



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Case No. 55/2014

HELD AT MBABANE

**In the matter between**

**THE ATTORNEY-GENERAL**

**Appellant**

and

**TITSELO DZADZE NDZIMANDZE (Nee Hlophe)**

**1<sup>st</sup> Respondent**

**JOYCE NTOMBI NDZIMANDZE (Nee Tfwala)**

**2<sup>nd</sup> Respondent**

**THANDI ROSE NDZIMANDZE (Nee Dlamini)**

**3<sup>rd</sup> Respondent**

**PHUMZILE NDZIMANDZE**

**4<sup>rd</sup> Respondent**

**MAKHOSI NDZIMANDZE**

**5<sup>th</sup> Respondent**

**JABULANE NDZIMANDZE**

**6<sup>th</sup> Respondent**

**THOBILE NDZIMANDZE**

**7<sup>th</sup> Respondent**

**NOMSA NDZIMANDZE**

**8<sup>th</sup> Respondent**

**CHARLES NDZIMANDZE**

**9<sup>th</sup> Respondent**

**WANDILE NDZIMANDZE**

**10<sup>th</sup> Respondent**

**THE MASTER OF THE HIGH COURT**

**11<sup>th</sup> Respondent**

<b>WEZZY NDZIMANDZE</b>	<b>12<sup>th</sup> Respondent</b>
<b>FUTHENI NDZIMANDZE</b>	<b>13<sup>th</sup> Respondent</b>
<b>EDDIE NDZIMANDZE</b>	<b>14<sup>th</sup> Respondent</b>
<b>SITELEGA THABSILE NDZIMANDZE</b>	<b>15<sup>th</sup> Respondent</b>
<b>MSHUMAYELI NDZIMANDZE</b>	<b>16<sup>th</sup> Respondent</b>
<b>MAJAWONKHE NDZIMANDZE</b>	<b>17<sup>th</sup> Respondent</b>
<b>TEMDZABU NDZIMANDZE</b>	<b>18<sup>th</sup> Respondent</b>
<b>SHERLEY NDZIMANDZE</b>	<b>19<sup>th</sup> Respondent</b>
<b>BONSILE NDZIMANDZE</b>	<b>20<sup>th</sup> Respondent</b>
<b>NCOBILE NDZIMANDZE</b>	<b>21<sup>st</sup> Respondent</b>
<b>BOY NDZIMANDZE</b>	<b>22<sup>nd</sup> Respondent</b>
<b>SIGCOKO NDZIMANDZE</b>	<b>23<sup>rd</sup> Respondent</b>
<b>CEDUSIZI MAGANU NDZIMANDZE</b>	<b>24<sup>th</sup> Respondent</b>
<b>MTHIMBA NDZIMANDZE</b>	<b>25<sup>th</sup> Respondent</b>
<b>CEBILE NDZIMANDZE</b>	<b>26<sup>th</sup> Respondent</b>
<b>SHANA PHILISWA NDZIMANDZE</b>	<b>27<sup>th</sup> Respondent</b>
<b>ZENZO NDZIMANDZE</b>	<b>28<sup>th</sup> Respondent</b>

Neutral citation: *Attorney General v Titselo Dzadze Ndzimandze (Nee Hlophe) & 27 Others (55/2014) [2014] SZSC 78 (3 DECEMBER 2014)*

Coram: EBRAHIM J.A., MOORE J.A., DR. S. TWUM J.A.,  
OTA J.A. and LEVINSOHN J.A.

Heard: **12 NOVEMBER 2014**

Delivered: **03 DECEMBER 2014**

**Summary: A Chief died intestate – Survived by three wives and 24 children – Two wives had pre-deceased him – Under section 2 (3) of the Intestate Succession Act of 1953 (Act 3 of 1953) surviving spouse entitled to a child’s share or E1200 whichever is the greater – Under section 34 (1) of the Constitution a surviving spouse is entitled to a reasonable provision out of the estate of the other spouse – Order of the Full Court of the High Court affirmed – Section 2 (3) of the Intestate Success Act of 1953 (Act 3 of 1953) declared unconstitutional and struck down – Master of the High Court ordered and directed to distribute and liquidate deceased estate 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.**

## **JUDGMENT**

**MOORE JA**

### **INTRODUCTION**

[1] On or about the 17<sup>th</sup> June 2013 the late Chief Sibengwane Ndzimandze died intestate. He was survived by three wives. Two other wives had predeceased him. Out of these five unions, the deceased had fathered 24 children who survived him. They were therefore 27 claimants upon the estate of the

deceased. Disputes and discords ensued between the survivors. Litigation followed. Eventually the Full Court of the High Court ordered that:

*“[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 11<sup>th</sup> 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.”*

## THE ISSUE

- [2] The burning issue before that Court was whether the estate of the deceased Chief was to be distributed under the terms of the 60 year old THE

INTESTATE SUCCESSION ACT, 1953: Date of commencement: 23<sup>rd</sup> January 1953 or under section 34 (1) of the Constitution.

[3] Having conducted a full hearing of the matter the Full Court of the High Court comprising of Annandale J, Dlamini AJ and Mavuso AJ made the order reproduced in paragraph [1] above.

