IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

20.9.08.16
DATE

SIGNATURE

CASE NUMBER: 8938/17
DATE: 16 August 2019

NEDBANK LIMITED — Applicant

V

SOLOMON GORDON N.O. — First Respondent

ESTEE-ELIZABETH MAMAN N.O. — Second Respondent

DESIREE KAHN N.O. — Third Respondent

THE MASTER OF THE HIGH COURT
(JOHANNESBURG – DECEASED ESTATES DEPARTMENT) — Fourth Respondent

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JUDGMENT

MABUSE J

[1] This is a review of taxation under the provisions of Rule 48(1) of the Uniform Rules of Court brought at the instance of First, Second and Third Respondents.

[2] The First, Second and Third Respondents were all appointed by the Fourth Respondent, the Master of the High Court, Johannesburg as the co-executors of the deceased estate of Gail Lesley Cobrin on the strength of the deceased's will made on 11 August 2012.

[3] THE PARTIES

3.1 The Applicant is a registered bank and a credit provider in terms of the National Credit Act 32 of 2005 ("the National Credit Act").

3.2 The First Respondent, Mr Solomon Gordon ("Mr Gordon"), is a duly admitted attorney employed as a consultant by Fairbridges Wertheim Becker Inc ("Fairbridges") at Ground Floor 33 Fricker Road, Ilovo, Johannesburg.

3.3 The Second Respondent is an adult female of Block 6, Visiomed Office Park, 269 Beyers Naude Street, North Cliff, Johannesburg.

3.4 The Third Respondent, Ms Desiree Kahn, is an adult female who was also appointed by the Fourth Respondent to administer the estate of the said deceased. Her address is the same of that of the Second Respondent.

[4] The Applicant had launched an application in terms of the provisions of the Administration of Estates Act 66 of 1965 ("the Administration of Estates Act") against the First, Second and Third Respondents in their capacities as the executors or executrixes of the said deceased estate in which it had sought the following relief:

"4(a) That the First, Second and Third Respondents be ordered to submit to the Master of the High Court the Liquidation and Distribution Account in respect of the estate of the late Gail Lesley Cobrin incorporating the Applicant's claim in the estate of the deceased, within 30 (thirty) days of service of this order on the First, Second and Third Respondents and to inform the Applicant's Attorneys that the Liquidation and Distribution Account has been submitted to the Master;

4(b) That, if the First, Second and Third Respondents fails (sic) to comply with the above order, the Applicant be granted leave to approach the above Honourable Court on the same papers, duly amplified, for an order directing the First, Second and Third Respondents be removed from the office of the executors of the Estate of the Late Gail Lesley Kobrin and directing the Fourth Respondent to appoint an Executor/Executrix in their place;

4(c) That, if the First, Second and Third Respondents fails (sic) to comply with paragraph (a) supra, the Second Respondents be directed to appoint an Executor/Executrix for the estate of the late Gail Lesley Kobrin who is administered by the Applicant;

4(d) Costs of the Application to be paid by the First, Second and Third Respondents De Boniis Propiis;

4(e) Further and/or alternative relief."

[5] This application was opposed by all the Respondents save the Master. After the Court had listened to all the parties, it ruled on 22 March 2018 as follows:

"1. Application is dismissed with costs on attorney and client scale.

2. Legal Representative of the Applicant are not allowed to charge any fee for preparation of this application."

[6] Subsequent to the said order, in particular on 7 May 2018, the Respondents' Attorneys, Fairbridges delivered a combined Bill of Costs in respect of the First, Second and Third Respondents. The said Bill of Costs was titled:

"Fees and Disbursements due to Fairbridges Wertheim Becker Inc. instructing attorneys for the First, to the Third Respondents, in terms of Court order dated 22 March 2018, Payable by the Applicant on the Attorney and Client Scale."

[7] The said Notice of Taxation contained an advisory that the Applicant may file, within 20 days of service of the said Notice of Taxation, a Notice of Intention to Oppose the taxation. As advised on 22 May 2018, the Applicant's Attorneys duly delivered a Notice of Intention to oppose the taxation. Simultaneously with the said notice, they also delivered the Applicant's Objections to the Bill of Costs.

[8] The said Bill of Costs was set down for taxation on 12 October 2018. On the said date, it was placed before the Taxing Master, a Ms Munira Ayob, who is also the Chief Taxing Master for taxation. Of the whole Bill of Costs, the taxing master disallowed a total sum of R52,267.50 on the ground that:

"an executor who is an attorney and acts in his professional capacity on behalf of the estate in a lawsuit is not entitled to remuneration as an attorney, notwithstanding that his co-executor approves of his doing so."

In this respect, she relies on **Fawcus's Estate v Van Boeschoten and Lorentz 1934 TPD 94.**

[9] Disgruntled by the Taxing Master's ruling to disallow the said amount the Third Respondent then filed a Notice to Review the Master's decision to disallow the said amount in terms of Rule 48(1) of the Uniform Rules of Court. The First Respondent contends that the Taxing Master erred in the following respects.

9.1 The task of the Taxing Master is to quantify the costs in accordance with the order of Court that already exists and not to ignore or vary it.

In this respect the Respondents have placed reliance on the following paragraph from the Law of Attorneys' Costs and Taxation Thereof page 36 par 23:

"A Taxing Master's duty is to carry out an order for costs not to vary it. Whether the order is right or wrong the Taxing Master must give effect to it. The argument that the trial Court was wrong in law in making the order it did is not an argument which can be advanced on taxation; for this would in effect amount to a Taxing Master sitting in appeal on the judgment of the Court which made the order. This is not the function of the Taxing Master."

9.2 it is not the function of the Taxing Master to interpret statutes or to conduct an enquiry to determine what fees should be charged in law by the executors;

9.3 the Respondents' Attorneys were acting for the co-executors in their personal capacities and not for the estate per se;

9.4 section 51(a) of the Administration of Estates Act 66 of 1965 ("the Act") read together with paragraph 12 of the Will in this matter especially allows the payment of professional fees for the executors.

[10] For the purposes of this judgment, I will accept that it is common cause between the parties that the sum of R52,267.50, if taxed and allowed, would have constituted part of the First, Second and Third Respondents' remuneration. The Respondents have not advanced any argument that the said amount did not constitute any salary. The said amount will therefore be classified as remuneration for the purposes of s 51(1) of Act 66 of 1965. The question now becomes: are the Respondents entitled to receive any remuneration outside the precinct of the word "remuneration" as envisaged in s 51(1) of Act 66 of 1965?

[11] The said application was opposed, and as I have pointed out earlier, by the First, Second and Third Respondents, in their capacities as the executors or the executrixes of the said estate and not in their personal professional capacities. That the First Respondent was an attorney is immaterial. It needs to be pointed out, though, that the First Respondent was not appointed as an executor in the deceased estate by reason of his professional capacity as an attorney. It is possible that when the testator nominated him as an executor in the will he took into account the fact that he was an attorney. To the Master of the High Court and as far as the Act is concerned that attribute is not material. The Act does not require that an executor, whether testamentary or testamentary dative, should possess certain qualifications. It is not an added requirement of the Act that all or some of the executors or executrixes should be attorneys or be professional persons although being an attorney would be an ideal

appointment. Whatever duties that the executor executes on behalf of the deceased estate he does so in his capacity as an executor and not in his capacity as an attorney.

[12] Section 51 of the Act deals with the remuneration of the executors and interim executors. It provides as follows:

"51(1) Every executor (including an executor liquidating and distributing and estate under subsection (4) of section 24) shall, subject to the provisions of subsections (3) and (4), be entitled to receive out of the assets of the estate –

(a) such remuneration as may be fixed by the deceased by will; or

(b) if no such remuneration is being fixed, a remuneration shall be assessed according to a prescribed tariff and shall be taxed by the Master.

(2) An interim curator appointed by section 12, shall, subject to the provisions of subsection (3), be entitled to receive out of the assets of the estate a remuneration which shall be so assessed and taxed.

(3) The Master may –

(a) if there are in any particular case special reasons for doing so, reduce or increase any such remuneration;

(b) this allow any such remuneration, either wholly or in part, if the executor or interim curator has failed to discharge his duties or has discharged them in an unexpected manner; and

(c) if the deceased had a limited interest in any property which dominated at his death, direct that so much of such remuneration as the Master considers equitable, or the whole thereof if there are no other assets available for the payment of such remuneration, shall be paid in such

portion as he may determine by the persons who became entitled to the property at the death of the deceased.

(4) An executor shall not be entitled to receive any remuneration before the estate has been distributed as provided in section 34(11) or 35(12), as the case may be, unless payment of such remuneration have been approved in writing by the Master."

[13] It is of paramount importance to explain what s 51(1) of the Act means. It is as clear as crystal that for whatever service the executor renders in the administration of the deceased estate, he will receive his remuneration from the assets of the estate. The Respondents were cited in the said application in their representative capacities as the executors or executrixes of the deceased estate. The First Respondent was cited in his personal capacity and not in his capacity as a consultant. Therefore, it was completely wrong for anybody:

13.1 to frame the reading of the Bill of Costs as "*fees and disbursements due to Fairbridges Wertheim Becker Incorporated, instructing attorneys for the First to Third Respondents, in terms of court order dated 22 March 2018, and payable by the Applicant on Attorney and client scale."* The said firm of attorneys had not been appointed as executors in the estate. So they were not entitled to any fees but yes. The First Respondent was not entitled to any fees outside his fees as set out in s 51(1) of the Act;

13.2 the fees that were awarded when the application by the Applicant was dismissed, belonged to the estate and not to the executors or the executrixes' attorneys. Neither the executor nor their attorneys were entitled to claim the fees that were

awarded by the Court. They were an asset in the estate of the deceased. They should therefore be reflected in the Liquidation and Distribution Account of the deceased. They were not assets of the executors or the attorneys.

[14] This brings me to the crucial point. Is an attorney, such as the First Respondent, who is appointed as an executor and who executes his duties as an executor, entitled to any fee outside his capacity as an executor? Is such a person entitled to be remunerated as an attorney or as an attorney and an executor or as an executor? On the basis of the plethora of authorities placed before me, the answer is simple. It does not matter what qualifications an executor has, he is paid for the services that he renders as an executor only. The fact that he renders such service as an executor services to the deceased estate as an attorney is irrelevant. This position in law was clearly and succinctly set out by the Applicant's attorneys in their Objections to the Bill of Costs and by the Chief Taxing Master in her stated case.

[15] The Applicant stated in its objections to the Bill of Costs that:

"The executor occupies a fiduciary position and must not therefore engage in a transaction by which he will personally acquire an interest adverse to his duty. It is for this reason that an executor who also acts on behalf of the estate in professional capacity cannot charge fees for work he may perform in that capacity. Thus it has been held that an executor was not entitled to fees for acting for the estate in his capacity as an attorney or auctioneer."

The Applicant's attorneys found support for their point in **Estate Faucus v Von Boeschoten and Loventz 1934 TPD 94** in which the Court per De Waal JP, had the following to say:

"An executor who is an attorney and acts in his professional capacity on behalf of the estate in a lawsuit is not entitled to remuneration as an attorney, notwithstanding that his co-executor approves of him so acting."

[16] The Court gave the following reasons for the said ruling:

"This is based on the principle that the Court will not allow a man to place himself in a position to which his duty and interest may be in conflict. It may be true that in this particular matter no harm would be done by allowing the commission, but the rule is one of prevention. If we did not adopt this rule an estate may be made to incur heavy liabilities to the executor if he employs himself or his partners to do special work for the estate. In a long series of transactions it may be difficult to prove the exact volume of time and labour expended by the executor in his capacity as agent, auctioneer, banker or solicitor. It is for this reason that English Courts have adopted the salutary rule that the personal representative of an estate is not entitled to any allowance whatsoever for his time and trouble in transacting a business relating to the estate over and above such an amount as is provided for in the will."

[17] In my view, the First Respondent has placed himself in a position in which his duty as an executor and his interest as an attorney are in conflict. This is precisely the situation that the authority cited above wants to prevent. I have pointed out earlier that the order

of costs was not made in favour of the attorneys acting for the Respondents but in favour of the estate.

[18] Finally, the Applicant's attorneys found further support for their point in **Nieuwoudt v Estate van der Merwe 1928 CPD 486**. In this case the Court stated that:

"... as by virtue of section 81(2) of Act 32, 1916, the Respondent's estate was not liable to remunerate the trustee for the fees due to him as an attorney, such fees could not be claimed from the applicant and that the items in the bill which represented fees charged by the trustee in his capacity as an attorney should be disallowed."

In the application the First Respondent, who was also an attorney of the firm Fairbridges acted in his capacity as an executor and not as an attorney. The ruling of the taxing master was that only disbursements were allowed and that all legal fees for work done by the First Respondent in his capacity as the attorney should be disallowed. Accordingly, I agree with the Applicant's attorneys' argument that an executor's commission covers the whole of his work for the estate and that if the executor is an attorney, he or his firm is not entitled to recover any fees for work done as an attorney. Support for this principle may be found in **Meester v Meyer en Andere [1975 (2)] SA [T.P.A] 1**, 13 where Margo R, as he then was, had the following to say:

"In 'n reeks gewysdes in ons Howe is die beginsel neergelê dat die vergoeding deur die Wet bepaal alle ander vergoeding uitsluit, en dat dit al die eksekuteur se dienste in die bereddering van die boedel dek."

In that manner the Court interpreted the proper meaning of s 51(1) of the Administration of Estates Act. The case defines the meaning of the word "remuneration" as set out in

the said section. Relying on Harris v Fisher N.O. 1960 (4) SA 855 (AA) at 862E, the Court quoted with approval the following passage by the *Equity Jurisprudence*:

"Executors or administrators will not be permitted under any circumstances to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate."

In the said case the Court followed the principle set out in **Re Estate Pretorius, 1917 TPA 211; Horn's Executor v The Master 1919 KPA 48; Estate Fawcus v Van Boeschoten and Lorentz 1934 TPA 94; Ex parte Estate Cullingworth 1936 NPA 524**. It cited with approval the following paragraph in **Re Barber 56 LJ Ch. 216 Chitty J**:

"Now undoubtedly a solicitor who is a trustee is not allowed a profit out of his trusteeship and the same rule applies to him as regards executorship ... and if the executor or trustee transacts business for the estate he is of course allowed his costs out of pocket, i.e. actual expenditure, but not anything for his time or trouble."

This, in my view, is a death knell to the argument that all the case law cited by the Applicant and accepted by the Taxing Master in her stated case predates the 1965 Act.

[19] The First, Second and Third Respondents required the Taxing Master to state a case for the decision of a Judge in terms of Rule 48(1) of the Uniform Rules of Court. The Taxing Master obliged. In such stated case the Chief Taxing Master gave reasons for disallowing certain items in the First, Second and Third Respondent's Bill of Costs. Of paramount importance in the stated case the Taxing Master aligned herself with the approach adopted by the Applicant's attorneys. In addition, the Chief Taxing Master relied on Law of Attorneys Costs and Taxation by Jacobs and Ehlers. According to the said authors, an attorney who performs duties as an attorney and who is also at the

same time an executor of an estate, is not entitled to recover costs for work done in his professional capacity.

[20] It is the duty of the Taxing Master to identify the work done and to establish whether it is work done ordinarily by an executor or an attorney. Once the Taxing Master is of the view that it is the work of an attorney done by an executor in his position as an attorney he should not allow it.

[21] The First, Second and Third Respondent's caused a Bill of Costs to be drawn by the said attorneys who later lodged it with the Registrar of this Court for taxation by the Taxing Master. The Taxing Master had a duty to tax it in terms of s 70 of the Uniform Rules of Court. Accordingly, the Taxing Master derives his powers to tax Bills of Costs from Rule 70 of the Uniform Rules of Court. He exercises his control for costs that may be legally recovered. It would seem that the point raised by the Respondents' attorney that it is not the function of the Taxing Master to interpret statutes or to conduct an enquiry to determine what should be charged in law by executors is flawed. It is the Taxing Master's duty to determine the costs that may be legally recovered. In order for the Taxing Master to do so, he or she must be able to know the provision of the Act under which an application is brought, whether any costs are payable; the circumstances under which such costs are payable and the party who should pay such costs.

[22] In Mouton and Another v Martine 1968 (4) 738 TPD at 742 A-B the Court, per Boshoff J, had the following to say:

"In former times it was the function of the Court, or one of the Judges, to tax the costs of the case. The purpose of the taxation was really twofold; firstly, to fix the costs at a certain amount so that execution could be levied on the judgment and, secondly, to ensure that the party who is condemned to pay the costs does not pay excessive, and the successful party does not receive insufficient, costs in respect of litigation which resulted in the order of costs."

[23] Accordingly, the function of the Taxing Master is to decide:

"...Whether the services have been performed, whether the charges are reasonable or adding to tariff, and whether disbursements properly allowable as between party and party have been made; his function is to determine the amount of the liability, assuming that liability exists, and the fact that he requires to be satisfied that liability exists before he will tax does not show that there is any liability. The question of liability is one for the Court, not for the Taxing Master."

See in this regard **Martins v Rand Share and Broking Finance Corporation (Pty) Ltd 1939 WLD 159 at 165.**

[24] In terms of Rule 70(3) of the Uniform Rules of Court, the Taxing Master has the power to allow all such costs, charges and expenses which appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. The Taxing Master has no authority to allow costs which appear to have been incurred or increased through either caution, negligence or mistake.

[25] In my view the Taxing Master acted correctly on the taxation of the Respondents' Bill of Costs. She applied the principles of law correctly. I find nothing wrong in her decision.

[26] Accordingly, the Taxing Master's decision to disallow the sum of R52,267.50 from the Respondents' Bill of Costs is hereby upheld.

PM MABUSE
JUDGE OF THE HIGH COURT

Attorneys

Attorneys for the Applicant:	Vezi & De Beer Inc.
Attorneys for the First, Second and Third Respondents:	Fairbridges Wertheim Becker c/o Macintosh Cross & Farquharson
Date of Judgment:	16 August 2019