IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.31 /06

In the matter between:

SIBONISO DLAMINI **APPELLANT**

AND

WINNIE MUIR **RESPONDENT**

CORAM: STEYN JA

TEBBUTT JA

BANDA JA

FOR THE APPELLANT: MR. SHABANGU

FOR THE RESPONDENT: MR. PM SHILUBANE

JUDGMENT

Tebbutt JA

(1) Family feuds are frequently the fiercest. The one which is the background to this appeal is no exception, the appeal being the tenth dispute resulting in litigation involving members of a family.

(2) The late Robert Martin Muir (the deceased) died on 4th June 1998. He left a widow, Winnie Muir, the respondent in this appeal, to whom he was married in community of property, two minor sons of that marriage and four children, all majors, of a former marriage. He, however, left no will. It therefore became necessary, as there was no testamentary executor nominated, to have an executor dative appointed by the Master of the High Court in terms of the Administration of Estates Act No.28 of 1902 (the Act), in order to administer and wind up the estate of the deceased. On 8th December 1998, an attorney Mr. Siboniso Dlamini, the appellant in this Court, was appointed executor dative by the Acting Master of the High Court, Mr. Isaac Dlamini (hereinafter the Master).

(3) The administration of the estate has not gone smoothly and it would appear that the respondent has brought a number of proceedings in the High Court relating to the estate. The present appeal arises from one of those.

(4) On 3rd June 2004 the respondent brought an application on notice of motion for an order (a) removing the respondent as executor dative in the deceased estate and (b) compelling the Master to call a meeting of the deceased's next of kin to nominate a successor for appointment by the Master as the executor dative in the appellant's stead. She also asked that costs be paid by the appellant ***de bonis propriis*** The application was opposed by the appellant.

(5) The matter came before Ebersohn J who, in a written judgment delivered on 14th June 2006 ordered -

(i) that the appellant be removed as executor dative;

(ii) that one Vusumuzi Thomas Simelane (an attorney) be appointed executor dative in his place; and

(iii) that appellant pay the costs of the application on the

scale of attorney and own client, ***de bonis propriis.***

(6) It is against that judgment and order that the appellant now appeals to this Court.

(7) In the course of his judgment the learned Judge also took the opportunity to make certain severe strictures on the operations of the office of the Master and, in particular, the role and conduct of the Acting Master, the said Isaac Dlamini, in that office. I shall return to this aspect later herein.

(8) The gravamen of the respondent's complaints against the appellant are, briefly, the following:

> (a) In terms of Section 51 (2) of the Act the appellant was obliged to file the first liquidation and distribution account in the estate within six months after his appointment. This he failed to do.
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> (b) The respondent objected to the account in certain respects, to which the appellant filed a response with the Master, who had then to decide the matter. He failed to do so. The respondent then approached the High Court to compel him to do so. The Master was ordered to make a ruling which he did on 8th August 2000. The respondent thereupon sought to review his ruling on several grounds, one of which was upheld by the then Chief Justice, Sapire CJ, who ordered the Master to require the appellant to redraw his account. This was not done.
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> (c) The appellant sold certain of the estate assets to one of the deceased's adult sons, Gary Muir, viz a Mercedes Benz car and a Nissan LDV, without the consent of the respondent or the Master and without Gary Muir's paying for them.

(d) The appellant handed over a business known as Kamxhosa Bar Restaurant and Disco owned by the deceased and thus part of his estate assets, to a trust, the D.H. Muir Trust, which he was not entitled to do.
(e) The appellant had failed to pay her from the estate the sum of E200 000 to which she was entitled.
(f) The appellant had conflicts of interest in his administration of the estate which required that he be removed from his office as executor.

(9) The appellant denied all the allegations. He said that -

(a) his first liquidation and distribution account was filed seven months after his appointment i.e. one month late. This appears clear from the date of its filing. The winding up of the estate, he said, had been bogged down by the numerous proceedings - apparently nine in number - that have been instituted by the respondent in regard to the administration of the estate;
(b) he had never been instructed by the Master to redraw his account;
(c) he had sold the cars to Muir with the consent of the Master;
(d) the business of the bar, restaurant and disco did not belong to the estate of the deceased;
(e) the respondent was not entitled to a payment of E200 000 which had, in any event, been used up by the costs of all the litigation instituted by the respondent;
(f) he had no conflicts of interest in administering the estate.

(10) The appellant also filed, in opposition to the respondent's application for his removal, an affidavit by the heir, Gary Muir, in which the latter irately refuted the respondent's allegations. These reflect the animosity between the

members of the family.

He referred to the "numerous malicious and ill-advised applications and court actions" instituted by the respondent in regard to the administration of the estate of the deceased.

He denied the allegations that the appellant had any conflicts of interest requiring his removal from office. He averred that the respondent had raised these as she had "from the very onset wanted to be appointed executor in the estate despite the fact that she was a known spendthrift who was hardly capable of managing her own affairs and as such was unfit for appointment. Furthermore, she has never commanded the trust and respect of any of the heirs who are all adults who were even during the lifetime of the deceased well aware of the respondent's machinations".

Muir said that he had paid for the cars he had bought from the estate. This had occurred with the knowledge and consent of the Master. He also denied that the respondent was entitled to a payment of E200 000 but in any event that a substantial amount of it had been used up in the litigation brought by the respondent, whose actions, he said, had prejudiced not only the interests of the heirs but also her own interests.

(11) In his judgment Ebersohn J found that the appellant only filed his first liquidation and distribution account some 14 months after his appointment. This, on the admitted facts, viz that the period was 7 months, was clearly incorrect. However, that was not the basis on which he ordered the appellant's removal. One of his main reasons was that the winding up of the estate had not been finalized despite the passage of many years since the appellant's appointment (in fact, eight years have now elapsed).

(12) Other factors influencing the learned Judge were the following. Despite it having been allowed by the Master, he considered the amount claimed by the

appellant as remuneration for his services viz E32869,53 to be excessive. Secondly, the first liquidation and distribution account reflected an amount of E40 000 as provision for legal fees. A decision by the Master to allow this amount was criticized by Sapire CJ in the judgment of the latter referred to above, on the ground that the appellant being an attorney could not claim against the estate for professional fees. Eberson J endorsed this criticism considering it conduct contrary to the appellant's duties as an executor. Thirdly, it was that decision by Sapire CJ which led to the latter's order, in regard to the first liquidation and distribution account, that "The Master is to require the executor to redraw his account so as to demonstrate his entitlement to all fees claimed." The appellant has not done so to this day. The appellant, as set out above, averred that he had never been given directions by the Master to redraw the account. As to this Ebersohn J pointed out that the appellant was a respondent in the proceedings before Sapire CJ and would have known of the order. He said that he found it "unacceptable for him (the appellant) to try to mislead this Court."

(13) Ebersohn J went on to hold thus:

> **"All the allegations against the first respondent have not been substantiated but what has been substantiated namely his delay of many years in finalizing the estate, his delay in amending the Liquidation and Distribution Account as was ordered by the then Chief Justice, his apparent misuse of funds of the estate, his attempt to mislead the Court. He also allowed the estate to suffer a vast pecuniary loss and to lose considerable value it is clear that the estate has a claim against him for damages. He cannot act on behalf of the estate against himself and therefore he must be removed as executor. The relief sought in prayer 2 is unnecessary as this Court has the power to appoint an executor dative. With regard to the costs it is clear that the estate should not be out of pocket and the first respondent will be ordered to pay the costs of the application on the scale of attorney and own client *de bonis propriis.*"**

Mr. Shabangu for the appellant contended that this Court should decline to

uphold the judgment of the learned Judge a quo. The appellant, so he argued, had been brought to Court to meet certain specific allegations i.e. those set out in paragraph 8 above. The onus had rested on the respondent to prove them. The learned Judge had not found that the respondent had discharged that onus nor had he dealt with each of those allegations. There is no merit in these contentions. In the first place the learned Judge was alive to the fact that not all the allegations against the appellant had been substantiated. He said so in terms. But he found that certain factors crucial to whether the appellant should, in the interests of the estate not be allowed to continue in office as executor, had been established. That was the critical enquiry before him. It is also the critical enquiry before this Court.

Mr. Shabangu also submitted that the learned Judge a quo erred, in granting appellant's removal, by doing so in terms of Section 84 of the Administration of Estates Act. It reads as follows:

> **"Every executor, tutor or curator shall be liable to be suspended or removed from his office by order of the High Court, if such court is satisfied on motion, that by reason of his absence from Swaziland, other avocations, failing health, or other sufficient cause, the interests of the estate under his car would be furthered by such suspension or removal."**

Appellant's contention is that such removal can only occur if the Court is satisfied that the interests of the estate would be furthered by the executor's removal where he is either (a) absent from Swaziland; or (b) occupied by other avocations; or (c) is in failing health; or (d) other sufficient cause. All these, so the contention goes, are impediments of a personal nature i.e. which would affect his ability to sufficiently or efficiently fulfil his duties. They would not relate to his failure to file timeously his first liquidation and distribution account nor to the final such account, nor to any alleged maladministration by the executor.

[16] I do not agree. While the first three of them may be said to have some connotation personal to the executor, the section is perfectly clear that he may also be removed for any "other sufficient cause." This is a wide provision and is not in my view confined merely to any cause personal in nature to the executor which is not covered by the first three circumstances mentioned. It would also be absurd to suggest that if, for example, an executor was stealing estate monies, he could not be removed from office by the Court under Section 84. This would obviously be an "other sufficient cause."

[17] Moreover it is, I think, now settled law in South Africa that the court can remove an executor if it is in the interests of the estate that this should occur. This goes back over 100 years ago to 1884. In the case of **LETTERSTEDT V BROERS (1884) 9AC 371,** the Privy Council, in an appeal from the then Cape Supreme Court, laid down the broad principles by which courts administering Roman Dutch law should be guided in relation to trustees viz that the court might remove a trustee "if satisfied that the continuance of the trustee would prevent the trust being properly administered" and that the main guide "must be the welfare of the beneficiaries." Those principles were confirmed by the South African Appellate Division in 1925 in **SACKVILLE WEST & NOURSE AND ANOTHER 1925 AD 516** and have consistently been applied in subsequent cases in South Africa (see e.g. **EX PARTE HILLS 1959(4) SA 644 (ECD)** at 617, and cases there cited; **DIE MEESTER V MEYER EN ANDERE 1975(2) SA 1 (TPD);** and **HOPPEN AND OTHERS V SHUB AND OTHERS 1987(3) SA 201 (C)** at 218-219. The Roman Dutch law, also being the common law of Swaziland, the principles set out would apply in Swaziland and they would equally apply to an executor. It was so held in **DIE MEESTER V MEYER EN ANDERE** supra at page 16-17. The latter case has been specifically applied in this country by this Court in **FIKILE MTHEMBU V GIDEON TRUTER WILLEMSE CIVIL CASE NO.8/2005 (COURT OF APPEAL),** a case concerned with the removal of an executor.

In **DIE MEESTER V MEYER EN ANDERE** supra the Full Court of the Transvaal High Court held that the court could remove an executor in an estate if it was undesirable that he should continue to act. The court said, per Margo J:

> **"The Court has a discretion and in my opinion the over riding consideration is the interests of the estate and of beneficiaries."**

Those views are, in my view, sound and should be applied in this country as indeed they have been in **FIKILE MTHEMBU V GIDEON TRUSTER WILLEMSE** supra.

[19] In the present case the winding up of the estate has taken some eight years and is obviously still some way from completion. While it is undoubted that some of this delay can be attributed to the litigation brought against the estate by the respondent, it does not account for the fact that apart from the filing of the first liquidation and distribution account which was, contrary to the provisions of Section 51(2) of the Act, in itself late, albeit only by a month, no further accounts have been prepared by the appellant.

[20] Section 51(4) of the Act requires an executor to render periodical accounts of his administration and distribution from time to time as the Master may direct. Even if the Master had given no such direction, a prudent executor would file such accounts particularly where, as in this case, his administration, as evidenced by the numerous applications brought by the respondent, is constantly being challenged and his removal, on at least one occasion prior to the present, being sought. The appellant has not done so. We find this to be unacceptable.

[21] Even in the present case one would have expected the appellant to provide for the Court a full account of his stewardship to date so as to ward off the attack on his administration and to satisfy the court that he is carrying

out his duties satisfactorily. I say this particularly in the light of the respondent's allegation in her application that he should be removed -

> **"... because of the manner in which he is administering the estate and if he is not removed as aforesaid my interest and the interests of the heirs in the estate will be prejudiced and the estate will suffer irreparable financial loss."**

[22] The appellant, in breach of the order by Sapire CJ, to redraw his account, has for over three years failed to do so. His excuse that the Master did not require him to do so does not hold water. He was a respondent in the proceedings before Sapire CJ but, in any event, as the executor in the estate he would, without doubt, have known of them and of the order. This is not only a dereliction of his duty but also an almost contemptuous disregard of an order of court.

[23] For the aforegoing reasons, apart from those set out by the learned Judge a quo, this Court can have no confidence in the appellant's administration of this estate. It seems clear that the interests of the estate and of the beneficiaries would in the future be prejudiced by his continuance in office and that their interests would be furthered by his removal, as was ordered by Ebersohn J.

[24] Save therefore for two aspects, it follows that the appeal must fail and falls to be dismissed.

[25] The two aspects are two of the orders of Ebersohn J, which require further consideration. They are (a) his order that the appellant pay the costs of the application in the High Court on the scale of attorney and own client ***"de bonis propriis";*** and (b) his order appointing Mr. Vusumuzi Thomas Simelane as executor in the appellant's stead.

[26] As to the costs order, it is of course well recognized that an order to pay

costs **"*de bonis propriis*"** is punitive in nature which should not be made lightly. In the present case while the appellant's administration of the estate is open to criticism it has not been shown that he had acted maliciously, ***mala fide*** or so improperly as to warrant his paying costs personally. It seems to us that such an order should not in the circumstances have been made.

The effect of altering the costs order of the Court a quo will be that some of the costs may have to come out of the estate. That is an inevitable consequence but it does not warrant this Court's making a punitive order against the appellant.

[27] As to the appointment of Mr. Simelane. In a notice in terms of Rules 35 and 36 of the Rules of the Court of Appeal, the respondent has asked this Court to vary the judgment of the court a quo by appointing her as the executrix dative in the estate of the deceased instead of Mr. Simelane.

In view of the poor relationship between her and the remaining beneficiaries it would appear undesirable to accede to her request. Clearly an independent person who is suitably qualified requires to be appointed to take over from the appellant. We were told from the Bar that Mr. Simelane has been ill and is apparently not presently in practice. The Court accordingly requested the attorneys for the parties to suggest, as a substitute for the appellant, a person of suitable qualifications and competence in whom the parties would have confidence to act as executor.

The parties have proposed as a substitute for the appellant Mr. Zonke Magagula, who is an attorney of the Court.

The court accepts that he will be a fit and proper person to act as executor dative in the estate.

[28] Earlier herein I referred to the severe criticisms and serious strictures by the learned Judge a quo on the Acting Master and his conduct, in the carrying out of his duties. The learned Judge collected a number of judgments both in the High Court and in this Court where the courts have expressed their reservations as to whether the Master should continue to hold office. In this Court in the matter of **FIKILE MTHEMBU V GIDEON V TRUTER WILLEMSE** supra, the Court in an addendum to its main judgment said in relation to certain allegations in that case, the following.

> **This does in my view, raise serious questions concerning the suitability of the Master to hold this office on whose judgment, competence, experience and integrity we as courts have to rely. On this evidence I would have very real concerns whether this office is in the hands of someone who is both honest and able.**
>
> **Our judgment together with this addendum is referred to the Minister of Justice for him to undertake such investigations as he deems fit to determine the suitability of Mr. Isaac M.F. Dlamini to hold office as Acting Master of the High Court."**

Ebersohn J also referred to certain damning comments on the Master in the Report of the Commission of Enquiry into the Operations of the Office of the Master of the High Court.

[29] Having regard to his concerns about the role of the Master in the estate ***in casu*** Ebersohn J in his order of 14th June 2006 made the following additional orders:

> **"4.1. The Registrar of this Court is directed to forward a copy of the REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT, of the ADDENDUM prepared by the Judges of the Court of Appeal and of this judgment to the Minister of Justice.**
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> **4.2. The Registrar of this Court is directed to forward a copy of the REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER**

OF THE HIGH COURT and of this judgment to the Law Society."

This Court can see no reason to disturb those orders.

In the result the following order is made:

1. The appeal is dismissed, with costs on the party and party scale.
2. The order of the High Court of 14* June 2006 in the application in **CASE NO. 1531/04** viz that the first respondent in that case, **SIBONISO CLEMENT DLAMINI** is removed as executor in the estate of the late Robert Martin Muir, Estate No.EH/136/98, is confirmed.
3. The costs of the application in Case No. 1531/04 are to be paid by the first respondent therein on the scale of party and party.
4. Mr. Zonke Magagula is appointed executor dative in the aforesaid estate.
5. Orders 4.1 and 4.2 in the Order of the High Court of 14th June 2006 remain unaffected.

P.H. TEBBUTT
Judge of Appeal

I AGREE

J.H. STEYN
Judge of Appeal

I AGREE

R.A. BANDA
Judge of Appeal

Delivered in open court on this 16th November 2006