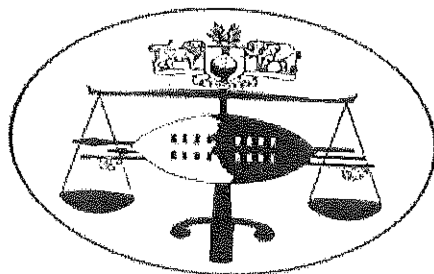


IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 28/2023**

In the matter between:

SICELO EDGAR MPANZA N.O
(EXECUTOR IN THE ESTATE OF THE LATE
BEATRICE THULI MPANZA (NEE KHUMALO)
SEN 64/2022) **Appellant**

And

JABULILE LUCY MPANZA (NEE KHUMALO)	**1st Respondent**
ALISON MPANDLENI MPANZA N.O	**2nd Respondent**
PHINDOKUHLE MPANZA	**3rd Respondent**
MASTER OF THE HIGH COURT	**4th Respondent**
ATTORNEY GENERAL	**5th Respondent**

Neutral Citation: *Sicelo Edgar Mpanza N.o vs Jabulile Lucy Mpanza and Others* (28/2023) *[2023] SZSC* 59 (18/12/2023)

Coram: **S.P. DLAMINI JA; M.J. MANZINI AJA AND L.M. SIMELANE AJA.**

Date heard: 13 November, 2023.

Date Delivered: 18 December, 2023.

SUMMARY: *Civil Law – Administration of Estates – Appeal against High Court dismissal of application to declare that jurisdiction of the Master of the High Court ousted by Section 68 of the Administration of Estates Act, 1902 – Appellant contending that Section 68 ousts jurisdiction of the Master of the High Court where deceased was married in accordance with Eswatini Law and Custom – Appellant further contending that High Court ought to have followed previous decisions of the Supreme Court on the basis of doctrine of stare decisis.*

Civil Law – Administration of Estates – Section 3 of the Wills Act, 1955 – Appellant contending that High Court was wrong to dismiss application to declare last will and testament as void – Appellant contending that formalities prescribed by Section 3(1)(e) ought to have been complied with.

Held: *A marriage contracted in accordance with Eswatini Law and Custom is a lawful marriage and jurisdiction of the Master of the High Court not ousted by Section 68 of Administration of Estates Act*

Held *Section 3(1)(e) does not apply where deceased appended signature on last will and testament*

Held *Appeal dismissed with costs.*

JUDGMENT

M.J. MANZINI, AJA:

[1] This appeal involves an issue of considerable public interest – the jurisdiction of the Master of the High Court over estates of Emaswati who were married in accordance with customary law during their lifetime.

[2] In a Judgment handed down on the 30th March, 2023 the High Court (per Mlangeni J) dismissed an application for an Order declaring that the Master of the High Court lacks jurisdiction over estates of Emaswati who were married in accordance with Eswatini Law and Custom during their lifetime.

Background

[3] In the Court *a quo*, Beatrice Thuli Mpanza, who passed away before termination of the proceedings and was substituted by the present

Appellant in his capacity as executor, approached the Court *a quo* for a declaratory order to the effect that the Master of the High Court *"lacks the original jurisdiction to administer the estate of the Late Petros Maqoqa Mpandza under file number EN 68/2020"*. The deceased was her husband.

[4] As consequential relief she prayed for the removal of the executor appointed by the Master to wind up the estate; for an order that any dispute arising out of the estate *"be prosecuted under Swazi Law and Custom"*; for an Order declaring the last will and testament of the late Petros Maqoqa Mpandza to be *"irregular and/or invalid and of no force and effect"*.

[5] The application was resisted by both Jabulile Lucy Mpanza (1st Respondent herein) who is a widow to the late Petros Maqoqa, and the executor testamentary appointed in terms of the contested last will and testament (2nd Respondent herein). The Attorney-General, on behalf of the Master of the High Court, filed a Notice to Raise Points of Law, contending that Section 68 does not oust the jurisdiction of the Master.

[6] The matter came before His Lordship Mlangeni J, who, in a lucid Judgment, dismissed the application with costs on the ordinary scale. Hence, the present appeal.

