IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE NO: 981/2014**

In the matter between:

WEZZY NDZIMANDZE	**1st Applicant**
FUTHENI NDZIMANDZE	**2nd Applicant**
EDDIE NDZIMANDZE	**3rd Applicant**
SITELEGA THABSILE NDZIMANDZE	**4th Applicant**
MSHUMAYELI NDZIMANDZE	**5th Applicant**
MAJAWONKHE NDZIMANDZE	**6th Applicant**
TEMDZABU NDZIMANDZE	**7th Applicant**
SHERLY NDZIMANDZE	**8th Applicant**
BONSILE NDZIMANDZE	**9th Applicant**
NCOBILE NDZIMANDZE	**10th Applicant**
BOY NDZIMANDZE	**11th Applicant**
SIGCOKO NDZIMANDZE	**12th Applicant**
CEDUSIZI MAGANU NDZIMANDZE	**13th Applicant**
MTHIMBA NDZIMANDZE	**14th Applicant**
CEBILE NDZIMANDZE	**15th Applicant**
SHANA PHILISWA NDZIMANDZE	**16th Applicant**
SENZO NDZIMANDZE	**17th Applicant**

And

TITSELO DZADZE NDZIMANDZE (Nee Hlophe)	**1st Respondent**
JOYCE NTOMBI NDZIMANDZE (Nee Tfwala)	**2nd Respondent**
THANDI ROSE NDZIMANDZE (Nee Dlamini)	**3rd Respondent**
PHUMZILE NDZIMANDZE	**4th Respondent**
MAKHOSI NDZIMANDZE	**5th Respondent**
JABULANI NDZIMANDZE	**6th Respondent**
THOBILE NDZIMANDZE	**7th Respondent**
NOMSA NDZIMANDZE	**8th Respondent**
CHARLES NDZIMANDZE	**9th Respondent**
WANDILE NDZIMANDZE	**10th Respondent**
THE MASTER OF THE HIGH COURT	**11th Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**12th Respondent**
SWAZILAND GOVERNMENT	**13th Respondent**
THE ATTORNEY GENERAL	**14th Respondent**

Neutral citation: *Wezzy Ndzimandze and 16 others vs Titselo Dzadze Ndzimandze and 13 others (981/2014) [2014] SZHC234 (23rd September 2014)*

Coram: Annandale J, Dlamini AJ and Mavuso AJ.

Counsel for the Applicants – No appearance

Counsel for the 1st – 3rd Respondents – Mr. M. S. Dlamini

Counsel for the 4th -10th Respondents – No appearance

Counsel for the 11th – 14th Respondents – Mr. V. Kunene

Case Summary: *Intestate Succession in Swaziland –Distribution of estate assets. Constitutional challenge against the proviso in Section 2(3) of the Intestate Succession Act of 1953 (Act 3 of 1953) which provides for a surviving spouse* ab intestato *to be entitled to only a child's share or up to only E1200, whichever is the greater. This grossly discriminatory provision is declared unconstitutional and struck down, in view of the superceding constitutional provision in Section 34 (1) of the Constitution of the Kingdom of Swaziland Act of 2005 (Act 1 of 2005). Acting under the proviso of Section 14(2) of the Constitution and in the interim, until regulated by new appropriate legislation, the Master of the High Court is directed to distribute deceased estates in accordance with the provisions under Section 34(1) of the Constitution of Swaziland by equating Customary Law Marriages to Civil Law Marriages in community of property. No adverse costs order made against any of the litigants.*

JUDGMENT

The Full Court:

[1] Ever since the dawn of mankind, there has often been a desire to "rule from the grave", to retain dominium over property amassed over a lifetime. The blessings from father to son over generations mostly consisted of the family fortune, however great or small. Complicated or simple last wills and testaments continue to dictate whatever is to happen to the property of deceased persons, who must receive what and how must it be utilised. Such dictates are compiled during the lifetime of a person, extending his or her commands long after death.

[2] Yet it is not every person who crafts a will during life, and it is a safe guess to say that most people die intestate, departing from this world without personally deciding what is to happen to whatever was amassed while alive. To accommodate this, and to create certainty and order, legal systems all over the world have developed both common law and statutory provisions as to how intestate succession must be dealt with.

[3] Swaziland has done likewise. In our pre-independence days, as long ago as 1902, the Administration of Estates Act, (Act 28 of 1902) regulated that "African" law and custom, "the customs and usages of the tribe or people to which he belonged", shall be applied to the administration and distribution of intestate deceased estates.

[4] As is soon reverted to below, the norms of distribution of intestate deceased estates has evolved over the centuries and today, rigid clarity exists as to how it shall be done. However, fairness and equality has escaped the widows who married under Swazi customary law, rendering them to the status of a child, once their former husbands have passed away without appropriately providing for them in a valid will. The widow under present day customary law inherits only a child's share, and it is furthermore limited to E1200!

