

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1162/98

In the matter between:

ANNIE DLAMINI

APPLICANT

and

**SIPHIWE SIMELANE
THE MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT**

CORAM

CHIEF MAFOHLA SUKATI:
ASSESSOR.
LOMKHOLO DLAMINI:
ASSESSOR.
MS. L. MSIMANGO OF
MABUZA ATTORNEYS
MR. J. MAVUSO OF JUSTICE
M. MAVUSO & COMPANY
MR. K. MNGOMEZULU OF
ATTORNEY GENERAL'S
CHAMBERS

FOR THE APPLICANT

FOR THE 1st RESPONDENT

FOR THE 2nd & 3rd RESPONDENT
Q.M. MABUZA -J,

JUDGMENT 27/11/09

[1] The applicant herein seeks the following orders:

- (1) **"Declaring the purported marriage between the first Respondent and the late AMBROSE GENDINYONI BANDA null and void:**
- (2) **"Directing the second respondent to call a meeting of the next of kin for the purposes of appointing an executor of the estate of the late AMBROSE GENDINYONI BANDA.**
- (3) **Granting costs of the application against the respondents.**
- (4) **"Granting further and/or alternative relief.**

[2] The application is opposed by the Respondents. The 2nd and 3rd Respondents filed opposing affidavits. Therein the 2nd Respondent states that when the estate was reported to him there was *prima facie* proof of a marriage between the deceased and the 1st Respondent. This proof is found in Annexure "A" to his affidavit. Annexure "A" is a declaration by the 1st Respondent before the Regional Secretary at Siteki wherein the 1st Respondent certifies that she was married to the deceased according to Swazi law and custom. Annexure "A" caused the 2nd Respondent to uphold the 1st Respondent as the surviving spouse. The 1st Respondent who opposed the application has filed her affidavit in which she states that she and the deceased were married in terms of Swazi law and custom at Siteki during 1995. The Applicant is the mother of the deceased and she denies that such a marriage took place because she would have been informed about it.

[3] Oral evidence was led and the Applicant testified that the deceased and the 1st Respondent had a relationship and used to live together during his lifetime. The deceased

previously had a wife by the surname of Mbatha and that she had left him and that they had one child who was still a minor. The 1st Respondent and the deceased fell in love after LaMbatha left. They lived together in LaMbatha's house for about seven to eight months and the 1st Respondent left thereafter. She further stated that the 1st Respondent was never smeared with red ochre at the instructions of the deceased.

[4] She stated that all customary marriages entered into by members of her family are carried out at her elder sister's home at Siteki. Her sister's name is Thozane. Thozane would have informed the Applicant had she conducted such a marriage.

[5] Cross-examined by Mr. Mavuso, the Applicant stated that she lived at Nkwalini outside Mbabane where she had built a home for herself. It was put to her that after the deceased and the 1st Respondent fell in love, the deceased used to live with the 1st Respondent's relatives who also had a home at Nkwalini. She agreed. It was put to her that the deceased had asked 1st Respondent's family for her hand in marriage. She denied this. She was informed that the 1st Respondent and the deceased travelled to Siteki to Thozane's home to get married. She responded that she was not aware of that. It was put to her that as arranged the marriage took place. Her response was that Thozane should have informed her but there was nothing that she had told her and she was not aware that the marriage had taken place. She was informed that a certain woman by the name of Mdedengu Nhlabatsi had smeared the 1st Respondent with red ochre. She responded that she had asked LaNhlabatsi about the

smearing and LaNhlabatsi had denied its occurrence or that she knew the 1st Respondent.

[6] It was put to her that Nonono, a young lady and daughter to Thozane had awakened the 1st Respondent early in the morning of her wedding day. Her response was that she did not know as nobody had informed her about it.

I set out the questions and answers:

Q: "My instructions are that after being called out she was taken to the cattle byre.

A: I do not know nobody told me.

Q: I am instructed further that at the cattle byre she was given a spear as is customary and she mekezaed.

A: I do not know anything.

Q: My instructions further is that after the ceremony the people who were there proceeded to the river

A: I do not know and Nonono did not tell me.

Q: The 1st Respondent says after spending some time at the river she then came up to the homestead and was smeared with red ochre.

A: Nonono did not tell me.

