of Bongani where she robed herself in full mourning gowns.

[12] The Court took the view that the crisp issue to be determined was whether the marriage had been terminated and whether appellant was still the wife of Bongani, and, as such, entitled to participate in the distribution of the estate. In the circumstances, two assessors were appointed to assist the presiding Judge as the matter concerned a marriage according to Swazi Law and Custom.

[13] The court *a quo* did not consider the requirements for the grant of a final interdict which it ought to have done and it granted a final interdict interdicting the appellant from participating as a dependant or beneficiary in the distribution of the estate of Bongani and removing her from the list of beneficiaries of the estate.

[14] Dissatisfied with the judgment of the court *a quo* the appellant noted an appeal as follows:

"1. *The Court a quo erred in law as a Civil Law Court to deal with an issue of Swazi Law and Custom. The Court a quo had no jurisdiction to deal with an issue on whether or not a Swazi Law and Custom marriage has been lawfully dissolved;*

2. *The Court a quo erred to deal with the issue of the Swazi Law and Custom when the rightful structure, the Chief's Kraal, ("Umphakatsi"), had already ruled that the Swazi Law and Custom Marriage between the Appellant and the deceased was not lawfully dissolved. The issue was res judicata. The remedy of the first and second respondent then was to appeal and/or review the decision of Umphakatsi which they have not done so up to date;*

3. *Alternatively, the Court a quo erred in not granting an interim interdict stopping the distribution of the Estate pending the noting of an appeal or review of the decision of Umphakatsi or final resolution of the issue of the Traditional Structures;*

4. *As a result of the Court a quo dealing with issues of Swazi Law and Custom erred under Law and Custom that the relationship of*

the Appellant and Dumisa Dlamini terminated the marriage between the Appellant and the deceased under Swazi Law and Custom. Even if adultery occurs there are peremptory processes that are followed to then terminate the marriage which were not done by the deceased.

5. *The Court a quo erred in law in finding that the process of terminating a marriage under Swazi Law is a mere procedure which cannot supersede the act of adultery. The law is clear that the procedure is peremptory for the dissolution of the marriage.*

6. *The Court a quo erred in law that it is the act of adultery that terminates a marriage under Swazi Law and Custom. Adultery is the reason for termination but the peremptory processes to then terminate the marriage has to followed which were not done by the deceased until his death;*

7. *The Court a quo erred in law in rejecting the expert evidence of Mr. Mahleka Ndumiso Dlamini on the peremptory procedure for terminating a Swazi Law and Custom Marriage;*

8. *The Court a quo erred in law in finding that the Swazi Law and Custom Marriage between the Appellant and the deceased terminated as the process to terminate same were not followed by the deceased;*

9. *The Court a quo erred in law to find that the Appellant committed adultery with Mr. Zama Dlamini without sufficient facts under Swazi Law and Custom;*

10. **The Court *a quo* erred in excluding the Appellant to benefit from the Estate of the deceased as his wife.**

ARGUMENT ON BEHALF OF THE APPELLANT

[15] Appellant contends that the court *a quo* never dealt with the three preliminary issues raised in appellant's answering affidavit. The first was the issue of jurisdiction and the second was the *locus standi* of the 1st respondent to institute the application. The third point was that the Umphakatsi had ruled, after hearing the parties that the marriage still subsisted and that the formal requirements for dissolution of the marriage had not taken place. Instead the

court *a quo* appointed two assessors to hear the matter on whether or not the marriage under Swazi Law and Custom had been formally dissolved.

[16] Appellant filed comprehensive heads of argument in support of the grounds of appeal but during his address appellant's counsel stated that he intended to mainly deal with the issue of jurisdiction as this issue ought to dispose of the whole matter.

[17] Appellant's counsel referred to the case of **Thandi L. Dlamini and Two Others v Regina and Another, Supreme Court Case (60/2019) [2020] SZSC 9 (09/06/2020** where this court expressed its disapproval of the court *a quo* for not dealing with the point of lack of jurisdiction in a matter involving Swazi Law and Custom as follows:

> "9. ***As it apparent from the Judgment, the Court a quo, unfortunately did not expressly interrogate or deal with the question of jurisdiction. The Court ought to have dealt with the issue and the reasons why it assumed***

jurisdiction. This failure is fatal blow to the whole judgment and this Court holds it as a serious error of that Court, as will become apparent later on in this judgment.

...

