IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 1537/2018

In the matter between:

LUNGILE HOTENCIA GAMEDZE **PLAINTIFF**

And

THE MASTER OF THE HIGH COURT OF ESWATINI **1ST RESPONDENT**
THE ATTORNEY GENERAL OF ESWATINI **2ND RESPONDENT**
DERICK NDO JELE N.O.
In his capacity as Executor of the Estate Late
Victor Gamedze (Master's Reference EL15/208) **3rd RESPONDENT**

TEMALUNGELO TANDZILE GAMEDZE **4TH RESPONDENT**
TENGETILE GAMEDZE **5TH RESPONDENT**
TIYANDZA GAMEDZE **6TH RESPONDENT**
NOSIPHO GAMEDZE **7TH RESPONDENT**
WANDILE GAMEDZE **8TH RESPONDENT**

Neutral Citation: *Lungile Hotencia Gamedze vs The Master of the High Court of Eswatini and 7 Others (1537/2018) [2020] SZHC (157) 14th August 2020*

Coram: **MLANGENI J.**

Heard: **23rd July 2020**

Delivered: **14th August 2020**

Flynote: *Civil Law – deceased's estate – deceased dying intestate and leaving a multi-million estate and survived by one wife and five (5) children.*

Deceased and surviving spouse married under Eswatini Law and Custom – subsequently conducting a marriage ceremony in the Roman Catholic Church – whether such subsequent ceremony fulfills the requirements of a civil rites marriage in terms of the Marriage Act.

Estate reported to the Master of The High Court in terms of Section 2 (1) of The Administration of Estates Act 28/1902. Executor appointed and filing a first Liquidation and Distribution Account on the basis of the Customary Marriage, the formula applied being that of a child's share for all the beneficiaries, including the surviving spouse.

The Master considering the account and approving it with minor changes – the result being that the surviving spouse is entitled to a child's share like the children of the deceased.

Surviving spouse objecting to the L&D account as being unfair, on the basis that she significantly contributed in the creation of the enormous family wealth, in cash and in kind.

Grounds of objection: -

i) Subsequent to the customary marriage she contracted a civil rites marriage with the deceased, hence the estate is to be administered on the basis of a civil rites marriage in community of property;

Alternatively

ii) There was a putative civil rites marriage between her and the deceased, hence the estate is to be administered in terms of the common law.

Alternatively

iii) Because of her significant contribution in the creation of the estate, in cash and in kind, she is a tacit universal partner and therefore entitled to a ½ share of the net assets and a child share.

Alternatively

iv) Section 34(1) of The Constitution decrees that a surviving spouse is entitled to a reasonable share of the deceased partner's estate.

The Master considering the objection and coming to the conclusion that the L&D account is acceptable and approving it, effectively endorsing the allocation of a child's share to the surviving spouse and all the other beneficiaries.

Surviving spouse approaching the High Court to review and set aside the Master's decision to uphold the L&D account, on the same grounds that were advanced before the Master through the objection.

Grounds of review considered

Family Law, Legal requirement to sign a marriage register discussed – without signature thereof no valid marriage.

Family law – whether putative marriage is part of our law – issue raised but not resolved.

Held: 1. The decision of the Master in approving the L&D account is reviewable on several grounds.

2. *The decision of the Master is reviewed and set aside.*
3. *The decision of the Master is hereby substituted.*
4. *By consent each party to bear its own costs.*

JUDGMENT

BACKGROUND

[1] On the 14th January 2018 one Victor Mfana Gamedzwe died intestate. He is survived by his wife Lungile Gamedze and five children. During his lifetime the deceased amassed what is, by the standards of this country, an enormous amount of wealth in corporeal assets, incorporeal assets and money in cash. As required by law[1]the deceased's estate was reported to the office of The Master of the High Court and an executor was appointed. In due course the executor filed a first Liquidation and Distribution Account (L&D account). It is a matter for commendation that the account, which was filed on the 10th June 2020, was approved by the Master two days later – on the 13th June 2020. The other side, however, is that such speed can be at the expense of efficiency, especially in view of the magnitude of the estate that is the subject of this application.

[2] In terms of the approved distribution all the beneficiaries in the estate – the surviving spouse and the children – are to receive equal shares in the net estate, famously referred to as **'a child share'[2].** The deceased's widow, who is the applicant in this matter, lodged an objection to the L&D account. The objection raised a wide range of issues. It's essence was that it is palpably unfair for the surviving spouse who contributed significantly in building up the estate, to receive a share that is equal to that of the rest of the beneficiaries who, it is common cause, contributed nothing in the estate.

[3] To my understanding there are three pillars upon which the objection stands. I mention them presently.

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[1] The administration of Estate Act 28/1902, per Section 2(1)

[2] During legal arguments attorney Mr. S. Masuku suggested that the notorious reference to a 'child share' is unsavory and degrading, and that a proper description is 'equal share'

3.1 The marital regime in terms of which the surviving spouse and the deceased were married.

3.2 Assertion by the surviving spouse that a tacit universal partnership existed between her and the deceased.

3.3 The distribution is against the letter and spirit of Section 34(1) of the Constitution of this country.

[4] The objection was presented in the form of extensive affidavits. In form and in substance it was quite formidable, some ninety-seven pages of fervent submissions. It had the hallmarks of the famous Stalingrad defence, wherein anything and everything matters. The Master's response to the objection is in five (5) paragraphs which are in two pages[3]. It is said that brevity is the soul of wit, but excessive brevity can be at the expense of substance. At paragraph G of The Master's response to the objection she states that she is not persuaded by the objection and therefore upholds the executor's allocation of equal shares to all the beneficiaries, including the surviving spouse.

THE APPLICATION

[5] The surviving spouse was aggrieved by The Master's response and has approached this court to review and set aside the decision of The Master. The application purports to be in terms of the Common Law and Section 51*bis* (8) of the Administration of Estates Act No.28/1902[4] (the Act). Section 51 *bis* (8) is in the following terms: -

> **"Any person (including the executor) aggrieved by any such direction by the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the High Court within thirty days after such direction or refusal ……..for an order to set aside The Master's decision and the court may make such order as it may think fit."**

[3] At pages 202 – 204 of the Book of Pleadings.
[4] At paragraph 4 of the Founding affidavit (FA) at page 9 of Book of Pleadings.

[6] It is appropriate that I capture the applicant's prayers in full and I do so below: -

> **"1. Reviewing and setting aside the First Respondent's decision on 22 August 2019 to reject the Applicant's objection of July 2019 to the Liquidation and Distribution Account, approved by the First respondent on 13th June 2019, in respect of the Estate Late Victor Mfana Gamedze (Master reference 15/2018)."**
>
> **2. Substituting the first respondent's decision with an order upholding the applicant's objection and directing the second respondent to amend the liquidation and distribution account in accordance with the objection as follows: -**
>
> **2.1 The Estate must be distributed as though Mr. Gamedze and the applicant had a joint estate; and**
>
> **2.2 The applicant should also receive a child's share of the remaining half of the joint estate…….**
>
> **3. In the alternative to paragraph 2 above, remitting the decision to the first respondent for reconsideration of the objection in the light of this court's judgment.**
>
> **4. Declaring that the applicant and the late Mr. Mfana Gamedze were married in terms of Civil Rites, alternatively, had a putative civil marriage, further alternatively that they were in a tacit universal partnership.**
>
> **5. Ordering any respondent which opposes this application to pay the Applicant's costs, jointly and severally, the one paying the other(s) to be absolved."**

GROUNDS OF REVIEW

[7] The parties are in agreement that the wording of Section 51 *bis* (8) of the Act, seen in the context of the need to expedite the resolution of estates

disputes, permits a hybrid of appeal and review. In the absence of an express provision for appeal, to my mind it follows that errors of law fall to be considered under the application that is envisaged by this provision.

[8] In this jurisdiction grounds of judicial review have been amply developed in a number of judgments[5]. I list them below: -

i) failure by the decision-maker to properly apply his or her mind to the evidence that is presented.
ii) unreasonableness or gross unreasonableness.
iii) failure of natural justice.
iv) taking into account irrelevant considerations or ignoring relevant considerations.
v) irregularity of procedure
vi) *Mala fide*, capriciousness or arbitrariness.

It has been held time and again that the list is not exhaustive[6]. For instance failure to give reasons for the decision, or to give reasons which are not justified by the evidence, appears to me to be a ground for review.

[9] The applicant endeavoured, in a submission comprising affidavits of nine deponents who know the deceased and the applicant very well, to demonstrate the egregious result that would be brought about by the executor's intended distribution. Although the Master is entitled in terms of Section 51 *bis* (7) of the Act to request further particulars from the objector, she did not do so, presumably because there was enough evidential material before her upon which to deal with the objection effectively and efficiently. Because the factual foundation of the objection was not challenged before The Master, either by the executor or by the other beneficiaries, it is the applicant's submission that those averments stood as uncontested before The Master, the result of which, goes the argument, is that the objection ought to have been sustained by the Master on one or more of the pillars I mentioned at paragraph 3 of this

[5] See, for instance,TQM Textile (Pty) Ltd v CMAC Arbitrator (1987/15) [2015] SZHC 2010; Jabulani Manana v Swaziland Building Society [2019] SZHC 17; Swaziland Electricity Company v Mbongiseni Dlamini & Others (722/2017) [2017] SZHC 271.
[6] Hlobisile Ndzimandze v Civil Service Commission & Others (449/15) [2016] SZHC 13 at para 43.

judgment. It appears to me that this is a firm pointer towards failure by the Master to apply her mind properly on the facts that were so copiously presented to her by the objector.

[10] In her response to the objection the Master made some glaring errors of law. At paragraph (f) page 203 of the Book of Pleadings, she makes the legal assertion that a universal partnership is **"an express or tacit agreement between two parties who choose to live together in a permanent relationship without marrying."** She furnishes no legal authority for this incongruous statement and indeed there is none. For one thing, by its nature the concept of a tacit universal partnership cannot apply where there is an express agreement, because the affairs of the agreeing parties must be determined in terms of the express agreement. For another thing, there is no reason why it would not apply in a situation where the parties are legally married. As a matter of fact, common experience is that this legal concept is what comes to the rescue of a party who discovers that he or she is unable to get a fair and equitable share in the estate of their deceased partner, due to a legal defect in the marital relationship or due to some other hurdle.

[11] Eminent writers have described a universal partnership in the following manner: –

> **"A universal partnership is often formed tacitly by a man and woman, whether married to each other or not, carrying on some business for their common benefit."[7]**

In GREGORY ARCHIBALD NEWELL v SIPHESIHLE SHARON MALAZA[8] the Supreme Court recognized the following legal requirements for the existence of a universal partnership: -

i) Each of the partners must contribute something towards the partnership, either in cash or in kind. An example of a contribution in kind is labour or skill.

[7] Wille's Principles of South Africa Law, 8th Edition, p611.
[8] (40/2017) [2017] SZSC 54

ii) The business should be carried out for the benefit of both parties.

iii) The object should be to make a profit.

The observation of MCB Maphalala C.J., in the said case, are highly edifying. I quote the Honourable Chief Justice below: -

> **"……the contribution of the parties should not be confined to a profit-making enterprise; any activity or effort made by a party in promoting the interest of both parties in their communal enterprise should be considered. This should include both commercial enterprises as well as non-profit making activities of their family life for which that party has taken responsibility in contributing to that vision and mandate of the enterprise." (at para 30).**

[12] In the case of FRANCIS JOYCE MAMBA v ROSTA MAMBA AND OTHERS[9] the deceased was a philanderer who seemed willing to wed anyone who asked, and this gave rise to contentions issues of bigamy. The estate issue was eventually resolved on the basis of a universal partnership which the court inferred from the evidence that was placed before it, and the applicant's marital status became irrelevant.

[13] I make reference to one other error of law that The Master has made. She is of the view that the applicant's assertion of a universal partnership ought to have been made in the form of a claim filed with the executor. This is obviously based on the erroneous assumption that the applicant is making the claim against the estate of the deceased. She is not. She is saying that she is entitled to half of the net assets, and the other half becomes Estate Late Victor Mfana Gamedze. In any event, she could not have known in advance how the executor was going to distribute the estate, and the comment by the Master that her claim based on universal

[9] [2015] SZHC 119; [2015] SZHC 9.

partnership is **“an afterthought”** is so dismissive that it cannot be countenanced.

[14] Further, and more decisively perhaps, The Master emphatically posits that since the applicant and the deceased were married in terms of Swazi Law and Custom **“the universal partnership theory does not apply”**[10]. Universal partnership is not a theory of sorts, as suggested by The Master. It is an inference of law based upon empirical evidence that is placed before the court. I have already mentioned that a universal partnership can exist within marriage, unless, of course, the marriage is out of community of property in terms of an antenuptial agreement. Later on in this judgment I will demonstrate that for one reason or another The Master had a fixation over the applicant’s customary marriage, to such an extent that not much else mattered.

[15] Finally, on errors of law, The Master is of the view that the applicant must establish **“a clear established right”** to inherit (para (d), page 203 of the Book of Pleadings). To the extent that this may suggest that the applicable standard of proof is anything other than a balance of probabilities, I disagree with the statement. It is trite that the standard of proof in civil matters is a balance of probabilities. There is no reason why it should be different in estate matters. In the case of Newell v Malaza,supra, the test for a tacit universal partnership was authoritatively stated in the following terms: -

> **“Where the conduct of the parties is capable of more than one inference, the test ……is whether it is more probable than not that a tacit agreement had been reached.”**

[16] In respect of the Applicant’s alternative argument that she was married to the deceased by Civil Rites, The Master's view was that no such claim was **“filed on record that her inheritance should be paid on the basis that she was married to the deceased in terms of Civil Rites. This new information that The Master is expected to consider is**

[10] At paragraph (f), page 203 of Book of Pleadings.

threatening to throw the estate into serious confusion and the office will not allow this"[11]. Clearly, The Master was overly concerned about avoiding confusion as opposed to doing justice in the matter, and this equates to taking into account irrelevant considerations. In any event she does not particularise the confusion that she is so apprehensive about.

[17] In this jurisdiction the courts have endorsed the overriding consideration of unreasonableness of the decision sought to be set aside, as a ground of review[12].

[18] Lastly, the applicant argues that The Master denied her the right to be heard, on a number of important conclusions that she arrived at, which had a direct bearing on the final decision to reject her objection. Examples of this include, but are not limited to, the following: -

i) that a universal partnership cannot exist within a marriage relationship;

ii) that the applicant's submissions before The Master would throw the estate into serious confusion;[13]

iii that there was no **"concrete legal base for her assertions."**[14]

This, in my view, equates to failure of natural justice.

[19] On the basis of the of the aforegoing I have come to the conclusion that The Master's decision is liable to be reviewed.

THE EVIDENCE

TACIT UNIVERSAL PARTNERSHIP

[20] The applicant has chronicled, in graphic detail, a business journey that she and the deceased started together from humble beginnings to the colossal business empire that is the subject of this unpleasant litigation. From the evidence it is abundantly clear that when she got married to her late

[11] Para (c), page 202 of Book of pleadings.
[12] Jabulani Manana v Swaziland Building Society [2019] SZHC 17, paras 34-38.
[13] See note 10 above.
[14] Page 203 of Book of Pleadings, para (d)

husband she is the one that brought wealth into the family-coming, as she did, from a family of means. She states that at the time her husband was a football player and employed as a bank clerk[15] At paragraph 53 of her founding affidavit she outlines, in detail, her vital role in laying the foundation for the growth of the family businesses. She states that prior to getting married to the deceased she was a business person in her own right. She sold some of her businesses in order to provide starting-up capital for the business ventures that she and the deceased conceived. At paragraphs 53.2 and 53.3 she avers the following: -

> **"53.2 I helped him start his business by buying him his car, opened his bank account, purchased the stock for his trade, contributed capital to the business, developed his business skills and registered his company for him.**
>
> **53.3 I supported my husband financially for many years while his business grew."**

[21] She further avers that she bought the present family home using resources that she brought into the marriage. Although she was not a shareholder in the company that she registered for him, they **"treated the business as a joint venture[16]"** and they **"both contributed financially to the business and benefitted from the profits.[17]"** Of no less significance is her formal qualification in Business Administration which she acquired in England. Logically, this will have come to bear positively in the business acumen that her late husband was to evince many years later. She further states that she did not receive a salary that was commensurate with her input and sheer size of the business and apparently there was no need for this because, according to her, she had unlimited access to all the resources that were acquired through the

[15] At para 53.1 of FA page 24 of Book of Pleadings.
[16] At para 53.4 of FA, page 24 of Book of Pleadings.
[17] At para 53.4 of FA, page 24 of Book of Pleadings.

various commercial undertakings. She further states that they made **"every major business decision together[18]"**

[22] In support of the above the applicant filed before The Master numerous affidavits of close friends and relatives who were there when it all began, including that of the accountant for the business operations, one Paul Mulindwa. This deponent states that he was the accountant for the applicant's mother since 1983 up until 2010 when she died and he was the accountant for the applicant and the deceased from 1992 till December 2013[19]. I quote extensively from the insightful affidavit of Paul Mulindwa below: -

> **"From my experience as accountant for these companies, I know that Victor's wife played a vital role in elevating Victor to be a successful businessman and provided his companies with capital and other resources that resulted in their growth and success.**
>
> **By the time Princess Lungile met Victor, I can confirm that she had substantial cash reserves. I also know that she contributed substantial sums of money, skill and resources to Victor's companies. For example I am aware that: -**
>
> **5.1 she bought Victor a red BMW which was valued at around E150,000.**
>
> **5.2 Princess Lungile established a company for Victor called MV Investments and bought him a large consignment of goods so that he could trade in household consumables, stationery and safety clothing.**
>
> **5.3 She also contributed the capital for the business in the amount of E500,000.00."**

[23] The accountant further states that he was privy to the manner in which the businesses were operated, and specifically that **"Lungile and Victor managed their businesses jointly as partners and they treated**

[18] At para 53.10 of FA, page 25 of Book of Pleadings.
[19] At page 158 of Book of Pleadings.

their assets as though they were co-owned by the two of them.[20]" The accountant is also aware that the applicant inherited three million Emalangeni (3,000,000.00) from her late mother in the year 2010, and that this inheritance was used in developing family property that was bought in Mbabane Central Business District (CBD). The story goes on and on.

[24] Paul Mulindwa ends his affidavit in supplication. He states, in the penultimate paragraph of his affidavit, that **"to treat these assets as Victor's alone would be a grave injustice that would ignore Lungile's vast contribution in capital.[21]"** There is no shred of evidence that effectively disputes Paul Mulindwa's testimony.

[25] I am unable to understand how all of this, this prodigious submission, was not enough to move the judgment of The Master in an equitable manner, especially in the absence of persuasive evidence to the contrary. The core business of The Master is people who are emotionally wounded. In applying the law, the office must do so in a manner that is fair, just and equitable – at all times and in every case that comes for consideration.

RESPONDENTS' ANSWER

[26] What is the respondents' answer to all of this? The Master did not file any affidavit in answer. The 7th and 8th Respondents' did file an answering affidavit by Nosipho Gamedze and I deal with the material contents of the said affidavit presently.

[27] I summarise the deponent's averments below: -

27.1 The assertion of a universal partnership ought to have been made during the deceased's lifetime:[22]

[20] At pages 158 to 159 of Book of Pleadings.
[21] At pages 10, page 160 of Book of Pleadings.
[22] At page 164 of Book of Pleadings.

If the deponent is not aware of the manner in which the deceased and the applicant lived their lives together, this averment may be understandable. If she is aware, then this averment is preposterous. In the normal course of events such issues do not arise during the lifetime of both partners. They arise after the death of one of them, when it becomes apparent that the marital regime (or the absence of it) does not provide the protection that was presumed or anticipated.

27.2 The deponent denies the existence of a tacit universal partnership.[23] However, no concrete facts in my view have been advanced to counter the compelling evidence of the applicant that points towards a tacit universal partnership.

27.3 Banking accounts, investments and properties were registered in the name of the deceased, to the knowledge and acceptance of the applicant. The deponent bolsters this averment as follows: -

> **"It is our submission that the only inference that can be drawn is that the deceased never considered the applicant as a partner whether actual or tacit. In fact the applicant ran her own businesses that she took over from her mother"**

The totality of the evidence does not support the above assertion. The applicant has specified assets, in cash and in kind, including expertise, that she brought to the marriage, at a time when the deceased did not have much. These contributions were in significant amounts, most of them proceeds from the sale of assets that she had prior to the marriage. Her mother died in 2010 and left her a fortune of about E3,000,000.00 which, according to Paul Mulindwa, was invested in property within the Mbabane Central Business District (CBD). The suggestion was made during legal arguments that the deceased was running his business affairs on his own, and that the applicant also ran her own, and that it was the intention of the spouses to run their investments separately. This is not borne out by the evidence, in as much as I was not shown the business

[23] Para 6, page 244, para 16, page 248; para 47, page 269; para 15, page 270 of Book of Pleadings.

enterprises that were operated by the applicant to the exclusion of the deceased. I am persuaded by the applicant's averment that she and the deceased took every business decision together and she had unlimited access to all the resources. Indeed, if that was not so, there would probably have been palpable discontent in one form or another during the lifetime of the deceased, and this would not have escaped the attention of the seventh and the eighth respondents.

In the words of accountant Paul Mulindwa, the deceased was made by the applicant. He deposed as follows: -

> **"Ultimately, there would be no Victor without Lungile. It would be absurd for his estate to be distributed in a manner that relegated Lungile to a mere dependent, like a child, who did not actively contribute to and build that same estate"[24]**

[28] Before concluding this part of the discourse, I make a passing reference to some errors of law that the deponent Nosipho Gamedze makes. She describes a tacit universal partnership as **"an express or tacit agreement……[25]"**, exactly the words that are used by The Master in her response to the objection. The less I say about this mis-statement of the law, the better. Further, the deponent states that universal partnership **"would only be called upon where the parties have been co-habiting and are not married.[26]"** This surely demonstrates the dangers of a witness venturing into legal issues. Lastly on this aspect, the deponent makes the incomprehensible averments that the application before court **"is not for the distribution of the estate on the basis of the existence of a universal tacit partnership but is a review."[27]**. I have already said that this is incomprehensible and it may be confusing as well. It presupposes that because this is a review application its object cannot be to have the estate distributed on the basis

[24] Para 38, page 263 of Book of Pleadings.
[25] Para 17 at page 162 of Book of Pleadings.
[26] Para 38.3, page 264 of Book of Pleadings.
[27] Para 40, page 265 of Book of Pleadings.

of a universal partnership, yet this is one of the pillars upon which the application is brought and, in my view, properly so.

[29] In his answering affidavit the executor makes the point that a customary marriage **"excludes the possibility of a tacit universal partnership as a matter of fact. A tacit universal partnership between husband and wife conflict with Swazi Law and custom, and could not have been tacitly agreed between."**[28] This is obviously a bold statement, but without legal authority it hardly justifies the conclusion that The Master arrived at on this subject. As a matter of fact, legal authority is to the effect that a tacit universal partnership may exist within marriage,[29] and of course a customary marriage is a marriage no less than a civil rites marriage[30].

[30] In her replying affidavit, the applicant states that the 7th and 8th respondents have no personal knowledge of her relationship with the deceased and the role she played in the creation of the wealth[31], and in fairness to them, they have not remotely suggested that they have first-hand knowledge of what was going on in the business affairs of the Gamedze home. This probably explains why their challenge to the applicant conspicuously lacks specificity. Of more significance is that the applicant states that she was not aware of the existence of the 7th and 8th respondents until after the death of the deceased and that she had all along believed that the estate belonged to her and her husband. Because the life they led was a good life, there was nothing to place her on guard so as to take any measures to safeguard her investments in the wealth of the family. In a typical situation where a tacit universal partnership is inferred there will, in all probability, be no up-to-date records of relevant transactions because the parties have no reason to anticipate the eventuality of conflict. Honourable Chinhengo J. has lucidly expressed the position in the following terms: -

[28] Para 44, page 266 of Book of Pleadings.
[29] Maenzanise v Ratcliffe and Another [2001]. JOL 9076 (ZH)
[30] Siphiwe Magagula (born Nkambule) v Lindiwe Mabuza & Others Civil Case No. 4577/08 at para 12.
[31] Page 560 of Book of Pleadings

"It is a notorious fact in cases of this kind that documentary proof in difficult to come by and the woman or man, for that matter, is hard put to prove that she or he made a significant contribution to the well-being of the family and to the acquisition of matrimonial assets. It is a notorious fact that in marriage relationship the parties do not keep records of all their purchases. They least anticipate a divorce or an untimely death of one of them and litigation at the end of it all[32]"

In Maenzanise's case the plaintiff did not have the benefit of a Paul Mulindwa, but the court found in her favour, from the tit-bits of evidence that she presented, that she was in a universal partnership with her late husband, with whom she was in a customary marriage. Of more importance is that the trial judge consciously adopted the position that although the parties were married in terms of customary law, lobola paid, it would not be proper to apply customary law in dealing with the estate, because the parties lived their lives in keeping with Western Culture.

[31] Counsel for The Master, Mr. N. Dlamini, has fallen into the trap of assuming that a tacit universal partnership cannot exist where there is a valid marriage. In his heads of arguments he makes the following bold statement: -

"In short, tacit universal partnership and express marriage do not co-exist.[33]"

No authority is given for this submission, and as a matter of fact it is legally incorrect[34].

[32] Where there are conflicting versions the test for a tacit universal partnership is whether it is more probable than not that a tacit partnership

[32] See note 29 above.
[33] Para 15 of 1st and 2nd Respondents' head of arguments .
[34] Gregory Archibald Newell v Siphesihle Sharon Malaza N.O. (40/2017) [2017] SZSC 54

agreement had been reached[35]. In the case before me there is compelling evidence that shows that a tacit partnership existed between the applicant and the deceased. The respondents' opposition is, at best, based on surmisation and, in some instances, a stark misunderstanding of the law. On this basis alone the application ought to succeed.

[33] On the premise set out just above it is not necessary for me to interrogate the other pillars upon which the application is based. However, because they raise issues of importance I will venture into them briefly, and I hope that in the process I will be able to demonstrate that although the distribution formula that has been sanctioned by The Master has some legal efficacy, on the facts before me it is unacceptable because it occasions a gross injustice and unfairness upon the applicant, given her crucial role not only in laying the foundation for the family wealth but also providing on-going support in one form or another, for the family business ventures.

THE MARITAL STATUS OF THE APPLICANT

[34] All the parties accept that the applicant was married to the deceased in terms of Swazi Law and Custom. The basis for this is the applicant's own evidence under oath, supported by various documentation which includes the children's birth certificates. What has stirred up a ferocious debate is the Applicant's subsequent assertion that she was also married to the deceased by civil rites, alternatively that she is in a putative civil rites marriage. This assertion took centre stage in the objection that was lodged before The Master. There is no doubt in my mind that the initiation of the applicant's case against the estate was somewhat erratic, but, as more evidence came to light, there was need for the executor and The Master to consider the additional evidence with an open mind, especially in view of the compelling weight of the evidence regarding the Applicant's role in creating the estate. That did not happen. The Master, for her part, was of the view that the additional evidence would throw the process of winding up the estate into confusion. She, together with the executor,

[35] Butters v Mncora 2012 (4) SA 1 SCA

tenaciously held onto the customary marriage and propose to distribute the estate in accordance with the dictates of that marriage regime. Mr. Masuku for the 7th and 8th respondents makes an analysis that provokes some thought. He is of the view that due to some recent judgments in this jurisdiction, including the one known as Ndzimandze 2,[36] it is likely that there is no settled legal regime for dealing with estates of persons married under customary law, and that what obtains is based on practice and or discretion.[37] If that is correct, because the applicant's rights are better protected under tacit universal partnership, that is all the more reason why the estate should be distributed on that basis. There is no reason why the applicant must be worse off than when the deceased was alive and why the other beneficiaries must be better off than when the deceased was alive.

DID THE APPLICANT CONTRACT A VALID CIVIL RITES MARRIAGE WITH THE DECEASED?

[35] Having been married by Swazi Law and Custom on the 11th June 1994, the applicant and the deceased subsequently conducted a marriage ceremony at Materdorolosa Church in Mbabane on the 6th August 1994. The officiating priest was one Father Jockonia Mahazule. According to the applicant, the intention of the parties was that the subsequent marriage was to prevail over the customary one, with the result that the estate should be dealt with as communal property.

[36] All the respondents took the position that there was no valid civil rites marriage between the applicant and the deceased and that the church ceremony was nothing more than a celebration. The respondents argue that a number of legal requirements in terms of The Marriage Act were not fulfilled, in that: -

36.1 Father Mahazule is not a marriage officer in terms of Section 16 of The Marriage Act 1964.

[36] [2014] SZSC 78

[37] At Mr. Masuku's head of arguments 23.12

36.2 No evidence of banns or special licence, as required by Section 8 of The Marriage Act, was furnished by the Applicant.

36.3 No proof that a marriage register was signed by the parties as required by Section 21 of the Births, Marriages and Deaths Act 22/1927. Respondents further argue that even the deceased's best man at the occasion, one Lloyd Maziya, does not say in his affidavit that he did sign a marriage register.

[37] The officiating priest, Father Mahazule, swore to an affidavit and attached to it a record that has entries of names of couples whose ceremonies were conducted at the Roman Catholic Church, and the names of the applicant and the deceased are on this list which appears to answer to a date in August 1994.[38] It is common cause that this list is not a marriage register as envisaged by Section 21 of the BMD Act and it is certainly not signed anywhere. The 7th and 8th respondents argue that failure by the parties to sign a marriage register is fatal, the result being that there is no valid marriage in terms of The Marriage Act. In the case of DLAMINI v DLAMINI[39] the Supreme Court made the following observation: -

> **"……if the register has not been duly signed by the couple and their witnesses, the ceremony would not be a marriage in terms of the Act, but just a ceremony, religious or other….. The signing of the marriage register (is) critical to the validity……."**

[38] It is on the basis of the above-quoted legal authority that I come to the conclusion that the ceremony that took place at the Master Dorolosa Church in Mbabane on the 6th August 1994 falls short of at least one critical requirement, that of signing of the marriage register. It is unnecessary for me to address the other grounds upon which the purported civil marriage is being challenged.

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[38] At page 141 -142 of Book of Pleadings

[39] Mduduzi Masiko Dlamini v Phililе Nonhlanhla Dlamini (33/2017) [2017] SZSC 58, at para 22

[39] Contrary to the prevalence of documentary evidence, the late Mr. Victor Gamedze did, at some point in time, believe that he was married to the applicant in community of property[40] and presumably by civil rites. This is as recent as 2016 when he made a power of attorney for the transfer of immovable property in the Hhohho Region. The weight of evidence is overwhelmingly against what Mr. Gamedze appears to have thought at the time of the said transfer.

[40] Because there was no valid civil rites marriage there can be no community of property between the deceased and the applicant.

PUTATIVE MARRIAGE

[41] It is common cause that the applicant and the deceased were in a valid marriage in accordance with customary rites. I have already found, however, that there was a tacit universal partnership between them and that the estate had to be distributed on that basis. It is therefore not necessary to go into a discussion on putative marriage, which is one way in which the common law comes to the rescue of one person or persons who genuinely believed that they were legally married when they are not. For the same reason, I will not delve into the question whether it is part of our law or not. I do, however, record my reservations about inferring a putative marriage where the couple is already in an indisputably valid marriage, as in the present case where there is a valid customary law marriage. Where, for instance, the parties are already married in terms of the Act how conceivable is a putative customary law marriage? I rest my case here on this one.

SECTION 34(1) OF THE CONSTITUTION

[42] This section provides as follows: -

> "**A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse**

[40] See Book of Pleadings strangely marked as 24.

died having made a will or not and whether the spouses were married by civil rites or customary rites."

It has been raised by the applicant as one other stand-alone ground upon which The Master's decision is impugned, the arguments being that a child's share is not a reasonable inheritance for a surviving spouse, especially on the facts under consideration.

[43] At the beginning of legal arguments both sides confirmed that in the event that the matter was resolvable without resort to the constitutional provision, there would be no need for me to deal with this aspect of the matter. This is in keeping with the principle of avoidance which is well-documented in this jurisdiction[41]. The other aspect is that procedurally this argument would probably need to be presented before a Full Bench sitting as a Constitutional Court.

[44] Because of the Conclusion that I have come to, that this matter is resolved on the basis of a tacit universal partnership, there is no need to go into this aspect of the matter.

REMEDY

[45] In terms of Section 51 *bis* (8) the court, upon setting aside the decision of The Master, may make such order or orders as it deems fit. This may include remitting the matter back to The Master for re-consideration. However, I will not do that because this court is in a good position to substitute its own decision for that of The Master[42], and in the interest of time it would not be a good idea to do so.

ORDERS

[46] On the conspectus of the matter I make the following orders: -

[41] Bongani Gumedze v The Chairman of the Civil Service Commission and Others (525/2009) [2017] SZHC 180, at para 29 see also – Jerry Nhlapho and 24 Others v Lucky Howe N.O., civil appeal case no. 37/2007.
[42] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another 2015 (5) SA 245.

46.1 The Master's decision rejecting the applicant's objection to the L&D account is hereby set aside.

46.2 It is hereby declared that a tacit universal partnership existed between the applicant and the deceased during the latter's lifetime.

46.3 The Master's decision referred to in 46.1 above is substituted with an order upholding the objection and directing the executor to amend the L&D account in accordance with the objection, the effect of which is that the applicant is to receive half of the net joint estate with Mr. Gamedze and a child's share of the remaining half.

46.4 Each party to bear its own costs, as agreed between the parties.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicant: **Advocate G. Marcus S.C., with Amy Armstrong (Virtually), instructed by Khumalo Attorneys**

For 1st and 2nd Respondent: **Mr. N. Dlamini on behalf of the Attorney General**

For 7th and 8th Respondent: **Mr. S. Masuku**