

SWAZILAND HIGH COURT

MUIR WINNIE

Applicant

Vs

MASTER OF THE HIGH COURT OF SWAZILAND

1st Respondent

DLAMINI S.C. NO

in his capacity as executor dative

in the estate of the late Robert Martin Muir

2nd Respondent

MUIR Gary

3rd Respondent

MUIR Diana 4th Respondent

MUIR Richard 5th Respondent

MUIR Melanie 6th Respondent

Civ. Case No. 3031/2000

Coram

Sapire, CJ

For Applicant

MR. SHILUBANE

For Respondents

S.C. DLAMINI

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JUDGMENT

My judgment in this matter was delivered in open court. Unfortunately the recording machine was unbeknown to me and to the operator not functioning properly at the time. No transcription of the judgment is accordingly available.

At the request of parties I am now repeating my reasons for the order which I made.

The applicant seeks the setting aside, reviewing and correcting of the Master's ruling dated 8th August 2000 in which the applicant's objection to 2nd respondent's first liquidation account in the estate of the late Robert Martin Muir was dismissed. The application is made in terms of Rule 53 and accordingly the notice of motion called upon the Master as 1st respondent to dispatch within 14 days of receipt of the notice of motion, the record of such proceedings sought to be corrected reviewed and or set aside with reasons as he may by law be required to make and to notify the applicant that he has done so. The applicant also asks for the costs of the application.

In the founding affidavit the applicant after describing the parties has recited that the 2nd respondent in his capacity as executor dative in the estate of the late Robert Martin Muir prepared a first liquidation and distribution account in the estate and filed it with the 1st Respondent on the 2nd August 1999. A copy of the account is annexed to the founding affidavit.

The applicant objected to the account and her objection is annexure "WM3" to the founding affidavit. In it a number of matters are raised. I will not at this stage deal with them as the grounds for review. A number of issues that, although mentioned in the letter of objection, are not persisted in as grounds for review.

The Master called on the 2nd respondent to comment on the objection and the respondent in due course filed his comments. This exchange comprises annexures "WM4" and "WM5". The Master thereafter invited the applicant to reply to the 2nd respondent's comments, which she did in annexure "WM6".

The 1st respondent did not immediately make a ruling on the objections and it required an order of this court to obtain satisfaction from him in this regard. The 1st respondent filed his ruling on the 8th of August 2000 only after a third application had been made requesting the court to make a ruling on his behalf.

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The first ground, on which review is sought, is that the respondent was biased against the applicant in dismissing her objection in that he considered irrelevant considerations by claiming that the applicant was seeking maintenance from the estate for her children Ryan and Natasha when in fact they were not staying with her.

This ground is not a ground for review. It is for the applicant herself to make the claim on the estate if necessary going to court so to do. It is up to the executor to admit the claim or to oppose it and if he chooses the latter course the matter will have to go to court. The question of whether or not the Applicant is, or her children are entitled to payments in respect of maintenance is not one which the Master can determine.

The second point on which review is sought is that the decision by the 2nd respondent to sell the Mercedes Benz and Nissan LDV was grossly unreasonable. Whatever the case may be the fact is that the sales were concluded and as far as the account is concerned it reflects what was in fact done, whether done properly or not. It is not possible at this stage as far as I am aware to set aside the sale or to require the account to be redrawn to reflect anything other than what had happened. If the executor has acted unlawfully, negligently or otherwise improperly a claim will lie against him for misadministration. This however is not a matter concerning the propriety of the account.

The third matter stands on a different footing. The 1st respondent's decision in allowing the 2nd respondent's fees of E35 000.00 is said to be grossly unreasonable. The applicant states that this is contrary to the tariffs set out in the schedule A of Act No. 28 of 1902 a copy of which was annexed to the papers marked WM9 for convenience. Under this heading the applicant also objects to the respondent's decision in allowing the 2nd respondent to claim the sum of E40 000.00 as legal fees. It is not clear as to the basis this amount is claimed upon. Bear in mind that the executor is himself an attorney he is not in law entitled to claim professional fees for legal services. This principle has been stated many times. It is not clear however in this case how the amount is arrived at or what it represents. To allow such an amount as a debit the amount should be specified and its legality demonstrated in the account. In this respect the Master's decision to dismiss the objection is to be set aside and he is to require the executor to specify all amounts claimed in this regard. This is to some extent foreseen in the Master's reasons but he did not follow through what he had stated and there is no suggestion that the executor had given any details as to the amount claimed in this regard. The application for review is accordingly allowed with costs, which are to come from the estate. The

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Master is to require the Executor to redraw his account so as to demonstrate his entitlement to all fees

claimed.

SAPIRE, CJ