[5] Cognisant of this discriminatory custom, our post-independence National Constitution recognised the problem and it dictates that: *"A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by Civil or Customary Rites"*. (Section 34 (1)).

[6] The pro-active vision of our constitution strongly emphasises fairness and reasonableness of succession. It not only provides for fair treatment of widows, but also for widowers. It also removes the distinction between customary and civil marriages insofar as succession is concerned, and it goes even further to prevent heartless spouses from disenfranchising their surviving wives or husbands in a valid will. The bottom line, so to speak, is that regardless of circumstances, each and every surviving spouse has a constitutionally entrenched right to a "reasonable provision" out of the estate.

[7] In order to give effect to this, the Constitution further provides in Section 34(2) that: *"Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife"*.

[8] It is common knowledge that our Constitution has been in place for almost a decade by now. It is also common cause that until now, parliament has failed to comply with this mandatory directive, thereby rendering the relevant provision in our constitution to be worthless.

[9] Numerous international instruments decry the deprivation of personal rights of women and children, or discrimination against them in any form, such as their rights to fair and reasonable distribution of deceased estates, which they have also contributed to. Also, Biblical scriptures abound in the admonition of bias, discrimination and exploitation of widows and orphans.

[10] In tandem with Section 34(2) of our Constitution, article 18(3) of the African Charter on Human and Peoples' Rights holds that *"The State shall ensure the elimination of every discrimination against woman and ensure the protection of the rights of women and the child as stipulated in international declarations and conventions"*.

[11] On the 14th July 2014 and at Siteki, the Minister (12th Respondent) made a speech termed to be: “In the ceremony for direction to the Master of the High Court’s office on issues of distribution of deceased estates” (sic).

[12] Acting in terms of Section 75(1) of the Constitution, the Minister made a statement giving draftx to the office of the Master of the High Court on how deceased’s estates should be distributed.

[13] At the time when the new “directive” was announced, the estate of the late Chief Sibengwane Ndzimandze was in the process of being finalised by the Master. The late Chief died intestate and had five customary law wives, three of whom survived him – the first three Respondents. He was also survived by twenty four children, Wezzy Ndzimandze and the sixteen other Applicants, as well as the fourth to tenth Respondents.

[14] The foundation of the present application mainly seeks to interdict the Master from implementation of the Ministers’ “directive” and also to set it aside. If the latter is implemented and applied the Applicants *qua* beneficiaries will receive less and the three widows will receive more from the estate. The Applicants want the distribution of the intestate deceased estate, with the marriage to the surviving spouses under Swazi Law and Custom, to be regulated by Section 2(3) of the Intestate Succession Act of 1953 (Act 3 of 1953).

[15] This Section, which has been applied for the past sixty years, holds as follows:

> *"If the spouses were married out of community of property and the deceased spouse leaves any descendent who is entitled to succeed* ab intestato *the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed One Thousand Two Hundred Emalangeni in value (whichever is greater)"*

[16] Effectively, the Applicants want the three surviving widows to each inherit a child's share, placing the mothers at par with their children, the same mischief our National Constitution sought to remedy. The operation of Swazi Law and Custom insofar as intestate succession of customary marriages go, discriminates against women, rendering them the same as their children.

Furthermore, in today's monetary terms, the limitation of E1200 is laughable. Sixty years ago it was enough to buy a car, a tractor and more – today, hardly two wheelbarrows.

[17] When spouses are married under civil rites, which allows for monogamous marriages only, the surviving spouse is entitled to one half of the estate in addition to a child's share. It is this chasm between customary and civil marriages which parliament ought to have rectified as mandated years ago, but failed to do, leading the Minister to try and do so.

[18] The practical difference between the two legal frameworks most certainty give rise to an apprehension of irreparable harm to the seventeen applicants. According to the second liquidation and distribution account which was filed by the Applicants, each surviving spouse and each child would stand to inherit E14 386.03, with an additional E4000 for each spouse to be used "for the cleansing ceremony".

[19] The Applicants want this to remain, although they are critical of the amounts of E4000 for the traditional cleansing ceremony, stating that there are enough available cattle for that purpose.

[20] In turn, the widows state in the answering affidavit that initially, each of the three were to receive E30 000, instead of the substantially reduced amount which the Applicants want to be the case. It is this difference between the first and second liquidation and distribution account, apparently prepared by the Master of the High Court based at Siteki, which spawned the differences between widow and child, escalating it to an irreconcilable level and eventual litigation.

[21] The widows state in their answer that halving the share they at first anticipated to inherit, caused them to 'lodge an appeal' to the Minister. They go further to state that the Master has a discretion in deciding what is reasonable. *"There is a customary practise at the Master's office where a spouse is given twice a child's share. Such has been going on a long time now" (*para.13).

