



IN THE HIGH COURT OF THE KINGDOM OF ESWATINI

JUDGMENT

HELD AT MBABANE

Civil Case No. 1210/2018

LUNGILE HOTENCIA GAMEDZE

1ST APPLICANT

TIYANDZA TINTFOMBI GAMEDZE

2ND APPLICANT

TEMALUNGELO TANDZILE GAMEDZE

3RD APPLICANT

and

NOSIPHO GAMEDZE

1ST RESPONDENT

**SIDUMO MDLADLA N.O. THE EXECUTIVE
DATIVE – ESTATE OF THE LATE VICTOR
MFANA GAMEDZE (ESTATE No. EL 15/2018**

2ND RESPONDENT

Neutral citation:

Lungile Hotencia Gamedze & 2 Others v Nosipho Gamedze and Another (1210/2018) [2019] SZHC 20 (13th February, 2019)

CORAM

MASEKO J

FOR APPLICANT:

MR M. KHUMALO OF KHUMALO ATTORNEYS

FOR RESPONDENT: MR S MASUKU OF HOWE MASUKU NSIBANDZE ATTORNEYS

DATE OF HEARING: 26TH OCTOBER 2018

DATE OF DELIVERY: 13TH FEBRUARY 2019

PREAMBLE: *Civil Procedure – Pre - requisites of a final mandatory interdict – Paternity test – whether a child born out of wedlock but who has a birth certificate with the father’s particulars and whose pregnancy was timeously reported, and further upon birth certain Siswati Customary ceremonies performed as acknowledgment of the child per the father’s instruction, and further where the father has paid customary damages of five cows and the customary cow of umdzalaso slaughtered, and further where the father has fully supported the child materially, financially and educationally – and where the father has never denied paternity of his child up until his untimely death – whether the court can disregard all these facts and order the child to undergo a DNA/ paternity test using her sisters as a reference point when the said sisters themselves never conducted any paternity test to ascertain whether they are biological children of the deceased, but also rely on their birth certificates to prove paternity.*

HELD: *That the pre – requisites of a final mandatory interdict have not been established by the Applicants.*

HELD FURTHER: *That the Constitutional and statutory birth right and identity of the 1st Respondent is beyond question*

HELD FURTHER: *That the paternity of 1st respondent between her deceased father and mother Nontsikelelo is clearly evident from the Birth Certificate and the customary ceremonies conducted by the Gamedze clan.*

HELD FURTHER: *That the Application is therefore dismissed.*

[1] On the 24th August 2018, the Applicants launched application proceedings for the following orders as appears in the Notice of Motion.

1. That the 1st Respondent be and is hereby ordered to undergo a paternity test at the Ermelo Provincial Hospital Ermelo, Mpumalanga, South Africa in respect of the paternity test in relation to the applicants within 10days from the date of this order.
2. That there be no order as to costs save that in the event of the Respondents opposition this court is

requested to make an order that the 1st Respondent or Respondents pay the applicants' cost of the application.

3. Further and /or alternative relief.

- [2] The Affidavit of the Applicant is annexed hereto in support of this application together with the supporting affidavits of 2nd and 3rd Applicants respectively.

TIMELINE

- [3] On the 13th August 2018 the 1st Respondent's attorneys filed a Notice of Intention To Oppose the application, and on the 23rd August 2018 they filed before court Annexure "NG1" being a certified copy of the Birth Certificate of the 1st Respondent.
- [4] Again on the 23rd August 2018, the 1st Respondent's attorneys filed the Answering Affidavit wherein they raised a point in limine of "*locus standi in judicio for the Applicants*". The 1st Respondent also attached the Supporting Affidavits of Nontsikelelo Christabel Hlatshwayo and Jabulani Gamedze respectively in support of her case.
- [5] The Applicants filed their Replying Affidavits on the 4th September 2018 and the Supporting Affidavits of Father Jochonia Thayela Mahuzule, Ncengile Susan Dlamini, Lloyd Maziya, Qethuka Sigombeni Dlamini, Tengetile Gamedze and Nomsa Dlamini were also filed.

- [6] The pleadings having been closed and the matter being ripe for arguments the Applicants' attorneys prepared a Book of Pleadings on the 5th September 2018 and same was filed in court and served on the 1st Respondent's attorney's on the same day.
- [7] I must mention that the 2nd Respondent did not file any opposition to the Applicants' application.