Q: My instructions are that after the ceremony was concluded a certain man was requested to take Siphiwe to her parental home at Lavumisa.

A: I do not know anything.

Q: I am instructed further that after a passage of some time Siphwe was taken back to Siteki by her brother Elliot Simelane.

A: Nonono did not tell me."

Q: "Does a Swazi customary marriage become invalid because the mother of the groom did not know or was not there?

A: If she was married formally she becomes a wife maybe in my case they took long to inform me maybe they did not inform me in time.

Q: When did you expect to be told of the marriage?

A: They were to tell me anytime because I used to go there and we would sit around even with Nonono and they could have told me. They could have told me soon or later it did not matter.

Q: Who is this person you allege took sometime to tell you about the ritual?

A: Anyone at home could have informed me.

Q: You have told the court that someone could have told you who took some time to tell you?

A: I was referring to Nonono.

Q: This matter is now about over 10 years. Have you not bothered to find out the truth of this ?

A: I did visit Siteki and they did not tell me anything.

Q: Is it not correct that you are concerned about this kuteka?

A: No.

Q: Are you saying that knowing of these proceedings you have not bothered to ask at Siteki as to what happened?

A: When I visit and ask they say that they know nothing involving Siphiwe. Nothing ever happens there.

Q: I put it to you whether present or not that the Respondent entered into a valid marriage according to Swazi law and custom at Siteki.

A: It is not true otherwise Nonono would have interviewed me about this.

It is noteworthy that the Applicant's complaint is that she did not know about the marriage as nobody informed her; not that it did not take place.

[7] The Applicant stated in cross-examination that the 1st Respondent lived together with the deceased for about eight months and thereafter left. That when the deceased died she had long left him. She revealed that the deceased was buried at Siteki and that she had seen the 1st Respondent at the deceased's funeral. She revealed that she had met the 1st Respondent in Mbabane town and saw that she was wearing mourning gowns. She further revealed that 1st Respondent had not been given any mourning gowns by her family as she was not the deceased's wife. She denied that she had a bad relationship with the 1st Respondent.

She told the court that the 1st Respondent had arrived at the funeral of the deceased in the company of a certain woman. It was this woman who she later met at Mbabane who informed her that the 1st Respondent was wearing mourning gowns. This woman asked the Applicant why the 1st Respondent was wearing mourning gowns and the Applicant replied that she did not know because she was not given any mourning clothes by the deceased family only a black string with which to mourn the deceased.

The Applicant revealed that after the burial the family met and the 1st Respondent requested a black string in order to mourn the deceased. The family agreed because she used to be the deceased lover. She left on that same day. Normally the mourning gowns worn by mourners are sewn by the family of the deceased. She concluded that the 1st Respondent had made up the mourning gowns herself and dressed herself without the knowledge of the family. She further stated that the deceased never told her that he wished to marry the 1st Respondent. She revealed that she had visited her home in Siteki several times and if a marriage had taken place her family especially Nonono would have informed but because it did not take place they did not inform her.

[10] When she was asked by the assessors if she knew that according to Swazi law and custom someone from Umphakatsi of the area is normally dispatched such as the chiefs runner to oversee the ceremony. She responded that she knew of such a practice but there was no marriage hence there was no need to send someone from Umphakatsi. She was further asked whether or not the 1st Respondent remained after the funeral as is the custom

when a wife is bereaved. She responded that she thought that it was not wrong for the 1st Respondent to leave as she was not the deceased's wife. She was asked how the 1st Respondent could take the string if she was not in mourning. The response was that the 1st Respondent had insisted. Asked as to how she could have worn a string over mourning gowns, the Applicant responded that she had been surprised by this.

Asked how the 1st Respondent could have attended a meeting for the bereaved family after the burial she responded that they saw 1st Respondent enter the room where they were meeting and did not have the heart to chase her out. Asked as to who had accompanied her when she went to be tekaed at Siteki, the Applicant responded that she did not know. **The Applicant was unable to state categorically that there was no marriage.**

[11] Mataleni Nhlabatsi (PW2) was the next witness to give evidence on behalf of the Applicant. She stated that Thozane was her sister in law and that the deceased was her nephew. She denied that she had tekaed the 1st Respondent. She denied knowledge of the marriage or that she was present when it occurred. She stated that she was present at the deceased funeral. Asked if what happened at the meeting after the burial, she merely responded that she did not hear anything.