[4] Evidently believing that it was his duty to do so in the public interest, the Attorney General filed a Notice of Appeal in the name of the Government upon the following grounds:

*“1. The court **a quo** erred in law and in fact in holding/assuming that the Intestate Succession Act, 1953, applies to deceased estates regulated by Swazi customary law;*

*2. The court **a quo** erred in law and in fact in holding/assuming that the Master of the High Court (11<sup>th</sup> Respondent) has a role to play in deceased estates regulated by Customary Law;*

*3. The court **a quo** erred in law in holding and declaring that section 2 (3) of the Intestate Succession Act 1953 is inconsistent with the provisions of section 34 of the Constitution.*

4. The court **a quo** erred in conferring the Master of the High Court (11<sup>th</sup> Respondent) by implication with (legislative) authority to determine and define ‘reasonable provision’ and ‘common law’ spouse in terms of section 34 of the Constitution.

5. The court **a quo** erred in law and in fact in equating Swazi customary marriage with (civil) marriage out of community of property:

6. The court **a quo** erred in law and in fact in holding that the Intestate Succession Act, 1953, is discriminatory (in fact or in effect) in that it makes a customary law widow to be a minor (and not a widower);

7. The court **a quo** erred in law and in fact in holding and declaring that by section 34 the Constitution has abolished the distinction between civil and customary rites marriages;

8. The court **a quo** erred in law and in fact in holding that the Intestate Succession Act 1953 only gives to the surviving spouse (a widow) only a child’s share limited E1,200.00 of the deceased estate;

9. The court **a quo** erred in law and in fact in holding that the provisions of section 2 (3) of the Intestate Succession Act, 1953 are necessarily in conflict with “reasonable provision under section 34 (1) of the Constitution;

10. The court **a quo** erred in holding by implication that the provisions of Swazi Customary Succession are repugnant to general principles of humanity.

11. The court a quo erred in directing/ordering the Master of the High Court (11<sup>th</sup> Respondent) to distribute and liquidate deceased estates in accordance with section 34 (1) of the Constitution.

12. The court a quo erred in not suspending the invalidity of section 2 (3) of the Intestate Succession Act 1953 and allowing Parliament to comply with section 34 (2) of the Constitution within a specified period.

## THE INTESTATE SUCCESSION ACT 1953

[5] This Act, which stood still for over six decades, violates the universal principle that whereas the law must be stable, it cannot stand still. In 2005, this Act was overtaken by the Constitution which is the supreme law. The Full court reached the unanimous conclusion, with which this Court agrees, that:

*“It is also abundantly clear that contrary to the express 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.”*

- [6] Sub-section (2) of section 2 of the Act, despite its manifest imperfections as viewed in the year 2014, was gender neutral even in those benighted colonial days: it reads:

*“If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed **ab intestato**, the surviving spouse shall succeed to the extent of child’s share or to so much as, together with the surviving spouse’s share in the joint estate, does not exceed one thousand two hundred Emalangeni in value (whichever is a greater).”*

- [7] The major complaint against that sub-section is that (a) it reduces a surviving spouse to the status of a child and (b) it limits the surviving spouse’s share in the joint estate to the miniscule sum of E1200 which sum, despite the vigorous defence of its adequacy by the Attorney General, converts to the trifling amounts of US \$109.37 or £69.68 Sterling. Be it



remembered also that this is not a monthly payment: but rather a one off, once for all, award.

- [8] The Full Court of the High Court, which is well qualified and knowledgeable about the prevailing value of the Emalangeneni when they gave judgment on 23<sup>rd</sup> September 2014 declared that:

*“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.”*

The lingering sum of E1200 under the 1953 Act is an example of the anomalies which frequently arise when a statute remains upon the books for six decades without amendment, and illustrates the need for an active law reform or law revision committee or commission.

## GENDER EQUALITY

- [9] The captioned matter warrants close consideration: not only because of its potential impact on the future of women in the continuing evolution of Swazi society, but also because of the strenuous arguments in the Heads of Argument by the learned Attorney General, that the growing momentum

towards the achievement of gender equality, which was one of the underlying bases of the Full Court's judgment, **“has the effect of dismantling the Swazi family as we know it.”**

[10] This topic must now be examined against the background of the Constitution of this Kingdom which is the supreme law, rather than from the standpoint of traditionalists who argue for the preservation of Section 2 (3) of the Intestate Succession Act of 1953 (Act 3 of 1953) which the Full court declared unconstitutional and accordingly struck down. The study of the new Constitutional dispensation reveals the considerable lengths to which the framers went to redress pre-existing gender imbalances, and validates the judgment of the Full Court which is based upon the solid rock of constitutional principles and precepts.

[11] The Heads of Argument of the Learned Attorney General posit that:

*“Whilst pointing out that section 252 has a role in determining the proper choice of law, the Learned Chief Justice also stated “. . . it must be stressed that the constitution is informed by very strong traditional values”. This of course is true and that is why the courts of Swaziland should not uncritically follow some of the foreign decisions such as touch on gender equality and discrimination. **Such***

*decisions may be instructive at the general level but quite poisonous in their detail.*” Emphasis added.

