

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE In

CASE NO. 2616/06

the matter between

MANQOBA DLAMINI

APPLICANT

BUSISIWE GRACE DLAMINI

1st RESPONDENT

THE MASTER OF THE HIGH COURT

2nd RESPONDENT

THE ATTORNEY GENERAL

3rd RESPONDENT

CORAM

: Q.M. MABUZA - JUDGE

FOR THE APPLICANT

: MR. S. MAGONGO

FOR THE 1ST RESPONDENT

: MR. M. SIMELANE

FOR THE 2ND & 3RD RESPONDENTS : NO APPEARANCE

BILLING ON POINTS IN LIMINE 6/6/07

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[11] The applicant herein seeks the following prayers:

- a. Pending finalization of this application, the first respondent be restrained and or interdicted from executing her duties as an Executrix Dative of the Estate Late of Silas Magombeni Dlamini Estate file number EH 11/05.
- b. The decision by the second respondent to appoint the first respondent as an Executrix Dative of the Estate Late of Silas Magombeni Dlamini - Estate file number EH 144/05.
- c. An independent Executor or Executrix be appointed to continue with the winding up of the Estate Late of Silas Magombeni Dlamini - Estate file number EH 144/05.
- d. The first respondent be ordered to account for all what she had done and the monies paid out since her inception of the position of being an Executrix Dative.
- e. Costs of this application.

[2] The 1st Respondent has raised points ***in limine*** herein and they appear on page 18 -20 of the book of pleadings as follows:

(a)The Applicant has no ***locus standii*** to institute the Application being an illegitimate child who is a major.

(2) The Application lacks sufficient averments to sustain a review application.

(3) Alternatively the Application does not meet the requirements of Section 84 of the Administration of Estates Act 28/1902.

(4) The Application is defective for NON JOINDER of the following children who have a direct and substantial interest in the estate namely;

(5) Bawelile Dlamini

(6) Norncebo Dlamini

(e) The application is bad in that law is pleaded in paragraph 12, 12.1, 12.2, 13, 14, 15, 16, 17, 18 and 19 without adducing any facts and or attaching the relevant statute.

[3] The Applicant has also submitted an objection that the 1st Respondent's notice of set down is joined with the notice to raise points and argues that there should be a separate document containing the points *in limine* and another comprising of the notice of set down. Therefore he argues the notice of set down embodying the points *in limine* is an irregular step and must be set aside. The Court has a discretion to condone the irregular step as it were and it is hereby condoned.

[4] After the death of the deceased herein on the 29 June 2005, the estate was reported to the Master of the High Court, the 2nd Respondent herein. The latter called for a meeting of the next-of-kin and the 1st Respondent was appointed Executrix Dative of the deceased estate.

[5] During his lifetime the deceased married 1st Respondent according to civil rites. They were married on the 11th September 1981. During the subsistence of the marriage relations between the two went sour so much so that a divorce was attempted but never finalized. It would seem

that it was abandoned. The Applicant has stated that the 1st Respondent had deserted the deceased early 1993 and she only surfaced when he died. For this reason he says she is not a fit and proper person to be an Executrix Dative. The 1st Respondent denies these allegations and states that when the deceased died she and him were on good terms. However it is not on the merits that this Court should make a finding but on the points of law which have been raised by the 1st Respondent.

[6] The deceased herein died intestate on the 29 June 2005. The Applicant was born of another woman with the deceased while the deceased was married by civil rites to the 1st Respondent. The Applicant has no ***locus standii*** to bring this application as he is illegitimate as far as the estate of the deceased is concerned.

[7] Section 31 of the Constitution of Swaziland does not affect the position of Applicant as the constitution became operative after the deceased had died and has no retrospective effect. The Application must fail on this point.

[8] The application lacks sufficient averments to sustain a review. It does not comply with the following grounds at

common law upon which the proceedings of administrative bodies may be subject to review namely:

(a) Where the proceedings are ultra vires and this will include bad faith or fraud by the tribunal or official exercising his power.

(b) Violation of the principles of natural justice.

(c) Failure to give reasons for a decision where there is a duty upon a tribunal to do so

(d) Mistake of law or fact in certain circumstances (our emphasis).

(e) Unreasonableness of decisions in certain circumstances (our emphasis).

(f) Non-compliance with where the rules of evidence in limited circumstances.

(g) Where the power exercised was

(See Judicial Review of Administrative Tribunals in South Africa (1963) by Rose Innes at p. 8) The application must fail on this point.

[9] The Applicant does not meet the requirements of Section 84 of the Administration of Estates Act 28/1902 which states:

"Removal and suspension of executors, tutors and curators.

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."

The application fails on this point

[10] I have been advised that the children Bawelile, Nomcebo, Nontsikelelo Mlandvo, Sandzisiwe and Wendy are all illegitimate children that the deceased sired from other women or another woman and not with the 1st Respondent. I was advised that they are minors and if that is true then they should have been joined as they have a direct and substantial interest in the estate in so far as maintenance is concerned.

[11] Paragraphs 12, 12.1, 12.2, 13, 14, 15, 16, 17, 18 and 19 of the applicant's founding affidavit have set out Sections of the Administration of Estates Act 1902 without adducing any facts to support the Applicant's claim. There is no need for me to set out their contents as this is merely a ruling. Pleadings should not contain law but facts to enable the opposing party to readily and properly deal therewith in their answering papers. The application must fail on this point as well.

[12] The application is dismissed with costs.


Q.M. MABUZA - JUDGE