[12] She was cross-examined by Mr. Mavuso. She denied that she was Mdedengu Nhlabatsi. She denied that she had ever smeared anyone with red ochre. She denied ever smearing any brides of the Applicants sons. This witness was generally truculent evasive and difficult. Her evidence was

that she did not know anything about the smearing of the 1st Respondent not that there was no marriage.

The Applicant closed her case after this witness.

[13] The defence case opened with the 1st Respondent Sipiwe Simelane giving evidence. She testified that at the time of her marriage to the deceased Ambrose Gendinyoni Banda she was living at Nkwalini Zone 4 outside Mbabane city. One day the deceased on one of his visits to her informed her that on a Friday they would travel to his home at Siteki. At Siteki Nonono Dlamini Thozane's daughter and niece to the Applicant knocked at the door where she was housed and announced that she should come out as they had tekaed her. The 1st Respondent was dressed in sidwaba (a traditional skirt) she was given a spear and taken to the cattle byre. When she and the deceased family members arrived in the cattle byre she was told to start a song. She informed them that she did not know any song, they informed her to start any song they would sing along with her.

[14] They advised her to cry which she did. A young boy raised a stick and announced that she was his father's daughter. She and the rest of the family were advised to go out of the kraal and run away. They were advised to go to a certain field where they would remain until 10.00 a.m. or 11.00 a.m. when they would return with a red cow. When she returned she was made to sit on a mat and was smeared with red ochre on her face, arms and legs with a child who sat next to her. The child's name is Bongiwe Khumalo. The 1st Respondent stated that she was smeared with red ochre

by PW2 Mdedengu Nhlabatsi. After the smearing she was taken inside where people were singing and clapping hands. She was shown a goat through the door before it was slaughtered. She was asked by her new in-laws if she had noted the goat's colour. She responded in the affirmative that it was red on the stomach and black on top. The goat was slaughtered cooked and eaten. Before it was eaten she was given a piece of meat which is called Kuluma but she did not eat it as traditionally she is not supposed to eat it.

Her in-laws cooked a chicken for her. In the evening she was advised to go and wash off the red ochre. She was accompanied by Mantombi Dlamini, her sister in-law. She did not cook that day. She began to cook (to kotita) the following day after she had unpacked her pots. She stayed with her in-laws for a week after the smearing before her in laws took her to her parental home at Matsanjeni. Before they took her home they dressed her with empty bile on her forehead. She was accompanied by Zodwa Thumbatsa (Mrs Shongwe). When they reached her parental home, they found her mother Josephine Mdluli, her brother Elliott Simelane and Mcakaza Simelane. There were other members of her family but she described them as too young then. She stated that the woman who smeared her with red ochre at Thozane's home advised her that she was now Mrs Banda and the deceased completed the ritual by putting siphandla on her wrist. The Applicant was not present.

She was cross-examined by Miss Msimango. She reiterated that the marriage had taken place at Thozane's home and that she attended the deceased's funeral. She disclosed that the family did not cover her with blankets and did not dress her in mourning gowns as they were quarrelling among themselves about her

status. She was however, given a black cloth from which she could sew for herself mourning gowns.

The witness was asked some questions by the Assessors. Chief Sukati asked why she was not tekaed at the Applicant's home at Nkwalini. Her response was that the deceased knew best, he had informed her that she would be tekaed at Siteki. She was not aware that she would be tekaed on that particular occasion when she travelled to

Siteki with the deceased. But the deceased had expressed his wish to make her his wife; its just that he did not tell her it would be when it happened. She was asked as to who had represented the royal family and she responded that it was Mgawuza Simelane. She could not call him to be a witness because of lack of money. When asked if her people received the cow that was to be paid for calling her out to be tekaed; she responded that they had not. She revealed that she was never shown the cow directly; she was told that it was red. The family showed her a herd of cattle that were in the field and that the cow was among this herd. She revealed that her mourning clothes were removed at Siteki where she was tekaed.

[18] Babe Lomkholo Dlamini put some questions to her. Her responses were that she tried to get Nonono Dlamini as a witness but she complained of lack of money. She agreed that PW2 was not the one who smeared her as she was not Mdedengu. She did not know if Mdedengu was still alive. She revealed that the Applicant knew her as the deceased wife because she had invited her to build a home where she stayed at Nkwalini. She further informed the court that it is this house and its contents at the Applicant's home which

forms part of the assets of the deceased's estate together with a sum of about E22,000.00 (Twenty two thousand Emalangi) which was with the office of the Master of the High Court.

Mandla Arafat Kunene was the second defence witness. The first Respondent is his sister. He testified that he recalled that when the 1st Respondent was tekaed the Banda family sent a Nyoni man with the delicate part of the goat (umsasane). He threw a card box at the 1st Respondent's family and announced that the 1st Respondent had been tekaed and ran off. They followed and called after him. The witness found a motor vehicle which was parked away from his home and out of sight with the deceased inside. The deceased explained that the 1st Respondent had been tekaed at Siteki. The witness stated that he was happy with these news because it meant that his family would get cattle because his sister was now married. However, they never collected the cattle because they did not know that Banda would die when he did. When they tried to collect the cattle the deceased family refused and accused the 1st Respondent being a witch who had killed the deceased. They never received the red cow either even though the deceased had informed them to collect it.

I am satisfied that a marriage in terms of Swazi Law and Custom was entered into between the deceased and the 1st Respondent. The Honourable Assessors agree with me. The 1st Respondent has described in vivid detail the events that took place on her wedding day that she could not have made each detail up with such precision. She recalled all the material details that make up a customary marriage.

- She recalled that Nonono Dlamini dressed her up in the traditional skirt (sidwaba).
- Nonono gave her a spear and took her to the cattle byre where she was required to sing.
- She was smeared by Mdedengu Nhlabatsi.
- The child who was smeared with her was Bongiwe Khumalo.
- A goat was slaughtered and she wore its bile (inyongo) and wristband (siphandla).
- She cooked for a week (to kotita)
- Was returned to her parental home accompanied by Zodwa Thumbatsi.
- The delicate part (umsasane) was taken by a Nyoni man to her parental home.
- She was shown or told of a red cow for tekaing her.
- That the marriage took place at Thozane's homestead at Siteki.

[21] The evidence of her brother corroborated her. He gave evidence about the arrival of umsasane to his parental home which was thrown at the family by a Nyoni man in the customary manner.

[22] The Applicant also gave evidence. She did not deny that the marriage did not take place. Throughout the evidence she bemoans the fact that nobody informed her of the marriage having taken place. She explained that marriages in respect of her family were all supposed to take place at her sister's home at Siteki. The 1st Respondent has detailed how her marriage took place at Thozane's home in Siteki. The 1st Respondent informed the Court that in recognition of her relationship and marital status with the deceased, the Applicant invited her to build her house at the home of the Applicant.

It is clear to me that the disowning of the 1st Respondent is two-fold. The first reason is motivated by the deceased estate. Both women want to inherit it. The second reason is the belief among Swazis that nobody dies from natural causes; but from witchcraft. This belief invariably applies when a husband dies the woman is imputed with supernatural powers. It is a pity that in this case the Applicant and the 1st Respondent failed to settle this issue amicably. Now the little money in the estate will go towards paying the attorney's fees. Thozane and the other members of the family were afraid of the Applicant hence their lying or being hostile. Consequently, the court rejects Thozane's affidavit and Mataleni Nhlabatsi's evidence. Deep down in their hearts they all know the truth including the Applicant. The truth being that the deceased and the 1st Respondent did marry and were husband and wife when he died. There was no need for the deceased to tell the Applicant, he was well off age. It is understandable why the 1st Respondent was unable to call her husband's family to give evidence on her behalf. They would have refused or if they had come would not have been forthcoming as they would have been perceived to be taking the Respondent's part by the Applicant.

[24] Having found that the 1st Respondent is the deceased wife; the application is dismissed with costs.

[25] I extend my gratitude to the Assessors for their invaluable assistance. In as much as I am familiar with the customary law applicable to marriages contracted in terms of Swazi law and custom, it is always comforting to be assisted by someone who knows just that extra bit more such as the Assessors herein. The questions they asked were not only incisive but extremely helpful. The discussions afterwards provided an invaluable font of knowledge. It is always a pleasure working with them and I thank the Judicial Commissioner, Mr. Mavuso for releasing them whenever their invaluable assistance is needed.


Q.M. MABUZA