[12] The preamble to the Constitution of this Kingdom describes it as a meld of “**the good institutions** of traditional Law and Custom with those of an open and democratic society” which seeks “to protect and promote the fundamental rights and freedoms of ALL in our Kingdom.” It also seeks “to guarantee the happiness and welfare of ALL our people” Emphasis added.

[12] Section 252 (2) of the Constitution to which reference was made in paragraph [10] above reads thus:

*“Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi Law and Custom) are hereby recognized and adopted and shall be applied and enforced as part of the law of Swaziland.”*

Sub-section (2) must, however, be read subject to the qualifying sub-section (3) which specifies that:

*“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.”*

For the sake of clarity it must be pointed out that that there are five inconsistencies which restrict and limit the application of subsection (2).

These are:

- i. Inconsistency with a provision of this Constitution.
- ii. Inconsistency with a statute.
- iii. Repugnance to natural justice.
- iv. Repugnance to morality.
- v. Repugnance to general principles of humanity.

[13] Section 20 sub-section (5) recognizes the pre-constitutional existence of social, economic or educational or other imbalances in society, and empowers Parliament to enact laws that are necessary for redressing those imbalances. Clearly, gender inequality is one of those pre-constitution areas of discrimination which Parliament was mandated to address upon a continuing, developing, and evolving basis. The whole of section 20 bears reproduction here. Its important provisions are:

*“20. (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*

*(2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of **gender**, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.*

*(3) For the purposes of this section, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by **gender**, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.*

*(4) Subject to the provisions of subsection (5) Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.*

*(5) Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society.”*

[14] Section 27 (1) adds to the fleshing out of the skeleton of gender equality. It declares that “men and women of marriageable age have a right to marry and found a family.” In the same gender neutral vein sub-section (2) says that “marriage shall be entered into only with the free and full consent of intending spouses”. Section 28 adds yet another vital plank to the gender

neutral edifice of the Constitution. It deals specifically with the rights and freedoms of women. It reads:

*“28. (1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.*

*(2) Subject to the availability of resources, the Government **shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.***

*(3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.*

[15] The critical importance of section 34 (1) has been discussed in following paragraphs. The concept of equality before the law and security of the person are restated in section 38 as are the rights and freedoms enumerated in (a) to (e) thereof which are guaranteed to persons of both genders in equal measure.

## THE MONARCHY

[16] Chapter II of the Constitution is captioned MORNACHY. It describes the elements of the highest institution in the nation of Swaziland both in its traditional and non-traditional characteristics. At the very pinnacle of Swazi life in all of its important manifestations sits the King and iNgwenyama who is a symbol of unity and the eternity of the Swazi Nation. Another important royal personage – reflecting female participation at the summit of the Swazi Nation is the Ndlovukazi who is invested with the functions and responsibilities assigned to her as Queen Regent. Sub-section (2) of section 7 reads:

*“Until the King and iNgwenyama has been installed, that is to say, until he has publicly assumed the functions and responsibilities of the King and iNgwenyama in accordance with this Constitution and Swazi Law and Custom, or during any period when he is by reason of absence from Swaziland or any other cause unable to perform the functions of his office, those functions shall be performed, save as otherwise provided in this Constitution, by the Ndlovukazi acting as Queen Regent.”*

[17] The Ndlovukazi as Queen Regent performs the functions of the King and iNgwenyama in the circumstances described in the section. The Ndlovukazi

is therefore not a mere consort of the King as is the case of other monarchies in other parts of the world. The characteristics of the Ndlovukazi are set out in section 229 of the Constitution thus:

*“(1) The Ndlovukazi (Queen Mother) is traditionally the mother of the iNgwenyama and the symbolic Grandmother of the Nation.*

*(2) The Ndlovukazi is selected and appointed in accordance with Swazi law and custom.*

*(3) The official residence of the Ndlovukazi is the legislative and ceremonial capital of the nation and the arena of the Incwala and Umhlanga.*

*(4) The Ndlovukazi has such powers and performs such functions as Swazi law and custom assigns to her.*

*(5) Without derogating from the generality of subsection (4) the Ndlovukazi exercises a moderating advisory role on iNgwenyama.*

*(6) The Ndlovukazi shall be immune from-*

*(a) suit and legal process in any civil case in respect of all things done or omitted to be done by her in her private capacity; and*

*(b) being summoned to appear as a witness in any civil or criminal proceedings.*



*(7) The Ndlovukazi shall be immune from taxation in respect of emoluments or any income accruing to her in her private capacity and all property owned by her in her private capacity.”*

The Queen Regent enjoys immunities similar to those enjoyed by the iNgwenyama and is empowered to make specific instructions to the ***Umntfwanenkhosi Lomkhulu (Senior Prince)***.

[18] Chapter III is captioned PROTECTION AND PROMOTION OF FUNDAMENTAL RIGHTS AND FREEDOMS. Its opening sentence in section 14 (1) is gender neutral: employing the expressions “individual” rather than “man” or “woman”. This deliberate strategy is designed to ensure that both genders are afforded the same rights and protections afforded to all persons by the Constitution. The gender neutral phrases “A person of whatever gender” and “the rights and freedoms of others” are employed in section 14 (3). Throughout this vitally important Chapter, gender neutral expressions such as “a person”, “any person”, “a vagrant”, “persons with disabilities”, “a worker”, “employees”, “surviving spouse”, and “member” are deliberately employed to guarantee that persons of both genders are afforded equal access to, and enjoyment of, the rights and freedoms laid down in the Chapter.

