IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No. 60/2019

HELD AT MBABANE

In the matter between:

THANDI L. DLAMINI1st Appellant

MASTER OF THE HIGH COURT2nd Appellant

ATTORNEY GENERAL3rd Appellant

and

REGINA T. DLAMINI1st Respondent

THULILE DLAMINI2nd Respondent

Neutral citation: *Thandi L. Dlamini and Two Others vs Regina T. Dlamini and Another* (60/2019) [2020] *SZSC* 9 (09/06/2020)

Coram:DR. B.J. ODOKI JA, S.J.K. MATSEBULA AJA AND M.J. MANZINI AJA.

Heard: 06th April, 2020.

Delivered:09th June, 2020.

SUMMARY: *Statute law – Interpretation thereof – Administration of Estates Act, 1908 – Points in limine disputing the jurisdiction of the High Court over estate of deceased African who was married in accordance with Swazi Law and Custom - During his lifetime deceased married four women – As a sequence of disputing the jurisdiction of the High Court, the jurisdiction of the Master of the High Court was also disputed - Deceased died having immovable properties registered in his name – One of surviving spouses who is also co-executrix refusing to sign liquidation and distribution account and demanding exclusion of immovable property from account claiming that property belongs to her as marital home – Application to High Court for declaratory order for inclusion of immovable property in liquidation and distribution account – Application resisted on grounds that the High Court , in its original jurisdiction, and the Master of the High Court lack jurisdiction – that the estate should be dealt with by a Swazi Court having jurisdiction under or in terms of Swazi Law and Custom – Declaratory Order granted – Appeal – Section 68 of the Administration of Estates Act, 1902 ousts the original jurisdiction of the High Court and orders the Master of the High Court not to interfere in the estates of deceased Africans married in terms of Swazi Law and Custom – Courts give effect to a statute as it stands unless doing so results in absurdity and unjust conclusion – Life styles of the parties considered – Legal practice dictates, unless there are compelling reasons to the contrary, points of law should be dealt with first before merits of the case.*

JUDGMENT

S.J.K. MATSEBULA AJA

The Case

[1]This is an appeal against a judgment of the High Court handed down by Magagula, J on the 3rd October, 2019.

[2]The parties to the appeal are the surviving spouses of the late Mfanasibili Gilbert Dlamini and the Master of the High Court duly represented by the Attorney General. The dispute pertains the administration of the deceased's estate and the choice of law applicable.

[3] In the Court *a quo*, the 1st and 2nd Respondents herein, as Applicants, launched proceedings by way of notice of motion primarily seeking the following relief:

3.1That an order be and is hereby issued declaring the immovable property described as Plot No. 234 of Farm 9 situate in the Manzini District is part of the estate of the Late Mfanasibili Gilbert Dlamini and ought to be included as such in the Liquidation and Distribution Account of the said estate under the Master of the High Court's File EM 140/2016.

3.2That an order be and is hereby issued directing and/or compelling the 1st Respondent to sign the Liquidation and Distribution Account of the

Late Mfanasibili Gilbert Dlamini so as to enable the winding up of the said estate in accordance with the law.

3.3Alternatively to prayer 2 above, removal of the 1st Respondent as co-executor in the Estate of the Late Mfanasibili Gilbert Dlamini EM 140/16.

[4]The 1st Appellant, who was cited as the 1st Respondent, opposed the application. Likewise the Master of the High Court, who was cited as the 3rd Respondent. The Master of the High Court and Attorney General filed separate Notices of Appeal as 2nd and 3rd Appellants respectively.

[5]The facts giving rise to the application which are relevant for the determination of this appeal can be summarised as follows:

5.1The 1st Appellant, 1st and 2nd Respondents are the surviving spouses of the late Mfanasibili Gilbert Dlamini ("the deceased"), all of whom he had married in accordance with Swazi Law and Custom. The deceased died intestate;

5.2Pursuant to his demise his death was duly reported to the Master of the High Court in accordance with Section 2 of the Administration of Estates Act, 1908;

5.3The estate inventory was drawn up, consisting of both movable and two immovable properties. Portion 9 of Farm 234 situate in the District of

Manzini is one of two immovable properties registered in the name of the deceased, and is held under Deed of Transfer No.8/1975;

5.4The 1st Appellant, 1st and 2nd Respondents were nominated (presumably at a meeting of the next of kin convened in terms of the Administration of Estates Act) and they all accepted appointment as co-executrixes of the estate of their late husband;

5.5On the 17th August, 2017 the Master of the High Court issued Letters of Administration No. EM 140/2016 to the 1st Appellant, 1st and 2nd Respondents;

5.6Pursuant to receipt of their Letters of Administration the co-executrixes embarked upon their duty of administering the estate. A series of meetings were held by the deceased's family to discuss the distribution of the estate, but the parties seemed to have failed to reach a common ground, particularly with respect to Portion 9 of Farm 234;

5.7Failure to reach a consensus was mainly due to the fact that the 1st Appellant claimed that Portion 9 of Farm 234 was not part of the estate and belonged to her on account of Swazi Law and Custom. She claimed that the property was her marital home to which she was entitled to use and enjoy during her lifetime as per Swazi Law and Custom;

5.8On the other hand, the 1st and 2nd Respondents contended that the property ought to be included in the distribution of the estate, and the

Appellant could not lay a claim to its ownership as it was title deed land;

5.9 Following the stand-off amongst the family and the co-executrixes, the 1st and 2nd Respondents sought the intervention of the Master of the High Court;

5.10 The Master of the High Court failed to broker a solution to the stand-off. Subsequently, a Liquidation and Distribution Account was drawn up by and signed by the 1st and 2nd Respondents, purportedly for lodgement with the Master in accordance with Section 51 of the Administration of Estates Act;

5.11 The Liquidation and Distribution Account drawn up by the 1st and 2nd Respondents included both immovable properties registered in the name of the deceased. The properties are the major assets in the estate with a combined value of E3, 340,000.00 (Three million three hundred and forty thousand Emalangeni). Portion 9 of Farm 234 is valued at E2, 700,000.00 (Two million seven hundred Thousand Emalangeni);

5.12 The property is developed, consisting of the house occupied by the 1st Appellant and housing flat units which are being rented out. As such, the property is income generating;

5.13The 1st Appellant refused to sign the Liquidation and Distribution Account and persisted in her claim that Portion 9 of Farm 234 should not be included for distribution;

5.14After a considerable period of inaction on both sides of the stand-off, the 1st and 2nd Respondents brought an application to the Court *a quo* for a declaratory order in the terms outlined above.

[6]The 1st Appellant, then 1st Respondent in the court a quo, raised a point of law for determination in the following terms –

> "*2.1That this matter is pre-maturely enrolled before this Honourable Court as Deceased was a Prince (Umntfwanenkhosi wase Mbelebeleni) married to four (4) wives. The manner/or method of distributing his estate therefore turns, firstly, upon principles of Swazi Law and Custom.*
>
> *2.2The Executors having failed to secure a method of winding up the estate that was acceptable to all the parties through the meetings that it held with Family Council, it ought to have then escalated the matter to the Umphakatsi as per the dictates of Swazi Law and Custom. Wherefore, I pray that this Honourable Court should not entertain this matter but instead direct that the matter be allowed to exhaust the remedies available under Swazi Customary Law."*

[7]The Master of the High Court made her opposition known to the application and filed a document headed "PRELIMINARY POINTS" and raised the question of jurisdiction of the High Court in the following manner –

"ADOPTION OF SWAZI LAW AND CUSTOM

2.1 I am advised and honestly believe that the honourable court does not have jurisdiction to hear and determine this matter on the ground that the dispute in casu involves Swazi nationals and is in respect of an estate of a Swazi who since time immemorial regarded his day to day business in terms of the usages and customs of Swaziland. Swazi Law and Custom is the most suitable regime to resolve the dispute. The above Honourable Court does not have jurisdiction to hear and determine matters falling under Swazi Law and Custom at this stage.

2.2 Section 252 (2) of the constitution of 2005 states;

"(2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland."

