THE HIGH COURT OF SWAZILAND

MANDLA LUKHELE

Applicant

And

THE MASTER OF THE HIGH COURT *et al*

Civil Case No. 2619/2003

Coram	S.B. MAPHALALA – J
For the Applicant	MR. B. V. ZWANE
For the Respondents	MR. B. G. MDLULI

JUDGMENT

(15/10/2004)

Before court is an application which was brought under a Certificate of Urgency for an order, *inter alia* authorising and directing the 3rd and 4th Respondents to release to Applicant all monies held by them in or as proceeds from the sale of sugar cane from Certain SF 43 based in Vuvulane Farms; interdicting and restricting the 1st Respondent from interfering in anyway whatsoever with the Applicant's occupation and use of the said "Farm" being SF 43 on the Vuvulane Farm, and costs hereof against the 1st Respondent.

The Applicant has filed an affidavit in support of his application wherein he outlines the substantial facts in support thereto. Pertinent annexures are also filed of record.

The Respondents oppose the granting of the application and the answering affidavit of the 6th Respondent is filed to that effect. In the said affidavit various points of law *in limine* are advanced together with averments on the merits. This judgment concerns the examination of the said objections raised *in limine*.

In turn, the Applicant has filed a replying affidavit to the answering affidavit of the 6th Respondent.

The points of law *in limine* may be paraphrased as follows:

i) ***Locus standi*** – that the Applicant has no *locus standi* to launch this application in as much as the subject matter thereof is property of the estate/s of their deceased parents.

ii) ***Non-joinder*** – that Applicant has deliberately failed and/or omitted to join the heirs of the estate.

iii) ***Urgency*** – that Applicant has not complied with the requirements of Rule 6 (25) in as much as he has failed to set forth explicitly the circumstances he avers render the matter urgent.

iv) ***Dispute of fact*** – that Applicant knew or ought to have known that a serious dispute of fact was bound to develop. These disputes of fact are listed in paragraph (10) (a), (b) and (c) of the 6th Respondent's answering affidavit.

I must state *en passant* that on point number ii) of non-joinder an application for joinder of the 5th, 6th, 7th and 8th Respondent was granted by Annandale ACJ on the 24th October 2003. Therefore no further mention of this aspect of the matter will be necessary for purposes of this judgment. So is the issue of urgency advanced as the third point mentioned above. When the matter came for argument it was conceded on behalf of the Respondents that this issue has to a large extent been overtaken by events, regard to the fact that the application itself was launched in October 2003, and it is only now that it is being argued. The Respondents expressed the view though that it was important that this matter be disposed of as soon as possible as the 1st Respondent's cannot proceed any further in the winding up of the estate.

On the first objection it was contended on behalf of the 5th, 6th, 7th and 8th Respondents that Applicant has no *locus standi* to bring this application. That it is trite law that only an executor in a deceased estate has the *locus standi* to litigate on behalf of an estate. Reliance was placed on the authority in the case of ***Howood vs Howood 1936 (1) P.H. 724***. In this regard it was argued that the subject matter of the dispute herein is indisputably an asset in the estate of the late Minah Lukhele.

On the remaining point of law *in limine, viz*, that there is a dispute of fact, it was contended that Applicant knew or ought to have known that a serious dispute of fact was bound to develop. It was submitted in this regard that in his own evidence Applicant knew, firstly, that the 1st Respondent was unwilling to withdraw the directive contained in the letter of the 22nd August 2003, addressed to the Chairman of V.I.F and hence knew that 1st Respondent disputed Applicant's right to claim such withdrawal. Secondly, Applicant knew that the heirs and/ or next of kin had been to the Master of the High Court disputing Applicant's right to collect the proceeds of the sugar cane sold; and thirdly, that Applicant knew that there was a dispute pertaining to the ownership of the money he sought to have the Master of the High Court release.

The Applicant on the other hand argued *au contraire* on the point of law of *locus standi* that this point cannot stand as this application is that his monies have been frozen and as such was suing in his personal capacity. He has not said that he was acting as an executor as seems to be the basis of this point of law *in limine*.

On the issue of the disputes of fact it was contended for the Applicant that the disputes of facts alluded to by the Respondent are issues that will be disposed of by a decision on whether the monies due and frozen are estate monies or not. Further on this point that this is a question of law. The court is to determine whether the 1st Respondent had the necessary authority to freeze the proceeds of the farm payable to the successor.

Before delving on the points raised, I find it important to briefly sketch the history of the matter for a better understanding of the issues in this case. The proceeds which are now the subject matter of this litigation eminate from the sale of sugar cane from

Certain SF 43 based in Vuvulane Farms. This farm is under the Vuvulane Irrigated Farm Scheme in the Lubombo Region.