## SECTION 34 OF THE CONSTITUTION

[19] The first thing to note is that this section is gender neutral. Secondly, that it applies to marriages by **civil** or **customary** rites. It is captioned:

### ***Property rights of spouses***

Subsection (1) reads:

*“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.**”* Emphasis added.

The wording of the subsection is reflective of the modern day reality that both spouses may die owning property in their own right or jointly with the surviving spouse. Many years ago, women, after much struggle, emerged from the inferior status of a ward of her husband, to the present situation where she can legally own property as a *feme sole* whether she is married or not. This new reality is of course subject to the rules relating to marriage in community of property.

[20] The new reality is that in many cases, the wife is the principal earner in the marriage or even the sole provider for the family. The portents are that, going forward, the concept of gender equality will become the new reality

even though much progress still needs to be made. Gender equality has nearly been realized in institutions of higher learning both among students and faculty in many parts of the modern world. Indeed, the new concern has to do with the relative under achievement of male students.

[21] In a word, section 34 of the Constitution recognizes and provides for the application of gender equality in the matter of the property rights of surviving spouses. But the real live issue here concerns surviving widows of polygamous marriages. This problem arises in most cases such as this because of the notorious fact that the great majority of women survive their husbands. The far sighted framers of section 34 of the Constitution conferred upon ALL surviving spouses, the entitlement to a reasonable provision out of the estate of the other spouse. This was a clear abrogation of the manifestly discriminatory provisions of The Intestate Succession Act 1953 which limited the surviving spouse's entitlement to a maximum of a child's share or E1200 whichever is greater. The inadequacy of E1200 has been discussed in paragraphs [6] – [7]. Where, as in this case, there are many surviving children, a child's share will inevitably be considerably reduced.

[22] Notwithstanding the progressive and modernizing section 34 of the Constitution the Attorney General nevertheless argues that:

*“The operation of section 34 (1) should not necessarily do away with the notion of a ‘child’s share’ or the different types of marriages. It would indeed be a sad day when the different types of marriages would be abolished in this country.”*

I do not understand section 34 to abolish any form of marriage. Indeed, it recognizes, and applies to, marriages by customary rites. Many couples and their families happily enjoy both a traditional as well as a non-traditional form of marriage. The utility of section 34 was clearly designed as a correction to pre-existing regimes governing the property rights of spouses. This much was admitted by the Appellant in paragraph 16.6 of his Heads of Argument which reads:

*“What may not be denied however is that section 34 (1) will affect or modify (to what extent it is presently unclear) the principle of freedom of testation as we know it, to curb any undue deprivation of a surviving spouse regardless of the type of marriage at issue. It should be made clear that the dispossession of a widow by her in laws is not supported by customary law whenever this has happened.”*

[23] The starting point for considering section 34 (1) of the Constitution must be the preamble which elaborates some of the underlying objectives with which the framers drafted the Constitution. The relevant objectives were:

- i. To start afresh under a new dispensation.
- ii. To establish a sustainable home-grown political order.
- iii. To review the various constitutional documents, decrees, laws, customs and practices so as to promote good governance, the rule of law, respect for our institutions and the progressive development of the Swazi society.
- iv. To blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of our Nation.
- v. To march forward progressively under our new Constitution.

Certain key words and phrases clearly demonstrate that the Constitution was designed to provide for a continuing development and evolution of Swazi society, to remedy laws and institutions which had become outdated and inefficacious with the passage of time, and to avoid a rigid adherence to traditional laws and practices which had become inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice, or

morality, or general principles of humanity as expressly set out in section 252 (3) of the Constitution.

[24] Viewed against this background, it is clear that section 34 (1) of the Constitution was innovative, forward looking, and intended to supplant any law, custom, or practice which was inconsistent with its terms.

#### DIRECTIVE PRINCIPLES

[25] Even though the provisions of sections 57 to 63 inclusive of the Constitution are not enforceable in any court or tribunal, they serve the useful purpose of helping the reader to appreciate the overall ethos and understand the underlying objectives of the Constitution as a whole and serve as useful aids to the interpretation and construction of the Constitution's mandatory provisions. What is more, they help to debunk the antiquated and misogynistic theory that the continuing advancement and development of women must necessarily have a negative effect upon Swazi culture. What those principles do help to promote, is the emancipation of women from the stifling dominance and oppression which they endured with stoic resignation in the past.

[26] Despite welcome advances in the progression of women such as the acquisition of the right to vote, and to serve in the disciplined forces, much still needs to be done before women finally emerge from the shadows of inequality and discrimination into the sunshine of full enjoyment of all the rights and freedoms which the Constitution guarantees to ALL persons.