2.3 In the Commissioner of Police v Mkhondvo Aaron Maseko [2011] SZSC 15 the court made it abundantly clear that under the Constitution of Swaziland, there are two separate and distinct systems of law co-existing within the Kingdom.

2.4 Whenever the question of appropriate forum arises for determination, a proper choice must be made between Roman-Dutch common law courts and Swazi National Courts (I presume she was referring to the Swazi Court).

2.5This matter falls within the ambit of S. 252 of the Constitution and must be given the reverence accorded to Swazi customary matters. (Sandile Hadebe and Sifiso Khumalo &3 Others (25/2012) [2013] (SZSC39)"

[8]In a brief Judgment His Lordship Magagula J. granted the Order declaring that Portion 9 of Farm 234 formed part of the estate of the deceased and ought to be included in the Liquidation and Distribution Account. He also directed the 1st Appellant to sign the Liquidation and Distribution Account within a period of fourteen (14) days from the date of the Order, failing which the Appellant shall be deemed to have been removed as an executrix in the estate. He reasoned that it was common cause that the immovable property was registered in the name of the deceased, and had he wanted it to be her sole property he would have transferred it to her. He concluded that the deceased wanted all his beneficiaries to benefit from the property. He further concluded that the 1st Appellant had failed to take the matter through whatever customary structure she thought would be of assistance to her and having refused to approach any other court to establish her claim on the property in question, cannot be heard to still say that the estate should be administered by some customary structures.

[9]As is apparent from the Judgment, the Court *a quo,* unfortunately, did not expressly interrogate or deal with the question of jurisdiction. The Court ought to have dealt with the issue and advance reasons why it assumed jurisdiction. This failure is a fatal blow to the whole judgement and this Court holds it as a serious error of that Court, as will become more apparent later on in this judgement.

[10]Dissatisfied with the Judgment of the Court *a quo* the 1st Appellant noted an appeal, soon to be followed by the Master of the High Court and Attorney General, as 2nd and 3rd Appellants respectively. The 1st Appellant's grounds of appeal are as follows:

"10.1The Learned Judge ought to have found that on account of the fact that the marriage contracted by the deceased and the surviving wives was a customary marriage under Swazi Law and Custom, and that the intention of the appellant and the deceased was that their affairs should be governed in terms of Swazi Law and Custom. The Learned Judge ought to have found that any dispute arising out of the consequences of such marriage ought to have been dealt with in terms of Swazi Law and Custom.

10.2The Learned Judge ought to have found that by virtue of Section 68 of the Administration of Estates Act No.28/1902, the Master of the High Court is precluded from handling estates or issues arising out of Swazi Customary Marriage, the High Court therefore lacked the original jurisdiction to hear and determine the matter but, to refer it to the traditional structures.

10.3The Learned Judge ought to have found that since the Appellant had raised the issue of jurisdiction, then, where such a question is raised on a proper choice between Roman Dutch Common Law & Swazi Law, the choice of law ought to have been Swazi law and Custom since the marriage regime was one that fell under Swazi Law and Custom.

10.4 The Learned Judge ought to have found that ever since the Appellant was married to the late Mfanasibili Gilbert Dlamini, from the period of 1977 to date, Portion 9 of Farm 234 situate in the Manzini District has been the marital home of the Appellant and the deceased since:

10.5 It's improvement, and the construction of all additional immovable structures outside the main house were as a result of the direct contribution of the Appellant;

10.6 The Appellant personally survived the mortgage bond of the property with Swazi Bank during the period of her deceased husband's incarceration between the period 1986 – 1992, through the assistance of the Appellant's late father;

10.7 It was on this home ever since the Appellant was married to the deceased that she raised all of the deceased's children who were born out of wedlock;

10.8 That the Appellant all her life, has known that place to be her matrimonial home, and has no other property and/or place to call home other than Portion 9 of Farm 234 in the Manzini District."

[11]The 2nd and 3rd Appellants' grounds of appeal are as follows:

"11.1The Court a quo erred in fact and in law in finding that the Master had jurisdiction to deal with the property described as Portion 9 of Farm 234 situate in the Manzini District yet the Respondents in their Replying Affidavit had confirmed that the issue of the home was dealt to finality at the family level where at paragraph 10 deposed that the Chief and the sister of the deceased had supported that the said property does not form part of the estate of the late Prince Mfanasibili Dlamini but is the matrimonial home of Thandi Dlamini (3rd Respondent) the surviving senior wife.

11.2 The Court a quo erred in law and in fact by coming to the conclusion that since the property in question was registered in the name of the deceased Prince Mfanasibili Dlamini then by necessary implication it belonged to him to be shared by the other spouses and their children, who in any event have their own matrimonial homes which have not been included in the distribution account.

11.3 The Court a quo erred in law and in fact by discriminating against the 1st Appellant (1st Respondent in Court a quo) by rendering her homeless.

11.4 The Court a quo erred in law and in fact by not dealing with the points in limine raised by the 2nd Appellant."

[12]Mr Magagula, on behalf of the 1st Appellant, argued that the Court *a quo* lacked jurisdiction to hear and determine the application for a declaratory order based on two reasons. First, it was submitted that there was undisputed evidence that the deceased was married to four wives in accordance with Swazi Law and Custom, and that any dispute stemming from such marriages ought to be dealt with by a Swazi Court having jurisdiction. It was submitted that the Court *a quo* misdirected itself in law and in fact in concluding that it had jurisdiction to deal with a matrimonial property dispute flowing from a marriage under Swazi Law and Custom. It was further contended that the Court *a quo* unlawfully assumed powers of being an executor by directing how the estate should be dealt with, which powers it did not have in law.

[13]Secondly, the 1st Appellant placed reliance on Section 68 (1) of the Administration of Estates Act and argued that the Master of the High Court did not have jurisdiction to interfere in the administration of the estate of the deceased on account of his marriages in accordance with Swazi Law and Custom. It was argued that the above Section ousted the jurisdiction of the Master of the High Court and, consequently, that of the High Court. We were referred to passages extracted from a Judgment of this Court in ***Attorney General v. the Master of the High Court (55/2014) [2014] SZSC 10 (30th June, 2016)*** which, it was argued, was binding and ought to be followed on the basis of the doctrine of precedent (*stare decisis*).

[14]Lastly, it was argued that the Judgment of the Court *a quo* should be set aside as its effect was to deprive the Appellant of her marital home, yet she had

made financial contributions to its development and maintenance, particularly during the period in which the deceased was incarcerated.

[15]Mr. Simelane, appearing for the 2nd and 3rd Appellants changed course and abandoned the challenge to the first part of the Order of the Judgment appealed against, that is, with respect to jurisdiction. He confirmed that the issues raised in the affidavit deposed to by the 2nd Appellant relating to jurisdiction were being abandoned, particularly the preliminary objection to the High Court's lack of jurisdiction.

[16] Mr. Simelane, however, took issue with the second part of the Order. He argued that in the face of the clear conflict between the 1st Appellant's interest as a claimant, that is, that Portion 9 of Farm 234 belongs to her and is her marital home, on the one hand, and her duty as co-executrix, on the other, she should not have been ordered to sign a Liquidation and Distributions Account to which she objected (or intended to object). He submitted that the proper course was to remove her as co-executrix, so as to enable her to file and pursue her claim. In this regard we were referred to remarks made by Ota JA in the case of ***Sindisiwe Dube v. Sonkhe Mdluli and Another (15/13) [2013] SZSC 13 (31 May 2013)***.

[17]Lastly, Mr. Simelane invited us to declare as unconstitutional the customary law of succession rule of primogeniture, which was endorsed by this Court in ***Attorney General v. The Master of the High Court*** (*supra*). He submitted that it was competent for us to make a declaration of unconstitutionality, notwithstanding the fact that the issue was being raised for the first time on appeal.

[18]Mr Dlamini, who appeared for the 1st and 2nd Respondents, argued that the Master of the High Court was legally vested with jurisdiction over the estate in terms of the Administration of Estates Act which prescribed that when any person died in the Kingdom leaving property, the death ought to be reported to the Master. That in reporting the death of a person to the Master of the High Court all the assets of a deceased must be set out in an inventory, and on this basis there was no reason to exclude Portion 9 of Farm 234 from the Liquidation and Distribution Account. He submitted that from this perspective the legal requirement for reporting an estate was inextricably linked with the Master's jurisdiction over all estates so reported.

[19]Mr. Dlamini further argued that the 1st Appellant had submitted herself to all the processes set out in the Administration of Estates Act. That is, she participated in reporting the estate; preparing the inventory of the deceased's assets; accepted nomination and appointment as co-executrix; and had not resigned as co-executrix. He submitted that the 1st Appellant conceded in her opposing affidavit that Portion 9 of Farm 234 formed part of the deceased's estate, and this was definitive of the questions of jurisdiction.

[20]He further submitted that the second part of the Order was appropriate in that for so long as the 1st Appellant was co-executrix she was bound to sign the Liquidation and Distribution Account, unless she resigned to pursue her claim. Thus, it was argued, the Order presented her with an election which she ought to make.

[21]Lastly, he argued that the passages referred to in ***Attorney General v. The Master of the High Court*** (*supra*) were *obiter dictum*, and that there was no firm legal pronouncement in the Judgment. In short, that they were not binding.

The Issue of Jurisdiction.

[22]The issue of jurisdiction, that is, the jurisdiction of the Master of the High Court as well as the original jurisdiction of the High Court on the estates of Emaswati married under Swazi Law and Custom and who die intestate is a thorny and important matter that the Courts of Eswatini must resolve quickly to bring certainty in this aspect of the law in this country.

[23]In the present case the issue of jurisdiction was raised as a point in *limine* or point of law, which is a process that addresses a technical legal point. It is raised prior to getting into merits of a case and normally relates to the issue of jurisdiction. Once the point of law is decided, the case may stand or fall and if it falls it saves time and money. In other cases it finalises the matter. Where the Court dismisses the point of law, the matter may then proceed to merits of the case. In the present case the Court *a quo* avoided the determination of the point of law and simply went into the merits of the case and no reasons were given for the avoidance.

[24]The 1st Appellant and the 2nd Appellant herein, raised the points of law in the Court *a quo* as stated above and for emphasis and reader-friendliness may be repeated here :

"**The 1st Appellant's Points of Law.**

"Ad Point of Law

2.1That this matter is pre-maturely enrolled before this Honourable Court as Deceased was a Prince (Umntfwanenkhosi wase Mbelebeleni) married to four (4) wives. The manner/or method of distributing his estate therefore turns, firstly, upon principles of Swazi Law and Custom.

2.2The Executors having failed to secure a method of winding up the estate that was acceptable to all the parties through the meetings that it held with Family Council, it ought to have then escalated the matter to the Umphakatsi as per the dictates of Swazi Law and Custom. Wherefore, I pray that this Honourable Court should not entertain this matter but instead direct that the matter be allowed to exhaust the remedies available under Swazi Customary Law."

The 2nd Appellant's Point of Law.

"ADOPTION OF SWAZI LAW AND CUSTOM

2.1I am advised and honestly believe that the Honourable Court does not have jurisdiction to hear and determine this matter

on the grounds that the dispute in casu involves Swazi nationals and is in respect of an estate of a Swazi who since time immemorial regarded his day to day business in terms of the usages and customs of Swaziland, Swazi Law and Custom is the most suitable regime to resolve the dispute. The above Honourable Court does not have jurisdiction to hear and determine matters falling under Swazi Law and Custom at this stage.

2.2Section 252 (2) of the Constitution of 2005 states;

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

[25]What is common in both the 1st and 2nd Appellants points of law is that both seek to oust the jurisdiction of the Court *a quo* being the High Court and have the matter decided in terms of Swazi Law and Custom under structures such as Umphakatsi and the Swazi Court as established by the Swazi Court Act, 1950. If it is found that the High Court had no jurisdiction, as sequence of that finding, the jurisdiction of the Master of the High Court would fall as well.

[26]The reply to the points of law by the 1st Respondent, can be summarised as follows:

(a) The dispute is primarily about ownership of the Lusushwana property (the farm) which is on title deed land in an urban boundary. I submit that this does not require the application of Swazi Law and Custom.

(b) I submit that the point of law raised in these paragraphs lacks merit. I reiterate the allegations in paragraph 8, 9, 10 and 11 above. (the referred to paragraphs relate to the fact that Swazi Law and Custom is not applicable since this is a dispute on ownership of the property, which has a title deed, is situated within an urban boundary, and the 1st Appellant wants the matter referred to Umphakatsi to be determined under Swazi Law and Custom because she has the support of the Chief).

[27] The 1st Respondent's replying affidavit clearly shows that the parties are not of the same mind of what the dispute is. The 1st Appellant is challenging the jurisdiction of the High Court on hearing the matter on its original jurisdiction but may hear it on its appellate jurisdiction when that stage is reached, that the High Court can only assist with the determination of the choice of law to be followed or applied on the proceedings of the matter whilst the 1st Respondent says the issue or dispute is about ownership of the property/farm. The issue, as I perceive it, is about inheritance or distribution of the property of the deceased and under which law should such distribution or inheritance be undertaken. In other words, it is about the movement or transfer of the property from the ownership of the deceased to a beneficiary and which law should be applied or used for such movement or transfer.

[28] The failure of the parties to appreciate the nature of the dispute or lack of consensus thereof was a just reason for the Court *a quo* to have deliberated

and determined the points of law. The issue was not a dispute of ownership *per se* but which law was to be applied to determine the mode of transfer of ownership.

[29]Once a point of law is raised in a matter, especially in an important matter such as this, it is imperative upon the Court seized with the matter to determine the point of law. I am of the view that this is an important matter which is in a way of national importance. The country is interested in knowing, with certainty, which law applies to the estates of Emaswati who contracted a SiSwati marriage and die intestate. Some Emaswati have massive investments and other immovable properties situated on Swazi Nation Land as well as in urban areas. Does that mean one part of the property will be administrated under the Roman Dutch Common law and under Statute Law (Administration of Estates of 1902) and the other part under Swazi Law and Custom. Big Supermarkets, Hardware shops, hotels and accommodation lodges are examples of investments found on Swazi Nation Land owned by EmaSwati married either by civil rites or customary rites who die or may die without executing a will. Urban boundaries and Swazi Nation Land should not be the only determining factor as to which regime of law applies. Registration of property in one's name should also not be the only determining factor as some properties found in possession of EmaSwati under Swazi Nation Land are dealt with under Swazi Law and Custom and statute law. For instance, properties registered under the Arms and Ammunition Act when the *paterfamilias* dies, Swazi Law and Custom determines who should inherit that property and once that determination has been made the beneficiary is then directed or required to register that inheritance under that person's name. This means a number of factors should

be considered before an election is made of which law should be applied including, most importantly, how the deceased carried his life during his lifetime (the lifestyle).

[30]If such issues can not readily be resolved the Court should be guided by statute law, that is, legislation or an Act of Parliament with the understanding that an Act of Parliament is superior than any other law including common law or judges' recognised practices. Parliament is recognised by our Constitution as the body responsible for the making of laws with power to delegate some of its powers. Section 252 of the Constitution attests to the supremacy of statute law.

[31] Careful reading of section 252 of the Constitution reveals the supremacy of statute law as well as the confirmation of the Roman Dutch Common Law and recognition and application of Swazi Law and Custom when it provides (see the underlined words) –

> *"**The Law of Swaziland.***
>
> ***252.(1)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 <u>Roman Dutch Common Law</u> as applicable to Swaziland since 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 <u>Constitution or a statute</u>.***
>
> ***(2)Subject to the provisions of this Constitution, the principles of <u>Swazi customary law</u> (Swazi law and custom) are hereby recognised and***

adopted and shall be applied and enforced as part of the law of Swaziland.

