



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case No. 3761/10A

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 (3761/10A) [2014] [SZHC 253] (10<sup>th</sup> October 2014)*

**Coram:** **MAPHALALA PJ**

**Heard:** 2<sup>nd</sup> September 2014

**Delivered:** 10<sup>th</sup> October 2014

**For Applicant:** Mr. H. Mdladla

**For Respondent:** Mr. T.L. Dlamini

Summary: (i) *Following a directive of this court at paragraph (iv) of the Summary in the judgment of this court of 2<sup>nd</sup> April, 2014 the parties filed the requisite documents required by the court.*

(ii) *In my assessment of these documents it became clear to this me that 1<sup>st</sup> Respondent has not filed the Distribution Account as required by the law and therefore the **rule nisi** ought to be confirmed without any further ado.*

**Legal authorities referred to in the judgment**

1. **Fikile Mthembu, Welile Mkhathshwa vs Welile Mabuza, Civil Case No.2645/2005;**
2. **Hopkinson vs Hopkinson (1953) 2 ALL ER 571 at 574.**

**JUDGMENT**

[1] This court in its judgment of the 2<sup>nd</sup> April 2014, ruled at paragraph [28] that there is a dispute of fact as to whether the Master of the High Court was furnished with the said Distribution Account. At paragraph [30] thereof ordered that the 1<sup>st</sup> Respondent file a sworn affidavit on this point and the offices of the Master to file a Supplementary Report with comments on paragraph 3 of the 1<sup>st</sup> Respondent's Answering Affidavit within 14 days from the issuance of this Ruling.

- [2] The parties mentioned above in paragraph [1] of this judgment have filed papers as directed by the court. However, the question remains whether the additional Heads of Arguments answer the question before the court.
- [3] In my assessment of the affidavit filed by the 1<sup>st</sup> Respondent it appears to me that the affidavit filed is that of Simon Mnumzane Vilane does not assist the court in the examination of the facts in this case. In this regard I agree with the submissions of the Applicant that this affidavit be struck off as it does not in any manner advance the 1<sup>st</sup> Respondent's case and it is only vexatious.
- [4] I further agree with the arguments of the Applicant's that the purported stamped covering letter is not annexed to the affidavit which further proves the untruthfulness of the 1<sup>st</sup> Respondent. On these facts it is quite clear that the Distribution Account was never filed and it boggles the mind of the Applicant and the court why 1<sup>st</sup> Respondent now in April, 2014 would send someone to file a Distribution Account twice instead of demanding the examination at least of the account by the 2<sup>nd</sup> Respondent. In my view, I agree with the contentions of the Applicant that there is no truth on a balance of probabilities and the affidavit has been filed to circumvent the effect of the order which amount to **mala fides** on the part of the 1<sup>st</sup> Respondent.

- [5] I have considered the legal authorities in the High Court case of **Fikile Mthembu, Welile Mkhathwa vs Welile Mabuza, Civil Case No.3645/2005** and the English case of **Hopkinson vs Hopkinson (1953) 2 ALLR 571** at 574 and on the circumstances the 1<sup>st</sup> Respondent's affidavit makes it difficult for the court to ascertain its truthfulness of his case.
- [6] Coming to the Master's report filed in tandem with the further affidavit of the 1<sup>st</sup> Respondent on the issue the 2<sup>nd</sup> Respondent has categorically denied ever receiving any Distribution Account from the 1<sup>st</sup> Respondent.
- [7] In my assessment of all the arguments of the 2<sup>nd</sup> Respondent canvassed in paragraphs 6.2, 6.3, 6.4, 6.5, 6.6 and 6.7 I agree with the 2<sup>nd</sup> Respondent's arguments at paragraph 6.7 to the following:

**“The 2<sup>nd</sup> Respondent has clearly demonstrated the procedure that once a document is received it shall be endorsed as received and for the distribution accounts thereafter taken for examination. *In casu*, there is no proof of endorsement, there is no advert for objections, the 1<sup>st</sup> Respondent purported resigned and lastly defied an order of this court to file his own sworn statement addressing the paragraph 3. Therefore, it is submitted the totalling of the facts lead to one inescapable conclusion that**

**the 1<sup>st</sup> Respondent has failed to exercise his duties as executor and/or failed dismally as he never to filed the Distribution Account. Therefore he is liable to the Applicant.”**

[8] The 1<sup>st</sup> Respondent in the Heads of Arguments of Mr. Dlamini has essentially stated that the matter ought to be dismissed as there is a dispute on fact which cannot be resolved on the papers. I disagree with this argument as it is clear that the 1<sup>st</sup> Respondent has not filed the Distribution Account required by law and therefore is in serious breach of the provisions of the **Administrate of Estates Act**.

[9] It is quite clear after assessing the arguments of the parties to and fro that the 1<sup>st</sup> Respondent is playing a cat and mouse game with the court and therefore this will not be tolerated.

[10] In the totality of the facts in this case and the arguments of the attorneys of the parties is abundantly clear to this court that the 1<sup>st</sup> Respondent has not been discharged by the Master of the High Court in terms of the provisions of the Administration of Estate Act. Therefore, it follows that the 1<sup>st</sup> Respondent is still in law duty bound to carry out his duties under the Act.

[11] According to the provisions of the above stated Act failure of an Executor to execute his duty under the Act carries a legal sanction.

[12] I must also add that the 1<sup>st</sup> Respondent was a Master of the High Court for many years and knows exactly the effect of the law on an Executor who has been found lacking in his duties in that office.

[13] In the result, for the foregoing reasons the **rule nisi** issued by this court is accordingly confirmed with costs.

**STANLEY B. MAPHALALA**

**PRINCIPAL JUDGE**