

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.2704/95

In the matter between:

WILLIAM FEKE MTHEMBU N.O. EXECUTOR APPLICANT

and

JOSEPH TETTEY 1ST RESPONDENT

MASTER OF THE HIGH COURT 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

FOR THE CORAM : J.M. MATSEBULA A.J

FOR THE CROWN : MR. MASUKU

FOR THE 1ST RESPONDENT : MR. SHILUBANE

FOR 2ND & 3RD RESPONDENTS :

JUDGEMENT

22/03/96

The applicant moved a notice of setdown on 29th February 1996 which was a sequel to a notice of application on 15th November 1995 for an order in the following terms:-

1. That Welile Emmanuel Mabuza be and is hereby appointed curator and liquidator to wind up and divide the joint estate of Joseph Tettey and the late Juliana Henwood Tettey.
2. That the curator ana liquidator be and is directed to carry out the duties imposed on him by this Order of Court by:-

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- a) taking possession of all assets formally belonging to the joint estate by collecting all debits,? moneys, or incomes due to the estate ana by determining and discharging the liabilities thereof;
 - b) demanding from 1st Respondent a true and correct account of any portion of the said assets taken possession of or dealt with by either 1st Respondent or by the late Juliana Henwood Tettey since the date of the decree of divorce and payment over or delivery of any balance or assets still in 1st Respondent's hands.
 - c) dividing the said assets equally between the 1st Respondent and the estate of the late Juliana Henwood Tettey or selling them and dividing the proceeds where a division can not conveniently or advantageously be effected;
 - d) to submit a report to the Court when the estate has been subdivided, bringing to the notice of the Court any conduct on the part of the surviving former spouse which may call for inquiry;
3. That the curator or liquidator be and hereby given liberty ana authority to apply to Court for special

directions in case he is not satisfied with the information supplied by the 1st Respondent as to the assets, or in case of any special difficulty arising.

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4. That the 1st Respondent be and is hereby interdicted and restrained from dealing in any way with the assets of the joint estate referred to in paragraph 1 hereof, save with the permission of the liquidator.

5. That costs of this motion do form part of the costs of the curatorship and of the liquidation of the joint estate herein aforesaid.

An affidavit of one William Feke Mthembu who is the Applicant N.O. Executor was used in support of the application.

Cited in the application were the following:-Joseph Tetey 1st Respondent Master of the High Court
2nd Respondent Attorney General 3rd Respondent

On 24th November 1995 1st Respondent filed a notice of intention to oppose and on 5th December 1995 filed his answering affidavit.

It would be appropriate at this stage to refer briefly to the supporting affidavit of the applicant. Paragraphs 1 to 2.1 of applicant's supporting affidavit are admitted by 1st Respondent.

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Paragraph 2.2 reads:-

The deceased estate of Juliana Henwood which came into being after the divorce of the 5th August 1995.

Paragraph 3 reads:-

I have consulted the relevant authorities of how to treat the joint estate and have come to the conclusion that a fit and proper person is to be appointed as receiver and liquidator of the joint estate.

Paragraph 4 reads:-

the duties of the receiver and liquidator are as set out in the notice of motion of this application.

Paragraph 5 reads:-

If I am granted the application, I should be able to finalise matters relating to the joint estate.

As it can be observed no where in his affidavit does the deponent William Feke Mthembu states that 1st Respondent has been approached in this regard and that he is unco-operative or refuses. Nor indeed does the deponent state that 1st Respondent does not disclose/may not disclose the full

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position in regard to the assets which he holds on the joint estate.

There is also filed on the 5th December 1995 1st Respondent's answering affidavit in which he

specifically states that he had not been approached by applicant to see if an amicable division of estate can be reached. 1st Respondent's affidavit also denies that he was married to the deceased in community of property as his domicile is not in Swaziland but in Ghana.

Applicant chose not to traverse 1st Respondent's affidavit and did not challenge the contents. Mr. Masuku who appeared for the applicant sought to argue and address the court on activities he carried out which activities are not contained in any affidavit in these proceedings. Mr, Masuku referred the court to GILLINGHAM VS GILLINGHAM 1904 T.S. @ 609 - a case which militates against his argument. At page 613 Innes C.J. said and I quote:

"When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, Who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general

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rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolved upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on its behalf. Under the general powers which the Court has to appoint curators it may nominate and empower some one (whether he is called liquidator, receiver, or curator - perhaps curator is the better word) to collect, realise, and divide the estate."

Mr. Shilubane who appeared for the 1st Respondent also referred the court to the Gillingham case supra and also to REVILL VS REVILL 1969(1) and at 327 reference is made to the Gillingham case supra.

Mr. Shilubane also argued that case 1555/93 has not been finally adjudicated upon. Case 1555/93 was the case dealing with the matter of divorce between 1st Respondent and his wife before her death.

The Court finds that the applicant has not made up a case on a balance of probabilities to support the prayers in terms of the notice of application. I dismiss the application with costs.

J.M. MATSEBULA

ACTING JUDGE