



**IN THE HIGH COURT OF SWAZILAND**  
**JUDGMENT**

Case No: 1556/10

In the matter between:

**LLOYD CRAIG HENWOOD**

**APPLICANT**

and

**GARTH GREGORY HENWOOD**

**1<sup>ST</sup> RESPONDENT**

**GENE ALLISTER HENWOOD**

**2<sup>ND</sup> RESPONDENT**

**TENNYSON HENWOOD**

**3<sup>RD</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE**

**4<sup>TH</sup> RESPONDENT**

**THE MASTER OF HIGH COURT**

**5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**6<sup>TH</sup> RESPONDENT**

**Neutral citation** : Lloyd Craig Henwood and Garth Gregory Henwood & 5 Others  
(1556/10) [2012] SZHC 238 (12 OCTOBER 2012)

**Coram** : MABUZA J

**Heard** : 25 JANUARY 2012

**Delivered** : 12 OCTOBER 2012

**Summary** : **Administration of Estates – Removal of Executors – Section 51 (2) provides correct procedure – Application pre-maturely before Court – Application dismissed – Costs to be levied from estate.**

[1] The Applicant seeks an order in the following terms:

1. Removing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as EXECUTORS as they have failed to wind up the Estate of the Late Aldest Armstrong Henwood – EL 155/08 within six months as they were appointed in the position on the 24<sup>th</sup> February 2009.
2. Directing 5<sup>th</sup> Respondent to convene a meeting of the next of kin in order to appoint an EXECUTOR to wind up the Estate of the Late Aldest Armstrong Henwood – EL155/08.
3. Confirming Applicant's legal right to access Farm 645, situate in the District of Lubombo, Swaziland.
4. Authorising and directing the 4<sup>th</sup> Respondent to provide such security as to him shall seem necessary to keep the peace and maintain law and order during Applicant's visits to the farm.
5. Interdicting, directing and restraining 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents or any other person acting on their behalf and/or instruction or independently, from interfering with Applicant's legal right to access and remain within Farm 645, District of Lubombo.
6. That the costs of this application be borne by any of the Respondents as shall oppose this Application.

7. Further and/or alternative relief.

[2] The cause of action herein arises from the failure to wind up the estate of the late Aldest Armstrong Henwood (Henwood). Henwood died on the 19<sup>th</sup> August 2008. His wife Phyllis Ethel Anne Henwood (Phyllis) predeceased him on the 12<sup>th</sup> October, 2003. Henwood and Phyllis died testate having executed their joint will on the 27<sup>th</sup> May 2000.

[3] The will nominated and appointed the first and second Respondents as co-executors of the estate. The Applicant was formally adopted by Phyllis and Henwood. His interest in the winding up of the estate is that Farm No. 645 situate in the Lubombo District known as Granite Range was in terms of the will bequeathed to him together with all the buildings thereon, of the farming implements, tractors, other equipment and motor vehicles owned and used by the Testators. The Applicant wishes to come into possession of his inheritance.

[4] On the 26<sup>th</sup> November 2008 at a meeting of the next of kin held at the offices of the Master of the High Court (the fifth Respondent) the first and second Respondents were appointed Executors in terms of the aforementioned will

and Letters of Administration were issued in their favour on the 24<sup>th</sup> February 2009. They have to date failed to file a Liquidation and Distribution Account with the Master of the High Court in respect of the estate.

[5] An application for the removal of an executor can be brought by any interested party. The Applicant is a beneficiary in terms of the Will and is therefore an interested party and this gives him legal standing to institute these proceedings.

[6] Section 84 of the Administration of Estates Act 28/1902 (the Act) provides that:

“Every executor ... 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, or other avocations, failing health, or other sufficient cause, the interests of the estate under his care would be furthered by such suspension or removal.”

[7] The aforesaid section enumerates several grounds from which the courts shall suspend or remove an executor. In *casu* the Applicant has filed for their removal. The grounds are namely:

- (a) by reason of absence from Swaziland;
- (b) other avocation(s)
- (c) failing health;
- (d) other sufficient cause;

That the interests of the estate under his care would be furthered by such suspension or removal.

