



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 3761/10

In the matter between:

PHINDILE NDZINISA

Applicant

vs

**SIBONISO CLEMENT DLAMINI N.O.
AND 2 OTHERS**

Respondent

Neutral citation: *Phindile Ndzinisa vs Siboniso Clement Dlamini NO & 2 Others (3761/10) [2014] [SZHC 53] (2nd April 2014)*

Coram: **MAPHALALA PJ**

Heard: 14th March 2014

Delivered: 2nd April 2014

For Applicant: Mr. T.L. Dlamini

For Respondent: Mr. H. Mdladla

- Summary:
- (i) *Notice of setdown to reconsider an order granted in the absence of party affected thereby;*
 - (ii) *The 1st Respondent on the other hand contends that the 1st Respondent was duly served with the application and therefore the Application by the 1st Respondent in terms of Rule 42 cannot succeed on the facts;*
 - (iii) *In my assessment of the facts and the arguments of the parties I find that 1st Respondent was duly served with the Application but he defaulted in appearing on the day of hearing.*
 - (iv) *The court rules that the parties file supplementary evidence on whether 1st Respondent has filed a proper Distribution Account under the Act.*

Legal authorities referred to in the judgment

- 1. *Master of the High Court vs The Executor Martin Nkululeko Dlamini (Estate Late Jericho David Matsebula, High Court Case No.1620/2012 (unreported)).***
- 2. *The Administration of Estates Act, as amended.***

JUDGMENT

[1] For decision by this court is a Notice of Intention to oppose in a Notice of Setdown for reconsideration of an order granted in the absence of a party filed with the Registrar on the 17th March 2014 in the following terms:

(a) *That the rule nisi issued on the 17th March 2014 be discharged with costs;*

(b) *Further and/or alternative relief.*

[2] The affidavit of the 1st Respondent Mr. Siboniso Clement Dlamini is filed in support of this Application where the material facts as stated in support thereto. Various averments are made therein in paragraphs 1, 2, 3, 4, 5 and 6 thereof represented by Mr. T.L. Dlamini an attorney of this court.

[3] The Applicant opposes the granting of the above relief in paragraph [1] of this judgment stating various arguments canvassed by attorney Mr. M. Mdladla for the Applicant.

Brief background

[4] The background of the dispute is clearly outlined in the Applicant's Heads of Arguments at paragraph [1] thereof as follows:

“1.1 The main application in this matter was instituted by the Applicant as long ago as October 2010. Sometime during about November, 2012 the Applicant obtained a consent order in terms of which the 1st Respondent

was to file his account with the Master during December, 2012.

1.2 *The 1st Respondent filed his account with the Master on the 7th December, 2012. The matter remained dormant in court until the 13th March, 2014 when the Applicant caused an Application to be served under a Certificate of Urgency on the 1st Respondent's clerk at 01:00pm requiring the 1st Respondent to appear in court at 9:30 the following morning.*

1.3 *On the 14th March 2014 in the absence of the 1st Respondent the Applicant obtained a rule nisi operating with interim effect in terms of which the 1st Respondent was ordered, inter alia, to pay monthly maintenance of E8,000.00 to the Applicant.”*

[5] Both attorneys filed Heads of Arguments and advanced arguments in court. I shall commence in outlining the arguments of the Respondents who have filed a Notice to Anticipate the *rule nisi* issued by this court in this matter.

(i) The 1st Respondent's arguments

[6] That the 1st Respondent anticipated the *rule nisi* for its discharge on the following grounds:

1.3.1. *The 1st Respondent avers he resigned; and*

1.3.2. *The 1st Respondent avers he duly filed the liquidation and a distribution account with the Master of the High Court.*

[7] The gravamen of the 1st Respondent's argument as canvassed in the Heads of Arguments of Mr. Dlamini in paragraphs 3.1 to 3.2 is in connection with the legal principle of *audi alteram partem* that in adhering to this principle of the Rules of Court do not provide for the granting of judgment against a party without trial.