(3)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." (my underlining)

[32] To emphasize the Supremacy of Parliament in law making, even in England where we received most of our laws especially statutes, history attests that it was the British Parliament which abolished primogeniture in 1925. Mr Simelane who represents the Master of the High Court and the Attorney General (2nd and 3rd Appellants respectively) had urged this Court to declare primogeniture unconstitutional.

[33]The doctrine of Separation of Powers informs us that, the Executive executes, implements and responsible for enforcement; Parliament legislates, that is, it enacts laws; and the Judiciary gives effect and where necessary interprets the enactments or legislation where there is an ambiguity, absurdity, conflict with other laws including the Constitution but does not itself enacts or legislate. This means the Courts must apply the law as given by the lawgiver.

[34]The question of jurisdiction of the High Court in this matter has reached this Court without having been decided by the High Court notwithstanding the fact that it had the opportunity to decide it. At this juncture one way of dealing with this matter is to refer it back to the High Court for the determination of the Points of Law: Whether the High Court has original

jurisdiction or not on estates based on traditional marriages contracted by Emaswati and other Africans south of the Equator and where such persons die intestate and, by extension, whether the Master of the High Court can or cannot exercise its administration functions on such estates of deceased persons married under Swazi Customary marriages. Whilst the option of referring the matter back to the High Court is open to this Court, I believe it is not the best route as this dispute has been raging on since 2016 yet it is desirable that estates of deceased persons should be dealt with or sorted out quickly. I prefer not to remit it to the High Court but to examine the law, especially the statutory provisions or statute law relative to this case.

HISTORICAL BACKGROUND OF THE LAW AND PURPOSE OF THE PROVISIONS

[35]During the colonization period of Eswatini the Europeans, especially the English lived side by side with the Africans, the Swazi in our case, but in non-integrated society. In 1904 the English colonizer decreed that Eswatini shall be governed by Roman Dutch Common Law which had essentially developed from Roman Law. Roman Law of inheritance was almost similar to Eswatini Customs of inheritance in that there was *paterfamilias* (Roman), an Umnumzane (Swazi) who on his death was succeeded by an heir or heirs and in Swazi culture called Inkosana. The similarities lies in the fact that both systems of inheritance are of universal succession which means that on the death of the head of the family the successor simply stepped in the shoes of the deceased and continued the estate as if the heir was the deceased alive. The heir inherited not only the property but also the debts and obligations of the deceased. Under Swazi Culture this position still obtains. Some

Europeans developed Roman Law into Roman Dutch Law whilst the Swazi left his system intact.

[36]Roman Dutch law does not embrace universal succession whilst Swazi culture maintains universal succession. It was probably on this realization that the British Sovereign of Swaziland introduced Section 68 of the Administration of Estates in 1902. The effect of Section 68 was to preserve the inheritance customs of the Swazi instead of imposing the European culture on them.

THE LAW AS IT STANDS

[37]Section 68 of the Administration of Estates Act, 1902 states:

"ESTATES OF AFRICANS

African law and custom to govern certain estates.

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

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

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

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

[39] The 1st Respondent argued that the deceased's estate should not be administered under Swazi Law and Custom because the property disputed is a farm, it is a registered title deed land and it is not situated under Swazi Nation Land but it is within urban boundaries. Does this argument transform the deceased or his estate from being African to European? The answer is, it doesn't, which means section 68 of this Act is not dislodged.

[40]The Roman Dutch Common Law which is applicable to this country has developed principles for those Africans who may be said to have assimilated to the European culture and should therefore have their estates when deceased be administered outside section 68. This brings the matter to which choice of law is applicable. This involves an analysis of the deceased

character during his life-time. Did the deceased carry his life as an African (Liswati) or as a European. If he carried himself as Liswati, Swazi Law and Custom should apply to his estate but if he carried himself out as a European, then his estate shall be administered in accordance with the Administration of Estates Act, 1902.

[41]The answer to the above question, ironically, is provided by the 1st Respondent:

(a) In paragraph 13 of the 1st Applicant's Replying Affidavit before the High Court she makes it known that the 1st Appellant herein "is not the only surviving spouse of the deceased…", meaning that the deceased had more than one wife.

(b) In paragraph 16, she states the following:

> ***"16.2Even the unit or block that the 1st Respondent normally occupied was frequented by many girlfriends of the deceased (including the Appellants) who had sleepovers, sometimes for weeks and even months. The deceased called the farm Lilawu lakhe."***

Lihawu is a SiSwati concept recognised under Swazi customary usages or practices as a hut or house reserved for males wherein they live a life of bachelors and where they are permitted to meet girlfriends and fiancées and also as a resting place. This definition of lilawu, though not refined, suffices for our purpose**.**

[42]The contents of the above paragraphs, depicts the character of the deceased. We also know that he was married under Swazi Law and Custom. It is also undisputed that the deceased had four (4) wives married to him. We further know that notwithstanding the fact that he had a farm or titled land inside the boundaries of an urban land, he owned lilawu therein or he treated, according to the 1st Respondent, such land or farm as lilawu. Lilawu is a concept unknown under Roman Dutch Law but Swazi Law and Custom. The question to be answered is whether such behaviour or character complies with what Europeans do or what an assimilated African would do. (We also know that he died intestate).

[43]To me, this character or behaviour conforms squarely to African behaviour more particularly that of Liswati who practises SiSwati culture. This is the behaviour of the deceased and it is common amongst EmaSwati married under Swazi Law and Custom.

[44]With the foregoing, I conclude that the deceased chose during his life-time which law regime should govern the consequences of his marriages including the disposal of his properties after his death. He chose Swazi Law and Custom to govern his affairs. During his life-time he never crossed the line but kept and lived his life in accordance with the dictates of Swazi Law and Custom, (SiSwati).

[45] Not only the deceased lived his life under Siswati Law and Customs but so did the wives. Under Swazi Law and Custom a man married to many wives provides each wife with a homestead wherein each wife and her children resides. Each wife regards that as her marital home. She keeps it on the

death of the husband as her marital home. True as per Swazi Law and Custom, the 1st and 2nd Respondents have each their marital homes and have not surrendered same to the Master of the High Court to be distributed in accordance with the Administration of Estates Act. This accords and is perfectly well under Swazi Law and Custom. It would be applying different standards to wish the marital homes of two wives (1st and 2nd Respondents) to be treated under Swazi Law and Custom and that of the 1st Appellant, under the Administration of Estates Act. Swazi law and custom should be able to determine what part of the farm constitutes the marital home and which part remains to indlunkulu to be administered by the heir/inkosana. But the Respondents are not considering even *demarcation* of the property and leave the 1st Appellant/Senior wife with the houses that she may have occupied but want the whole farm and to that effect, they evaluated it and put values to each beneficiary reflecting amounts which each beneficiary would get from proceeds of the sale of the farm. To me that, under any regime of law, would be unjust.

[46]Section 25 of the Marriages Act, 1964 is also relevant, it states:

> **"25 (1)If both parties to a marriage are Africans, the consequences flowing from a marriage shall be governed by the law and custom applicable to them unless prior to the solemnisation of the marriage the parties agree that the consequences flowing from the marriage shall be governed by the common law."**

This provision emphases the fact that as long as you are an African, unless prior to solemnisation of the marriage you contract-out of the of the application of this provision, the consequences flowing from the marriage shall be governed by Swazi Law and Custom. This means even if an African marries under the Act, that is the civil marriage, he is still governed by Swazi Law and Custom unless he has contracted out as stated in the provision. There is no evidence that the deceased ever contracted out, more so, that Swazi customary marriages have no such option. This section does not, as does section 68 of the Administration of Estates Act, 1902, refer to an "***African who during his lifetime has not contracted a lawful marriage".*** It bridges the gap and fosters the clarification that even if as Liswati/Swazi you are lawfully married under the Act the consequences of marriage shall be governed by Swazi Law and Custom "***unless prior to the solemnisation of the marriage the parties agree that the consequences flowing from the marriage shall be governed by the common law."***

The two provisions, section 68 of the Administration of Estates Act, 1902 and section 5 of the Marriages Act, 1964 provides us with the legislative intent or the intention of the legislature as to how the property of married Swazis should be dealt with, that is, Swazi Law and Custom applies unless they contract out as provided.

[47]**Section 4 of the Intestate Act of 1953 has the same language exempting Africans from its operations, it states as follows –**

> ***"Saving.***
>
> **4.This Act shall not apply to any African if the estate of such African is required to be administered and distributed**

according to the customs and usages of the tribe or people to which the African belonged by virtue of section 68 of the Administration of Estates Act, No. 28 of 1902."

[48]In the present case, the applicable law is section 68 of the Administration of Estates Act, No. 28 of 1902. This position of our law was correctly stated in the obiter of **Justice M.C.B. Maphalala CJ** in **Attorney General v The Master of the High Court (55/2014 [2016] SZSC 10 930 June 2016)** at paragraph 25:

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

DUTY OF A COURT

[49]Every Court of law has a duty to interpret and give effect to an Act of Parliament amongst other duties where a provision or statute is clear and unambiguous. The Court must give effect to the ordinary meaning of the words therein. **Justice Ramodibedi CJ in Shongwe and Others v**

Maziya and Another (37/11) [2011] SZSC 31 (30 November 2011) re-iterated the above principle as follows:

"[13]As a matter of first principle, the cardinal rule of construction is that words must be given their ordinary, literal and grammatical meaning. The Court will only depart from such meaning if it leads to "a result which is manifestly absurd, unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute." See Volschenck v Volschenk 1946 TPD 486 at 487 – 488. I had occasion to express myself in a similar vein (Kirby JP and Lord Abernethy JA concurring) in the Botswana Court of Appeal in Richard Miles and Another v the South East District Council, Civil Appeal No. CACLB – 058 – 10. It bears repeating what I said:-

> ***"[13]It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is also well settled that in carrying out that exercise the Courts should give the words used their ordinary and natural meaning. If in doing that the meaning of the words is plain and unambiguous they should be given that meaning unless it would lead to an absurdity or a result which having regard to the context and purpose of the legislation, the Legislature could not have intended. See for example, Molomo v Molomo 1980 BLR 250, Hannah J at page 254; Mascom Wireless Botswana (Pty) Ltd v Linda's Holdings (Pty) Ltd t/a Fones 4 U 2004 (2) BLR 65 (CA)."***

[50]And at paragraph 15, (supra) the Learned Chief Justice had this to say:

"[15]In a well-written judgment, the learned Judge a quo (MCB Maphalala J, as he then was) was alive to the cardinal rule of construction as highlighted above. Thus, for example, the learned Judge said the following in the course of his judgment:-

> ***"[17]The wording of Section 151 (8) is clear and unambiguous; hence, there is no need to resort to other forms of statutory interpretation such as the broad, liberal, generous or purposive interpretation. It is trite law that where the meaning in a statute is clear and unambiguous it has to be given its literal meaning unless such a meaning leads to an injustice, unreasonableness or absurdity. The literal meaning of Section 151 (8) does not lead to absurdity, manifest injustice or unreasonableness. When interpreting a statutory provision regard must be to ascertain the intention of Parliament."***

[51]I am convinced that in applying these principles to Section 68 of the Administration of Estates Act, 1902 and reading into it section 5 of the Marriages Act, 1964, they would not lead to a result which is manifestly absurd, unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute or Act. On the contrary, firstly, it recognises and preserves Swazi Law and Custom. Secondly, it would lead to the development of Swazi Law and Custom as well as other laws including registration laws respecting immovable property, in case there is any deficiency. For example in Eswatini there is a

practice or principle of holding immovable property in trust for others such as the King who holds land in trust for the Swazi Nation. There is no reason why this principle could not be extended to an heir or such other person so designated by the family under Swazi Law and Custom to hold such property and have it registered under his or her name but for the benefit of the other beneficiaries of the deceased. This is a principle well known under Swazi Law and Custom where the heir holds the property but for the benefit for all the children and wives of the deceased. For example, where one son comes of age and wants to marry the person (normally Inkosana) holding the property in trust or on behalf of the beneficiaries or heirs would take from the deceased cattle and pay Lobola for the son.

[52]Listening to submissions by both Counsel, I can't help concluding that the problem here is not Swazi Law and Custom but the Swazi who has over the past years since independence from colonial rule neglected to test and develop the capacity of Swazi Law and Custom which is his own but comfortable with foreign or imported laws whose genesis are grounded on the customs of those nations. It is understandable with branches of laws that the Swazi does not have to use foreign or imported laws, such as international trade law, Securities laws and others. Roman Dutch Law has been developed over the years to be what it is today.

[53]Section 2 of the Administration of Estate Act, 1902 requires the reporting of the deceased's estate to the Master of the High Court when in Hhohho but to the Regional Administrator in the other Regions who shall send one copy to the Master of the High Court and keep one copy. It would seem Counsel for the Respondents has an issue with this clause though not apparent to me.

The reporting requirements applies to everyone whether African or not African within the country. The Master of the High Court needs the notification of the death of the deceased so as to properly exercise his or her functions under the Act which would include the function not to interfere with the estate which belongs to an African. The Master cannot do this from the air unless the estate of the deceased has been reported to him or her.

[54]Mr. B.S. Dlamini Counsel for the Respondents argued that the 1st Appellant waived her opposition to have the matter dealt with under Swazi Law and Custom but acquiescenced as shown by her compliance with the requirements of the Act. These include the reporting of the estate, attendance to meeting of next of kin, accepting appointment of executrix, acceptance of letters of administration and more. We were not told why the 1st Appellant changed her mind or course of direction, the Court may not speculate what caused the change as it could have been the realization that she had taken initially the wrong steps to enforce her rights. The Court is only certain that a private agreement or an individual step of a person cannot alter the postulates of an Act of Parliament. When a statute prohibits the happening of a thing or where it sets out a procedure to be followed by everyone, one individual or group of individuals cannot legally alter that command. An Act is not a private property but an Act of Parliament regulating actions for the benefit of the greater society and creates certainty of what behaviour is expected from all. In *casu*, the statutes commands that Africans who not having contracted a lawful marriage during their life-times (and who die intestate) shall not have their properties administered under the Act after their demise. This means that deceased estates of African spouses married under custom shall be administered in terms of customary law. Until

Parliament changes that command, it shall remain a provision to be given effect by this Court. There is an option for those aggrieved by this command to approach the High Court constituted as a Constitutional Court to declare this provision unconstitutional as permitted by the Constitution of the Kingdom of Eswatini Act, 2005. But that has not as yet happened.

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

[56]In the result:

(a) The Appeal succeeds;
(b) Orders 9.1, 9.2 and 9.3 of the Court *a quo* are set aside;
(c) The matter, and any dispute arising out of the matter, to be prosecuted under Swazi Law and Custom;
(d) Costs to be paid from the estate of the deceased.

S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree **DR. B.J. ODOKI**

JUSTICE OF APPEAL

For the 1st Appellant: H. MAGAGULA

For the 2nd and 3rd Appellants: M. SIMELANE

For the 1st and 2nd Respondents: B.S. DLAMINI

DISSENTING JUDGMENT

M.J. MANZINI AJA

[1]I have had the opportunity to read the judgment prepared by my brother SJK Matsebula AJA and to which Dr. B Odoki JA has concurred. I do not agree with the conclusion that the High Court lacked jurisdiction to deal with the matter at hand. In my view the appeal should be dismissed, and the reasons for coming to this conclusion are set out below.

[2]To put matters into perspective, I do not agree with the majority decision on two salient points. Firstly, on the interpretation of section 68 of the Administration of Estates Act, 1908, that is to say, whether the choice of law set out therein is peremptory or merely directory. And secondly, on the characterization of the issue or dispute between the parties, and whether the High Court was vested with jurisdiction to hear and determine it (the issue or dispute).

[3]The facts giving rise to this matter have been set out in the majority judgment and I do not intend to repeat them, save to highlight those which are the basis of my dissenting judgment.

[4]The main issue raised in this appeal is whether the Court *a quo* was clothed with jurisdiction to hear and determine the application for the declaratory order as set out in the Notice of Motion. In **Graaff-Reinet Municipality v Van Rynevelds' Pass Irrigation Board 1950 (2) SA 252 (AD)** Watermeyer CJ said that:

> **"Jurisdiction means the power or competence of a Court to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc."**

High Court jurisdiction in matters involving Swazi Law and Custom

[5]The jurisdiction of the High Court is set out in section 151 of the Constitution of the Kingdom of Eswatini, which reads as follows:

"151(1)The High Court has –

(a) unlimited original jurisdiction in civil and criminal matters the High Court possesses at the date of commencement of this Constitution;

(b) such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in Swaziland;

(c) such revisional jurisdiction as the High Court possesses at the date of commencement of this Constitution; and

(d) such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland.

[6] Section 151(3), however, places a limitation on the jurisdiction of the High Court. This section provides that:

"151(3)Notwithstanding the provisions of subsection (1),

the High Court –

(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;

(b) has no original but has review and appellate jurisdiction in matter in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.

[7]There can be no doubt that section 151(3) (b) places a limitation on the jurisdiction of the High Court. In expressing his view on section 151(8) of the Constitution, which places a similar limitation on the jurisdiction of the High Court, Ramodibedi CJ (as he then was) in **Shongwe and Others v Maziya and Another (37/11) [2011] SZSC 31 (30 November 2011)** said –

"[12]It is plain, as it seems to me, that by introducing S 151(8) the framers of the Constitution intended to remove the matters listed in the section from the jurisdiction of the High Court. In this regard, the words "notwithstanding subsection (1)" appearing in S 151(8) are decisive in my view. The ordinary natural meaning of the word "notwithstanding" is "in spite of", "despite". See for example, Kotze v Santam Insurance Ltd 1994(1) SA 237(c). Construed in this way, what the framers of the Constitution did was, firstly, to recognise the ordinary unlimited jurisdiction of the High Court and

secondly, to expressly remove, in clear and unambiguous terms, the matters listed in S 151(8) from such jurisdiction. Simple logic dictates, therefore, that S 151(1) must yield to S 151(8)".

[8]Thus, in matters where a Swazi Court has jurisdiction, the High Court has no original jurisdiction but review and appellate jurisdiction. In order for the appeal to succeed on the ground of lack of jurisdiction, the 1st Appellant, first and foremost, must establish that the matter or dispute which was submitted to the Court *a quo* is one which falls within the jurisdiction of a Swazi Court. Absent this showing, there is no legal basis on which the Court *a quo* can be adjudged to have lacked jurisdiction to hear and determine the matter.

Civil jurisdiction of Swazi Courts

[9]The civil jurisdiction of Swazi Courts is set out in section 7(1) of the Swazi Courts Act of 1950 which reads as follows:

"7(1)Every Swazi Court shall exercise civil jurisdiction, to the extent set out in its warrant and subject to the provisions of this Act, over causes and matters in which all the parties are

members of the Swazi nation and the defendant is ordinarily resident, or the cause of action shall have arisen, within the area of jurisdiction of the court

(2)Notwithstanding anything contained in this or any other Act such jurisdiction shall be deemed to extend to the hearing and determination of suits for the recovery of civil debts due to the Government under the provisions of any law, where such jurisdiction has been expressly conferred upon a Swazi Court under section ll".

[10]The civil jurisdiction of Swazi Courts is limited by the **type of law** which they are authorised to administer. Section 11 provides that:

"Subject to the provisions of this Act a Swazi Court shall administer:

(a) The Swazi Law and Custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland;

(b) The provisions of all rules or orders made by the Ngwenyama or a Chief under the Swazi Administration Act

No. 79 of 1950 or any law repealing or replacing the same, and in force within the area of jurisdiction of the court;

(c) The provisions of any law which the court is by or under such law authorised to administer".

[11]The Swazi Courts Act does not contain any provision expressly dealing with the administration of deceased estates. Neither does it contain any provision expressly conferring jurisdiction on Swazi Courts to administer deceased estates. The only link between Swazi Courts and the administration of deceased estates is to be found in section 68 of the Administration of Estates Act, 1908, the full text of which has been reproduced in the majority decision.

[12]In my understanding section 68 of the Administration of Estates Act does two things. Firstly, it expresses, in statutory form, the choice of law regarding the administration of deceased estates. It sets out what determines whether a deceased estate should be administered in accordance with customary law (Swazi Law and Custom in this instance). Secondly, it confers jurisdiction on Swazi Courts to determine **"any controversies or questions"** which arise among a deceased person's relatives or reputed relatives **"regarding the distribution of the property left by him"** (deceased).

[13]As far as the conferment of jurisdiction on Swazi Courts to deal with **"controversies or questions…regarding the distribution of the property"** left by a deceased is concerned, the language of section 68 is clear and unambiguous. However, in my view, the same cannot be said of the choice of law criteria expressed in the said section. This is my point of departure with the majority decision.

[14]The first issue I take with the majority decision with respect to the choice of law expressed in section 68 is that it proceeds from the premise that the said provision is peremptory. That is to say, it is peremptory that the estate of a LiSwati who dies intestate whilst married in accordance with Swazi Law and Custom **"shall"** be administered and distributed in accordance with Swazi Law and Custom, thereby ousting the jurisdiction of the Master of the High Court (and of the High Court). That this is so is evidenced by reliance on the *obiter dictum* of His Lordship MCB Maphalala in **Attorney General v The Master of the High Court** where he stated that –

"Clearly the Master of the High Court has no jurisdiction to administer deceased estates where the spouses were married in terms of Swazi Law and Custom".

Furthermore, the majority concludes by stating that **"the statute commands that Africans who not having contracted a lawful marriage during their life-times (and who die intestate) <u>shall</u> not have their properties administered under the Act after their demise. This means that deceased estates of Africans married under custom <u>shall</u> be administered in terms of customary law."** [My own underlining]

[15]The conclusion reached by the majority begs the question, is it peremptory that all estates of EmaSwati who die intestate whilst married in accordance with Swazi Law and Custom shall be administered and distributed in accordance with Swazi Law and Custom, to the extent that the jurisdiction of the Master of the High Court and of the High Court is ousted? This is a crucial question, the answer to which not only determines the legal effect of the acceptance by 1st Appellant, as well as the 1st and 2nd Respondents, of their appointment as co-executrixies, but also the legal efficacy of all things done and acts performed by the co-executrixies pursuant to their receipt of the Letters of

Administration issued to them by the Master of the High Court. At a broader level, it determines the path of how the estates of EmaSwati who will die intestate whilst married in accordance with Swazi Law and Custom will be administered and distributed, and the legality of the Master's handling of those being currently administered in terms of the Act.

[16]I have observed that in **Attorney General v The Master of the High Court**, and in the decision of the majority, the question whether the choice of law expressed in section 68 is peremptory or directory was not considered at all. Yet, in statutory interpretation this is often an important consideration. It is trite law that the use of the word **"shall"** in a statutory provision, as in the case of section 68 where it reads – **"… shall be administered and distributed"**, is no longer conclusive that its command is peremptory or obligatory.

[17]The significance of ascertaining whether the choice of law expressed in section 68 is peremptory or not lies in the fact that a failure to comply with a peremptory statutory provision is visited with nullity. In other words, the choice of law criteria is obligatory. In the context of section 68 this would mean that it is peremptory to administer and distribute the estate of a

LiSwati who dies intestate whilst married in terms of Swazi Law and Custom according to customary law (that is Swazi Law and Custom). *In casu*, the practical effect of this would be to vest jurisdiction of the estate administration process and the distribution of the estate in Swazi Courts, thereby ousting the jurisdiction of the Master of the High Court (and of the High Court).

[18]The principles to be applied in determining whether the provisions of a statute are peremptory or directory were discussed and neatly summarized by Wessels JA in **Sutter v Scheepers 1932 AD 165** where he stated the following –

> **"A long series of cases both here and in England have evolved certain guiding principles. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word "shall" when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction – Standard Bank Ltd v van Rhym 1925, A.D.266)**

(1) If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate;

(2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory

(3) If, when we consider the scope and objects of a provision, <u>we find that its terms would, if strictly carried out, lead to injustice</u> and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory

(4) The history of the legislation will also afford a clue in some cases".

[19]In **<u>Nkisimane and Others v Santam Insurance Co Ltd 1978(2) SA 430AD at 434A</u>** Trollip JA stated as follows –

"Preliminary I should say that statutory requirements are often categorised as 'peremptory' or 'directory'. They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and <u>what the consequences are of non – or defective compliance</u>. These must depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular" . [Own underlining]

And he continues at **434C**

"In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective".

[20]Applying the tests referred to above, my view is that section 68 should be construed as directory rather than peremptory. That is to say, non - compliance with the choice of law set out in section 68 should not lead to nullity. Practically, concerned EmaSwati must not be compelled to administer an estate of a LiSwati who died intestate whilst married in terms with Swazi Law and Custom in accordance with customary law (that is Swazi Law and Custom) purely based on marriage type.

[21]Firstly, the provision is cast in positive language, yet there is no sanction added in the event of non-compliance.

[22]Secondly, if section 68 is construed in peremptory terms it would result in oppressive and unjust circumstances. The object of the Administration of Estates Act is to provide a framework for regulating the administration of the estates of deceased persons. In legal terminology the administration of an estate refers to the rules and procedures which must be followed by a person appointed to wind up an estate. These include how the person is appointed, the powers and duties of the appointee, and most importantly, who has supervisory powers over the process. These rules provide certainty on how

the process of administration is initiated and completed. All these rules and procedures are set out in the Administration of Estates Act. A century ago Swazi Law and Custom was uncodified, and remains so to this very day. Thus, there is no ascertainable body of rules setting out how the estate of a deceased person is to be administered. For this reason it made sound policy for the colonial government to adopt a policy of non-interference in the deceased estates of EmaSwati.

[23]The absence of a readily ascertainable body of rules pertaining the administration of an estate in terms of Swazi Law and Custom invariably visits untold hardship to those who are not familiar with this legal system. Crucially, Swazi Law and Custom is ill equipped to deal with certain types of assets which an estate may be possessed of. Take the case of immovable property. In terms of the Deeds Registry Act, 1968 ownership of immovable property is to be passed from one person to another by means of a "deed of transfer" (a title deed) executed or attested by the Registrar of Deeds. On the other hand, the concept of land registration is unknown in Swazi Law and Custom, wherein land tenure is based on the principles of **"kukhonta"**. In terms of this system land is allocated by Chiefs and is not registered in the names of the persons to whom it is allocated. There is no "deed of transfer"

(title deed). The result is that there are no rules regulating how and by whom an immovable property registered in the name of the deceased LiSwati is ultimately registered in the name of a beneficiary (or beneficiaries). The "how" and "by whom" is an integral part of the administration of an estate possessed of immovable property. Practically, this means that there are no Swazi Law and Custom rules to govern the process, but section 68 compels EmaSwati to apply this system of law. This, in my view, is oppressive and unjust.

[24]Thirdly, if section 68 is construed in peremptory terms it compels us to disregard other relevant factors in determining the choice of law regarding the administration of estates, such as the lifestyle of a deceased person, and the size and complexity of an estate and the peculiar law(s) to be applied in the devolution of specific types of assets constituting the estate. For one, the size and complexity of the estate of a LiSwati who dies intestate whilst married in accordance with Swazi Law and Custom would be irrelevant. The fact that a LiSwati led an urban lifestyle (though married in term of Swazi Law and Custom) would equally be irrelevant. Yet, these factors are very useful in determining the appropriate choice of law.

[25]I could not help but note that although the majority decision is premised on the proposition that section 68 is a peremptory legislative command which should be given effect to, the decision seems to suggest that the lifestyle of the deceased has a role to play in the choice of law. For instance it calls for **"an analysis of the deceased character during his life-time"**. The majority then proceeds to make the analysis and thereafter concludes that **"the deceased chose during his life-time which law should govern consequences of his marriage including the disposal of his properties after his death"**. In my view these are inconsistent propositions, in that in terms of section 68 the choice of law is based on the type of marriage contracted by a deceased or his/ her parents and whether a person died intestate, lifestyle is irrelevant.

[26]Fourthly, section 68 is in itself ambiguous. The section refers to an **"African who during his lifetime has not contracted <u>a lawful marriage</u>, or who, being unmarried is not the offspring of parents <u>lawfully married</u>"**. The Act does not define what **"lawful marriage"** or **"lawfully married"** means. If we adopt a literalist approach in interpreting the phrases **"lawful marriage"** and **"lawfully married"**, that is, by giving the words their ordinary and natural meaning, the result is far from "a marriage in

accordance with Swazi Law and Custom". Yet, the majority decision contends that **"The Court must give the ordinary meaning of the words therein''**. How then do we conclude that the phrases **"lawful marriage"** and **"lawfully married"** mean a civil rites or common law marriage, and excludes a marriage in accordance with Swazi Law and Custom? Why is it contended that in 1908 a marriage in accordance with Swazi Law and Custom was not a lawful marriage? Therein lies the ambiguity.

[27]It is plain to me that in interpreting section 68 it can only be implied that **"lawful marriage"** and **"lawfully married"** refers to a marriage according to civil rites or common law marriage. Implying is certainly not synonymous with giving words their ordinary meaning. In an effort to overcome this ambiguity the majority decision resorted to **"reading into it section 5 of the Marriages Act, 1964"**. In my understanding "reading in" is a more drastic remedy used by the courts to rescue or change legislation in order to keep it alive or save it from a declaration of unconstitutionality. I am not persuaded that this Court should engage this drastic step in dealing with section 68, particularly because the constitutionality of the provision is not under attack.

[28]Taking into account the aforegoing, in particular my conclusion that the choice of law expressed in section 68 is not peremptory, my view is that the acceptance by the 1st Appellant (and the other executrixies) of their appointment as co-executrixies constituted a valid and legal submission to the jurisdiction of the Master of the High Court and of the High Court. According to **Pollak on Jurisdiction (2nd Edition 1993)** at page 122 –

> **"It is submitted that jurisdiction is vested in the court of the area served by the Master who issued the letters of executorship, or in the court which granted recognition to the executor. By accepting letters of executorship or by procuring his recognition, an executor submits in all matters relating to the estate to the jurisdiction of the court to which the Master belongs or of the Court to which the application for recognition was made".**

[29]In **Katz NO v Segal & Others 1977(2) SA 1038(C)** the court was faced with a challenge to its jurisdiction in an application brought before it for the removal of an executor. Diemont J at page 1041 stated the following-

> **"It would seem strange and somewhat illogical if it were to be held that this Court has jurisdiction to decide a dispute where the**

Master seeks to remove an executor from office but not where one or the other interested parties seeks to do so. Such a result can be avoided if it is accepted, as I think it should be, that when an executor accepts letters of administration he submits himself to the authority of the Master and the Court of which that Master is an official. The Master is responsible to this Court."

I align myself fully with the conclusion reached in this case, and submit that it applies to the matter at hand.

[30] The 1st Appellant accepted her nomination and appointment as co-executrix in terms of the Act. Appointment to the office of executrix came with it a legal duty to observe the Act. Specifically, Section 117 provides that executors "**…shall be subject to and conform with the provisions of this Act, and shall administer the estate in accordance therewith"**. It is an undisputed fact that at the time of launching the High Court proceedings the 1st Appellant had not resigned as co-executrix. More pertinently she did not object to all of the processes prescribed in the Act which culminated in her appointment as co-executrix. The process of the administration of the deceased's estate began with the reporting of his death to the Master, with her nomination and acceptance of appointment as co-executrix being a significant milestone in that process. By consenting to being part of this process of administration of the deceased estate, as the facts undisputedly show, the 1st Appellant reconciled herself with the administration of the

estate in accordance with the Administration of Estates Act. Having unequivocally done so she cannot now turn around to contend that the Master of the High Court has no jurisdiction over the administration of the estate. The 1st Appellant failed to raise the issue of jurisdiction and object at the first possible opportunity. This justifies an inference that she submitted to the jurisdiction of the Master of the High Court.