Appellant's case

[7] At the hearing Appellant narrowed its appeal to two grounds. In the main Appellant's case is that the deceased practiced customary law as he had married two wives through Eswatini Law and Custom, and that he had conducted his affairs in terms of Eswatini culture. It was contented that on account of these two main reasons, the Master of the High Court lacked "original (*sic*) jurisdiction" to administer his estate. Appellant contended that the estate ought to have been reported to the traditional authorities under the deceased's Chief and Indvuna. Appellant further contended that the appointment of the executor ought not to have taken place due to the irregularity and/or invalidity of the deceased's last will and testament, and, in addition, Eswatini Law and Custom dictates that the affairs of a deceased person are taken care of by an *"Inkhosana"*.

[8] In oral argument Appellant's Counsel, Mr. Nsibande, placed heavy reliance on two decisions of this Court: **Attorney-General v The Master**

(55/2014) [2014] SZSC 10 (30th June, 2016) and the majority Judgment in **Thandi L. Dlamini and Two Others v. Regina T. Dlamini and Another (60/2019) [2020] SZSC 9 (09/06/2020)**. He contended that based on the doctrine of *stare decisis* the Court *a quo* ought to have followed the Judgments.

[9] On the second front, Appellant contended that the last will and testament of the deceased was invalid as there was no certificate at the end of each and every page signed by an administrative officer, justice of the peace, commissioner of oaths or notary public as is required by Section 3(1)(e) of the Wills Act, 1955. Appellant further contended that there was no date appearing on the last will and testament.

1st, 2nd and 4th Respondents' case

[10] 1st, 2nd and 4th Respondents' case is simply that the deceased was lawfully married in accordance with Eswatini Law and Customs, and therefore his estate is not excluded from the jurisdiction of the Master of the High Court by Section 68 of the Act. Respondents' Counsel, Ms. Matsebula, urged us to depart from the decisions relied upon by Appellants but instead to follow the minority judgment in **Thandi L. Dlamini and Two Others v. Regina**

T. Dlamini and Another (*supra*). Respondents further contended that the last will and testament complied in every respect with the formalities set out in the Wills Act. It was argued that the formalities which Appellant relied upon did not apply to the deceased's last will and testament, as the deceased had appended a full signature, not a mark. Furthermore, that the Act did not prescribe that a will should bear a date.

4th and 5th Respondent's case

[11] The Attorney-General, on behalf of the Master of the High Court, similarly urged us not to follow the two decisions of this Court referred to above. Mr. Simelane, from the Attorney-General's office, argued that the remarks made in **Attorney-General v. The Master** (*supra*) to the effect that the Master of the High Court lacks jurisdiction over estates of Emaswati who were married in accordance with Eswatini Law and Custom, were made *obiter*, and therefore not binding. He submitted that the majority judgment in **Thandi L. Dlamini and Two Others v. Regina T. Dlamini and Another** (*supra*) was wrong, in following the aforesaid *dictum*. He further submitted that a marriage contracted in accordance with Eswatini Law and Custom was a lawful marriage, and, therefore, the jurisdiction of the Master of the High Court was not ousted by Section 68.

Analysis

[12] There are two issues for determination by this Court. The first, which is central, is whether Section 68 of the Administration of Estates Act ousts the jurisdiction of the Master of the High Court over estates of Emaswati who were married in accordance with Eswatini Law and Custom. The second less significant issue is whether the formalities prescribed in the Wills Act were complied with in executing the deceased's last will and testament.

[13] Section 68 of the Administration of Estates Act provides as follows:

> *"68. (1) If any African who during his lifetime has not contracted a lawful marriage, or who, being unmarried is not the offspring of parents lawfully married, dies intestate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged; and if any controversies or questions shall arise among his relatives, or reputed relatives, regarding the distribution of the property left by him, such controversies*

or questions shall be determined by a Swazi Court having jurisdiction.

(2) The Master may not be called upon to interfere in the administration and distribution of the estate of any such African.

(3) For the purpose of this section, "African" shall mean any person belonging to any of the aboriginal races or tribes of Africa south of the Equator, or any person one of whose parents belongs to any such race or tribe."

