

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : MTHATHA

CASE NO.: 4341/2019

In the matter between:

THINA NGCINGWANA

Applicant

and

SONWABO DUMISANI NGCINGWANA

1st Respondent

THE MASTER OF THE HIGH COURT,

MTHATHA

2nd Respondent

FINEPROPS 1142 CC

3rd Respondent

THE COMPANIES AND INTELECTUAL

PROPERTIES COMMISSION

4th Respondent

THE SHERIFF OF THE HIGH COURT

MTHATHA

5th Respondent

JUDGMENT

GRIFFITHS, J.:

[1] I am seized with an interlocutory application pursuant to the provisions of Rule 35(13). The application has been strenuously opposed by the first respondent only, with the Master having indicated that he abides the decision of the court.

[2] The applicant, in her capacity as executor in the deceased estate of the late P M Ngcingwana, instituted an application on 12 November 2019 seeking certain relief relating to a member's interest in the third respondent Close Corporation ("the main application"). The main application was also opposed by the first respondent who, in addition, instituted a counter application seeking a review of the Master's earlier decision to remove him as executor in the estate, together orders that he be reinstated and that the applicant be removed as executor. The counter application is opposed by the applicant. It is the counter-application which has spawned this interlocutory application and it has been made clear therein as emphasized by Mr. Paterson (who appeared on behalf of the applicant) that it is only as against the counter-application that the interlocutory application is directed.

[3] The matter has a long and rocky history. I do not intend to go into it in any detail save to state that the deceased died during 2001 and the first respondent was appointed by the Master as executor on 4 April 2001. Standard

Executors and Trustees assisted him as agents in the administration of the estate until their resignation during September 2009. During 2013 the Master made application to this court seeking to remove the first respondent as executor. This was dismissed but ultimately an order was issued by the court instructing the Master to convene a meeting on 22 November 2013 at which the heirs to the estate were to be present together with the respondent and/or his representative. The purpose of the meeting was to expedite the liquidation and distribution of the estate.

[4] At that meeting the first respondent was represented by his attorney, Mr. Potelwa, and certain resolutions were finalized. In his report, filed in terms of the provisions of Rule 53 in the counter application, the Master referred to this meeting and annexed, *inter alia*, the minutes thereof which reflected such resolutions and undertakings. Despite this, and on 29 October 2018, the Master removed the first respondent as executor and duly appointed the applicant in his stead. It seems from his report that the Master did this largely because the first respondent failed to comply with the resolutions or agreements which were adopted.

[5] In the counter-application, the first respondent contended that he had diligently performed as executor and that the Master had had no grounds for removing him. He contended that he regularly submitted liquidation and distribution accounts but that certain queries were raised by the Master. A liquidation and distribution account was submitted in 2015 but the first respondent complained concerning various queries raised thereanent by the Master. There were complaints about a certain delays caused by the necessity to purchase a house for the deceased's widow and difficulties which had arisen

concerning the terms of a trust which was to be used as a vehicle for the purchase of this house. He further stated that demands were made by the Master to which he responded and that he was never informed of his removal as executor but only gained knowledge thereof from a letter sent by the applicant's erstwhile attorneys. He also maintained that he did not receive a notice from the Master prior to the decision to remove him and that the decision to remove him was actuated by malice on the part of the Master.

[6] As I have indicated, the applicant has opposed the counter-application of the first respondent. She stated that upon her appointment as executor she was not provided with a record of the first respondent's administration of the estate. In her founding affidavit, she referred to the absence of proof relating to the averments put up by the first respondent in the counter-application. In particular, he did not put up the various liquidation and distribution accounts he referred to liberally therein, nor did he refer to the meeting of 22 November 2013 and as to how, if he did, he had complied, or had sought to comply with the resolutions adopted. She referred to the fact that the first respondent failed to mention the resolution adopted at that meeting relating to the first respondent's responsibility to account for his conduct of the various businesses which had emerged as forming part of the deceased estate. She also referred to the averment relating to malice, and that she is unable to deal with this without a full record of the relevant accounts together with their explanations and the various necessary vouchers and acquittances.

[7] The opposition to the interlocutory application appears to subsist on three main legs, these being, firstly that Rule 35(13) requires that, before any other orders are made relating to discovery, the court has to make a distinct and

separate order to the effect that the rules of discovery are to apply to this particular application, secondly, that all the necessary documentation pertaining to the Master's decision is contained in the Master's report and bundled documents and, thirdly, that the applicant has not made out a case for "exceptional circumstances".

[8] Plasket J (as he then was) has succinctly set out the background to and the requirements of sub-rule 35(13) in the case of *Premier Freight (PTY) LTD v Breathetex Corporation (PTY) LTD*¹. Because I believe the reasoning applied therein applies, in the main, with equal force to the present matter I quote that portion of the judgment in full:

"[14] Applying these principles to the present case, I am of the view that this is a case in which a direction should be made to the effect that the rules of discovery apply. I have arrived at this conclusion on the basis of a consideration of a number of factors outlined below.

[15] First, at issue in this matter is a claim for a substantial amount of money: an order is sought directing the respondent to pay to the applicant over R2 million plus interest. While I do not agree that the mere fact that a final order is to be made renders this matter exceptional, and I do not read the *Saunders Valve Co Ltd* case to be authority for this proposition, it does appear to me that the nature and scope of the relief sought is a factor to be considered when a Court is called upon to exercise its discretion in terms of Rule 35(13).

[16] Secondly, the respondent has raised a defence that, whatever its merits at the end of the day, does not appear to be frivolous and it claims, again with some justification, that it does not have all of the documentation that it needs to succeed in its defence because the applicant has refused to provide it with those documents despite request. The potential prejudice to the respondent is clear. As in the *Saunders Valve Co Ltd* case, the applicant in the main application from whom discovery is sought bears the *onus*. The prejudice to the respondent would have been avoided had the applicant instituted action proceedings instead of motion proceedings.

[17] Thirdly, the documents that the respondent seeks are, on the face of it, relevant to its defence and, what is more, they are relevant to a central issue in the litigation. They do not relate, as was the case in *The MV Urgup* matter, to an interlocutory application distinct from the central issues: the parties are 'litigating at full stretch' as it was put by Thring J; and the invocation of Rule 35(13) cannot therefore be seen as the use of a 'sniping weapon in preliminary skirmishes'.

¹ 2003 (6) SA 190 (SE) paragraphs 14 - 23.

[18] Fourthly, the respondent's application for a direction that the Rules of discovery apply is relatively well directed: it cannot be described as a fishing expedition and discovery is unlikely to result in an extension of the issues.

[19] Fifthly, the issue of discovery cannot be said to have been raised at too late a stage in the proceedings: the application was made as part of the answering papers but foreshadowed in correspondence between the attorneys for the parties in which the respondent requested documentation, the request was refused by the applicant and the respondent was, in effect, advised by the applicant to bring an application if it wanted the documents. In these circumstances and even though further affidavits will have to be filed, that inconvenience is not sufficient, in my view, to persuade me to exercise my discretion against the respondent.

[20] Sixthly, the applicant decided to proceed by way of application, thus robbing the respondent of the automatic resort to discovery. The applicant cannot necessarily be faulted in this regard: there is no suggestion that it abused the process in order to deny the respondent the right to discovery and it, after all, runs the risk of its application being dismissed in the event of the existence of material disputes of fact. That said, however, it cannot be gainsaid that the respondent is at something of a disadvantage. By invoking Rule 35(13) in these circumstances, it is not seeking to use discovery in the way that the applicant did in *MV Rizcun Trader (2)*, namely in order to obtain information that it ought to have had before it proceeded.

[21] Seventhly, in all probability, the documents that the respondent seeks will resolve the matter one way or the other. They will either establish that the amount represented to be the amount owing was, or was not, the correct amount.

[22] Eighthly, it appears to me that there is, without wishing to prejudge the merits, a reasonable apprehension that not everything is before the Court for the just and fair resolution of the dispute between the applicant and the respondent. When such an apprehension exists and a party seeks an order in terms of Rule 35(13) that would have the effect of placing every relevant document before the Court, one should, in my view, be slow to exercise a discretion against such a party.

[23] When these factors are taken together, the result is that the present is, indeed, an exceptional case in which it is warranted to direct, in terms of Rule 35(13), that the Rules of discovery apply.”

[9] In my view, almost all the considerations set out in the eight points listed by Plasket JR, with the necessary adjustments, are applicable to the present matter. Indeed, I would go further to say that as amply demonstrated by Mr. Paterson in argument before me, the first respondent's own affidavits together with the Master's report make it abundantly clear that the first respondent has not sought to place relevant documentation before the court. As executor, whilst he was in that position, he was in a position of *uberrimae fides*. He was obliged in terms of the relevant legislation to account fully for his actions and to leave a proper and complete paper trail in relation thereto. In these papers, he has

placed before the court oblique references to certain documentation without placing it in its full and proper context so as to give the court a full picture. What has emerged from his affidavits in the two applications is that he, in no measure, denies that he either has, or has had, all the documentation referred to in the notice of motion in his possession. Certainly, in the interlocutory application he has not denied possession of such, nor has he raised any form of privilege or other reason for not disclosing the documentation. To my mind this, on its own, is telling.

[10] Mr. Paterson has in argument also taken the court through the documents sought in the notice of motion and given valid and compelling reasons for the discovery thereof. Either such documentation has been referred to by the first respondent in the main application or ought to have been referred to by virtue of references thereto in the Master's report, in particular the minutes of the meeting of 22 November 2013 and the vitally important undertakings made on his behalf by his then attorney. In this regard, and in particular, I refer to undertakings relating to rental monies of the deceased estate which were apparently paid to the SD Ngcingwana Family Trust, a trust apparently owned and administered by the first respondent, together with the undertaking to provide the bank statements pertaining to such trust. In addition, and in particular, I refer to the liquidation and distribution account annexed to the applicant's founding affidavit in the interlocutory proceedings as apparently filed by the first respondent which reflects that various immovable properties owned by the deceased estate were sold for substantial amounts to a Close Corporation (Upbeatprops 1057 CC) which CC was subsequently sold to the first respondent for the paltry sum of R100.

[11] There is little doubt that the counter-application is of considerable importance to the applicant. Its success would mean not only that she would be removed as executor of the estate, but that an impugned executor against whom the Master has already brought an application for his removal and who was subsequently removed by the Master from that office, would be reinstated thereto. It would also mean that a deceased estate which has not yet been wound up after a period of 19 years under the stewardship of the first respondent, would simply continue to be administered by him which is clearly not in the interests of anyone concerned, let alone the heirs to the estate. Once the first respondent was removed as executor, and replaced by the applicant, she became clothed with all the duties and responsibilities which go with such office, and was, in turn, obliged to act *uberrimae fides*. She is thus obliged to act in the best interests of the estate and to do all that is necessary to further such interests. As against this, I believe that she was duty-bound to bring this application as in the absence of the documentation sought, she will be hamstrung and unable to carry out such duties. Furthermore, it is clear that the first respondent bears the onus, one which is not easy to discharge, to establish his right to success under the counter-application.

[12] Regarding the grounds of opposition, I have difficulty in understanding the argument relating to Rule 35(13). The applicant has sought in the notice of motion the very directive which is contemplated in that sub-rule, namely that the provisions of the extensive Rule 35 relating to discovery are to apply to applications “*in so far as the court may direct*”. This is indeed the precise intention of the applicant in the order sought.

[13] As to the argument that the report of the Master is conclusive, or that the applicant may apply to compel the Master to provide all the relevant documentation, this is misconceived. It is the right of the first respondent (as applicant in the counter-application) in terms of rule 53 to insist that a full record of the proceedings upon which the Master made his decision is provided. The first respondent has instituted a counter-application which has serious ramifications for the applicant as I have said. He has referred to documentation which he apparently has but has not placed before the court or provided to the applicant and has failed to refer to documentation which he ought to have placed before the court and/or provided to the applicant. In the circumstances, there can be little doubt but that he must be compelled to provide such documentation.

[14] As to the argument regarding relating to exceptional circumstances, this has already been dealt with. In my view there can be very little doubt but that such exceptional circumstances apply in this matter.

[15] In the circumstances the following order will issue:

1. The First Respondent is ordered to discover the following documents in terms of Rule (35)(2):

1.1 A full set of the papers in case no. 556/2009;

1.2 A full set of the papers in case no. 1172/2012;

- 1.3 The liquidation and distribution account submitted by Messrs Potelwa during 2010;**
- 1.4 The liquidation and distribution accounts submitted by Standard Trust;**
- 1.5 The liquidation and distribution account submitted during 2015;**
- 1.6 The reports submitted by First Respondent's attorneys regarding the formation of the trust;**
- 1.7 The liquidation and distribution account submitted in July 2017;**
- 1.8 The twelve lever arch files referred to in paragraph 75 of the Supporting affidavit attested to on 2 March 2020;**
- 1.9 The bank statements referred to in Annexure SDN7 paragraph 4;**
- 1.10 The agreements of sale between the deceased estate and Upbeatprops 1057 CC referred to in the Liquidation and Distribution Account dated about February 2007 and prepared for First Respondent in his capacity as Executor by Barry Paul Daisley, such agreements including:**
 - 1.10.1 the sale of Erf 29, 30, 71, 72, 75, 76 and 198, Port St Johns;**

1.10.2 the sale of the sole proprietorships of PMN Enterprises, Rocks Filling Station, Motor Spares, Elite Bottle Store, Rock in Liquor Restaurant;

1.11 The CK 2 documents of the following close corporations;

1.11.1 Upbeatprops 1057 CC;

1.11.2 Upbeatprops 1058 CC;

1.11.3 Upbeatprops 1059 CC;

1.11.4 Upbeatprops 1060 CC;

1.11.5 Tradepost 2132 CC;

1.11.6 Lightprops 1136 CC;

1.11.7 Fineprops 1142 CC;

1.11.8 Fineprops 1143 CC;

1.12 All financial statements from 2001 to 2010 relevant to the business operations of the deceased estate and rental collections as referred to in resolution 6 of the resolutions of the meeting of 22 November 2013 as reflected in Annexure G to the Report of the Master, and in particular the financial statements of the abovementioned close corporations;

1.13 The bank statements of the SD Ngcingwana Family Trust from its formation to April 2010, as referred to in resolution 7 of the resolutions of the meeting of 22 November 2013 as reflected in Annexure G to the Report of the Master;

4. The First Respondent is ordered to pay the costs of this application.”

R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT : Mr Paterson SC

INSTRUCTED BY : Drake Flemmer & Orsmond

COUNSEL FOR RESPONDENT : Mr Ngumle

INSTRUCTED BY : Mbabane Maswazi & Mkosana Inc

HEARD ON : 21 JULY 2022

DELIVERED ON : 26 JULY 2022

