IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 12/2016

In the matter between:

SIKHUMBUZO DLAMINI	**Appellant**
VS	
THE QUADRO TRUST	**1st Respondent**
THOMAS MOORE CARL KIRK	**2nd Respondent**
ROBERT RICHARD JAMES KIRK	**3rd Respondent**
ANDREAS MFANISENI LUKHELE N.O	**4th Respondent**
MANDY MENZI DLAMINI N.O	**5th Respondent**
NONTOKOZO DLAMINI	**6th Respondent**
REGISTRAR OF DEEDS	**7th Respondent**
MASTER OF THE HIGH COURT	**8th Respondent**
ATTORNEY GENERAL	**9th Respondent**

Neutral citation: ***Sikhumbuzo Dlamini vs The Quadro Trust & 8 Others (12/2016) [2016] SZSC 06 (30 June 2016)***

Coram: **J MAGAGULA AJA, C. MAPHANGA AJA AND K. NXUMALO AJA**

Heard: **6 May 2016**

Delivered: **30 June 2016**

Summary: ***Locus standi – Right to inherit ab intestatio from grand parent – Status of illegitimacy – Abolition of common law status of illegitimacy – Effect of Section 25 of the Constitution Act, 2005.***

JUDGMENT

J. MAGAGULA AJA

BACKGROUND

[1] In this matter the appellant who was the applicant in the court *a quo* filed an application at the High Court in which he sought an order in the following terms:

> ***"1. Declaring that the sale and transfer of the one half (1/2) undivided shares in the properties described hereunder of the Estate of the late Eunice Mumsy Inskip to and in favour of the first respondent is unlawful and is hereby set aside viz:***
>
> ***1.1 CERTAIN: Portion 2 of Farm No. 1270 situate in the district of Manzini, Swaziland.***
>
> ***MEASURING: 1,7606 (One Coma Seven Six Zero Six) hectares.***
>
> ***HELD: Under Certificate of Registered Title No. 210/1990 dated 20th April, 1990.***
>
> ***1.2 CERTAIN: Portion 3 of Farm No. 1270 situate in the District of of Manzini Swaziland.***
>
> ***MEASURING: 11,1283 (One One Coma One Two Eight Three) hectares.***

HELD: ***Under Certificate of Registered Title No. 210/1990 dated the 20th April, 1990.***

2. ***That the Registrar of Deeds be and is hereby ordered to cancel the registration of transfer into the name of the first respondent.***

3. ***That the fourth and fifth respondents be and are hereby removed as the co-executors dative in the estate of the late Eunice Mumsy Inskip.***

4. ***That the applicant be and is hereby appointed the executor in the estate of the late Eunice Mumsy Inskip.***

5. ***Costs of this application.***

6. ***Further and/or alternative relief."***

[2] The application was supported by an affidavit in which the appellant described himself as follows:

> ***"I am one of the beneficiaries in the Estate of the late Eunice Mumsy Inskip who died on the 31st December, 1998. In fact the late Eunice Mumsy Inskip was my grandmother as she was the mother of my father, Boy Vincent Dlamini, who pre-deceased my grandmother."***

[3] The appellant goes on to explain in his affidavit that the beneficiaries of the late Eunice Mumsy Inskip are her grandchildren being himself and four others, one of whom is however deceased.

[4] The appellant also states that his said grandmother had a sister named Mary Queeneth Inskip who died on the 30th January 1998.

[5] Appellant further alleges that during their lifetime the two sisters were joint owners of the properties described in paragraph (1) hereof and that they held such properties in equal undivided shares, each having a share in each of the properties.

[6] After the death of the two sisters it became necessary to terminate the joint ownership of the properties in order to facilitate a winding up of the estates. The late Eunice Mumsy Inskip died intestate. It is not clear *ex facie* the papers if the late Mary Queeneth Inskip left a will.

[7] Despite several meetings held between the executors and beneficiaries of both estates in an attempt to subdivide the properties, there were no positive results achieved.

[8] The executors in the estate of the late Eunice Mumsy Inskip who are the Fourth and Fifth respondents herein, then moved an *ex parte* application at the High

Court seeking an order allowing them to sell the undivided share of the late Eunice Mumsy Inskip in the properties by public auction in order for them to finalise the winding up of the estate.

[9] The High Court granted an order which reads as follows:-

"Having heard counsel for the applicants it is hereby ordered that :-

1. ***The executors of the estate of the late Eunice Inskip are authorized and directed to sell and/or dispose by public auction the properties known as:-***

CERTAIN: One half (1/2) undivided share in portion 2 of Farm 1270, Malkerns, Manzini District, Swaziland; and

CERTAIN: One half (1/2) undivided share in portion 3 of Farm 1270, Malkerns Manzini District, Swaziland. And thereafter dispose of the proceeds there from according to law."

[10] Prior to the granting of the order by the court the appellant and his siblings all of them acting as beneficiaries in the estate of the late Eunice Inskip signed a Power of Attorney authorizing the executors of the estate to sell by public auction the undivided one half (1/2) share of the estate held over the two immovable properties.

[11] Appellant further alleges that on the 3rd November, 2014 he went to the Malkerns Town Board offices to *inter alia* furnish the Town Board with a Post Office address. Upon arrival at the offices he was surprised to learn that the properties were then registered in the name of the first respondent and Mary Queeneth Inskip as the joint owners.

[12] The appellant claims that he had never seen any advertisement for the sale of the shares by public auction nor did he agree to the sale of the shares by private treaty.

[13] He accordingly approached the High Court seeking the order set out in paragraph (1) hereof. The application was opposed by all the respondents herein. A full set of papers was filed including opposing affidavits and a Replying affidavit.

[14] In his opposing affidavit the second respondent raised a point in *limine* as follows:-

"*IN LIMINE*

> ***At the outset I state that the applicant has no locus standi to bring this application. The applicant is not a lawful beneficiary in the estate of the late Eunice Mumsy Inskip. The applicant is a grandchild of the deceased Eunice Inskip. He was born of a relationship between the son of the deceased Boy Vincent Dlamini who pre-deceased the deceased and a woman to whom the said Boy Vincent Dlamini was never married. Accordingly no right of inheritance intestate could pass to the applicant through Boy Vincent Dlamini the applicant having been born out of wedlock. (The applicant is hereby challenged to disprove this in his reply***

hereto). The applicant therefore has no locus standi in law to bring the present application and it must be dismissed with costs."

[15] In this replying affidavit the appellant denied that he had no *locus standi* to bring the application stating inter alia ***"……I deny that I have no locus standi to bring this application and that I am not a lawful beneficiary in the estate of the late Eunice Mumsy Inskip. I admit that I was born out of wedlock. I aver, however that the fact that I was born out of wedlock does not preclude me from being a beneficiary from the estate of the late Eunice Mumsy Inskip in that my father never disowned me, all the other beneficiaries in the estate of my grandmother were born out of wedlock and the fact that my father and mother did not eventually marry should not be visited on me…."***

[16] The matter was eventually set down for hearing and on the date of hearing the court had to dispose of points raised in *limine* first. Other points had been raised by some of the respondents but it is not necessary to deal with them here since they were never dealt with by the court *a quo* and there is no ruling on them.

[17] The court *a quo* heard arguments on the point of *locus standi* which had been raised by the second respondent and issued a ruling upholding the point and consequently dismissing the application. The appellant then lodged the present appeal.

THE APPEAL

[18] The grounds of appeal as stated in the notice of appeal are as follows:

> **"1.** ***The court a quo misdirected itself in holding that the appellant had no locus standi when appellant had been accepted as a beneficiary in the estate of the late Eunice Mumsy Inskip by the executors.***
>
> ***2. The court a quo misdirected itself in holding that the appellant had no right in law to inherit from his grandmother the late Eunice Mumsy Inskip who died intestate in that the appellant's father had predeceased the appellant's grandmother."***

[19] The argument of Mr. Bhembe who appeared on behalf of the appellant in this court can be summarized as follows:-

a) The judge in the court *a quo* misdirected himself by holding that the appellant had no *locus standi* to bring the application as he did not qualify to inherit from his grandmother. He referred the court to the textbook entitled **THE LAW OF SUCCESSION IN SOUTH AFRICA written by Corbett, Hahlo, Hofmeyr and Kahn**. He then demonstrated how grandchildren inherit from their grandparents *ab intestatio*.

b) The principle that illegitimate children cannot inherit from their father is obsolete and has been specifically abolished by Section 31 of the Constitution of Swaziland Act, 2005.

[20] In upholding the point raised *in limine* **Mlangeni J** stated at page 13 of his judgment:

"***19. Against the background where applicant vaguely asserts locus standi the respondents, in common cause vigorously argue the opposite. Where the applicant has failed to assert that a grandchild has a legal right to inherit from a grandparent, the respondents have asserted that this is not the case; that in intestacy it is only biological children of the deceased who have a legal right to inherit. It is in this context, perhaps that the case of GREEN VS FITZGERALD AND OTHERS, 1923 AD 100 is not very helpful to the cause of the Applicant. For one thing in that case there was a will; for another thing it sought to define the extent of interest of illegitimate children. It does not deal with the interests of grandchildren in the estate of their departed grandparent. It is my view that such interest is too remote to found locus standi. If grandchildren had such a right what argument would be there to exclude great grandchildren?***

20. **"*Applicant's deceased father, Boy Vincent Dlamini died before his interest in the mother's estate could vest in him, hence there is nothing that he can pass on to his children."***

[21] The learned judge then goes on at page 14 to quote a passage from **THE LAW OF SUCCESSION IN SOUTH AFRICA 2ND EDITION BY CORBETT HOFMEYR AND KAHN** at page 4-5 which goes:-

"Succession is conditioned on survivorship. No person can succeed as an heir or legatee unless he or she survives the deceased person. One who has predeceased….. the deceased cannot take any benefits from the estate….."

The learned judge then concludes on the same page:

"In other words the death of the applicant's father intervened to cut the Applicant and his siblings out and in the absence of a will they do not have a legitimate claim in the estate."

[22] In their work entitled **THE LAW SUCCESSION IN SOUTH AFRICA** the learned authors **CORBETT, HAHLO, HOFMEYR and KAHN** give a succinct exposion of the law of Intestate succession as it obtained in Holland since the 10th January 1661. At page 584 the authors state:

"*Today it is settled law that the Octrooi became law at the Cape. Accordingly Schependomsrecht, as contained in the Political Ordinance of 1 April 1580 and the Interpretation Ordinance of 13 May 1594 and modified by the Octrooi of 10 January 1661, is the law of intestate Succession of South Africa."*

The learned authors proceed to state at page 585 that ***"By the Succession Act 13 of 1934 rights of succession ab intestatio were conferred upon a surviving spouse."***

[23] The learned authors proceed on page 585 and outline the order of succession as follows:

"*Under the Roman – Dutch law of intestate succession as received in South Africa and modified by the Succession Act 1934, the order of intestate succession in South Africa is as follows:*

1. Where there is no surviving spouse

(a) The first order of succession, consisting of the deceased's descendants, inherits. If all the deceased's children are alive, they share the inheritance in equal parts. If one or more of the children have predeceased the

intestate, their share or shares devolve upon their children and further descendants by representation per stirpes"

[24] It is abundantly clear from this exposition of the law under Roman Dutch Law that grandchildren are entitled to inherit from their grand parents *ab intestatio* where their parents have predeceased the grandparent. Even great grandchildren are entitled to take from their great grandparents under the principle of representation *per stirpes*.

[25] In fact the learned authors referred to above state at page 582 that:

"The cornerstone of early…Schependomsrecht were, firstly the system of parentelae or orders of succession governed by the maxim that the estate does not like to climb…….thirdly representation per stirpes ad infinitum. The first parentela or order of succession under this system consists of the deceased's descendants: his children and their descendants by representation."

[26] Clearly therefore a grandchild has a right in Roman-Dutch law to inherit from his grandparent by representation where his parent predeceased the grandparent. The same goes for great grandchildren as well as their descendants. The appellant is therefore a lawful beneficiary and has a right to take from the estate of his grandmother, the late Eunice Mumsy Inskip. The learned judge *a quo* clearly misdirected himself in finding that the Appellant was not a lawful beneficiary.

[27] Mr. Lukhele who appeared for the fourth and fifth respondents raised some concern that the law as presented by CORBETT *et al* might have been diluted by the South African Succession Act of 1934 and is therefore no longer pure Roman – Dutch law. The authors have however clearly stated at page 585 of their work that the import of the South African Succession Act 1934 was only to confer rights of Succession *ab intestatio* upon a surviving spouse. I am therefore satisfied that the law presented by the authors is pure Roman – Dutch law as imported into Swaziland by the General Administration Act of 1905. Section 3 of the General Administration Act, 1905 provides:

> ***"The Roman – Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland."***

This Act came into force on the 22nd February, 1905, way before the South African Succession Act was enacted in 1934. Further, the General Administration Act did not import the law as applied in South Africa. It imported it as Roman-Dutch law undiluted.