#### REDRESSING IMBALANCES

[27] With the realities articulated in the foregoing paragraphs fully in mind, the framers deliberately enacted a number of constitutional provisions designed to redress pre-existing imbalances and to accelerate the progress of women towards the desirable of full equality – not only in the so-called women’s areas – but also in such so-called masculine areas such as politics, business, the executive levels of the public service, sport, the disciplined services, and the clergy. The era of the confinement of women to their boudoirs and their kitchens has passed irrevocably into our economic, social and cultural history.

[28] The enlightened and forward looking framers of the Constitution completed their work reflecting inputs from various vusela consultations, economic and constitutional commissions, political experiments and *Sibaya* meetings. The

process of arriving at a national consensus lasted for a decade and a half. It sought to establish a home-grown political order. It also viewed various constitutional documents, decrees, laws, **customs and practices** so as to promote the **progressive development** of this nation. It reflects a national consensus.

[29] The deliberate use of the word “progressive” and its derivatives in the preamble signifies that the Constitution was drafted to be dynamic and capable of being interpreted by the courts in future years in a manner designed to cater for and to recognize the ever changing and evolving characteristics of Swazi society. In this way the framers have avoided the arid controversies in other constitutional democracies between the constructionists who regard the Constitution as having been set in stone, and therefore immutable, and the progressives who view the Constitution as a living document which recognizes and adapts itself to the on-going metamorphosis of the Swazi society which it serves.

[30] Examples of the deliberate and intentional provision for the upgrading of the status of women by redressing some of the errors of the past are:



- i. Section 28 which guarantees the rights and the freedoms of women.
- ii. Section 32 (3) which provides protection for female workers.
- iii. Section 59 (5) which requires the state “in particular to ...take all necessary steps **so as to ensure the full integration of women** into the main stream of economic development”.
- iv. Section 60 (4) which requires the state to “**ensure gender balance** and fair representation of marginalized groups in all constitutional and other bodies.”
- v. Section 84 (2) which declares that “the women of Swaziland, and other marginalized groups have a right to equitable representation in parliament and other public structures”. This provision clearly proceeds upon the premise that before the Constitution came into being, “the women of Swaziland” belonged to the marginalized groups whose representation the Constitution was seeking to ensure and to protect.
- vi. Section 86 is captioned ***Representation of Women***. It ensures that at least four women are elected on a regional basis to the House of Representatives. Section 95 elaborates further provisions designed to ensure the election of a minimum number of women to the House.

- vii. Section 94 (2) provides that “Ten Senators, **at least half of whom shall be female**, shall be elected ... so as to represent a cross-section of the Swazi Society. Sub-section (3) requires that “Twenty Senators, **at least eight of whom shall be female**, shall be appointed by the King acting in his discretion after consultation with such bodies as the King may deem appropriate.”

## STRIKING DOWN

[31] The Full court of the High Court, correctly in the view of this Court, took its bearings from the leading judgment of this Court in **Attorney General v Mary-Joyce Doo Aphane** [2010] SZSC 32 swazilii where “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 recognized 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.*
- 7.

Having considered the law as expressed in **Attorney General v Aphone** *supra* and other relevant authorities the Full Court applied the law to the circumstances of the instant case in these terms:

*“[54] In the present matter, the case is about the distribution of an estate where 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 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,”*

The Full Court was careful to deny any encroachment upon the legislative preserve of Parliament. Paragraph [55] reads thus:

*[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 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.”*

We take it that in the above passages the Full court has used the expressions “spouses” and “partners” interchangeably.

[32] Having correctly identified the unconstitutional defects in the ancient Intestate Succession Act 1953 (Act 3 of 1953), and the mischief which it was capable of continuing to work, their Lordships concluded that:

*“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 crystallized 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.”*

The Order of the Court, with which this Court agrees, has been set out in paragraph [1] above.

## CONCLUSION

[33] The Constitution of the Kingdom of Swaziland Act, 2005 (Act No: 001) of 2005 effected a bold modernization of its principles while preserving some elements of Swazi Law and Custom. Inevitably, as the Swazi society developed, and Swazi Law and Custom evolved over the years, a certain lag began to grow between traditional norms, customs and values as against the swifter evolution of modernity. In this process citizens sometimes discovered that they had suffered wrongs for which there was no adequate remedy under the existing law. The case of the **Attorney General v Aphane** above was such a case. In order to bring relief to the Plaintiff, this Court effected a correction to an obsolete piece of legislation by using the remedial tools referred to in paragraph [31] above.

[34] In this case surviving spouses could get no justice under the provisions of the 1953 law which reduce them to the status of a child and limited the amount they could take upon the intestacy of a deceased spouse to the meagre sum – having regard to today’s value of money – of E1200. The

Full Court of the High Court, pending action by the legislature under section 34 (2), brought relief to the plaintive widows by striking down the ineffective Intestate Succession Act by giving effect to the remedial provisions of section 34 (1) of the Constitution of this Kingdom.

ORDER

[34] It is order of this Court that:

- i. The appeal be and is hereby dismissed with costs.
- ii. The orders of the Full Court of the High Court be and are hereby affirmed.