[31]Thus, if one proceeds from the proposition that the choice of law expressed in section 68 is not peremptory, which I submit is correct, the 1st Appellant and her co-executrixies submitted to the jurisdiction of the Master of the High Court and of the High Court. This does not amount to conferring jurisdiction where the Master of the High Court or the High Court have no jurisdiction at all, as it seems to be suggested by the majority decision.

Characterization of the issues or disputes

[32]According to **Erasmus Superior Court Practice (Volume 2 – 2nd Edition 2016)** -

> **"… since pleadings are made for the court, not the court for pleadings, it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can**

be caused to either party, to decide the case on the real issues. In this regard the court has a wide discretion. The court must look at the substantial issue between the parties and not blindly follow the *ipssisima verba* of the pleadings".

[33]In order to determine the real issue(s) between the parties it is necessary to analyse some of the averments made by the respective parties in their affidavits. The Respondents approached the High Court for an Order declaring that Portion 234 of Farm No. 9 situate in the Manzini District is **"part of the estate"** of the deceased, and that it should be included as such in his Liquidation and Distribution Account. The basis of the application was that the 1st Appellant was refusing to sign the Liquidation and Distribution Account because it was not part of the deceased's estate. The Respondents contended that the immovable property was part of the estate as it was registered in the name of the deceased, that is, it is title deed land and an asset in the estate. Therefore by law it must be included in the Liquidation and Distribution Account. The Respondents further contended that the 1st Appellant could sign the Liquidation and Distribution Account and thereafter object to it if it did not deal with her claim.

[34]On the other hand the 1st Appellant contended, *in limine*, that the matter was prematurely enrolled, because the manner and/ or method of distributing the estate **"turns firstly, upon principles of Swazi Law and Custom"**. The 1st Appellant contended that the **"Executors… ought to have escalated the matter to the Umphakatsi as per the dictates of Swazi Law and Custom"**. In replying to the merits the 1st Appellant repeated her contention that the **"executors ought to have sought for the intervention of the customary structures, i.e. Umphakatsi of Mbelebeleni"**. Notably, the 1st Appellant conceded **"That the Farm forms part of the deceased's estate has never been placed under contention"**. Also notable is the 1st Applicant's averment that **"I am not opposed to the preparation and filing of a Liquidation and Distribution Account for the estate"**. The most significant averment is where the 1st Applicant states that **"the substance and/ or validity of my above claim stands to be tested and verified by firstly the traditional courts before it is brought before the High Court for final determination".**

[35]In my view, the 1st Appellant's interest was primarily the determination of her claim to the immovable property, which, if considered, would have to be determined by applying Swazi Law and Custom , notwithstanding that the Court *a quo* had not been asked to determine issues of succession. This is evidenced by the fact that she was not concerned about the other immovable property registered in the name of the deceased, nor saying that it too must be dealt with under Swazi Law and Custom. Thus, the central issue for determination was whether the immovable property is part of the estate of the deceased, that is to say, it is one of the assets constituting the estate, not upon whom should it devolve or by whom should it be inherited or to whom should it be distributed. As far as I am concerned these are two separate issues. The first issue is about which assets are vested or constitute the deceased's estate, and the other is about succession to the property. Resolution of the first issue does not import the application of Swazi Law and Custom, and on this basis does not fall within the jurisdiction of a Swazi Court, whether in terms of Section 68 of the Administration of Estates Act or section 7(1) read together with section 11 of the Swazi Courts Act. Admittedly, resolution of the second issue would import the application of Swazi Law and Custom, and place the matter within the jurisdiction of a Swazi Court in terms of section 68 of the Administration of Estates Act.

[36]Based on the aforegoing I am not in agreement with the majority decision that the issue before the Court *a quo* was restricted to **"inheritance or distribution of the property of the deceased and under which law such distribution of the property of the deceased and under which law such distribution or inheritance be undertaken"**, and that the alleged failure of the Court *a quo* to deal with this point was fatal to the proceedings.

[37]In my view, a court is empowered, in the exercise of its discretion, to direct that a preliminary point (i.e a point *in limine*) to be disposed of first in motion proceedings. See in this respect **Brian Kahn v Samsudin 2012 (3) SA 310 (GSJ); Reymond v Abdulnabi and Others 1985 (3) SA 348 (WLD) and Erasmus Superior Court Practice at D1 – 53**. In the Court *a quo* His Lordship Magagula J, dealt with the point *in limine* in the following terms –

> **"The 1st Respondent seems to believe that her wish would be granted if the deceased estate were to be administered accordance with Swazi Law and Custom."**

He continues to say –

"Clearly the 1st Respondent is the one who wanted a customary solution to her problem. She admits that the family customary structure failed to assist her. She then claims that the matter should have been elevated to the Umphakatsi (Chiefs' Kraal) level. She however clearly did not do this. This was her responsibility…"

He then concludes –

"The 1st Respondent having failed to take the matter through whatever customary structure she thought would be of assistance to her and having refused to approach any other court to establish her claim on the property in question, cannot be heard to still say that the estate should be administered by some customary structures."

[38]Whether the conclusion by His Lordship is correct or not is one thing, but it is not correct that he did not deal with the point *in limine*. His view was clearly that the 1st Appellant had the responsibility to launch proceedings within Swazi Law and Custom structures for her desired relief. I concur with this view. The point *in limine* did not preclude the Court *a quo* from dealing with

the other issue before it. In other words, the nature of the point of law was not as to oust the jurisdiction of the Court to deal with the first issue, which did not import the application of Swazi Law and Custom.

[39] In passing, I wish to point out that contrary to the 1st Appellant's contentions, an Order directing that Portion 9 of Farm 234 be included in the Liquidation and Distribution Account at this stage of the administration process is not equivalent to endorsing or pronouncing on how the estate will be distributed. The Court *a quo* simply ensured compliance with the Administration of Estates Act, and this falls within the ambit of its jurisdiction. To this extent the Order does not deprive the 1st Appellant her right to file a claim against the estate. It is still within her right to do so, if she is so inclined. If the claim is filed and there is a dispute, the dispute shall have to be determined by a Swazi Court. Once it is determined upon whom the property is to devolve, the remaining co-executrixies shall reflect this in the Liquidation and Distribution Account, and cause the property to be transferred to the correct beneficiary in accordance with the Deeds Registry Act. I find nothing untoward in this manner of winding up the estate.

Removal of the 1st Appellant as co-executrix

[40]In concluding this Judgment I now turn focus to the second part of the Court *a quo*'s Order. In view of the conflict between the 1st Appellant's personal interests and her duties as co-executrix, the Court *a quo* ought not to have issued an Order directing her to sign the Liquidation and Distribution

Account. The 1st Appellant cannot on the one hand fight for her claim in respect of Portion 9 of 234, and defend the estate against the claim on the other. The delay in the winding up of the deceased's estate can largely be attributed to this conflict of interest. I am of the view that the Court *a quo* should have outright ordered the removal of the 1st Appellant as co-executrix in terms of the alternative prayer, on account of the conflict of interest. See in this respect **Grobbellar v. Grobbellar 1959 (4) SA 719 (A)** and **Meyerowitz on Administration of Estates (6th edition) paragraph 11.6.**

[41]In the result, I make the following Order:

1. The 1st Appellant's appeal against the first part of the Order appealed against is dismissed;

2. The 2nd and 3rd Appellants' appeal against the second part of the Order succeeds, and the Order is replaced with the following:

   "The 1st Respondent is hereby removed as co-executrix in the estate of the late Mfanasibili Gilbert Dlamini with immediate effect".

3. Costs of this appeal are to be borne by the estate.

M.J. MANZINI

ACTING JUSTICE OF APPEAL