



**IN THE SUPREME COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

Civil Case No. 11/2018

In the matter between

THABSILE THANDEKA KHOZA

APPELLANT

AND

KHANYISILE BONISIWE MAKHANYA

1st Respondent

MFANZILE MICHAEL SUKATI

2nd Respondent

SIPHIWE ALICE HLOPHE

3rd Respondent

ESTATE LATE JOYCE SISANA DLAMINI

4th Respondent

THE MASTER OF THE HIGH COURT

5th Respondent

THE ATTORNEY GENERAL

6th Respondent

Neutral Citation: *Thabsile Thandeka Khoza vs Khanyisile Bonisiwe Makhanya and Others (11/2018) [2018] SZSC 57 (30TH November, 2018)*

Coram: DR B. J. ODOKI JA, J.N. CURRIE AJA AND
M. J. MANZINI AJA

Heard : 8th October 2018

Delivered : 30TH November 2018

Summary

Civil procedure – whether “beneficiary” has locus stands to bring action/motion proceedings against estate and nominated executrix - no Letters of Administration issued – effect thereof – raising of new issues or points of law for the first time on appeal – when permissible – appeal dismissed.

JUDGMENT

MJ MANZINI AJA

- [1] This is an appeal against a judgment of the High Court handed down on the 13th February, 2018 by Mabuza P J, dismissing an application launched by the Appellant.
- [2] In the Court *a quo* the Appellant instituted motion proceedings seeking the following relief:
- (a) Directing that the First and Fifth Respondents facilitate and give effect to the transfer of immovable property Lot No. 1661, Mbabane Township, Extension 13 into the names of the Applicant and First to Third Respondents within 30 days of grant of this order.
 - (b) Directing that the First and Fifth Respondents facilitate and give effect to the transfer of immovable property Lot No. 1661, Mbabane Township, Extension 13 into the names of the Applicant and First to Third Respondents within 30 days of grant of this order.
 - (c) Directing that the First Respondent pay to the Applicant a quarter (1/4) share of all monthly rental income received as rental income

from the period of July 2008 to July 2017 in respect of the leasing of immovable property lot No. 1661, Mbabane Township, Extension 13 within Seven (7) days of filing of the rental account.

- (d) Directing that the First Respondent immediately pay to the Applicant a quarter (1/4) share of all monthly rental income received from the leasing out of immovable property Lot No. 1661, Mbabane Township, Extension 13 on a monthly basis effective from the end of July.
- (e) Costs of suit in the event of opposition to the application
- (f) Further and/ or alternative relief.

[3] Only the 1st Respondent opposed the application, filed an Answering Affidavit, and raised preliminary objections which were upheld by the Court *a quo*. Hence, the appeal.

[4] The grounds of appeal as stated in the Notice of Appeal are as follows:

1. That the Honourable court *a quo* erred in law by holding that no person can institute proceedings on behalf of the estate except the Executor.
2. That the Honourable Court *a quo* erred in law in failing to direct that the First Respondent gives a full account of rental money

received from the leasing out of immovable property Lot No.1661, Mbabane Township, Extension on 13 despite the fact that the First and Second Respondents are responsible for the administration of the immovable property and collection of rentals in respect of the immovable property.

3. That the Honourable Court *a quo* erred in law in failing to direct under further and alternative relief and on the basis of fairness and equity that the First and Second Respondents pay into the Guardians Fund the rental proceeds received from immovable property Lot No. 1661. Mbabane Township, Extension 13, pending the winding up of the estate of the late Joice Sisana Dlamini.
4. That the Honourable Court *a quo* erred in law in dismissing the entire application on the basis of Points of Law which do not vitiate all the prayers and relief sought in the Notice of Motion, namely; prayer 2 of the Notice of Motion.

Brief Summary of the facts

[5] This is a brief summary of the facts as they appear from the Record:

- 5.1 The Appellant instituted proceedings in the Court *a quo*, and described herself in the Founding Affidavit as a “*beneficiary in the Estate of the late Joice Sisana Dlamini*”;
- 5.2 She cited the 1st Respondent as “*a beneficiary as well as the executor dative in the estate of the late Joice Sisana Dlamini*”;

