IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO: 341/08

In the matter between:

CENTRAL BANK OF SWAZILAND **Plaintiff**

AND

DAISY DUMSILE MTHETHWA **Defendant**

Bate of **bearing:** 18 **March 2009**
Date **of judgment:** **29 May, 2009**

Ms. **Attorney Z. D. Jele for the Plaintiff**
Mr. Attorney S. Dlamini for the Defendant

JUDGMENT

MASUKU J.

1] This is a summary judgment application with a difference.

It does not have the accompaniment of a *deja vu* feeling

about it. This is due to the unusual fact that liability for payment of the sum claimed by the Defendant is not denied. What is disputed though is the Plaintiffs right to claim payment of the amount in question using the instrumentality of the Court's process.

[2] The facts giving rise to this application are largely undisputed and they acuminate to this: The Plaintiff is the registered owner of landed property in Mbabane described as Farm Ban Fell No.629 which is adjacent to that of one Henry Vusani Mthethwa, now deceased. The latter's property is described as Portion 339 (a portion of portion 55) of Farm Dalriach No. 188. I shall henceforth refer to him as "the deceased". The Defendant, it must be mentioned, is cited in her capacity as the executrix dative of the deceased's estate.

[3] In March, 2005, the Plaintiff, duly represented by one P.P. Dlamini and the deceased entered into a partly oral and partly written agreement which if stripped to its bare bones was for the construction of a boundary wall along the common boundary of their aforesaid properties. The price for the same was E68 975.00, which was to be borne by both parties equally. It was agreed further that the Plaintiff would, however, pay the amount in full and would be reimbursed by

the deceased of his contribution. The work was undertaken and duly completed, culminating in the Plaintiff, as undertaken duly making payment to the agreed contractor. The Defendant has however, not reimbursed the Plaintiff as agreed.

[4] The Plaintiff, in the face of the non-payment, has sued out summons for payment of E34 487.50 against the Defendant, being the extent of the Defendant's indebtedness to the Plaintiff in respect of his contribution to the construction of the aforesaid wall. After a notice to defend was filed by the Defendant, the Plaintiff moved an application for summary judgment.

[5] Whilst the Defendant does not contest its liability, as stated earlier, it did however raise a plea in abatement to wit: that pursuant to the deceased's demise, the Defendant issued a notice in terms of section 42 (1) of the Administration of Estates Act 28 of 1902, (hereinafter called, "the Act") dated 9 February, 2007, calling upon creditors and debtors to the estate, to file their claims or debts within a specified period. The Plaintiff duly responded thereto and filed its claim. The

Defendant avers that the Plaintiff shall be paid once the liquidation and distribution account has been finalized. It is the Defendant's contention that the Plaintiff cannot have a second bite to the same cherry, so to speak, by lodging a claim with the executrix in terms of the Act on the one hand and then lodging a civil claim in respect of the same debt with this Court, on the other.

[6] Central to the determination of this matter is the interpretation to be properly accorded the provisions of Section 43 of the Act and which have the following rendering:-

> "No person who has obtained the judgment of any court against any deceased person in his lifetime or against his executor, shall in any suit or action commenced against such executor, or which is pending against the deceased at the time of his death and thereafter as continued against such executor, to sue out or obtain any process in execution of any such judgment before the expiration of the period notified in the Gazette in manner provided in Section 42; and no such person shall sue out or obtain any process in execution of any such judgment within six months from the time when the letters of administration were granted to the executor against whom execution of such judgment is sought, without first obtaining an order from the High Court, for the issue of such process."

Section 42, to which reference is made in the above-quoted section stipulates the period within which claims against

deceased persons' estates may be made, as stipulated in the Gazette, as being ordinarily (save as provided in Section 65 of the Act) not less than 30 days and not more than three months. I interpolate to observe that in the instant case, the Defendant stipulated the period of 30 days in her aforesaid notice.

[7] It would appear to me that Section 43 carries two prohibitions in relation to execution of judgments obtained against deceased persons' estates. The first relates to the execution of any such judgment before the expiration of the period set out in Section 42 i.e. not less than three months from the date of the publication of the notice. The second is that before any such judgment can be executed, the judgment creditor should first apply and obtain leave from the Court before the issue of process in execution of such judgment.

