



**IN THE HIGH COURT OF SWAZILAND**

Case no. 172/2012

In the matter between:-

**ZANDILE DLAMINI**

**Applicant**

and

**SIKHUMBUZO MUSA ZONDO**

**1<sup>st</sup> Respondent**

**THE MASTER OF THE HIGH COURT**

**2<sup>nd</sup> Respondent**

**Neutral citation:** *Zandile Dlamini v Sikhumbuzo Musa Zondo & Another* (172/12) [2013] SZHC264 (26<sup>th</sup> November 2013)

**Coram:** HLOPHE J

**Date Heard:** 12/10/2012

**Date Delivered:** 26/11/2013

***Summary:***

*Civil law –Administration of Estates – Application for an order inter alia revoking the first respondent’s appointment as an executor as well as*

*interdicting the sale and alienation of the immovable property involved – Whether case made for the relief sought – Applicant and first respondent together with other three are all siblings born of their deceased mother whose estate is now disputed – First Respondent now selling a house as executor and claiming from proceeds reimbursement for improvements allegedly effected on the property – Applicant contending that claim is overstated and whole scenario poses a conflict of interest for the First Respondent who can no longer realistically perform his duties as an executor, who is impartial – Court finds there is a conflict of interest sets aside sale in execution and nullifies first Respondent’s appointment.*

## **JUDGMENT**

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- [1] Applicant and First Respondent together with five others are beneficiaries in the estate of their late mother one Thokozile Dinah Dlamini. The estate aforesaid has as one of its properties or assets, an immovable property fully described as plot No. 2584, Zone 6, Mahwalala, Hhohho District.
- [2] It is common cause that after the death of the said Thokozile Dlamini her beneficiaries who included the Applicant and first Respondent as well as the husband of the said Thokozile Dlamini and the other children of the deceased, signed a distribution agreement in terms of which it was allegedly agreed they would all own the immovable property in question in equal and undivided shares, as their home. It is further not disputed that at the time the immovable property concerned

consisted of a stick and mud house. Whilst it is common cause that the said immovable property was subsequently improved with a three bed room house and a car port being built, it is in dispute as to who did so. Whereas the first Respondent wants to say he was the one to have effected the improvements and financed same, the Applicant disputes this and avers that the improvements were funded by the first Respondent together with his other siblings, particularly Nelsiwe Dlamini and Zwelithini Dlamini.

- [3] It is not in dispute that when the improvements on the property were effected, the first Respondent was staying there on whilst the Applicant was staying at her marital home.
- [4] She had to later to leave the matrimonial home and go back to her maternal home, where the first Respondent stayed. Their relationship later deteriorated which led to the first Respondent leaving the said homestead, to stay elsewhere. He returned later, and in exercise of his powers as an executor, he then prepared a liquidation and distribution account of the estate of their late mother Thokozile Dlamini. He put the immovable property for sale at a sum of E340 000.00. This amount is the one that was supposedly meant to be shared. In fact the property concerned was the only asset on the liquidation and distribution account.
- [5] The liquidation and distribution account alleged that the improvements effected on the property by the first Respondent amounted to a sum of

E228 384 .00. He had provided in the liquidation account drawn by him for the payment to him of the said sum. The other estate liabilities were the normal ones which include the executor's remuneration and the taxing master's fee.

[6] The effect of this liquidation and distribution account meant that the Applicant and her other siblings would now have no place to call a home given that the property was put up for sale, which was advertised in one of the local newspapers. Nothing is however being said about the Distribution Agreement concluded by that beneficiaries in the Estate of the late Thokozile Dlamini who had allegedly agreed that same was to continue to be owned by all the said beneficiaries in equal undivided shares.

[7] In view of the fact that the first Respondent as executor prepared the Liquidation and Distribution Account in which he is the only creditor, for a huge amount in support of which there is no documentary proof of expenditure other than an affidavit deposed to by himself, the Applicant instituted the current proceedings seeking *inter alia* orders of this Court revoking the first Respondents' appointment as executor on the contention that he was seriously conflicted. There was also sought an order that in the interim the Master of the High Court, takes charge of the estate. Another order sought was the one interdicting the Respondent from selling the immovable property concerned.

[8] In response to the application the first Respondent opposed it. It was contended in the main application that there was no basis for the allegation that the first Respondent was conflicted because he was appointed executor after his interest as a creditor in the estate was already known. As for the sale of the property, it was contended that that is the natural consequence of liquidating estates and it was all about realizing the assets. The first Respondent contended further that the affidavit filed was a recognized method of proving a claim in estates.

[9] I have noted of my own that despite the allegations being made by common cause that there was signed a distribution agreement between the parties, none of the parties seemed inclined to raise the issue and divulge more on its fate. This has prompted me to approach the matter as though the said agreement is not there as it seems that is how the parties wish to have the matter dealt with. I say this because I did not hear anyone informing the Court on why the alleged Distribution Agreement was not being enforced or even when and how it ended up not being of any force.

[10] According to section 84 of the Administration of Estates Act 28/1902:-

*“84. Every Executor, tutor or curator 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.”*

[11] It is not in dispute that in view of the first Respondent's being the only creditor to the estate at so huge an amount in the estate, there is an apparent conflict of interest, particularly if one considers the claim by the first Respondent had not been proved. The question is whether such apparent conflict does justify the order revoking first Respondent's appointment as an executor.

[12] It seems to me that in the matter at hand there can be little doubt that the first Respondent's position as a creditor to the estate makes his job as an executor untenable in my view. It makes it worse that the claim has not been proved by the first Respondent as opposed to him merely relying on an evaluation report. It seems to me that he would be entitled to the amounts concerned in the manner he is doing where he can prove the claim through the production of receipts and vouchers. Otherwise if his claim is not reimbessive, then it is damages which I think he needs to have proved in Court and its true value confirmed in terms of a judgment by the Courts. Since there is no such it seems to me that only a deligent and unconflicted person can act and be seen to be so doing in the interests of the estate.

[13] I therefore cannot see how the first Respondent can avoid being removed from the post of executor so as to enable him pursue his interests in the

estate both as a claimant and as a child to the deceased as he would be required to prove his said claim.

[14] In order for this exercise to be realized it seems to me that the best that needs to be done is to set aside the intended sale and direct that the entire process of winding up be commenced *denovo* before an independent and neutral person, which should include clarity on the Distribution Agreement allegedly concluded by the parties including the effect of the agreement on the ability of the Executor to claim a refund by approaching the Master as opposed to going to Court.

[15] That being the case I am of the view that the Applicant's application succeeds and I accordingly make the following order.

(1) The sale of the immovable property forming the subject matter of these proceedings be and is hereby set aside.

(2) The first Respondent's appointment as an executor be and is hereby revoked and set aside.

(3) Pending the appointment of an appropriately qualifying person in all respects of the matter, as executor of the Estate of the late Thokozile Dinah Dlamini the 2<sup>nd</sup> Respondent is directed to take charge of the estate.

(4) The costs are to follow the event.

**Delivered in open Court on this.....day of November 2013.**

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**N. J. HLOPHE  
JUDGE – HIGH COURT**

**For the Applicant:** Mr. S. Mdladla

**For the 1<sup>st</sup> Respondent:** Mr. M. E. Simelane

**For the 2<sup>nd</sup> Respondent:** No appearance