- 5.3 The 2nd and 3rd Respondents were also cited as “*beneficiaries in the said estate*”;
- 5.4 The “*Estate of the late Joice Sisana Dlamini*” was also cited as the 4th Respondent;
- 5.5 The Appellant alleged that the only asset in estate of the late Joice Sisana Dlamini was certain immovably property described as Lot No. 1661, Mbabane Township, and Extension 13;
- 5.6 She further alleged that upon the winding up of the estate the immovable property was to be transferred into her name, as well as those of the 1st and 3rd Respondents as per a document she referred to as “*the estate liquidation form and distribution account*”;
- 5.7 She further alleged that the 1st Respondent had been “*in charge of the immovable property and since the death of our mother and continues to be solely responsible for its administration*”;
- 5.8 The Appellant also alleged that “*since July, 2008 the immovable property had been leased out consistently to various tenants*”, and that the 1st Respondent as administrator of the immovable property was solely responsible for collecting monthly rentals;
- 5.9 Based on the above allegations the Appellant claimed that she was “*legally entitled to a pro rata equitable share of a quarter (1/4) of the proceeds from the monthly rentals paid by the tenants to the 1st Respondent*”; and “*equally entitled to a pro rata share of monthly rentals from the immovable property moving forward and effective as at the end of July, 2017*”.
- 5.10 The Appellant also alleged that she was entitled to an order directing the 1st and 5th Respondent to facilitate and give effect to the transfer of the immovable property in question.

5.11 In answer, the 1st Respondent dealt with the merits and raised the following preliminary objections:

5.11.1 That the Appellant (as applicant) lacked *locus standi*, as she had failed to state the basis on which she claimed to be a “beneficiary”. Furthermore, that she failed to state whether she was an intestate heir, or a legatee, or that she was a beneficiary in terms of Liquidation and Distribution Account approved by the Master of the High Court (5th Respondent), as no right vests in any heir or legatee until such approval;

5.11.2 That she herself (1st Respondent) lacked *locus standi* to be cited in the proceedings either as an executrix, as Letters of Administration had not yet been issued in her favour, or as beneficiary;

5.11.3 That the immovable property in question did not vest in the estate; and

5.11.4 That the Applicant lacked *locus standi* to apply for an order that an account be rendered, or that payments of a portion of rentals be made to her.

[6] In her concise judgment, Mabuza JP ordered “that the points of law are upheld” and dismissed the application. In fact, she only dealt with and upheld one point of law, that is with respect to the lack of *locus standi* to sue an estate or to bring proceedings on behalf of an estate where no Letters of Administration have been issued. Her reasons, and the authorities relied upon, are set out in the judgment. It is not necessary to deal with all the reasons, as they were conceded by counsel for the Appellant in his oral address. During his address, however, Mr Tengbeh changed tune and argued that a beneficiary has *locus standi* to bring an

action directed at safeguarding the interest of an estate, where necessary. He submitted that in terms of Section 41 of the Administration of Estates Act, 1902 every person who is not an executor and who was in possession of property belonging to an estate, had a duty to account to the Master of the High Court.

- [7] The 1st Respondent, so the argument went, was under a legal duty to account to the Master of the High Court for the rentals she had all along been collecting. We were urged to find that just as Mabuza J P had issued an order directing the Master, as 5th Respondent, to immediately issue Letters of Administration to the 1st Respondent, an Order which was not prayed for, she could, and should have, issued an Order that the 1st Respondent should account to the Master under the prayer “further and/or alternative relief.”
- [8] In my view, this argument cannot be sustained. When pressed by the court Mr Tengbeh conceded that the argument was not raised in the papers serving before the Court *a quo*, nor was it raised in oral arguments. Therefore, it was not determined by the Court *a quo*. On what basis then, can this court fault the Judge *a quo*? **In BBX (Pty) Ltd vs Muzi Wandile Leander Hlatjwayo N.O. and 3 others (61/2014) [2015] SZSC 32 (9 December 2015)** this court dealt with the requirements for raising new issues or points of law on appeal. These requirements are underpinned by the general rule that the duty of an appellate court is to ascertain whether the court below came to a correct conclusion on the case submitted to it. Thus, if a legal point or issue was neither raised nor argued in the court below, nor raised in the pleadings, to allow argument on it for the first time on appeal, in all probability, translates into unfairness to the opposing party. Hence, Mr Mamba’s (counsel for the 1st Respondent) objection to the new argument based on Section 41.

[9] For the reasons stated above, the new issue or argument raised by the Appellant cannot be sustained, and the court hereby dismisses it.

[10] In the circumstances I hereby make the following order:

1. The appeal is dismissed with costs.

M J MANZINI

ACTING JUSTICE OF

APPEAL

I agree

DR B J ODOKI

JUSTICE OF APPEAL

I agree

J CURRIE

**ACTING JUSTICE OF
APPEAL**

Counsel for the Appellant : Mr F. Tengbeh

Counsel for the 1st Respondent: Mr L. R. Mamba