1ST APPLICANT'S FOUNDING AFFIDAVIT

- [8] In her Founding Affidavit, the 1st Applicant states that she is the widow of the late Victor Mfana Gamedze and that two daughters were born out of her union with the late Mr Gamedze. The daughters are the 2nd and 3rd Applicants respectively.
- [9] 1st Applicant states in paragraph 6 of her Affidavit that this court has jurisdiction to hear and determine this matter by virtue of the cause of action having occurred within its area of jurisdiction and also by virtue of the parties being domiciled within the kingdom of Eswatini.
- [10] At paragraph 7 the 1st Applicant states as follows and I quote
- “The *raison d'etre* for the application is to ensure that the applicants are not unduly prejudiced and disadvantaged in relation to the quantum that they are due to derive from the said estate of the said late Victor Mfana Gamedze, in the

event that the paternity test definitely shows that the 1st Respondent is indeed not a biological child of the late Victor Mfana Gamedze. Similarly, and more importantly, the application equally ensures that the 1st Respondent is treated even handedly as an heiress or beneficiary of the said estate, in the event the paternity yields a positive result. Suffice it to say, that the applicants are presently uncertain of the paternity of the 1st Respondent, one way or the other.”

[11] It is common cause that on the 20th July 2018 the 1st Applicant through her attorneys addressed correspondence to the 1st Respondent to undergo a DNA test (paternity test). This request was refused by the 1st Respondent personally through correspondence dated the 27th July 2018. These two letters are annexed hereto as annexures “A” and “B” respectively. Due to their importance, I find it prudent to reproduce them verbatim in this judgement.

ANNEXURE”A”

Mbuso E. Simelane & Associates

2nd Floor Dlanubeka Building

Office 208

Mdada Street, Mbabane

RE: THE ESTATE OF THE LATE VICTOR MFANA GAMEDZE –
ESTATE EL 15/2018

1. We act for and on behalf of Mrs Lungile Hotencia Gamedze, Tiyandza Gamedze, Tengetile Gamedze and Temalungelo Gamedze who are the rightful beneficiaries in the estate of the late Victor Mfana Gamedze and are herein referred to as our clients.
2. On clients have been made aware of a claim filed by Nosipho Gamedze in the estate of the late Victor Mfana Gamedze allegedly on the basis that she is the biological child of the deceased.
3. Our clients deny that the aforesaid Nosipho Gamedze is a biological child of the deceased, either as alleged or at all
4. On clients will therefor require that the said Nosipho Gamedze should undergo a paternity test (DNA) to determine if indeed she is the biological child of the late Victor Mfana Gamedze.
5. In as much as our clients will not deny a child born of the deceased his or her right to inheritance, they remain duty bound to protect the rightful heirs from bogus people from the street who claim to be long lost children of the deceased upon reading newspaper reports that the estate of the deceased is worth millions.

6. Kindly advise of a suitable date wherein arrangements can be made for your client to undergo the paternity tests as aforestated.

Yours Faithfully

KHUMALO ATTORNEYS (SIGNED)

CC: MR. SIDUMO V. MDLADLA (EXECUTOR)

[12] The 1st Respondent responded to this letter on the 27th July 2018 in this manner

ANNEXURE “B”

27th July 2018

Khumalo Attorneys

Cnr Mdada & Gwamile Streets

P.O.Box D224

The Gables

Dear Sir,

RE: THE ESTATE OF THE LATE VICTOR MFANA GAMEDZE –
ESTATE NO EL 15/2018.

1. The letter dated 20th July 2018 refers.
2. I note the demeaning and insulting language which you decided to use but I will choose not to descend to your level and engage in the same and just respond to the content.
3. In light of my duly registered birth certificate which I submitted in support of my claim, I will not do a paternity test.

Yours Faithfully

NOSIPHO GAMEDZE (signed)

CC SV. MDLADLA (EXECUTOR)

[13] I have quoted these two letters because they are crucial in these proceedings in that they are the basis of these proceedings and further set the tone and attitudes of the parties herein.

1ST RESPONDENT’S ANSWERING AFFIDAVIT POINT IN LIMINE:

[14] It is common cause that the 1st Respondent raised the point in limine of *locus standi in judicio* of the Applicants and further proceeded to answer to the merits of the matter

[15] However during arguments the parties argued the points and merits simultaneously for convenience.

- [16] In limine the 1st Respondent stated in her Answering Affidavit that 1st Applicant was obliged to prove her marriage to the deceased, and further to prove the marriage regime in order to establish the basis in which she herself is entitled to inherit from the deceased's estate.
- [17] She stated further that paternity issues in the normal course of events area brought about when the father puts in issue his legal liability to maintain his child, and that in this case, the deceased Victor Mfana Gamedze never placed her birth and existence in issue during his lifetime, hence calling upon the Applicants to establish exceptional circumstances in their pleadings giving them the right to challenge her status.
- [18] She stated further that the 2nd and 3rd Applicants themselves have no right in law to contest her birth status because they themselves did not undergo any DNA test to confirm if they are indeed children of the deceased.
- [19] She stated further that the Applicants have not established any grounds that overturns her right to maintenance, inheritance, privacy, dignity and bodily integrity. She argued that this was a move to harass and subject her to public humiliation and not to find truth and that she reject such effort with the contempt it deserves.

