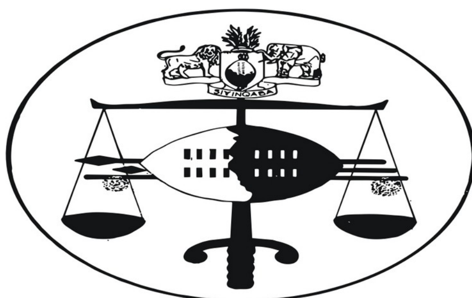

THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No. 84/2012

In the Matter between:

LLOYD CRAIG HENWOOD	**Appellant**

And

GARTH GREGORY HENWOOD	**1st Respondent**
GENE ALLISTER HENWOOD	**2nd Respondent**
TENNYSON HENWOOD	**3rd Respondent**
THE COMMISSIONER OF POLICE	**4th Respondent**
THE MASTER OF THE HIGH COURT	**5th Respondent**
THE ATTORNEY GENERAL	**6th Respondent**

Neutral citation : *Lloyd Craig Henwood v Garth Gregory Henwood and Another (84/2012) [2013] SZSC 27 (31 May 2013).*

Coram : **DR.S. TWUM JA,**
P. LEVINSOHN JA,
B.J. ODOKI JA

Heard **:** 14th May 2013

Delivered **:** 31 May 2013

Summary **:** ***Administration of estates Act – application to remove excecutors premature having regard to Section 52 of the said Act.***

JUDGMENT

P. LEVINSOHN, JA

[1] For ease of reference and for convenience I shall refer to the parties to this appeal by their respective designations in the court *a quo.*

[2] This litigation has its origins in an unfortunate family feud in regard to the administration of the estate of the late *Aldest Armstrong Henwood* ("the deceased").

[3] The applicant is the adopted son of the deceased while the 1st and 2nd respondents are his natural born sons. The deceased and his late wife executed a joint will in 2000. In terms thereof the survivor was constituted as the sole heir of all the property of the first dying subject however to a proviso that upon the death of the survivor the farm known as *Granite Range* together with all farming equipment and

other movables would devolve upon the Applicant. In terms of the will the 1st and 2nd respondents were appointed as executors in the event of the simultaneous death of the testator and the testatrix. Upon the death of the deceased (the survivor) the *Master* obviously influenced by the deceased's nomination of the 1st and 2nd respondents above appointed them as the executors of the deceased estate and issued the formal letters of administration.

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[4] On 5th May 2010 the applicant launched motion proceedings in the court *a quo.* Ultimately (after an opposed application in terms of Rule 30) he sought principally the removal of the 1st and 2nd respondents as executors of the estate and an interdict in regard to his right of access to the said farm.

[5] The applicant averred in his founding affidavit that as an heir in terms of the deceased's last will he has an interest in the administration of the estate and thus possesses the necessary locus stand: He states that the two respondents accepted their appointment as executors on 28th November 2008. To date no accounts have been lodged with the *Master* and no effort has been made to distribute the assets to those

rightfully entitled to same. He goes on to make the serious allegation that they are dealing with the assets of the estate as their own private property. Furthermore the applicant has been prevented from taking possession and occupying the said farm. In fact he avers that the three respondent brothers ordered him to vacate the property under a threat of violence.

[6] The first respondent in his opposing affidavit significantly admits that a liquidation and distribution account in the estate has not been filed.

He avers that the estate is a complex one principally because of certain South African assets which need to be realised as well as the applicant's failure to account for certain estate funds in his possession. The first respondent then goes on to deny the allegations in regard to threats of violence and the order to vacate the property.

[7] The *Master* in her report to the Court noted that *"there is no doubt that the time taken by the first and second respondents in bringing the affairs of the estate of the deceased towards completion has been inordinately long and that the interests of the estate and its heirs have been severely adversely affected.*

Therefore Section 84 of the Act supra to remove the executors from the office of executorship should apply"

[8] The application came before *Mabuza J.* In a written judgment delivered on 12th October 2012 the learned judge dismissed the application with the costs to come out of the deceased estate. The applicant now appeals against that order.

[9] In order to deal with the issues that arise in this appeal it is necessary to set out the various statutory provisions that are relevant to the matter.

[10] Section 51(2) of the Administration of Estates Act ("the Act") 28 of 1902 provides as follows:

> *"(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 <u>Master</u> upon sufficient cause shown to the satisfaction of the <u>Master</u>, 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."

[11] Section 52 provides as follows:

"When any executor fails to lodge with the Master the account mentioned in the last section (51(2)) the Master or any person having an interest in such estate, may, at any time after the expiry of six months, from the day on which the letters of administration were granted to such executor, summon him to show cause before the High Court why such account has not been so lodged.

Provided that the Master or such other person shall, not later than one month before suing out any such summons, apply by letter to the executor in default, requiring him to lodge his account on pain of being summoned to do so under this section ; and,

Provided further, that any executor receiving any such application from the Master or any such person, may lay before the Master such grounds and reasons as he may be able to advance why he has not lodged his account and the Master, should such grounds and reasons seem to him sufficient, may grant to such executor such an extension of time for the lodging

> *of such account as he shall in the circumstances deem reasonable …………………………..”*

[12] The next relevant provision is section 84:

> *“Every executor,…..shall be liable to be suspended or removed from his office by order of the High Court if such court is satisfied on motion, that by reason of absence from Swaziland, other avocations, failing health, or other sufficient cause, the interests of the estate under his care would be furthered by such suspension or removal.”*

[13] In my view the court a quo was plainly correct in characterising the first and second respondent’s handling of this estate in the following terms:

> *“It is evident to me that the executors are guilty of non-administration; gross inefficiency and of serious dereliction of duty and qualify to be removed on the ground of “other sufficient cause” (S84 supra).”*

[14] The learned judge however reasoned that in view of the proviso to Section 52 (supra) the application before her was premature. Before considering this finding I should deal with a submission made by

counsel for the appellant. If I understood it correctly, counsel complained that this point was not canvassed in the affidavits nor was sufficient notice given to his side that it was being raised and accordingly the appellant was "ambushed" so to speak.

[15] It seems to me that neither party in motion proceedings can be prevented from raising a legal point which bears on the issues in the particular application. In terms of Rule 6 (12) (c) provision is made for a party to give notice to his/her opponent that he/she intends to raise such argument. Where however a party only becomes aware of his opponents point during the hearing and is as it were, taken by surprise, he/she should be vigilant.

Depending on the circumstances a postponement at his/her opponent's cost should be sought and perhaps more importantly, the point may call for further affidavits or, as in this particular case, a further report from the master. It seems that the applicant did neither of these things.

[16] I return now to the learned judge's finding. Section 52 empowers either the *Master* or an interested party to summon an executor in default of rendering an account to show cause before the High court why such account has not been lodged. The section uses the word "may" which is simply directory and not peremptory. In effect both the master and the interested party are not obliged to summon the executor but may exercise their own discretion to do so. However, it appears to me that before they embark on this course it must be shown that an essential jurisdictional fact has been complied with, namely, that the executor has been notified in terms of the first proviso to Section 52 that he is required to lodge the account on pain of being summoned.

This proviso uses the word "shall" and in my view is clearly peremptory. The legislature's intention was aimed at protecting the interests of the deceased estate by avoiding litigation and thus give the executor concerned an opportunity to provide an explanation and perhaps seek the master's indulgence in regard to a postponement.

[17] In my opinion the learned *judge* correctly interpreted the proviso to Section 52. The only outstanding issue was that of the interdictory relief sought. Here again, I am of the opinion that the learned *judge* rightly adjudged that because of the irreconcilable disputes of fact on the papers the *applicant* had not discharged the onus on a preponderance of probability of showing that he was entitled to such relief.

[18] In the premises the appeal fails and it is dismissed with costs such costs to be paid by the deceased estate of the late *Aldest Henwood.*

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P. LEVINSOHN
JUDGE OF APPEAL

I agree

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DR. S. TWUM_
JUDGE OF APPEAL

I agree ____________________

B.J. ODOKI
JUDGE OF APPEAL

For Appellant : Attorney Mbuso E. Simelane

For Respondents: Attorney J.W. Waring