

THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 3197/2005

In the matter between

TEBADI NHLENGETFWA

Applicant

v

SARA BUYILE MAGAGULA

1st Respondent

THE MASTER OF THE HIGH COURT

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent**RULING**

[1] This is an application for the removal of the first respondent from her position as Executrix Dative in the Estate of the late Johannes Vusi Nhlengetfwa.

[2] The application for the removal is based on the contention that the first respondent has taken too long to wind up the estate. The first respondent is the sister of the deceased. It is common cause that on about 16th October 2002 a meeting of all next of kin was held at the office of the Acting Assistant Master of the High Court for purposes of nominating an executor or Executrix Dative. This meeting was held in terms of section 24(1) of the Administration of Estates Act. The applicant attended that meeting presumably in his capacity as the surviving spouse. The first respondent who also attended that meeting raised no objection to the applicant's presence at that meeting. The minutes of that meeting show that the respondent knew that the deceased had been married to this applicant but she was unable to fill in the particulars because she did not know where the marriage took

place. It would also appear, according to the minutes of that meeting, that the first respondent conceded that the applicant had married the deceased but that they had separated. It was at that meeting, which was held on 16th October 2002, that the first respondent was appointed Executrix Dative.

[3] The issue of the validity of the marriage between the applicant and the deceased, although it is not necessary for my decision, has featured greatly in this application. The basis on which the application is premised is the alleged delay in winding up the estate. As it has been noted earlier in this ruling the first respondent was appointed Executrix Dative on the 16th October 2002 and it is the contention of Mr. Zwane that a period of more than four years is too long to wind up a small estate, whose only property consists of cash. Mr. Zwane has submitted that the delay to wind up the estate has adversely affected the interests of other beneficiaries in that the payment of monthly pension funds which are due to the dependents of the deceased, cannot be made. Mr. Zwane has contended, therefore, that the delay, occasioned, cannot be in the interests of the estate as the estate should have been wound up within six months. He has submitted that there has never been any application to extend the period in which the estate may be administered.

[4] Mr. Thwala, who appeared for the first respondent, has mainly focused his attention on the issue of the validity of the marriage. With respect while, indeed, the issue of marriage and the late submission of the account have been raised, the ground given for the removal of the first respondent is the long delay it has taken to wind up the estate. Mr. Thwala has not, in any way, addressed the main ground on which

this application is premised, namely that the first respondent has delayed in winding up the estate. No explanation has been given for the delay and no application for extension has been made.

[5] I have considered the issue of the validity of the marriage and I am satisfied, having regard to the circumstances, and having regard also to the evidence which is available on record, that the objection to the validity of the marriage between the applicant and the deceased is not well taken. It lacks, in my view, bona fides. The purported marriage certificate and the birth certificate of the son of the marriage between the applicant and the deceased come from the same source. The first respondent has apparently accepted the authenticity of the birth certificate but has rejected the marriage certificate. There is also the affidavit which was deposed to by Mrs. Thula Nhlengetfwa, a step mother of the deceased and the respondent. This lady clearly states in her affidavit, that the applicant and the deceased were married in South Africa and that her husband, who is the father of the deceased and the first respondent, was aware of the marriage. She further states that the deceased and the applicant were advised to organise a wedding ceremony in Swaziland. The first respondent was the person who was helping the applicant during the Kuhlambisa ceremony which took place in Swaziland. Mr. Zwane has submitted that the Kuhlambisa ceremony is only done at the end of exchange of gifts and is evidence that people are now married. Mr. Thwala did not challenge that proposition. This evidence remains uncontroverted by the first respondent. There can be no doubt that the applicant contention that she was validly married to the deceased has some support.

[6] Removal of an executer is governed by the provisions of Section 84

of the Administration of Estates Act and it provides as follows:-

"S. 84 Every executor, tutor or curator shall be liable to be suspended or removed from his office by order of the High Court, if such court is satisfied on motion, that by reason of absence from Swaziland, other avocations, failing health, or other sufficient cause, the interests of the estate under his care would be furthered by such suspension or removal:"

"Provided that in every case of suspension the court may substitute some fit and proper person to act during such suspension, in his place subject to such conditions as to the giving of security and the conduct and administration of the estate as the said court may deem just."

[7] I am satisfied that a delay of over a period of four years to wind up a small estate, as we have here which only involves cash, is unduly long period and it would not be in the interests of the estate for it to continue to be in the care of the first respondent. The first respondent appears to be indifferent to the interests of the estate. Her main concern is to ensure that the applicant is excluded from the list of people who should benefit from the estate. The first respondent was appointed executrix on 16th October 2002 and her first liquidation and distribution account was not submitted until almost a year after, in August 2003. No further accounts have been made by the first respondent. Under Section 51(4) of the Administration of Estates Act she is required to render periodical accounts of her administration and distribution from time to time as may be directed by the Master. A

diligent and prudent executor would clearly do that even before he is directed to do so by the Master.

[8] A letter which was written to the first respondent by the Master drawing her attention to the fact that the applicant was "in truth and in fact" married to the deceased has remained unanswered till now. The latter was requesting the first respondent to rectify the error before the account could be drawn and presented to the Master in terms of Section 51 (2) of the Administration of Estates Act. That letter was written on 27th January 2003, almost five years ago. The Master will not be able to know how well the estate is being administered if his letters are not replied to. It is now five years since the first respondent was appointed and the estate remains not fully administered. This, in my view, is unacceptable delay which should not be tolerated.

In the case of SIBONISO DLAMINI AND WINNIE MUIR Appeal Case No. 31/2006 it held that a period of eight years to wind up a much bigger estate than we have here, was unduly long period. In considering whether an executor should be removed from his office the paramount consideration is the welfare of the beneficiaries. As I have already observed the delay to wind up the estate has already prejudiced the beneficiaries through the delayed payment of pension funds. I am satisfied that the interests of the estate will not be advanced if the first respondent is allowed to continue in the office of Executrix. This application succeeds with costs and the order of this court is that the first respondent be removed as Executrix Dative of the estate of Johannes Vusi Nhlengethwa and the Master of the High Court is directed to appoint a fit and proper person to administer the said

Estate.

Pronounced in open court on the 13th ..day of August 2007

R.A. BANDA

CHIEF JUSTICE