[22] Certainly, such a practise, if indeed it can be properly be termed as such, is contrary to the statute. The widows may say that it is an "*effort by the Master to effect and comply with Section 34 of the Constitution"*, but it remains a deviance from our existing legislation. Yet again, it points towards a parliamentary slumber or inactiveness to legislate in accordance with what the constitution so clearly requires to be done, under Section 34 (2), let alone the wishes and needs of the people of Swaziland.

[23] In their application, the Applicants initially prayed for orders to have the matter heard as one of urgency and to have the High Court issue a rule nisi, as follows:-

> "3.1 That pending the determination of the Administration and Distribution of Deceased's estate under Swazi Law and Custom by Parliament, the 12th Respondent's pronouncement and /or directive of the 14th July 2014 to the 11th Respondent termed "policy" be declared to be invalid, irregular and be set aside (sic).
>
> 3.2 Interdicting and restraining the 11th Respondent from using said policy in the Administration and Distribution of the Estate of late Chief Sibengwane Mampini Ndzimandze under File No.EL92/2013.
>
> 3.3 Directing and ordering the aforesaid estate to be distributed by the 11th Respondent in accordance with Section 2(3) of the Intestate Succession Act of No.3/1953.

3.4 Directing and Ordering the 11th Respondent to remove the 1st, 2nd and 3rd Respondents as executrix of the Estate late Chief Sibengwane Ndzimandze and that the 11th Respondent be ordered to appoint a neutral person as executor.

3.5 Directing the Respondents to pay costs in the event of opposition."

[24] It is not necessary for this for this court to dissect and analyse the relief sought under prayer 3.1. It is patently obvious that its wording is unclear and ambiguous, rendering it susceptible to sharp criticism. For instance, parliament will never distribute the deceased's estate. Probably, this relief is just badly pleaded.

[25] From what has already been stated above, and without the need to delve any deeper into the application, it is trite that any opposition to the relief in prayers 3.1 and 3.2 would be a waste of time and resources.

[26] It is also abundantly clear that contrary to the expressed wishes of the Applicants, Section 2(3) of Intestate Succession Act of 1953 (Act 3 of 1953) is irreconcilable and in stark violation of Section 34(1) of the Constitution of Swaziland. It would be foolhardy, heartless and with callous disregard of its constitutional mandate, for the High Court to order its continued usage. It violates and undermines the rights of intestate spouses married under customary law, which relegates a wife to a mere child in the distribution of a deceased estate, instead of being entitled to

a reasonable portion thereof, testate or intestate, married in whichever way permissible under the laws and customs in existence.

[27] The applicants furthermore stood no chance to succeed in their application for removal of the three widows (first three respondents) as executrix of the estate.

[28] No justification and motivation for this relief has been established in the founding affidavits. There is no allegation worthy of any serious consideration in an attempt to justify removal. Apart from procedural shortcomings, such as asking the Master for a report on any stated or unknown mischief, incompetence, bias, prejudice or whatever, it rather seems to us like a misapprehension of what the functions of executors are.

[29] In their answer to the unfounded application for their removal, the executrix say that they suspect the rationale for his prayer to be that they were unwilling to sign off a recalculated liquidation and distribution account as prepared and presented by the Master, which reduces their anticipated inheritances by one half of what they were previously told it would be.

[30] Without any further ado, we would have been inclined to dismiss this prayer in the event that it came to be fully considered and possibly motivated by embellishing argument from their attorney in the course of a contested hearing.

[31] It was only after the main application had already been filed that events seemed to spiral and escalate the matter to major status. From the onset, this Court has

deliberately applied its mind to only the pleadings filed of record. This by obvious extension means that the High Court does not seek recourse to media reports about a matter like this. It also does not get inspiration and guidance from looking at inflammatory statements which seek to create a divide between the different arms of government, nor the playing up of different personalities or *dramatis personae*, as was seriously being done in the present matter.

[32] Nevertheless, it became common knowledge in the public domain, such that even judicial notice might perhaps have been drawn from the notorious fact, that the Prime Minister of Swaziland very publicly and very well publicised, set aside the "policy statement" issued by the Minister of Justice and Constitutional affairs, which "policy statement" propelled the initial application to be brought to Court.