ON THE MERITS

- [19] On the merits she stated that she was born on the 8th August 1987 between deceased Victor Mfana Gamedze and her mother Nontsikelelo Hlatshwayo who also filed an affidavit in support of 1st Respondent. She alleges that she is the second biological daughter to the deceased.
- [20] It is her evidence that in the year 2006, the deceased and her mother Nontsikelelo took it upon themselves to prepare a Birth Certificate in terms of Section 28(1) of the Birth Marriages and Deaths Registration Act 5 of 1983. The Birth Certificate is the one referred to earlier in the judgement and is marked Annexure “NG1”.
- [21] She states that as can be gleaned from the certificate all her parents’ particulars are reflected therein and that this was done way back in 2006.
- [22] It is her evidence that she was introduced to the Gamedze family at the age of three (3) in accordance with Siswati Law and custom and further that her father the deceased Victor Mfana Gamedze has been fully responsible for her education, maintenance, hospital and medical needs since she has known him until his untimely death on the 14th January 2018.
- [23] It is her evidence that during his lifetime, the deceased, Victor Mfana Gamedze through his company MVtel

- (i) Bought her a motor vehicle
- (ii) Fueled the said motor vehicle
- (ii) Serviced the said motor vehicle
- (iv) Provided parking space at Madlenya House, and
- (v) Maintained her financially

[24] However she state that all these benefits e.g parking space at Madlenya House and the financial and material support from her father's company these benefits were stopped by the 1st Applicant a few months after deceased's death.

[25] At paragraph 12.9, 12.10 page 30 of the Book, she states as follows

“12.9 The 1st applicant, to my knowledge, has known me way even before the 2nd and 3rd Applicants were born. I am the second child born of the deceased before 1st applicant and deceased's union.”

12.10 The 1st Applicant had been in constant communication with the Gamedze family regarding my existence and even to the deceased. It is however, surprising that she never at any stage during the deceased's life questioned my relationship with the late nor demanded that my father and I take a paternity test.”

[26] At paragraph 17.1 page 31 of the Book she states as follows

“The deceased has never put in issue my paternity, instead, he embraced my birth, my existence as his child. He went on to arrange my birth certificate as proof that I am his child and continued to maintain me until his demise. I reiterate that the Applicant has been aware of my existence and surprisingly not at any stage challenged my paternity only to wait for deceased death;”

[27] At paragraph 18 page 32 of the Book, she states as follows;

“I must bring to the attention of the court the fact that I would have agreed to the paternity tests if my father was still alive. The procedure now that he is deceased is that blood samples ought to be taken from the Applicants, my mother and myself. The 2nd and 3rd Applicants purportedly being my father’s children, the process may prejudice me now that my father is deceased, because I am also not sure if the 2nd and 3rd Applicants are indeed the deceased’s children to be used as the reference point.”

[28] She states further that her rights to privacy, dignity and bodily integrity ought to be observed and protected as well as her rights to inheritance despite her being born out of wedlock.

[29] At paragraphs 22.1 – 22.2 pages 33-34 of the Book, she states as follows

“1st Applicant is lying under oath, we met after my deceased father was wounded at the Medisun Clinic, she even rudely asked the relatives around her that I be taken out of the hospital because of reasons only known to her, she knew who I was. It is just that she never wanted me around her and or around the other children;

It is also not true that the deceased never mentioned me to her at all. My deceased father informed me that she always had a problem in accepting me as his daughter, but that he had tried to convince her to accept me into the family, but had refused. He would nonetheless, treat me like all his children.”

[30] The Supporting Affidavit of the 1st Respondent’s mother, Nontsikelelo Christabel Hlatshwayo is found at pages 36 – 40 of the Book. She states that the 1st Respondent was born on the 8th August 1987 and the custom of reporting the pregnancy was undertaken with the father and mother of the deceased Victor Mfana Gamedze when she was six months pregnant and they acknowledged the pregnancy. She states that after 1st Respondent’s birth when she was three (3) months old, she was again taken to the parents of the deceased for identification and she passed the test and was accepted and acknowledged into the Gamedze clan.

[31] She states further that at the age of three (3) a goat was slaughtered for her as per the Gamedze clan custom of welcoming a child into the clan. During this ceremony were Mkhulu Gizane Gamedze (deceased’s father)

and others. All this happened with the knowledge and approval of the deceased who had stated that they should follow the customary path and initiate the 1st Respondent to the Gamedze clan.

[32] She states further that during 1999 and at Mangwaneni Mbabane the deceased paid damages in the form of five (5) cows in cash and that the customary cow of umndzalaso was slaughtered later at her parental home at Gege.

