

In the matter between:

RUTH NANA HLATSHWAYO

Applicant

and

AGNES MAGAGULA

Respondent

CORAM:

DUNN, J.

FOR APPLICANT

MR. SHILUBANE

FOR RESPONDENT

MR. NXUMALO

JUDGMENT 05/05/89

Dunn, J.

The respondent in this matter is the executrix in the estate of the late J.S.F. Magagula. The applicant is the natural mother and legal guardian of two minor children born out of wedlock with the late J.S.F. Magagula. In January, 1985, the applicant (as plaintiff) issued summons claiming payment of the sum of E9.375 as maintenance for each of the minor children against the deceased's estate. The action was defended and was eventually set down for trial on the 30th June, 1988 when the following order was granted by Hannah, C.J.

"By consent it is ordered that:

- (i) the defendant pays to the plaintiff the sum of E16,645.00.
- (ii) this order is not to be enforced without leave of the court. Liberty to the plaintiff

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to apply for such leave on seven days notice to the defendant if satisfactory arrangements for payment are not agreed between the parties.

- (iii) the defendant pays the plaintiff's costs of the action.

The parties have failed to reach agreement and by notice dated 7th March 1989 the plaintiff applied for an order in the following terms-(a) that the applicant be given leave to execute any of the immovable property in the estate of the late Jonathan Siphso Felisizwe Magagula in terms of the rules of court.

(b) costs of the application.

The application is opposed by the respondent who has set out in some detail, arrangements she states she is making to meet the claim. The respondent sets out that the estate does not have any cash and that she has had to sell two properties of the estate in order to settle most of the claims against the estate. She states "I have not ignored the applicant's claim. I now intend to transfer the one property of the estate into the names of the children of the deceased with myself. This property is certain Remaining Extent of Portion 171 of Farm Dalriach measuring in extent 8,3500 hectares. This property is bonded to Swazi Bank for an amount of E81,000.00. I have reached an agreement with Swazi Bank that the children can take over the property together with the loan and Swazi Bank will agree to a sub-division of the property provided some of the proceeds are used towards reducing the

amount

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owing on the property. The property is big enough and two or three sub-divisions can be made and the proceeds from their sale will realise sufficient monies to settle the claim of the minor children." The respondent concludes as follows-

"To execute against the immovable property will prejudice the inheritance of the children of the deceased who might end up losing if the property is sold in execution. In any event the price at which the property may be sold may not realise sufficient cash to settle the bank's claim and the claim of the applicant."

The applicant points out in her replying affidavit that the respondent has not indicated how the other immovable property in the estate has or will be dealt with. She further points out that the arrangements suggested by the respondent are "fraught with uncertainty and will take a long time to complete before the proceeds from the proposed sale of the sub-divided portions are received."

The respondent has not indicated what claims, if any, there are still outstanding against the estate. It is, however, not disputed that there are sufficient assets in the estate to meet the applicant's claim.

The respondent's proposed method of settling the claim is not acceptable to the applicant and I can see no reason why the applicant should be denied the relief she seeks.

There are sufficient assets in the estate to meet the maintenance requirements of the legitimate minor children of the deceased and the applicant is entitled to have her claim settled before the payment of legacies and inheritances is made from the estate. See Meyerowitz, THE LAW AND PRACTICE OF ADMINISTRATION OF ASSETS, 5th ed.309 and the authorities there referred to.

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The application is granted as prayed.

B. DUNN
JUDGE.