[8] It is clear that in the instant case, the Plaintiff has not yet obtained judgment. He is seeking to do so by moving the Court to grant judgment in his favour in a summary fashion. For that reason, the imperatives stated in Section 43 are yet premature. The only question to determine, for present purposes, is whether it is permissible for a party who has duly lodged a claim in terms of Section 42 (l)of the Act, to thereafter institute a claim before this Court, seeking an order to be granted in that party's favour against the estate.

[9] Mr. Dlamini contended that the Plaintiff cannot properly lodge a claim in terms of the Act and proceed to also institute a claim in the Courts in respect of the same debt. It was his contention that once a party has lodged its claim against the estate in terms of the Act, it must abide by its election to the end and may not, mid-stream so to speak, then attempt to use the processes of the Court which will result in its claim being given preference. He submitted further that if there is a delay in the winding up of the estate as the Plaintiff claims there is *in casu,* the remedy is to apply to the Court in terms of Section 52 of the Act and have the executor show cause why the estate account has not been lodged.

[10] Mr. Dlamini further submitted that the resort to the Courts in cases where a claim has already been lodged is detrimental to the estate's creditors for the reason that the estate necessarily has to engage services of attorneys to represent it and that the money, which would otherwise be available to the larger body of creditors, is spent in legal fees.

[11] In his contrary argument, Mr. Jele submitted that a party in the Defendant's shoes who has failed to comply with the provisions of the Act in respect of lodging an account and

who, notwithstanding the delay incurred, has not applied for extension of time in terms of the Act for the lodgment of the account cannot come to Court and claim that he or she should not be sued. He contended further that there is no provision in the Act which precludes a party who has lodged a claim in terms of the Act from pursuing the same claim in Court, particularly in circumstances where there is inordinate delay in winding up the estate as appears to be the case in the instant matter.

[12] Mr. Jele contended further that whilst the Plaintiff has waited patiently, folding its arms in anticipation of the distribution of the account, the deceased's immovable property has been sold in execution in the intervening period of time and that the Plaintiff wishes to participate in the proceeds of further sales as any further delay may prejudice its claim. This contention is also found in the Plaintiffs reply to the affidavit resisting summary judgment. Finally, it was urged upon the Court to hold that a party in the Plaintiffs position is not bound to wait until the finalization of the distribution to realize its claim.

[13] I should mention that although the Master was not a party to this action, after judgment was reserved, I asked for the office of the Master's submissions in writing. In that regard, a report/cum submissions was filed and the allegation that the Defendant did not seek extension of time for the winding up of the estate was particularly denied. The Master's office stated that the Defendant applied for and was granted leave to extend the time for finalization of the estate. The Master further stated that his office is requiring periodic accounts to be furnished. It is also contended by that office that the deceased's estate is complex although no specifics in that regard are disclosed.

[14] It would appear to me, regard had to the report by the Master, that the fears harboured by the Plaintiff and the allegation that the Defendant has not requested for an extension of time may not be relied upon. In that regard the substratum upon which the Plaintiffs fears are grounded and in turn the edifice of its case is fundamentally shaken. I note that Mr. Jele, despite being afforded an opportunity to respond to the Master's report, did not do so and in the circumstances, I shall rely on the said report. That not withstanding, I shall proceed to deal with the merits of the Plaintiffs complaint and how it impacts on the case at hand.

[15] I should, however, point out with the benefit of hindsight that this was a matter in which though it be an action, the provisions of Rule 6 (23) of this Court's Rules, calling upon service of the papers on the Master for consideration and

report ought to have been complied with by the Plaintiff. In that regard, by the time the matter served in Court, the Court would have been properly advised of the situation on the ground, including the correct position regarding some of the allegations made by the Plaintiff against the executrix regarding non-compliance with the Act, including the allegation that some estate property has been and is being sold.

[16] Section 43, quoted in full above, recognizes two types of judgments. The first is one obtained against the deceased person during his life time. The second is one obtained against the executor/trix after the deceased's death. The said section also recognizes that the judgments referred to above may result from two types of action. First is one against the executor and second is one that was pending against the deceased at the time of death and which was subsequently proceeded with against the said executor/trix.

estate. The procedure is, if necessary, to summon the executor to Court to show cause why the account has not been so lodged within six months. See Section 52 of the Act.

