IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1357/2005

In the matter between

KEVIN THEMBA CELE Applicant

And

THEMBA SOLOMON CELE 1st Respondent

THE MASTER OF THE HIGH COURT 2nd Respondent

Coram: ANNANDALE, ACJ

For the Applicant: Mr. M.E. Simelane

For the 1st Respondent: Mr. P.M. Shilubane

For the 2nd Respondent: No Appearance

JUDGMENT

6 OCTOBER 2005

[1] Following the death of the applicant's mother and the appointment of the first respondent, his father, as executor of her estate, a dispute arises between son and father as to the amount that the applicant has to receive as heir. He now seeks an order to compel his father, as executor, to pay him E84 378.74. His father, qua executor is cited in eo nomine and not nomine officio.

[2] Before turning to deal with the legal point that the first respondent raises, I briefly refer to the applicant's case as set out in his founding affidavit because it lies at the heart of the matter.

[3] He says that the first respondent was appointed as executor by the second respondent, the Master, and that he performed his functions, with the result that a Liquidation and Distribution account was submitted, approved and advertised without any objections being lodged. He then goes on to state that the account had "mathematical errors as it sought to distribute the estate amongst six dependants yet they are five."

[4] His father admits that such a mistake was made but goes on to say that the applicant did not lodge an objection as he could have done and then adds that he "...is not entitled to be paid the

amount claimed by him because it was not awarded to him in terms of the estate account." His remedy is said to be in having the account amended and approved by the Master whereafter he can claim his dues, held out to be E92 531.19 in toto and not El05 227.19 (being the claimed amount prior to factoring in the amount already paid out and receipted).

[5] To this, the applicant launches a vociferous attack in his reply, accusing his father of malicious fraud and his attorney of overcharging. His replying affidavit could very well be subjected to an application to strike out portions from it.

[6] The executor/father alleges various payments in kind, in lieu of cash, which if taken at face value is less than what is claimed to be due. No tender of the remaining balance is made and the applicant takes issue with this too, apart from denying such alleged payments in kind.

[7] Clearly no love is lost between father and son or applicant and first respondent. For the time being and due to the reasons below it is not necessary to delve into the details any further or to decide who is correct in which aspect.

[8] The legal point taken by the first respondent in limine is that the application ought to be dismissed on the ground that the other heirs or beneficiaries in the estate have not been joined and that they have a direct and substantial interest in the matter. A second point, raised from the bar during the hearing of the matter, is that Section 51 bis (10) of the Administration of Estates

Act, 1902 (Act 28 of 1902) provides that an heir can only claim from the estate on the basis of the distribution account and not as is now being done.

[9] The relevant parts hereof reads that:-

"If an account has lain for inspection as provided for in this Section and;

(a) no objection thereto has been lodged; or

(b) an objection has been lodged and the account has been amended ... and has again lain open for inspection...

(c) ...

the executor shall forthwith pay the creditors and distribute the assets among the heirs in accordance with the account..."

[10] The argument is that the applicant now claims an amount on basis of his own calculations and not an amount as per the estate account.

[11] To some extent this is valid. The applicant does not claim to be paid the amount that is stipulated in the distribution account as that which is due to him as heir but a different amount, albeit adjusted downwards to accommodate the amount already paid to him. He claims on the basis of a different method of calculation, to accommodate four children, and a child's share, a

fifth of the amount after the half share of the surviving spouse has been deducted. The account itself refers to a sixth share, not a fifth, as basis for calculating a child's share.

[12] The applicant did not lodge an objection against the account, as he could have done. His attitude seems to have been one of indifference until after the horse had bolted from the stable.

[13] In his papers he says that he "...trusted (his) father to deal with the estate in a fair and truthful manner, so much that (he) did not bother to even go to the Master's Office when he distributed the assets of the estate."

[14] In Meyerowitz on Administration of Estates - Estate duty on capital transfer tax, 6th edition June 1993 at para 18.2 the learned author, with reliance on what Centlivres JA held in CIR v Estate Creeve 1943 AD 656 at 692, deals with such claims as the present.

