



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1207/2013

In the matter between:

NONZWAKAZI ELIZABETH GWIJI

APPLICANT

AND

**ROBINSON MARTIN ZEEMAN (NO)
MASTER OF THE HIGH COURT (NO)
THE ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

*Neutral citation: Nonzwakazi Elizabeth Gwiji v. Robinson Martin
Zeeman (NO) (1207/2013) [2014] SZHC 191 (8th
August 2014)*

Coram : M. E. SIMELANE, AJ

Heard : 8th July 2014

Delivered : 8th August 2014

Summary

Administration of estate – property situate on Swazi nation land can be administered in terms of the Administration Act 28/1902 – nominated executor failing to obtain Letters of Administration removed – Master to convene a next of kin meeting to appoint a neutral executor.

JUDGMENT 8th AUGUST 2014

[1] By a Notice of Application the Applicant seeks the following Orders:

- “1. That the Master be allowed to exercise her powers to appoint an appraiser to value the assets of Estate late Nelson Stanislaus Zeeman EH 191/2012; in terms of section 39 of the Administration of Estate Act 28/1902 as amended*
- 2. That the 1st respondent be ordered to open an estate account with a registered financial institution and to deposit all rentals collected from deceased’s cottage situate at Nyonyane Ezulwini; on Swazi nation land.*
- 3. That 1st respondent be ordered to deposit all deceased’s proceeds from deceased’s bus; a 1999*

ERF Bus Standard BSD 929 AH into the estate account for onward transmission to the Master's Guardian Fund.

- 4. That 1st respondent be ordered to file with the Master's office a comprehensive account of income derived from the rental he has been collecting from deceased's cottage situate at Nyonyane, Ezulwini; and, collections as opposed to the necessary expenses incurred in the running of deceased bus, a 1999 ERF Bus Standard registered BSD 929 AH.*
- 5. That 1st respondent be ordered to expedite the deceased's estate by complying with section 51 bis 1 & 2 of the Administration of Estate Act No. 28/1092 as amended.*

ALTERNATIVELY THAT

- 6. 1st respondent be removed and discharged as Executor.*
- 7. There is far all intents and purposes sufficient cause for his removal and discharge to have the interest of the estate furthered.*
- 8. 1st respondent be ordered to furnish security by way of taking up a bond with the Swaziland Royal Insurance Corporation, to cover deceased's vehicle against possible contingencies for the lack of pecuniary indemnity.*

9. *Costs in the event 1st respondent opposes the application.*

- [2] The prayers are so wide but during arguments the applicant concentrated on prayer 2, 3, 4, 5, 6, 7 and 9 of the Notice of Application.
- [3] Emphasis was however that the 1st respondent should be removed as executor because ever since he was nominated into the position of executor on the 24th October 2012 he has not taken a bond in terms of section 30 of the Administration of Estates Act 28/1902 in order to be given Letters of Administration in the estate of the late NELSON STANISLAUS ZEEMAN Masters reference EN 191/2012.
- [4] Further the applicant contends that the 1st respondent is collecting rentals from a cottage situate at Nyonyane Ezulwini on Swazi nation land which is part of the estate assets.

- [5] The applicant apparently opened the estate file and lodged an inventory which showed the house and a certain bus amongst the deceased assets.
- [6] Further the applicant claims to be a creditor in the estate by virtue of a letter she sent to the executor dated 22nd November 2012 wherein she claims E55 506.00 (fifty five thousand five hundred and six emalangeneni) as arrear maintenance for a child that the deceased fathered from her.
- [7] The 1st respondent argued that he is not bound to obtain Letters of Administration as the Master of the High Court has not required same.
- [8] He argued further that the Master issued him with a Letter of Authority in order to attend to the winding up of the estate which reads as follows:

*“Master of the High Court
P.O. Box 19
Mbabane*

19th December 2012

LETTER OF AUTHORITY

**RE: ESTATE LATE NELSON STANISLAUS ZEEMAN
MASTER'S REFERENCE NUMBR - EH191/2012**

*This serves to confirm that **Robinson Zeeman** whose Personal Identity Number is 5511036100015 is the Executor Dative of the above estate duly appointed in terms of **section 24 (1) of the Administration of Deceased Estate Act 28/1902** in a meeting held at the Master's Offices in Mbabane, 1st Floor Millers Mansion Building on the 24th October 2012, before the Master of the High Court.*

**PHUMZILE MASILELA
MASTER OF THE HIGH COURT"**

[9] My I pause to mention that a **Letter of Authority** is not provided for in terms of the Administration of Estates Act 28/1902 and does not clothe a nominated executor with authority to act on behalf of the estate.

