IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO; 1468/2009**

In the matter between:

RICHARD CLYDE MUIR	**Applican t**

AND

WINNIE MUIR	**1st Respondent**
THE MASTER OF THE HIGH COURT	**2nd Respondent**

THE ATTORNEY-GENERAL	**3rd Respondent**
DIANA MUIR	**4th Respondent**
MELAINE MUIR	**5th Respondent**
GARY MUIR	**6th Respondent**
RYAN MUIR	**7th Respondent**
NATASHA MUIR	**8th Respondent**
SHIMON MUIR	**9th Respondent**

Date of Hearing: 13 August, 2009
Date of judgment: 21 August, 2009

Advocate M.L.M. Maziya for the Applicant
Mr. Attorney P.M. Shilubane for 1st and 9th Respondents
Mr. Attorney F. Mthembu for 5th and 6th Respondents

JUDGMENT

MASUKU J.

[1] This is yet another bout in a series of legal skirmishes which appear to bedevil the estate of Late Robert Martin Muir. On 10 March, 2009, the Master of the High Court, cited as the 2nd Respondent herein, issued letters of administration of the above-named estate in favour of the 1st Respondent, Winnie Muir.

[2] Dissatisfied with the correctness of that decision, Richard Clyde Muir, launched the present application, the essence of which is to move this Court to set aside the said appointment and for an order directing the 2nd Respondent to issue letters of administration in favour of an independent and impartial person, preferably an attorney with sufficient knowledge and experience, in winding up of deceased estates. The Applicant also prays for costs on the Attorney and own client scale to be mulcted against the first three Respondents.

[3] In response to this application, Messrs. P.M. Shilubane raised points of law *in limine* without pleading over on the

merits. This appears to have been in terms of Rule 6 (12) (c) of the Rules of this Court. This will ordinarily mean that if the points *in limine* are dismissed, then *cadit quaestio.* This is the risk inherent where a party does not plead over on the merits. I will advert to the points of law shortly.

[4] For his part, the 2nd Respondent filed a Report dated 27 May, 2009, in terms of Rule 6 (23). I shall refer to the relevant and salient portions thereof. I should, however state that at the hearing, there was no appearance for the 2nd and 3rd Respondents, an occurrence that is happening with disturbing regularity and one that I have had to comment upon in recent weeks. The Taxpayers in this country deserve much better service and representation. I specifically call upon the Honourable Attorney-General to take adequate measures to guard against this cancerous practice which lays the taxpayer bare to censure and at times to payment of costs that can certainly be avoided or at the least ameliorated.

[5] In the report, the Master states that Attorney Zonke Magagula, who had been appointed on the strength of a Court of Appeal judgment, as executor dative of the said estate, had resigned on 17 November, 2008. The judgment will be adverted to in the course of this judgment. The Master states further that 1st Respondent, who is the surviving spouse, had on many occasions sought to appointed in Magagula's stead.

[6] The Master's office stated further that it had issued letters of administration in favour of the 1st Respondent after a series of meetings had been held with the deceased's next of kin. More importantly, the Master's office conceded that the said letters ought not to have been issued to the 1st Respondent and that in doing so, the office had committed a mistake, and that the issue of the said letters was not intentional. Lastly, the Master's office indicated that it was willing to abide by this Court's decision on the instant application.

[7] I now turn to deal with the points *in limine* referred to above. First was that the Applicant's Notice of Motion, being one for review did not comply with the provisions of Rule 53; that Mason Muir, an heir had not been joined in the application, that Shimon Muir had not been served with the papers though cited as a party; that there was no service on the 5th and 6th Respondents and lastly that the Applicant has not made out a case for the relief sought because the finding by the Court of Appeal that the 1st Respondent was not qualified for appointment constitutes a mere opinion of that court and is not admissible as evidence in the instant case.

[8] I find it convenient to deal firstly with the points relating to service and non *joinder.*

Mason Muir's alleged *non-joinder*

[9] It is true that from a reading of the citation, Mason Muir has not been specifically cited as a party. It appears to be common cause though that he is an heir. The answer

proferred by the Applicant to this query is to be found in paragraph 2 of the Founding Affidavit which reads as follows:

> "The 1st Respondent is Winnie Muir N.O. an adult Swazi widow cited in her capacity as the Executor *(sic)* dative in the Estate of the Late Robert Martin Muir and Legal guardian of her minor children *[sic),* Mason Muir".

[10] It is clear therefore that on account of the fact, which is not controverted on the papers, that Mason Muir is a minor child, he was not cited directly but through his mother and guardian. This, in my view, provides a full answer to the Respondents' complaint although it is always preferable to state in the citation that a guardian is cited in a representative capacity as well. The failure to do so would not, in my view be properly regarded as fatal for to do so would amount to putting form ahead of

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[11] I should hasten to mention that in the heads of argument, the 1st Respondent's attorneys appear to raise a new point of law, namely that the 1st Respondent ought to have been cited in her personal and not representative

capacity. This point was not raised in the notice raising the points and it is in my view unfair and improper, to expect the Applicant to deal with points of law which have not been properly raised. Reliance was placed on the case of *McNamee and Other v Executors Estate McNamee* 1913 TPD 428.

[12] In that case, the Executors, who were also trustees were sued in their representative capacities for forfeiture of all fees and commissions claimed by then which they paid themselves from the estate. The Court held that they should have been cited in their personal and not representative capacities. This judgment must be considered in the light of its facts. The Court found that the conclusions in the summons were personal to themselves as individuals and they only could satisfy the judgment in their individual capacities. It is therefore clear that this case in not authority for the general proposition that in every case the executor must be cited in a

personal capacity. The *ratio decidendi* of this case is therefore not applicable to the instant case.

Regarding service on Shimon, it is clear that Mr. Shilubane represents Shimon and this is clear indication that Shimon is aware of the present proceedings. There is nothing said by Shimon that indicates he was not served with the papers and is, more importantly, unaware of these proceedings and that he is complaining about that. The fact that he is represented in an *inducium* that his rights and interests are being protected by his attorney, Mr.

Shilubane. I find no real merit in this point of law and accordingly dismiss it.

Non-service on 5th and 6th Respondents

[14] The 5th and 6th Respondents are Melanie and Gary Muir. It would appear that based on powers of attorney signed by both Respondents, they appointed C.J. Littler and Company to be their lawful attorneys and agents to act in

their place and stead. The 1st Respondent contends that there was no service on them.

[15] I do not understand why the 1st Respondent should act as a busybody in the affairs of other persons not affecting her. It is clear on the papers that Mrs. Mthembu acts on behalf of both Respondents and she is an attorney of record. It is therefore clear that whatever issues there may be about service of the papers on them, whether correctly or incorrectly raised, they are aware of the present application and instructed their attorney to abide by the Court's decision. This point is in my view bad and ought to be dismissed because what the Court must be properly satisfied about is that the party against whom an order is likely to be issued, is aware of the proceedings. Mrs. Mthembu's presence is a clear and unambiguous statement that the said Respondents are aware of this application.

Should I be wrong on any of the above legal points, I am, nonetheless, of the view that the following judgment of the Court of Appeal in should hold sway. It was held in *Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors,* Appeal case No.23/2006 that the Court should avoid shying away from dealing with substantive issues by dismissing matter on highly technical matters. The Court of Appeal, per Tebbutt J.A. said at page 23-24 (paragraphs [39] to [40]:- See judgment at page 23.

> "The learned Judge *a quo* with respect, also appears to have overlooked the current trend in matters of this sort, which is now well-recognised and firmly established, *viz* not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and, if possible, inexpensive decisions of cases on their real merits (see e.g. the dicta to that effect by Schreiner J A in *Trans-African Insurance Co. Ltd v Maluleka* 1956(2) SA 273(A) at 278G; *Federated Timbers Ltd v Botha* 1978(3) SA 645(A) at 645C - F; *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004(2) SA 81 (SE)). In the latter case the Court held that (at 95 F- 96A, par 40):
>
> > The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs.'
>
> The above considerations should also be applied in our courts in this Kingdom. This Court has observed a tendency among some judges to uphold technical points

in limine in order it seems, I would dare to add, to avoid having to grapple with the real merits of a matter. It is an approach which this Court feels should be strongly discouraged.

Review

Mr. Shilubane argued and quite forcefully too that the Applicant is guilty of bringing this case to Court via the wrong procedure. His contention, based on Section 75 of the Administration of Estates Act No. 28 of 1902, (hereinafter called "the Act") is that since the application is for the review of the Master's decision, then the Applicant ought to have approached the Court in terms of Rule 53, which generally governs applications for review. Is there any merit in the contention?

[18] Section 75, referred to above reads as follows:-

> "Every such appointment made by the Master shall on the application of any of the relations of, or of the curator nominate of any estate or property belonging to, such minor, be subject to review and may be confirmed, or set aside by the High Court, and if it sets any such appointment aside, it may appoint some other fit and proper person to be the tutor dative of such minor."

Mr. Maziya's argument was that the above section is irrelevant and totally unconnected with the Applicant's application, particularly viewed from the relief he seeks. Is he correct?

[19] The opening phrase in Section 75 makes reference to "Every such appointment." The question to ask, which may ultimately decide whether it is Mr. Shilubane or Mr. Maziya that is correct, is what is meant by "such appointment"? The answer, is in my view to be found in Section 74 of the Act. That section deals with the appointment of tutors' dative by the Master. That there is a connection between the two sections can in my view be seen from the closing words in section 75, namely that a person aggrieved by the appointment may apply to this Court for review and possible setting aside by this Court the appointment, with this Court being at large to "appoint some other fit and proper person to be the <u>tutor dative</u> of such minor." (Emphasis added)

[20] It is therefor plain that section 75 is irrelevant and of no application to the present case. I say so because that section in the first place, applies in respect of appointment of tutors dative. This case is concerned with the appointment by the Master of an executrix dative. Secondly, the application is not for the review of the Master's decision, but for the setting aside of the same.

[21] I should, in this context, state that even if Mr. Shilubane were correct about the applicability of section 75, which is clearly not the case as I have held, the word "review", as used in the above section is in the loose sense and not in the same manner as that employed in matters of judicial review. The latter is normally employed in cases where the applicant challenges the formal correctness of the method or procedure followed and not necessarily the result. -See Harns, Civil Procedure in the Supreme Court, Butterworths, 1998 at page 477. The "review" in the instant case, it will be seen, is not necessarily directed at the method or procedure followed, but at the result.

[22] The manner in which the word is employed in the above section appears to be akin to review of taxation by this Court under Rule 48. What will normally be alleged is that the result is wrong, without necessarily attacking the method and more often than not, the production of the record will not conduce to the resolution of the question whether the decision is correct in law. In any event, authority is legion for the proposition that the record is for the benefit of the applicant and who may waive this benefit and request the Court to hear the application for review in the absence of the record. See Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed at page 592.

I am of the firm view that even if this was a proper case of review, the issue of the record would not be of much assistance given the nature, scope and magnitude of the complaint, namely that the Master appointed the 1st Respondent in violation of an Order of the Court of Appeal. That is a question

to be decided without the aid of any record but the judgment in question.

[24] These is also a related issue raised by Mr. Shilubane and on the basis of which he urged the Court to nonsuit the Applicant. He contended that the Applicant's papers lack averments necessary to afford him the relief sought. It was argued that there is no allegation that the 1st Respondent is guilty of any wrongdoing in executing the demands of her office as executrix dative. The case of *Sackuille v Nourse and Another* 1928 AD 516, was cited in support of this proposition.

[25] On other facts, the legal position propounded in the above case is certainly sound. As correctly stated by Mr. Maziya, the contention in this case has nothing to do with the 1st Respondent's fitness in the execution of her duties as executrix. The issue is not about how well or badly she is or has been handling the estate. The question is whether the Master was correct in appointing her when the Court

of Appeal had held that it was undesirable that she holds the said position.

[26] Clearly, the question of the presence or absence of wrong-doing is neither here nor there. This argument is, in my considered opinion irrelevant and the case cited totally inapplicable to the case at hand. I am of the considered view, subject to the last issue arising for determination, that the Applicant has made all the necessary allegations on the basis of which this Court can afford him the redress he seeks, particularly in view of the concession by the Master to which I shall presently turn.

Judgment of the Court of Appeal

[27] It is common cause that on 16 November, 2006 the Court of Appeal issued a judgment under Case No. 31/06 in which Mr. S.C. Dlamini, the then executor dative challenged his removal from that office by this Court. The 1st Respondent was the Respondent in the appeal. The Court of Appeal, to which the appeal was noted, upheld

the decision to remove him from that office. The Court of Appeal proceeded to appoint Mr. Magagula as executor dative and whom it appears the parties had proposed.

[28] The gravamen of the Applicant's complaint is to be found at page 13 of the judgment, particularly at paragraph 27 thereof. The Court said the following about the 1st Respondent's suitability for the post of executrix dative:-

> "In view of the poor relationship between her and the remaining beneficiaries it would appear undesirable to accede to her request. Clearly an independent person who suitably qualified requires to be appointed to take over from the appellant."

[29] Mr. Shilubane's gripe with the above excerpt is that the finding of the Court of Appeal above "that the first respondent is not qualified to be appointed executor is a mere opinion of that Court and as such is not admissible as evidence in this case." The contention was predicated on the *ratio decidendi* of the celebrated

English case of *Hollington v F. Hewthorn & Co. Ltd* [1943] KB 587 (C.A.). This has been commonly referred to as the rule in *Hollington v Hewthorn.*

[30] The learned authors Zeffert et al, The South African Law of Evidence, Lexis Nexis, Butterworths 2003 comment generously on the above rule from page 315. This rule is an extension of the exclusion of opinion evidence where it was held that a conviction by a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he was convicted. In the *Hollington* case, an action for damages arising out of a motor vehicle collision was instituted by the plaintiff on behalf of his dead son's estate. In view of the plaintiffs son's death, there was no direct evidence of negligence. To try and cure that defect, a record of the other driver's convictions for negligent driving in a prosecution following the accident in question was sought to be introduced. That record was held to be inadmissible.

