



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Appeal Case No. 15/2013

In the matter between

SINDISIWE DUBE

APPELLANT

And

SONKHE MDLULI

1ST RESPONDENT

NANA MDLULI

2ND RESPONDENT

Neutral citation: *Sindisiwe Dube vs Sonkhe Mdluli and Another (15/13)*
[2013] SZSC 13 (31May 2013)

Coram: **DR S. TWUM JA. , M.C.B. MAPHALALA JA. and**
E.A. OTA JA.

Heard **9 MAY 2013**

Delivered: **31 MAY 2013**

Summary: **Civil Procedure: Section 51 bis of the Administration of Estates Act 1902; Deceased estate; First Distribution and Liquidation Account; Concerns raised in relation thereto**

prior to approval by the Master; Account thereafter approved and had lain for inspection for the 21 days statutorily prescribed by the Act; No objection taken to the Account within the 21 days; Account distributed thereafter by the Executrixes; Respondents accepted their awards; sold and approved the sale of both movable and immovable property of the estate in realization of same; Respondents subsequently, 4 years thereafter, raised objection *a quo* against the award of maintenance to their minor siblings part of which had not been distributed by the Executrixes; The Court *a quo* granted the application; The Court *a quo* amended the Account and ordered the Executrixes to file an amended Account and to incorporate the amendment therein; Appeal against the order of the Court *a quo* upheld; Held: the provisions of section 51 *bis* is to be construed strictly; When an Account in an estate of the deceased has lain for inspection for the 21 days period statutorily prescribed and no objection is taken thereto, any objection thereafter is precluded; In the interest of substantial justice such an objection may be allowed only in very exception circumstances provided the Account has not been distributed.

JUDGMENT

OTA. JA

[1] This is an appeal from the judgment of **Madam Justice Q.M. Mabuza** delivered on 22 February 2013. It is pertinent right from the outset to chronicle a detailed history of this case to foster a better understanding of the issues which exacerbated relations between the parties, resulting in litigation. The sequence of events is also paramount to the ineluctable conclusions reached. It is convenient for me to refer to the parties with the appellation as they appear in the appeal.

[2] CHRONOLOGY

The bone of contention it appears is the First liquidation and Distribution Account (the Account), of the estate of late Robert Mfanawakhona Mdluli (deceased), who passed away on 14 December 2003. The deceased left behind 11 children both legitimate and illegitimate. The legitimate children were born of two marriages which the deceased contracted during his life time. The first marriage was with one Thandi Mdluli who pre-deceased him. Four children were born out of this union, namely, Mano Mdluli (Mano Dlamini), Nana Mdluli, Mbuso Mdluli and Sonkhe Mdluli who had all attained majority at the time of his demise. It is worth mentioning that Sonkhe Mdluli and Nana Mdluli who are the Respondents in this appeal, were the Applicants in the proceedings before the Court *a quo*.

- [3] After the death of Thandi Mdluli, the deceased contracted another marriage under Swazi Law and Custom with Jabulile Virginia Mdluli (the widow). Three children were born of this marriage, namely, Musawenkhosi Mdluli, Setsabile Mdluli and Ncobayedwa Mdluli, who were all minors at his death.
- [4] The deceased also had three illegitimate children who were also minors at his passing, namely, Themba Mdluli whose biological mother is unknown but who is under the guardianship of the widow, Nolwazi Mdluli who is also under the guardianship of the widow with the consent of her biological mother, Pauline Busisiwe Ntshangase and Sikhona Mdluli, who it is common cause has a mental disability. His biological mother is Sindisiwe Dube the Appellant, who was cited in the proceedings *a quo* as 3rd Respondent.
- [5] The deceased left behind several movable and immovable assets, including a company styled Beshiselweni Investments (Pty) Ltd, (the company), in which he held 99% majority shares. It is common cause that this company owns immovable property in Mbabane which is leased out to several tenants for rentals.
- [6] It is also common cause that the widow Jabulile Virginia Mdluli and Mano Dlamini, who were cited as 1st and 2nd Respondents *a quo*, were appointed Executrices of the deceased estate by the Master (7th Respondent *a quo*).
- [7] The parties are *ad idem* that the deceased maintained the legitimate and illegitimate minor children during his life time, and this tradition continued after his demise prior to the issuance of the Account.

[8] Subsequently, the Executrices in the exercise of their duties as such, issued the Account, which was titled “*First and Final Liquidation and Distribution Account*” and which encapsulated the maintenance of the minor children, which was burdened on the obviously considerable assets of the company.

[9] It appears that prior to the Account being approved by the Master, some of the beneficiaries, namely, Mano Dlamini, Nana Mdluli, Mbuso Mdluli and Sonkhe Mdluli, expressed concerns about it to the Master via a letter dated 8 August 2006 (SM3). This letter which is a bristling issue in these proceedings lies at the substratum of the grouse between the parties. Its content is apposite at this juncture:-

“RE: ESTATE LATE ROBERT M. MDLULI – ES 309/2003

The distribution account is okay except for the following that need to be cleared:-

- 1. Firstly the title of the distribution account refers to ‘first and final distribution account’, Yet there are still things outstanding namely:-***
 - a. Live stock including cattle at Hawane Farm.***
 - b. The estate has 99 shares in Beshiselweni, we understand that some income from a (sic) shares will be used to settle maintenance for the underage children, which is fine, however we need to be clear as to what this really means? Does this mean over a period of time or once the debts have been settled the shares will be redistributed? We need to agree on a time frame.***
 - c. There is a remainder of the share after the maintenance settlement as per claim, there are about 20 something shares unaccounted for. What happens to these? Where are they distributed?***
- 2. We need clarity and a breakdown in terms of the maintenance and does this amount include mother’s contributions?***
- 3. Reference is made to page 16 how was 4.5% equals to E98.800.00 and 5 % equals to E200.700.00. How where (sic) these calculated.***

4. *Reference is made to Nolwazi who is said to be a child of the deceased. Here we request proof of birth certificate.*
5. *Claims against estate (page 12 NO. 5.6 & 5.7) we were never shown the affidavit(s) and if so we believe that the affidavit must be between the deceased and the other party.*
6. *The Mdluli family is not in agreement with the maintenance and education of the children out of wedlock to be under Jabulile Virginia Mdluli (page 15 – 16), the children are Themba and Nolwazi.*
7. *We are also aware that Lot 502 of Farm No. 2 (page 3, N0: 1.7) was never valuated as all properties were re-valuated, which may bring the value of the estate down.*

If all the above can be looked into / attended too, the liquidation and distribution account would be fine “

[10] SM3 was signed by all four authors. What I find very disturbing about SM3 is that one of the signatories is Mano Dlamini who is a Co-Executrix of the estate and who assented to the Account. By SM3, the Executrix appears to be raising concerns about her own Account. When this appeal was heard, Mr Madzinane who appeared for the Respondents correctly contended that the steps taken by the Executrix are highly irregular and bring to the fore the urgent need to educate Executors on the intricacies of the administration of an estate. I agree with him.

[11] Be that as it may, it appears that when the Master was approving the Account on 8 September 2006, he directed the Executrices to address the “concerns” raised by the “heirs” in SM3. The parties are not in agreement as to the purport of SM3, whether it constitutes an objection within the terms of the Administration of Estates Act 1902 (the Act) and whether the concerns raised therein were or ought to have been addressed by the Master before the said Account was approved.

- [12] The Respondents maintained an intransigent position that SM3 constitutes an objection and ought to have been dealt with prior to approval of the Account, but the Master failed to do this. The Appellant and the other Respondents *a quo*, took issue *in limine* with the jurisdiction of the Court to entertain the application, and argued *au contraire*, that SM3 is not an objection within the purview of the Act, this notwithstanding, the concerns raised therein were addressed and settled at several next of kin meetings before approval of the Account.
- [13] Suffice it to say that the Master approved the Account which was duly advertised (annexure JM1), and lay open at the Masters office for inspection for 21 days from 22 September 2006. There was no objection from any interested parties within this period.
- [14] Consequently, after the 21 days period lapsed, and in 2009, the Executrixes distributed the assets of the estate among the beneficiaries according to the Account. The beneficiaries, including the Respondents accepted their inheritance under the Account and took copious steps as the record demonstrates, to ensure a realization of same via the sale of both movable and immovable assets of the estate.
- [15] It appears that after the Account had lain for inspection, the Respondents raised other concerns, tailored along the same lines as SM3. These concerns are captured in letters dated 14 December 2006 (annexure SM5), 5 March 2008 (annexure SM4) and 5 November 2009 (annexure SM6), respectively. These concerns proved abortive.