[33] The original application was set down by the attorney of the Applicants, under a certificate of urgency, to be heard on the 25th July 2014. On that date, His Lordship the Honourable Chief Justice of Swaziland, recorded a consent order in the following terms:-

1. *"By consent the parties agree that the real issue for determination in this matter is whether section 2 (3) of the Intestate Succession Act 3/1953 is valid or whether it is in contravention of section 34 (1) of the Constitution.*
2. *Accordingly, the matter is referred to the Constitutional Court for determination.*

3. *The Constitutional Court will also determine all the other issues raised in the matter.*
4. *The Respondents must file opposing affidavits on or before 6th August 2014.*
5. *The Applicants must file replying affidavits on or before 15th August 2014.*
6. *The Applicants must file heads of argument on or before 26th August 2014.*
7. *The Respondents must file heads of argument on or before 26th August 2014.*
8. *The matter will be heard on 28th August 2014 at 9:30 AM."*

[34] However, before the designated and agreed date for the hearing was reached, the attorney for the applicants sought to withdraw the application and he also sought to withdraw as attorney of record. This sudden about turn was not accepted and it resulted in the following Order of Court to be recorded by his Lordship, the Honourable Chief Justice of Swaziland on the 13th August 2014:-

> *"The Applicants' application to withdraw the matter is refused on the ground that this is a matter of huge national importance.*
>
> *The Court is already seized with the matter and there is a need to interpret section 34 (1) of the Constitution as against Section 2 (3) of the Intestate Succession Act 1953.*

Furthermore, the Court has taken into account the fact that Mr. Mamba for 1st –10th Respondents will be filing a counter – application on or before 15th August 2014."

[35] True to his word, learned counsel for the first three respondents, not the first ten as referred to in the abovementioned order, filed an answering affidavit which embodies a counter application. They pray for an order that Section 2(3) of the Intestate Succession Act of 1953 (Act 3 of 1953) be declared inconsistent with Section 34(1) of the Constitution of the Kingdom of Swaziland and therefore unconstitutional.

[36] At this juncture, we deviate to record that on the designated date when the matter was to have been heard, August the 28th, no leeway was made. A Full Court could not be constituted to hear and determine the constitutional challenge and it was adjourned to the first court day thereafter, the 2nd September 2014.

[37] On the latter date, none of the Applicants nor their counsel made an appearance. This was after leave to withdraw was refused and in defiance of an Order of Court. Nevertheless, this Court would not be held to ransom and we proceeded to hear legal argument from learned counsel in attendance, which we also record to have been most helpful to the Court and in consonance with both our constitution and their noble profession, as befits senior members of the Bar who argue the same legal issue.

[38] During the course of hearing argument, the only real and material differences between counsel was the manner in which the interim vacuum needs to be addressed until such time parliament rises to the occasion

[39] With the respondents praying for a dismissal of the main application at a punitive scale and the original applicants seeking costs against all respondents in the event of opposition, this aspect also gave rise to lively debate in open court. We will soon revert to the aspect of costs.

[40] There is no doubt that this Court is enjoined to uphold the provisions of our National Constitution and to enforce the rights enshrined therein, even to the extent that Parliament may be directed to fulfil its obligation, such as is found in Section 34(2) of the constitution, which it has failed to do since 2005.

[41] Section 14(2) provides that:-

> "*The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this constitution*".

[42] Section 35(1) of the Constitution provides for the practical implementation of the duty imposed on the Judiciary to enforce and uphold the rights enshrined in the Constitution by requiring that:-

"Where a person alleges that any of the foregoing provisions has been, is being, or is likely to be, contravened in relation to that person...then, without prejudice to any other action with respect to the same matter which is lawfully available, that person...may apply to the High Court for redress".

[43] Having unanimously found that section 2 (3) of the Intestate Succession Act No.3 of 1953 is inconsistent with section 34 (1) of the Constitution of Swaziland No.1 of 2005, the next question to consider is: What is the competent order that must be issued by this court to address the vacuum that will have been left as a result of the declaration of invalidity of this provision of the statute.

In a paper titled **"**Fashioning Constitutional Remedies in South Africa: Some Reflections" Middle Temple Conference (2010), Her Ladyship, the Honourable Justice K. O'Regan, Judge of the Constitutional Court of South Africa, addressed the conference as follows;

> *"Then I shall outline some of the issues that have arisen relevant to declarations of invalidity in the South African context, in particular the question of the retrospective effect of an order of invalidity, the role of severance, both actual and notional severance, and the use of the technique of "reading in".*

[44] The Honourable Judge proceeded to deal at length with the two main approaches in such matters namely, *interpretation* as opposed to *declarations of invalidity and ancillary relief.* On the question of interpretation, the issue is addressed as follows by the Honourable Judge;

> *"Under our constitutional order, just like under the Human Rights Act in the United Kingdom, if one can find a constitutionally sound interpretation of legislation that can be said to be a reasonably possible interpretation given the text of the legislation, questions of constitutional inconsistency fall away. The first question in considering any constitutional challenge to a statutory provision, therefore, is whether the language of the provision is reasonably capable of bearing a meaning that would be consistent with the constitution."*

[45] The important question arising is, how far should this court go in attempting to find a meaning consistent with the constitution against the express language used in the statute itself.

The relevant piece of legislation sought to be declared invalid and inconsistent with the constitution provides that;

"If the spouses were married out of community of property and the deceased spouse leaves any descendant who is entitled to succeed ab intestato the surviving spouse shall succeed to the extent of a child's share or to so much as

does not exceed One Thousand Two Hundred Emalangeni in value (whichever is greater).”

[46] A declaration of invalidity is another option that a court hearing a constitutional issue may resort to. Once a court has concluded that a statutory provision is inconsistent with the Constitution, it has no choice but to declare the provision inconsistent. According to the Honourable Judge O’Regan;

> *“The court does, however, have a range of choices as to the precise terms of the declaration of constitutional invalidity and any ancillary relief.*
>
> *The two obvious decisions for a court are: the scope of the order of invalidity; and the effective date of the order of invalidity; should it come into operation immediately with prospective effect only, should it have retrospective effect, or should it be suspended for a period to give the relevant authorities time to correct the constitutional problem.”*

In the case of Schachter v Canada [1992]2 S.C.R 679 the court held that;

> *“Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if;*

A. *Striking down the legislation without enacting something in its place would pose a danger to the public.*

B. *Striking down the legislation without enacting something in its place would threaten the rule of law; or,*

C. *The legislation was deemed unconstitutional because of under inclusiveness rather than over breadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated."*

[47] In the South African case of National Coalition For Gay And Lesbian Equality And Others v Minister Of Home Affairs And Others 2000 (1) BCLR 39 (CC), the Constitutional Court stated that:

> *"The Court's obligation to provide appropriate relief, must be read together with section 172(1) (b) which requires the Court to make an order which is just and equitable.*
>
> *The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case.*
>
> *It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and the circumstances of each*

case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature. Whether, and to what extent, a court may interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case."

[48] In summary, section 172 (1) (a) of the 1996 Constitution of South Africa obliges a competent court to declare that "*any law...that is inconsistent with the Constitution is invalid to the extent of its inconsistency."* In our jurisdiction, section 151 (3) provides that;

"Without derogating from the generality of subsection (1) the High Court has jurisdiction:–

(a) To enforce the fundamental human rights and freedoms guaranteed by this Constitution; and

(b) To hear and determine any matter of a constitutional matter."

Since our Constitution is only general in so far as the exercise of remedial powers by a court when declaring a particular provision of a statute to be unconstitutional, it would follow that the warning sounded by the Courts in the many cases of this nature against the temptation to venture into Parliament's

terrain should apply with vigorous force. Section 106 of the Constitution of the Kingdom of Swaziland provides;

"Subject to the provisions of this Constitution-

(a) the supreme legislative authority of Swaziland vests in the King-in-Parliament;

(b) the King and Parliament may make laws for the peace, order and good Government of Swaziland."

[49] In seeking to "interpret" certain provisions of the statute which are inconsistent with the Constitution or when seeking to "read in" words in a statute to bring such words in conformity with the Constitution can lead to a situation where the well-guarded principle of separation of powers is rendered obscure, that is, if this exercise is not properly executed. In section 2 (1) of the Swaziland Constitution it is provided that;

"This Constitution is the Supreme Law of Swaziland and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency be void."

Section 2 (1) of the Constitution of Swaziland must be read together with Section 35 of the Constitution wherein it is provided that the High Court may;

"make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter."

[50] In the local Supreme Court case of The Attorney General v Mary-Joyce Doo Aphane, Civil Appeal Case No.12/2010, the Supreme Court extensively and comprehensively dealt with all the guidelines to be followed by a court hearing legal issues of a similar nature.In this regard, the Supreme Court recognised that in the context of Swaziland,

"*the High Court, depending on the circumstances of the particular case, could properly apply the remedies of:*

1. Striking down

2. Striking down and temporarily suspending the declaration of invalidity

3. Reading down

4. Reading in

5. Severance

6. Such other remedies as may be appropriate and which lie within the competence of the court."

[51] Having carefully examined all the available options in seeking to address the remedial quiz in the context of Swaziland, the Supreme Court sought guidance

from the South African case of National Coalition For Gay And Lesbian Equality v Minister Of Home Affairs (supra) at pp 40-41 Wherein the law was stated as follows;

> *"Having concluded that it is permissible in terms of our Constitution for this Court to read words into a statute to remedy unconstitutionality, it is necessary to summarise the principles which would guide the Court in deciding when such an order is appropriate. In developing such principles, it is important that the particular needs of our Constitution and its remedial requirements be constantly borne in mind.*
>
> *The severance of words from a statutory provision and reading words into provision are closely related remedial powers of the Court.*
>
> *In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. In our society, where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.*

In deciding to read words into a statute , a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing), a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution."

[52] In choosing the appropriate remedy specifically for the *Doo Aphane* case, the Court made reference to the "Bill of Rights Handbook" (5th Ed) at p.197 where it is provided that;

"Ideally speaking, a Court's order must not only afford effective relief to a successful litigant, but also to all similarly situated people. This is the second factor that must be considered. As the Constitutional Court has stated, in constitutional cases there is 'a wider public dimension. The bell tolls for everyone.' (National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (Note 24 above) paragraphs 82). This requires a consideration of the interests of all those who might be affected by the order, and not merely the interests of the parties to the litigation (Hoffman, note 25 above) paragraphs 42-43.

The third factor that is often referred to is the separation of powers and, flowing from it, the deference a court owes to the legislature when

devising a constitutional remedy. Although it has refrained from laying down guidelines, the Constitutional Court has stated that deference involves 'restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature' (National Coalition Case).

[53] In the final result and, having regard to the particular circumstances of the case, the Supreme Court ordered a complete striking down of the offending provisions in the Deeds Registry Act as well as the relevant regulations thereof. In issuing that order, the Supreme Court ordered that the declaration of invalidity is suspended for a period of 12 months in order to enable Parliament to pass legislation as it may deem fit to correct the invalidity in section 16 (3) of the Deeds Registry Act.

[54] In the present matter, the case is about the distribution of an estate where the parties were married in community of property (or Swazi Law and Custom) and the deceased died without leaving behind a will. In such a case the legislature has provided that *"....the surviving spouse shall succeed (inherit) to the extent of a child's share or to so much as does not exceed One Thousand Two Hundred Emalangeni in value (whichever is the greater)."* This provision of the Intestate Succession Act, is not only inconsistent with the Constitution but it is also antiquated and not relevant to the many changes that have taken place in family law, gender issues and the economic conditions of modern families.

Even if we could be either *reading down, reading in* or *severing* some words in the provision complained of, such would not serve any useful purpose.

[55] By so saying, we are not by any means dictating to Parliament how to legislate and precisely what they should provide for in this matter. What we do say is that the Constitution of Swaziland requires a surviving spouse to inherit a 'reasonable share' from their deceased partner's estate. It cannot be said to be a reasonable distribution when a surviving partner's share is equal to that of a child. The surviving spouse will in the ordinary course of events, have contributed, either financially or otherwise, in the accumulation of assets in the deceased estate. It cannot therefore be said to be reasonable that the surviving spouse must benefit a share equal to that of a child. Also the constitution denounces any surviving spouse or child to be "disinherited" by a testator, in whatever form of marriage since it would not leave "a reasonable" provision out of the estate.

[56] Having so said, we are therefore convinced that an appropriate order in the circumstances of this case would be one ordering a striking down of the relevant provision of our law of succession, pertinently crystallised in section 2 (3) of the Intestate Succession Act, 1953 (Act 3 of 1953). Until Parliament fills the void with appropriate legislation, the Master of the High Court shall be ordered by this Court to deal with all estates in consonance with the clear dictates of section 34 (1) of our Constitution, as ordered below.

[57] Roman Dutch Law and Swazi Customary Law, constitute the common law legal system of Swaziland, unless supplemented, modified, excluded or changed by Parliamentary Legislation. These Laws co-exist and, supplement each other. Section 252 (1) of Act No.1 of 2005, (the Constitution) provides as follows;

"Subject to the provisions of this Constitution or any other written Law, the principles and rules that formed, immediately before the 6th September 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since the 22nd February 1907 are confirmed and shall be applied and enforced as the Common Law of Swaziland except where and to the extent that those principles or rules are inconsistent with this constitution or a statute"

Subsection (2) of the above Section, reads;

"Subject to the provisions of this Constitution, the Principles of Swazi Customary Law and Custom (Swazi Law and Custom) are hereby recognized and adopted and shall be applied and enforced as part of the law of Swaziland.

Because of its importance, reference also needs to be made to Subsection (3) of the above Section;

"The provisions of Subsection (2) ***do not*** *apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute or repugnant to natural justice or morality or general* ***principles of humanity."***

[58] Section 2(3) of Act No.3 of 1953 the Intestate Succession Act, makes reference to Marriages Out of Community of Property. A question that arises is whether or not the concepts of marriages in, or out of community, are known under Swazi Law and Custom. And if known, whether or not they would have the same meaning and effect.

[59] For present purposes, it can safely be accepted that this distinction is unknown to Swazi Law and Custom which recognizes the principle of primogeniture (the eldest son being heir), that the wife inherits the same as a child and that joint matrimonial estates are the norm. Ante nuptial contracts, separate estates, accrual and such are squarely within the domain of civil marriages. In fact, there is a sizeable chasm the distinction between customary and civil marriages, with wholly different requirement and consequences of each.