[33] She states further that during the year 2006, the deceased Victor Gamedze called her and advised her to attend to the Ministry of Home Affairs to fill up her part on the Birth Registration Forms as mother to the 1st Respondent as he had duly completed his part for purposes of having 1st Respondent issued with the Birth Certificate annexed hereto as Annexure “NG1”. She duly completed her part and indeed the Birth Certificate was issued, and further that the 1st Respondent was very close to her father until his untimely death, and further that deceased supported her child in all respects and paid for her education including tertiary, gave her monthly allowance and even bought her a car and also provided accommodation to the 1st Respondent.

[34] I must say that her evidence corroborates that of the 1st Respondent in material respect and in particular the parental support given by deceased to 1st Respondent as well as the crucial issue of the Birth Certificate Annexure “NG1”.

- [35] The next supporting Affidavit is that of Jabulane Gamedze found at pages 41 – 45 of the Book of Pleadings.
- [36] He testifies that he is the biological brother of the deceased being born from the same father but different mothers, and that his brother deceased Victor Mfana Gamedze acknowledged Nosipho from pregnancy and that immediately after her birth she was formally initiated into the Gamedze clan through their custom and further that another customary event was performed when she was about three (3) years old as her acknowledgement and acceptance by the Gamedze family. A goat was slaughtered per Siswati custom. He corroborates 1st Respondent's mother that during this customary practice deceased's father Babe Gizane Gamedze (who is also deceased), Gogo La Shongwe, Aunty Yeye Gamedze and her husband Mr Nkambule were present. All these customary ceremonies were conducted at the Gamedze home at Siphofaneni in the Lubombo Region.
- [37] He states further that 1st Applicant has always been fully aware of all deceased's children including 1st Respondent, and that 1st Applicant recently attested to that during a big family meeting to discuss family issues after the death of the deceased. He states further that the deceased was very responsible as he looked after his children very well including Nosipho and that at no stage did deceased ever express any

doubt about Nosipho's paternity instead he acknowledged her at all times as his biological child.

1ST APPLICANT'S REPLYING AFFIDAVIT PAGE 52 – 91 OF THE
BOOK OF PLEADINGS

- [38] In reply to the Answering Affidavit, the 1st Applicant states that she was married through Siswati custom to the late Victor Mfana Gamedze on the 11th June 1994 and further that on the 6th August 1994 they married by Civil rites at the Mater Dolorosa Catholic Church where the marriage was solemnized by Father Jochonia Thayela Mahazule. An affidavit of Father Mahazule is filed herein and marked Annexure E
- [39] I must state from the onset that notwithstanding the attack on the status of the marriage between 1st Applicant and deceased by the 1st Respondent, I find for a fact the 1st Applicant was lawfully married to the deceased both in terms of Siswati Law and Custom and by civil rites solemnized by Father Mahazule of the Mater Dolorosa Roman Catholic Church in Mbabane.
- [40] The 1st Applicant also clarifies that the need for 1st Respondent to undergo the paternity is not to cause her any undue embarrassment but to ascertain her paternity. She states that her desire for 1st Respondent to undergo the test is not out of malice as she has another daughter of deceased born out of wedlock Tengetile Gamedze whom she brought up

and who is now married to Ben Dlamini. As a result she is now living with Tengetile's son Gift Moyo.

[41] She states that during the preparations of her husband's funeral she was advised by her sister – in law Nomsa Dlamini(Born Gamedze)that the 1st Respondent arrived at her home in Dalriach and was refused entry into the house and that she thereafter caused a scene. Nomsa Dlamini indeed filed a Confirmatory Affidavit to this effect.

[42] I must state that the difficulty with Nomsa's Confirmatory affidavit is that it was filed for the first time in the 1st Applicant's Replying Affidavit and the 1st Respondent was never given an opportunity to answer to all the new allegations that are made in the 1st Applicant' Replying Affidavit. This usually presents difficulties for the Applicant who raises new issues in a Replying Affidavit when these issues should have been raised in the Founding Affidavit because the Respondent is not afforded an opportunity to respond to them.

[43] The 1st Applicant further state that the Birth Certificate Annexure "NG1" was prepared nineteen (19) years after the birth of the 1st Respondent and that a birth certificate per se does not prove the paternity of an individual.

[44] A lot has been said about the minor whose name I will not mention in this judgement, but I must point out that the issue of the minor is totally distinguishable from the 1st Respondent's case and therefore it is my

considered view that the issue of the minor should not have been brought into these proceeding and that his name should never have been mentioned in the first place. Each case must therefore be treated on its own merits.

