

IN THE HIGH COURT OF SWAZILAND**PHINDILE CHRISTIE**

Applicant

And

SIPHO CHRISTIE1st Respondent**GLADYS CHRISTIE**2nd Respondent**CONSTANCE CHRISTIE**3rd Respondent**GUGU CHRISTIE**4th Respondent

Civil Case No. 3241/2007

Coram: S. B. MAPHALALA - J

For the Applicant: MR. S. KUBHEKA

For the Respondents: MR. B.S. DLAMINI

JUDGMENT11th September 2007

[1] At around 5.00am on a Saturday of the 8 September 2007, in my home the Applicant approached this court as a duty Judge under a Certificate of Urgency for an order stopping a funeral of the deceased who is a father to the Applicant and the Respondents before the court. The application is for an order in the following terms:

- 1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency;**
- 2. Interdicting the burial of the corpse of the deceased, Albert Christie, arranged for tomorrow the 8th September 2007 pending a post-mortem to be conducted to determine his cause of death;**

3. **Directing and/or authorizing the Government pathologist of the Royal Swaziland Police Headquarters, Mbabane to conduct a post-mortem on the deceased's corpse to ascertain the cause of death;**
4. **Directing and/or authorizing the Director of Swaziland Medical Services to do all that is necessary to give effect to this order;**
5. **Authorizing and/or directing the Deputy Sheriff for the region of Hhohho to do all that is necessary to give effect to this order;**
6. **Authorizing and/or instructing the Station Commander and/or Desk Officer or their lawful delegated junior officers of the Royal Swaziland Police, Mbabane, to do all that is necessary to assist in the carrying out of this order;**
7. **That an interim order to operate with immediate effect be granted in terms of paragraphs 1, 2, 5 and 6 herein above should not be made final on the September 2007.**
8. **Costs of suit only in the event of opposition to this application;**
9. **Further and/or alternative relief.**

[2] The Applicant is founded on the affidavit of the Applicant where pertinent averments are made including the issue of urgency. When the matter was heard Counsel for the Applicant applied that an amendment of the prayers be made in prayer 2 thereof to read as follows: **interdicting the burial of the corpse of the deceased, Albert Christie, arranged for tomorrow the 8 September 2007 pending a production of a death certificate of the deceased to the Applicant.**

[3] In view of the papers filed of record and the submissions by Counsel for the Applicant the court granted an order in the following terms:

1. **An order directing the Respondents to furnish the Applicant with the Medical Certificate certifying the cause of death of Albert Christie prior to the burial;**
2. **Interdicting the burial of the corpse of the deceased, Albert Christie, arranged for the 8th September 2007, pending a production of a death certificate of the deceased to the Applicant;**
3. **That an interim order to operate with immediate effect be granted in terms of prayers 1 and 2 herein above should not be made final on the 10th September 2007 only in the event the Respondent fail to furnish the Applicant with the death certificate the interim order in terms of paragraphs 1, 2, 5 and 6 of the Notice of Motion.**

[4] The rule *nisi* issued by the court as shown above was made returnable on the 10th September 2007. When the matter was called Counsel for the Respondent *Mr. Dlamini*

indicated to the court that Respondents desire to raise points of law *in limine* from the Bar and will furnish the opposing affidavits in due course. Counsel for the Applicant, however submitted that in this case there are only two issues that need to be addressed being firstly the leading of oral evidence of the Station Commander and secondly, costs of the matter. Counsel for the Respondent pressed the court that this is not the position but proceeded to say that the Respondents are entitled to pursue the points of law. He stated that the Respondents have been embarrassed by this application in that the arrangement of the funeral were at a very delicate phase to get an order shown as the above-cited interim order. I must further wish to state that such applications are very sensitive and important because of the emotional issues where parties have been grieving for the death of a loved one. Courts in the normal course of events are reluctant to give such orders to stop a funeral. That as it may I have allowed Counsel for the Respondent to raise these preliminary points.

[5] The first point *in limine* is that on the affidavit to support the relief in prayer 2 there is nothing whatsoever to support this prayer. The second point of law *in limine* was abandoned by the Respondent which deals with the issue of the amendment of prayer 2 as shown above. That Applicant had not followed the rules of this court for the effected amendment. The third point *in limine* deals with the issue of urgency that Applicant was aware of the death of the deceased on the 30 August 2007, but kept quiet about the matter and only sprung in action at the eleventh hour and thus embarrassed the Respondent. That, whatever urgency in this matter is self-created and in this regard Respondents sought an order of costs in the punitive scale.

[6] The last point *in limine* is that Applicant wanted to be given the certificate whilst she has not cited the Registrar of Births, Marriages and deaths who is in law the custodian of such certificates and therefore stated that in this respect the application is fatally defective and ought to be dismissed in this ground alone.

[7] In reply to these arguments Counsel for the Applicant submitted his replies in the following sequence. Firstly, he deals with the first point that Applicant has not proved the requirements of an interim interdict. In this regard the court was referred to many portions of the Founding affidavit including paragraphs 17, 18, 21, 22, 23 and 24. In this regard Counsel for the Applicant stated that firstly Applicant has proved a clear right, secondly, that the said right has been infringed by the Respondents. Thirdly, that the balance of convenience favour the granting of the interdict in that an order of exhumation of the body in the future would put all the parties in a situation of a double jeopardy and further that there would be double expenses if that route is pursued. On the fourth requirement that Applicant did not have another alternative remedy.

