



**IN THE HIGH COURT
OF ESWATINI
JUDGMENT**

Civil Case No. 2030/2016

In the matter between

**ASHLEY FAYE HEIDTMANN (Born Watkins)
SHAYNNE GAYE PULLEN (Born Watkins)
CAILEAN PETA DA COSTA (Born Watkins)**

**1st Applicant
2nd Applicant
3rd Applicant**

And

**THE EXECUTRIX-ELAINE PATRICIA WELCH N.O.
OF THE ESTATE OF BRIAN JOHN WATKINS**

1st Respondent

THE MASTER OF THE HIGH COURT

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

STANDARD BANK OF SWAZILAND

4th Respondent

Neutral citation:

*Ashley Faye Heidtmann (Born Watkins) & 2 Others v The
Executrix –Elaine Patricia Welch N.O. & 3 Others (2030/2016)
[2018] SZHC 146 (06 July 2018)*

CORAM:

MAMBA J

HEARD:

Various dates in 2017 & 2018 including 28 June 2018

DELIVERED

06 JULY 2018

[1] *Civil Law – Administration of Estates Act 28 of 1902 (as amended) – Duties of Executor, one of which to file First Liquidation and Distribution Account within 6 months of grant of Letters of Administration – Section 51 (2) failing which to seek Extension from Master – Good cause (sufficient and lawful excuse) to be shown for such grant of extension.*

[2] *Administration of Estate – Removal of Executrix and forfeiture of benefits – Section 54 of the Act – Any forfeiture to be decided by Master – Aggrieved party may approach Court on review*

[1] Through his Will and Last Testament executed on 27 June 2007, the late Brian John Watkins, who died on 09 July 2010, nominated and appointed Elaine Patricia Welch, the First Respondent to be the executrix of his Estate. There were also certain bequests or legacies made in her favour by the testator.

[2] The three Applicants are the children of the deceased. They are also beneficiaries to the said Will. In this application, there are no specific prayers or relief sought against the other three Respondents, bar the prayers stated in prayers 3.1 and 3.2 stated below.

[3] The Letters of Administration issued to the First Respondent are dated 05 August 2010. In terms of the applicable legislation; viz, Section 51 of the Administration of Estates Act 28 of 1902 (as amended), the First

Respondent had to file the first Liquidation and Distribution Account within a period of six (6) months from the date of issuance of the said letters of Administration; she was, however, at liberty, on good cause shown, to have the said period extended by the Second Respondent.

- [4] It is common cause that the First Respondent did not apply for an extension of the period referred to in the preceding paragraph and only lodged and filed her First Liquidation and Distribution Account on 31 May 2012. It is significant to observe that there was no objection or demur by either the Applicants or the Second Respondent to this late filing of the Liquidation and Distribution Account by the First Respondent. There is clear evidence herein that the Applicants were in constant touch or correspondence with the First Respondent all the time before and after filing of the said account. Equally clear is the fact that in or about June 2015, the Applicants registered their concerns with the First Respondent regarding her failure to file the Liquidation and Distribution Account. They demanded that she must lodge or file the account within 30 days failing which they would seek for her removal as the Executrix of the Estate. One such letter of demand was dated 02 September 2015. The Applicants' concerns were also forwarded to the Second Respondent.

[5] It is not insignificant to record that there were certain bequests or legacies that were actually paid out or made by the First Respondent before November 2015. These do not form part of the controversy in this application. Again, it is noted that these legacies were known to all the Applicants.

[6] Following the Executrix's failure to lodge or file the requisite Liquidation and Distribution Account, the Applicants, on 25 November 2016 filed this application seeking, *inter alia*, the following prayers:

‘[3] That pending finalization of this matter, a *Rule Nisi* be issued calling upon the Respondents to show cause on a date to be determined by the above Honourable Court as to why a final order should not be made final in the following terms:

3.1 Interdicting and restraining the First Respondent from any payment or withdrawals from the Estate account of **BRIAN JOHN WATKINS**, Standard Bank 014/00/522832/01 or any other account belonging to the estate pending the outcome of this matter;

3.2 Interdicting and restraining the Fourth Respondent from making any payment from the Estate Account of

Brian John Watkins, Account No: 014/00/522832/01
pending the outcome of this matter;

- 3.3 That the First Respondent powers of Executorship are suspended and that she is restrained and interdicted from having any dealings with regard to estate assets and monies of the late **BRIAN JOHN WATKINS** pending the outcome of this matter;
- 3.4 Directing that MR. KEVIN JOHNSTON be temporary appointed to deal with the administration of the Estate of the Late Brian John Watkins EH 178/10 pending the outcome of this matter and that the issue of security be waived as agreed by all beneficiaries to this application;
4. Removing the First Respondent from the office of Executorship in the Estate of the late Brian John Watkins EH 178/10;
5. Compelling the First Respondent to return to the Second Respondent the original Letters of Administration granted to her on 06 August 2010;