"In cases on interpretation of wills, South African courts frequently say that when bequests are made to a legatee the legatee acquires a real right in respect of such a bequest or that the bequeathed property would pass under the will which takes effect on death (Rosenburg v Dry's Executers 1911 AD 679). Again, where heirs are appointed, the dominium of the deceased's estate becomes vested in the heirs (e.g. Estate Cato vs Estate Cato 1915 AD 300-1). But this cannot mean that the heirs are vested with the ownership of specific assets in the estate, for what is vested in the heirs is the right to claim from the estate's executors at some future time, after confirmation of the liquidation and distribution account, satisfaction of their claims under

the account."

[15] Presently, the issue does not concern specific assets but money. Dies venit arise when the account is confirmed. The applicant claims that the executor must now pay him, not in accordance with the account but according to his own calculation, based on a different factor of division. He did not lodge an objection to the account when he could have done so, prior to confirmation. The applicant has not come to court to seek an order to compel the distribution account to be referred back to the Master, to direct a re-calculation thereof. His claim, according to Meyerowitz supra, is otherwise limited to compel the executor to distribute in accordance with the account, which account itself he now belatedly places under attack.

[16] Should the second point in limine in itself not be sufficient to carry the day, which position is not so found, the first point is decisive, that of non-joinder.

[17] It is common cause that the applicant is but one of the heirs. He has siblings who are entitled to the same share as his. None of them have been joined by the applicant, whose contention is that they do not have any direct and substantial interest in the matter.

[18] This contention is based on the assumption that they cannot yet claim their inheritances, as they are presently minors, until one day when they attain maturity; also that as minors, their best interests is best guarded by the first respondent as their guardian, who is also the executor.

[19] The fallacy of this argument is clear when the concession by the first respondent is considered, namely that he readily concedes to have made an error in calculating a child's share. He may well be their father and guardian, but he is also the executor of the estate, who despite having been checked by the Master, made a serious error, adversely affecting each of the minor non-joined children, by allocating a sixth share instead of a fifth share. However much the executor may have his minor children's interest at heart, they were each nevertheless deprived of a part of their inheritance in the distribution account, a prejudice that is more than merely theoretical. Sadly too, this is yet a further example of the absence of diligence in the office of the Master.

[20] Should the claimed relief be granted to the applicant as the only interested party apart from the first respondent, the claims of the other siblings may very well be affected. To uphold the argument that they cannot yet lay claim to their expected parts of the inheritance, as they are minors who must wait until they reach the age of maturity and they therefore have no real interest is an argument that cannot be sustained.

[21] If they cannot for some reason, which is not canvassed in the papers before court, already claim to be paid their share, then surely by the time they are minors no more the money they have legitimate expectations to will not be the same amounts as otherwise it could be. Put differently, dies cedit has already come and gone but when dies venit arrives later in time, it will be too late for them to change their positions. At least they must be given the opportunity

to take part in the matter before court, and challenge it if they so choose. They cannot simply be bypassed because they are still youngsters, deprived of the opportunity to make a meaningful choice of their own.

[22] Their present position is also more than an indirect commercial interest only. ABRAHAMSE & OTHERS vs CAPE TOWN CITY COUNCIL 1953(3) SA 855(C) at 859, as advanced by applicants attorney, is not an authority to exclude the other heirs from this matter due to such a limited interest. They have a legal interest too, to have their legitimate expectations to an inheritance protected. The law of intestate succession is clear and trite as to how it should be divided amongst the remaining spouse married in community of property and the children. A mere casual perusal of the distribution account prima facie shows that the errors are not limited to dividing child portions by six and not five.

[23] Without going so far as to give an unasked for determination of who is to get how much, this court is satisfied that the three minor children will end up with different amounts than what they presently are due to inherit, should the applicant now have his way, further that the amounts they are to inherit are different from that as calculated in the "approved" account.

[24] They do indeed have a direct and substantial interest in the matter and as such they should have been co-joined, even though they might still be minors and lack the capacity to litigate by themselves. In such cases, they have to be represented by an appropriate person.

[25] Under these circumstances, due to the reasons stated above, it is not necessary to entertain the merits of the application itself and the application is ordered to be dismissed in limine, with costs.

[26] It is further ordered that by copy of this judgment, which the Registrar is directed to forward to the Master forthwith, the Master be appraised of the problematic and contentious liquidation and distribution account, in order to take appropriate measures. Since only the founding papers have been served on the Master, ex facie the papers before me, copies of the answering and replying affidavits are also to accompany the copy of the judgment.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE