



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No.1800/2015

In the matter between

**APPOLLO THOMAS MAHLALELA**

Applicant

**VS**

**TIMOTHY MATHONSI**

1<sup>st</sup> Respondent

**NATIONAL COMMISSIONER OF POLICE**

2<sup>nd</sup> Respondent

**Neutral citation:** *Appollo Thomas Mahlalela vs Timothy Mathonsi & Another (1800/2015) [2015]SZHC 213 (14 December 2015)*

**Coram:** FAKUDZE, J

**Heard:** 4 December, 2015

**Delivered:** 11 December, 2015

**Summary:** *Family law – under Swazi Law and Custom, death does not necessarily dissolve a marriage – Marriage under Swazi Law and Custom entails a contract not only between the individual spouses, but also between the families of the spouses – A woman married*

*under Swazi Law and Custom whose husband has died must be formally “released” by her in laws before she can re-marry – Evidence of such release must be established – when such does not happen, the family of the first husband has a right to bury their daughter –in-law – Rule nisi is confirmed, application is upheld and applicant’s family has the right to bury the deceased. Since costs have not been motivated, each party to bear its own costs.*

## **JUDGMENT**

### **REASONS FOR EX TEMPORE JUDGMENT ISSUED ON THE 4<sup>TH</sup> DECEMBER 2015**

#### **BACKGROUND**

[1] The Applicant filed a Notice of Motion on Friday 20<sup>th</sup> November, 2015 on an *ex parte* basis and under a certificate of urgency. The Notice was for an order in the following terms:

1. Dispensing with the form, time limits and manner of service provided for in the rules of this Honorable Court and granting leave for this Application to be heard as one of urgency.
2. Condoning the Applicant’s non-compliance with the Rules of this Honorable Court.
3. A *Rule Nisi* calling upon the 1<sup>st</sup> Respondent to show cause on the 25<sup>th</sup> November, 2015 at 9.30 A.M. before this Honorable Court why an order in the following terms should not be made final-

3.1 Declaring that the Nhlebela family to which Lindiwe Nhlebela (nee Nzima), now deceased, has a legitimate

right to bury the said deceased as she was legally married to them by virtue of Swazi Law and Custom.

3.2 Declaring that one Appollo Thomas Mahlalela being the *paterfamilias* of the Nhlebela family to which the deceased was married has the *potestas* as to do all that is necessary and incidental to the preparation of the burial of the deceased at the Nhlebela homestead.

3.3 Restraining and interdicting one Timothy Mathonsi or any other person acting at the instance and/or behest of the said Timothy Mathonsi from interfering with funeral arrangements and burial of the said deceased by the Nhlebela and Nzima families.

3.4 Ordering the said Timothy Mathonsi to return forthwith all household furniture and a certain motor vehicle described in the court order annexed hereto and marked "ATM4" "belonging to the deceased removed by the said Timothy Mathonsi from the deceased home situated at Matsetsa Siteki in the Lubombo Region as appears from the order of Court dated 17<sup>th</sup> November, 2015 issued by the Piggs Peak Magistrate.

3.5 Directing the mortuary keeping the body of the deceased at the instance of the said Timothy to release the body forthwith to Thomas Mahlalela.

3.6 Interdicting and restraining the 1<sup>st</sup> Respondent or any other person acting on the authority of the 1<sup>st</sup> Respondent from burying the deceased Lindiwe Nhlebela.

3.7 Ordering and authorizing the 2<sup>nd</sup> Respondent or any member of the Royal Swaziland Police to ensure that the Order is effectively complied with and assist in the service of the Order and Application.

4. Paragraphs 3.1 to 3.7 to operate with immediate effect interim relief pending the finalization of this Application.

5. Costs of the Application if it is opposed.

[2] An interim order was accordingly granted and the *Rule Nisi* was issued and returnable on the 25<sup>th</sup> November, 2015. The 1<sup>st</sup> Respondent filed a Notice of Intention to Oppose on the 23<sup>rd</sup> November, 2015. He also filed a Notice to raise points of law. The points of law that were raised was that the Respondent had been served with an Application that had not been commissioned and that the Founding Affidavit and the Confirmatory Affidavit of Royal Nzima had not been affixed the necessary revenue stamps.