6. Compelling the First Respondent to deposit into the account of the Second Respondent all monies, together with interest, belonging to the Estate of the deceased, currently in her care and custody, and to provide the Second Respondent with the full account of her administration on a date to be determined by the above Honourable Court within 30 days;
7. Directing the 2nd Respondent to appoint MR. KEVIN JOHNSTON permanently as executor of the Estate of the Late Brian John Watkins EH 178/10 and that the furnishing of security be waived;
8. Forfeiture of all the benefits to which the First Respondent was entitled to as executor or otherwise;
9. Cost of the Application against the First Respondent in her personal capacity as no cost order is sort against the Respondents

[7] The assets in the estate comprise of both corporeal and incorporeal assets, movable and immovable property. The incorporeal assets are, in the main company shares and or interests in various businesses in Eswatini. The Applicants also complain that the First Liquidation and Distribution

Account that was eventually lodged and filed with the Second Respondent does not reflect a true and correct inventory of the assets of the deceased or estate. They accused the First Respondent of dishonesty or impropriety in this regard. She is also accused of embarking on various litigation without their knowledge or consent. This, they claim is to their detriment or prejudice as the beneficiaries in estate, as these court proceedings have resulted in the estate incurring legal costs. The case between WBD Investment (Pty) Ltd against Snergy Chartered Accounts & Kerry Smith, which served before this Court and the Supreme Court is cited as an example of such costly litigation she is said to have embarked on without their knowledge or consent. She is also accused of using estate property for her own benefit, contrary to her duties as an executrix.

[8] The First Respondent has denied any dishonesty or impropriety of whatever nature or form.

[9] It is not necessary for me for purposes of this judgment to go into the finer or minute details of the merits or demerits of this matter. Although the matter dragged on for a considerable period in Court and copious evidence was led by the Applicants, a great portion of this evidence was,

in my judgment, unnecessary and unwarranted for a just conclusion of the matter. For instance, once the First Respondent had agreed to step down as the executrix and also agreed to have Mr. Kevin Johnston appointed as the executor, there was very little discernible purpose; if any, in prosecuting this application. This will become clear presently.

[10] When the matter served before Court on an urgent and *ex parte* basis, this Court granted the interim order sought. The First Respondent was suspended as the executrix and Mr. Kevin Johnston was appointed as interim executor. The First Respondent eventually agreed to step down as the executrix in February 2018 and later agreed to have Mr. Johnston appointed as the executor; subject to him providing the necessary security for this due execution of his duties as the executor.

[11] This Court notes or records that the Applicants persisted in their application for an order in terms of prayers 8 and 9 of the Notice of Motion; arguing in the main that the First Respondent had acted dishonourably in her capacity as the Testamentary executrix and thus should be ordered to pay the costs of these proceedings and also forfeit all her rights, however accruing from the estate. In support of their

arguments, the Applicants cited the case of *The Master of the High Court v The Executrix Martin Nkululeko Dlamini (Estate late Jericho David Matsebula (1620/2012) [2014] SZHC 22 (24 February 2014)* where this Court granted, *inter alia*, an order that:

‘2. Respondent is hereby removed as an executor of the estate of late Jericho David Matsebula;

4. All benefits, commission fees, and disbursements due to respondent are hereby forfeited; and

6. Respondent is ordered to pay costs *de bonis propriis*’.

[12] In *Martin’s* case (*supra*), the executor had failed to lodge a Liquidation and Distribution Account within the time stipulated in the Act. He had also failed to show that the monies released to him by the Master for distribution amongst the beneficiaries, were still in his custody. He refused to exhibit the required bank balance, citing attorney-client confidentiality. The Court held that the respondent had failed to give an

acceptable explanation why he had failed to lodge the said account. It held that –

‘Again, on enquiring as to the reason the respondent failed to distribute the said amounts to the beneficiaries, respondent cited the [Lawyers] strike. It is very amazing that whenever it was time for the respondent to discharge his duties, the strike by the Law Society and the absence of the file from the Master’s office were quoted as a hindrance whereas there was always available time to request and receive the monies from the office of Applicant and this very file was not needed to requisition the same.’

So, clearly, the Court arrived at a firm view that the executor had acted dishonourably and not in keeping or in accordance with the fiduciary duties of an executor. One further important point to note herein is the fact that the application had been filed by the Master. So, in essence, the Master had taken the decision that the executor ought to be removed from his position and ordered to forfeit his benefits and the Court was merely being asked to sanction this decision by the Master.

