

IN THE HIGH COURT OF SWAZILAND

(HELD AT MBABANE)

CASE NO.: 2244/06

In the matter between

VUSUMUZI THOMAS SIMELANE N.O.

Plaintiff

and

PATRICK MUIR N.O.

Defendant

JUDGMENT DELIVERED ON: 20th SEPTEMBER 2006

CORAM: P.Z. EBERSOHN J.

For Applicant: ADV. P. FLYNN Instructd by C.J.

LITTLER & CO.

For Respondent: ATT. P.M. SHILUBANE

JUDGMENT

EBERSOHN J:

[1] The plaintiff in his representative capacity sued the defendant in his representative capacity for the return of a certain business administered by the defendant and for ancillary relief.

[2] In the summons the plaintiff is described as follows:

VUSUMUZI THOMAS SIMELANE N.O. who sues herein in his capacity as the executor in the estate of the late Robert Martin Muir acting under and virtue of Court Order dated June, 2006."

[3] In paragraph 1 of the particulars of claim the plaintiff is described as follows:

"VUSUMUZI THOMAS SIMELANE N.O. who sues herein in his capacity as the executor in the estate of the late Robert Martin Muir acting under and virtue of Court Order dated 14th June, 2006, a copy of the said order is annexed hereto marked "A"."

[4] The Court Order attached as annexure "A" relates to an order in a matter wherein the previous executor was dismissed by the Court in terms of section 84 of the Administration of Estates Act, No. 28 of 1902 and in terms whereof the plaintiff was appointed as executor.

[5] The defendant excepted to the summons on the basis that the plaintiff did not allege that he was appointed as such by the Master of the High Court in terms of Section 22 of the Act which is a further requirement even if the Court appointed him in terms of Section 84. Mr. Flynn, who appeared for the defendant, propounded the argument that besides the order of the Court appointing the plaintiff he should have applied for and had issued to him letters of administration by the Master of the High Court before the plaintiff could act as executor.

[5] Paragraph 1 of Mr. Shilubane's heads of argument which he filed on behalf of the plaintiff reads as follows:

"In this matter, the respondent was appointed by the Court and therefore there is no need to refer to the letters of administration or section 25 of the Act or section 30 of the Administration of Estates Act, 1902."

[6] As the plaintiffs papers now stand there is a lacuna and I am of the opinion that Mr. Flynn is correct and that the Master issued letters of administration to the plaintiff should have been stated in the summons.

[7] I accordingly make the following order

1. The exception is upheld with costs.

2. Leave is granted to the plaintiff to give notice within 14 days from the date of this judgment that he intends amending his summons and particulars of claim failing which the summons will lapse.

**P. Z. EBERSOHN
JUDGE OF THE HIGH COURT**