



IN THE HIGH COURT OF SWAZILAND

Civil case No: 448/2010

In the matter between:

LANGA DLAMINI NO

FIRST APPLICANT

SANDILE DLAMINI NO

SECOND APPLICANT

PHOLANI DLAMINI NO

THIRD APPLICANT

AND

MANDLA HOMEBOY DLAMINI

FIRST RESPONDENT

THE MASTER OF THE HIGH COURT

SECOND RESPONDENT

Neutral citation:

Langa Dlamini NO and Two Others v. Mandla Homeboy Dlamini and Another (448/2010) [2014] SZHC124 (19 June 2014)

Coram:

M.C.B. MAPHALALA, J

Summary

Administration of Estates – application for orders interdicting and restraining the first respondent from dealing with the assets of the Estate, ejecting the first respondent and all those holding title under him from the immovable property of the Estate and directing first respondent to account to the current co-executors in his capacity as Executor of the Estate – essential requirements of a final interdict considered – held that the applicants have failed to establish the essential requirements of a final interdict – application dismissed with costs.

JUDGMENT

- [1] This is an application interdicting and restraining the first respondent from dealing with the assets of the late Duma Simbaphi Dlamini, Estate No. 145/1992. They further sought an order ejecting the first respondent and all those who hold title under him from the immovable property of the Estate. They also sought an order directing the first respondent to account to the current co-executors in his capacity as a former executor of the Estate. Costs were sought on an attorney and own client scale.
- [2] The applicants are joint-executors of the estate of the deceased by virtue of Letters of Administration issued on the 2nd December 2010. On the 5th December 2008, this court issued by consent an order for the removal of the first respondent from the office of executorship of the Estate. Pursuant thereto, the second respondent advised the first respondent in writing on the 7th May 2009 to comply with the Order of the 5th December 2008 and to further desist from collecting rentals from certain Estate property leased out.
- [3] The applicants contend that the first respondent continues to interfere in the affairs of the Estate by using the assets of the Estate for personal gain and denying others access to the farm situated at Mankayane. They further contend that the first respondent is in the process of disposing a herd of cattle belonging to the Estate to the prejudice of the other beneficiaries. They further contend that the first respondent, after using the assets of the Estate, he leaves them

unattended and idle. To that extent they referred to a tractor which was abandoned and left idle and unattended after he had used it. They argued that the conduct of the first respondent borders on contempt of the court order made by this court on the 5th December 2008.

- [4] The applicants further contend that the first respondent is dissipating the assets of the Estate and when confronted, he threatens and insults the co-executors. A letter by the second respondent is attached to the application marked annexure 2 in which the first respondent was advised not to collect rental from farm 1009 and farm 1184 for grazing as well as from the Mankayane Restaurant; similarly, he was advised to comply with the court order issued on the 5th December 2008.

On the 27th March 2009 the second respondent informed the first respondent in writing to desist from threatening and using foul and insulting language against the appointed executor. On the 23rd April 2010 the proprietor and lessee of Mankanyane Restaurant Mfanimpela Phillip Mkhonta was informed by the second respondent that he should pay monthly rentals at its offices from the end of April 2010.

- [5] The first respondents had deposed to an answering affidavit in which he denies interfering with the winding up of his father's Estate. He further denies using the assets of the Estate to the prejudice of the other beneficiaries or denying the

co-executors access to the farm. However, he concedes collecting rental from the Mankayane Restaurant on the basis that it belonged to her mother. To that extent he argued that he has every right to collect rental.

He explained that his father had three wives; two of their homesteads are situated on the farm and the third homestead is situated on Swazi Nation Land. Each of the homesteads was allocated cattle by the deceased during his lifetime. The deceased directed that his wives should retain the assets allocated to them during his lifetime including the cattle. The first respondent contends that he stays at his mother's homestead, and, that the cattle in his mother's homestead belongs to his mother and not the Estate. To that extent he argued that the cattle allocated to the other two homesteads are often disposed by the applicants and that they do not account to anybody because the cattle were given to their mothers.

