



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 1981/2015

In the matter between

MOHAMED IQBAL TILLY

Applicant

And

MOHAMMED ISMAIL TILLY

1st Respondent

FATIMA WADEE (Nee TILLY)

2nd Respondent

RASHIDA ASVAT (Nee TILLY)

3rd Respondent

RABIA COOVADIA (Nee TILLY)

4th Respondent

AMINA MOOLA (Nee TILLY)

5th Respondent

THE MASTER OF THE HIGH COURT

6th Respondent

THE REGISTRAR OF DEEDS

7th Respondent

THE ATTORNEY GENERAL

8th Respondent

NEDBANK SWAZILAND LIMITED

9th Respondent

FIRST NATIONAL BANK

10th Respondent

STANDARD BANK

11th Respondent

Neutral Citation: *Mohammed Iqbal Tilly Vs Mohammed Ismail Tilly and 10 others (1981/2015)*

[2015] SZHC 25 (21st February 2017)

Coram: Hlophe J.

For the Applicant: Mr Tegbeh

For the 1st to 5th Respondents: Mr. M. T. Mabila On instructions from Masina Ndlovu Attorneys

For the 6th to 11th Respondents: No appearance and no opposition to the application

Date Heard: 22nd February 2017

Date Delivered: 22nd February 2017

Summary

Application Proceedings – An order sought inter alia directing First Respondent to account for the sale of certain properties belonging to the estate of the late Mohammed Essop Ismail Tilly; directing First Respondent to pay the proceeds of the said sale into the Master of the High Court’s Account; revoking the letters of administration issued by the Master of the High Court interdicting the alienation

of further immovable assets of the estate and interdicting the operation of Bank Accounts belonging to the deceased.

After all pleadings had been filed with matter ripe for hearing, parties attempting to settle same – Dispute ensues on whether matter settled amicably between the parties Court called upon to determine this question – Court of the view agreement of settlement not concluded and therefore merits of the matter should be determined.

Whether case made for the prayers sought in the merits - Court of the view case made with regards some prayers and not made with regards others – Certain specific orders granted with costs at the ordinary scale.

JUDGMENT

[1] The Applicant instituted proceedings under a certificate of urgency seeking an order of this Court in the following terms:

- 1.1. That the forms with regard service and time limits provided for in the Rules of the above Honourable Court be dispensed with and that this matter be dealt with as an urgent matter in terms of

the Provisions of Rule 6(25) of the Rules of the above Honourable Court.

1.2. That the first Respondent be hereby directed to immediately account for the proceeds of sale of the following immovable property previously registered in the name of the late Mohamed Essop Ismail Tilly.

1.2.1. Certain: Portion 277 of Farm No.2 situated in the Hhohho District, Measuring: 2329 (Two Three Two Nine) square metres.

1.2.2. Certain; Portion 41 of Farm No.50 situated in the Hhohho District, Swaziland;
Measuring: 1, 9187 (One Comma, Nine One Eight Seven) Hectares.

1.3 That Respondent be hereby directed to pay into the Master of the High Court the sum of E5, 100, 000-00 (Five Million One

Hundred Thousand Emalangeni) being the proceeds of sale from the immovable property mentioned in 1.2 above within 5 days of finalization of this application.

- 1.4. That the Letters of Administration issued under Estate Number E M90/2015 to Mohammed Ismail Tilly for the Administration of the Estate of the late Mohammed Essop Ismail Tilly be immediately hereby revoked forthwith and /or set aside.
- 1.5. That the Sixth Respondent be hereby ordered and directed to immediately consolidate the Master of the High Court estate files Number EM 90/2015 and EH 257/2015, presently opened in the name of the Late Mohammed Essop Ismail Tilly.
- 1.6 That the Seventh Respondent be hereby interdicted from effecting any transfer of all and any immovable property held in the name of the late Mohammed Essop Ismail Tilly and/or (in) which (the late) Mohamed Ismail Tilly is co – owner pending the winding up of the consolidated estate under estate file numbers; EM 90/2015 and EH 257/2015.
- 1.7. That the Sixth Respondent be and is hereby ordered and directed to call a next of kin meeting under the consolidated

estate numbers EM 90/2015 and EH 257/2015 within 14 days of the finalization of this application in terms of Section 24 of the Administration of Estates Act, 1902.

