



IN THE HIGH COURT OF ESWATINI

CASE NO. 1084/2022

In the matter between:

Nondumiso Babhekile Mamba (nee Simelane)

Applicant

And

Dumile Vilakati

1st Respondent

Veterinary Officer Mkhokhi area Siphofaneni

2nd Respondent

Master of the High Court

3rd Respondent

Eswatini Royal Police

4th Respondent

Attorney General

5th Respondent

**NEUTRAL CITATION : Nondumiso Babhekile Mamba And Dumile Vilakati
(1084/2022) SZHC - 255 (10/11/2022)**

CORUM: BW MAGAGULA J

HEARD: 30th September 2022

DELIVERED: 10th November 2022

Summary:

Civil law- Administration of Estates Act of 1902- urgent application by executor ordering the veterinary officer to transfer livestock registered in the name of the deceased at the dipping tank to her own dipping tank number–points of law of urgency taken- also points of law of disputes of facts.

Considered –disputes of fact must be material and relevant to the determination of the issue at hand. The dispute in respect of the marital status and the ownership of the homestead is no barrier for the determination of the prayers sought; which is for transferring the goats to the executor to enable her to wind up the estate of the deceased in terms of the Administration of the estates Act.

Held Further: Applicant has raised the issue of universal partnership prematurely. She has jumped the gun. The executor is expected to publish as part of her duties, a notice calling upon debtors and creditors to lodge claims against the estate. Application granted with costs.

Judgment

Background facts

[1] This matter pertains to an unfortunate family feud like it so often happens when a man dies interstate, leaving more than one wife and assets. As we have now and again

seen in our Courts from time immemorial. It happens more often than not, that the assets of the late husband become the subject of litigation between the wives and their respective families.

[2] This is also what happened in this case when the late Sizwe Pollen Mamba passed away on the 5th of January 2022. He had two homesteads. One at Engculwini area in the Manzini District and another one at Mkhaya area in Siphofaneni. Although the status of Dumile Vilakati, as a wife to the deceased is in dispute. What is not in dispute is that the deceased was the head of both homesteads which are both situated in Swazi national land. The Applicant is resident on the one at Engculwini and Dumile Vilakati is resident on the one at Mkhaya.

[3] The Applicant is the Executor of the deceased Estate, having been appointed by the 3rd Respondent on the 10th June 2022 under Estate file Number EM33/2022.

[4] The Applicant is before Court seeking an order that the 1st and 2nd Respondents be directed to deliver and transfer to her, in her capacity as an executor 55 goats registered in the deceased name from Cota dipping tank No. 930 Kraal No.70 to Ntabamhloshana dipping tank No.334 kraal No.180.

[5] The Executor has also prayed for an order that if the Respondents fail to comply, the Sheriff of the Court be authorized to attach and remove the 55 goats from whosoever is in possession of same and deliver them to her forthwith.

[6] The Executor also seek that the Court orders and directs members of the Royal Eswatini Police, particularly those based at Siphofaneni Police station, to assist the Sheriff of the Court in the execution of the Court order.

[7] The Application is opposed by the 1st Respondent. She has not only filed an answering affidavit to the merits, but she has also raised preliminary points of law.

The points in limine

Lack of urgency

[8] The 1st Respondent has raised a point of urgency where she argues that the matter is not urgent, if there is any urgency it is self-created by the Applicant. The Applicant is alleged to have been aware since on or about the 5th January 2022 that the goats she claims belong to estate of the late Sizwe Pollen Mamba were in the possession of the 1st Respondent and that she has the legal right and title over them by virtue of the fact that she contributed towards their acquisition. 1st Respondent is alleged to have contributed towards the acquisition of the said goats through a universal partnership as she has been staying together with the deceased as husband and wife since the year 2014 till the death of the late Sizwe Pollen Mamba.

[9] It appears that the above point of law was dealt with by his Lordship Justice Maphanga on the 17th June 2022 when the matter first appeared before him. I will not over play this legal point any further.

Disputes of fact

[10] It has also been argued that the Applicant's application is riddled with glaring disputes of fact, which were obvious to the Applicant at the time of launching the current proceedings. Such disputes of fact cannot be ventilated before Court on the papers alone. The disputes are alleged to be the following;

10.1 All the goats in question belong to Estate Late Sizwe Pollen Mamba. It is also contested that they are 55 in number. When the Applicant allegedly procured the stock removal permit she allegedly did not confirm the number of the goats from Cota dipping tank. It is submitted that the aforesaid goats are owned jointly by the late Sizwe Pollen Mamba and the 1st Respondent.

10.2 The ownership of the homestead situated at Mkhaya area under Chief Mawandla Gamedze, Indvuna Mtsetseleni Simelane is disputed. The 1st Respondent disputes that the home belongs to the Applicant but she alleges that the home belongs to her.

[11] The 1st Respondent argues therefore, that the matter is clouded with serious disputes of fact, which are material and were foreseeable to the Applicant at the time she launched this application. In the premise, the 1st Respondent argues that the Applicant's application ought to be dismissed with costs.

[12] I now discern to consider the above point of law and ascertain if it has merit. The legal position is so far as the question of disputes of facts has been traversed on a number of decided cases and text books. The learned authors **Hebstein and VanWinsen** in their

text book the Civil Practice of the Supreme Court of South Africa, 4th edition at page 34 where the position of the law is stated as follows;

“It is clearly undesirable in cases in which facts relied upon are disputed to endeavor to settle the disputes of fact on an affidavit. For the ascertainment of the true facts is effected by the trial judge on consideration not only of probability, which ought not to arise in motion proceedings but also of credibility of witnesses giving evidence viva voce. In that event, it is more satisfactory that the evidence should be led and that the Court should have the opportunity of listening and coming to a conclusion”.

See also Mbhekwa Mthethwa N.O Vs Winile Dube and 4 others case no 79/2021.

[13] I will now turn to consider if in the matter at hand, the facts alleged to be in dispute are material, as to render the matter irresolvable¹. The Applicant is before the Court armed with “annexure E” which is annexed in her founding affidavit. This annexure is a stock removal permit which was issued under the hand of a government department of the Kingdom of Eswatini, with a specific permit number being 168668. The permit states clearly that it is a permission which is granted under the **Diseases of Livestock Regulations (chapter 95) of the laws of Swaziland 1951 as amended**. The permit clearly states that it is granted to Mrs Nondumiso Babhekile Simelane who happens to be

¹ In the matter of Elizabeth Mbhedvose Shongwe v William Mngumane Magagula Civil Case 1376/2006; this Lordship S.B Maphalala discussed a point of law in respect of a dispute of facts on the basis that it was not material to resolve the matter. See also Didabantfu Khumalo vs The Attorney General-Appeal Court Case No.31/2020 and Hlobisile Maseko (Nee Sukati) and others vs Sellinah Maseko (nee Mabuza) and others case No.3815/2010

the Applicant in the matter before Court. It grants her permission to move not more than 55 goats from Cota TA 930/70 dipping tank in the name of Mr. Sizwe Pollen Mamba.

[14] This stock removal permit was not issued by the Applicant, but it was issued by an authorized issuing officer representing the government of the Kingdom of Eswatini. The veterinary officer could not have issued a stock removal permit for 55 goats without having satisfied himself that there are 55 goats registered in the name of Sizwe Pollen Mamba in the government register of livestock. Even if it is disputed, it is not a material and substantial and real dispute as to prevent the Court from deciding the matter. Even if I would entertain the argument that for whatever reasons the goats may not be 55 in number as stated in the permit, but that is no barrier for the determination of the matter. The quantity of the goats cannot intercept their transmission to the Applicant. If there are less than 55 goats available and the Court is inclined to grant the order, whatever number of goats is available can be transferred to the executor as part of her responsibilities in terms of the Administrations of Estates Act of 1902. The accuracy of their quantity in my view, cannot forestall the adjudication of the entire application.

[15] Annexure D as well, points to the direction that the number of goats at least at the time the Applicant instituted the current proceedings were ascertainable. This annexure is a letter authored by the Master of the High Court, addressed to the Director of Veterinary services, Ministry of Agriculture. Where the Master was authorizing the transfer of the 55 goats to the Applicant Therefore the inaccurate number of goats available, could not have been foreseeable to the Applicant at the time she launched the application. It was reasonable for her to assume they were 55. Therefore, the argument by the 1st Respondent that, such a dispute of fact was foreseeable, is clearly unfounded in the circumstances.

[16] The 1st Respondent also contend that the Applicant should have known that there is a potential dispute with regard to the ownership of the goats, by virtue of the universal partnership. She argues that she also contributed to the existence of the goats. In my view, that cannot be a basis of raising a point in limine. This argument constitute a defence to the merits. It is a version of the 1st Respondent to the merits of the application. To say such facts were foreseeable at the time she launched the affidavit is farfetched. How could it have been foreseeable to the Applicant at the time she launched the application what the 1st Respondent's defence would be? Therefore, the existence of a universal partnership cannot constitute a valid legal point. The argument actually addresses the 1st Respondent's response to the merits of the Applicant's application.

[17] It is therefore my considered view that this *point in limine* must also fail.

[18] The dispute as to the ownership of the homestead at Mkhaya area is also not material and a real dispute of fact which can avert the determination of the prayers sought by the Applicant. The Executor only wants the goats to be transferred over to her not the home. Again I find that the dispute as to who owns the home is not real and substantial for the determination of the matter. It must also fail.

MERITS

[19] The 1st Respondent's version is that she met the deceased in March 2014, wherein she fell in love with him and that marked the beginning of a love relationship. In the year 2018, it is alleged the deceased proceeded to ask for her hand in marriage. He subsequently paid an amount E 16 000.00, in lieu of four cattle that her family had asked.

[20] It is also submitted by the 1st Respondent that on the 8th November 2018 the deceased together with 1st Respondent approached the Vikizijula Royal Kraal at Phonjwane, wherein they jointly requested and acquired a piece of land to build their home. This process of acquisition is known as Kukhonta. It is alleged the Umphakatsi proceeded to perform the customary ritual of Kubopha Lifindvo and the 1st Respondent and the deceased established their homestead. It is this very home that the Applicant is now somehow mistakenly or by design considers to be her home. So argues the 1st Respondent.

[21] The 1st Respondent further submits on or about June 2019 together with the deceased, they proceeded to build their homestead on the aforesaid land and that she contributed towards this construction through a loan which she acquired from a financial institution. In August 2019 they moved into their new home.

[22] The 1st Respondent in relation to the issue at hand, being the goats concedes that the goats are registered in the deceased name. However, that was done in the contest of the deceased being the head of the family. The 1st Respondent emphasizes that the goats and chickens were jointly acquired through joint effort. She is the one who was always present at the aforesaid homestead. She is the one who attended to looking after the livestock with the aid of a herdsman. The deceased was not permanently resident at their home.

[23] The 1st Respondent also submits that the goats are approximately 43 in number. She has further alleged that some goats stray and get lost and some get stolen, some die due to sicknesses.

[24] The 1st Respondent therefore contends that the aforesaid goats do not form part of the deceased's Estate, instead the Estate has a claim against her to the extent of the deceased's share in light of the joint ownership.

[25] In her reply, the Applicant in essence argues that the whole issue of the status of the 1st Respondent being a wife, either through processes of Swazi Law and Customs or through universal partnership should not form part of the determination of this matter as it will be dealt with according to the Swazi Law and Custom not by this Court. Predominantly, the Applicant is before court in her capacity as an executor not in her personal capacity as a wife. She is mandated to take custody of all assets belonging to the deceased and subject them to the processes set out in the Administration of Estates Act.

[26] The Applicant also argues that in as much as the contention of the 1st Respondent being a wife are not relevant at this stage. It is telling though that the 1st Respondent is conversant that she is not a wife. When the meeting of the next of kin was convened at the Master of the High court offices, she was not in attendance. The Applicant argues that this is because she knows that she is not a next of kin of the deceased. She failed to even provide this Court with tangible evidence that she is a wife.

[27] I will now proceed to adjudicate on the merits of the matter. The Administration of Estates Act of 1902 enjoins any Executor to take

possession of the assets of the deceased, as part of her duties of winding up the estate as set out in the Act². The Applicant is before Court in her official capacity as an executor to enforce exactly that. The kind of defence that has been mounted by the 1st Respondent can still be pursued when she enforces her right as a wife as she has alleged. It is open to her to make a claim to the executor for her share if she so wishes. Prima-facie, documents before Court, point to the direction that the deceased is the owner of the goats. Hence, the Executor is entitled to take charge and custody of same. The permits issued by the Veterinary Officer clearly indicate that the goats are in the name of the deceased. Whatever claim that the 1st Respondent can have being her contribution in terms of labour and whatever she contributed in the acquisition of the goats can be pursued through a claim. The administration of Estates Act provides for any other person who has a claim against it to lay the claim with the executor within the time frame stated in the notice³.

[28] In the decided case of **Gregory Archibald Newell v Sphesihle Sharon Malaza (40/2017) [2017 SZSC 54]** also quoted in with approval in the matter of **Lungile Hotencan v the Master of the High Court and seven others (1537/2018 [SZC157]**

The Supreme Court Set out the legal requirements for the existence of a universal partnership to be as follows;

a) *Each of the partners must contribute something towards the partnership, either in cash or in kind. An example of a contribution in kind is labour or skill*

² See Section 41 of The Administration of Estates Act of 1902.

³ See Section 42 (1) and (2) of The Administration of Estates Act of 1902.

- b) *The business should be carried out for the benefit of both parties*
- c) *The object should be to make profit*

[29] Although in the dicta of the judgment his Lordship MCB Mapalala CJ through the following informing captioned “ **....the contribution of the parties should not be confined to a profit making enterprise , any activity or effort made by a party in promoting the interest of both parties in their communal enterprise should be considered. This should include both commercial enterprises as well as non-profit making activities of their family life for which that party has taken responsibility in contributing to that vision and mandate of the enterprise”.**

[30] One of the pillars on which the 1st Respondent argues is that it is inconceivable that the goats should be taken away from her custody and possession, into the custody of the Applicant with the hope that the 1st Respondent will then at a later stage claim against the deceased estate and become a creditor.

[31] In other words the 1st Applicant is of the view is that in an as much as the goats are registered in the name of the deceased, the claim should be logged the other way round. It is the estate that must make a claim with her for the half share of the deceased’s goats.

[32] I do not have any issue in so far as the law is concerned on the question of a universal partnership. The 1st Respondent is correct however it is the

application of same to the facts of the matter at hand that appears to me to be inaccurate. In my view the first Respondent is jumping the gun, the Administration of Estates Act is clear on what should happen once a deceased die. The executor must take custody and possession. The correspondence that is before Court being the letters of administration, the letter is written by the master to the Ministry of Agriculture telling that that process is already in motion. That does not stipulate that any person is entitled to hold on the assets of the deceased on the basis of the fact that she was in universal partnership with the deceased. In my view if the assets are registered in the name of the deceased then she is entitled to motivate her claim of the universal partnership to the executor who in law is entitled to take charge of the deceased's assets and follow the process as set out in the Act in terms of distributing those assets including distributing the assets to people who hold a valid right of a universal partnership.

[33] The 1st Respondent's counsel has cited copiously from the decision of the Lungile Gamedze (Supra). However, what the 1st Respondent did not manifestly highlight before Court is that the litigation in that case happened after the claim had been filed at the Master of the High Court. It is the decision of the Master that was being contested, the wife in that matter did not try to interfere with the functions of the Executor.

Conclusion

[34] Due to the foregoing I have come to the conclusion that the Applicant is an Executor duly appointed as such in terms of the administration of Estates Act 28/1902 as such she must be allowed to carry out her duties as fully set out in

section 11, 12&13 of the said Act. The 1st Respondent has recourse in her alleged capacity as a core owner of the goats to lodge a claim once same has been advertised by the Applicant, whereby in terms of the Act the Applicant is obliged to publish an advertisement calling on debtors and creditors if the estate to lodge their claims, she will also do so if she is able to prove her partnership, she will accordingly be provided for in the liquidation and distribution account.

ORDER

- 1) The 1st and 2nd Respondents are directed and ordered to forthwith deliver to Applicant and to transfer to her in her capacity as an Executor under file number 33/22; 55 goats or whatever number available as per the government register appearing in the deceased's name from Cota dipping tank no. 930 Kraal Number 70, to Ntabamhloshana dipping tank No.334 kraal No.180.
- 2) That failing compliance with prayer one above, the Sherriff of the Court be authorized to attach and remove the 55 goats or whatever number lawfully available from the register kept by 2nd Respondent from whosoever is in possession of the said goats and deliver them to the Applicant forthwith; and
- 3) Ordering and directing the members of the 3rd Respondent particularly the Siphofaneni police officers, to assist the Deputy Sheriff of Court by

ensuring that there is compliance from 1st and 2nd Respondent and whosoever is in possession of the 55 goats or whatever number that is available.

4) That the 1st Respondent be ordered to pay costs of suit.

B.W. MAGAGULA
JUDGE OF THE HIGH COURT

FOR APPLICANT:

M. MTHETHWA

(B. J. SIMELANE ATTORNEYS)

FOR DEFENDANT:

T. SIBANDZE

(RODRIGUES ATTORNEYS)