[45] The 1st Applicant has to a large extent denied the contents of the affidavit of Jabulane Gamedze. She further states that the only child born out of wedlock that was introduced to her is Tengetile Gamedze and not the 1st Respondent and further that she was the one who caused the family meeting to be held at Siteki in order to discuss the issue of the 1st Respondent and the minor who had filed claims against the deceased's estate yet they were unknown to her.

[46] I must state that there is nowhere in the 1st Applicant's Replying Affidavit where she deals with the Supporting Affidavit of Nontsikelelo Christabel Hlatshwayo, the biological mother of the 1st Respondent. Her crucial evidence remains unchallenged and uncontroverted. From page 52 to page 91 of the Book the 1st Applicant does not challenge the evidence of Nontsikelelo Christabel Hlatshwayo.

APPLICANTS'S CASE

[47] Mr Khumalo who appeared for the Applicants prepared a Book of Pleadings, filed detailed Heads of Argument and also filed a Bundle of Authorities. The court is indebted to Counsel for his professionalism.

- [48] Mr Khumalo submitted that the main objective of the application is to ensure that the Applicants who are heiresses to the estate of the late Victor Mfana Gamedze are not unduly prejudiced and disadvantaged in relation to the quantum that they are due to inherit from the estate of the deceased.
- [49] He submitted further that the overriding intention of the Applicants is to ascertain the paternity of the 1st Respondent since she has filed a claim against the estate of the deceased. He submitted further that the 1st Respondent in her defence has raised a plethora of distortions, unsubstantiated, embarrassing, insulting and vexatious allegations and that there are a lot of contradicting and inconsistent allegations in the 1st Respondent's answering affidavit and confirmatory affidavits.
- [50] Mr Khumalo submitted that the point in *limine of locus standi in judicio* against the Applicants has no merit because the Applicants have a direct and substantial interest in the estate of the deceased by virtue of the 1st Applicant being the lawful wife of the deceased and the 2nd and 3rd Applicants being the biological daughters of the deceased. He referred to ***Herbstein and Van Winsen on page 217 of the Civil Practice of the High Court of South Africa 5th ed***, where direct and substantial interest is defined as follows

“A direct and substantial interest has been held to be an interest in the right which is the subject matter of the

litigation and not merely a financial interest which is only an indirect interest in such litigation. It is a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only”.

[51] Mr Khumalo further referred to the Supreme Court judgement of **Jan Sithole N.O and Seven Others vs The Prime Minister and Six Others Civil Appeal Case No. 35/2007** where Tebbutt JA (as he then was) enunciating the reasoning of the full Bench stated that

“After reviewing certain authorities both in South Africa and in this Country the courts a quo stated that a litigant has locus standi only if he or she can show direct and substantial interest in the subject matter ...

That decision represents for now, the law of this country on the matter of standing.”

See also

Fred Leibrandt & Another vs Steven Philip Leibradt & from Others Civil Case No 22/2016.

Lawyers for Human Rights (Swaziland) and Another vs Attorney General Civil Appeal 1822/2001.

[52] I must state that I am of the considered view and in agreement with Mr. Khumalo that the Applicants have *lucus standi in judicio*

to institute these proceedings because by virtue of being the lawful wife and biological children respectively of the deceased establishes a direct and substantial interest on their part.

[53] In dealing with the issue of the paternity, Mr Khumalo submitted that this court has jurisdiction to compel the 1st Respondent to undergo a paternity test. He relied in the main in the case of **Sobantu Dlamini vs Muzi Dlamini & Patience Phumzile Dlamini Case 2801/2010** where at **page 5 – 6 Mamba J** stated as follows;

“This application and the order sought herein must be understood and viewed in its proper setting or context. Crucial and fundamental in this setting is the relationship of the parties; in particular that between the Applicant and the 2nd Respondent. They are a married couple. This is a special relationship. It demands a sensitive and sensible approach to it. Indeed, as pointed out by all the parties herein, the 2008 court application brought in tension and strain within the family. This tension does not only affect the three parties herein, but the rest of the family members including the 2nd Respondent’s people and the other many children of applicant. All the people have a legitimate interest to know, not just a

curiosity, whether or not the applicant is the biological father of the 1st Respondent.