- 1.8. That the Bank Accounts in the name of Mohammed Ismail Tilly held in the Ninth, Tenth and Eleventh Respondents be immediately frozen pending finalization of this application.
- 1.9. That the Bank Accounts held in the name of Estate Late Mohamed Essop Ismail Tilly in the Ninth, Tenth and Eleventh Respondents be immediately frozen pending finalization of this application.
- 1.10. That a Rule Nisi be hereby issued returnable on a date to be determined by the above Honourable Court, calling upon the First Respondent to show cause why prayers 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12 should not be made final.
- 1.11. That this Honourable Court grants the Applicant the necessary leave of Court to effect service of this order upon the First to Fifth Respondents in Ermelo, South Africa.
- 1.12. Costs of suit at Attorney and own client scale in the event of opposition thereto.

1.13. Any further and/or alternative relief.

- [2] The Application is founded on the affidavit of the Applicant, who described himself as a grandchild of the late Mohamed Essop Ismail Tilly, who allegedly owned the properties which form the subject of these proceedings.
- [3] At the time he passed on, it is contended that the Late Mohamed Essop Ismail Tilly had five children born of his marriage to his late wife, who predeceased him. The Applicant is the son to the only male among the five children of the late Mr and Mrs Mohammed Essop Ismail Tilly, called Rased Ahmed Tilly. Otherwise the other children of the two, who are all females, now go under marital surnames and have been cited as the Second to Fifth Respondents herein. The First Respondent on the other hand is described as the brother to the late Mohamed Essop Ismail Tilly. Of note is that he shares almost the same name with his brother as he is called Mohamed Ismail Tilly; which means that his name differs from that of the late, by the exclusion of the name, Essop only.

[4] It is apparent from the facts disclosed in the matter that at the time of his death, the late Mr Tilly left behind several immovable assets. He was otherwise a South African businessman of Ermelo, Mpumalanga Province and he had several assets in that country while he also had others here in Swaziland.

[5] The Applicant contends that in an endeavor to help himself to the immovable assets of the Estate, the First Respondent disposed of various immovable assets of the estate of the late which are situate in Swaziland. As he did so he allegedly made it look like he had distributed the proceeds from the sale of the said assets therefrom among the Estate's beneficiaries. The other assets the First Respondent allegedly purported to distribute to himself as an alleged sole beneficiary in terms of the deceased's alleged will. It is noteworthy that whereas the Applicant's father Mohamed Rased Tilly was supposed to be a beneficiary, nothing was allocated to him or to the beneficiaries to his estate of which the Applicant was one. It is not in dispute that since the Applicant's father was already late at the time the First Respondent purported to distribute the proceeds from the sale of the estate properties referred to, his (that is Mohamed Rased Tilly) inheritance or share should have been paid to the Applicant in terms of the Common Law,

which suggests prima facie that the Applicant's exclusion from sharing was irregular.

[6] It also transpired that the Estate of the late Mohamed Essop Ismail Tilly had been registered in two Districts in Swaziland being the Manzini and the Hhohho Districts which on its face appears to be abnormal. These were under different Estate File numbers namely EM 90/2015 and EH 257/2015. They were however required to be supervised by the same authority in the Master of the High Court.

[7] In both these Estate files, the Swaziland Letters of Administration were issued on the basis of certain foreign letters of an administration produced by the First Respondent and having been issued in the Gauteng Province of the Republic of South Africa. For estate File Number EM 90/2015, there was no will produced by the First Respondent to accompany the foreign letters but for estate file number EH 257/2015, there was produced a will in terms of which the same deceased person's estate had to be dealt with. The said will be provided that the First Respondent is the only beneficiary.

Again this is abnormal. Often the estate of a deceased person is dealt with ab interstato where there is no will and in terms of a will where there is one.

- [8] As a basis for the reliefs sought, it was contended by the Applicant that the First Respondent had, like in the Republic of South Africa, allegedly fraudulently purported to wind up the deceased's estate. In that process he had allegedly purported to wind up the estate under File Number EM 90/2015 differently from that under file EH257/2015. In the former state file he had as appeared on the copy of the Liquidation and Distribution Account annexed to the papers, allegedly included in the Liquidation and Distribution Account certain three properties namely Portion 41 of Farm 50, Hhohho Swaziland, Portion 132 of Farm 2, Hhohho District, Swaziland and Portion 133 of Farm No. 2, Hhohho District, Swaziland. On these latter two properties, it had allegedly been suggested that the deceased's interest therein was a third (1/3) share in each such property. Under file number EH257/2015, he had purported to liquidate and distribute three properties to himself as the sole beneficiary and the details of how this happened are laid down herein below.

[9] Whereas there was annexed proof of receipt of the proceeds from the Liquidation and Distribution Account to the Second to Fifth Respondents as Beneficiaries of the estate concerned, the Applicant contended that this was not true as no such distribution had in reality been done. Of course other than the Applicant's say so, there has not been availed any unequivocal proof of this latter assertion. This becomes more apparent if one considers the fact that the Respondents concerned signed acquittances confirming their receipts of their alleged share and also allegedly signed affidavits confirming their having received their aforesaid alleged share.

[10] In the other Liquidation and Distribution Account, that is the one prepared under file number 257/2015, it was provided or stated that all the three properties being allegedly liquidated in terms thereof, their proceeds were to be distributed, as stated above, to the First Respondent as the sole beneficiary in terms of the late Mohamed Essop Ismail Tilly's alleged will. These were listed as certain Remaining Extent of Portion 10, (a Portion of Portion A) of Farm No.50, Hhohho District, Portion 132 of Farm No 2, Hhohho District and Portion 133 of Farm No. 2, Hhohho District. The Applicant disputes the authenticity of this Liquidation and Distribution Account. He sought and was granted an interim order of Court interdicting

the putting into effect of this particular Liquidation and Distribution Account.

[11] It was claimed further by the Applicant that there were also several other immovable properties of the late Mohammed Essop Ismail Tilly which were not included in any of the Liquidation and Distribution Accounts. It was contended that these were fraudulently being concealed by the First Respondent for his secret benefit later on. It was in fact contended that as a matter of fact, whilst this application had already commenced and was pending in Court, the First Respondent had secretly attempted to alienate one more of the Estate's immovable properties in the certain Remainder of Lot 587, Matsapha, at a sum of E4, 350, 000 -00. (Four Million Three Hundred and Fifty Thousand Emalangi).

[12] It is on the face of the foregoing contentions that the applicant seeks the reliefs he does in these proceedings which are fully set out above.

[13] Only the First Respondent filed papers in opposition. Otherwise, all the other Respondents did not oppose the Application. Of Particular note is the failure by the second to fifth Respondents to oppose the application. Instead they allegedly clarified by means of supporting affidavits that they received their share of the inheritance as reflected in the acquittances referred to above. Indeed there is what appears on their faces of each such acquittance to be the proof of receipt of their share of their inheritances in the form of the acquittances referred to above.

[14] The answering affidavit filed by the First Respondent has been referred to only as a Preliminary Affidavit. It is not in dispute that notwithstanding the lapse of a considerable period before the hearing of the matter, there has never been filed any document called a Comprehensive Affidavit in line with the assertion that the one filed was a preliminary one. I can only point out that the Rules of Court do not seem to recognize anything called a Preliminary Affidavit as they only talk of three sets of affidavits namely the funding, answering and a reply affidavit. All these were filed in this matter, making it ripe for hearing therefore. A comment is merited to the effect that even though in terms of his said affidavit, the First Respondent suggests he will await a directive from this Court on whether or not to file a further

answering affidavit, such a contention is an anomaly. This Court acts only as an arbiter and not as an advisor to the parties. Such is left to a party's own Attorney or Counsel. It suffices that the matter can only be dealt with on the basis of the papers placed before it in terms of the Rules of Court.

[15] In terms of his answering affidavit the First Respondent's case is as set out herein below. In so far as he is called upon to account for the sale of the properties mentioned in the Applicant's prayer as Portion 227 of Farm No. 2, Hhohho District, and Portion 41 of Farm No.50, Hhohho District, the Applicant disputes knowledge of, or his having sold Portion 277 of Farm No.2, Hhohho District. He claims to have heard of it for the first time in the papers, filed of record in this matter. He therefore denies any duty on his part to account for same.

[16] As concerns an account with regards the property described as Portion 41 of Farm No.50, Hhohho District, the First Respondent expresses surprise on why he is being called upon to account for this particular property because it is allegedly very clear from the Applicant's own papers that same was sold and had its proceeds distributed in terms of the Distribution Account

approved by the Master of the High Court just like its sale. He contends this prayer is ill - conceived therefore as the proceeds were allegedly distributed in terms of the Liquidation and Distribution Account annexed to the papers.