22. *The issue of jurisdiction, that is, the jurisdiction of the Master of the High Court as well as the original jurisdiction of the High Court on the estates of Emaswati married under Swazi Law and Custom and who die intestate is a thorny and important matter that the Courts of Eswatini must resolve quickly and bring certainty in this aspect of the law in this country.*

23. *In the present case the issue of the jurisdiction was raised as a point in limine or point of law, which is a process that addresses a technical legal point. It is raised prior to getting into merits of a case and normally relates to the issue of the jurisdiction. Once the point of law is decided, the case may stand or fall and it (sic) is falls it saves time and money. In other cases it finalizes the*

matter. Where the Court dismisses the point of law, the matter may then proceed to the merits of the case. In the present case the Court a quo avoided the determination of the point of law and simply went into the merits of the case and no reasons were given of the avoidance.

...

29. *Once a point of law is raised in a matter, especially in an important matter such as this one, it is imperative upon the Court seized with the matter to determine the point of law.*

...

55. *This Court comes to the conclusion that the points of law should have been heard and determined. This Court comes to the conclusion that section 68 of the Administration of Estates Act, 1902, is valid and applicable in this Court.*

....

(a) The matter, and any dispute arising of the matter to be prosecuted under Swazi Law and Custom ..."

[18] Section 151 (3) of the Constitution provides that the High Court does not have original jurisdiction in matters where a Swazi Court has jurisdiction. Therefore the court *a quo* lacked primary jurisdiction to make a finding that the marriage between the parties was dissolved and that it is the traditional structures or the Swazi Courts that can make such and determination.

[19] Further, that the matter had already been overtaken by events in that the *Umphakatsi* had, after hearing the parties, declared that the marriage between appellant and the deceased still subsisted after the death of the deceased as the formal requirements to terminate the marriage under Swazi Law and Custom had not taken place. Thus, the remedy of the 1st respondent was to appeal and/or review the decision of the *Umphakatsi.*

[20] Finally, he submitted that the court *a quo* was wrong in law to proceed to deal with the merits of the matter without considering the issue of jurisdiction

and the matter should be dismissed and that the judgment of the court *a quo* should set aside on this point alone. The Constitution makes no provision for the High Court to appoint assessors and then deal with a matter involving Swazi Law and Custom.

ARGUMENT ON BEHALF OF 1ST RESPONDENT

[21] 1st respondent contends that the court *a quo* did have jurisdiction as it was not required to determine the merits of the marriage in dispute. It was approached with regard to the distribution of the estate on the basis of the fact that the marriage between the parties had been terminated prior to the death of Bongani.

[22] 1st respondent's counsel submitted that the High Court has jurisdiction to deal with all matters involving the estate of any deceased person. Declaratory rights in such matters are made only by the High Court.

[23] 1st respondent's counsel relied on the case of **Nokuthula Makhanya, Jenneth Tholakele Sihlongonyane, Cecelia Gcinaphi Makhanya, Isaac**

where the court was called upon to make a declaratory order involving hereditary rights where a marriage had been concluded by Swazi Law and Custom.

[24] 1st respondent submitted that there was no error in law and in fact that the court *a quo* granted an interim interdict preventing the distribution of the estate of Bongani pending the noting of an appeal or review of the decision of the Umphakatsi or the final resolution of the issue in by the traditional structures.

[25] Lastly, 1st respondent's counsel argued at some length with regard to the purported termination of the marriage and the decision of the Umphakatsi which appellant's counsel maintains is controversial and nothing turns on it. The marriage had been terminated earlier before the ruling of the Umphakatsi. At the time of the meeting with the Umphakatsi the appellant had left the homestead and was living with her boyfriend, Zama in Siteki. All the relevant and ancillary procedures for terminating a marriage by Swazi Law and Custom were followed by the deceased based on the adultery of the

appellant. Evidence was led in the court *a quo* that the families had met during the life time of the deceased and the customary marriage was dissolved.

[26] Finally, in view of these circumstances the court *a quo* was entitled to deal with the issue of the distribution of the estate and there are no issues which the court *a quo* could have entertained, "turning on the purported 'Ruling' as same was and is, on its face a fabrication that was made and orchestrated for purposes of misleading the court *a quo.*"

THE LAW AND FINDINGS OF THIS COURT

[27] It is apparent from the judgment that the court *a quo* did not deal in any manner with the question of jurisdiction although the issue was raised by the appellant/1st respondent in its points *in limine* in its answering affidavit. When these points are raised they require to be considered by the Court because the matter may stand or fall on the preliminary points raised. In the present case the court *a quo* avoided dealing with the points in *limine,* seemingly assumed jurisdiction and went straight to the merits of the application and gave no reasons for the failure to deal with the points *in limine.*

It should have advanced reasons as to why it assumed jurisdiction and then dealt with the merits of the application. Instead the court *a quo* appointed two assessors to assist the court and directed that the parties lead oral evidence with regard to the status of the marriage and whether or not it had been lawfully terminated according to Swazi Law and Custom.