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**S.A. MOORE**  
**JUSTICE OF APPEAL**

I agree

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**A.M. EBRAHIM**  
**JUSTICE OF APPEAL**

I agree

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**E.A. OTA**  
**JUSTICE OF APPEAL**

I agree

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**P. LEVINSOHN**  
**JUSTICE OF APPEAL**

**DR S. TWUM J.A.**

[1] This is an appeal lodged by the Attorney-General for the Government of Swaziland from the judgment of the Full Bench of the High Court (Coram: - Annandale J, Dlamini AJ and Mavuso J) in Civil Case No. 981/2014, entitled *Wezzy Ndzimandze and 16 Others vs Titselo Dzadze Ndzimandze and 13 Others*. It was a case of customary succession laced with a need for vibrant constitutional adjudication.

[2] The deceased was Chief Sibengwane Ndzimandze. He was survived by three wives, all married to him under Swazi customary law, and 24 children.

One of the widows, Titselo Dzadze Ndzimandze said she was married to him in 1972. About a year after her marriage, King Sobhuza II had by His Proclamation of 1973 repealed the previous Constitution which had ushered Swaziland into independence from Britain on 6<sup>th</sup> September 1968. It was not until 2005 that a new Constitution of the Kingdom of Swaziland was enacted as Act No. 1 of 2005. It is this Constitution that was to determine the fortunes of a motley array of suitors in this case. But more of that anon!

[3] Heirs and Beneficiaries

Seventeen (17) of the Chief's 24 children applied to the High Court for appropriate relief as descendants and so beneficiaries in their deceased father's estate under case No. 98/14. They were the Applicants. There were three (3) groups of Respondents. 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the surviving widows. The 4<sup>th</sup> – 10<sup>th</sup> Respondents were also children of the deceased who simply opposed the application by their siblings. The final group of Respondents comprised the Master of the High Court, the Minister of Justice and Constitutional Affairs, the Government of Swaziland and the Attorney General.

[4] The Applicants



In their application, the Applicants claimed:-

- (a) To be heirs and beneficiaries of their father's estate due to be administered and distributed by the Master of the High Court (11<sup>th</sup> Respondent) (hereinafter referred to as the "Master").
- (b) That the Minister of Justice and Constitutional Affairs had made a pronouncement termed "policy" on 14<sup>th</sup> July 2014, declaring that the estate of their father should be distributed by the Master using the one formula which took no cognizance of whether he was married to any, or all of his wives, deceased or him surviving, by civil rights or Swazi Law and Custom.
- (c) They claimed that the Master was minded to use this "policy" in the administration and distribution of their father's estate. They contended that the said directive and/or pronouncement was wrongful, irregular and invalid and therefore should not be used.
- (d) They prayed for an order from the Court directing the Master to distribute their father's estate in accordance with section 2 (3) of the Intestate Succession Act, No 3 of 1953.

- (e) Finally, they prayed for an order that their father's surviving spouses (i.e. widows) appearing in the record as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, be removed as executrices of the estate of their father and that a neutral person be appointed as executor.

[5] The widows:

- (a) On behalf of herself and on behalf of the two other widows, the 1<sup>st</sup> Respondent, Titselo Dzadze Ndzimandze swore to an Answering Affidavit in which she claimed that she and the other two were widows of the deceased. She emphasised that she swore to the affidavit on behalf of the 3 widows. They claimed to be concerned about the formula which it appeared the Master was going to use in the distribution of their late husband's estate. They said, upon legal advice, they would insist that s.34(1) of the Constitution should be used in distributing their husband's estate instead of s.2(3) of the Intestate Succession Act, 3 of 1953, as the Applicants had urged him to do.
- (b) The 1<sup>st</sup> Respondent deposed in paragraph 38 of her affidavit that the Master had earlier allocated the sum of E30, 000.00 to each of the

widows, but had subsequently changed that to only E14, 000.00. She opined that the widows had contributed immensely to the development and acquisition of their husband's estate. She said the Kingdom's Constitution recognised their contribution and had provided therein that widows should be entitled to a "reasonable provision" out of that estate.

- (c) Madam Titselo Dzado Ndzimandze continued by saying the surviving widows apprehended harm to their interests if the Master was allowed to allocate to each of them only twice a child's share. Consequently, she prayed that s.2(3) of the Intestate Succession Act should be declared unconstitutional and that s.34 (1) of the Constitution should rather be applied. She also stated in paragraph 44.2 of her affidavit that currently the widows were staying at different Royal Kraals. She said they were not employed and had no sources of income. She said they had lost their husband and the only pillar of their survival. She said the 17 Applicants were self-dependant and were gainfully employed or were positioned to fend for themselves. She said it was therefore unreasonable that they should be expected to share equally with the Applicants who had their own

means of livelihood and who too easily forget that they are their mothers. In sum, she said, the most quintessential matter to be dealt with in the proceedings was the formula to be used by the Master in the distribution of the estate of their deceased husband. They opted for the application of s.34 (1) of the Constitution instead of s.2 (3) of the Intestate Succession Act – No. 3 of 1953. Additionally in effect the three widows sought to interdict the Master from implementing the Minister's directive given to him, apparently under s.75(1) of the Constitution. The widows also claimed that they were aware of an alleged practice in the Master's office whereby a spouse would receive twice a child's share. The Constitution had provided a remedy for them and that is what they wanted.

[6] Matters took an unexpected turn. On 6<sup>th</sup> August 2014, the Applicants withdrew their Notice of Motion and Founding Affidavit and tendered costs occasioned thereby. On 22<sup>nd</sup> August 2014, the Attorneys for the Applicants sought leave to withdraw as attorneys of record. This application was heard by His Lordship, the Chief Justice. He refused it on the ground that it was a matter of extreme national importance. He also added that the Court was already seized with the matter and there was a need to interpret s.34 (1) of

the Constitution as against s.2 (3) of the Intestate Succession Act 1953. Further, he said the Court had already taken into account the fact that the Mamba for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent would be filing a counter-application on or before 15<sup>th</sup> August 2014. After considerable discussion with the attorneys, His Lordship recorded the following consent order:-

- (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 of 1953 is valid or whether it is in contravention of s34(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.

[7] The 14<sup>th</sup> Respondent, the Attorney General, filed Notice of Intention to Oppose the Application but he filed no affidavit in support. Further, notwithstanding the refusal of His Lordship the Chief Justice, to grant

learned counsel for the Applicants, leave to withdraw, the record shows that neither the Applicants nor their counsel appeared at the hearing before the court a quo. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, of course, appeared and assisted the Court in the best traditions of the Bar. They had made a counter-application on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It was to this purpose that they prayed for an order that sections 2 (3) of the Intestate Succession Act 1953, should be declared inconsistent with s34 of the Constitution and so invalid.

[8] Judgment: At the end of the trial the Court made the following orders:-

- (i) 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.
- (ii) Until Parliament has enacted legislation to regulate property rights of spouses, including common law husband and wife, the Master of the High Court (the 11<sup>th</sup> Respondent) is hereby ordered and directed to distribute and liquidate deceased's

estate in accordance with the provisions of section 34(1) of the Constitution of Swaziland, by equalising customary law marriages to civil marriages in community of property. (emphasis supplied).

- (iii) No adverse costs order is made- each litigant to pay his or her own legal costs.

### **Attorney General's Appeal**

[9] On 25<sup>th</sup> September 2014, the Attorney General appealed on behalf of the Government upon the following grounds:-

- “1. The court *a quo* erred in law and in fact in holding/assuming that the Intestate Succession Act, 1953, applies to deceased estates regulated by Swazi customary law;
2. The court *a quo* erred in law and in fact in holding/assuming that the Master of the High Court (11<sup>th</sup> Respondent) has a roll to play in deceased estates regulated by Customary Law;

3. The court *a quo* erred in law in holding and declaring that section 2(3) of the Intestate Succession Act 1953 is inconsistent with the provisions of section 34 of the Constitution.
4. The court *a quo* erred in conferring the Master of the High Court (11<sup>th</sup> Respondent) by implication with (legislative) authority to determine and define ‘reasonable provision’ and ‘common law’ spouse in terms of section 34 of the Constitution.
5. The court *a quo* erred in law and in fact in equating Swazi customary marriage with (civil) marriage out of community of property;
6. The court *a quo* erred in law and in fact in holding that the Intestate Succession Act, 1953, is discriminatory (in fact or in effect) in that it makes a customary law widow to be a minor (and not a widower);



7. The court *a quo* erred in law and in fact in holding and declaring that by section 34 the Constitution has abolished the distinction between civil and customary rites marriages;
8. The court *a quo* erred in law and in fact in holding that the Intestate Succession Act 1953 only gives to the surviving spouse (a widow) only a child's share limited E1200.00 of the deceased estate;
9. The court *a quo* erred in law and in fact in holding that the provisions of section 2(3) of the Intestate Succession Act, 1953 are necessarily in conflict with "reasonable provision under section 34(1) of the Constitution.
10. The court *a quo* erred in holding by implication that the provisions of Swazi Customary Succession are repugnant to general principles of humanity.
11. The court *a quo* erred in directing/ordering the Master of the High Court (11<sup>th</sup> Respondent) to distribute and liquidate

deceased estates in accordance with section 34(1) of the Constitution.

12. The court *a quo* erred in not suspending the invalidity of section 2(3) of the Intestate Succession Act 1953 and allowing Parliament to comply with section 34(2) of the Constitution within a specified period.”

[10] Some 12 grounds were set out. In my view grounds 1,3 and 9 deal with whether or not s.2(3) of the Intestate Succession Act 1953 are inconsistent with s.34(1) of the Constitution, are therefore invalid and should be struck down. I am fully in agreement with the views of the Full Bench that s.2(3) of Act 3/1953 is unconstitutional and should be struck down. Grounds 4, 5, 7 and 11 discussed the directive which the court *a quo* gave to the Master to distribute the deceased’s estate. This matter has been discussed fully in this judgment. In my view, it is not of such moment as to upset the judgment of the court *a quo*. Admittedly, the statement by the Full Bench was over broad. What I understand that court to mean is that the Master should regard a half share of the estate whether due to a surviving spouse married in civil rites or under the customary law, as “reasonable provision”. With this

clarification, and until Parliament otherwise enacts, the Master may distribute the estate of deceased spouses who died intestate, according to this formula. Finally it is my view that ground 12 goes to no issue and it is accordingly dismissed.

