



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: KPM104/2018

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

(Reg. No. 1929/001225/06)

And

GEORGE CLARANCE GIBBENS N.O

First Respondent

(Id No. 630226 5028 088)

In his capacity as duly appointed executrix:

in the Estate of the Late Reginah Nthabiseng Kabai)

MASTER OF THE HIGH COURT

Second Respondent

(Mmabatho – Deceased Estate Department)

JUDGMENT

MAKOTI AJ

INTRODUCTION

- [1] This application came as some sort of a *mandamus*, with the Applicant seeking an order to compel the First Respondent to perform statutory functions imposed upon him in his capacity as executor of the estate of the late **Reginah Nthabiseng Kabai** ('the deceased'). In pith, what the Applicant wants is that the administration of the estate be finalised by the First Respondent.
- [2] The Applicant is a creditor of the deceased estate, which debt arose from a loan agreement ('loan facility') that it had with the deceased and her surviving spouse, **Mr Tsemele Eli Kabai** ('Kabai'). The loan was secured through a mortgage bond that was registered over the immovable property that the deceased and Kabai had purchased through the loan facility. The property now falls to be administered within the estate of the deceased and Kabai. Logic informs that the Applicant's ultimate interest is to see the full settlement of the mortgage loan account.
- [3] It is common cause that the First Respondent was appointed as executor of the deceased estate and was issued with letters of executorship on **27 July 2015**. Also, the parties are in agreement that appointment of the First Respondent happened some four years after the death of the deceased, who died on **23 July 2011**. Ordinarily, the administration of this deceased estate ought to have been finalised a long time ago. Given the obvious lapse of time, the Applicant wants the First Respondent to be directed to lodge the final liquidation and distribution account with the Master of the High Court ('the Master').

- [4] The First Respondent opposed this application on both factual and technical grounds. In respect of the technical point, the First Respondent pleaded the non-joinder of Kabai as the surviving spouse of the deceased. On the merits, the First Respondent stated under oath that the final liquidation and distribution account was duly submitted to the Master and, on **16 November 2016**, an approval in terms of the Act was granted. In essence, the contention by the First Respondent was that he has fully complied with his obligations as executor of the deceased estate.

NON-JOINDER OF KABAI

- [5] I do not intend to spend much time on this point in that, in my view, this matter can be disposed on the merits. Of course, I accept that the rights arising out of the administration of deceased estate vest on the Master's approval of the final liquidation and distribution account.¹ I proceed to deal with the matter on the merits.

STATUTORY FUNCTIONS OF EXECUTOR

- [6] One of the primary functions of an executor is provided for in s 35 of the Administration of Deceased Estates² ('the Act'), which stipulation reads in the following manner:

"35 Liquidation and distribution accounts

- (1) *An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but*

¹ Gounden and Another v Master of the High Court and Others (3698/2014) [2015] ZAKZDHC 6 (18 February 2015). Also, De Leef Family Trust and Others v Commissioner of Inland Revenue 1993 (3) SA 345 (A).

² Act No.66 of 1965.

within-

- (a) *six months after letters of executorship have been granted to him; or*
- (b) *such further period as the Master may in any case allow, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate.”*

[7] The Court confirmed the functions of an executor in **Jones v Pretorius NO**,³ when it held that:

“A deceased estate is an aggregate of assets and liabilities. Rights of action that vest in an estate, naturally form part of the assets thereof. See Lockhat’s Estate v North British & Mercantile Insurance Co. Ltd 1959 (3) SA 295 at 302F-G. Upon his or her appointment, only the executor has powers and duties to deal with the estate. His or her rights and obligations are derived from the common law and statutory provisions. One of the main obligations of an executor is to recover what is due to the estate.”

[8] The record shows that the first and final liquidation and distribution account contemplated in s 35 of the Act was prepared by the First Respondent on **12 October 2016**. It is this account that was apparently approved by the Master on **16 November 2016**. Upon approval, the liquidation and distribution account was published in the Potchefstroom Herald on **20 January 2017**.

[9] Reacting to this Court application, the Master issued a report on **12 February 2019**, which corroborated the statement of the First Respondent by recording that:

“The Executor lodged a Liquidation and Distribution Account dated 12 April

³ Jones v Pretorius NO (281/2019) [2020] ZASCA 113 (29 September 2020).

2016 and after we queried it, lodged a revised account dated 12 October 2016 which we approved. The account was advertised on 20 January 2017 and no objections were received. The account is attached as Annexure and includes the claim by the Applicant.”

[10] On this front it could not be contended that the First Respondent as executor has failed to perform his duties in terms of the Act. In reply the Applicant noted the steps that were taken by the First Respondent, in particular the liquidation and distribution account that was drawn, and subsequently approved by the Master. Nonetheless, the Applicant persisted with the application and the demand that the First Respondent be compelled to comply with his statutory obligations as executor of the estate. Further, the Applicant contended that the account in its form was not implementable.

[11] What seems to be the remaining of the parties’ dispute is that, once the account was approved, the First Respondent ought to have paid the creditors and beneficiaries in accordance with the Master’s approved liquidation and distribution account. The First Respondent’s case was that it was the Applicant that prevented him from effecting payment in terms of the approved account.

[12] Had the First Respondent paid creditors and distributed the estate as provided, he would have fully discharged his obligations in terms of the Act, in particular s 35(12) which reads:

“(12) When an account has lain open for inspection as hereinbefore provided and-

(a) no objection has been lodged; or

(b) ... and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master's decision; or

(c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor: Provided that-

(i) a cheque purporting to be drawn payable to a creditor or heir in respect of any claim or share due to him and paid by the banker on whom it is drawn; or

(ii) an affidavit by the executor in which he declares that a creditor was paid or that an heir received his share in accordance with the account, may be accepted by the Master in lieu of any such receipt or acquittance."

[13] Once the account has been approved, the Act states that any party who is aggrieved thereby and wishes to object to the account shall do so by approaching Court to set aside the Master's approval of the account, what the Act refers to as the decision.⁴ This postulates that the remedy available to a party that is dissatisfied with the account may approach Court in review proceedings. Failing that, the executor must pay creditors and heir in accordance with the approved account.

⁴ S 35(10) of the Act.

- [14] There is no denial that the First Respondent was duty bound to promptly pay creditors and beneficiaries once the Master had approved the account. In fact, the First Respondent readily accepted that he was obliged to pay creditors of the estate and distribute the residue to the heirs. Viewed within the prism of s 35(12) of the Act, the First Respondent no longer had any choice but to give effect to the approved liquidation and distribution account.
- [15] The Applicant, on the other hand, failed or refused to grant consent to the First Respondent to finally execute his duties, and this time in accordance with the Master's approved account. Its contention was that the final liquidation and distribution account was not implementable. By this it was made apparent that the Applicant was expressing its dissatisfaction with the Master's approved account. Its open route, in my view, was to pursue the procedure in s 35(10) to have the account set aside. It did not do so.
- [16] At this point one fails to fathom the contention that the First Respondent as executor has failed, or is failing to execute his obligations in terms of the Act. I say this in light of the fact that the First Respondent seems to have taken the steps necessary to see to the finality of the administration of the estate, and has thus far conducted his functions under the guidance and supervision of the Master. And the approval process is one of the legislative steps contemplated in the Act.
- [17] It is apposite to characterise the nature of the relief that the Applicant sought in this application. The first prayer is that the First Respondent be ordered to lodge the liquidation and distribution

account.⁵ The second, which is conditional upon the First Respondent having already lodged the account, is that he be ordered to perform his further obligations in terms of s 35 of the Act.⁶

[18] As at the date when this application was lodged, on **05 November 2018**, the Applicant was aware or ought reasonably to have been aware of the status of the liquidation and distribution account. If, for whatever reason it was not aware, it could have enquired from the Master and it would possibly have obtained the answer. In several letters the Applicant was advised of the fact that the account was already approved.⁷ But, all that is no longer important, and this is because *de facto* that parties agree that the liquidation and distribution account was lodged and finally approved by the Master after it had lain for inspection in terms of the Act.

[19] Once the Applicant was told of the approval of the liquidation and distribution account, it persisted with the demand that the First Respondent performs all his remaining legislative obligations in terms of s 35 of the Act. The underlying causa is that the Applicant wanted payment of the balance of the debt owed to it by the deceased and Kabai.

[20] In my respectful view, the First Respondent could not act in any manner other than in accordance with the account that was already approved by the Master. That account could only be changed if the

⁵ Notice of Motion, p 1 par a).

⁶ *Ibid*, p 2 par b).

⁷ Annexure I, N and O dated 11 June 2018, 05 July 2018 and 01 October 2018.

Applicant, or any other person aggrieved thereby, had successfully applied to Court to have the decision set aside.

[21] The principle espoused in **Broodryk v die Meester en 'n Ander**⁸ is that an interested person who has filed a claim against a deceased estate and is dissatisfied with the Master's treatment of his claim qualifies as a 'person aggrieved' in terms of s 35(10) of the Act and therefore has the requisite *locus standi* to apply for the setting aside of the Master's decision on his objection to the liquidation and distribution account. This is not denied by the Applicant.

[22] On behalf of the First Respondent it was contended that statutory relief is not available to a party that has failed to timeously lodge an objection contemplated in s 35(10) of the Act. That the First Respondent wanted to finalise the administration of the deceased estate has not been put into dispute. This raises the question as to why did the Applicant take to the Court seeking an order to compel the First Respondent to do that which he has always intended to do, but for the conduct of the Applicant in not giving its consent. Rhetorically, on what basis could the First Respondent finalise the administration of the deceased estate if not in terms of the Master's approved account.

[23] In summation, my understanding of the case is that the Applicant has a legitimate claim against the deceased estate. The claim arose from a loan to the deceased that was secured through

⁸ Broodryk v die Meester en 'n Ander 1991 (4) SA 825 (C).

registration of a mortgage bond. The First Respondent, as executor, has prepared a liquidation and distribution account. The account lay for inspection and there was no objection to it. Subsequent to the publication of the account, the Master approved it and thereby granting the First Respondent permission to pay creditors and to distribute the assets in terms of the approved account. The First Respondent sought consent from the Applicant to have the undivided half share of the immovable property to the surviving spouse of the deceased. The Applicant declined to grant the consent, leading to this stalemate between the parties.

[24] As to what the Applicant has in mind when it requires to Court to order the First Respondent to put in effect the contents of the liquidation and distribution account is not fathomable, not least on the facts of this matter. It is so that an executor in a deceased estate whose first and final liquidation and distribution account has lain for inspection without objection for the statutory period laid down in s 35 of the Act can thereafter correct that account if he then finds it to be erroneous. Put differently, the First Respondent can in those circumstances, reframe the account and, in compliance with the provisions of s 35(12) of the Act, pay the creditors and heirs in terms of the reframed account.⁹

[25] That is not the case in this matter, in that it is the Applicant that wants certain changes done to the liquidation and distribution account. This renders the Applicant an aggrieved person and it has remedies in terms of s 35(10) of the Act. An attempt to compel the

⁹ Griffiths v Barclays Bank Trust Co Ltd (UK) No 1986 (4) SA 1 (C).

First Respondent to do what he has always intended to do renders this application misleading. On that basis alone, this application must fail.

[26] From the established facts, it is quite palpable that what the parties are at odds about is not whether the First Respondent is refusing or has failed to perform his functions in terms of s 35(12) of the Act, but rather that the Applicant wants to see a different outcome from what is contained in the account. In other words, the dispute lies in the substance of what the liquidation and distribution account entails.

[27] The belated contention from the Applicant, in reply, that the liquidation and distribution account is not implementable invokes an old Latin maxim '*lex non cogit ad impossibilia*'.¹⁰ If that be the case, based on the Applicant's version alone, which came in reply, why would the Court direct the First Respondent to implement the distribution in terms of a liquidation and distribution account that is not implementable? It seems to me devoid of logic that the Court may be asked to compel someone to perform the impossible.

[28] Having regard to the full facts of this application, and as I have alluded to earlier, the relief sought by the Applicant must fail.

COSTS

¹⁰ *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 635A-636E. See also, *MacDuff and Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 57 – '*a person who prevented the fulfilment of a condition, is deemed to have allowed such a condition to be fulfilled*'.

[29] I now turn to the issue of costs. The Applicant prayed that, on the success of the application, punitive costs be granted against the First Respondent. On the other hand, the First Respondent asked that the costs of the application, in the event of its dismissal, should be granted against the applicant.

[30] The principles surrounding the granting of punitive costs *de bonis propriis* was recently considered by the Constitutional Court which held amongst others that:

“... Considerations of justice and equity dictate that the legal basis for awarding such costs, appreciating their disastrous consequences, must not only be correctly identified, but how they find application in this case must also be properly explained. “Gross” negligence and “bad faith” had to be demonstrated and so should the meeting of the test for imposing personal costs on an attorney and client scale have been explained.” (Emphasis added)

[31] The determination of costs is a question that falls within the discretion of the Court, which discretion must be applied judiciously.¹¹ The default position is that costs follow the cause and I find no reason why the costs should not follow the result, which must still be just and equitable. In the present case, given what I have already stated above, there exist no reasons why it would not be just and equitable to award costs to the successful litigant.

ORDER

[33] I make the following orders:

¹¹ Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.

1. The application is dismissed;
2. The applicant is ordered to pay the costs of this application.

MAKOTI M Z

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

REPRESENTATIVES:

APPLICANT: ADV CGVO SEVENSTER

VEZI & DE BEER INC

LABUSCHAGNE ATTORNEYS

MAHIKENG

RESPONDENT: ADV JF PISTOR SC

KLYNVELD-GIBBENS INC

C/O MAREE & MAREE ATTORNEYS

MAHIKENG

DATE OF HEARING : 11 MARCH 2021

DATE OF JUDGMENT : 11 JUNE 2021