[28] Section 151 (3) of the Constitution provides that the High Court does not have original jurisdiction in matters where a Swazi Court has jurisdiction. This section provides:

> *"151(3) notwithstanding the provisions of subsection (1), of the High Court –*
>
> *(b) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;*
>
> (c) *has no original but has review and appellate jurisdiction in matter in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.* (my underlining)

[29] When the court *a quo* heard the matter together with two assessors it was exercising its original jurisdiction. In matters where a Swazi Court has jurisdiction, the High Court has no original jurisdiction.

[30] I agree with the appellant that the issue for dissolution of the marriage calls to be determined by the traditional authorities or the Swazi Courts and therefore the court *a quo* did not have jurisdiction to determine the primary issue of whether the marriage was dissolved or not and the consequences flowing therefrom.

[31] That is not to suggest that the High Court at the appropriate time may not intervene i.e. to expunge a record of marriage at the Births, Marriage and Deaths Registry.

[32] This Court is not required to determine whether the marriage was terminated or not as the issue of jurisdiction, in my view, disposes of the matter. The court *a quo* was not seized with jurisdiction to deal with a matrimonial property dispute under Swazi Law and Custom but was possessed with the

authority to deal with the distribution of the estate assets once the status of the marriage had been determined by the Swazi Courts or the traditional authorities.

[33] The issue of whether the marriage was dissolved or not is disputed by the parties. The dispute is to be dealt with by the traditional authorities. The authorities on Swazi Customary law are not in agreement on the procedure to be followed with regard to the dissolution of a marriage concluded according to Swazi Law and Custom but it is generally accepted that it is a union of two families and not only two persons. Further that the death of one spouse does not terminate the marriage. Despite the differing pronouncements on the dissolution of a customary marriage, it is generally accepted that dissolution of a customary marriage is not encouraged; it requires a lengthy process at attempting reconciliation.

[34] In the matter of **Samuel Myeni Hlawe vs Beatrice Tholakele Seyama and Two Others Supreme Court Case No. 56/2017** the court held that the High Court lacks jurisdiction to deal with the issue of the dissolution of the customary marriages and held:

"31. Whether a customary marriage subsists or is dissolved is a matter for a Swazi court or equivalent traditional council. The shortcoming faced by this Court in appeals such as the present is that the researchers and writers have already relied on oral accounts by informers and not on hard cases decided by the appropriate courts and councils. The common law courts should mainly rely on evidence generated by the traditional authorities exercising jurisdiction in customary matters, of which the "family court" is none. The Judicial Commissioner can assist guide litigants where to go for the appropriate decision. Litigants should not come before the High Court on their own unsupported evidence regarding the dissolution of their marriages. This is to avoid instances such as the present where the husband is pitted against his wife (possibly in full glare of their children). Litigants applying for deregistration of their marriage should come with independent evidence or proof by an appropriate authority having jurisdiction in the matter."

[35] In the recent judgment of this Court in the matter of **Gcinaphi Susan Nxumalo vs Fortune Nxumalo and Others (24/2021) [2021] SZSC 30 (15th November 2021)** the court held that:

> ***"The law and practice require that there be a final judgment determining the customary marriage terminated to be recognized by the High Court before the order to expunge the registration of the marriage certificate from the Register of Marriages under the administrative custody of the 2nd Respondent is granted. It is not enough that there be adultery (or witchcraft); what is required is a lawful decision dissolving the marriage."***

[36] Without going into the issue of whether the matter was dissolved or not, it is clear that the parties conduct did not meet the requirements of Swazi Customary law for the dissolution of a customary marriage. Whatever short comings of the Umphakatsi might exist it was not assailed and as such remains intact. A party aggrieved by it is not without appellate remedy which was never exercised in the present matter.

[37] Whilst the court *a quo* had the necessary jurisdiction to deal with the division of the estate of a deceased person married under Swazi Law and Custom it could not do this before there was a final pronouncement on the status of the marriage. This issue was for the traditional authorities to finally determine and issue an instrument to this effect whereupon the court *a quo* could determine the distribution of the estate assets. The traditional authorities did not issue a final pronouncement on the status of the marriage but stated:

> *"2. In the matter of banishing Nobuhle from the home which she was named for Kukhonta, the Swazi Law and Custom makes it clear of the procedure which should be followed when banishing a wife. In this matter which is raised by Wilson and his wife where they are saying Bongani had banished his wife there was no case brought to the Royal Kraal that LaNdwandwe (Nobuhle) was found red handed with a man. The Royal Kraal still maintains its stands that Bongani never came to it with an intention to banish his wife until his death, that is the reason the Royal Kraal knows that they stayed together peacefully until Bongai's demise. The Royal Kraal's decision is that Wilson must vacate Bongani's homestead and leave Bongani's wife*

to raise their kids at home which they built together with the deceased." (my underlining)

[38] Appellant's second ground of appeal put in issue the correctness of the Court *a quo*'s decision to grant a final interdict when it ought to have granted an interim interdict if any. The court granted a final interdict without considering the requirements for the grant of a final interdict and I am of the view that the court *a quo* misdirected itself in this regard. Whilst it could possibly have granted an interim interdict staying finalization of the estate and referred the matter back to the Umphakatsi for final determination on the status of the marriage it did not do so and instead granted a final interdict in terms of which the appellant was interdicted from participating in the distribution of the estate and was removed from the list of beneficiaries of the estate.

[39] The requisites to claim an interdict are a clear right, injury committed or reasonably apprehended, and no alternative remedy – see the case of **Setlogelo v. Setlogelo 1914 AD 221 at 227** .

[40] The Setlogelo case was approved and adopted by the Supreme Court of Eswatini in **Thokozile Dlamini v. Chief Mkhumbi Dlamini and Another Supreme Court Case No. 2/2010 SZSC 3 [2010]** per Ramodibedi CJ where the court said:

> ***"11.Now, following the celebrated case of it is well-established that the pre-requisites for an interdict are a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by another ordinary remedy. See also V. I. F. Limited v. Vuvulane Irrigation Farmers Association and Another, Civil Appeal Case No. 30/2000."***

[41] The onus in applying for a final interdict is on an applicant to prove on a balance of probability a clear right in terms of substantive law. The requirement of a clear right is the most important of the three requirements.

[42] Clearly, the 1st respondent did not meet the requirements for the grant of a final interdict. In the court *a quo* it was disputed as to whether the marriage

had been dissolved or not and therefore the applicant in the court *a quo* did not have a clear right to the interdict which was in effect a final interdict.

[43] Secondly, 1st respondent failed the test of an alternative remedy to the interdict sought. 1st respondent to have sought final resolution of the status of the marriage by the traditional authorities before approaching the court *a quo.*

[44] In view of the aforegoing, I am of the view that the appeal falls to be dismissed. In dismissing the appeal the parties are not left without a remedy as they are able to pursue the issue of dissolution and the consequences thereof with regard to the division of the deceased's estate through the appropriate traditional structures.

[45] Since the Umphakatsi may be deemed *functus officio*, the matter is referred to the Swazi Court for consideration.

COSTS

[46] With regard to costs both counsel submitted that each party should pay its own costs and that the estate should not be burdened with the issue of costs.

[47] Accordingly the following order is made:

1. The decision of the Court *a quo* dated the 23rd of October 2020 is set aside and substituted with the following:

   1.1 The Registrar of the Supreme Court is hereby instructed to transmit the matter to the Swazi Court of appropriate jurisdiction through the office of the Judicial Commissioner.

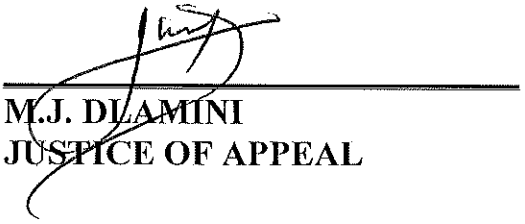
2. No order as to costs.

J. M. CURRIE
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree



M.J. DLAMINI
JUSTICE OF APPEAL

For the Appellant: MR. N.D. JELE, ROBINSON BERTRAM ATTORNEYS.

For the 1st Respondent: MS.L.R.SIMELANE, KHUMALO-NGCAMPHALALA ATTORNEYS