[11] (i) In paragraph 18 of the Judgment, the Court recorded that during the course of hearing argument, the only real material difference between counsel was the manner in which the interim vacuum needs to be addressed until such time Parliament rises to the occasion.

(ii) For the avoidance of doubt, s.34(1) provides :

“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 will or not and whether the spouses were married by civil or customary rites.”

[12] The problem is that there is no provision in section 34 (1) which seeks to equate customary law marriages to civil law marriages. In my view, it was only S2 (3) of the Intestate Succession Act 1953 (No 3) which was said to be inconsistent with s.34(1) of the Constitution. S.2(1) of Act 3 of 1953

provides that subject to s.4, the surviving spouse of every person who dies after the Act wholly or partly intestate, is hereby declared to be an intestate heir of the deceased spouse. This is how the widows, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents became heirs and executrices. Section 2 (3) of Act 3 of 1953 provides:

“Where spouses married out of community of property and the deceased leaves any descendant (blood relationship) who is entitled to succeed on intestacy, the surviving spouse(s) shall succeed to the extent of a child’s share or to so much as does not exceed E1200 in value whatever is greater.) This is the bone of contention – said to be inconsistent with section 34 (1) of the Constitution.

[13] The sub-heading to section 34 is “**Property rights of spouses.**” S.34(1) boldly proclaims that a surviving spouse is entitled to a **reasonable provision** out of the estate of the other spouse. This entitlement is vested and protected under Chapter Three of the Constitution. This gives it added value and may be enforced by application to the High Court. In the case of a spouse married under customary law, the right accrues only upon the death of the other spouse.

[14] Now, what s 34 (1) provides is that irrespective of the type of marriage which the surviving spouse entered into, (and even if the deceased made a will) she or he is entitled to a **reasonable provision** from the deceased's estate. In my view, that "reasonable provision" then becomes a charge on the assets available and should be satisfied before the bulk is distributed according to the incidents of the marriage entered into by the deceased; and whether or not he made a will. Of course, all this is without prejudice to what Parliament will ultimately do under s.34(2).

[15] The word "**reasonable**" is well-known to the law. Under section 29 (7) (b) of the Constitution, a child is entitled to reasonable provision out of the estate of its parents; in Criminal Law, the guilt of an accused persons may have to be proved beyond **reasonable** doubt. In administrative actions, parties may rely on **reasonable** (later, legitimate) expectations; in applications for leave to appeal the applicant must demonstrate that he has **reasonable** prospects of success. Last but not least, only **reasonable** force may be used in self defence. What is **reasonable provision**, will obviously depend upon the circumstances and number of the Applicants, the Respondents and the net value of the deceased's estate. It may be paid by a lump sum or it may be satisfied by periodical payments. Perhaps, in our

African context, the widows, if any, may wish their reasonable provision to be a lump sum. But the decision of what that reasonable provision may be and the conditions and terms for its payment will ultimately be a matter for Parliament. What this Court is doing now is to fill the vacuum created by the striking down of s.2(3) of the Intestate Succession Act 1953 which has been declared unconstitutional. If I may cite one of the preambles to the Constitution in support:

“Whereas all the branches of government are the Guardians of the Constitution, it is necessary that the Courts be the ultimate interpreters of the Constitution.”

What the Court cannot do is to re-write the Constitution. When a Constitution has been so meticulously fashioned and political power in the nation has been carefully shared amongst the various organs and institutions of State, it is imperative that the language used in the Constitution should be given effect to. The indelible line of demarcation in this country is that, generally, it is for Parliament to enact laws and for the Courts to interpret and apply those laws to given fact-situations. I am persuaded from the foregoing that the Kingdom’s Constitution makes the right choices.

[16] Where any widow was married in community of property there may be no need to sort out the value of reasonable provision. The half share of the estate may be considered **reasonable provision**. Of course, the rights of any children to a **reasonable provision** out of their father's estate may also have to be determined under s.29 (7) (b) before the widow's half share is determined. But all this will apply until Parliament enacts legislation pursuant to s.34(2) of the Constitution.

[18] It is THEREFORE ORDRED as follows:-

1. Section 2(3) of the Intestate Succession Act, (No. 3) 1953, is hereby struck down as being inconsistent with s.34(1) of the Constitution. The finding of the Full Bench to this effect is hereby confirmed.
2. Until Parliament otherwise enacts, the Master may, pursuant to section 34(1) of the Constitution, distribute the estate of deceased persons so as to give half-share of the net value of that estate to the surviving spouse(s) whether or not the marriage was under the Swazi law and Custom or under civil rites, and

whether or not the deceased spouse left a will, provided that any bequest made by the deceased will also be given effect to.

3. The directive given to the Master by the Full Bench to distribute the deceased's estate otherwise than as stated in Order 2 above, is hereby set aside.

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**DR. S. TWUM**  
**JUSTICE OF APPEAL**

For the Appellants : Mr. J. Dlamini  
For the Respondent 1<sup>st</sup>, 2<sup>nd</sup>  
and 3<sup>rd</sup> Respondents : Mr. S. P. Mamba  
: Mr. S. Dlamini with him