[8] On the point about urgency Counsel for the Applicant took the court through a painstaking journey of the events in this case that the urgency in which the matter has been brought has been canvassed in the Founding affidavit of the Applicant. It appears on the papers filed of record that the Applicant together with the elder brother of the deceased have been excluded in participating in the burial of the deceased and this fact has fueled the Applicant's suspicions that something untoward has occurred in the death of the deceased, thus this urgent application. In this regard the court was invited to look at all the circumstances of this case. Again the court was taken through the events in this matter.

[9] On the last point of law *in limine* concerning the joinder of department of the Registrar of Births, Marriages and Deaths the argument is that the joinder of this officer was not necessary as the Director has no role to play in this matter. In this regard the only documents necessary to prove the case is the notification of death.

[10] I have considered the pros and cons of these arguments and have come to the considered view that the Applicant is correct in all her points against the arguments advanced by the Respondents *in limine*. Firstly, on the point about the requirements of an

interim interdict I am of the considered view that Applicant has amply proved the requirements of an interim interdict as required by the law which governs the granting of an interim interdict. In this regard I refer to what is stated by the learned author *C.B. Prest, Interlocutory Interdicts (Juta & Co. Ltd) (1991)* at page 53 as follows:

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief, and
- (d) that the Applicant has no other satisfactory remedy.

[11] Secondly on the issue of urgency I have come to the considered view that Applicant has proved urgency as required by Rule 6 (25) (a) and (b) of the High Court Rules. I cannot fault the Applicant at all after reading the Founding affidavit on how the dispute between the parties came about. It would appear to me that on the facts that she was propelled to act the way she did by the Respondents exclusion in the preparation of the funeral of the deceased. The suspicion that she had on the actions of the Respondents has caused her to approach the court as she did, on urgent basis. Therefore the point of law on urgency fails.

[12] On the last point that of the Registrar of Births, Marriages and Death has not been joined I again am in agreement with the Counsel for the Applicant that it was not necessary to join this officer in view of the fact that what is sought by the Applicant in this case is a notification of death which is not issued by the offices of the Registrar aforementioned. In this regard this point of law *in limine* fails.

[13] At the end of the arguments I raised an issue of the evidence of the Station Commander who has played an important role in this dispute. Counsel for the Applicant supported this view by the court that the officer be called to clarify some of the issues in this case. Counsel for the Respondent however exhibited a lukewarm attitude to this

suggestion by the court but left this decision to the court. I therefore ruled that the officer be called to lead *viva voce* evidence and produce the certificate before court.

[14] The officer is stationed in the Mbabane Police Station and is a Station Commander there by the name 2457 Assistant Superintendent Charles Tsabedze. He deposed at some length. He submitted before court a certified copy of the death certificate and a doctor's medical report. These documents were entered as exhibit "A" and "B" respectively. The gravamen of his evidence is that on a Friday of the 7th September 2007, at 16.00hours the Respondents came to the police station and was handed these documents with strict instructions not to give to the Applicant and was further told by these Respondents that if he fails to comply with this strict instruction they will take legal action against the police. During that time the Applicant had approached his office investigating about the cause of death of her father. The police also at that time were at the verge of making a similar application as the application by the Applicant to stop the funeral so that the cause of death of the deceased is ascertained.

[15] At that time the Station Commander assigned one Detective Clement Sihlongonyane to assist the Applicant to establish the cause or possible death of the deceased Albert Christie. The officer testified that when he asked the Respondents what was the cause of this embargo of information he was told by one of the Respondents that Applicant was an illegitimate child and therefore not welcomed in the family. The officer stated further that he waited for the Applicant to tell her about this but he could not get hold of her until today when he is called to give evidence by the court. The officer was cross-examined searchingly by Counsel for the Respondent but he was adamant in his replies under cross-examination.

[16] It would appear to me that on the evidence of the Station Commander the Applicant would not have gotten the documents from the officers had she got in touch with the officer before launching this application. It is clear on these facts that the Respondents

are the cause of all these problems in this case. They had in their possession the document sought by the Applicant and they tell the highest police officer in this district not to give it to the Applicant on pain of legal action. The respondents have exhibited a deep rooted hatred of the Applicant such that they are prepared to go to court to prevent her from looking at the certificates. Even when they are served with the interim order during the funeral they preferred that this matter come to court and the funeral stopped instead of handing her these documents.

[17] It appears from the facts adduced in this matter that the Applicant's illegitimacy has made her a *persona non grata* to the Respondents such that she should not be told how her father died. This is the chilling effect of the Respondents' actions in this case. I further do not think it is correct what the Respondents say that the issue of the certificate is separate from the Applicant's suspicions. These issues go together in that one cannot say that she should have obtained the certificate from the Births, Marriages and Death offices and stop bothering the Respondents in their preparation to bury their father. She suspected that there was some foul play in this case such that she approached the court to allay those suspicions.

[18] In the result, for the afore-going reasons I have come to the considered view that the points of law *in limine* fail and in view of the fact that the certificates sought have been secured by the Applicant there will be no useful purpose in proceeding with the merits of the case. Therefore the rule *nisi* in place is discharged and each party to pay his or her costs.

S. B. MAPHALALA

JUDGE