IN THE HIGH COURT OF SWAZILAND

JUDGEMENT

Civil Appeal Case No. 1257/15

In the matter between:

THOKO REGINAH MAMBA	**1ST APPLICANT**
ISRAEL WENDY DLAMINI	**2ND APPLICANT**
And	
PHUMZILE SIMELANE (NEE DLAMINI)	**1ST RESPONDENT**
PAULOS DLAMINI	**2ND RESPONDENT**
CRUCIFIX FUNERAL HOME (PTY) LTD	**3RD RESPONDENT**
NATIONAL COMMISSIONER OF POLICE	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral Citation: *Thoko Regina Mamba, Israel Wendy Dlamini v. Phumzile Simelane (Nee Dlamini) Paulos Dlamini, Crucifix Funeral Home (Pty) LTD. National Commissioner of Police Attorney General (1257/15)* [2015] SZHC 186 (30 October 2015)

Coram: MLANGENI J.

Heard: 7th October 2015

Order issued: 8th October 2015

Delivered: 30th October 2015

Summary: ***Civil Procedure – Application for leave to execute judgment, the effect of such leave being that internment of the deceased would proceed notwithstanding the pending appeal.***

In such matters courts have a wide discretion, and in the exercise of such discretion court guided by a variety of factors such as prospects of success on appeal, whether irreparable harm would be occasioned by execution pending appeal, balance of inconvenience to the parties, etc.

Leave to execute granted, with costs

JUDGMENT

BACKGROUND

[1] His Lordship S.V. Mdladla A.J. was called upon to deal with an application whose core prayers were as follows:

> ***"3. Pending finalization of this matter, the 3rd Respondent be interdicted from releasing the deceased body of John Madlebe Dlamini to anyone.***
>
> ***4. Direction that the late John Madlebe Dlamini be buried at Sithobelweni area in the Lubombo Region.***
>
> ***5. Setting aside the purported will of the late John Madlebe Dlamini."***

[2] Whether it is proper to challenge a will on motion I have strong reservations, but since the issue was not raised before Justice Mdladla or before me, it must be reserved for another day and time.

[3] The matter came to court on an urgent basis and a *rule nisi* having been issued on the 14th August 2015, full pleadings were filed and the matter duly argued before His Lordship Mdladla. At the Hearing His Lordship required oral evidence in respect of the validity or otherwise of the will, in my view correctly so because the issue is inherently contentious and often emotion – charged.

[4] At the end of oral evidence and legal submissions, the court discharged the *rule nisi* and dismissed the application with costs.

[5] The effect of the order was that the First Respondent therein (now First Applicant) was free to proceed with arrangements for the internment of the late John Madlebe Dlamini at Maphilingo area in the Lubombo Region, per the dictates of the will of the deceased. However, that was not to be. The Applicant immediately filed an appeal against the judgment of Mdladla A.J.

[6] In our law it is settled that the lodging of an appeal suspends execution of the judgment appealed against, pending the outcome of the appeal. However, the court that has issued the judgment appealed against may, upon application, grant leave to execute the judgment notwithstanding the pending appeal. The Respondents, with judgment in their favour, then came back to court on an urgent basis, and sought leave of the court to execute the judgment notwithstanding the pending appeal. This later application was launched on the 26th August 2015 under the same case number as the earlier one.

[7] This judgment is in respect of the application for leave to execute the judgment that was handed down by Honourable Mdladla A.J., apparently on the 24th August 2015. The main prayer in the application is prayer 'C' which I quote presently –

> "***C) That the Judgment issued by Justice S.V. Mdladla on the 24th August be and hereby executed with immediate effect."***

[8] I point out, needlessly, that the prayer is not a shining example of drafting but I take it that under circumstances of the extreme urgency such things can be expected. Sadly, the founding affidavit is also less than satisfactory. The substantive portion of the affidavit is in a mere five paragraphs, 4, 5, 6, 7 and 8. In legal discipline it is said that brevity is the soul of wit, but in a matter of importance to litigants brevity can easily be at the expense of the litigant's case.

<u>THE LAW</u>

[9] Judgments of courts are immediately executable. Sometimes they come after many years of litigation, so it makes sense that they should be immediately executable. Entrenched in our system of Justice is the right to appeal which every litigant has, up to a certain pinnacle. This right exists unless expressly excluded, e.g. by contract, by statute or otherwise. Issues of waiver may also apply under certain circumstances.

[10] At common law the noting of an appeal has the effect of suspending execution of the judgment appealed against. It is said that the underlying purpose of this principle or rule is to avoid irreparable harm being occasioned to the Appellant while the appeal is pending. Where, for instance, it would be impossible to restore the status *quo ante* there is likely to be irreparable harm, and in this event the court should be loathe to grant leave to execute.

[11] The onus is upon the Applicant to show the existence of special circumstances that justify departure from the general rule that the noting of an appeal has the effect of suspending execution. The court has a wide discretion in the matter and, in granting leave, it may impose such conditions as are appropriate in the circumstances of the case. In judgments sounding in money, for instance, courts will normally require the judgment creditor to furnish security *de restituendo*. See, for instance, the case of LONG DISTANCE SWAZILAND v SWAZI PAPER MILLS (PTY) LTD, H/C Case No. 84/2009.

[12] The quest of the court is to do real and substantial justice. In the words of Innes C.J. in Rood v Wallach –

> ***"In considering in each particular matter what substantial justice requires, the courts may take into account all circumstances surrounding the case, and among other things it would be justified, I think, in taking into consideration the special circumstances of the parties."***

[13] In the case of Swazi MTN v MVTEL COMMUNICATIONS ((PTY) LTD AND ANOTHER, H/C Case No. 7/2006, the court made an informative analysis of the law on the subject, including factors that guide the court in the exercise of discretion. The factors include, among others, the following.

(i) Whether or not execution would occasion irreparable harm;

(ii) Prospects of success on appeal;

(iii) Balance of inconvenience or hardship to either party;

[14] In respect of irreparable harm if, for instance, the purpose of the appeal would be irreversibly defeated if leave to execute judgment is granted, then the court should not grant leave. If there are no reasonable prospects of success on appeal, this consideration should weigh against the Respondent.

[15] Significantly, Mdladla A.J. held that the then Applicants (Now Respondents) did not have *locus standi*to interdict the funeral arrangements.See: PARAGRAPHS 15 and 16 of His Lordship's judgment. His Lordship further notes that even if there was no valid will, they would still not have *locus standi.* Who are the Applicants in the initialapplication? The First Applicant is a daughter to the deceased, born of a marriage that was eventually dissolved by judicial decree. The Second Applicant is a brother to the deceased. In their papers they did not allege that they represent the so-called family council. So clearly they failed to demonstrate the basis of their authority to move the application to interdict the funeral arrangements. Certainly not *vis-à-vis* the First Respondent who was the wife of the deceased right up to his demise.

[16] It is my view that on the issue of *locus standi* the present Respondents have dim prospects of success on appeal. *Locus standi* being a threshold issue, the matter could well end there – the application for leave can be granted on that basis only.

[17] But then despite holding that the then Applicants had no *locus standi,* Mdladla A.J. went the extra mile into the merits of the matter wherein he heard oral evidence to determine the validity or otherwise of the deceased's will. He came to the conclusion that the will was valid. He had the benefit of seeing and observing the witnesses. What chances are there that an appeal court would find otherwise? At best very minimal.

[18] I find that the prospects of success on appeal are not good at all. In their founding affidavit the present Applicants did not canvass the issue of prospects of success. I take it that this is not a fatal deficiency. In the exercise of the wide discretion that I have, I am

at large to take a wholistic view of the facts and circumstances of the matter in an effort to resolve this important aspect. Mr. N. D. Jele for the present Respondents agreed with me that I may go beyond the founding affidavit and take a broader view of the totality of circumstances.

[19] The appeal which is the subject matter of this application could well be vexatious. In this country more often than not, dead bodies are contested for the wrong reasons. Where there is a bit of wealth in the estate – whether perceived or real – that fuels raging legal battles that may even be *contra bonos mores*. If a man makes a will and in the will he specifically states where his remains must be put to rest, no one has a better right to dictate otherwise.

[20] On the issue of irreparable harm, I am of the view that on the present facts execution of the judgment would not occasion irreparable harm. The procedure of exhumation is legally possible. In the unlikely event of success on appeal, the present Respondents can obtain an exhumation order. Much is said about the expense and emotional trauma that comes with exhumation. I am not persuaded that this is worse than living with a dead relative in the morgue for months while close relatives, friends and neighbours live in congestion as part of 'kufukama'. Add this to the cost of sustaining these emotional supporters, you have a formidable situation to deal with. I am of the view that exhumation is likely to be a cheaper and shorter process.

[21] As part of their challenge against the present Applicants, the present Respondents have raised the issue of the validity of the marriage of the deceased to the present First Applicant. It is alleged that the marriage is *void ab initio* because when it was purportedly contracted the deceased was in a civil rites marriage which was, however, lawfully dissolved soon thereafter. On this basis, goes the argument, the present First Applicant has no right to direct the internment process of the deceased. This is despite the fact that in his will the deceased repeatedly refers to the First Applicant as "my wife THOKO REGINAH DLAMINI".

[22] The posthumous challenge to the status of wives and husbands often generates unfair contests because the crucial voice can no longer be heard. On the facts of the present matter the marital status of the First Applicant is being challenged by members of the deceased's family despite that she lived with him as man and wife for a very long time, and he refers to her in his will as his wife. I think that this kind of challenge, through the back door as it were, should not be encouraged. In the appeal case of NOLWAZI MNDZEBELE V. PATRICIA CEBSILE MNDZEBELE, Civil Appeal No. 13/2014, the Supreme Court demonstrated reluctance to embark on a course to determine the validity or otherwise of the subsequent marriage which was in terms of Swazi Law and Custom. The tenor of the judgment, per Levinson J.A. sitting with Ramodibedi C.J. as he then was

and M.C.B. Maphalala J.A. as he then was, suggests that the issue is not exactly cut and dried.

ORDER

[23] In this matter I heard legal submissions on the 7th October 2015. Due to the nature of the subject matter, I took the view that the parties could not afford to wait many days for a written judgment. I therefore postponed the matter to the following day, the 8th October 2015, for an order or orders.

[24] On the 8th October 2015 I made orders in the following terms:-

(i) The Applicants are hereby granted leave to execute the judgment of Acting Justice S.V. Mdladla which was made on the 24th August 2015.

(ii) The Third Respondent, CRUCIFIX FUNERAL HOME, is hereby authorized to release the body of the late JOHN MADLEBE DLAMINI to the Applicants upon their request.

(iii) Costs of the Application to be borne by the First Respondent.

[23] I did not see the need to place any conditions to the leave granted.

I now hand down my reasons for the orders that I granted.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicant: C.C. SNYMAN

For the Respondent: D. JELE