[8] In *casu* the answering affidavits of the executors disclose that they are Swazi male adults of Maloma, Lubombo district Swaziland. There is no evidence to show that they are in terms of (7) (a) above absent from Swaziland, nor do they suffer from failing health or other avocation. The Concise Oxford dictionary defines avocation as a hobby or minor occupation. That would leave (7) (d) “other sufficient cause”; which is discussed in the following paragraphs.

[9] Legal authorities show that courts will not readily remove an executor but will remove one on the ground of absence of administration if proved to its satisfaction. See **Adams & Others v Jalaldien** No. 1919 CPD, 17 where it was held that a court does not readily remove an executor from office and before doing so must be satisfied that there has been mal-administration or an absence of administration on the part of the executor. See also *ex parte* Suleman 1950 (2) SA 373 (C) where the court granted an application for removal of an executor on the grounds that his conduct constituted a want of reasonable fidelity. He had failed over a period of six months or more to reply to urgent letters or to get in touch with his co-executor or her attorney in the face of a financial crisis looming over the estate.

[10] *In casu* it is clear from the evidence presented before me that the Executors have failed to administer the estate since the Letters of Administration were issued in their favour on the 24<sup>th</sup> February 2009.

[11] Further, Executors have been removed for failing to lodge accounts after a long period had elapsed. See **Phoenix Assurance Co. v Wepener** 1935 OPD 35; they have been removed for serious dereliction of duty. Section 51 (2) of the Administration of Estates Act No. 28/1902 provides that:

“As soon as may be ... and not later than six months from the day on which the letters of administration were issued to him (unless upon application to the Master upon sufficient cause shown to the satisfaction of the Master, further time be given from time to time for that purpose), frame and lodge with the Master a full and true account supported by vouchers of the administration and distribution account of the said estate, and also a duplicate or fair and true copy of such account.”

[12] No such account has been filed with the office of the Master notwithstanding that the Letters of Administration were issued in Executors favour on the 24<sup>th</sup> February 2009.

[13] The executors do not deny their failure to file the Liquidation and Distribution Account in respect of the estate with the Master of the High Court. Their excuse is that this is a complicated estate which comprises of assets in South Africa. But they have not disclosed the nature of the assets in South Africa that makes it difficult for them to wind up the estate. In any event the procedure for reporting and winding up an estate in South Africa is similar to that in Swaziland. They have to report the estate in the office of the Master in South Africa. This they do through their local attorneys who

would instruct correspondent attorneys in South Africa to report and wind up the estate in South Africa.

Furthermore, the Applicant who was Henwood's right hand man during his last days before his death says that the assets in South Africa comprise of cash at Standard Bank and some life policies. There is nothing complicated in regard to these assets.

- [14] The other excuse for their failure given by the executors is that the Applicant has in his possession a sum of money in excess of E300,000.00 which he refuses to hand over or account for. The Applicant denies that he has such moneys in his possession and says that any moneys he was privy to was during the lifetime of Henwood who used it to pay various accounts. Nevertheless even if the Applicant was suspected to have such moneys in his possession the executors can still file accounts in respect of the estate and exclude the money said to be with the Applicant for a future account in terms of section 51 (3) of the Act. They can in the meantime issue summons against the Applicant for the recovery of the money. There is no evidence that they have activated this remedy at all. Their excuse cannot avail them.

[15] Section 51 (3) and (4) permit executors to file interim accounts. Section 51 (3) provides that:

“If any such account be not the final account, it shall set forth all debts due to the estate and still outstanding, and all debts due to the estate and still outstanding, and all property and effects still unsold and unrealized, and the reasons why the same have not been collected or realized as the case may be”.

Section 51 (4) provides that:

“The executor shall from time to time, as the Master may direct, render periodical accounts of his administration and distribution until the estate be finally liquidated, and should he fail to do so, he shall be liable to be summoned in terms of section 52”.

[16] There is no doubt that the executors have failed to lodge an account with the Master as outlined above nor have they approached the Master to request an extension of time. It is evident to me that the executors are guilty of non-administration; gross inefficiency and of serious dereliction of duty and qualify to be removed on the ground of “other sufficient cause”. The question is can they be removed at this juncture or is the application for their

removal premature? The act makes provision for steps the Master should activate when such circumstances arise.