- [6] The first respondent alleges that upon the death of his father, the second applicant took over a butchery at Mankayane from their elder sister together with stock and money for his personal use. He argues that the butchery forms part of the estate and that the second applicant is guilty of misusing the assets of the Estate to the prejudice of the other beneficiaries.

He contends that on the 2nd February 2004, the second applicant leased a certain shop on lot 766 in Mankayane to the Central Co-operative Union behind his

back as the executor of the estate and collected a monthly rental of E8,000.00 (eight thousand emalangeneni) until the Central Co-operative Union was liquidated. He argued that the second applicant has not disclosed this fact to the court; in addition the second applicant has never accounted to the second respondent or the other beneficiaries. He annexed a copy of the Lease Agreement between the second applicant and the Central Co-operative Union.

[7] The first respondent further contends that their father left to the third applicant and his mother about one hundred and twenty five herd of cattle, two tractors, an Isuzu bakkie plus their homestead. It is his contention that the third applicant and his mother dispose these assets without accounting to anyone. He further contends that they have never brought the assets to him when he was the executor of his father's estate. He argues that they sell the cattle and use the proceeds for their own benefit.

He denies the allegation made by the applicants that he is in the process of disposing of the cattle allocated to his mother. However, he argues that the cattle do not form part of his father's estate on the ground that they are registered in his mother's name. Notwithstanding this he contends that he has never sold the cattle and the applicant's allegations are misleading and baseless.

[8] Similarly, he denies acting in contempt of the court order issued on the 5th December 2008. To that extent he attached three letters being annexure “B”, “C” and “D” as evidence thereof. Annexure “B” is a letter from Robinson Bertram Attorneys to his erstwhile attorneys Masina Mazibuko & Company dated 20 December 2001. Robinson Bertram Attorneys were representing the other beneficiaries in the estate, and, they accused the first respondent of dissipating the assets of the estate, and, they demanded the lodging of a Liquidation and Distribution Account with the second respondent. Attorneys Masina, Mazibuko & Company responded by annexure “C” which was a letter dated 9th September 1999 and copied to the second respondent as well as to the Executor in which they advised as follows:

**“The Veterinary Officer
Dambuza Dip Tank
Mgazini
Shiselweni**

Dear Sir,

RE: CATTLE OF THE LATE DUMA DLAMINI

We are Attorneys winding up the estate of the late Duma Dlamini. His cattle do not form part of the estate; he allocated them to his various wives and beneficiaries during his lifetime and therefore there are no restrictions placed on them. The Master by copy of this letter is informed of this position.”

[9] Annexure “D” was written by Attorneys Masina Mazibuko & Company to Robinson Bertram responding to their letter marked herein as annexure “B” which advises as follows: firstly, that the Final Liquidation and Distribution Account was approved by the family and later by the second respondent on the 3rd November 2000 after advertisement in terms of section 51 of the Administration of Estates Act; and, that there was no objection to the account. Secondly, that Sanele Dlamini was the main cause of the delay in finalising the account on the basis that he had requested a loan of E100, 000.00 (one hundred thousand emalangeni) from the Estate funds to be repaid within one year. The family together with the executor, the applicant herein, after consultation with the second respondent, lent and advanced the amount to the second applicant; however, to-date he has not repaid the loan.

Thirdly, the farm on Crown land at Ngwempisi which is the homestead of Make Masuku Junior with a shop was not included in the account as it was allocated by the deceased to the family and situated on Swazi Nation land. Fourthly, the cattle allocated by the deceased to his three wives LaMasuku Senior, LaMasuku Junior and LaShabangu under Swazi law and Custom were not included in the account. Fifthly, the tractor which upon his death was at the home of LaMasuku Junior was not included in the account at the instance of the executor, the applicants and the other two wives. Sixthly, that realising the large family of the deceased, a family company was established with the consent of the beneficiaries, the executor as well as the second respondent; and,

the estate assets were to vest in the family company in which all the beneficiaries would be shareholders; and, that the attorneys were awaiting the Title Deeds of the estate property so that they could register them in the name of the company. Lastly, the Estate butchery at Mankayane was unlawfully taken over by the second applicant who is refusing to account for the money and stock in the credit of the butchery. The lawyers urged the second applicant to account to the executor for his activities in the butchery. This letter was copied to the first respondent as well as the second respondent.

[10] The first respondent denies threatening the applicants and argued that he was not aware of annexure “4”, being a letter addressed to him by the Master of the High Court urging him to desist from threatening and using insulting language against the appointed executors, being the applicants herein. Furthermore, he denied mismanaging any asset of the Estate and argued that the Restaurant belongs to her late mother who was operating it with her own licence.

[11] The first respondent has contended in the answering affidavit that the First Distribution and Liquidation Account was approved by all the beneficiaries; hence, a final distribution and Liquidation Account was advertised in terms of section 51 of the Administration of Estates Act. He further contended that the account lay open for inspection and objection for the required period but there was no objection; and, the second respondent subsequently approved the Final Account. This evidence has not been controverted in the replying affidavit.

[12] Similarly, the replying affidavit does not deal with the specific evidence as regards the homestead at Ngwempisi inhabited by LaMasuku Junior or even the allocation of the cattle by the deceased to his three wives. In addition the replying affidavit doesn't deal with the evidence that a family company was incorporated with the object of registering the assets of the Estate for the benefit of all the beneficiaries; and, that all the beneficiaries after consulting their attorneys agreed to have the company registered.

Furthermore, the replying affidavit does not dispute the evidence that all the beneficiaries benefitted from the sale of cattle allocated to their homesteads. Lastly, the evidence that Sanele Dlamini borrowed E100, 000.00 (one hundred thousand emalangeni) cash from the estate funds and never repaid was the cause for the delay in winding up the estate has also not been disputed.

[13] It is common cause that when the matter appeared in court for the first time, on the 16th December 2010 a *rule nisi* was issued calling upon the first respondent to show cause why the interim orders should not be made final.

The applicants seek a final interdict. *Friedman AJP* in the case of *Minister of Law and Order v. Committee of the Church Summit* 1994 (3) SA 89 at 98 dealt with the question of a clear right, which is one of the essential requirements for a final interdict.

“Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probability the facts and evidence which he has, a clear or definite right in terms of substantive law. The right which the applicant must prove is also a right which can be protected. This is a right which exists only in law, or statutory law.”

[14] In the case of *Maziya Ntombi v. Ndzimandze Thembinkosi* Civil Appeal No. 02/2012 at para 41 and 43, I had occasion to say the following:

“[41] From the foregoing, it is clear that the court *a quo* was correct in finding that the respondent was entitled to a final interdict against the appellant. The leading case in this regard is the case of *Setlogelo v. Setlogelo* 1914 AD 221 at 227 where *Innes JA* stated the following:

‘The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.’

....

[43] I agree with the court *a quo* that the requirement of a clear right is the most important of the three requirements of a final interdict, and that the other two requirements are predicated on the presence of a clear right to the subject-matter of the dispute.”

[15] It is apparent from the evidence that the applicants are joint-executors in the Estate of the late Duma Simbaphi Dlamini in terms of Letters of

Administration No. E145/1992 issued on the 2nd December 2010. However, the applicants have failed to show that they have a clear right in terms of substantive law to institute the present proceedings. There is no evidence before court to establish the cause of action that the first respondent has interfered with the winding up of the estate. Furthermore, there is no evidence before court that the first respondent is dealing with the assets of the Estate to the prejudice of the beneficiaries to the extent of dissipating the assets or that he is unlawfully occupying any immovable property belonging to the Estate. In addition the Final Liquidation and Distribution Account has been approved by the family as well as the second respondent in the absence of any objection. In the circumstances the application is bound to fail.

[16] Accordingly, the application is dismissed with costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant
For First Respondent

Attorney Noel Mabuza
Attorney Harry Mdluli