[13] Section 54 of the Act provides that:

‘54. Every executor shall, in respect of his administration, distribution and final settlement of any estate, be entitled to claim, receive or retain out of the assets of such estate, or from any person who is heir, legatee or creditor is entitled to the whole or any part of such estate, such remuneration as may have been fixed by the deceased, by Will or deed, or otherwise a fair and reasonable compensation, to be assessed and taxed by the Master, subject to the review of the High Court, upon the petition of such executor or of any person having an interest in such estate:

Provided, that if any executor fails to lodge the account of his administration and distribution of the estate within 6 months from the date on which letters of administration were granted to him, and has no lawful and sufficient excuse for such failure, the Master may disallow the whole or any portion of the fees which such executor might otherwise have been entitled to receive in respect of his administration of such estate.’

This section makes it plain that it is the duty of the Master to determine whether or not the executor has no lawful and sufficient excuse for failing to lodge the relevant accounts and thus liable to have the whole of his

claim or benefits or a portion thereof disallowed. The Court acts as a review or appellate body.

[14] One notes further that in the present matter, whilst it is true that the First Liquidation and Distribution Account was lodged well out of time; i.e. after the period of six months and there was no permission sought for the extension of time, neither the Master nor the Applicants objected to this. In fact there were two liquidation and distribution accounts filed. Additionally, the beneficiaries at certain intervals, requested and received advances, in monetary terms, from the First Respondent. It is not entirely correct to suggest that the Second Respondent did nothing about the First Respondent's failure to wind up the estate within a reasonable period. (See in this regard the letter from the Second Respondent dated 27 August 2012 urging her to wind up the estate and distribute the assets amongst the beneficiaries. This was, however, well after the expiration of the period of six months within which the First Liquidation and Distribution Account should have been filed).

[15] From the totality of the evidence herein, it would, in my judgment, be premature at this stage to hold that the First Respondent has acted

improperly and thus she has to forfeit her benefits as executor or that she should be ordered to pay the costs of this application. This Court should not rush to make such a finding based on the hotly debated evidence. The Master, as the functionary entrusted with the primary duty to administer or be the overseer of estates of deceased persons, must be allowed the space and time to look into such matters and make the relevant decision or decisions, before the matter is determined by the Court. It is the duty of the executor (Mr. Johnston) to put together the assets of the estate and eventually distribute them amongst the beneficiaries. It is also his duty and prerogative to receive and consider claims for and against the estate, and again make the appropriate decision thereon. The debatement of the account is best done before the Master and not before this Court or other forum. The Master's office is the appropriate forum, designated by the applicable legislation, to deal with such matters. If any person or party is aggrieved by such a decision, then this Court could be approached for relief.

[16] For the sake of completeness of this judgment, it has to be noted that when the First Respondent agreed to step down and did step down, she did so after the Court had met with the parties and their legal representatives in chambers and briefly discussed with them the

applicable law in this case. The case of *Reichman v Reichman & Others* (2011/15348) [2011] ZAGPJ HC 177; 2012 (4) SA 432 (GSJ) (23 November 2011) is instructive in this connection. The First Respondent was not just the executrix but a beneficiary as well. In stepping down as the executrix, it was recorded that she was by no means accepting or admitting that she had committed any wrongful or dishonourable act in the execution of her duties as the executrix.

[17] On the issue of costs, this Court is of the considered view that the final order that was arrived at in this case was a compromise. The gravamen or substantive order that the applicants sought was the removal of the First Respondent as the executrix. The other orders are ancillary thereto. After due consideration, and with the help from the Court, the First Respondent agreed to step down as the executrix testamentary, without accepting any wrongdoing. She did so because as the evidence plainly showed, the relationship between her and the other beneficiaries had irretrievably broken down. She was, however, not the cause of that breakdown; or at least, there is no finding to this effect. One other factor taken into consideration is the fact that this is essentially a family dispute. The Applicants are the children of the deceased, whilst the First Respondent was the deceased's partner. Fostering family cohesion, unity

and cordiality is part of the ethical and equitable responsibility or component of the administration of justice. After all, the issue of costs is, in the final analysis, one of equity rather than raw legality. An order for costs against any litigant in a situation such as the present, would, I venture to suggest, not be consonant or consistent with such goal of family cordiality. In any event there was no finding of fault or culpability herein to warrant an order for costs. Thus there was no order of costs.



MAMBA J

FOR THE APPLICANTS:

MS M. BOXHALL-SMITH

FOR THE FIRST RESPONDENT:

**MR. SIBANDZE (RODRIGUES &
ASSOCIATES)**