



**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**JUDGMENT**

**Civil Appeal No. 78/2013**

**In the matter between**

**SIMON VILANE N.O.**

**First Appellant**

**MANDLENKHOSI VILANE N.O.**

**Second Appellant**

**UMFOMOTI INVESTMENTS N.O.**

**Third Appellant**

**And**

**LIPNEY INVESTMENTS (PTY) LTD**

**Respondent**

**Neutral citation:**

*Simon Vilane N.O., Mandlenkhosi Vilane N.O.,  
Umfomoti Investments N.O. v Lipney Investments  
(Pty) LTD (23/2013) [2014] SZSC 28 (30 May 2014)*

**Coram:**

**RAMODIBEDI CJ, EBRAHIM JA and MCB  
MAPHALALA JA,**

**Heard: 21 MAY 2014**

**Delivered: 30 MAY 2014**

### **SUMMARY**

*Practice and procedure – Interdict – The respondent company, as applicant, sought and obtained an interim order interdicting and restraining the appellants from transferring certain disputed property as well as an order to have the property registered in its name – Serious allegations of fraud directed against the appellants – No answering affidavits forthcoming from the appellants – The appellants wrongly relying on Rule 35 (20) of the High Court Rules on discovery as justification for not filing answering affidavits - The court a quo correctly holding the view that there was “no contest” as to the facts and thus confirming the interim order – Appeal dismissed with costs.*

### **JUDGMENT**

**RAMODIBEDI CJ**

[1] The respondent company, as applicant, sought and obtained an interim order in the High Court interdicting and restraining the appellants from alienating, transferring or encumbering certain immovable property under deed of Transfer No. 273/2013, being portion 3 of Farm No. 28

situated in the Lubombo District in Swaziland. Furthermore, the respondent applied for an order registering the property in its name.

[2] According to the uncontested contents of the founding affidavit of Walter Phillip Bennett, who is a Director of the respondent company, the disputed property originally belonged to the late Henry Ntonto Vilane (“the deceased”). It was subsequently sold to the respondent by one Siboniso C. Dlamini in his capacity as the Executor of the deceased’s estate. He was duly cited as the 7<sup>th</sup> respondent in the court below. An order for the transfer of the property into the respondent’s name was actually sought against him in the present matter.

[3] It is pertinent to record that the founding affidavit of Walter Phillip Bennett is replete with several serious allegations of fraud perpetrated by the appellants against the deceased’s estate. These may be summarised as follows:-

(1) Upon the decesead’s death, and before the Executor could be appointed by the Master of the High Court to administer the

estate, his eldest son, Ben Jacob Vilane, fraudulently caused all his properties to be transferred into his name, claiming that he was the designated heir. It is alleged that in so doing, he made a fraudulent misrepresentation to the Registrar of Deeds that he was the Executor of the deceased's estate and was, therefore, authorised to effect the transfer. In my view, these were serious allegations which stood uncontroverted.

It need hardly be stressed that in law the heir does not acquire dominium in the deceased's estate until it is wound up after the appointment of an executor. It will be seen for that matter that in terms of s 41 of the Administration of Estates Act 28 of 1902, all persons (including the heir) who are in possession of any assets belonging to the deceased's estate are obliged to deliver such assets to the Executor. See, for example, the decision of this Court in **Elijah Matsebula and Another v Cebile Matsebula (born Hlophe), Case No. 21/2011**. It is indeed so that in terms of the Act all the estates of the deceased persons must be reported to the Master of the High Court who then issues letters of

administration in terms of s 22. It follows, then, that there can be no question of self-help in a matter such as this as the appellants seem to suggest.

- (2) True to the notion that there is no honour amongst thieves, it is further alleged in Walter Phillip Bennett's founding affidavit that Ben Jacob Vilane's younger brother, one Anthony Tinyo Vilane, subsequently fraudulently transferred the properties from his brother into his own name. The latter, however, obtained a court order which transferred the property back to him.
  
- (3) Walter Phillip Bennett is unchallenged in paragraph 19 of his founding affidavit to the effect that upon the realisation of the various fraudulent activities committed against the deceased's estate, the Master of the High Court appointed Siboniso C. Dlamini as the Executor of the deceased's estate as indicated above. This was done by way of a court order dated 2 June 1993, which superceded the previous one in favour of Ben Jacob Vilane.

(4) Finally, Walter Phillip Bennett averred in his founding affidavit that the first and second appellants subsequently attempted to fraudulently transfer the property in question to the third appellant.

[4] It is undoubtedly opportune at this stage to make this pertinent observation. This is that it is a strange feature of this case that the appellants, who were respondents in the court below, failed to file any answering affidavits. This, in the face of an avalanche of accusations of several acts of fraud as fully set out above. In my view, they have got only themselves to blame for the result that follows hereunder.

[5] As I see it, the appellants' naivety may be gleaned from their second ground of appeal in which they make the following point:-

*“(c) The learned judge erred in not finding that having issued a Rule 35 (20) [of the High Court Rules] there was no duty on the appellants to file answering papers, the respondent having not produced the documents as requested.”*

[6] Indeed, the record shows that, instead of filing an answering affidavit, the appellants filed a Rule 35 (20) notice which is on discovery, inspection and production of documents and tape recordings. The notice provided as follows:-

*“BE PLEASED TO TAKE NOTICE THAT the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents require the applicant to produce for their inspection the following documents referred to in the applicant’s founding affidavit:*

- (i) the Order of Court of the 2<sup>nd</sup> June, 1993.*
- (ii) the pleadings/affidavits underlying such Order.”*

[7] Now, the sanction for failing to comply with Rule 35 (20) notice is contained in Rule 35 (21). It is simply to the effect that a defaulting party shall not, save with the leave of the court, use such document or tape recording in the proceedings. However, the other party may use the document or tape recording. It follows, therefore, that Rule 35 (20) is not, by any stretch of the imagination, a substitute for an answering affidavit.

[8] In this Court Adv Flynn for the appellants made heavy weather of the fact that they could not file answering affidavits before having sight of the order of June 1993 (or 1992 as it subsequently emerged) referred to in the founding affidavit as fully set out in paragraph [3] above. Pressed by this Court on the soundness of such a proposition in the circumstances of this case, counsel switched horses midstream. He was heard to argue that the respondent's own papers filed subsequently were full of contradictions and that the end result was that the respondent had failed to establish a clear right for the interdict sought. Counsel's submissions are, in my view, untenable for reasons that follow hereunder.

(1) The fact that the court order in question was not immediately forthcoming is not sufficient justification for the appellants' failure to file answering affidavits. In any event, they failed to put the respondent to terms on the point. In this regard it is important to observe that they only issued a Rule 35 (20) notice but failed to follow it up with a proper application to compel discovery. As stated in paragraph [7] above, it is clear, as it seems to me, that in



the absence of an application to compel discovery, followed by a court order in that regard, the appellants' remedy lies in Rule 35 (21) in terms of which the defaulting party is not entitled to use such document in the proceedings except with the leave of the court.

- (2) The record shows that by the time the matter was argued in the *court a quo* in October 2013, the respondent had duly furnished the appellants with the court order in question. Yet despite the order having been made available to them they still failed to file answering affidavits. In a well presented argument, Mr M.E Simelane for the respondent submitted that the appellants did not have the courage to address on oath the "wrongs" they had committed against the deceased's estate. I am disposed to agree in the circumstances of this case.

- [9] In its approach to the matter, the *court a quo* took the view that because of the appellants' failure to file answering affidavits, there was "simply

no contest in this case and the application ought to be granted without any further ado.” I am unable to find any fault with this approach in the circumstances of this case. Indeed, the learned Judge *a quo* is supported by authority. Thus, for example, in **Chobokoane v Solicitor General 1985 – 1989 LAC 64** at 65 the Lesotho Court of Appeal made the following apposite remarks which I am happy to adopt in this jurisdiction:-

*“The affidavit made by the applicant constitutes and contains not only his allegations but also his evidence, and if this evidence is not controverted or explained, it will usually be accepted by the Court. In other words the affidavit itself constitutes proof, and no further proof is necessary. ... and as there has been no denial, the matter must be approached on the basis that these allegations by appellant are proved.”*

In this jurisdiction see, for example, **The Prime Minister of Swaziland and Others V Christopher Vilakati, Civil Appeal Case No. 30/12** per Moore JA (Ebrahim and Ota JJA concurring).

[10] Adv Flynn relied heavily on the cases of **Protea Assurance Co LTD and Another V Waverly Agencies CC and Others 1994 (3) SA 247**

**(C) and Unilever plc and Another V Polagric (Pty) LTD 2001 (2) SA 329 (C)** respectively for the proposition that the appellants were entitled to the discovery of the court order in question before they could file answering affidavits. I consider, however, that those cases were quoted out of context. The reality is that those were cases in which applications were made to compel discovery. They are thus distinguishable from the present case where no such application was made at all. All that was done here, as I repeat, was to file a notice for discovery without more.

[11] At this stage I discern the need to draw attention to the following salutary remarks of Corbett J, as he then was, in **Bader and Another v Weston and Another 1967 (1) SA 134 (C)** at 136:-

*“It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the Court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court. Having done so, it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a*

*cause of action and this will often be a convenient procedure where material disputes of fact have arisen which cannot be resolved without recourse to the hearing of oral evidence. On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point.”*

One has a similar situation here.

[12] It follows from these considerations that there is no merit in the appeal.

It is accordingly dismissed with costs.

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**M. M. RAMODIBEDI**  
**CHIEF JUSTICE**

**I agree**

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**A.M. EBRAHIM**  
**JUSTICE OF APPEAL**

**I agree**

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**MCB MAPHALALA  
JUSTICE OF APPEAL**

**For Appellants : Adv P.E. Flynn**

**For Respondent : Mr M.E. Simelane**