The farmers engaged in this enterprise were allocated portions called "Farms" to use for farming but never acquired ownership of such portions. Farmers then formed groups under which they conduct their business. Such groups then deal with the 4th Respondent as representative of the farmers under them. According to the scheme any farmer allocated use of a portion has to nominate a person that will be responsible or take over the use in the event of his or her death. In that token, the Applicant's mother who is now late appointed the Applicant to be the person to take over the farming on her Farm No. 42.

On the 19th May 2000, the Applicant was nominated at a next of kin meeting held before the Siteki Regional Administrator as a successor to the late Minah Lukhele (mother) of Farm SF 43.

According to the Applicant the "Farm" he was farming never belonged to his mother and therefore can never be part of her Estate. The farm devolved into his possession by operation of the Rules and Regulations of the owners and/or Managers of the Vuvulane Farms being Vuvulane Irrigation Farms (Pty) Ltd. According to him the proceed from the farm are from his own inputs. Therefore the 1st Respondent has no authority whatsoever to stop 3rd and 4th Respondent from making payments to him of the monies due to him.

The 6th Respondent, who filed the Respondents' answering affidavit, is a blood sister of the Applicant and one of the heirs in the joint estates of their deceased parents, namely the late Abel Madevu Lukhele and the late Minah Lukhele. The version of the Respondents is that the family made a report of Applicant's mishandling of the Estate assets *viz*, the farm earning and as a consequence the Master of the High Court called a meeting of the family members including the Applicant. In this meeting it was made clear to the Applicant that he was neither the duly appointed executor nor the legal administrator of the Estate and had been doing so purely for convenience by the leave and licence of the family. It was further indicated to him that pending the resolution of the dispute that had arisen and the regularization of the estate by a

proper and legal appointment of an executor and administrator, or proper representative of the estate, the funds would be frozen in the hand of the paying agent, V.I.F.

Having outlined the essential facts in this case I now proceed to consider the remaining points of law *in limine, viz* i) the issue of *loci standi* and iv) the disputes of fact. I shall consider these objections *ad seriatim*:

i) Loci standi.

On this point *Mr. Zwane* who appeared for the Applicant relied on what is said by the author T W Bennett in his work entitled **"Application of Customary Law in Southern Africa"** at page *226* to support his argument that since the Applicant's mother died interstate her estate therefore stands to be determined by customary law. Further as a consequence the Master of the High Court has no legal authority to apply the ***Adminstration of Estate Act, 28 of 1902.*** The learned author puts it this way at page *226 in fin 227*:

> **"In Swaziland the Administration of Estates Act lays down, in s68:**
> If any African who during his lifetime has not contracted a lawful marriage, or who, being unmarried is not the offspring of parents lawfully married, dies interstate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged".
>
> The choice of the term "lawful" marriage is unfortunate: presumably it means a civil/Christian marriage and, as such, is a legacy of the early Transvaal prejudice against customary unions. In Lesotho the form of the marriage (at the time of the deceased's death) was one of two factors to be taken into account in deciding what law to apply to the administration of estates. In Swaziland (and in Zimbabwe, which follow below) marriage is the sole criterion for deciding the law to be applied. Both here and in Zimbabwe there is every likelihood that on intestacy the estate of the spouses will devolve according to customary law, whatever the form of their marriage happened to be. In these circumstances, the application of the common law of administration seems incongruous. Conversely, of course, the common law will not necessarily apply even if the deceased left a will.

The argument taken further in this regard is that the nomination of the Applicant in a next of kin meeting held before the Siteki Regional Administrator on the 19th May 2000, clothed him with the necessary *loci standi* to institute these proceedings.

It appears to me though that the Applicant on his own papers is confused as to what gives him the necessary *loci standi* to make this application. On one hand he is acting on his own personal capacity, and in the other hand he is relying on his nomination by his mother to administer the "farm" upon her death. Further still the confusion continues in that he relies also on his nomination by the next of kin before the Siteki Regional Administrator on the 19th May 2000.

Having considered all the facts of this matter and the arguments advanced for and against the objection of *loci standi* I have come to the conclusion that Applicant has no *loci standi* to institute these proceedings. The Applicant was nominated for the benefit of the estate and therefore he cannot claim any personal benefits before the estate is wound up. It follows therefore from this that the Master of the High Court is perfectly entitled to invoke the provisions of the Administration of Estate Act, as he did. The issue, in my view of whether the deceased died testate or interstate will fall to be determined by the Master of the High Court following the procedure laid out by the Act. It would appear to me further that the actions of the Master of the High Court are proper to secure the status *quo ante* pending the winding up of the estate in whatever regime i.e, the common law or the customary law.

For the afore-going reasons I have come to the considered view that the Applicant has no *loci standi* and I therefore uphold the point of law *in limine* raised in this regard.

In the result, the application is dismissed and costs to follow the event.

S.B. MAPHALALA

JUDGE