[17] In so far as he is being called upon to pay a certain sum of money into the Master of the High Court's Account, the First Respondents questions the rationale behind this prayer. He says it is clear from the papers that this was distributed between the beneficiaries. He asks where in such a case he would get the money from to pay into the Master's Account as prayed for given that the proceeds from the sale of the property were allegedly distributed to the beneficiaries, meaning that he cannot possibly pay same into the Master Account.

[18] With regards the revocation of the letters of administration as sought in connection with estate file number EM 90/15, he alleges that such a prayer has been overtaken by events. He contends there would be no point in the said letters being revoked as the winding up of the said estate has allegedly been finalized.

[19] He contends similarly with regards the prayer that the two estate files be consolidated. He claims there is no need for this given that the liquidation and distribution of the proceeds from the estate with regards Estate File Number EM 90/2015 has already been finalized. He contends the consolidation of these files will not serve any purpose because he, as executor, has become functus officio.

[20] The First Respondent contends further that no case has been made for the freezing of his accounts as held with the ninth, tenth and eleventh Respondents. He contends no money has been shown to have, whilst unduly earned from the estate, been deposited into his aforesaid accounts.

[21] It is disputed that any need has been shown why it was necessary to call a meeting of the Next of Kin. It was argued that for estate file EM 90/2015, the winding up of the estate had long taken place and that the meeting prayed for has already been overtaken by events. An obvious argument with regards Estate File Number 257/2015, is that the liquidation and distribution

of the proceeds from the liquidation of the estate concerned was in terms of a will whose validity has not been set aside.

[22] With regards the prayer seeking the freezing of the Bank Accounts held in the names of the Late Mr Mohammed Essop Ismail Tilly, the First Respondent contended that he had no interest in that relief and that it did not matter whether same was or was not granted to him. A comment to this would be that the position adopted by the First Respondent of not caring whether the order sought is granted or not is very strange. This is because an Executor would perhaps be expected to give reasons for such a position as he is the person who is taken to have entered the shoes of the deceased.

[23] The First Respondent did not address himself at all to the question whether or not it was necessary to interdict the transfer or alienation of the other assets of the late Mr Essop Tilly going forward. This includes the question of his removal as an executor.

[24] It would appear that with all the necessary papers having been filed, there ensued discussions between the papers. Proposals had in fact already been made by the Applicant on what orders could be granted by consent. In terms of a letter marked “Without Prejudice” by the Applicant’s Counsel dated the 10th March 2016, the orders proposed to be taken by consent were in terms of Prayers 1, 4, 5, 6, 7 and amended 9 of the Notice of Motion. This offer was to be accepted by noon of the same date if my understanding of the phrase recorded as “12 noon instant” is correct. There was obviously no response there to until 22 March 2016 when the First Respondent’s Attorneys, purported to accept the offer meant to be accepted on the 12th noon of the 10th March 2016, the same day on which the letter was written. In fact the prayers expressly accepted were an order being entered in terms of Prayers 1,2 and 9 of the Notice of Motion. Otherwise the grant or otherwise of prayers 5,6,7 and 9 was left in the hands of the Court to see whether or not to grant them as they mainly concerned the Master of the High Court.

[25] It would appear that the position of the parties with regards whether or not a settlement agreement had been reached differed. Whereas the Applicant contended no such an agreement had been reached, the Respondent believed

otherwise and in fact went on to contend that there had been a novation of the proceedings between the parties.

[26] It seems clear in my view that there was never a settlement agreement reached between the parties. The reality is that the offer in question was not accepted in line with the time set out in terms of the proposal. There is no proof it was still open for acceptance 12 days after its being made as was the case herein. I have not been referred to any authority that confirms such an offer could be accepted days after the lapse put forth in terms of the proposal or offer itself. See in this regard **Lewis Vs Rutherford 1924 AD 261@262**.

In R-A Christie's The Law of Contract In South Africa Third Edition (Supra), the following is stated at page 66, emphasizing when an offer should be accepted: "One aspect of the rule that acceptance must be clear and unequivocal or unambiguous is that the acceptance must exactly correspond with the offer".

The point being made here is that there can be no contract where an offer had already lapsed as at the time the purported acceptance occurred.

[27] With the parties Counsel having agreed during the argument of the matter, that if the Court were to find that there was no settlement agreement, then this Court could go on and determine the matter on the papers and Heads of Argument, I shall attempt to determine the matter in the manner set out herein below.

[28] The starting point is that I find it very strange that two files would be registered in different districts of Swaziland dealing with the estate of one person as was the case with regards the Estate of the late Mohammed Essop Ismail Tilly. It complicates it further that in one such estate file, the Liquidation and Distribution was purportedly being done on the basis that the deceased had died intestate yet in terms of the other estate file it was on the basis that the deceased had died testate. This for me indicates a very serious shortcoming, in the First Respondent being able to legitimately act as an Executor. It in fact justifies the Applicants suspicion that there was something wrong with the entire exercise. It makes it worse that where there

is purported reliance on a will, the First Respondent is both an executor and the sole beneficiary which is indicative of a serious conflict on his part.

[29] Otherwise the issues for determination are whether a case has been made for the reliefs sought. That is to say, has a case been made for an order calling upon the First Respondent to account for the proceeds of the sale of Portion 277 of Farm No.2, Hhohho District and of Portion 41 of Farm No. 50, Hhohho District; whether a case has been made for an order demanding payment into the Master's Office of the sum of E5,100, 000.00, allegedly forming the proceeds of the sale of the immovable property mentioned in the above prayer; whether a case has been made for an order revoking the Letters of Administration issued in Estate EM90/2015 to the First Respondent; Whether a case has been made for a consolidation of Estate File Numbers EM90/2015 and EH257/2015 opened in the name of the late Mohammed Essop Ismail Tilly; Whether the Seventh Respondent can on the material before Court, be interdicted from effecting the transfer of all immovable property held in the name of the Late Mohammed Essop Ismail Tilly pending the winding up of the consolidated estate files aforesaid; Whether the 6th Respondent should be ordered to call a next of kin meeting under the consolidated estate numbers aforesaid; Whether a case has been

made for an order “freezing” or interdicting the operation of the First Respondent’s Accounts as held with the Ninth, Tenth and Eleventh Respondents;

Whether a case has been made for an order interdicting or “freezing” the operation of the Bank Accounts of the late Mohammed Essop Ismail Tilly held with the Ninth, Tenth and Eleventh and lastly whether a case has been for an order for costs on the scale as between Attorney and own client which should be borne by the First Respondent.

A. Whether a case has been made for an order calling upon the First Respondent to account for the proceeds of the sale of Portion 277 of Farm No.2, Hhohho District and Portion 41 of Farm 50, Hhohho District.

[30] Whereas the Applicant contended in his founding affidavit that the First Respondent had sold Portion 277 of Farm No.2 Hhohho District, the latter specifically denied having done so. He in fact alleged he knew nothing about the said property and contended further that it was his first time to hear of such. Reacting to this contention by means of his replying affidavit, the First Respondent contended that the First Respondent had alienated the

property in question and that as he did so, he purported to be the Late Mohammed Essop Ismail Tilly and abused the closeness in their names. It was suggested that this manner of doing things was the First Respondent's modus operandi.

[31] Whereas the opposing affidavit by the First Respondent had no doubt raised a dispute of fact, the Replying Affidavit had only cemented the said dispute, making it impossible for it to be resolved on the basis of the papers. The position of our law is very clear that where a dispute of fact exists, such an issue cannot be resolved on the papers but should rather be referred to oral evidence on a specific issue or to trial be dismissed from the roll particularly where the dispute was foreseeable as at the time the application was moved. See in this regard **Room Hire Company (PTY) LTD Vs Jeppe Street Mansions (PTY) LTD 1977(3) SA 364.**

[32] It seems to me that very little will be achieved through referring the matter to oral evidence or to trial. The dispute concerned seems fundamental in my view and ought to have been foreseeable. I am convinced that the best way forward is to decline the order requested with regards the prayer concern and

in relation to this specific property. It has to be understood my decision is not to suggest that the First Respondent is innocent of the allegations than it confirms that there is a dispute on who sold and or alienated the property in question. It is very obvious this alienation, although purporting to have been done by the late Mohammed Essop Ismail Tilly on the face of it, this could not have been done by him but, by someone else who was no doubt committing a fraud as the concerned Mr Tilly was long dead. The Applicant would thus be better placed to commence his proceedings by way of summons so as to ensure that this particular dispute is properly determined.

[33] Accordingly I will order that pending finalization of action proceedings to be instituted within two months of this Court's order, no further action will be taken towards the consummation of the process aimed at completing the alienation of the property concerned and in whatever form.

[34] The next question still under the same subheading, is whether in law a case has been made for an order calling upon the First Respondent to account for the proceeds of the sale of Portion 41 of Farm 50, Hhohho District.

[35] This relief is sought in the backdrop of a disclosure by the Applicant himself that after the sale of the said portion of land, the proceeds were shared between all the beneficiaries from the deceased's estate except for the Applicant's father or his estate. Although the Applicant wants to suggest it was not true the proceeds were so shared and that in actual fact it was not the Second to Fifths Respondents who received the shares set out in the Distribution Account, his assertions are not supported by any evidence save for his apparent speculation. There are annexed to the First Respondent's answering affidavit the acquittances signifying receipt of the various inheritances purporting to have been signed by the said beneficiaries. There are further confirmatory or supporting affidavits by each one of the said beneficiaries confirming their having received their share of the portion of their father's estate with regards the proceeds from the sale of Portion 41 of Farm 50, Hhohho District.

[36] Whereas the Applicant was undoubtedly required to benefit the share belonging to the estate of his own late father from the said Liquidation and Distribution Account which did not happen, it seems to me that he does have a relief according to law against either the First Respondent or the Estate

itself from which further proceeds can be adjusted to accommodate his earlier not being afforded his lawful share.

[37] I am therefore convinced that an account was given in terms of the Liquidation and Distribution Account filed of record and that the relief framed in the manner this one is, is not appropriate and cannot be granted.

B. Whether a Case Has Been Made For An Order Demanding Payment Into The Master's Office Of The Sum Of E5, 100, 000-00.

[38] According to the Applicant the amount of E5, 100, 000-00 refers to the proceeds realized by the First Respondent when he allegedly sold the property referred to in the foregoing paragraphs, being Portion 277 of Farm No. 2, Hhohho District and Portion 41 of Farm 50 Hhohho District. I have already stated what I have found to be the position with regards Portion 277 of Farm 2, Hhohho District, where I have found that there is a dispute on who sold it as such no account can be talked of with regards this particular property. With regards the proceeds recovered or realized from the sale of Portion 41 of Farm 50, Hhohho District, I have already found that those

proceeds were shared between the beneficiaries of the late Mohammed Essop Ismail Tilly's Estate, even if they excluded the estate of the Applicant's father which should have apparently been beneficiary.

[39] These observations mean that no basis has been created for any monies held by the First Respondent which he can be ordered readily to pay into the Master's Offices or Accounts in line with this particular prayer. On Portion 277 of Farm No2, there first has to be a determination of the question who exactly alienated the property concerned and with regards Portion 41 of Farm 50, it has been found that the Second to Fifth Respondent did receive their share of the proceeds from the sale of the said property with the entire proceeds being exhausted in that process, even though the share that should have been paid to the Applicant's father estate and by extension to the Applicant was not paid.

[40] This relief as well cannot be granted as it is premature with regards Portion 277 of Farm No.2, Hhohho District; while it is overtaken by events with regards Portion 41 of Farm 50, Hhohho District.

C. Has A Case Been Made For An Order Revoking The Letters Of Administration Issued To The First Respondent In Estate File Numbers EM 90/2015 and EH 257/2015.

[41] As indicated above, the starting point is the anomaly observed with regards the opening of two estate files to liquidate and distribute one deceased person's estate. I have already stated it is further complicated by the fact that where the said estate files were opened, one was to be dealt with in terms of a will while the other one was to be dealt with on the basis that there was no will. It worsens it further that, when all the beneficiaries of the deceased's estate were being paid their share of the estate, one of the beneficiaries in the estate of the Applicant's father was left out. It seems to me that the First Respondent cannot fairly and properly wind up the deceased's estate including to fairly distribute the proceeds therefrom particularly when considering the contentions that some other immovable assets of the estate have not been included in the Liquidation and Distribution Accounts that have been made.

[42] It seems to me that for the sake of fairness and that whatever the position is in South Africa with regards the winding up of the deceased's estate there

coupled with its liquidation, this Court will be doing justice if it revokes the letters of administration so that a process to appoint an independent and neutral executor can be done. The First Respondent's position is further clouded by the fact that in terms of the alleged will he is both an executor and a sole beneficiary. I have understood the Applicant to be quibbling that will even though not in so many words. Ofcourse the First Respondent did not say anything in opposition to this contention.

D. Whether A Case Has Been Made For The Consolidation of The Two Estate Files referred to as EM 90/2015 and EH 257/2015.

[43] As indicated above, it was strange for two files to be opened for the winding up of the estate of the late Mohammed Essop Ismail Tilly in one jurisdiction. It was obviously in recognition of this anomaly that the Applicant asked for an order that these two estate files be consolidated into one. In opposition to this prayer, the First Respondent disputed the need for this and contended that since the winding up in the other file, EM 90/2015, had already been finalized there was no need for the order being sought.

[44] It is difficult for the Court to understand what is meant by the winding up in the other file having been completed. This is because, it was not disputed that some of the properties or immovable assets of the late Mr Tilly had still not been wound up which I take to mean they had still not been placed or put into any inventory. If this is true, one cannot know into which estate file such immovable assets are going to be inventoried and subsequently wound up. None of the two estate files can be ruled out on this purpose therefore. This means that the two estate files need to be consolidated into one file particularly, file number EH 257/2015 given that it was said that EM 90/2015 had already been closed. I am sure this anomaly of having the master being supervised in two different estate files in different districts should be brought to an end. This being the case it follows that an order of Court should issue directing that the two Estate Files referred to be consolidated into one file.

E. Can the 7th Respondent Be Interdicted from effecting a transfer of any immovable property belonging to the late Mr Tilly pending the finalization of the winding up of the estate in terms of the consolidated files referred to above.

[50] An order was also sought for an order interdicting the effecting of a transfer of any of the immovable properties of the late Mr Tilly by the 7th Respondent, pending the completion of the winding up. The obvious motivation for this order is the fact that it was discovered, according to the Applicants assertion, which was not disputed, that the First Respondent, or someone unknown was in the habit of secretly selling and alienating some properties of the estate. It is believed that if an order as sought is granted, it will bring this practice to a close, as the properties will be monitored closely with such an interdict in place and will only be registered as approved.

[51] This order was not only unopposed but there is in my view no reason why such an order cannot be granted. It obviously does no one no harm yet it ensures that the property concerned is secured. Consequently, I see no reason why this order should not be granted and I go ahead to do so. In this matter, it is obvious that the applicant is spurred into action by the discovery of properties said to belong to the deceased's estate which had already been alienated or those that were in the process of being so alienated or without sound reasons for so doing being put in place let alone without anyone wanting to own up.

F. Whether The 6th Respondent Can Be Ordered to Call a Meeting of the Next Of Kin

[52] The Applicant also sought an order of this Court compelling the 6th Respondent to call a meeting of the next of kin of the deceased for purposes of appointing an executor. With the initially to appointed executor, who was appointed on the basis of Foreign Letters of Administration having been removed, it seems to me that it would now be imperative for the 6th Respondent to call a meeting of the next of kin and there at appoint someone else as such an executor dative following the requirements of law.

[53] I am convinced that in the present circumstances this would have to be the route to follow. I accordingly order that such a meeting called for the said purpose within 21 days from the grant of this order.

G. Whether A Case Has Been Made For An Order Interdicting Or “Freezing” The Operation of the First Respondent’s Account

[54] The Applicant seeks an order freezing or interdicting the operation of the First Respondent's Bank Accounts held with the Ninth, Tenth and Eleventh Respondents. I agree with Respondents that from the papers filed of record, nothing has been said pointing to some money that was illegally misappropriated by the First Respondent and deposited into his aforesaid account. This I agree would entitle the Applicant to seek an order to preserve the monies so deposited or to ensure that such monies are not desipated.

[55] With this objection having been raised, the Applicant sought to justify the seeking of this order on the basis that the First Respondent was a peregrinus of this Court who it was going to be found had misappropriated the monies belonging to the estate and therefore that same was going to be used as a means to confirm the applicant's case against the First Respondent.

[56] Clearly this is not the case established in the applicant's founding papers. It was never to found or confirm jurisdiction that the order in question was sought. It was sought simply because the First Respondent had allegedly helped himself to some monies owned by the Estate. There is therefore

clearly no doubt that a case has not been made for the relief sought in this regard which therefore falls to be rejected.

H. Whether A Case Has Been Made For An Order Interdicting or “Freezing” the operation of the Bank Accounts Belonging To The Late Mohammed Essop Ismail Tilly.

[57] Although an order freezing or interdicting the operation of the deceased’s accounts held with the Ninth, Tenth and Eleventh Respondents was sought, there was no opposition to its grant. Owing to the said order, I shall first take it that indeed there are such accounts of the late Mr Tilly held with the Respondents concerned. If this is the case, I can see no reason why such an order cannot be granted as prayed for by the applicant. After all, it should almost follow automatically that upon his death, the Bank Accounts of a deceased person cannot be operated without the Master’s permission.

I. Whether A Case Has Been Made For Costs At A Punitive Scale.

[58] It is a settled position of our law that such costs are granted in rare instances particularly where there has been exhibited unbecoming conduct by a party which calls for censure by a Court. Whilst strong allegations of fraud have been made against the First Respondent there is no unequivocal evidence before Court pointing at such conduct. There could no doubt be suspicions of unbecoming conduct which however cannot be settled in these proceedings as they would no doubt require oral evidence to be proved. I am otherwise convinced that there are those prayers to which a case has been made against the First Respondent. I will therefore, in exercise of the discretion this Court has, order that the First Respondent is to pay the costs of these proceedings at the ordinary scale.

[59] For the foregoing reasons and for the removal of doubt I make the following order:

1. Pending the finalization of action proceedings to be instituted within 30 days from today's date aimed at ascertaining who attempted to alienate the property fully described hereunder, no action aimed at completing the alienation of the property

described as Portion 277 of Farm 2, Hhohho District; from the deceased's estate shall be taken in whatever form.

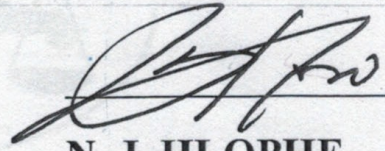
2. The order sought calling upon the First Respondent to account for the proceeds of the sale of Portion 41 of Farm 50, Hhohho District is not granted on account of such proceeds having been shown to have been distributed to some of the beneficiaries in terms of the Liquidation and Distribution Account.
3. The order sought demanding payment into the Master's Account of a sum of E5,100,000-00 is refused on account of such proceeds having been shown to have been distributed to some beneficiaries in terms of the Liquidation and Distribution Account.
4. The Letters of Administration issued in favour of the First Respondent in the Estate Files opened with the Master of the High Court as EM 90/2015 and EH 257/2015 in the estate of

the late Mohammed Essop Ismail Tilly be and are hereby revoked.

5. The Two Estate Files opened under EM 90/2015 and EH 257/2015 in the estate of the Late Mohammed Essop Ismail Tilly be and are hereby consolidated and are to be dealt with under one file number being EH 257/2015.
6. The alienation of any immovable property in the Estate of the Late Mohammed Essop Ismail Tilly, be and is hereby interdicted until the entire estate shall have been wound up, liquidated and the proceeds therefrom distributed according to law.
7. The 7th Respondent be and is hereby interdicted from effecting the registration of any property belonging to the Estate of the Late Mr Mohammed Essop Ismail Tilly into the name of any other person except where such shall be subsequent to a

genuine winding up, liquidation and distribution of assets from the said estate.

8. In order to give effect to the appointment of a New Executor, the 6th Respondent be and is hereby ordered to, within 14 days from the date of handing down this Judgement, call a meeting of the next of kin of the late Mr Tilly for the purpose of appointing an Executor as envisaged in the Administration of Estates Act of 1902.
9. The operation of the accounts of the Late Mohammed Essop Ismail Tilly as held with the Ninth, Tenth and Eleventh Respondents be and is hereby interdicted pending the finalization of the winding up, liquidation and distribution of the assets of the said Estate.
10. The First Respondent be and is hereby ordered to pay the costs of these proceedings at the ordinary scale.

A handwritten signature in black ink, appearing to read 'N. J. Hlophe', written over a horizontal line.

N. J. HLOPHE

JUDGE – HIGH COURT