[14] On a plain reading, according to this provision the indicia which determine whether or not the estate of an African who has died intestate shall be distributed according to the customs and usages of the tribe or people to which he belonged are:

(a) If the African during his lifetime had not contracted a lawful marriage; or

(b) If the African, being unmarried, is not the offspring of parents lawfully married.

[15] Although Section 68 defines who qualifies as an *"African"* there is nothing contained in the provision to indicate that the phrases *"lawful marriage"* or *"lawfully married"* carry a special meaning or are to be specially interpreted. I mention this because in the two Judgments relied upon Appellant it has been held, or, at the very least, strongly implied, that a marriage contracted in accordance with Eswatini Law and Custom is not to be considered as a *"lawful marriage"* for purposes of Section 68. Put differently, the proposition is that where a deceased person was married in accordance with Eswatini Law and Custom his (or her) estate is excluded from the jurisdiction of the Master of the High Court on account of Section 68. The only logical explanation for this exclusion is that a marriage contracted in accordance with Eswatini Law and Custom is not to be considered as a *"lawful marriage"* for purposes of Section 68.

[16] At the outset, it bears emphasis that Counsel for Appellant conceded that a marriage contracted in accordance with Eswatini Law and Custom is a valid and lawful marriage for all intents and purposes. Notwithstanding the concession, he contended that the Court was bound to follow **Attorney-General v. The Master** (*supra*) and **Thandi L. Dlamini and Two Others v. Regina T. Dlamini and Another** (*supra*) on the basis of the doctrine of *stare decisis*.

[17] In light of his line of argument, it behoves this Court to examine the Judgments relied upon and determine whether the proposition flowing therefrom should be concretized and followed as binding.

[18] The proposition under consideration found support in **Attorney-General v. The Master of the High Court** (*supra*) a matter brought on review in terms of Section 148(2) of the Constitution, this Court stated the following:

> "35 *It is apparent from Section 68 of the Administration of Estates Act that a customary marriage was not considered as a lawful marriage by the Colonial Government in Swaziland. Only Africans who had abandoned their customs in favour of a European way of life, and, further married by civil rites were considered to have a lawful marriage. Accordingly, the deceased estate of Chief Sibengwane Ndzimandze, to the extent of his customary marriage, cannot be administered by the principles of Swazi Law and Custom; and all disputes relating to the deceased estate have to be determined by a Swazi Court.*"
>
> (own underlining)

[19] The Court had earlier stated that:

> ***"[25] Section 68 of the Administration of Estates Act specifically provides that deceased estates of African spouses married under custom shall be administered in terms of customary law. This Act further provides that the Master of the High Court is not mandated to interfere in the administration of such estate if a dispute arises, and, that only Swazi Courts shall have jurisdiction to determine such a dispute. Clearly, the Master of the High Court has no jurisdiction to administer deceased estates where spouses were married in terms of Swazi Law and Custom."***

[own underlining]

[20] Clearly, the Full Bench made the preceding remarks based on the proposition that a marriage contracted in accordance with Eswatini Law and Custom is not a *"lawful marriage"* for purposes of Section 68. This is despite the express recognition of marriages contracted in accordance with Eswatini Law and Custom by the Marriage Act, 1964; and, in addition, the express recognition of Eswatini Law and Custom as part of

the law of the Kingdom of Eswatini by Section 252(2) of the Constitution, 2005.

[21] I find the proposition that a marriage contracted in accordance with Eswatini Law and Custom is not a *"lawful marriage"* for purposes of Section 68 incongruous with current law. The Full Bench did not advance any reasons why it should still be acceptable to consider customary marriages as not being *"lawful marriages"* in our current legal framework. Considering the gravity of the matter that the Court was seized with, coupled with the conclusions it eventually reached, it would have been beneficial for the Court to analyse and advance reasons as to why customary law marriages should still be considered as not being *"lawful marriages"*. This was rather unfortunate.

[22] The conclusion reached by the Full Bench is also problematic in that it was made *obiter*, considering that the question whether a marriage contracted in accordance with Eswatini Law and Custom was not a *"lawful marriage"* for purposes of Section 68 was not in issue, and most probably not argued. There, what was in issue was the Minister's Estate Policy which had been

issued by the Minister of Justice purporting to exercise powers vested by Section 75(1) of the Constitution.

