



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2089/2020

In the matter between:

BRICHELLE LINDE

Applicant

and

T MOKGOBO N.O.

First Respondent

THE MASTER OF THE HIGH COURT, BLOEMFONTEIN

Second Respondent

J H D BLOEM N.O.

Third Respondent

B LINDE N.O.

Fourth Respondent

C BOTHA N.O.

Fifth Respondent

FAL FINANSIELE DIENSTE INC

Sixth

Respondent

SPANGENBERG ZIETSMAN & BLOEM INC

Seventh Respondent

CORAM: LOUBSER, J *et* MPAMA, AJ

HEARD ON: 21 NOVEMBER 2022

JUDGEMENT BY: MPAMA, AJ

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 6 APRIL 2023. The date and time for hand-down is deemed to be 6 APRIL 2023 at 12:00

- [1] This is an application for the review and setting aside of a decision of the Master of the High Court, Bloemfontein, made on 12 March 2020 in which he refused to uphold the applicant's objection to a liquidation and distribution account. The objection was lodged in terms of Section 37(7) of the Administration of Estates Act¹ (the Act). The applicant, Ms Bricelle Linde was married out of community of property with the accrual system to the late mr Jacobs Daniel Bruwer (the deceased) who passed away on 10 February 2014.
- [2] The first respondent is an Assistant Master at the Master's office, Bloemfontein, and is cited in his official capacity. The second respondent is the Master of the High Court, Bloemfontein. The third respondent is mr Johannes Hendrik Daniel Bloem, an attorney cited in his capacity as the executor of the deceased's estate. The fourth and the fifth respondents are the trustees of the JDB Group Trust. The sixth respondent is a company in which the deceased was a shareholder in his lifetime and the seventh respondent is a firm of attorneys wherein the third respondent is an attorney.
- [3] The deceased died testate. The applicant and the JDB Group Trust are the only heirs of the estate of the deceased. The executor of the deceased estate lodged a liquidation and distribution account (L&D account). The applicant raised certain objections to the L & D account (to be dealt with hereinunder) with the Master. The Master dismissed the objections in terms of section 35(9) of the Act on the basis that he was unable to decide the objections due to the existence of factual disputes. The applicant, aggrieved by this decision of the Master, approached this court for the review of the Master's decision in terms of section 35 (10) of the Act. The section provides:
- “Any person aggrieved by any such direction of the Master may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the court may allow, for an order to set aside the Master's decision and the Court may make such an order as it may think fit”.
- [4] The applicant in her notice of motion requests the following relief:

¹ Act 66 of 1965

- “1. That condonation be granted for the late filing of the review application in terms of section 35(10) of the Administration of Estates Act, 66 of 1965.
2. Reviewing and setting aside the decision by the first respondent in his capacity as the Assistant Master of the High Court, Bloemfontein, dated 12 March 2020 in terms of section 35(10) of the Administration of Estates Act, 66 of 1965.
3. Substituting the decision by the first respondent with the following decision:
 “That the applicant’s objection against the L & D account dated 21 February 2020 be upheld” and make such order as the Honourable Court deems fit.
4. Ordering the respondents who oppose this application to pay the costs thereof.”

[5] The applicant requests the court in the event that it finds in her favour and set aside the decision of the first respondent, to make an order in terms of section 7 of the Promotion of Administrative Justice Act² and to substitute the Master’s finding instead of remitting the matter back to him.

[6] THE OBJECTIONS:

- (i) The first objection relates to item 4 of the L & D account. The deceased in his lifetime had shares in a company, FAL Financial Services (FAL). The executor obtained an evaluation of the deceased’s shares from mr Wessel Smit of Core Tax. The value of shares was determined to be an amount of R447 746.00. The applicant found this value excessive. She then approached mr Smit and had the shares re-evaluated without consulting the executor. Mr. Smit revised the value of shares to an amount to R268 647.00. No reasons were proffered by mr Smit regarding the revised value. The applicant furnished the revised value of the shares to the executor before the account of the deceased estate was submitted to the Master in terms of section 35(1) of the Act. The executor refused to accept the new evaluation. He drew the account and reflected the initial value of the shares. The applicant raised an objection to this item of the L & D account.

²Act 3 of 2000

- (ii) The second objection deals with a debit loan account in FAL of which the deceased was a director with a mr Simkin and a mr van Jaarsveld. FAL lodged a claim against the estate of the deceased for an amount of R117 475.63 being an amount paid by FAL for the deceased's personal expenses. At the heart of this claim are monthly premiums paid by FAL for the deceased's life cover totalling R126 321.02, premiums for the deceased's contribution to Discovery Medical Scheme totalling R32 054.32 and monthly donations of R250.00 paid on behalf of the deceased to Boys Town. The applicant objected to this claim and requested the executor to conduct an enquiry in terms of section 32 (1) (a) of the Act. Such an enquiry was held on 14 May 2019. This claim was upheld after the enquiry. The applicant, dissatisfied with the outcome of the enquiry lodged an objection to the Master regarding this claim.
- (iii) The third objection relates to the legal costs due to the firm of attorneys of which the executor is an attorney. The executor is an attorney at Messrs Spangenberg, Zietsman and Bloem Attorneys (the seventh respondent). The firm of attorneys claimed an amount of R47 768.50 for services rendered to the deceased's estate. This claim was allowed by the executor. The applicant objected to this claim on the basis that the executor cannot be an executor of the estate and at the same time become an attorney rendering services to the estate and claim legal fees for services rendered as an attorney. The applicant averred that the executor is conflicted. If the estate needs the services of an attorney, an independent firm of attorneys ought to be appointed and not the executor's firm, it is contended.
- (iv) The fourth objection lies in the payment of the executor's fees. The applicant contended that the executor is not entitled to remuneration for the executor at a rate of 3.5 % amounting to R 129 297.66. The applicant contends that the "inordinate and unacceptable delays" in the finalisation of the administration of the deceased's estate and the actions of the executor which resulted in the estate paying penalties for late payment of the estate duty warrants that the remuneration or a portion thereof be disallowed by the Master.

(v) The fifth objection is based on an alleged miscalculation of the cash fall by the executor. The applicant contends that the amount of cash fall reflected in the account as R368 083.95 is incorrect. The correct amount is R 304 977.88.

[7] The crisp issue to be decided is whether the Master was correct when he ruled that he is unable to make a decision on objections raised by the applicant due to a factual dispute.

[8] As for the application for condonation: The review application must be brought within 30 days or within such a longer period as the court may allow. See section 35(10) of the Act. The application for condonation is not opposed by the respondents. The decision under review was taken on 12 March 2020 and the review proceedings were commenced on 23 June 2020. The applicant explains in her affidavit that the delays were occasioned by the lockdown due to COVID 19. I find no reason not to grant the indulgence. The application for condonation should succeed.

[9] Without overburdening the judgment, I now turn to deal with each objection as raised by the applicant.

9.1 Objection 1: It is undisputed that the applicant without consulting the executor approached the evaluator of the deceased's shares at FAL. The value of the shares was altered. Section 13 of the Act places a duty on the executor to liquidate and distribute the assets in the deceased's estate. The duties include selling property, realising its proceeds, settling debt and paying out the proceeds of the estate to the heirs. The applicant usurped the powers of the executor by approaching Core Tax. It is inexplicable how the new value was arrived at as there is no explanation from mr Smit regarding the two values of the shares. I am satisfied that there is no factual dispute here, and the Master ought to have dismissed the objection.

9.2 Objection 2: The deceased was a shareholder in FAL with mr Simkin and mr van Jaarsveld. The applicant has raised a number of issues regarding this claim. First she makes allegations that mr Simkin and mr van Jaarsveld were not entitled to any profits made by this entity as they were not auditors and by

operation of law are not allowed to share profits as they are not auditors. She went further and explained that the entity, FAL, was intended to benefit from the life insurance taken by the deceased, the company rightly paid the premiums. The applicant went on and on explaining how this money was on a monthly basis reconciled by the company hence the deceased had a credit balance at the time of his demise. On her affidavit an impression is created that payment of these amounts by the estate will result in double payments. The executor gave a valid explanation as to why this amount is payable and due by the estate. The applicant's objection in this respect stands to be rejected.

- 9.3 Objection 3 & 4: An executor in the performance of his duties must draw a L& D account showing the assets and claims against the estate of the deceased. This account must be placed before the Master for examination. The assets must be distributed and transferred to the heirs and claims against the estate must be paid. These duties entitles an executor to remuneration at the prescribed tariff of 3.5 % of the deceased's estate.

Section 51 of the Act deals with the remuneration of the executor. It provides:

“51(1) Every executor (including an executor liquidating and distributing an 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 maybe fixed by the deceased by the 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).....

(3) The Master may:

- (a) if there are in any particular case special reasons for doing so, reduce or increase any such remuneration;
- (b) disallow 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 unsatisfactory manner; and
- (c)

There is no doubt that an executor receives his remuneration from the assets of the estate. The only issue is whether the firm of attorneys of which an

executor is a director of is entitled to receive fees more than the amount allowed in the Act (the 3.5%). The applicant's contention with the amount claimed by the executor's firm of attorneys is that there is a conflict of interest, another firm ought to have been appointed to offer the legal services to the estate. It is not the applicant's contention that the firm did not offer the services to the estate or in the claimed amount. In the case of **ESTATE FAUCUS v VON BOESCHOTEN and LOVENTZ**³ it was said:

"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."

The court went further and said:

"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 maybe in conflict".

The applicant's affidavit is not helpful as to when the firm of attorneys started acting on behalf of the deceased. The executor explained that the firm was approached by the deceased in his lifetime and despite the fact that an executor was appointed from the firm, the firm continued acting on behalf of the deceased's estate. The applicant went further to make a bald statement of conflicting interest between the executor and the firm of attorneys. This statement has not been substantiated by the applicant. My considered view is that the principle enunciated in the case of *Faucus (supra)* does not find application in this case. The firm of attorneys acted on behalf of the deceased before his demise and continued after his demise. It does not appear that the applicant raised her concerns in this respect until the L& D account was laid for inspection.

Regards the remuneration of the executor, the applicant only mentions the delays by the executor in finalising the estate of the deceased and the estate duty that he failed to pay resulting in the estate being penalised for late payment. Her affidavit does not mention what occasioned the delays. The executor in his affidavit singled out the applicant for the delays and mentions that there were no funds available to pay the estate duty. He conceded that he failed to

³ 1934 TPD 94

approach the applicant with regard to the payment of the estate duty. The executor went further and provided a reason for not approaching the applicant, being that he never was in a position to calculate the estate duty since he had many problems in receiving information pertaining to monies the deceased was entitled to. Because of these problems he was also not in a position to approach the Commissioner for an extension of time to pay the estate duty, more so since he was accused of an omission in failing to pay estate duty. It is my view that the circumstances listed in section 51(3) of the Act have not been established.

9.4 Objection 5: The parties are in agreement that this objection can be upheld. It related to wrong amounts being reflected in the L & D account.

[10] A review court has powers to scrutinise and set aside the administrative decisions if found to be irrational, or taken without authority or where the decision maker made an error in law. The Master exercising his administrative powers made a ruling. The Master failed to rule on the objections on the basis that there were factual disputes. It is this finding that the court is requested to review and set aside. I am satisfied that the ruling made by the Master was wrong in law and ought to be set aside. The parties have requested that the court should make its own order instead of remitting the matter back to the Master.

[11] In the result the following orders are made:

1. Condonation is granted for the late filing of the review application.
2. The decision of the First Respondent not to decide the applicant's objections against the L & D account dated 21 February 2020 is hereby reviewed and set aside.
3. The applicant's objections no 1 to 4 to the L & D account are dismissed.
4. The applicant's objection no.5 is upheld, and the cash shortfall in the L & D account is amended to reflect the amount of R304 977.88.
5. No cost order is made.

L. MPAMA, AJ

I concur:

P. J. LOUBSER, J

For the Applicant: Adv. M. P. van der Merwe SC

Instructed by: c/o Madri Du Preez Attorneys
Bloemfontein

For the Respondents: Mr. J. H. D. Bloem

Instructed by: Messrs Spangenberg, Zietsman & Bloem
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