IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1620/2012

In the matter between:

THE MASTER OF THE HIGH COURT **Applicant**

And

THE EXECUTOR MARTIN NKULULEKO DLAMINI
(ESTATE LATE JERICHO DAVID MATSEBULA) **Respondent**

Neutral citation: ***The Master of the High Court v The Executor Martin Nkululeko Dlamini (Estate late Jericho David Matsebula (1620/2012) [2014] SZHC 22(12st February 2014)***

Coram: **M. Dlamini J.**

Heard: **6 February 2014**

Delivered: **24th February 2014**

Failure to file liquidation and distribution account – serious dereliction of duty in terms of Administration of Estate Act 1902 – executors have fiduciary duty and - expected to exercise their responsibilities in terms of law – be honest and faithfully – court to eschew act or omission of executors with view to ascertain whether estate is not adversely affected

Summary: Serving before this court is an application for removal of respondent from the office of executorship, return of the letters of administration, payment of all monies paid to respondent and forfeiture of the executor's benefits. The application is opposed on the basis that the applicant frustrated the respondent from carrying out his duties.

Common cause

[1] It is not in dispute that the respondent by letters of administration issued by applicant was appointed as an executor of the late estate Jericho David Matsebula on 29th January, 2010. Following this appointment, respondent claimed on behalf of the estate the sum of E92,000. This amount was released to the respondent on 14th July 2010. A further sum of E200,091.97 was remitted to the respondent on 6th May 2011 following a request. These sums of money were never distributed to the beneficiaries of the estate.

[2] It is common cause that the respondent submitted a bond during his appointment. This bond expired on 24th January 2011.

Applicant's case

[3] The applicant submits that the respondent has failed to discharge his duty as an executor. These duties include failure to call meetings of the next of kin, submission of a liquidation and distribution account and further failure to disburse the monies received from applicant to the beneficiaries of the estate.

Defence:

[4] In his defence the respondent who is an admitted attorney of this court averred:

"*6.2 I further wish to aver that the master's file on this estate was taken by police in 2011 as I was advised by the Secretary and the Substantive Master of the High Court at the time because the incumbent Registrar of the High Court had accused the author herein and ever since that incident the file had never been returned to the Master and I was served by the Honourable Chief Justice on these allegations after studying the file in my presence that the alleged fraudulent transactions were actually lawful and bond fide transactions that were paying school fees for the beneficiaries of the estate and this was done without the involvement of the master's office nor was anything asked from myself before a report was made by the registrar to the Honourable Chief Justice.*

6.3 I wish to aver that for a lengthy period the file has not been with the Master and even when instructions were handed to the Attorney General recently the substantive Attorney one Mr. B. Tsabedze also confirmed difficulty on the availability of the file even though he has now confirmed that it has resurfaced with the office of the Master and the Registrar of the High Court has also recently confirmed with me that the file is now available at the Master's office and that I should now pursue finalising it and the person to assist was the present substantive Master of the High Court.

6.4 I therefore wish to aver that I had for several times been seeking for the Master's letter to support an extension of the bond of security with the insurer but because the file has not been with the master nor such cooperation could be accessed and I am now surprised to learn that it is

not blamed on my office but the assertions above explains the difficulties in the operations of the Master's office and the deponent of the founding affidavit can hardly know any thing on the history of this file in issue herein."

[5] Although the respondent in his answering affidavit deposed that he paid school fees on behalf of the beneficiaries, during submission respondent informed the court that all the money dispatched to him was still in his custody. His submissions were in line with his last averment where he pointed out that he was still awaiting a claim by Civil Matsebula, one of the beneficiaries. The said Civil Matsebula, accoroding to 1st respondent, was paying school fees the beneficiary, Gcina Matsebula.

[6] The respondent attests that he did advertise as per his duties. In support he referred the court to a notice addressed to the Times of Swaziland, a newspaper circulating in Swaziland. He further referred to three copies of receipt reflecting payment.

Adjudgment

[7] The issue *in casu* pivots around the duties of the respondent as an executor. Section 51 stipulates:

"*Administration and distribution accounts.*

51. (1) Every executor shall administer and distribute the estate to which he is appointed executor according to law, and the provisions of any valid will, codicil or other testamentary instrument relating to such estate.

(2) *As soon as may be after the expiry of the period notified in the Gazette in manner provided by this Act, 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 of the said estate, and also a duplicate or fair and true copy of such account.*

(3) *If any such account be not the final account, it shall set forth 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 realised, as the case may be.*

(4) *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."*(my emphasis)

[8] On this provision **Meyerowitz** in **The Law and Practice of Administration of Estates** 4th Ed page 100 sums it neatly as follows:

"*When the executor has satisfied himself as to the debts due by the estate, and has realized such assets, as are necessary to liquidate these debts or as otherwise may be necessary or required, and has obtained proper valuation of the unrealized assets, he is then in a position to draw an account of his administration and lodge it for examination with the Master."*

[9] It appears from the papers filed and the *viva voce* submissions on behalf of respondent that respondent failed to comply with the terms of provision 51 in that up to the date of arguments, neither a liquidation and distribution

account was filed nor was there any application for an extension in terms of the Act by respondent.

[10] The respondent in defence of his failure to comply with the provisions of section 51 informed the court that the applicant took away the file from applicant's office to the police, thus he could not have access to the information to enable him to compile the necessary account. The court enquired from respondent as to when the applicant surrendered its file to the police? The applicant informed the court that it was in May 2011.

[11] The letters of Administration were issued to the respondent on 29th January, 2010. Section 51 (2) provides that the executor shall "*frame and lodge with the Master a full and true account supported by vouchers of the administration and distribution of the said estate*" not "*later than six months from the day on which letters of administration were issued*." Even if one were to assume that the applicant did cause the removal of its file to the police, such position cannot entail because on respondent's own submission, the file was removed in May, 2011. This period was after sixteen or so months from the date of the Letters of Administration. Needless to point out that respondent did not need applicant's file to discharge his duties. From the nature of respondent's office, it was expected of him to keep all records of his actions. This position was conceded by respondent during the hearing as he informed the court that in fact the file taken by the police was a duplicate of a file from his office. He, however, failed to advance cogent reasons as to his failure to use this file from his office to prepare the liquidation and distribution account.

[12] It is uncontested that the respondent received from the applicant a sum close to E300,000. During submissions, the respondent informed court that

this sum was in his trust account. Applicant in reply informed this court that this on its own was contrary to the practice procedure at the office of applicant. This amount ought to have been deposited into an account in the name of the estate.

[13] **Meyerowitz** *supra* at 107 writes of an executor:

> "*The executor acts upon his own responsibility, but he is not free to deal with the assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the will and in terms of the law, which prescribes his duties and the method of his administration and makes him subject to the supervision of the Master in regard to a number of matters.*"(my emphasis)

[14] The practice procedure of executors opening bank accounts in the name of the estate, provides the Master with the opportunity to monitor and supervise the estate account as per the learned author **Meyerowitz** *supra*. The Master cannot do so where the executor who happens to be a practising attorney as *in casu,* deposits the money into a trust account. This was conceded by respondent as when invited by this court to produce a statement of his trust account as proof that the said sum of about E300,000 was still in his custody, declined to do so on the basis that he could not divulge his trust account to any other person for the reasons that there are other funds in this account. Had this amount been deposited to the estate's account, it is my understanding, respondent would not have objected to an inspection by this account. Again no clear reason was advanced to court on the reason why he chose to deviate from this practice procedure. I note that in South Africa, it is specifically provided for in the enactment. However, that a similar provision is absent from our legislation does not give

respondent the licence to deviate from this well founded practice in the office of applicant.

[15] The refusal by respondent to show this court that the sums released to him are still within his coffers has another connotation. I do not wish to draw the inference except to restate the wise words of the learned author Meyerowitz *op. cit*., on the responsibility by an executor *viz*. "*His position is a fiduciary one and therefore he must act not only in good faith but also legally*".

[16] Commenting on a similar case, **Curlewis J** in **Incorporated Law Society v Salinger and Wolmarans 1917 T.P.D. 660** at 668 stated:

> "*It is very unsatisfactory to find that neither of the respondents has produced the bank pass-book to the court. It would have assisted us considerably to have known what the financial state of the "B" account actually was in May 1916 and also on the 2nd June 1916. Salinger has told us that he could not find the pass-book. Even if that be true, it does not absolve him from the responsibility of at any rate procuring from the bank a copy of the account during the year 1916. He knew he could easily do that, but he failed to do it; and I, for my part, must put a strong construction against the respondents on the fact that the pass-book has not been produced. The conclusion I come to is that either the "B" account was overdrawn and the £60 went to reduce the overdraft to the bank, or it was paid into that account and used by the firm to pay their liabilities to other clients*."(my emphasis)

[17] I see no reason why this court should not also draw the same "*strong construction*" *in casu* with regard to respondent who happens to be in the same circumstance as **Salinger** *supra*.

[18] The court was informed as supported by the pleadings that the respondent as per section 30 issued security upon his appointment as an executor. However, this bond was for a period of one year. When the sum of E200,091.97 was released to respondent, the bond had lapsed. It was submitted on behalf of applicant that to applicant's Counsel's dismay, it was not clear why the Master released the sum of E200,091.97 in the light of the absence of security by respondent. I do not wish to adopt the procedure taken in **Beukes Lodewikus Willemse N. O. v Jeremija de la Ronviere Rens N. O. and Others, 1973/2003** where the learned judge stated at page 3:

> "*Despite this legal requirement, the first respondent prima facie did not comply with the Act. Six months came and went without a liquidation and distribution account being filed with the Master of the High Court in Swaziland. Since their appointment to date, without any extension having been applied for, as far as the papers before court indicate, no account has yet been filed and there is no indication of any steps taken by the Master to rectify the situation. The Registrar of the High Court is directed to bring this to the attention of the Master forthwith, who is to report within 7 days to the Court via the Registrar why this matter was not expedited and why the appointed co-executors were not compelled to comply with the requirements of Section 52 of the Act, and what steps have been taken to avoid recurrences."* (my emphasis)

[19] In the present case, the position is more exacerbated in that the Master released a relatively significant sum to the respondent in full view of the absence of a bond. This was despite the requirement by an Act of Parliament for an appointed executor to file security. No wonder even Counsel representing the Master was at a loss as to how such an amount could be released. However, it would be travesty of justice to concentrate on this issue as this case is not against the Master.

[20] The respondent failed to renew the bond. He, however, proceeded to request a further sum of money from applicant despite lack of security and extended time for his office as he did not apply for the same when the period of six months lapsed. As he was in a position of trust, it was incumbent upon respondent to renew the bond and apply for an extension. To expect the applicant to remind respondent of these duties would, in my view, a dereliction of duty on the part of the respondents.

[21] What exacerbates respondent position in the present case is that when he requested for the sum of E200,091.97 in May, 2011, the sum of E92,000 released on 14th July 2010 had not been distributed to the heirs. It is not clear as to why respondent kept on drawing from the estate without the heirs benefiting from the same. I leave this matter to the able hands of the Law Society of Swaziland to draw the only reasonable conclusion from the its circumstances and deal with it according to law (Legal Practitioners Act).

[22] Turning to the present case, my duty was well canvassed in **Meester v Meyer 1975 (2) S.A. 1 (T)** at 16 on the breach of the fiduciary position as follows:

> "*But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees, who have abused their trust, it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Court of Equity to adopt such course. But the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity*."(my emphasis)

[23] The respondent in resisting applicant's application for removal deposed on 14th December 2012:

"*…and in taking consideration of the required procedures this estate should be winded up by the end of February 2013 or March 2013*."

[24] Despite the above undertaking to wind the estate by March, 2013, respondent failed to do so up to even the day in which the matter was heard finally on 6th February 2014, with the matter having been postponed several times at the instance of respondent. This is a further demonstration of dishonesty by respondent not only before applicant but the court as well. During submission, respondent requested the court to grant it a further sixty (60) days to wind up the estate. No reasons were advanced for its failure to comply with the law, nor the undertaking as cited above prior. This goes to demonstrate respondent's attitude towards this matter. In **Meester's** case *supra* at page 17 the court cited:

"*Both the statute and the case cited (**Lettersted v Broers**) indicate that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as dishonest, gross inefficient or a untrustworthy person whose future conduct can be expected to be such as expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument."* (my emphasis)

[25] In South Africa there is a provision outlining the circumstances under which letters of administration are to be revoked either by the Master or the High Court. These circumstances are:

"The court may, at any time remove an executor from office:

1. *If not being otherwise obliged to furnish security, he is called upon by the Master under section 23 (3) to furnish security and he fails to comply within the period allowed by the Master; or*

2. *If he has at any time been a party to an agreement or arrangement whereby he has undertaken that he will, in his capacity as executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or*

3. *If he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or*

4. *If he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or*

5. *If for any reason the court is satisfied that it is undesirable that he should act as executor of the estate concerned."*

[26] In Swaziland, we have no corresponding provision except for Section 29 which reads:

"*Revocation of letters of administration by decree of court, or Master.*

29. Letters of administration granted to a person as testamentary executor, may be revoked and annulled by the decree of the High Court, on proof to the satisfaction of such court, that the will or codicil, in respect of which such letters have been granted, is null, or has been revoked, either wholly or in so far as it relates to the nomination of such executor: and letters of administration granted to any person as executor dative, may be revoked and annulled by the Master, on production to him of any will or codicil by which any other person who then is legally capable and

qualified and who consents to act as executor, has been legally nominated testamentary executor to the estate which such executor dative has been appointed to administer:

Provided that if the non-production of such will or codicil, prior to the granting of letters of administration to the executor dative, was due to the fault or negligence of the person therein nominated testamentary executor, such person shall be personally liable for, and may be compelled at the instance of the Master, or any person interested, to make good to the estate all expenses which have been incurred in respect of, and with reference to, the appointment of the executor dative."

[27] However sections 22, 30 and 51 read respectively:

"Letters of administration.

22. The estates of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the form contained in Schedule "B", by the Master to the testamentary executors duly appointed by such deceased persons, or to such persons who are in default of testamentary executors appointed executors dative in terms of this Act.

"Security for due administration.

30. 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.

51. (1) Every executor shall administer and distribute the estate to which he is appointed executor according to law, and the provisions of any valid will, codicil or other testamentary instrument relating to such estate." (my emphasis)

[28] From the above sections it is clear that it is the spirit of the legislation that executors whether dative or testamentary are expected to exercise their duties with due care and honesty, "*according to law*". It is for this reason, my humble observation that **Annandale ACJ** as he then was, in **Beukes** *op. cit*. at page 28 state of the 1st respondent:

> "*His conduct which caused the application to be brought exacerbated the situation by his vigorous but misplaced opposition to the application, clutching to his appointment to the detriment of the estate in respect of which he has a fiduciary and legal duty to administer like a bonus paterfamilias …"* (my emphasis)

[29] In the totality of the above circumstances, it is my considered view that the respondent failed in his duty as an executor. The respondent submitted four copies of receipts, with two bearing the Times of Swaziland's emblem. He submitted these receipts as proof of advertisement for the next of kin's meeting. However, on perusal, only one receipt reflected the file number in issue. The other three were irrelevant to this matter. Even on this one receipt bearing the estate under issue, upon the court's enquiry as to what transpired to that meeting advertised, respondent informed the court that there was never any meeting as he could not attend following a strike by the Law Society. There was in the result no liquidation and distribution account filed. However, and surprisingly so, two payments were received by the respondent in favour of this estate. Again on enquiring as to the reason the respondent failed to distribute the said amounts to the beneficiaries, respondent cited the strike again. It is very amazing that whenever it was time for the respondent to discharge his duties, the strike by the Law Society and the absence of the file from the Master's office were quoted as a hindrance whereas there was always available time to

request and receive the monies from the office of applicant and this very file was not needed to requisition the same.

[30] The applicant has prayed for an order of forfeiture of respondent's benefits as an executor. The general rule on forfeiture of remuneration was clearly highlighted in **Levin v Levy 1917 T.P.D. 702** at 705 where their Lordships held:

> "*It is well established that where an agent has acted improperly and unfaithfully in the performance of his duty towards his principal, he will forfeit any remuneration or commission to which he would otherwise have been entitled if his improper or unfaithful conduct is connected with the duty he had to perform.*"

[31] Section 54 of the Act provides:

> *"Remuneration of executors*
>
> *54. Every executor shall, in respect of his administration, distribution and final settlement of any estate, be entitled to claim, receive or retain out of the assets of such estate, or from any person who is heir, legatee or creditor is entitled to the whole or any part of such estate, such remuneration as may have been fixed by the deceased, by will or deed, or otherwise a fair and reasonable compensation, to be assessed and taxed by the Master, subject to the review of the High Court, upon the petition of such executor or of any person having an interest in such estate:*
>
> *Provided, that if any executor fails to lodge the account of his administration and distribution of the estate within six months from the date on which letters of administration were granted to him, and has no lawful and sufficient excuse for such failure, the Master may disallow the whole or any portion of the fees which such executor might otherwise have been entitled to receive in respect of his administration of such estate."* (my emphasis)

[32] In **Meester** case *op. cit.* at page 13 the court observed:

> "*Now undoubtedly a solicitor who is a trustee is not allowed a profit out of his trusteeship and the same rule applies to him as regards executor-ship …and if the executor or trustee transacts business for the estate he is of course allowed his costs out of pocket, i.e. actual expenditure but not anything for his time or trouble*."

[33] The learned judge proceeds to state the rationale as follows:

> *"…but the rule is one of prevention. If we did not adopt this rule an estate may be made to incur heavy liabilities to the executor if he employs himself or his partner to do special work for the estate. In a long series of transactions it may be difficult to prove the exact value of the time and labour expended by the executor in his capacity as agent, auctioneer, banker or solicitor.*"

[34] *In casu* respondent has dismally failed to submit administration and distribution account. He failed even to do the very first act of convening the next of kin's meeting. This protracted delay by the respondent saw the death of one of the main beneficiaries, the spouse to the deceased, without any distribution. As per the section, he is therefore not entitled to any remuneration or fees, including disbursement. If he incurred any disbursement at all, this should be from his pocket.

[35] In addressing costs, I draw reference from the case of **Beukes** *op cit* at page 28, his Lordship, addressing the question of costs state:

> "*In the opinion of this court the first respondent should not have opposed the application in the first place but should have conceded that he was not fit to retain his appointment as co-executor. His conduct which caused the application to be brought exacerbated the situation by his vigorous but misplaced opposition*

to the application, clutching to his appointment to the detriment of the estate in respect of which he has a fiduciary and legal duty to administer like a bonis paterfamilias …..."(my emphasis)

[36] His Lordship then concludes:

> "*4. The first respondent is ordered to pay costs of this application…. The costs are also on the scale of attorney client, out of his own pocket.*"

[37] I see no reason why this court should differ from the position taken by the honourable judge in **Beukes** *op. cit.* as the present case is on all fours with the **Beukes** case.

[38] In the totality of the above, I enter the following orders:

1. The letters of administration granted to respondent on 29th January 2010 are hereby revoked and respondent is ordered to return the same to applicant forthwith;

2. Respondent is hereby removed as an executor of the estate of late Jericho David Matsebula;

3. Respondent is hereby ordered to deposit with the applicant the sums of E92,000 and E200,091.97 with interest as per bank rate calculated from 14th July 2010 and 6th May 2011 respectively within sixty (60) working days from date of judgment;

4. All benefits, commission, fees and disbursement due to respondent are hereby forfeited;

5. The matter is referred to the Law Society of Swaziland which is ordered to deal with respondent in accordance with the law within six months from date of this judgment and thereafter file its judgment with the Registrar of this Court.

6. Respondent is ordered to pay costs de *bonis propiis*.

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M. DLAMINI
JUDGE

For Applicant : B. Tsabedze
For Respondent : M. Dlamini