[54] At page 12 *Mamba J refers to the case of M vs R 1989 (1) SA 416 OPD* wherein the headnote reads as follows

“As regards the Courts power to order the Respondent to subject herself against her will to the taking of blood samples, the court remarked that this was an area of conflicting ideals and interests viz on the one hand the pursuit of the truth and on the other hand the right to privacy of the party who does not want to consent to the performing of blood tests. The court, however, came to the conclusion that it was within its inherent jurisdiction, as constituting a procedural matter; to order respondent to have the blood tests taken and that she should indeed be so ordered, especially due to the following factors;

- 1) It was in S’s interest that reliable information was urgently attained to gain clarity on the question of whether applicant was indeed his father;***
- 2) Blood analyses being currently performed were indubitably a reliable aid in clarifying a dispute about paternity;***

- 3) The results of the intended blood samples would be admissible as evidence in a court of law**
- 4) The public interest and the judiciary's keen pursuit of the truth in all legal disputes and;**
- 5) The fact that respondent was S's guardian and was compelled to act in the best interests even if doing so would be contradictory to her own wishes."**

1ST RESPONDENT'S CASE

[55] Mr Masuku who appeared on behalf of the 1st Respondent submitted that the Applicants filed a short and scanty affidavit when dealing with this matter whereas they are seeking complicated orders, in essence being an interdict and to invade well constitutionally protected rights of the 1st Respondent and these being;

- (i) The right to privacy, dignity and protection against inhumane and degrading treatment as provided for in Section 18 (1) and (2) of the Constitution of Eswatini
- (ii) The rights of the child to know his or her parents as provided in Section 29 (7) of the Constitution
- (iii) The right that a child has to be properly cared for and be brought up by parents or other lawful authority in place of parents as provided in Section 29 (3) of the Constitution.

- [56] Mr Masuku submitted further that the Applicants seek to invade and destroy the already existing rights of the 1st Respondent protected under the Children’s Protection and Welfare Act No 6 of 2012.
- [57] Mr Masuku submitted further that the Applicants seek an interdict to compel the 1st Respondent to undergo a paternity test when the father of the 1st Respondent is deceased. He argued that in the ordinary course of events paternity issues are brought about when the father puts in issue whether he is the father of the child or not. The deceased never at any stage denied paternity of the 1st Respondent so he submitted.
- [58] Mr Masuku submitted further that the deceased acknowledged the child (i.e. 1st Respondent) and went on to perform all the customary ceremonies confirming paternity and that during his lifetime he never placed her birth and existence in issue let alone in doubt. Further that he accepted her and maintained her throughout his lifetime and to crown it all he even obtained a Birth Certificate for her. Mr Masuku, submitted that corroboration of evidence was found in the evidence of Nontsikelelo Christabel Hlatshwayo and Jabulane Gamedze.
- [60] Mr Masuku submitted further that the Applicant lacked the requisite *locus standi in judicio* to institute these proceedings because they only have “an indirect financial interest and which does not suffice in these proceedings”.

[61] Mr Masuku submitted further that but for the fact that the deceased never placed the 1st Respondent's paternity in issue, it is, therefore, not in the 1st Respondent's interest to undergo the test.

[62] The court is indebted to Mr Masuku for the detailed Heads of Arguments as well as the Bundle of Authorities that were filed herein.

EVALUATION OF THE EVIDENCE:

[63] The 1st Respondent's point in *limine of locus standi in judicio* does not have merit and is hereby dismissed.

[64] The 1st Respondent has proven through uncontroverted evidence that her mother Nontsikelelo Christabel Gamedze conceived her from the deceased Victor Mfana Gamedze during 1986 and that she was born on the 8th August 1987. This is evidence from the Birth Certificate Annexure "NG1" and in particular the names of the parents of 1st Respondent being indisputably Victor Mfana Gamedze and Nontsikelelo Christabel Hlatshwayo respectively.

[65] The certificate also reveals that 1st Respondent was born on the 8th August 1987 at Mbabane. The certificate was issued by the District Registrar on the 6th June 2006 and the PIN 8708081100232 is also clearly shown therein and, further that the certificate contains the important particulars of both parents is an indication that it was applied for by both parents jointly and severally in the furtherance of a common

purpose, and the common purpose being the issuance of the Birth Certificate in favour of their daughter the 1st Respondent.

[66] The Children's Protection and Welfare Act No 6 of 2012 was enacted to provide protection and welfare of children, the care, protection and maintenance of children; and also to provide for matters incidental thereto.

Section 18 (3) of the Act provides as follows

“A parent or guardian shall be responsible for the registration of the birth of his children and the name (s) of the parent(s) or guardian shall appear on the birth certificate”

[67] I must state this Act is complimentary to the Births, Marriages and Deaths Registration Act No 5 of 1983 wherein Section 28(1) provides as follows;

“28(1) Upon receipt of any birth, marriage or death information form in duplicate and the prescribed fee, from a registration information officer or the marriage officer or the informant as the case may be, of the birth, marriage or death of a person and after registering it and recording its details in the relevant registers, the registration officer shall issue to the informant a certificate to be known as birth, marriage, or death certificate as the case may be in the prescribed form, and shall furnish

to the Registrar a Copy thereof along with the original birth, marriage and death information form;;”

- [68] Annexure NG1 is a clear indication that the deceased and Nonstikelelo Christabel Hlatshwayo duly complied with the provisions of Section 28(1) as outlined above. They complied with their parental duty of providing the 1st Respondent with her identity document being the Birth Certificate.
- [69] It is common cause that the National Identity Card which contains the Personal Identity Number commonly known as the PIN is issued to an applicant upon the production of his/her birth certificate which contains the particulars of the father and mother respectively. A birth certificate is therefore a very important document to an individual because it is the birth certificate which provides a person's identity, nationality and names of the parents of that person. Where a birth certificate contains the particulars of the mother only, it is when the father denies paternity of the child and refuses to complete the official forms and in such cases DNA tests are usually conducted to establish and ascertain paternity. This is not the position *in casu*.
- [70] In matters where the paternity of a person is in issue it is usually the father who puts that in issue and where necessary a DNA or paternity test is conducted and the results then speak for themselves.

[71] I am convinced that the deceased *in casu* is 1st Respondent's biological father because the facts are very straight forward and can be summarised in this fashion.

- (i) The 1st Respondent was born out of a union between the deceased Victor Mfana Gamadze and Nontsikelelo Christabel Hlatshwayo on the 8th August 1987 after the custom of reporting a pregnancy was conducted when Nontsikelelo was six months pregnant and her pregnancy was accepted by the Gamedze family.
- (ii) At three (3) months old the 1st Respondent was taken by her mother to the Gamedze family at Siphofaneni area where an identification and acknowledgement customary ceremony was conducted and the 1st Respondent was thus formally welcomed into the Gamedze clan.
- (iii) When the 1st Respondent was three (3) years old another customary ceremony was performed whereby a goat was slaughtered to welcome the 1st Respondent into the Gamedze clan and the elders were present. Again this ceremony was conducted at Siphofaneni by the Gamedze family and with the deceased Victor Mfana Gamedze's mandate.

- (iv) In 1999 the deceased Victor in the company of Gamedze family members paid five cows (in cash) to the Hlatshwayo family at Mangwaneni Mbabane and later the cow known as umdzalaso in Siswati custom, was slaughtered at Gege, being the parental home of Nontsikelelo Hlatshwayo.
- (v) On the 6th June 2006 the deceased and Nontsikelelo Hlatshwayo processed the Birth Certificate of the 1st Respondent herein annexed as Annexure “NG1”
- (vi) From her birth, the deceased has supported and maintained the 1st Respondent throughout his lifetime until his untimely death on 14th January 2018. He provided her with financial support, he purchased a car for her, he paid for her education at all levels including tertiary, and he also provided her with a parking space at the Madlenya House etc...
- (vii) According to deceased Jabulane Gamedze, the deceased acknowledged the 1st Respondent as his biological daughter and never doubted that until his untimely death.

[72] I must state that from the manner in which the deceased Victor Mfana Gamedze conducted himself during his lifetime towards the 1st

Respondent, is a clear indication that he was her biological father. In these circumstances the deceased is the only one who could question her paternity upon new information having been made available to him or him discovering that new information himself whatever the case would have been. This is not the case *in casu*. Until his untimely death Victor Mfana Gamedze had provided all forms of support to his daughter Nosipho Gamedze and the circumstances of this case are such that it is not possible for Applicant to challenge the birth right of 1st Respondent let alone her paternity because the deceased never made it an issue. Not only did he perform fully all the customary practices but he further acquired a Birth Certificate for 1st Respondent thus confirming her identity and paternity. There is no evidence that has been placed before me to suggest that the deceased is not the biological father of the deceased.

[73] I have been referred to numerous authorities by counsel on both sides respectively where this principle has been clearly articulated that whilst dignity and privacy are constitutional rights enshrined in our Constitution, it is equally a constitutional right of a child to know his or her parents. From her birth to adulthood 1st Respondent has known her parents to be the deceased Victor Gamedze and Nontsikelelo. This is her constitutional and statutory right which was never an issue during the lifetime of the deceased.

[74] *In casu* the situation is somewhat peculiar because it is the Applicants who are seeking for an order to compel the 1st Respondent to undergo a paternity test simply because they believe she is not the biological daughter of deceased and therefore not liable to inherit from his estate. However the cold facts are that the 1st Respondent's identity and paternity was conferred upon her by the deceased and at no stage during deceased's lifetime did 1st Respondent ever struggle with identity and paternity issues until deceased met his untimely death on the 14th January 2018.

[75] The 1st Respondent therefore has a clear right to her identity of being the biological daughter of deceased. This is her Constitutional right and statutory right and as I observed herein above, it is only the deceased who could initiate paternity issues against the 1st Respondent and it therefore becomes a mountainous problem for anyone who challenges her paternity other than her deceased father because such person would be challenging her identity.

