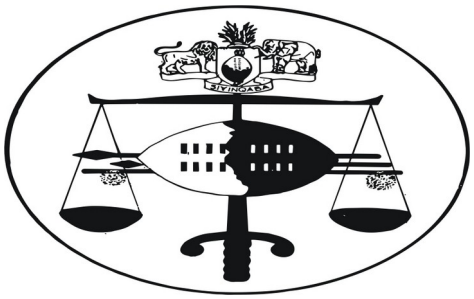

IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Civil Appeal No. 12/2007

In the matter between

MANQOBA DLAMINI Appellant

Vs

BUSISIWE GRACE DLAMINI (BORN SIBANDZE) NO 1st Respondent
THE MASTER OF THE HIGH COURT 2nd Respondent
THE ATTORNEY GENERAL 3rd Respondent

Coram BANDA, CJ
STEYN, JA
ZIETSMAN, JA

For Appellant Mr. Magongo

For 1st Respondent Mr. Mbuso Simelane

JUDGMENT

BANDA, CJ

[1] This is an appeal against the ruling of the High Court where it held that the appellant's application to review

the appointment of the first respondent could not be upheld.

[2] The appellant had brought an application by Notice of Motion in which he sought the following orders –

1) Pending finalisation of this application, the first respondent be restrained and or interdicted from executing her duties as an Executrix Dative of the Estate (of) Late Silas Magombeni Dlamini, Estate file number EH.144/05.

2) The decision by the second respondent to appoint the first respondent as Executrix Dative of the Estate (of) Late Silas Magombeni Dlamini Estate file number EH144/05 be reviewed and set aside.

3) An independent Executer or Executrix be appointed to continue with the winding up of the Estate (of) Late Silas Magombeni Dlamini – Estate file number EH144/05.

4) The first respondent be ordered to account for all what she had and the monies paid out since her inception of the position of being an Executrix Dative.

5) Cost of this application.

[3] The respondent opposed the application on the grounds that the applicant did not have *locus standi* to bring the application.

[4] In his founding affidavit the applicant raised two grounds as a basis for his application. He contended that the first respondent was not a fit and proper person to be appointed an Executrix Dative because she had allegedly deserted the deceased for a period of twelve (12) years only to come back after his death. The applicant also alleged that the first respondent had committed adultery and that, therefore, she could not be a fit and proper person to administer the estate of the deceased husband. While the first respondent admits leaving the matrimonial home she contended that she left because of the cruel tendencies of her husband but continued to see each other as husband and wife. She denies committing adultery and has attacked the applicant for making the allegation without adducing evidence to support it.

[5] The respondent and the deceased had contracted a civil marriage on 11th September 1981. They lived

together and were able to establish their own transport business. They operated bus service between Swaziland and Johannesburg.

[6] Mr. Magongo for the applicant has contended that the applicant has the right to apply for the review of the first respondent's appointment as Executrix Dative under the provisions of S.25 of the Administration of Estate Act. That section provides as follows –

> *"In every case in which a competition shall take place*
> *for the office of executor dative, the surviving spouse*
> *failing whom the next of kin and failing whom a*
> *creditor, and failing whom a legatee shall be referred*
> *by the Master for such office:*
>
> *Provided that nothing in this section contained shall*
> *prevent any one or more of the above mentioned*
> *classes of persons from being conjoined in the said*
> *office with one or more of any of the other such*
> *classes and:*

Provided further that if it appears to the Master or the High Court on reviewing the appointment made by the Master that any good reason exists against the appointment of all or any of the abovementioned persons or classes of persons as executor or executors, any such person or class of persons may be passed by, and some other fit and proper person or persons may be appointed by the Master or such Court;

Provided further that every such appointment so made by the Master shall, on the application of any person having an interest in such estate, be reviewed, and confirmed or set aside by the High Court, and such court by whom such appointment is set aside, may appoint some fit and proper person."

[7] Mr. Magongo contends that the applicant has a direct and substantial interest to bring the application for review.

[8] Review proceedings are governed by the provisions of Rule 53 of the Rules of the Court. That rule provides as follows:-

> *" 53(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi judicial or administrative functions shall be by way of Notice of Motion directed and delivered by the party seeking to review such decision or proceedings to the Magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected -*
>
> a) *Calling upon such persons to show cause why such decisions or proceedings should not be reviewed and corrected or set aside, and*

b) *Calling upon the Magistrate, presiding officer, chairman or officer as the case may be, to dispatch, within fourteen days of the receipt of the Notice of Motion, to the Registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.*

(2) The Notice of Motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavits setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected."

[9] The rule clearly sets out what is required in the application for review. The tribunal whose decision is to be reviewed must have been performing a judicial, quasi judicial or administrative function. There can be no doubt that when the Master appointed the first

respondent to be the Executrix Dative he exercised a judicial function in that he exercised that function after hearing what the next of kin had said. The application must further show, by affidavit, the grounds and circumstances upon which the applicant relies to have the decision set aside or corrected. The provisions of Section 25 also provide that good reason should exist against the appointment before it can be reviewed.

[10] Mr. Magongo has urged the Court to give a " simple and literal meaning" to the last proviso of Section 25 and has submitted that once an application has been made by a person having an interest in the estate, the Court is bound to review the appointment. He has further submitted that the principles of review which the learned judge in the Court *a quo* gives at page 74 of the record is not applicable to this application, and contends that the application met the requirements of review which should be construed in the widest sense possible.

[11] We have difficulty in accepting Mr. Magongo's submission when he appears to suggest that once a person, who has interest in the estate simply makes an application, the court is bound to review the appointment . Both the provisions of Section 25 of the

Administration of Estates Act and Rule 53 make it clear beyond doubt that the application must give grounds for attacking the decision to appoint before it can be reviewed. In the case of ***Johannesburg Consolidated Investments vs Johannesburg Town Council*** (1903) TS111 Innes CJ stated the position as follows:

> *" But there is a second specie of review analogous to the one with which I have dealt, but differing from it in certain well defined respects. Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of a statute or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them."*

[12] The remedy of review is directed at correcting any irregularity or illegality in the process of making that decision. As LA. Rose Innes states in his Book, Judicial Review of Admiistrative Tribunals in South Africa at page 201

" Review is a remedy directed at correcting any irregularity of a procedural nature or any illegality in the proceedings of a tribunal, the Court of review is not concerned with the merits of the decision arrived at by the administrative body, provided that the procedures and method adopted by that body are regular, the review Court does not enter into the correctness in substance of the decision that was made. It has repeatedly been held that where a statute confers authority upon an administrative body to decide a matter left to its discretion the Courts have no power to substitute their own decision for that of the administrative body, especially authorised to make that decision."

[13] This application has not shown what the irregularity or illegality is that the applicant seeks the Court to correct or set aside. The applicant does not attack the method or procedure which the second respondent followed in making the appointment. The applicant has suggested that there was competition for the appointment of Executrix Dative but he has failed to indicate which person was in competition for the appointment. The

first respondent has admitted that her marriage to the deceased was not all bliss as evidenced by the divorce proceedings which had been contemplated but she has stated that these proceedings were not proceeded with and that they had reconciled although they continued to live in separate homes. The first respondent is gainfully employed by the Government of Swaziland as a teacher and she has, therefore, an independent income of her own.

[14] We have carefully considered the submissions by both counsel in this application together with the authorities which they cited to us. We are satisfied and find that this application did not set out, as required by the law of review, the grounds which would entitle the Court below to invoke its power to review the decision of the second respondent in appointing the first respondent.

[15] The applicant is by common cause an illegitimate child of the deceased. We do not think he can be regarded as a member of the next of kin. We agree with the learned judge in the Court *a quo* that Section 31 of the Constitution has no retrospective application. The applicant cannot, therefore, derive any advantage from it. It is noted that apart from the applicant there are other children of the deceased and who would have the

same interest in the Estate as the applicant would have. If the appellant as an illegitimate child has *locus* standi then these children ought to have been joined as parties to the application. The application would also fail on this point of non-joinder.

[16] We can find no fault, and none has been proved, which could have entitled the Court below to review the decision of the second respondent in appointing the first respondent as the Executrix Dative to the Estate of the late Silas Magombeni Dlamini. No evidence has been adduced to show that the first respondent cannot administer the Estate in the best interest of all interested persons. This appeal has no merit.

[17] We must, therefore, dismiss this appeal with costs, such costs to include the certified costs of counsel.

Delivered in open court at Mbabane this 15th day of November, 2007

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R.A. BANDA, CJ

I agree _____

J.H. STEYN, JA

I agree

N.W. ZIETSMAN, JA