



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

CIVIL CASE NO. 656/13

In the matter between:

LINDIWE SIFUNDZA

APPLICANT

v

YVONNE SOTHO

1ST RESPONDENT

MASISI VILANE

2ND RESPONDENT

INYATSI PROVIDENT FUND

3RD RESPONDENT

THE MASTER OF THE HIGH COURT

4TH RESPONDENT

THE ATTORNEY GENERAL

5TH RESPONDENT

Neutral Citation : Lindiwe Sifundza v Yvonne Sotho (656/13) [2014] SZHC 185 (8 AUGUST 2014)

Coram: Q.M. MABUZA -J

Heard: 13/12/13

Delivered: 8/8/2014

Summary: Practice – Pleadings – Applicant seeking interdict – Points of Law taken to application – Urgency – Locus Standi in judicio – Disputes of fact – Points of Law upheld – Application dismissed with costs.

JUDGMENT

MABUZA –J

[1] This is an application dated 29th April 2013 brought under a certificate of urgency and in which the Applicant prays for *inter alia*:-

1. Dispensing with the time limits, forms and provisions as required in terms of the Rules of this Honourable Court that this matter be heard as one of urgency.
2. Condoning Applicant's non-compliance with the rules of Court.
3. That a *rule nisi* hereby issue with immediate effect returnable on a date to be determined by the Honourable court upon which Respondents are to show cause why a final order in the following terms should not be granted;
 - a) Interdicting and restraining the 3rd Respondent from disbursing or making payments to the 1st Respondent, her minor child namely: **APHIWE NKOSIS'VILE SIFUNDZA** and 2nd Respondents's minor child namely: **SAKHIZWE SIFUNDZA** pending finalization of this matter.
 - b) Declaring that the 1st Respondent together with Sakhizwe Sifundza are not entitled to benefit from the estate of the late **Khanya Sifundza** and that they are not heirs and beneficiaries to the estate.

c) Directing the 1st and 2nd Respondents to return forthwith any monies they may have benefitted from the estate of the deceased.

4. Costs in the event the application is opposed.

5. Any further and/or alternative relief.

[2] The Applicant is a widow who was married by Swazi Law and Custom to Khanya Sifundza on the 27th July 2008. Although it is not stated when Mr. Sifundza died it is common course between the parties that he is now deceased. While the deceased was alive he was employed by Inyatsi (Pty) Limited and was contributing to the company's pension fund, Inyatsi Provident Fund (3rd Respondent).

[3] The 1st Respondent is the mother to three children said to be the children she had with the deceased. The children's names are:

- Nothando Thandeka Sifundza
- Lindokuhle Vusumuzi Sifundza
- Aphiwe Nkosis'vile Sifundza

[4] The applicant denies that the minor child Aphiwe Nkosis'vile Sifundza is the deceased's child or that this child was a dependent of the deceased.

[5] It is further stated that the 1st Respondent is the first wife of the deceased and therefore a senior wife to the deceased. Again the applicant denies that the 1st Respondent is the deceased's first wife or that she was a dependent of the deceased during his lifetime. Instead she says that the deceased and the 1st Respondent had a long relationship which had broken up by the time the deceased died.

[6] The 2nd Respondent is stated to be the mother of the minor child Sakhizwe Sifundza allegedly fathered by the deceased. The applicant denies that Sakhizwe is the child of the deceased. She further denies that this child was a dependent of the deceased.

[7] The application is opposed by the 1st and 3rd Respondent (the respondents) Mr. Edwin Mbingo deposed to the 3rd Respondent's opposing affidavit. In it he says that as a standard practice of the company's pension fund the deceased registered the following people in respect of the nomination form as dependents:

- Sotho Yvonne (the 1st Respondent),
- Nothando Sifundza,
- Lindokuhle Sifundza,
- Lindelwa Sifundza, and
- Nkosis'vile Sifundza.

The nomination form with these names is attached to Mr. Mbingo's affidavit as Annexure "AW1". It is dated 16/8/2007 and purports to be signed by the deceased.

[8] Annexure "AW1" is disputed by the Applicant as well as the signature thereto which she says does not belong to the deceased. She has also attached annexure "LSD7" to her founding affidavit a nomination form that she says is the true form that the deceased completed, signed and filed with the 3rd Respondent. Annexure "LSD7" features the names of:

- Lindiwe Mara Lubisi (the applicant),
- Lindokuhle Sifundza, and
- Amahle Nkosis'vile Sifundza.

Annexure "LSD7" was completed on the 15/3/2008 and was purportedly signed by the deceased.

[9] The urgency alleged is that the 3rd Respondent "has already made certain payment in the form of advances and is about to release the final payment to all the dependents including the 1st Respondent and her child and to the 2nd Respondent and all beneficiaries as part of the pension benefits much to the prejudice of the applicant and other beneficiaries".

[10] The 1st and 3rd Respondents raised points of law which are similar, to the extent that Miss Boxhall Smith chose to align herself with Mr. Mavuso's submissions at the hearing before me on the 13/12/13. The points in law raised are *inter alia* the following:

- urgency,
- applicant's lack of *locus standi* in *judicio*,
- Disputes of facts.

Urgency

[11] The argument submitted on behalf of the Respondents in respect of urgency is that the urgency is self-created because the Applicant was aware of the fact that the 3rd Respondent was disbursing money to the Respondents for example school fees were paid for the disputed minor during January 2013 but she only brought the application during 30th April 2014. In response the Applicant denies that the urgency is self-created in that she had no idea that certain funds had already been paid to the 1st and 2nd Respondents. She says that the 3rd Respondent only disclosed this information during a meeting held on or about March 2013 during which they advised how the pension would be disturbed.

[12] Even if the Court would believe that the Applicant found out during March 2013 she only brought the application at the end of April 2013 and sat on her laurels for a full month after her discovery.

[13] I now turn to some of the authorities that are applicable in respect of this subject matter. Rule 6 (25) which deals with urgent applications provides as follows:

“(a) In urgent applications the Court or a Judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to the Court or Judge, as the case may be, seems fit.

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course.”

[14] In the judgment of Dunn J in **Humphrey H. Henwood v Maloma Colliery Ltd and Another**, Case No. 1623/94 (unreported) it was held that these provisions cited above are peremptory.

[15] In **H.P. Enterprises (Pty) Ltd v Nedbank (Swaziland) Ltd** Case No. 788/99 (unreported) at pages 2 – 3 Sapire CJ stated:

“Litigants must guard against abuse of the urgency procedure more especially where it is calculated to produce an unfair result. If practitioners (whether they be attorneys or advocates) issue certificates of urgency without regard to the objective urgency of the matter, the certification becomes meaningless and no credence can be given to such documents. Such practitioners owe a duty to the Court in certifying matters as urgent, to have satisfied themselves on objective assessment that the matter is indeed urgent. A litigant seeking to invoke the urgency procedure must make specific allegations of fact which demonstrate that observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful, but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow”.

[16] In **Gallagher v Normans Transport Lines (Pty) Ltd** 1992 (3) SA 500 at 502 per Flemming AJP

“The mere existence of some urgency cannot therefore justify an application not using form 2 (a) of the first schedule to the Uniform Rules. The Rules do not tolerate the illogical knee – jerk reaction that, once there is any amount of urgency, that form of notice of motion may be jettisoned - and often, a *rule nisi* be sought. The

Applicant must, in all respects, responsibly strike a balance between the duty to obey Rule 6 (5) and the entitlement to deviate, remembering that that entitlement is dependent upon and is thus limited according to the urgency which prevails”, quoted with approval by Masuku J in the case of Winnie Muir (born Howard) v Siboniso Clement Dlamini N.O. & Others Case No. 368/99 (Unreported) see also John Mzeleni Dlamini v The Chief Electoral Officer Umphatsi Lukhetfo & Others Case No. 2051/99 (unreported).

- [17] In the event I find that there is no urgency in *casu* and any such urgency perceived by the Applicant to exist is self-created and I accordingly uphold this point of law.

Locus Standi in judicio

- [18] An argument is made on behalf of the Respondents that the Applicant does not have *locus standi in judicio* to institute these proceedings in so far as she seeks an order declaring that 1st Respondent and her minor child “are not entitled to benefit from the estate of the late Khanya Sifundza and that they are not heirs and beneficiaries to the estate” in terms of prayer (b) of the notice of motion. It is the Respondents further argument that it is clear from prayer (B) (prayer C having been abandoned) that this application concerns the deceased’s estate and not merely pension benefits.

[19] That being the case the Applicant in her personal capacity has no *locus standi in judicio* to bring this application in so far as it pertains to the estate of a deceased person. It is trite law and I agree that the lawful representative of an estate person since deceased to institute or defend legal proceedings is the executor of such estate.

[20] The Applicant is proceeding in her personal capacity and she describes herself in her affidavit as a widow of Nyakatfo area in the Hhohho District. The Applicant has not alleged that she is the executor of the estate of my deceased husband or, at the very least, attach her letters of administration as proof of her executorship. The Last Will and Testament of the deceased (Annexure “LSD2”) nominates, constitutes and appoints Nontobeko Sukati-Msibi as the executrix testamentary of the estate in question. This is the person that has a *locus standi* to bring these proceedings alternatively the Master of the High Court of Swaziland.

[21] In **Gross & Others v Pentz** 1996 (4) SA 617 (A) at page 625 it was held:

“In my view, it should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have *locus standi* to do so. This was the conclusion

reached by the Court *a quo* and I agree with what Scott J said on this aspect of the matter (see reported judgment at 523B-G).”

[22] In the event this point of law is upheld.

Disputes of fact

[23] In the background set out above I have illuminated several disputes of fact namely:

- That the marriage of the 1st Respondent to the deceased is disputed;
- That the paternity of the minor child Sakhizwe Sifundza is disputed.
- The right of the 1st Respondent, her child Aphiwe and Sakhizwe to be declared dependants of the deceased;
- The correct nomination form between Annexures”LSD7” and “AW1”;
- The signature purporting to be the deceased in Annexure “AW1” is disputed.

[24] The parties in general seem not to be entirely adverse to paternity tests being conducted on Aphiwe and Sakhizwe and I would support such a venture as it would put to rest any speculation about the two children’s paternity and I so order.

[21] In the event the points of law are hereby upheld and the application is dismissed with costs.

Q.M. MABUZA -J
JUDGE OF THE HIGH COURT

FOR THE APPLICANT	:	MS. N. SUKATI
FOR THE 1ST RESPONDENT	:	MR. T. MAVUSO
FOR THE 3RD RESPONDENT	:	MISS BOXSHALL-SMITH