

THE HIGH COURT OF SWAZILAND

GELANE NTOMBIZILE GAMEDZE (NEE DLAMINI)

Applicant

And

MOTOR VEHICLE ACCIDENT FUND

1st Respondent

SOPHIE D. SHONGWE

2nd Respondent

Civil Case No. 1948/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. J. MASEKO

For the Respondents: MR. W. MKHATSHWA

RULING

(On points of law in limine) (28th October 2005)

[1] Serving before court is an application for a declaratory order that a certain Sicelo Ishmael Shongwe, an illegitimate minor child of the Applicant, be declared a child of the late John Mkwapela Shongwe. The Applicant is the natural mother of the said child, who was born on the 4th October 1984. The Applicant avers that the said child was born out of wedlock as a result of a love affair between herself and John Mkwapela Shongwe. She further deposed in paragraph 6 of her Founding affidavit that, amongst other things, during his lifetime, the late John Mkwapela Shongwe never denied paternity of the minor child. On or about the 28th January 2004, she duly lodge a claim against the 1st Respondent for loss of support for the said child. The 2nd Respondent has also lodged a similar claim on behalf of her minor child under MVA Claim No. 2001/0531. The latter has objected to Applicant's claim on the grounds that her minor child was not fathered by the late John Mkwapela Shongwe.

[2] The 2nd Respondent opposes the granting of the declaratory order being sought by the Applicant and to that end has filed an Answering affidavits on points in limine and on the merits. This judgment concerns the points of law in limine. These points are formulated in the following fashion:

5. Locus standi

5.1 The applicant has not indicated her marital status although she indicates that her maiden name was Dlamini, thereby inferring that she is married woman.

5.2 I have been advised, that in the event of the Applicant being a married female, without the assistance of her husband, she would not have the necessary locus standi to launch this application

5.3 It is therefore denied that the Applicant has the necessary locus standi to launch this application.

6. Dispute of fact

6.1 The Applicant should have anticipated the dispute of fact which would arise in this matter and launched an action and

not brought this matter before court on application procedures.

6.2 It will be argued on my behalf at the hearing of this matter that the Honourable court should exercise its discretion and dismiss the application on this ground".

[3] On the first point, it was contended for the 2nd Respondent that it is essential for an Applicant to state clearly that they have locus standi in judicio to bring the application. It is accordingly insufficient of a woman Applicant, merely to set out her name without otherwise indicating her status, i.e whether she is married, widowed or divorced or, if the first, whether or not she is subject to the marital power. In this regard the court was referred to Herbstein and Van Winsen, *The Civil Practice of the Superior Court of South Africa*, 3rd Edition at page 76, the case of *Wilson - Yelverton vs Gallymore* 1950 (2) S.A. 26 (D) and also the textbook by H.R. Hahlo, *The South African Law of Husband and Wife*, 5th Edition at page 234. Mr. Mkhathswa further relied on what is said by the authors Herbstein and Van Winsen (*supra*) at page 134 that Rule 17 (4) (b) makes no specific provision for the description of parties to applications, but in practice much the same information is required and it is equally essential to show that the parties have locus standi in judicio.

[4] On the second point viz, the dispute of fact, it was contended for the 2nd Respondent that the Applicant ought to have realized prior to the launch of these proceedings that a serious dispute of fact was bound to develop, especially with regards the issue of paternity as it appears at paragraph 9, 10 and 12 of the Applicant's own affidavit. Therefore, the options open to this court in terms of Rule 6 (17) and (18), should be to dismiss the present application with costs. The court was further referred to a plethora of decided cases on this aspect of the matter including the celebrated case of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Limited* 1949 (3) S.A. 1155 (T) at 1165. The court was further referred to *Amler's Precedents of Pleading*, 4th Edition at 104 for the legal proposition that procedurally, where a declaratory order is sought, if a dispute of fact is foreseeable, the declaration should be sought by way of action.

[5] A further point was raised at paragraph 4 of 2nd Respondent's Heads of Argument to the effect that at law all the necessary allegations upon which the Applicant relies, must appear in its Founding affidavit, as it will not generally be allowed to supplement the affidavit by adducing supporting facts in a Replying affidavit.

[6] Mr. Maseko who appeared for the Applicant advanced argument au contraire. On the first objection regarding loci standi he relied heavily on what was said by Schabert AJ of the Transvaal Provisional Division in the case of Carson and others NNO vs Spencer, 1982 (2) S.A. 755 where in the head-note thereof it is stated that there is no requirement that, in application proceedings under Rule of Court 6, Applicants must state their sex and that females must state whether they are married or not and if married, their marital status. The rule must be viewed as a provision complete in itself, for purposes of which locus standi will be presumed when the parties are natural persons and there is nothing to indicate a lack of legal capacity. It appears to me that this legal authority applies to the facts of the present case. The Applicant is the natural mother of an illegitimate child, and it would appear to me that locus standi in judicio will be presumed and there is nothing to indicate a lack of legal capacity. Therefore the point of law in limine in this regard ought to fail.

[7] On the second point that of the dispute of fact, I am in agreement with Mr. Mkhathshwa that Applicant ought to have foreseen the dispute of fact as regards the issue of paternity as it appears at paragraph 9, 10 and 11 of the Applicant's Founding affidavit. Further, it would appear to me that Applicant should have proceeded by way of action as it was propounded in the case of Electrical Contractor's Association of S.A. vs Building Industries Federation S.A. 1980 (2) S.A. 516 (T) to the principle that, where a declaratory order is sought, if a dispute of fact is foreseeable, a declaration should be sought by way of action.

[8] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE