REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER:8813/2019

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	~~YES~~/NO
2.OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
3.REVISED	
19/09/2019 DATE	SIGNATURE

In the matter between:

WILKEN FREDERICK JACOBUS Applicant

and

FREYSEN WILLIE N.O. Respondent

JUDGMENT

DIPPENAAR J:

Introduction

[1] This application concerns the respondent's account for services rendered pursuant to his appointment as receiver and liquidator tasked to determine and distribute the accrual of the estates of the applicant and his former spouse, Mrs Wilken, by order of court granted under case number 19779/2014 on 4 February 2016. The property involved included an immovable property and certain movables. The respondent is a practicing attorney.

[2] The applicant initially sought a declaratory order directing that the respondent's costs be governed by section 63 of the Insolvency Act, alternatively that the respondent be directed to tax his account before the Master of the High Court, Johannesburg, together with ancillary relief. In addition, applicant sought leave to approach the court, on duly supplemented papers, for the removal of the respondent as receiver and liquidator should he fail to comply with the order.

[3] At the hearing the applicant sought an amendment to his notice of motion, notice of which was given to the respondent on or about 27 June 2019. The applicant sought to substitute the declaratory order referring to the Insolvency Act with one that the respondent's costs as receiver and liquidator be capped to a percentage of the value of the movable and immovable property situated at portion 55 of farm 52, Witfontein, Randfontein, to be determined by the court.

[4] An additional order was sought directing that the fees charged by the respondent under case numbers 15637/2018 and 46175/17 be excluded from his account. The latter relief was not initially raised but was canvassed in the application papers. The respondent elected not to deal in any detail with these issues in his replying affidavit to the counter application.

[5] The respondent objected to the amendment on various technical grounds, including the absence of a condonation application, the defective nature of the application and the lack of any tender of costs. He contended for prejudice as the amendment would delay the finalisation of the distribution account and contended that he was not afforded the opportunity to address the issues raised by the amendment in his counter application or answering papers.

[6] The applicant did not launch any substantive application for an amendment but simply relied on his notice of amendment dated 27 June 2019. The respondent had formally objected to the said notice on 15 July 2019, outside the 10 day period afforded by the rules to do so. The applicant had not however filed any amended pages and its amendment lapsed.

[7] Absent a proper application for an amendment, I am not persuaded that it would be in the interests of justice to consider the amendment.

[8] The respondent launched a counterapplication for various declaratory orders aimed at declaring that his account is not subject to taxation by the Master or under the Insolvency Act, that his account is reasonable, authorizing the respondent to proceed with payment of the monies due to the parties after finalisation of his bill of costs and directing the applicant to pay any shortfall on the account, together with ancillary relief.

The relevant background facts

[9] Pursuant to his appointment, the respondent commenced his duties. The respondent was involved as attorney in two matters pertaining to the sale of the immovable property in which Freysen attorneys was cited as first respondent, an urgent application under case number 46175/2017 launched during November 2017 and an application under case number 15637/2018 launched during April 2018. The applicant contends that he was unaware of these legal proceedings.

[10] By 24 October 2018, the immovable property had been sold and transferred. Most of the outstanding issues were resolved, except the respondent's fees. At a meeting between the respective parties, the respondent requested Mrs Wilken's attorney to draft a settlement agreement. The draft contained a clause stating that the applicant accepted the respondent's fees as reasonable.

[11] As no account had yet been provided to the applicant he requested the respondent to provide an accounting of the moneys held by the respondent as well as his account. The applicant refused to sign or consider the settlement agreement before this was received.

[12] On 28 November 2018 a statement of account was received from the respondent, reflecting his fees as R498 280.56. The applicant was advised that the statement of account would lie for inspection at the respondent's offices from 29 November to 7 December 2018. The respondent reserved the right to amend his statement of account in the event that the applicant disputed it. The respondent further threatened that he would institute legal proceedings against the applicant for the delivery of all financial information pertaining to his post-divorce farming activities, issues which, according to the applicant, had already been resolved.

[13] Correspondence ensued between the parties until February 2019 in which the applicant disputed the statement of account and insisted on its taxation. The applicant formed the view that the Insolvency Act applied.

[14] On 4 March 2019, the respondent served a liquidation and distribution account on the applicant, which reflected an amount of R100 000 under the notation "detained in lieu of costs to be taxed". This liquidation and distribution account is in dispute between the parties. The present application was launched on 8 March 2019.

Duties of respondent as receiver and liquidator

[15] The genesis of the dispute between the parties is the liquidation and distribution account issued by the respondent and provided to the applicant in March 2019 and the respondent's statement of account dated 26 November 2018 in an amount of R498 280.56.

[16] The applicant contends that the liquidation and distribution account is incorrect in various respects and it has not been subject to taxation. It is not necessary for purposes of this judgment to deal with the individual complaints of the applicant in detail.

[17] The order in terms of which the respondent was appointed as receiver and liquidator[1], only refers to "the reasonable costs" of the respondent. It does not refer to any mechanism in terms of which such fees are to be assessed, nor any guideline in respect thereof.

[18] The respondent interprets this to mean that his fees are not subject to taxation as the Insolvency Act does not apply and his statement is not subject to taxation by the taxing master. He further contends that the Master of the High Court has no jurisdiction to assess his statement of account.

[19] Counsel for the parties could not refer me to any authority in point which expressly dealt with how the fees of a receiver and liquidator such as the respondent are to be regulated[2]. The available authorities do not expressly address this issue.

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[1] The order authorised and instructed the respondent to draft a distribution account (clause 1.1.9) and to pay the reasonable costs of the liquidation from the applicant's remaining assets per the distribution account (clause 1.1.10). Paragraph 3 of the order provided that the applicant was to pay the reasonable costs of the liquidator from his own remaining estate, after the liquidation ad per the receiver and liquidators' duties stipulated in 1.1.10. The respondent was further authorised to apply to court for any further directions concerning any difficulty arising (clause 1.1.12).

[2] M v M (82156/14) [2017] ZAGPJHC 354 (20 November 2017); Ndaba v Ndaba 2017 (1) SA 342 (SCA)

[20] The applicant contends that it is "common practice" amongst practitioners to apply the provisions of section 63 of the Insolvency Act[3]. As correctly pointed out by the respondent, the Insolvency Act however applies to insolvent estates only. It was common cause that the estates of the applicant and his former spouse were solvent and not insolvent. Considering the definition of trustee in section 1 of the said Act and the purpose of the Act, which is to consolidate and amend the law relating to insolvent persons and to their estates, the Insolvency Act does not apply.

[21] It follows that the applicant is not entitled to the primary declaratory relief sought.

[22] The basis of the appointment of a receiver and liquidator is stated thus by Innes CJ in Gillingham v Gillingham[4]:

> *"When two persons are married in community of property universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule, there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on his behalf. Under the general powers which the Court has to appoint curators it may nominate and empower some one (whether he is called liquidator, receiver or curator-perhaps curator is the better word) to collect, realise and divide the estate. And that that has been the practice in South African Courts is clear"*[5].

[23] The nature of a liquidator such as the respondent is that of a curator[6]. He is an officer of the court and not a representative of one of the parties[7].

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[3] 24 of 1936
[4] 1904 TS 609 at 613
[5] *see Revill v Revill 1969 (1) SA 325 (C)*
[6] Van Onselen NO v Kgengwenyane 1997 (2) SA 423 (BSC) at 428B-D

[24] As stated by Fisher J in *Mngomezulu and Another v Van Den Heever NO*[8], a fiduciary relationship is usually (although not necessarily decisively) marked by three characteristics:(a) Scope for the exercise of some discretion or power,(b) A power or discretion that can be used unilaterally to affect the beneficiary's legal or practical interests,(c) A peculiar vulnerability to the exercise of that discretion or power.

[25] The position held by the respondent as receiver and liquidator in my view meets these criteria. As such the respondent as curator has certain common law fiduciary obligations to the applicant, one of them being the duty to account [9] in addition to the powers and duties afforded to him under the order in terms of which he was appointed.

[26] The Matrimonial Property Act, which in Chapter 1 regulates the accrual system in terms of which the respondent was tasked to divide the Wilkens' estates, provides no guidance as to supervision over a receiver and liquidator such as the respondent.

[27] The Administration of Estates Act[10] ("the AE Act") in Chapter IV regulates tutors and curators and in section 72(1)(d)[11] refers to the appointment of persons by a court to administer the property of another of to perform an act in respect of such property. It is unknown whether there has been compliance with this section.

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[7] Johnson v Johnson and Another 1935 CPD 325 at 329, cited with approval in Ex Parte De Wet NO 1952 (4) SA 122 O at 125D; 76y

[8] 2018 91) SACR 601 (GJ); (442211/2012) [2018] ZGPJHC 11 at para [17]

[9] Doyle v Board of Executors 1999 (2) SA 805 (C); Clarkson v Gelb and Others 1981 (1) SA 288 (W) 293F-295C

[10] 66 of 1965

[11] It provides: *"The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act[11], 1953, or any order of court made under any such provision or any provision of the Divorce Act 1979, on the written application of any person- (d) who has been appointed by the Court or a judge to administer the property of any minor or other person as tutor or curator and to take care of his person, or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it; ...grant letters of tutorship or curatorship, as the case may be to such person".*

[28] The Act regulates both the accounts[12] and remuneration[13] of curators.

[29] Section 84(1) of the AE Act provides:

> *"(1) Every tutor and curator shall, subject to the provisions of subsection (2), be entitled to receive out of the income derived from the property concerned or out of the property itself-*
>
> *(a) such remuneration as may have been fixed by any will or written instrument by which he has been nominated; or*
>
> *(b) if no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master".*

[30] It prescribes the mechanism in terms of which the respondent's fees are to be assessed, subject to the provisions of section 84(2). The prescribed tariffs are regulated by the regulations[14] made by the Minister under section 103 of the Act[15].

[31] The respondent's statement of account must be properly assessed by the Master according to the applicable parameters prescribed by the regulations to the AE Act. The contention advanced that this court must determine whether the respondent's fees are reasonable is misconceived.

[32] The assessment of his statement of account is not however the limit of the respondent's accounting obligations. In *Sacks v Ogince*[16] it was held that the duty to account under common law arises separately from, and irrespective of, the obligation of a curator to account to the Master in terms of the Administration of Estates Act because "the two accounts are rendered to different persons and for different purposes". At

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[12] Section 83
[13] Section 84
[14] Including regulations 7 and 8(3)
[15] GN R473 in GG 3425 of 24 March 1972 (as amended)
[16] 1960 (1) SA 180 (O) at 181E-H

common law the right to receive an account most commonly arises from the existence of a fiduciary relationship between the parties.

[33] From the stance adopted by the respondent in this application that his statement of account is not open to scrutiny, it appears that he has misconceived his duties. He has a duty to account to the applicant, not only by subjecting his statement of account to assessment by the Master of the High Court, but also to account fully for his administration to the applicant and Mrs Wilken.

[34] The applicant has complained that the respondent has not accounted properly for his administration and that he was not advised of the legal proceedings under case numbers 46175/2017 and 15637 /2018 pertaining to the sale of the immovable property. The respondent elected not to disclose the context and history of this litigation in his papers or to address the applicant's complaints in any meaningful manner.

[35] It remains unclear in what capacity the respondent acted in the aforesaid litigation as his firm was cited as one of the parties and it appears that he acted as attorney, rather than in his capacity as receiver and liquidator. The respondent has a duty to properly account to the applicant and Mrs Wilken for his administration as receiver and liquidator, including the said litigation. From the uncontested facts it appears that he has been manifestly remiss in doing so.

[36] For the above reasons, I am persuaded that the applicant is entitled to the relief sought aimed at the assessment of the respondent's statement of account. The applicant has not in this application sought any further relief pertaining to the respondent's accounting obligations.

[37] The respondent's counter application seeks relief that in my view is incompetent and improper to grant for the reasons set out in this judgment. It must thus fail.

Costs

[38] The normal principle is that costs follow the result. No reasons have been advanced to deviate from this principle. The applicant has sought a punitive costs order on the scale as between attorney and client.

[39] Considering the misconception on the part of the respondent as to his fiduciary duties[17] and the stance adopted by him in these proceedings, I am persuaded that such an order is justified[18].

[40] The respondent has been cited in this application in his official capacity as receiver and liquidator. In my view, it would be a grave injustice if the costs order I intend to grant, be paid from the funds under the control of the respondent, where they are currently held in terms of the order.

[41] I grant the following order:

[1] The respondent is directed to submit his statement of account for assessment by the Master of the High Court, Johannesburg in terms of section 84(1)(b) the Administration of Estates Act 66 of 1965 and subject to the provisions of that Act within 30 days of date of this order.

[2] In the event that the respondent fails to comply with his obligations, the applicant is granted leave to supplement his papers and apply for the removal of the respondent as sought in prayer 3 of his notice of motion or any other appropriate relief.

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[17] Mngomezulu supra
[18] De Sousa v Technology Corporate Management (Pty) Ltd 2017 (5) SA 577(GJ) 655C-J; Ward v Sulzer 1973 93) SA 701 (A)

[3] The respondent is directed to pay the costs of the application on the scale as between attorney and client.

[4] The respondent's counter application is dismissed with costs on the scale as between attorney and client.

[5] The respondent is directed to pay the costs in [3] and [4] above from funds other than the funds presently under his control in terms of the order granted under case number 19779/2014 on 4 February 2016.

F DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	02 September 2019
DATE OF JUDGMENT	:	19 September 2019
APPLICANT'S COUNSEL	:	Adv JC Carstens
APPLICANT'S ATTORNEYS	:	GD Ficq attorneys Mr Ficq
RESPONDENTS' COUNSEL	:	Adv J Brenkman
RESPONDENTS' ATTORNEYS	:	Freysen attorneys Mr Freysen