[28] Although the status of illegitimacy of the appellant was raised as the real reason why the respondents took the view that he cannot inherit from his grandmother, the learned judge *a quo* did not take this point into account when he made his ruling. He actually stated that he did not find it necessary for the respondents to go that far.

[29] This point of illegitimacy was however canvassed to some length by counsel who appeared before this court. It appears to me to be necessary that this court should therefore deal with it as well.

[30] Mr. Bhembe's contentions on this point were basically two fold. Firstly he maintained that the concept of illegitimacy as known in the common is now obsolete. He went to some length citing authorities by which he sought to demonstrate that the concept was no longer accepted in some other jurisdictions in Southern Africa. I must say that I could not see what this line of argument was going to achieve if this concept still formed part of the common law of this country. This court only interprets law and it has no authority to change it. Changing laws is a prerogative of the legislature.

[31] Mr. Bhembe however also contended that the status of illegitimacy has since been abolished by Section 31 of the Constitution of Swaziland Act 2005. The Section reads as follows:

> ***"31. For the avoidance of doubt the (Common Law) status of illegitimacy of persons born out of wedlock is abolished***."

[32] In my view this section is clear and straight forward and admits of no further interpretation. Mr. Mamba who appeared for the first to third respondents however contended that this section was too broad and still needed some parliamentary enactment to clarify it. He contended that illegitimacy also affects the rights of

parents in as far as their children are concerned and that it comes into play even in issues of custody of children.

[33] In my view it is only children, in the sense of an offspring as opposed to a minor, who were affected by the status of illegitimacy. Children born out of wedlock stood to suffer certain disadvantages because of this status of illegitimacy in particular when it came to inheritance. They could not inherit from their father. Section 31 of the Constitution is merely putting a child born out of wedlock in the same position as the offspring of married persons. The Section also spells out, to remove any doubt, that it is the common law status of illegitimacy that is being abolished. That status only applied to children. I do not see how it affected parents as well. I can only echo the words **of Justice Mabuza, J in the case of Stapley Vs Dobson (High Court Civil Case No. 2240/07)** where the learned Judge of the High Court stated:

> ***"It follows therefore that by enacting Section 31 of the Constitution, Ashley is now entitled to intestate succession as regards the applicant. The Section does not change the common law status of either the applicant or the respondent until Parliament enact the necessary laws in terms of Section 29 (7) of the Constitution."***

(The applicant was the natural father and the respondent the mother of Ashley in Stapley Vs Dobson)

[34] In the premises I have come to the conclusion that the Constitution has abolished the common law status of illegitimacy in this country. The result is that a child born out of wedlock shall be equally treated with children born of a marriage when it comes to inheritance. They can now inherit from their father as well.

[35] In any event it does not seem to me that a child needed to first qualify to take from the estate of his parent before he could take from the estate of his grandparent. At least I have not come across such requirement in the authorities. The only requirement seems to have been that the parent predeceased the grandparent. That alone gave the child the right to take from the estate of the grandparent under Roman – Dutch law. This seems to be in line with the maxim "the estate does not like to climb." So long as there are descendants the estate devolves upon them irrespective of whether they are children, grandchildren, great grandchildren or further descendants of the deceased.

[36] This therefore brings me to the conclusion that even if Section 31 of the Constitution had not been enacted, the appellant would not have been precluded from being a beneficiary in the estate of his grandmother.

[37] In light of my finding in the preceding paragraphs and paragraph 26 hereof it follows that the appellant is a lawful beneficiary in the estate of the late Eunice Mumsy

Inskip. He therefore has the necessary *locus standi* to institute or defend legal proceedings relating to such estate.

[38] The court accordingly makes the following order:

1. The appeal is upheld and the ruling of the court *a quo* dismissing the application of the appellant is set aside.
2. The matter is referred back to the court *a quo* for further prosecution thereof.
3. The respondents are ordered to pay the costs of this appeal jointly and severally the one paying the others to be absolved.

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J.S. MAGAGULA AJA

I agree

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K. M NXUMALO AJA

I agree

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C.S. MAPHANGA AJA