[60] Whether a Swazi Customary marriage is in or Out of Community of Property, the Constitution of Swaziland has already provided a remedy to the problem. From the language used in Section 34(1) of Act No.1 2005 (The Constitution) it is clear that the Legislature sought to harmonize the differences pertaining to the law of succession between civil and customary marriages, testate or intestate, and to import a new concept of reasonable entitlement to a provision out of a deceased estate.

In practice, it raises the status of previously disadvantaged widows, married in accordance with Swazi Law and Custom to that of her counter –part whose marriage was by civil rites and In community of property. In practical reality, the Constitution of Swaziland seeks to harmonize the positions of surviving spouses, especially widows married under customary law, frequently not the only wife either, with that of people married under civil law, in or out of community of property.

[61] The inheritance of a spouse, married under Swazi Law and Custom, also being equal to that of a child's share, against the backdrop of Section 34(1) of the Constitution, is clearly in stark dissonance. There is no justice in treating an adult like a child, nor is there any justice in treating a child like an adult. Further it cannot be said that a child's share awarded to a surviving spouse is a reasonable provision out of the deceased spouse's estate. To do such would amount to ignoring the surviving spouse's contribution to the estate. Tragically, this has been the statutory law for the past sixty years.

[62] Section 14(2) of Act No.1 2005 provides as follows;

"The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive , Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural

and legal persons in Swaziland, and shall be enforceable by the courts as provided in this constitution."

Section 35(1) of Act No.1 of 2005, compliments Section14 (2) and it states as follows;

"Where a person alleges that any of the aforegoing provisions has been , is being, or is likely to be , contravened in relation to that person…..then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress"

[63] ***In casu*** , the 1st , 2nd and 3rd Respondents seek an order striking down, Section 2(3) of Act No.3 of 1953 on the basis that it is inconsistent with Section 34(1)of Act No.1 of 2005 and therefore unconstitutional. They argue that by invoking the above Section in the distribution of the estate of their late husband, violates their fundamental rights and freedom, and that are they as such, entitled to seek redress in this court.

[64] This Court derives its remedial power to enforce the rights in the Bill of Rights under Section 2(1) of the Constitution which states that:

"This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution, that other law shall, to the extent of inconsistency, be void"

The aforegoing is also in the tandem with Section 14(2) *supra*.

[65] The South African Constitutional Court was faced with a similar position, in the following cases:-

Bhembe and others V The Magistrates Court, Kayelitsha and others case CCT 49/03

Shibi V Sithole and Others case CCT 69/03

South African Human Rights Commission and Another V President of the Republic of South Africa and Another case CCT 50/03

The cases concerned Constitutional challenges to the rule of primogeniture as it applied to African customary law of succession .They also challenged Section 23 of the Black Administration ACT 38 OF 1927 together with the Regulations promulgated in terms of that Section and Section 1(4) (b) of the Intestate Succession Act, 81 of 1987.

The Constitutional Court upheld the challenges, struck down the impugned statutory provisions and regulations, and put in place a new interim regime to govern intestate succession for black estates.

At paragraph 115 of the Majority Judgment delivered by the then Deputy Chief Justice Langa, he stated as follows;

"I consider, nevertheless, that the legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions. It is the appropriate forum to make the

adjustments needed to rectify the defects identified in the customary law of succession. What should be borne in mind is that the task of preventing ongoing violations of human rights is urgent.

The rights involved are very important, implicating the foundation values of our constitution .The victims of the delays in rectifying the defects in the legal system are those who are among the most vulnerable of our society"

He went on to state that;

"The court's task to facilitate the cleansing of the statute book of legislation so deeply rooted in our unjust past, while preventing undue hardship and dislocation. The court must accordingly fashion an effective and comprehensive order that will be operative until appropriate Legislation is put in place. Any order by this court should be regarded as an interim in measure. It would be undesirable if the order were to be regarded as a permanent fixture of the customary law of succession."

The order of the court as formulated below seeks to follow these guidelines while

we remain mindful of distinctly different function of the three arms of government.

[66] Generally, costs orders in litigation lie within the discretion of the Court which hears and determines the matter before it. Although there are no absolute hard and fast rules, the discretion may also not be arbitrarily exercised. The duty of the Court remains to also carefully apply its mind to the issue of costs and each litigant is also afforded an opportunity to make its submissions in this regard.

[67] Presently, the sixteen applicants have included a prayer for costs, to be paid by the Respondents in the event of opposition. On the other hand, the Respondents pray for a dismissal of the application with costs at the punitive scale.

[68] If over simplistic and mechanical methods were to be used, the Applicants could have argued that since they withdraw the application, the Respondents did not need to oppose it. However, the Respondents, and in particular the first three, i.e. the widows and also the 4th to 10th Respondents, the children who did not want their mothers to inherit as little as possible, were indeed required to oppose an application adverse to them. If not, they could well have been found to be in acquiescence and that they tacitly agreed with an application because they did not oppose.

[69] Not only did they oppose the application but they also are essentially victorious. Indeed, their counter application shall in the years to come be remembered as the cornerstone of awakening the legislature from almost nine years of non-compliance with their constitutionally imposed duty to act. If not for this counter

application, the adverse discrimination against surviving spouses in intestate customary law marriages might as well have continued indefinitely.

[70] Mechanically, it could thus be said that the Respondents were not only successful, but monumentally so, and since they prayed for costs on a punitive scale, they should get it. However, that would be a misdirection by this Court, as in our view the matter is not so simplistic as to merely hold that costs follow the event, at the scale prayed for.

[71] We would also err to hold that the Applicants must perforce pay the costs because they not only ended up with an order in direct contrast with what they initially came to Court for, but also that they withdraw it well knowing that it would not be the end of the matter and that a counter application was on the verge of being filed. Likewise, we would also err if we were to say that the conduct of the Applicants was so repugnant that they must be "shown their place" by a punitive costs order. Indeed, their wish was for their mothers to inherit less and not more. Still, it is in consonance with existing legislation, for the upholding of which they cannot be mulcted with costs.

[72] During the hearing of the matter, Attorney Dlamini for the Applicants (in the counter-application), though initially seeking to persuade the Court to grant costs in his favour from the estate, later abandoned this mission and conceded that in such matters, the established principle in litigation being that '*costs follow the event'* is relaxed so as not to discourage would be litigants from seeking to

enforce the Constitutional rights enshrined in the Constitution. This concession by Mr Dlamini and indeed Mr Kunene for the State is applauded and encouraged. The "Bill of Rights Handbook" at p.138 provides that;

"The Constitutional Court has indicated that in constitutional litigation an additional principle applies. It is that litigants should not be deterred by the threat of an adverse costs order from approaching a Court to litigate on an alleged violation of the Constitution. If the issues raised by the applicant in a constitutional case are raised in good faith and not vexatiously... and if the proceedings instituted by the applicant lead to the resolution of those issues, the applicant [or respondent as the case may be] should not be penalised by a costs order even if an adverse decision has been given against him or her."

In this view, the present matter falls squarely within this niche.

[73] In our considered view, the most revered social unit is the family. The father, mother or mothers as may be and the children from such marriage(s) are the basic cohesive foundation of society in this Kingdom. Obviously, the distribution and liquidation of the estate of the late Chief Ndzimandze has already inflamed different personalities in the ongoing saga but it has also brought to the fore one of the less cherished personality traits – greed and selfishness.

[74] With that said adverse costs orders against one faction of the family is certainty not prone to restore good relationships. Though it refers to industrial and not

family relationships, the following dictum which deals with the phrase "according to the requirements of law and fairness," comes to mind:

> "*Frequently, the parties will have an ongoing relationship that will survive after a dispute has been resolved. A costs order, especially where the dispute has been a* bona fide *one, may damage the relationship and thereby detrimentally affect Industrial peace and the conciliation process".* (See National Union of Mineworkers vs East Rand Gold and Uranium Co. Ltd (1991) 12 ILJ 1221 (A)).

[75] We are in agreement with the salient principle of fostering reconciliation, peace, respect and forgiveness, extrapolated to the extended family unit before us. We heard argument in favour of costs to be borne by the estate itself, but it would universally diminish each one's share proportionally. It is a well-known fact that legal costs in litigation relating to deceased estates could well erode an entire legacy, the only real beneficiaries being legal practitioners.

[76] On careful consideration, we have rather opted to make no adverse costs order at all, instead leaving each litigant liable to pay his and her own legal costs, recoverable by their respective attorneys from the individuals.

ORDER OF THE FULL COURT

[77] In view of Section 34 (1) of the Constitution of the Kingdom of Swaziland Act of 2005 (Act 1 of 2005), Section 2(3) of the Intestate Succession Act of 1953 (Act 3 of 1953) is hereby declared unconstitutional and struck down.

[78] Until Parliament has enacted legislation to regulate the property rights of spouses including common law husband and wife, the Master of the High Court (the 11th Respondent) is hereby ordered and directed to distribute and liquidate deceased estates in accordance with the provisions of Section 34(1) of the Constitution of Swaziland, by equating customary law marriages to civil law marriages in community of property.

No adverse costs order is made – each litigant to pay his or her own legal costs.

Thus ordered on this the 23rd day of September 2014.

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JACOBUS P. ANNANDALE
JUDGE OF THE HIGH COURT

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JUSTICE M. MAVUSO
ACTING JUDGE OF THE HIGH COURT

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BONGANI S. DLAMINI
ACTING JUDGE OF THE HIGH COURT

Heard: 2nd September 2014

Delivered: 23rd September 2014