[10] It may be issued for convenience purpose but it is unlawful because an executor acts by virtue of Letters of Administration.

[11] The 1st respondent further argues that the cottage was excluded by the Master of the High Court from the inventory because the deceased was not married. The Master has however not filed an affidavit to support this bizarre conclusion.

[12] Property based on Swazi nation land can be administered by an executor because the right to use and occupy the said land vests on the deceased during his lifetime hence there is no reason why it ought to be excluded from his assets when he is dead. In **Titi Nyoni and Another v. Joyce Nyoni (unreported) appeal Civil - court case No. 53/2004** dealing with property situate on Swazi nation land his Lordship Browde JA (H. Stein JA and N.W. Zietman concurring) held as follows:

“It is obviously desirable in the circumstances that an executor be appointed to administer the estate of the late Jabulane Akim Nyoni. This will facilitate a proper resolution of the difficulties endured in the distribution of the deceased assets and will consequently be of benefit to all concerned in this family wrangle.”

[13] The Master of the High Court filed a report and she stated as follows:

“

2.1

The 1st respondent is the executor of the estate of Nelson Zeeman and was appointed as such on the 24th October 2012. Immediately on such appointment the 1st respondent is seized with the responsibility of winding up the estate.

2.2

According to information in the estate file, the 1st respondent has not found the value of all the property belonging to the estate in terms of section 37 (1) of the Administration of Estate Act. Section 37 (1) provides that:

“Every executor shall make an inventory showing the value of all property goods and effects, movable and immovable, of whatever kind, belonging to the estate which has been appointed to administer”

2.3

The 1st respondent has not furnished the 2nd respondent with security for the due and faithful administration of the estate. Section 30 of the Act supra provides that:

“Every executor dative, assumed executor or curator bonis shall before being permitted to enter up on the administration of an estate, find security to the satisfaction of the Master for the due and faithful administration of the estate to which he has been appointed in such

amount as in the circumstances are reasonable.”

2.4

Section 51 of the Administration of Estate Act calls upon the 1st respondent to draw up a Liquidation and Distribution Account disposing of the assets of the late NELSON ZEEMAN, and file with the 1st Respondent an account or periodic accounts as the case may be. However, the 1st respondent has failed to file with the 2nd respondent any account. In addition, the 1st respondent was reminded of his duties and directed to submit a Liquidation and Distribution Account in terms of Section 51 (2) of the Act supra. A copy of a letter reminding the 1st respondent is attached and marked ‘MHC1’.

3.

It is the 2nd respondent’s submission that the 1st respondent has failed to complete the Liquidation process within the stipulated period. Further, the 1st respondent did not apply for an extension of time to wind up the estate as provided in section 51 (2) of the Act above. The time taken by the 1st respondent in bringing the affairs of the estate of the deceased towards completion is unjustifiably long and the interest of the estate and those of claimant’s creditors are being adversely affected.

4.

I have no further information to lay before the Honourable Court and shall abide by the decision of the Honourable Court.”

COURT ANALYSIS

- [14] (i) An executor's first duty is to collect all the estate assets.
- (ii) Draw up the complete inventory of these assets with their value.
- (iii) The executor must open a bank account in the name of the estate in which the estate money must be banked.

The 1st respondent has ignored this elementary principle of Estate law.

- [15] Justice Ota in **Banjwayini Shongwe v. Abraham Shongwe** (556/2012) [2012] SZHC 170 at paragraph 40 to 44 has crystallised the position of executors which position I am in agreement. The dicta is as follows:

*"[40] **Mr. Simelane** has availed me of the text **Administration of Estates and Estate Duty 2007 edition paragraph 8.1**, where the learned author **Meyerowitz** laid down this position of the law in the following terms:-*

"Except for the limited authority given to the person in charge of a deceased's estate and to an interim curator pending the appointment of an executor, the

estate of a deceased person cannot be dealt with or liquidated and the assets are “frozen” until such time as an executor to the estate is appointed by the Master.

Executors are of two kinds, testamentary and dative, the former, as the name implies, being nominated by the testator in his will, and the latter being appointed in default of any executor. In both cases the executor derives his authority to act by receiving a grant of letters of executorship from the Master. An executor testamentary has no locus standi to act on behalf of the estate until such grant. The fact of nomination in the will does not confer any authority upon the nominee to deal or intermeddle with the estate or constitute him the representative e.g. to receive notices.

While there are different procedures and different requirements by the Master for the appointment of executor testamentary and executor dative, their functions, rights and duties are generally the same, except in so far as the will gives the executor testamentary powers which an executor does not have unless given by the will e.g. the power of assumption or the right to incur liabilities on behalf of the estate---”.

[41] *The foot note to the foregoing paragraph reads:*

“Section 13 (1) provides that no person shall liquidate or distribute the estate of any

deceased person, except under letters of executorship granted or signed and sealed or endorsed or in pursuance of a direction by the Master. The words “liquidate” and “distribute” mean to put the estate in order by, or example paying the debts, etc and thereby putting it into a state in which the assets can be separated into parts and divided among the heirs, and the actual dividing up thereof see **Cillers v Kuhn 1975 (3) SA 881 (WCD)**. **Kempman v Law Union and Rock Insurance Co Ltd 1957 (1) SA 506 (W)**. In that case it was held that the appointment with authority e.g. to receive notices of cancellation of a policy, must be taken to exist as from the time of receipt of letters of executorship and not from the date when the Master’s signature happened to be placed on the letters of executorship. It is considered that this goes too far and that the executor’s authority commences from the issue of letters of executorship by the Master, which, if the letters are posted, will be the time of posting, and not the actual receipt by the executors of his letters see also **Brand v Volkas 1959 (1) SA 494 (T)**”.

[42] Similarly, Section 30 of the Administration of Estate Act states in clear and unambiguous language, that an executor will not be permitted to enter upon the administration of an estate without providing

security for the due administration of the estate. For the avoidance of doubts that legislation is couched in the following terms:-

“Security for due administration.

Every executor dative, assumed executor or curator bonis shall, before being permitted to enter upon the administration of an estate, find security to the satisfaction of the Master for the due and faithful Administration of the estate to which he has been appointed in such amount as in the circumstances are reasonable”.

[43] It is inexorably apparent from the totality of the foregoing, that an executor would only act on behalf of an estate where he has been granted letters of administration. It is the letters of administration that clothes the executor with the requisite authority to act on behalf of the estate. The executor having obtained the letters of administration is required by law to furnish security for the due administration of the estate.

[44] In casu, it would thus appears to me that the activities of the executors in embarking upon the sale of the assets of the estate, prior to being granted letters of administration and furnishing security, were clearly unlawful, therefore null and void. It also appears to me that the consent given by the Master of the High Court for the executors to

proceed with the said sale, prior to their being granted letters of administration and furnishing security is also null and void and liable to be set aside. It is beyond dispute from the totality of the foregoing that the sale which was scheduled for the 14th of July 2012, was therefore illegal.”

[16] It is common cause that the 1st respondent cannot be said to be an executor in the proper sense of the word and he is not entitled to start winding up the estate until he furnishes the Master with security. The Master need not require the value of the assets but may accept a lesser amount.

*“Section 30 thereof is unambiguous administrative requirement to be satisfied before an Executor Dative is issued with Letters of Administration.” **Mandlenkosi Lucky Vilane & Another v. Master of the High Court** (1615/2012) SZHC 270 [21 December 2012]*

[17] The 1st respondent has failed to act in terms of the Master’s letter dated 27th August 2013 demanding that he should wind up the estate. The Master is also unhappy about the conduct of 1st respondent.

[18] It will be in the best interest of the estate if his nomination is revoked and a neutral party be appointed. It's been a year and 11 months since 1st respondent was nominated but to date he has not done anything to wind up the estate.

[19] In any event the 1st respondent has a claim against the estate for the repairs he effected on the Estate bus thus he cannot effectually execute his duties as executor and creditor at the same time. (**Zandile Dlamini v. Sikhumbuzo Musa Zondo and Another (172/2012) [2013] SZHC 264.**)

[20] From the foregoing I hereby order as follows:

a) The 1st respondent is removed as nominated Executor.

b) The Master of the High Court is ordered to call a next of kin meeting to appoint a neutral executor in the estate of the late NELSON STANISLAUS ZEEMAN EH 191/2012 within the next 20 days.

c) The 1st respondent is ordered to file with the Master's office a comprehensive account of income and expenditure statement of the estate of Nelson Stanislaus Zeeman EH 191/2012.

d) Costs to be borne by the estate.

MBUSO E. SIMELANE
ACTING JUDGE

For Applicant : **N. Gwiji**
For 1st Respondent : **D. Madau**
For 2nd, 3rd Respondent : **S. Dlamini**