[20] Although this procedure may and will ordinarily have costs implications for the estate, the magnitude of such costs may not be compared to those necessarily incurred where a claim is lodged with the Court for prosecution to the end, especially to as *in casu,* where a claim had been lodged in terms of the Act before the issuance of summons. Furthermore, the process of Court generally takes a long time if the matter is defended has to go to trial. Four years would be a conservative estimate, which translates into the period deceased's estate would require to remain unfinalised whilst awaiting the final determination of the civil cause against the estate.

[21] It would therefore appear to me in view of the legislative solicitudes which probably guided the policy I stated above,

[17] From a reading of the above Section, one can deduce that there is no statutory prohibition against suing an executor in relation to a claim that one has against a deceased estate. This is in my view plain from the nomenclature employed

above. The question, however, is whether such claims, particularly against the executors may be instituted in Court after the claimant has already lodged a claim against the estate in terms of the Act. I do not, however, have to answer the question whether a claimant may institute a claim against the deceased in his lifetime, or against the estate after the deceased's death and thereafter or in the case of a claim after the deceased's demise, simultaneously lodge a claim in Court against the estate. The latter question certainly does not arise in the present matter.

[18] In my considered view, the question adumbrated above, needs to be considered from the view point of policy. When one has regard to the entire fabric of the Act, it becomes implicit that the policy objective was to ensure that claims against deceased estates were lodged, processed and possibly paid out, where the estates are not insolvent, as expeditiously and inexpensively as possible. This was in my view for good reason. This was to ensure that the processes of claiming and proving claims, where appropriate, were not laborious and expensive or complicated, therefor needing experts to process them. One prime consideration, it would appear to me, was that as much as possible, the assets of the estate should be applied to meeting claims against the

estate rather than using same to meet legal costs and other associated expenses, which could be avoided or minimized by using the panoply of the procedures provided in the Act.

It is for this reason that the procedure under the Act is self-contained and to that end has, where necessary, detailed means of interrogating a claim without the need to engage in serious or any legal gymnastics. Furthermore, it is common cause that the Act provides in-built mechanisms for persons who, like the Plaintiff, alleges that there is a delay in the finalization and eventual distribution of the that a party who lodges a claim against a deceased estate should ordinarily be bound to his election. That party may not ordinarily jettison the route set out in the Act and lay a civil claim against the estate as a means to expedite its claim. I should hasten to mention that the fears raised by Mr. Thwala of such a Plaintiffs claim being preferred merely - because it is endorsed by the Court is not necessarily justified, nor his fear that the estate may have to pay a claimant twice in respect of the same debt realistic.

[22] Mr. Jele argued and quite forcefully too that in view of the delay adverted to above and given the fact that other claimants with Court judgments in their favour were participating in the proceeds of the estate in issue, the

Plaintiff could not wait indefinitely, but had to take legal means at its disposal to have its claim met. As indicated earlier, there is no evidence before Court that the Plaintiff did avail itself the procedures under Section 52, to ensure expeditious winding up and eventual distribution of the estate. It was certainly not demonstrated to this Court that that route failed to yield results for the Plaintiff,

necessitating that it should embark upon the present exercise in order to have its claim duly met and expeditiously too.

[23] Secondly, although there is some evidence that some claims are being met from the estate assets through the Court processes and not necessarily through the running the gauntlet of the lodgment and eventual payment thereof in terms of the Act, there is again no evidence before Court firstly as to whether in respect of those judgments and execution processes, the said parties had in fact, like the Plaintiff lodged their claims in terms of the Act, but that notwithstanding, still pursued their claims using the instrumentality of the civil courts. Secondly, it is not clear whether those were not claims that were instituted against

the deceased in his lifetime, which were subsequently continued against the executor.

[24] It would appear to me that if the claims referred to were not lodged in terms of the Act at any stage and were further instituted against the deceased in his lifetime, there would be nothing wrong with those being processed if the provisions of Section 43 are being followed. A situation, however, in which a person lodges a claim in terms of the Act, thereby submitting to the jurisdiction to the Master, should not be lightly allowed so as to jettison that route and then be entitled to sue the estate in a civil court for the same claim which has previously been lodged with the Master.