[3] When the matter came up for argument on the points of law, it transpired that the documents in the Judge's file and that of the Registrar had been commissioned and had the necessary stamps affixed thereto. The same applied to that of the Applicant. 1<sup>st</sup> Respondent's Counsel conceded and then abandoned the points of law.

[4] The 1<sup>st</sup> Respondent was called upon to file the Answering Affidavit by the 30<sup>th</sup> November, 2015 and the Applicant was to file the Replying Affidavit by the 1<sup>st</sup> November, 2015. The parties were to file their Heads of Argument by the 2<sup>nd</sup> November, 2015 and the matter was to be heard on the 3<sup>rd</sup> December, 2015. The *Rule Nisi* was extended to that date. On the 3<sup>rd</sup> December, 2015, the Applicant had not filed the Replying Affidavit and the Court ordered that Applicant's Counsel will pay for the wasted costs for that day. The Court put the parties to terms that the Replying Affidavit should be filed by close of business on the 3<sup>rd</sup> December, 2015. Both parties should file the Heads of Argument and the Bundle of authorities by close of business on the 3<sup>rd</sup> December, 2015. The matter was

finally heard on 4<sup>th</sup> December, 2015 and an *ex tempore* Judgment was delivered in favor of the Applicant.

## ISSUES

[5] It is common cause that the deceased was married by Swazi Law and Custom to Petros Dingane Nhlebela who is also deceased. After the death of Petros, the deceased went to report the death to her family. This culminated into various family meetings, where according to some family of the deceased's members, led to the families agreeing that the deceased Lindiwe Nhlebela (nee Nzima) should not wear a mourning gown and that she should be "released" from the Swazi Law and Custom marriage because she was still young. The "release" would enable her to marry again if she so wishes. There was also the issue that even during the lifetime of Petros, there were talks of the customary marriage between the two being dissolved. There is no evidence in the papers that were filed before this Court that shows that the marriage was finally dissolved. It is reasonable to therefore conclude that when Petros passed away, the marriage was still subsisting.

The Nhlebela family is disputing the fact that there were talks around the deceased being "released." In fact the family is alleging that after the death of Petros, the deceased was advised to look after the matrimonial home at Matseta and maintain her minor children. The deceased accepted the advice and by so doing accepted to remain a wife to Nhlebela. Appollo Thomas Mahlalela was assigned to oversee the deceased's welfare.

[6] Later, the deceased got married to the 1<sup>st</sup> Respondent according to Swazi Law and Custom. Lobola was also paid and the deceased and the 1<sup>st</sup> Respondent established their home in Nhlanguyavuka in the Hhohho Region. The issue before this Court is who has the right to bury the deceased? Is it the family of the deceased's first husband or the family of the 1<sup>st</sup> Respondent who married the deceased after the death of the first husband? The other issue is whether in Swazi Law and Custom, the death of the husband automatically terminates the marriage or not.

## APPLICABLE LAW

[7] The Courts in our jurisdiction and other notable scholars have taken time to explore the issue of solemnization, divorce and the right to bury a spouse where marriage under Swazi Law and Custom is concerned. In the matter between **Patricia Cebisile Mndzebele (nee Msibi) v Nolwazi Mndzebele and others** **High Court Case No. 828/2013**, Her Lordship, Dlamini J, quoted with approval their Lordships observation of the fact that death does not automatically terminates a marriage contracted in terms of Swazi Law and Custom in the matter of **Knox Mshumayeli Nxumalo v Nellie Siphwe Ndlovu and Others** **Appeal Case No. 42/ 2010**. Their Lordships said at paragraph 12-

*“Even death does not automatically bring an end to a marriage.”*

This assertion is expanded upon by Thandabantu Nhlapho on **Marriage and Divorce in Swazi Law and Custom** at page 75, where the learned author states that –

*“Under Swazi Law and Custom death does not necessarily dissolve a marriage. Because the contract is between the families of the spouses, the death of one spouse simply ushers in a new phase in the relationship. Whatever this phase is established successfully and continues to thrive will depend on the sensitivity and goodwill with which the negotiations between the families are carried out.”*

In the matter between **Thembi Mhlanga v Alfred Mhlanga and Others Appeal Case No. 16/2014**, their Lordships buttressed the point that marriage under Swazi Law and Custom is a contract not only between the spouses, but is also a contract between the families of the spouses when they said in paragraph 14-

*“It is well settled in the country that a marriage in terms of Swazi Law and Custom involves not only the individuals concerned but the two families. Furthermore, where the marriage takes place in a chieftdom, the chief is informed of such an event so that he could*

*send a member of the Chief's Inner Council to represent him. This alone, is partly to provide proof of the marriage having been solemnized and partly to ensure that peace prevails during the ceremony.”*

## **APPLICATION OF LAW TO THE FACTS**

[8] The parties are agreed that the deceased, Lindiwe Nzima – Nhlebela was once married to the late Petros Dingane Nhlebela. She was smeared with red ochre and lobola was paid accordingly. Affidavits have been filed by both the Applicant and others confirming this position. There is also no dispute that the marriage subsisted when Petros died. However, there is a dispute that after the death of Petros Nhlebela, Lindiwe lawfully married the 1<sup>st</sup> Respondent by Swazi Law and Custom reason being that she was a wife to the Nhlebela family. Her “release” from the marriage had not been blessed by that family. This arises from the Applicant’s Replying affidavit where it is stated that the Nhlebela family is not even aware that the deceased is married to the 1<sup>st</sup> Respondent. The Applicant further alleges that if the Nhlebela family had blessed the deceased’s “release”, the dowry that was paid by the 1<sup>st</sup> Respondent would have been paid to the Nhlebela by virtue of the fact that the deceased was still a lawfully wedded wife to the late Petros Nhlebela.

The possibility that when the 1<sup>st</sup> Respondent asked the deceased for a hand in marriage, the deceased was staying at her parental home is quite high. This becomes evident from the Confirmatory Affidavits accompanying the 1<sup>st</sup> Respondent’s Answering Affidavit proving that lobola was paid at deceased’s parental homestead. The 1<sup>st</sup> Respondent has also filed an Answering Affidavit clarifying how he married the deceased and even paid lobola at the deceased’s parental home. There are also Confirmatory Affidavits from both the deceased’s parental family and that of 1<sup>st</sup> Respondent’s family confirming the solemnisation of the customary marriage at Nhlanguyavuka. A Confirmatory Affidavit from the Royal kraal where the 1<sup>st</sup> Respondent and the deceased were staying has also been filed. Its purpose is to confirm that the marriage was reported and blessed by the Royal kraal

[9] The borne of contention is that even though the deceased was later married to the 1<sup>st</sup> Respondent, the Applicant and his family did not formally “release” her. If the deceased was not “released”, she is still a wife to the Nhlebela family. By virtue of being the wife, the Nhlebela family has the right to bury her. The 1<sup>st</sup> Respondent argues on the other hand that by virtue of marrying the deceased, he has the right to bury her. The Confirmatory Affidavits of Thandi Mathonsi, Dvungamazi Lukhele, Thulani Gumedze, Gebegebe Mathonsi, and Agreeneth Jantjies (deceased’s mother) all bear testimony to the solemnization of the customary marriage between 1<sup>st</sup> Respondent and the deceased.

[10] Of all the Confirmatory Affidavits that have been filed in support of the 1<sup>st</sup> Respondent’s case, the one of Agreeneth is the most important one for determining the merits of the case that is before this Court. Agreeneth states in paragraph 5.1 that -

*“Seven herd of cattle were paid as lobola to my family. The deceased Petros Nhlebela established their matrimonial home at Matsetsa in the Lubombo district. Petros Dingane Nhlebela passed away sometime in August, 2006 and the deceased came to report the news of his death to me. After the death of Petros Dingane Nhlebela, my family requested one Chilomo Dlamini who is my relative to accompany the deceased to the Nhlebela home at Lomahasha to inform them that my daughter should be liberated from the marriage with the Nhlebela as she was still young in age.”*

[11] The underlined words in paragraph 5.1 are instructive. Agreeneth’s Confirmatory Affidavit further states in paragraphs 7,7.1 and 8 that-



7. *“The deceased informed me that at the Nhlebela homestead they found some of Petros Dingane Nhlebela’s family members and one Make Mkhabela who was Petros’ biological mother.*

7.1. *Petros Dingane’s family suggested that the deceased should not mourn her husband as she was still young and moreover they acknowledged the fact that they had stated that the Nzima family were desirous of dissolving the customary marriage between Lindiwe and Petros Nhlebela.*

8. *The deceased informed me that she thereafter said her good bye to the Nhlebela family and the Nhlebela family members who were present at the time of release, released her and stated that she was a free woman to re-marry as she was still young to mourn their deceased’s son and continue with the marital duties at the Nhlebela homestead.”*

[12] The above cited paragraphs in Agreeneth’s Confirmatory Affidavit were heavily attacked by the Applicant’s Counsel on the grounds that they are hearsay. Agreeneth was not at the meeting with the Nhlebela family when all that she attests to took place. Agreeneth’s daughter who told her what transpired at that meeting is deceased. Agreeneth states in her Affidavit that one Chilomo Dlamini was sent to negotiate the “release.” Unfortunately, Chilomo Dlamini’s Confirmatory Affidavit has not been filed. Counsel for the 1<sup>st</sup> Respondent conceded that Chilomo’s Affidavit was vitally important to corroborate the evidence of Agreeneth and that without it, Agreeneth’s Confirmatory Affidavit amounts to hearsay. This Court also agrees with Applicant’s counsel’s submission on this point. The Court cannot rely on Agreeneth’s Affidavit because after all, she is the only one who is attesting to this fact and the fact that she was not there when the talks were taking place at the Nhlebela homestead.

[13] It is this Court’s considered view that in the light of the authorities alluded to earlier in this judgment, it is clear that death does not automatically terminate a marriage contracted under Swazi Law and Custom. This arises from the fact that

the marriage is not only between the individual spouses, but also between the individual spouses' families. If we are to go by the principle in Thandabantu Nhlapho's book on Marriage and Divorce under Swazi Law and Custom (*supra*) that "*the death of one spouse simply ushers in a new phase in the relationship. Whatever this phase is established successfully and continues to thrive will depend on the sensitivity and good will with which the negotiations between the families are carried out*", it follows that a woman who wants to be "released" from a marriage contracted in terms of Swazi Law and Custom following the death of her husband, must ensure that the said "release" is a product of an agreed process between the families. Once she is so "released", she is free to re-marry. In this particular case, there are some doubts if this procedure was followed. This emanates from the fact that Chilomo's Confirmatory Affidavit has not been filed. What compounds the matter further is the fact that the Applicant vehemently denies that there was the "release" meeting when he says in paragraphs 19 and 45 of the Replying Affidavit-

*"19. I had no knowledge at all that the deceased was marrying the 1<sup>st</sup> Respondent; such authority to re-marry was not sought from us, the Nhlebelas family.*

*45. I submit that no such communication was made to the Nhlebelas. I am advised and verily believe to be true, that in fact, Swazi Law and Custom dictates that we, the Nhlebelas, were the rightful persons to direct whether to "ngena" the deceased or allow her to go and marry onwards."*

[14] It is trite law that a party who seeks the right to bury a deceased person should establish a clear right to do so. See **Steven Nhlanganiso Gamedze v Jabu Zelia Dlamini and Others High Court Case No. 1053/13**. I am convinced in the case before this Court that the Applicant, on behalf of the Nhlebelas family, has established this right. The *Rule Nisi* that was issued by this Court on the 4<sup>th</sup> December, 2015 is hereby confirmed and the Application is upheld. The issue of costs was not motivated by any of the parties and I therefore order that each party shall bear its own costs.

---

**M.R. FAKUDZE**  
**JUDGE OF THE HIGH COURT**

Applicant: D. Manica

1<sup>st</sup> Respondent: H. Mkhabela