Section 52 provides that:

“When any executor has failed to lodge with the Master the account mentioned in section 51 (2) the Master or any person having an interest in such estate, may, at any time after the expiry of six months, from the day on which the letters of administration were granted to such executor, summon him to show cause before the High Court why such an account has not been lodged”.

[17] There are three provisos to this section which have to be complied with before section 52 is activated, namely:

- (a) that the Master or such person shall who has an interest not later than the month apply by letter to the executor in default, requiring him to lodge his account on pain of being summoned to do so under this section;
- (b) that... the executor may lay before the Master such grounds and reasons as he may be able to advance why he has not lodged his account and the Master, should such grounds and

reasons seem to him sufficient may grant to such executor such an extension of time for lodging of such account ...

- (c) that if any such executor ... fails to satisfy the Master that he ought to receive an extension of time may apply to the High Court ... for an order granting to such executor an extension of time with which to lodge his account.

[18] As stated earlier on in this judgment, the executors having failed to lodge the Liquidation and Distribution Account within the stipulated six months failed to approach the Master in order to request an extension of time. On the other hand neither did the Master call for the Account in terms of section 52. The report filed by the Master does not state that she exercised her powers by invoking section 52, neither did the Applicant as an interested party invoke the provisions of this section. Further to the above, there is no provision in the Act that empowers or authorizes the Applicant to overlook the provisions of section 52 and to approach this court directly.

[19] It is my considered view that until the provisions of section 52 have been complied with this court cannot remove the executors as prayed for even though good reasons have been furnished to enable the court to do so. Having made this finding this court cannot direct the 5<sup>th</sup> Respondent to

convene a meeting of the next of kin in order to appoint an executor to wind up the estate. The court would only be able to do this after being shown evidence that notwithstanding the invocation of section 52, the executors have still failed to lodge the estate account. It is my finding that the application is at this juncture premature and consequently the orders prayed for in respect of prayers 1 (1) and 1 (2) fail and are hereby refused.

[20] At the time of the death of Henwood, the Applicant and his family lived in the farm house on Farm 645 but the first, second and third Respondents ordered him and his family to vacate the property under threat of violence and he was actually assaulted by the third Respondent. He says that he has been prohibited from setting foot on Farm 645. That on the 19<sup>th</sup> March 2010 he met the third Respondent who threatened and insulted him over the phone. The first, second and third Respondents in their answering affidavits deny that they have ever insulted or threatened to assault the Applicant. The third respondent denies ever assaulting the Applicant. They say that he comes and goes to Farm 645 as he pleases with no interference from them. The conflicting stories obviously raise a dispute of fact which cannot be resolved on affidavit including that of Fiona the natural mother of the Applicant.

[21] It is clear that there is bad blood between the Applicant and the three Respondents but I am unable to issue an order in terms of prayer 1 (3) and 1 (5) until perhaps after confirmation of the Liquidation and Distribution account. Even though the bequest to the Applicant of Farm 645 has not been challenged by the other siblings they have indicated that they wish to challenge his status as their adopted brother; that is the adoption order because they feel that the bequest was made to him because he was adopted by Henwood and Phyllis.

[22] The three Respondents say that the Applicant comes and goes to Farm 645 as he pleases and because of the emphasis to his “legal right of access” which has not yet been confirmed in a Liquidation and Distribution account; I cannot order prayer 1 (5). However I am able to order prayer 1(4) which I hereby do. I do so on the understanding that Farm 645 or wherever Phyllis and Henwood made their home was the Applicant’s home too together with the rest of his siblings which include the first, second and third Respondents.

[23] The Applicant is an interested party to the estate herein and should have exhausted the remedies open to him in section 51 (2) of the Act. However,

due to the failure of the executors to carry out their duties of winding up the estate I order that the costs in respect of both parties be paid out of the estate.

[24] In summary this is the order I make:

- (a) The application is refused and dismissed in respect of prayers 1 (1), 1 (2), 1 (3) and 1 (5).
- (b) An order in terms of prayer 1 (4) is hereby granted.
- (c) Costs in respect of both parties are to be paid out of the estate.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Applicant : Mr. M. Simelane  
For the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents : Mr. S. Hlophe  
For the 4<sup>th</sup> 5<sup>th</sup> & 6<sup>th</sup> Respondents : Miss T. Simelane