[31] In my view, the rule seems to apply where the record of proceedings in one case is sought to be used as evidence of a fact needed to be proved in another case, without leading evidence in proof of that fact in the latter case. I am of the considered opinion that this rule is inapplicable *in casu* because the record of proceedings in the appeal case is not being sought to be admitted in separate proceedings to prove a certain fact in issue in the present proceedings.

[32] I do not have before me proceedings in which I have to decide the question of the 1st Respondent's fitness to hold the office of executrix dative and to that end, I intend relying on the judgment of the Court of Appeal for deciding the question before me. The proceedings before me are not about whether the 1st Respondent is fit or not to hold the office of executrix. They are merely designed to give effect to an Order granted by the Court of Appeal which was binding on the Master and which the latter did not comply with. This is a far cry from an argument that the

finding of the Court of Appeal is being used before this Court to decide the question of the 1st Respondent's fitness and which question is for this Court to decide in different and generally unconnected proceedings.

[33] I am of the firm view that Mr. Maziya's argument that the aforesaid Rule is inapplicable in the instant case is eminently correct. If Mr. Shilubane's argument were to sustained, it would mean that orders of Court could be flouted with impurity on the ground that the finding or order was an opinion of that other Court of judge. *In casu,* as I have stated, the Applicant seeks to have the Master follow the judgment of the Court of Appeal and which is binding on his office. Before me is not a question whether the 1st Respondent is fit or not but whether in appointing the 1st Respondent, the Master followed a judgment that was binding on him.

[34] There is one misstatement that I need to correct. In his notice to raise points of law, Mr. Shilubane stated that the Court of Appeal held that the 1st Respondent was not

qualified to be appointed an executrix dative. This is not correct. As recorded earlier, the Court of Appeal did not say that she did not qualify to hold the office but said that it was undesirable for her to do so on account of her poor relationship with the other beneficiaries. It was in that light that an independent person was ultimately appointed. In other words, the 1st Respondent qualified in terms of the Administration of Estates Act *(supra)* to hold office but certain considerations rendered her, in the opinion of the Court of Appeal, unsuitable to hold the office.

[35] All in all, I am of the view that the facts of this case are not covered by the rule in the *Hollington* case. There is nothing to prevent this Court from ensuring that the Master, in appointing an executor dative, follows the judgment of the Court of Appeal which he is bound to.

It is clear from the Report that the Master concedes and correctly so that he was in error in appointing the 1st Respondent and much against the Court of Appeal's finding

and requirement that the person to be appointed must be independent. Whether the 1st Respondent has "suitable qualifications and competence" as the Court required is also a live question that need not be answered in view of the conclusion that I have reached.

I now turn to the question of costs. Mr. Maziya has applied for costs on the punitive scale against the first three Respondents. It is clear from the Master's report that the appointment was an oversight to which that office owned up. They did not flagrantly, it would appear, go against the terms of the highest Court in the land. For that reason, I am not satisfied that there is any basis for granting the Applicant costs on the scale applied for. See in this regard *In Re: Alluvial Creek* (Ltd) 1929 CPD 532.

In the premises, it is clear that as a result of the 2nd Respondent's avowed mistake, the Applicant had dad to enforce the Court of Appeal judgment on the pain of an application. The 1st Respondent, although she did not appoint herself, did oppose the relief sought and on grounds that I have

found to have been untenable. Costs against the above Respondents are therefor inevitable.

For the foregoing reasons, I grant the following Orders: -

[38.1] The appointment of Winnie Muir as the executrix dative to the estate of the late **Robert Martin Muir, Estate No. EH 136/1998** by the Master of the High Court be and is hereby set aside.

[38.2] The Master of the High Court be and is hereby ordered to issue letters of administration to and in favour of a person who is independent and impartial, preferably an Attorney with sufficient knowledge and experience in the winding up of deceased's estates.

[38.3] The 1st and 2nd Respondents be and are hereby ordered to pay the costs on the scale between party and party jointly and severally, the one paying the other to be absolved, including costs of Counsel to be

certified in terms of Rule 68 (2) of the Rules of this Court as amended.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 21st DAY OF AUGUST, 2009.

Messrs. L. Dlamini 8c Associates for the Applicant
Messrs. P.M. Shilubane 8s Associates for the 1st Respondent
Messrs. Mthembu Attorneys for the 5th 8c 6th Respondent