[8] The attorney for the 1st Respondent stated the law in support of the above position of his client that the judicial framework within such an estate must be administered is laid down in the Administration of Estates Act 1903. That in terms of this Act the winding up of the deceased's estates is in the exclusive domain of the Master.

[9] That the Act lays down that the Executor must lodge his account for examination with the Master. That the Master must examine the account and where appropriate authorise the Executor to advertise the same. That when the account is lying for inspection interested parties may lodge their objections thereto. The Master then calls for the Executor's answer to the objection. That upon receipt of the

Executor's answer the Master makes a ruling. That it is only then that an aggrieved party may approach the court for review and challenge the Master's ruling.

[10] The concluding argument for the 1st Respondent is that the order that the 1st Respondent should pay the Applicant's monthly maintenance was granted without the benefit of a trial or even prior to affording the said Respondent a hearing and thus erroneously granted and therefore has no basis in law and ought to be discharged with costs.

(ii) The Applicant's arguments

[11] The attorney for the Applicant Mr. M. Mdladla also filed Heads of Arguments outlining the background of the matter and in paragraph 1.4 of page 3 of his Heads of Arguments advanced the following arguments:

“The Applicant has denied any error on the court issuing the interim order. The Applicant submits that the court did not err in granting the interim order on the following reasons:

1.4.1 The 1st Respondent cannot resign without accounting for estate funds in his possession;

1.4.2 The 1st Respondent has failed to file the liquidation and distribution account with the Master of the High Court to

date; further arguments shall be advanced at the date of hearing.

1.4.3 The Master of the High Court has not received, approved and endorsed same distribution;

1.4.4 The 1st Respondent has failed to further account for my half-share of the estate. I am lawfully entitled to by virtue of being the deceased's lawful surviving spouse.

[12] The Applicant's attorney dealt with the application of the facts of law to the following legal proposition:

"The Application has placed the cart before the horse by approaching the court before the Master has dealt with the account. The order that the 1st Respondent must pay monthly maintenance to the Applicant was made without affording the 1st Respondent an opportunity of being heard and was erroneous as there were facts of which the court was not aware which would have prevented the granting of the order. One of those facts is that the 1st Respondent disputes his liability to pay the said amount."

[13] The attorney for the Applicant then outlined the issues for determination at paragraph 2 of his Heads of Arguments as follows:

1. *Whether or not the court granted the interim order through error;*

2. *Whether 1st Respondent is entitled in law to resign without accounting to the deceased's estate whilst monies are held by him."*

[14] The attorney for the Applicant contended that this matter falls squarely as to what is expected of an Executor of an estate in his duties in the winding up of an estate in terms of the law and his fiduciary duty and cited the High Court case of *Master of the High Court vs Executor Martin Nkululeko Dlamini, Estate Late Jericho David Matsebula, Case No.1620/12 (unreported)* to the following dicta:

"29. In the totality of the above circumstances, it is my considered view that the Respondent failed in his duty as an Executor. The Respondent submitted four copies of receipts, with two bearing the Times of Swaziland's emblem. He submitted these receipts as proof of advertisement for the next of kin's meeting. However, on perusal, only one receipt reflected the file number in issue. The other three were irrelevant to this matter... There was in the result no liquidation and distribution account filed. However, and surprisingly so, two payments were received by the Respondent in favour of the estate. Again on enquiring as to reason, the Respondent failed to distribute the said amounts to the beneficiaries, Respondent cited the strike again. It is very amazing that when 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."

[15] The final argument on behalf of the Applicant is that the 1st Respondent cannot resign without accounting as required by law. That therefore, his joinder is not misconceived. Further, that the 1st Respondent has failed to lodge the Distribution Account according to law with the Master of the High Court for appraisal and endorsement hence, there is no error. That the *rule nisi* be upheld.

The court analysis and conclusions thereon

[16] Having considered the able arguments of the attorneys of the parties, I wish to start by resolving the preliminary point raised by the 1st Respondent that the court erred in granting the *rule nisi* in favour of the Applicant as it was granted without his knowledge. I will then proceed to the determination of the questions outlined by the Applicant at paragraph 1.3 of his Heads of Arguments to the following:

1.3.1 The 1st Respondent avers he resigns; and

13.2 The 1st Respondent avers he duly filed the liquidation and distribution account with the Master of the High Court;

[17] The case for the Applicant is canvassed at paragraph 1.4 of the Applicant's Heads of Arguments.

[18] The questions therefore for determination by this court are two fold:

(i) *whether or not the court granted the interim order through error;*

(ii) *whether 1st Respondent is entitled in law to resign without accounting to the deceased's estate whilst monies are held by him.*

[19] In my perusal of the affidavits filed by the parties, the Applicant filed an Application under a Certificate of Urgency for various orders and served the Application to the parties being the offices of S.C. Dlamini & Company and office of the Attorney-General. The Application was served on the 13th March 2014 on both Respondents.

[20] Therefore on these facts it cannot be said that the Application was granted without the knowledge of the Applicant. For this reason therefore, the

preliminary point is accordingly dismissed. Therefore, this disposes of the first question framed at paragraph [6] of this judgment.

[21] On the second question for determination, I am in agreement which was stated by the Applicant's attorney *in toto* on my perusal of the papers. I find the 1st Respondent failed to follow the rigours of the Administration of Deceased's Estate Act in executing his duties in the winding up of the deceased's estate in this case. I find what was stated by *Dlamini J* in the case of *Master of the High Court vs Executor Martin Dlamini (supra)* apposite and apply to the facts of the present case.

[22] An executor in terms of this legislation cannot decide will nilly to discharge himself from his responsibility under the Act.

[23] The averments of the parties on this aspect of matter are stated at paragraph 6.2, 6.3 and 6.4 of the Answering Affidavit of the Applicant at paragraph 62, 63 and 64 of her Answering Affidavit as follows:

“6.2 I further aver that the purported resignation by the 1st Respondent has been another unlawful and flagrant tactic for 1st Respondent to avert being accountable to the estate. Furthermore, I am advised by my attorneys that they

enquired from the Assistant Master of the High Court, Cebisile Ngwenya, at Siteki as to whether the Master of High Court had accepted the 1st Respondent's resignation and replied to the negative on the 18th March 2014. This I am advised was due to the fact that the Master of the High Court had not received any distribution account from 1st Respondent. Secondly, the Master of the High Court had not consented to the 1st Respondent's purported resignation as he must account for all monies held under the estate as the estate funds were held by 1st Respondent and therefore, a resignation letter cannot be merely upon notice without accounting for all monies held by 1st Respondent. I am advised that the joinder of 1st Respondent is not misconceived or bad in law in the circumstances of this case.

6.3 *Further, the 1st Respondent still has not returned the Letters of Administration to the Master of the High Court and the Master of the High Court has not called a meeting of the next kin to appoint a new Executor due to the fact that the 1st Respondent is obliged to account for all monies he holds under my deceased husband's estate before he can purportedly resign to avert liability. Such is a sign of bad faith which is wanting of 1st Respondent who has a fiduciary duty to protect the estate's interests but to date has failed to do so.*

6.4 *I state that my attorneys will make an application before the above Honourable Court for leave to file the confirmatory of the Assistant Master of the High Court, Cebisile Ngwenya, in*

due course. However, due to her location at the Master of the High Court offices at Siteki, I was not able to prepare the affidavit and get it signed before the matter was before court.”

[24] The 1st Respondent then replied as follows at paragraph 6, 7 and 8 of his affidavit to the above averments in paragraph [23] of this judgment:

“6. Ad paragraph 6.2

I have a right to resign as executor and I have exercised that right. I have accounted for the estate assets. The Applicant has attached the account to her papers viz annexure “ZZ5”.

7. Ad paragraph 6.3

This does not detract from the fact that I have resigned as executor. What happens thereafter is up to the Master.

8. Ad paragraph 6.4

It cannot be disputed that I resigned as executor. The letter of resignation is attached to the Applicant’s founding affidavit.”

[25] In my assessment of the above averments of the parties is clear that the 1st Respondent has not been discharged by the Master of the High Court in accordance with the provisions of the Administration of Estate Act and therefore the arguments of the 1st Respondent fails.

[26] In coming to the above decision I perused the record of the Master of the High Court filed in this case and for the sake of completeness I refer in this judgment to what she states from paragraph [7] to [11] of the said report as follows:

“7.

On the 23rd January 2014 the 1st Respondent filled a letter of resignation as Executor of this estate. He stated that he has filed the account of his administration of the estate with the office of the Master which is not correct. I hereby submit that the Master of the High Court does not have a copy of the account as alleged by the 1st Respondent.

8.

However, there will be some procedural requirements that 1st Respondent must first deal with before vacating the position. Given that 1st Respondent took on the role of Executor, he cannot simply walk away of his own accord without duly accounting in accordance with the law. As a matter of law, once he commenced acting as Executor, he became responsible for the administration of the estate. As such, if he wishes to resign as Executor after taking control of the testator’s property, he must formally renounce his position in writing. In order to do this, he will need to submit a letter of renunciation in writing to the Master of the High Court, and also he has to provide the Master of High Court with any information already gathered in relation to the deceased’s estate.

This information will subsequently be passed on to the person who takes on the role of executor following his purported departure.

9.

I also submit that the executor had not lodge an account with the 2nd Respondent and cannot therefore resign as Executor from the estate and also lodge any periodical payments made by him and he must account for all monies received by him as the executor with the Master of the High Court office.

10.

I further submit that an Executor completes his duties when he has filed a distribution account and the master has examined and approved such account and the executor has advertised the 21 days notice and there are no objections of the said account, this is in terms of section 51 bis (1) of the Administration of Deceased Act 28 of 1902. If all has been complied with in terms of the law, the Executor does not have to resign, but is issued with a certificate of discharge stating that the Executor has complied with all his duties. This is done by the Master when satisfied that all is in order and the account had no objection.

11.

Therefore since the Executor have not submitted any full account of his administration of the deceased estate, the Executor because all the monies were paid into his account and he has not filed with the Master of the High Court together with interest belonging to the estate of the deceased which in the Master's knowledge is still in his custody."

[27] However, the 1st Respondent filed an Answering Affidavit with the Registrar of this court on the 27th March, 2014 and stated at paragraph 3 the following:

“I deny the contents hereof. The account was lodged during December 2012 with the Master at Mbabane for onward transmission to Siteki. It was the Master who was supposed to examine the account and instruct the executor accordingly. However the Master took no action and the Applicant’s attorneys kept pressing, they were themselves furnished with the account in March, 2013. This account shows no balance for distribution. So when the Applicant moved the present application under Certificate of Urgency she knew this to be the position. Annexed hereto marked “RA1” is an affidavit of Sincedzile Sibandze who had delivered the account.”

[28] In view of the above averments in the 1st Respondent’s Answering Affidavit it appears to me that a dispute of fact has arisen as to whether the Master of the High Court was furnished with the said Distribution Account. I must emphasize that 1st Respondent has not been discharged as Executor in terms of the Administration of Estates Act. The fact of his resigning is neither here nor there as of no legal effect in view of the provisions of the Act.

[29] Therefore, for this very narrow point in dispute I order that oral evidence be led on this aspect of the matter. I will therefore not grant what is sought in the Notice of setdown by the 13th March, 2014 and would allow that this point of difference be resolved.

[30] I accordingly, order that the 1st Respondent to file a sworn affidavit on this point and the office of the Master to file a Supplementary Report with comments on paragraph 3 of the 1st Respondent's Answering Affidavit within 14 days from the issuance of this Ruling.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE