HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE NO.1696/09**

OLGA KUNENE **APPLICANT**

AND

SAYINILE XABA GCINAPHI XABA **1ST RESPONDENT** **2ND RESPONDENT**

CORAM **MAPHALALA PJ**

FOR THE APPLICANT **MR. B.S. DLAMINI MR.**

FOR THE RESPONDENTS **M. SIMELANE**

JUDGMENT

1ST JUNE 2009

[1] On the Saturday of the 16th May 2009 at 1200hrs the Applicant filed an urgent application to a Judge at his residence for an order in the following terms:

"(a) That an order be and is hereby issued dispensing the normal forms of service and time limits and hearing this matter on urgent basis.

(2) That a rule nisi and is hereby issued interdicting and restraining the 1st and 2nd Respondents from proceeding with burial of the late Mandla Mkhotshwana Mkhonta who died on the 11th May 2009.

(3) That an order be and is hereby issued declaring that the 1st and 2nd Respondents have no right in law to proceed with the burial arrangements of the late Mandla Mkhotshwana Mkhonta.

(4) That an order be and is hereby issued directing that the rule nisi should operate with interim relief pending the finalisation of the matter.

(5) Costs of the application.

(6) Such further and/or alternative relief."

[2] The funeral which was sought to be interdicted was about to commence.

[3] The learned *Judge Annandale* who heard the matter entered by consent an order that the funeral be delayed for a period of one week. For the interim, all the interested relations, family, friends and any other interested parties shall meet and endeavour to jointly decide on all matters attendant to the funeral arrangements. Should the need arise this matter may be enrolled by either party.

[4] On the 27th May 2009 the matter appeared before me as a duty Judge where counsel made submissions on

points *in limine* and the merits of the case the negotiations of the parties as suggested by the learned Judge Annandale having failed.

[5] The founding affidavit of the Applicant who according to her is an elder blood relative of the late Mandla Mkhotshwana Mkhonta who died on 11th May 2009, who is an aunt to the deceased is filed thereto.

[6] The Respondents oppose the granting of this application and has filed an answering affidavit in this regard. In the said affidavit four points *in limine* have been raised. Firstly, that the Applicant does not have *locus standi* to move the present application because she is not an heir or relative of the deceased because she is married in terms of civil law to Respondents' uncle Mfanimpela Kunene. The second point raised is that the application is replete with disputes of fact and were foreseeable when the application was moved.

[7] The third point *in limine* is that the Applicant has not advanced any basis in law as to which custom or rite she based the application on the need to bury the deceased at Msahhwini. The fourth point raised is that of non joinder of the Master of the High Court. Further on a point raised of the non joinder of Mncedisi Mkhonta the deceased's son who has a direct interest

in the matter. He opposes that his father be buried at kaZondwako.

[8] In arguments before me on Wednesday 22nd May 2009 Counsel for the Respondent abandoned the last two points of non joinder and I shall not address this aspect of the matter in this judgment.

[9] On the first point *in limine* counsel for the Respondent cited the legal authority of *Corbett et al, The Law of Succession in South Africa* at page 556 where the learned author's state that the term 'blood relations' rather obviously included all persons related to the testator by blood. This phrase 'next of kin' stands for the testator's heirs *ab intestatio* the argument is that for this authority the Applicant lacks *locus standi* to prosecute the present case as she does not qualify to be called a blood relative as stated by the above cited authors.

[10] Counsel for the Applicant on the other hand argued that this is not so because his client took care of the deceased from when he was a child up to where he was an adult. Because of this it would be ridiculous to argue that she does not have the capacity to prosecute cases on behalf of the deceased. Unfortunately, the

incident of *locus standi* is a question of law not some sentimental reasons,no matter how valid they may be.

[11] The present issue is clearly stated by the learned authors cited above in paragraph [9] of this judgment. For these reasons I would dismiss the application for lack of *locus standi.* The Applicant is not an heir or relative of the deceased as she is married in terms of civil law to Respondent's uncle Mfanimpela Kunene.

[12] On another point although now proceeding *obiter dictum* the duty to attend to the funeral and burial or cremation of the deceased revolves upon his heirs. Directions in his will as to the funeral ceremony and disposal of his body have, if lawful and possible, to be carried out. Failing such directions his known wishes must be followed. If he was an adherent of a particular religious faith, he must be presumed to have desired that his customary rites should be observed. *(See Corbett et al (supra)* at page 3 thereof.

[13] According to the Respondent's answering affidavit the deceased chose his home kaZondwako where he had wanted to build his home. It was his intention which he related to his spouse that kaZondwako was his home.

[14] On the other hand Applicant in her replying affidavit merely denied the above state of affairs. In this regard

arguments were addressed by the attorneys of the parties.

[15] Mr. Simelane for the Respondent cited the *Law of South Africa, Vol.3* at paragraphs 136-137 to the following legal proposition:

> "In dealing with the Applicant's allegations of fact, the Respondent should bear in mind that the affidavit is not a pleading and that a statement of lack of knowledge coupled with a challenge to the Applicant to prove part of his case does not amount to a denial of the averments of the Applicant. It follows that failure to deal at all with an allegation by the Applicant amounts to an admission of such allegation. It is normally not sufficient for the Respondent to content himself with a bare and unsubstantiated denial."

[16] In view of the above legal authority I have come to the considered view that Applicant has not adequately addressed the arguments of the Respondent in the answering affidavit. The Respondent's version stands uncontroverted and should be accepted as the truth of the matter.

[17] It would appear to me following the legal reasoning of *Corbett et al (supra)* cited at paragraph [12] of this judgment that the wishes of the deceased ought to be respected in the present case.

[18] (See also the cases of *Mnyama vs Gxalaba & Another 1990(1) SA 650, Mabulu vs Thys & Another 1993(4) SA 701 SE* at 703

BC cited at folio 56 at page 308 of Prest, *The Law and Practice of Interdicts, 1993* on the principles governing the present case.

PRINCIPAL JUDGE

[19] For the aforegoing reasons the application is dismissed and that each party to pay his/her own costs.

S.B. MAPHALALA