[16] It was against a backdrop of the foregoing facts that the Respondents as Applicants , approached the Court *a quo* for redress contending for the following:-

- “1. *Reviewing and / or setting aside the decision of the 7th Respondent of approving the First Liquidation and Distribution Account of the Estate without first addressing and / or dealing with the objection by the Applicants dated the 8th August 2006.*
2. *Reviewing and / or setting aside the First Liquidation and Distribution Account of the Estate of the Late Robert Mfanawakhona Mdluli only on the aspect of maintenance for both the legitimate and illegitimate children.*
3. *An order declaring the Estate of the Late Robert Mdluli not liable to pay maintenance for the minor legitimate children.*

ALTERNATIVELY

An order declaring the Estate of the Late Robert M. Mdluli liable to pay half the maintenance for the legitimate and illegitimate children of the Late Robert Mfanawakhona Mdluli.

4. *An order directing the 7th Respondent to pay costs of suit at attorney client scale. The other Respondents to pay costs of suit only on opposition of the application unsuccessfully and each paying, the other (s) to be absolved.*
5. *Granting Applicants further and / or alternative relief”*

[17] A litany of issues were raised and canvassed before the Court *a quo*. These included the concerns raised in SM3 which bear no repetition as well as some debate about the livestock and cattle held at Hawane.

[18] After canvassing the foregoing issues, the Court *a quo* made the following orders in paragraph [26] of its decision, the relevant portions of which are as follows:-

“[26] I shall not set aside the Liquidation Account as I understand that certain awards have already been made. I make the following orders:-

- (a) That the estate of the Late Robert M. Mdluli is only liable to pay half the maintenance for both the legitimate and illegitimate children. Their respective mothers are liable to pay the other half.**
- (b) The Executrix are hereby ordered to file an amended liquidation and Distribution Account which reflects the new maintenance figures; amounts to be re-imbursed to the estate; correct calculation of percentages; the livestock and cattle at Hawane; the unaccounted for shares in Beshiselweni (Pty) Ltd.**
- (c) The Executrix are hereby ordered to formally attend to items 4, 5, 6 and 7 of Annexure SM3”**

[19] THE APPEAL

These are the orders under attack in this appeal premised upon grounds in the Notice of Appeal which I find a need to regurgitate in extenso in a bid to expose their sheer inelegance and unacceptable character. The grounds are as follows:-

- 1. The learned Judge *a quo* erred in law and in fact by making the orders she did (except for 26 (d)) because they were not prayed for in the Notice of Motion.**
- 2. The learned Judge *a quo* erred in law and in fact, by considering annexure “SM3” in Respondents founding affidavit which is not an objection in terms of the estates enabling Act in order to come to her decisions to be influenced by same.**
- 3. The learned Judge *a quo* erred in law and in fact by ordering an amended Liquidation and Distribution account yet certain awards had been accepted by some beneficiaries (inclusive of the Respondents) hence the Respondents were estopped from challenging the First and Final Distribution Account.**
- 4. The learned Judge *a quo* erred in law and in fact by not considering that all the terms listed in order 26 (b) could be dealt with in the second and final Liquidation and Distribution Account**

as there is no provision in law to amend a duly approved Distribution Account.

5. **Alternatively the learned Judge *a quo* erred in law and in fact by ordering an approved Liquidation and Distribution Account to be amended as the Executors were *functus officio* against same**
6. **The learned Judge *a quo* erred in law and in fact by re-ordering the Executors to cut the maintenance due to appellant's daughter when the Executors considered the claim lodged by her and offered less than claimed.**
7. **Alternatively the learned Judge *a quo* erred in law and in fact by ordering the Executors to re-cut the maintenance lodged by the Appellant.**
8. **Alternatively the learned Judge *a quo* considered the Respondents case at the exclusion of the Appellants case found at paragraphs 16 to 17 of her Answering Affidavit relating to the contribution of maintenance.**
9. **The learned Judge *a quo* erred in law by not considering the points of law raised by the Appellant, Attorney General and one of the Executors Jabulile Virginia Mdluli when coming to her decision.**
10. **Alternatively if it be found that she considered the points *in limine*, the learned Judge *a quo* erred in fact and law by not dismissing the application as the Respondents were time barred from challenging the Liquidation and Distribution Account and or there was no objection filed in terms of the enabling Act.**

[20] The Appellant filed additional grounds of appeal which she undertook in her papers to seek the leave of this Court to argue. No such leave was ever sought and obtained. Still, in the pursuit of this exercise and to discourage this practice, I set them out hereunder:-

1. **The learned Judge *a quo* erred in law and in fact by ordering that the estate of the late Robert M. Mdluli is only liable to pay half the maintenance for illegitimate (and legitimate) children and the mothers to contribute the other half without assessing the financial standing of the estate and the mother.**

2. **Alternatively the learned Judge *a quo* erred in fact and in law by ordering the mothers to contribute a half share of the maintenance vis a vis (sic) against the worth of the estate.**
3. **Alternatively the learned Judge *a quo* erred in law and in fact by providing a mathematical formula of a half share in relation to maintenance.**

[21] The grounds of this appeal are deserving of this Courts reprobation. They are unnecessarily prolix, tortuous and repetitive.

[22] The danger with this sort of grounds of appeal is that it poses an impediment in the path of both the appellate Court and Respondent who have the added, and I am bound to say, unpleasant task of foraging through the monstrous morass of grounds to distill the gravamen of the real issue (s) for decision.

[23] We must not lose sight of the fact that the object and purpose of the grounds of appeal is to confer jurisdiction on the Court and also give the Respondent adequate notice of the issues in controversy in the appeal, in the interest of justice. That is why Rule 6 (4) of the Rules of this Court prescribes that the grounds shall be numbered consecutively and shall be concise i.e be specific and not repetitive; clear not couched in general terms. This is to ensure that the element of notice is not defeated by vague and general statements of complaint. See **Thabiso Fakudze v Silence Gamedze and Other Civil Appeal No. 14/2012.**

[24] I am compelled to warn here, that the success or beauty of any grounds of appeal is not quantitative but qualitative premised on relevance. Be that as it may, I have tried to wade through the monstrous morass; ignoring the march gas exhaling from the forest of repetition that line the way, and I am glad to say, that the only issue crying out for determination is whether or not the Court *a quo* was competent to entertain the objection of the Respondents and to grant the challenged orders, as envisioned by the Act.

[25] Now, the power to object to the Liquidation and Distribution Account in a deceased estate is derived from statute. The enabling Statute is section 55 *bis* of the Act. The relevant subsections state as follows:-

- “(1) Every executor’s account lodged with the Master in terms of section 51 shall, after the Master has examined it and approved of it, lie open at the office of the Master, and if the deceased was ordinarily resident in any region other than the region of Hhohho Region, a duplicate thereof shall lie open at the office of the Regional Administrator of such other region for not less than twenty one days, for inspection by any person interested in the estate.
- (2) The executors shall give notice that the account will be so open for inspection by advertisement in the gazette and in a newspaper circulating in Swaziland and approved of generally or specifically, by the Master.
- (3) The notice referred to in subsection (2) shall state the period during which, and the place at which the account will lie open for inspection.
- (5) Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons stated therefore, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.
- (6) The executor shall, within fourteen days after receipt by him of the copy of any objection transmit two copies of his comments thereon to the Master.

- (7) If, after consideration of such objection the comments of the executor and such further particulars as the Master may require, the Master is of the opinion that such objection is well founded or if, apart from any objection, is of the opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.
- (8) Any person (including the executor) aggrieved by any such direction by the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the High Court within thirty days after such direction or refusal, or within such further period as the Master may on request allow, or within such further period as the High Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.
- (9) If any such direction may affect the interest of a person who has not lodged an objection to the account and the account is amended, the account so amended shall, unless such person consents in writing to the account being acted upon again lie open for inspection in the manner and with the notice and subject to the remedies provided for in this section.
- (10) If any account has lain for inspection as provided for in this section and:-
- (a) No objection thereto has been lodged ; or
 - (b) An objection has been lodged and the account has been amended in accordance with the Masters direction and has again lain open for inspection, if necessary as provided for in subsection (9), and no application has been made to the High Court within the period referred to in subsection (8) to set aside the Master's decision, or
 - (c) An objection has been lodged or withdrawn or has not been sustained and no such application has been made to the High Court in such period.

the executor shall forthwith pay the creditors and distribute the assets among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the master the deeds of registration relating to such distribution or lodge with the Master a certificate by the registrar of deeds or a conveyancer specifying the registration which have been effected by the executor---“ (emphasis added)