[23] An application had been launched at the High Court seeking an Order to declare the said Estate Policy invalid, irregular and liable to be set aside. Applicants had further prayed for an Order restraining the Master of the High Court from using the Estate Policy in the administration and distribution of the deceased estate; Applicants had further prayed for an Order directing the Master of the High Court to distribute the estate in accordance with the Intestate Section 2(3) of the Succession Act; lastly, they had prayed for an order for the removal of deceased's widows as executrixes and the appointment of a neutral executor. Applicants had not approached the High Court to exclude the Master from the administration of the estate.

[24] The High Court, sat as a Full Bench on account of the constitutional issues involved in the matter, and the issue for determination was whether Section 2(3) of the Intestate Succession Act No.3 of 1953 is valid or whether it is in contravention of Section 34(1) of the Constitution. The High Court issued an Order striking down Section 2(3) as unconstitutional, and, in

addition, directed that pending enactment of legislation to regulate the rights of spouses the Master of the High Court shall distribute and liquidate deceased's estates in accordance with the provisions of Section 34(1) of the Constitution of Swaziland by equating customary law to civil marriages in community of property.

[25] Notably, the High Court did not conclude that marriages contracted in accordance with Eswatini Law and Custom were not *"lawful marriages"* for purposes of Section 68. As a consequence, the Notice of Appeal filed by the Attorney-General did not make any reference to Section 68.

[26] On appeal, this Court, by a majority of four to one, confirmed the decision and Orders of the High Court. Hence, the Review Application by the Attorney-General on behalf of the Government. None of the grounds for review pertained Section 68 or the question whether marriages in accordance with Eswatini Law and Custom were not *"lawful marriages"* for purposes of Section 68.

[27] In my view, taking into account the well known principles that distinguish between *obiter dictum* and *ratio decidendi*, the conclusions made by the Full Bench on Review were clearly *obiter*. The question whether a marriage contracted in accordance with Eswatini Law and Custom was not considered to be *"lawful marriage"* for purposes of Section 68 was not in issue either before the High Court, on Appeal, or a ground for review. It was not argued at any of these levels.

[28] It is not surprising then that the Attorney-General, at whose instance the Review Application had been launched, has urged this Court not to follow the above Judgment. To quote verbatim a portion of the Heads of Argument filed by the Attorney-General:

> ***"These HEADS are aimed at supporting the entire paragraph 13 of Judge Mlangeni Judgment as being correct and to plead with the Honourable Court not to follow the previously decided Judgments of…"***

[29] I now turn to deal with **Thandi L. Dlamini and Two Others v. Regina T. Dlamini and Another** (*supra*) wherein this Court had occasion to deal with the interpretation of Section 68 in an appeal against a decision confirming the jurisdiction of the Master of the High Court over the estate of a deceased Prince who during his lifetime had been married to four wives in accordance with Eswatini Law and Custom. There, Appellants (who were Respondents in the Court *a quo*) had raised a preliminary point contending that the High Court (and by extension the Master of the High Court) had no jurisdiction over the estate of the deceased Prince on account of his marriages by Eswatini Law and Custom. Appellants had pegged their case squarely on **Attorney-General v. The Master** (*supra*).

[30] The majority Judgment, rightly so, acknowledged that the conclusion reached (or remarks made) by the Full Bench in **Attorney-General v. The Master** (*supra*) with respect to the interpretation of Section 68 was *obiter*, but nevertheless gave effect to it, and upheld the appeal.

[31] At paragraph [38] the majority Judgment stated the following:

"[38] This provision was specifically promulgated for Africans as defined under subjection (3) of the Section. The deceased Prince Mfanasibili Dlamini was, it has not been stated otherwise, an African born South of the Equator, married to four (4) wives under Swazi Law and Custom and died intestate and therefore this Section 68 applies to his estate."

[32] At paragraph [48] it went on the state that:

"[48] In the present case, the applicable law is Section 68 of the Administration of Estates Act, No. 28 of 1902. This position of our law was correctly stated in the obiter of Justice M.C.B. Maphalala CJ in Attorney-General v. The Master of the High Court...."

[33] The majority concluded by stating that:

"[55] This Court comes to the conclusion that the points of law should have been heard and determined. This Court further comes to the conclusion that Section 68 of the Administration of Estates Act, 1902 is valid and applicable to this Case."

[34] The majority Judgment, however, admitted to advance reasons as to why it did not consider the Prince's four marriages (contracted in accordance with Eswatini Law and Custom), as *"lawful marriages"*. Put differently, why was the late Prince not considered to have been lawfully married for purposes of Section 68? For, the majority would not have concluded as it did if his marriages were considered as lawful marriages.

[35] As a result I am of the view that the question as to whether marriages contracted in accordance with Eswatini Law and Custom are not to be considered as lawful marriages for purposes of Section 68 was not adequately ventilated in the two Judgments under consideration.

[36] As indicated earlier, the law as it stands, recognises marriages contracted in accordance with Eswatini Law and Custom as valid and lawful marriages. It would be odd and defy legal reason to hold that a marriage contracted in accordance with Eswatini Law and Custom is not a *"lawful marriage"* for purposes of Section 68, but valid and lawful for all other purposes. If that was the case or perception during the colonial era it cannot be so now, decades after the Marriage Act was passed, and the advent of the Constitution in 2005. The colonial legacy ought to be discarded. I find no justification to perpetuate a view that undermines marriages contracted in accordance with Eswatini Law and Custom.

[37] In light of the foregoing I am not inclined to follow the *obiter dictum* in **Attorney-General v. The Master** (*supra*) nor the majority Judgment in **Thandi L. Dlamini and Two Others v. Regina T. Dlamini and Another** (*supra*). Section 146(5) of the Constitution permits this Court to depart from its previous decisions when it appears that it was wrong. As long as a century ago Solomon J said of the doctrine of *stare decisis*:

> ***"Of course, in ordinary circumstances the Court will abide by its decisions; stare decisis is a good rule to follow. But where a court***

is satisfied that its previous decision was wrong, <u>and more particularly where the point was not argued,</u> then I think it is not only competent for the court, but it is its duty in such a case not to abide by its previous decision, but to overrule it."

(**<u>R v. Faithfull and Gray 1907 TS 1081</u>**)

In addition see **<u>Teaching Service Commission and Another v Timothy Tsabedze (6/2019) [2022] SZSC 48 (25/02/2022)</u>**

[38] In the result, the decision of the Court *a quo* cannot be faulted.

[39] Consequently, the jurisdiction of the Master of the High Court over the estate of the late Petros Maqoqa Mpanza shall not be ousted purely on the basis that he was married in accordance with Eswatini Law and Custom. He was lawfully married, and his estate is not excluded by Section 68 from the jurisdiction of the Master of the High Court.

[40] Lastly, Appellants' attack on the last will and testament is clearly misguided and without merit. The formalities which it is contended were

not complied with only apply if *"the will was signed by the testator by making of a mark or by some other person in the presence and by the direction of the testator…"*. (Section 3 (e) of the Wills Act). The Court *a quo* was therefore correct in refusing to declare the will invalid.

[41] In light of the foregoing the appeal is dismissed. Costs to follow the cause.

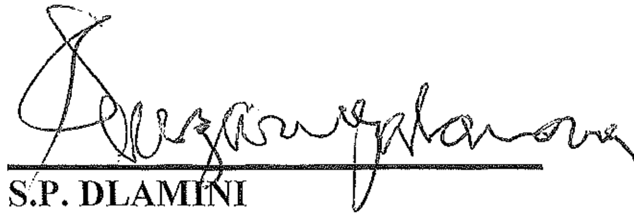
[42] The Court hereby makes the following Order:

1. The Appeal is dismissed.
2. Appellant is to pay the costs of the Appeal.

M.J. MANZINI

ACTING JUSTICE OF APPEAL

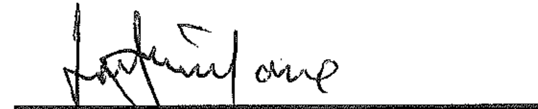
I agree



S.P. DLAMINI

JUSTICE OF APPEAL

I agree



L.M. SIMELANE

ACTING JUSTICE OF APPEAL

For the Appellant: MR. M. NSIBANDE

For the 1st, 2nd and 4th Respondents: MS. S. MATSEBULA

For the 4th and 5th Respondents: MR. M. SIMELANE