

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civ. Case No. 648/2011

In the matter between

KHISIMUSI CLEMENT MAHLALELA

Applicant

And

SANELISO SABELO MAHLALELA

1st Respondent

DUPS FUNERAL PARLOUR

2nd Respondent

COMMISSIONER OF POLICE

3rd Respondent

In re:

SANELISO S. MAHLALELA

Applicant

vs

KHISIMUSI CLEMENT MAHLALELA

1st Respondent

MALUNGISA MAHLALELA

2nd Respondent

CORAM

Mamba J

FOR APPLICANT

Ms. S. Masuku

FOR 1st RESPONDENT

Mr. S. Madau

JUDGMENT
11th April, 2011

[1] The late Duma Msimisi Mahlalela died on 16 February, 2011. Following his death, some of his family members, including the 1st respondent herein who is the deceased's brother started making the necessary arrangements for his

funeral and interment. Whilst this was going on, it became public knowledge, and this was published in the print media circulating in this country, that some members of the Mahlalela family, including the applicant, who is the grandfather of the deceased and one Malungisa Mahlalela, an uncle to the deceased, wanted the deceased to be buried at Mkhuzweni area in the Hhohho Region, contrary to the wishes and intentions of the 1st respondent who wanted the deceased to be buried at Sigombeni area in the Manzini Region. When one side could not yield to the demands of the other the stage was set for a legal battle.

[2] On 23rd February, 2011, the 1st respondent filed an urgent application against the applicant and Malungisa Mahlalela herein seeking an order:

"restraining and interdicting the respondents or anyone else holding title under them from in anyway disturbing, interfering or influencing the applicant in the preparation of the funeral and subsequent burial of Duma Msimisi Mahlalela scheduled for the 26th February 2011 or any other date that may be arranged." The application was set-down for hearing at 9.30 in the forenoon on 24th February 2011 and service thereof was made or effected on both Malungisa and the applicant on 23 February 2011. Neither of these men opposed this application.

[3] In support of the application, the 1st respondent inter alia, made the following allegations; which have not been denied or disputed by any one:

- 3.1. Both his parents died pre-deceasing him and the deceased.
- 3.2. Since the death of the said parents, he and the deceased lived and were under the care and custody of their maternal parents at Sgombeni and have always regarded this as their permanent home.

3.3. The relationship between the Mahlalela family and the deceased's mother was strained such that when she died she was buried at Sgombeni and not at Mkhuzweni where her husband is buried.

3.4. In her last Will and Testament, the mother of the deceased willed that she and her children, (including the deceased), should be buried at Sgombeni.

3.5. The first respondent wants to bury the deceased at Sgombeni.

3.6. After the death of the deceased, a delegation, allegedly sent by the applicant approached the deceased's mother's people at Sgombeni requesting that the funeral and burial should be at Mkhuzweni. On being approached on this and the publication in the print media, the applicant denied knowledge of it, whilst Malungisa threatened to take legal action to have the deceased buried at Mkhuzweni.

[4] In his application aforesaid, the 1st respondent also made the allegation that "...as a close surviving relative [of the deceased] I have a clear right to determine where and how the deceased should be buried. Besides no one else and in particular the respondents do [sic] have the rights to determine where the deceased should be buried as they long disowned us

[5] On 24th February 2011, after going through the papers filed and hearing submissions by 1st respondents attorneys and there being no opposition to the application, I granted it against Malungisa Mahlalela only. I refused to grant an order against the applicant in view of the insufficiency of the allegations against him warranting such an order. The 1st respondent had himself stated in his founding affidavit that the applicant had specifically disassociated himself from

what was contained in the press and what was relayed to the 1st respondent's mother's people by a group of people allegedly sent by the applicant, that the burial should take place at Mkhuzweni.

[6] The order referred to above was served on Malungisa Mahlalela on the 24th February 2011 and he apparently brought it to the knowledge of the applicant on the same day.

[7] The above order prompted the applicant to file this application wherein he claims inter alia, for an interim order interdicting and restraining the 1st respondent or any other person acting in concert with him from proceeding with the burial of the deceased on the 26th February, 2011. He also seeks an order declaring that he is "...the one vested with the power and authority of determining and directing the burial of the deceased. Like the application filed by the 1st respondent two days before him, the applicant stated that his application was urgent in view of the fact that the burial was due to take place on 26th February 2011. He set it down for hearing on 25th February, 2011 at 3.00 in the afternoon and served it on the 1st respondent's attorneys at 14.27 that day. The application is opposed.

[8] From the above facts, it is abundantly plain that the interdict sought by the applicant and the grounds thereof, is the same as that sought and obtained by the 1st respondent. They both allege that they are the rightful persons to determine where the deceased should be buried and that, each to the exclusion of the other, should be allowed to conduct the burial at their chosen sites. The applicant alleges that, he is a staunch observer of Swazi custom and tradition.

He alleges further that Swazi law and tradition empowers him, as the head of the Mahlalela family, to determine where the deceased should be buried and that he has determined that this should be at Mkhuzweni where the father of the deceased is buried. He is opposed to the burial taking place at Sgombeni.

[9] The question that immediately announces itself is: in view of the applicant's stance or view herein, why did he not oppose the application filed by the 1st respondent? He answers this crucial or vital question in this manner:

"Due to my advanced age, I could not instruct attorneys to oppose the application and more particularly because I had not been made aware that some other person was taking away my right to direct and determine the deceased's burial". But he immediately states that: "From annexure KCM2 it is stated under oath that first Respondent intends to bury the deceased at Sigombeni area being their maternal home which is something I am opposed to as both the first respondent and the deceased are domiciled at Mkhuzweni area in the District of Hhohho and all their forebears, save their mother, are buried thereat." Applicant concedes therefore that the 1st respondent clearly stated in his founding affidavit that he wants the burial of the deceased to be at Sgombeni and that he, the applicant, is opposed to this. This is a startling concession to make and it does not answer the question posed above. Above all, the order sought and obtained by the 1st respondent was clear and unambiguous. He wanted a free and unencumbered say on the preparation for the funeral and the location of the burial site. The Applicant has not said he did not understand the terms of the interdict sought. He has not said that this was not explained to him

when he was served with the court papers. He has, again not explained how his "advanced age" prohibited him from instructing his attorneys to oppose the application on 23rd February, 2011 but a day thereafter permitted him to instruct his attorneys to file this, his own application.

[10] The dispute over the burial of the deceased came into the public domain at the latest on 21st February 2011 as per the annexed newspaper article. When contacted by the 1st respondent, the applicant denied his involvement with those who were advocating that the deceased should be buried at Mkhuzweni. Even if he had not sent this delegation to the Dlamini's, the delegation's presence and its agenda should have been and in fact was enough notification to him that some people, unauthorized by him, were bent on determining and conducting the burial of the deceased. He set back and did nothing to assert his claim or rights. Again, and this is common ground, the deceased died on 16th February, 2011 and the applicant did nothing at all in preparation for the burial, other than filing this application. This application has been filed at the eleventh hour. No satisfactory explanation has been forthcoming from the applicant for this delay or in particular, his failure to oppose the application filed by the 1st respondent which was served on him. He was a liberty then, to file a counter application to the application. This is what he should have done. He did not do so. He erred in his failure, fatally so.

[11] It is not in the interests of the administration of justice that there should be multiple legal proceedings, each litigant filing his own application, on one and the same issue. This is understandable and excusable where a party who has a direct and substantial interest in a matter that is the subject of the litigation that is

not already pending in court or has been concluded by the court is or was not aware of such proceedings. Different and or multiple proceedings between the same parties and over the same cause of action or subject matter are undesirable. They unnecessarily clog or choke up the court roll. It is with this in mind that, in appropriate or deserving case, the court will order joinder of the parties or a consolidation of the cases or that certain proceedings be struck off the roll, with an appropriate order for costs, as the case may be. Where a litigant has been given the chance to oppose a matter, he should do so rather than sit back and only to file his own application on the same issue. This is what the applicant did herein. He erred.

[12] In view of the above insurmountable shortcomings or deficiencies in the applicant's papers, the fact that an order has already been competently issued by this court in favour of the 1st respondent on the same issue and there being no application for the rescission of that order; and the filing of this application at the eleventh hour by the applicant, when virtually all the preparations for the burial have been made; it is my considered judgment that even if the applicant had satisfied or established all the requisites for an interim interdict, I should not exercise my discretion in favour of granting the application. There can be no two deferring orders on the same matter.

[13] There is no rherit in this application and it is dismissed with costs.

MAMBA J

Ex tempore judgment delivered on 25 February 2011).