[25] Having said this, I must mention that the process wherein parties lodge a claim under the Act and that process is not finalized and yet there is some estate property being sold in execution of Court judgments has the potential to raise a legitimate fear on the part of a claimant proceeding under the Act that his claim may not be met when the estate is finally wound up as there may be no assets from which to distribute the dues to the debtors. In this regard, the

Master must be ever vigilant, particularly as in the instant case where it is clear that the Plaintiffs claim against the estate is otherwise being admitted.

[26] There are two further issues that I need to point out. Firstly regarding the parallel lodging of claims i.e. in terms of the Act and through the civil processes at the same time, there may be cases, which not only cause confusion but embarrassment as well. I conceive a situation where for instance a claim lodged in terms of the Act is admitted but it is then dismissed in the Court proceedings even without the executor defending the same. Such eventualities, it would appear to me, can be eliminated by as far as possible proceeding with the claim which is clearly possible of final resolution in terms of the Act and not duplicating the procedure by instituting Court processes in relation to the same claim as the Plaintiff has done.

[27] I must say, however, that there may yet be cases which on account of their nature and complexity may not be properly dealt with in terms of the Act and which would obviously require oral evidence and a fully blown trial to determine the estate's liability. These are, in my view, matters which

cannot properly be lodged in terms of the Act on account of their need first for a judicial determination on the issue of liability, which the processes specified in the provisions of the Act, would be ill-equipped to adjudicate sufficiently.

[28] Second, it is my view that it must not be forgotten although I had spoken about two processes for the lodgment and possible settlement of claims, that at the end, it is this Court in the final analysis, that exercises supervisory powers over all the procedures including those under the Act where problems arise. Many provisions of the Act would attest to this proposition, including the very appellation of the Officer who is tasked with the application of the provisions of the Act. He is called (although not gender-sensitive), the Master of the High Court.

[29] In the premises, I am of the considered view that although the Defendant does not, on the merits, have a defence to the claim, the fact that the Plaintiff had lodged its claim against the Defendant in terms of the Act, it may not midstream, resort to litigation for the purpose of again pursuing the same claim. To do so would stultify the Act and do serious violence to the legislative solicitudes referred to above and *pari passu* draw the estate into the murky but clearly

avoidable pools of incurring unnecessary expenses. This is more so because it has not been shown or demonstrated that the Plaintiff cannot be afforded redress by pursuing its claim in the uncomplicated and inexpensive mode provided under the Act.

[30] On the question of costs for the summary judgment application, considering that this is not a matter that should be referred to trial in view of its peculiarities, it is my considered view that although the Plaintiff has not succeeded to get judgment on a technicality, it is, however, clear that the Defendant has failed to live up to the expectations exacted upon it by the Act. The fear harboured by the Plaintiff regarding the distribution of the estate's assets before the estate is properly and finally wound up is reasonable. A fairer order in the circumstances is for each party to bear its own costs.

[31] For the aforegoing reasons, I issue the following Order:-

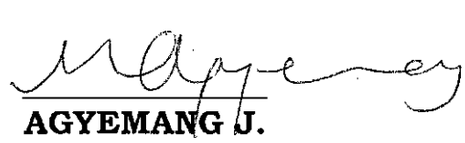
31.1 The application for summary judgment be and is hereby refused.

31.2 Each party be and is hereby ordered to pay its own costs.

31.3 The Plaintiff is ordered to avail itself of the procedures set out in the Administration of Estates Act, 1902 in pursuing its claim.

[32] It will become obvious that there has been some delay in handing down this judgment. The parties were advised in April that the judgment was ready but I saw it fit and desirable to have the Master's attitude to the claim. The report from the Master delayed. I then had to allow both protagonists time to consider the Report and to respond thereto. The Defendant did so. Nothing was forthcoming from the Plaintiff. In the circumstances, I could not wait indefinitely. I had to deliver the judgment, unfortunately without the Plaintiffs response to the Master's report.

DELIVERED IN OPEN COURT ON THIS THE 29th DAY OF MAY, 2009.



AGYEMANG J.
FOR MASUKU J.

Messrs. Robinson Betram Attorneys for the Plaintiff

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