[26] The *literal legis* of the foregoing legislation puts it beyond dispute that the Statute itself prescribed the steps (when, how and by whom), to be taken in objecting to an account in a deceased estate and sets the time limits within which those steps should be taken. The immortalized principle is that generally, such statutory provisions are construed strictly. See **Grunberg v The Assistant Master and Another 1949 (1) SA 1204 (GW); Master of The Supreme Court v Stern 1987 (1) SA 756 (T) 1987 (1) SA p 756; Rippon and Another v Coleman 1966 (4) SA 453 (E).**

[27] The reason for this is not farfetch. Those steps are not merely fanciful or ceremonious. They are underscored by the conscious and practical effort of parliament to ensure an expeditious administration of the estate of the deceased, in respect of which section 51 of the Act directs the Executor, not later than six months from the day of which the letters of administration were issued to him (unless upon sufficient cause shown to the satisfaction of the Master; further time be given from time to time for that purpose), to 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 of a fair and true copy of such Account.

[28] When a man dies, there are a gamut of issues to be addressed, such as wives, children, cars, rental, cattle, houses, school fees, feeding, shares, to mention but a few. Therefore, time is of the essence. That is why the lawgiver anticipated the steps in section 51 *bis* to prevent the administration of the estate by the Executors being unnecessarily burdened and protracted by indiscriminate objections. So it regulates the making of the objections to ensure that such issues are settled within a reasonable time of the laying of

the complaint to allow the Executors proceed with the full administration of the estate. It is commonsensical that indiscriminate objections if allowed, will frustrate the administration of the estate; which will be stalled until such objections are decided; thus unleashing unnecessary hardship on the beneficiaries, who often times are minors and are the paramount consideration in the estates dealing with the deceased.

[29] The Executor therefore does not succeed to the person of the deceased. His office is *sui generis*. Its main functions are to administer and distribute the estate legally, with due care and diligence pursuant to the Act. To this end, the Act empowers him to take possession of the deceased assets, which involves collecting any debts due to the deceased, and to prepare and submit to the Master a Liquidation and Distribution Account. The administration of the estate therefore vests solely in the Executor and is not subject to any objections, interference or interjections from the beneficiaries until the Account has lain for inspection.

[30] This is underpinned by the principle that once there is a duly appointed Executor he assumes legal title to the estate, which he has to manage for the benefit of the estate. The beneficiaries have no legal interest in the estate. What they have is an equitable interest which is prospective in the sense that it is only after all debts and outgoings have been settled by the Executor that they can benefit from what is left. It is a form of floating equity. The beneficiaries can only acquire a legal estate after distribution of the estate and that will be limited to the portion given to them. Until then, they have no legal interest in the estate. See **Benjamin Way N.O. v Rodney Way N.O. and Others Civil Appeal No. 63/2012, Elijah Matsebula and Another v**

Cebsile Matsebula (Born Hlophe) Civil Appeal No 21/2011. Banjwayini Shongwe v Abraham Shongwe and Others, Civil Appeal No 1236/12.

- [31] However, prior to when the Account has lain for inspection the beneficiaries do have the right to apply to Court or the Master to have the Executor removed for maladministration or negligence. See **Meyerowitz** in the text **Administration of Estates (6th ed)** at **para 12.20**.
- [32] *In casu*, the *dramatis personae* show that the approved Account had lain for inspection for 21 days at the Masters office from 22 September 2006, as shown by annexure JM1, the Government Gazette which evidenced advertisement of same. By ordinary arithematical computation, the 21 day period statutorily prescribed for inspection of the Account and objection thereto, lapsed on 12 October 2006. SM3 which was urged on 8 August 2006, prior to the 21 days period, does not therefore, by any stretching of the imagination qualify as such an objection within the contemplation of the Act. Similarly, annexures SM4, SM5 and SM6 in which the Respondents raised similar “*objections*” or “*concerns*” (nomenclature is not important), also fall outside this period of 21 days and do not pass the test.
- [33] What is beyond dispute and as admitted by Mr Madzinane, is that the Respondents did not take any objection to the Account within the 21 days period when it had lain for inspection at the Masters office; nor did they move any motion at the High Court within the statutory 30 days period for the Court to set aside any decision of the Master in relation to any such objection; neither was there any extension of time granted by the Master or

the Court within which to launch such an application. The objection urged before the Court *a quo* on 17 March 2010, about four (4) years after the account had lain for inspection and subsequently distributed, therefore, did grave violence to the entrenched statutory procedure.

[34] I agree with Mr Simelane who appeared for the Appellant, that the foregoing state of affairs constituted a veritable ground for termination of the proceedings *a quo in limine*.

[35] The Court *a quo* was certainly alive to the fact that SM3 does not constitute an objection as envisaged by the Act, wherein in paragraph [25] of the assailed decision it held as follows: ***“The issues raised therein are important even though ‘SM3’ does not amount to an objection in terms of section 51 bis of the Administration of Estates Act No. 28/1902”***

[36] After such a crucial finding, the Court appears to have orchestrated a dramatic summersault in granting the impugned orders. The Court, in my respectful view, fell into grave error in that adventure.

[37] It seems, as can be extrapolated from the record, that this error stemmed from a misconception by the Court, that the issues raised in SM3 ought to have been addressed by the Master and Executrixes prior to approval of the Account. This posture runs counter to the entrenched position of the law, which is that such objection is taken within the period when the Account has lain for inspection and not before. The beneficiaries had no power to

interfere with the administration of the estate as they embarked upon in SM3.

[38] When this appeal was heard, Mr Mandzinane contended that the Masters directives to the Executrixes to address the concerns, accorded some esteemation to SM3; and that their failure to do so, entitled the Respondents to raise the objection at just any time, and is a good ground for its condonation. This contention to my mind, is flawed. I say this because whilst agreeing that the Executrixes are by law under the supervision of the Master and are required to obey him, this however, does not derogate from the fact that such an objection is taken when the Account has lain for inspection. We must not also lose sight of the fact that the question of whether or not the Executrixes complied with the directives of the Master is disputed on the papers, defeating any concluded opinion thereto.

[39] In any case, even if I were to view SM3 with some favour ascribing a measure of probity to it in these circumstances, it is my considered view that when the Executrixes allegedly failed to comply with the directives of the Master; and the Master proceeded to approve the Account in affront of his own directives; the Respondents were by law required to immediately take objection to the Account when it had lain for inspection.

[40] It is also important that I observe here, that jurisprudence is not in accord as to whether an objection lodged after the statutory period of 21 days for launching same is beyond condonation. Some schools of thought say it is; others hold *au contraire*.

[41] This is the gravamen of the decision of the South African Courts which are urged in these proceedings and which I proceed to consider for the sake of completeness. The first is the case of **Grunberg v The Assistant Master and Another (Supra)**. What is of paramountcy in that decision, is that the Court considered the procedure laid down by section 68 (8) and (9) of Act 24 of 1913 of South Africa, which is in *pari materia* with our section 51 *bis*, for the decision of disputes in the administration of estates by the Master, and with application to the Court, which makes it of high persuasion.

[42] The facts of that case briefly stated, are that after the Account in an estate had lain for inspection and subsequently distributed, the Applicant obtained a *rule nisi* calling upon the Respondents to show cause why the period of lodging such as objection should not be enlarged and the Master should not be directed and authorized to consider such objections as if such objections had been timeously made.

[43] The Court in discharging the rule, held that, when an account in a deceased estate had lain open for inspection for three weeks without objection, the special procedure laid down for decision of disputes in administration of the estate by the Master, with appeal to the Court, is no longer available to an objector. Once the time for the inspection of the Account has expired, the Master has no power to entertain an objection. The Court opined “***In the present case the executor has already made payments in accordance with the Liquidation Account. It seems to me that to hold that the Court can extend that period for lodging objections is likely to cause uncertainty in the minds of executors as to when they should commence paying out and might create difficulties for them in the liquidation of estates. I do not***

think that it was the intention of the legislature that either the Master or the Court would have power to grant an extension of time for the lodging of an objection”

[44] It is this same stanza that was adopted by the local Courts in the case of **Kevin Themba Cele v Themba Solomon Cele and The Master of High Court Civil Case No. 1357/2005**, where the Applicant moved an application objecting to a Distribution Account after it had lain for inspection and been distributed.

[45] An exception to the above proposition is found in the case of **Baard v Estate Baard (1928 (PD 505)** referred to in **Grunberg (Supra)**. In that case the Master had first overruled an objection but subsequently, a further fact being placed before him, he changed his mind, and sustained it. It was decided in the case to which the objector was not a party, that having once given his ruling the Master was *functus officio* and could not amend or vary that order. The objector who was misled by the Master’s varying decision into believing that his objection had lawfully been sustained naturally had not within the statutory period of 30 days, made an application to the Court to set aside the original decision. The Court held that in such very exceptional circumstances the objector was entitled to extension of time to a further period of thirty days, from the date of notification of the judgment to her by the Master to apply to Court raising the objection.

[46] Adumbrating on this question in the case of **The Master of the Supreme Court v Stern (Supra)** ,where an objection was also taken outside the

statutory period and after the Account had been distributed, the Court also expressed a divergent view in the following language:-

“An Account which has lain for inspection without objection is not under all circumstances necessarily final and binding on the executor. This is the effect of the decision in Coetzer en’n Ander V De Kock NO en Andere 1976 (1) SA 351 (0) at 360 A – C- E. The example was quoted by Mr Bezuidenhout of further estate assets being discovered after the account has lain for inspection and after all the beneficiaries have been paid out before the discharge of the executor. Unless the Master has the power to direct the executor to amend the account, the estate cannot be properly and finally administered. It seems to me that this power is expressly given to the Master, quite apart from any interested person lodging an objection, by s35 (9) of the Act which provides that the Master ‘apart from any objection, (if) he is of the opinion that the account is in any respect incorrect and should be amended--- may direct the executor to amend the account’. The section does not limit this power of the Master to the time period prescribed for the lodging of objections. Meyerowitz (op cit para 12.15) supports this view and comments as follows:-

‘An account which has lain for inspection is not necessarily final and binding on the executor. If before making distribution he discovers an error in the account or some other good reason exists, he may withdrawn or amend his account in which event creditors and heirs would have to wait for payment until the amended account has lain for inspection’”. (emphasis mine)

[47] Speaking for myself, I wish to firstly, but with respect, depart from the proposition of the Court in **Stern (Supra)**, that the power of the Master to *meri motu* call for an amendment of the Account in terms of section 35 (9) of the South African legislation, which is couched in identical language with our section 51 *bis* (7) , is not restricted to the statutory period when the Account has lain for inspection; thus entitling the Master to authorize such objection and amendment after the statutory period. I say this because the spirit of section 51 *bis* which is titled **“Advertising accounts and objections thereto etc;’** and under which this subsection falls, is that all such objections, whether by the Master or interested parties, shall be taken within the 21 days statutory period of objection. This power of the Master forms a

part and parcel of the section 51 *bis* procedure and cannot be removed from it.

[48] I am however more attracted to the proposition, in the interest of substantial justice, that objections can be entertained to an Account after it has lain for inspection in very exceptional circumstances; like the **footnote 4 at page 120 Meyerowitz (Supra)** suggests “*e.g. a new will is discovered, a purchaser of estate property defaults, a debt due to the estate cannot be recovered, additional beneficiaries are found and so on*” see **Stern (Supra)**. I am also inclined to agree with **Meyerowitz (Supra)**, that such an objection and amendment shall lie if discovered before making a distribution of the Account. Therefore, where very exceptional circumstances arise after the Account has lain for inspection and prior to its distribution, such objections and amendment may be allowed. To hold to the contrary would lead to extreme uncertainty and absurdity in the administration of the estate of the deceased. Each case must invariably be treated according to its own peculiar facts and circumstances.

[49] This is however not such a case. No exceptional circumstances exist that would warrant such condonation for the Respondents, who like the other beneficiaries, had accepted their awards pursuant to the Account; signed powers of attorney to transfer assets of the estate into their names; as well as sold and approved the sale of both movable and immovable assets in the estate in realization of same. Not to mention the cattle which was paid as Lobola for the 1st Respondent.

[50] The mere fact that the Account had been so distributed, in my view, rendered any subsequent objection thereto beyond condonation. It is certainly inequitable for the Respondents to take their awards when they were not satisfied with the Account, as they sought to demonstrate in SM3, then come back four years later to protest. It is a stale call. The long lapse of time has removed any vantage of the cause of the application; rendering it sterile and totally unenforceable.

[51] What I find extremely outrageous in this whole venture is that the 21 days period for inspection lapsed in October 2006. Distribution took place in January 2009. The Respondents, who have all along had legal representation did nothing within this period, either to apply to the Master or the Court to extend the period for them to raise the objection. They rested on their oars; contenting themselves with letter writing. Equity aids the vigilant not the indolent. The Respondents cannot approbate and reprobate, blow hot and cold at the same time; shifting goal posts in aid of their disingenuous adventure. They are clearly attempting to shut the stable after the horse has bolted away and the Court cannot allow its process to be used in this manner, which has all the potential of bringing the administration of justice into disrepute among right thinking members of the society.

[52] The fact that part of the maintenance award in issue has not been distributed does not make any difference. The Account must be taken wholistically not in piece-meal. The contention of the Respondents that this situation makes an amendment feasible, cannot lie; and to my mind, only goes to show their lack of candor in this application. Having obviously exhausted their own awards, they are determined to also take a slice of that awarded to the

minors; thus depriving them of their benefit. The Respondents are to put it in plain language “*Dogs in a manager*”; what they cannot have they certainly do not want their minor siblings to have.

[53] In any event, the Respondents neither sought nor obtained condonation for the application *a quo* which was clearly and completely out of time. They, therefore, had no legs to stand upon before the Court. They were to my mind on a mischievous and unscrupulous venture in launching that application, which application is inimical to their mischief.

[54] THE ORDERS

Mr Simelane contended that even the nature of the orders granted by the Court *a quo* are clearly defective. I agree with him. By purporting to amend the Account in the pervading circumstances, the Court usurped the functions of the Executrixes. The Court it must be re-stated, is not an “*upper executor*”

[55] Assuming the orders could be validly made, the proper procedure as correctly advanced by Mr Mandzinane when he gallantly conceded that the orders *a quo* were seriously flawed, would have been, rather than pluck figures in the air in coming to the ratio of 50/50 contribution of maintenance by the estate and the mothers of the minors, for the Court to refer the matter back to the Master; ordering him to direct the Executrixes to effect the necessary amendment to the Account, which will be done after the means of the mothers have been properly interrogated and proved as required by law.

This is however water under the bridge. The fact remains that the orders made are invalid.

[56] The Respondents are not completely without remedy. The Executrixes issued a certificate dated 7 July 2006 (annexure SD1 on page 98 of the record), in which they certified ***“that other assets of the deceased will be accounted for in a subsequent Liquidation and Distribution Account”***. It is still open to the Respondents to apply to the Master to direct the Executrixes to prepare a 2nd Account incorporating the assets of the estate which are not accounted for and any other concerns they may harbor; or they may wish to sue the Executrixes for damages for any maladministration or negligence perceived. Life is full of choices. The choice is entirely theirs. This Court is not a legal bureau for any party.

[57] MAINTENANCE

I do not wish to belabor myself with the issue of maintenance as it has been rendered purely academic, save to observe, that award of maintenance as perceived in our law, is contribution from both the mother and father. What will be the ration of contribution will depend on the proved means of the parties. See **Winnie Muir v S.C. Dlamini N.O. and Others Civil Appeal No. 22/2003**. This is however not a rule of thumb. It is strictly followed where it is proved that both parents have comparable means. However, in a situation where the father obviously has the financial muscle, as *in casu*, to shoulder the maintenance of his children, it will be tantamount to an attitude of over restraint to insist on this rule, thereby, unnecessarily burdening the poor mothers, who in the peculiarity of our African context have negligible

or no means. That was the essence of my decision rendered as President of the Gambia Court of Appeal in the case of **Williams v Williams, Gambia Court of Appeal Case No. 34/2007**. The same would be the case if the mother was the senior financial partner.

[58] In view of the issues that have arisen in this case, it is important that I emphasise that section 31 of the Constitution Act 2005, abolished the common law status of illegitimacy of persons born out of wedlock; and section 29 (3) (4) and (7)(b) gives equal Rights to children, whether legitimate or illegitimate, in the following words:-

“(3) A child has the right to be properly cared for and brought up by parents or other lawful authority in place of parents.

(4) Children born in or out of wedlock shall enjoy same protection and rights.

(7) Parliament shall enact laws necessary to ensure that:-

(b) a child is entitled to reasonable provision out of the estate of its parents”

[59] In light of the totality of the above, this appeal has merits. It succeeds.

[60] The orders of the Court *a quo* paraded in paragraph 26 (a) (b) and (c) of the impugned decision are hereby set aside. In place of same, I substitute the following:-

“This application be and is hereby dismissed”

[61] Costs of this appeal shall be paid out of the estate.

E.A. OTA

JUSTICE OF APPEAL

I agree

DR. S. TWUM

JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA

JUSTICE OF APPEAL

For Appellant:

M. Simelane

For Respondents:

S. Madzinane