[76] The cases referred to by both counsel deals with the paternity issues which are raised by the father. The classic case of Sobantu Dlamini (*supra*) is very instructive in these circumstances. Sobantu is the only one who could challenge the paternity of his 30 year old son against his wife. He has done that during his lifetime and whatever the outcome of the paternity test, he is the father who has said I have new information

that suggest that the son was infact not his biological son for the reasons he has stated in his papers.

[77] The Sobantu case is totally distinguishable from this case because *in casu* because the deceased is no more, but what is glaring is that, up until he met his untimely death, Victor Gamedze had declared and acknowledged 1st Respondent as his biological daughter from conception (pregnancy) until he passed on leaving her an adult and having provided her with an Identity, Birth Certificate, Education and many other amenities of life that parents afford their children. Even all the other cases referred to by Counsel are at par with the Sobantu Case. This case is one of a kind and if not carefully considered may lead to grave injustice to children born out of wedlock whereas their statuses have since been properly dealt with by the Constitution of Eswatini. Article 31 of the Constitution provides as follows

“For the avoidance of doubt, the (common law) status of illegitimacy of persons born out of wedlock is abolished”

[78] Even if it is true that the Applicants, in particular 1st Applicant do not know 1st Respondent and have never heard of her, the information about her as contained in the pleadings i.e the Birth Certificate, and the customary practices that were there observed during the lifetime of the deceased and coupled with the testimony of deceased’s brother Jabulani

Gamedze is a clear indication of her paternity and identity which is a right enshrined in the Constitution and statutes of Eswatini and it would therefore be very difficult for the Applicants and any other person to strip her of these existing clear rights of paternity and identity as a daughter of deceased Victor Mfana Gamedze.

[79] All the judgements referred to by counsel from this court and the Honourable Supreme Court have one thing in common, and that is, it is the fathers that are challenging paternity, and no one is doing it on their behalf (the fathers), because they are the only ones who could raise paternity issues successfully. The facts in in this matter are in favour of the 1st Respondent and it would be very difficult for any court in these circumstances to order the 1st Respondent to undergo a paternity test because that would mean effectively that there is a doubt on the contents of the Birth Certificate which was prepared with the information provided by the father and mother of 1st Respondent during preparation for the issue of the Birth Certificate.

THE NATURE OF AN INTERDICT

[80] An interdict can either be in the form of a prohibitory interdict or a mandatory interdict. In either form, the interdict sought can be interim or final. The pre – requisites for a final interdict and interim are different. For ease of reference and completeness I shall list the pre – requisites of the different interdicts.

I. FINAL INTERDICT

In order to obtain a final interdict an applicant must establish

- a) A clear right
- b) An injury committed or reasonably apprehended ; and
- c) The absence of similar or adequate protection by any other ordinary remedy

II. TEMPORARY /INTERIM INTERDICT

In order to obtain an interim interdict, an applicant must establish

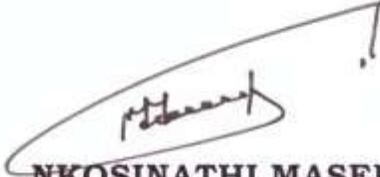
- a) That the right that forms the subject matter of the main action and that the applicant seeks to protect is *prima facie* established even though open to some doubt
- b) There is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right;
- c) The balance of convenience favours the granting of interim relief ; and
- d) The applicant has no other satisfactory remedy.

(See Herbstein and Van Winsen – The Civil Practice of the High Courts of South Africa 5th Edition Juta at page 1454.)

- [81] *In casu* the Applicants are seeking a final interdict to compel the 1st Respondent to undergo a paternity test to determine if she is the biological daughter of the deceased.
- [82] The Applicants have not established the pre – requisites for the grant of the final interdict in their pleadings and therefore such failure to establish same is fatal to their papers and consequently the prayers sought stands to be dismissed.
- [83] I must state that the 1st Respondent and the 2nd and 3rd Applicants respectively are biological children of the deceased and that none of them had to undergo a paternity test to prove that they are indeed daughters of the deceased. The only proof they have are their birth certificates which contains the respective particulars of their mothers and the deceased. In the kingdom of Eswatini it is the Birth Certificate which proves the paternity and identity of citizens. All other forms of identification be it the National Identity Card, Drivers licence, Travel Document, International Passport etc, are all issued on the basis of the information contained in the Birth Certificate.
- [84] The importance of a birth certificate in the life of a Liswati Citizen is therefore clearly evident from the statutory provisions dealing with issues of birth, marriages, and deaths.
- [85] Having fully considered all the submissions by counsel and the pleadings on record, I hereby issue the following order.

1. The Application to compel the 1st Respondent to undergo a paternity /DNA test is hereby dismissed with costs.
2. The costs are to be paid by the Executor in Estate No. EL 15/2018.

So ordered



NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT