

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 75876/13**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE: 15 MAY 2023

SIGNATURE:

In the application between:

SHIRAZ SABDIA, THE JOINT EXECUTOR  
OF THE ESTATE OF THE LATE MOHAMED FARUK  
SABDIA

FIRST APPLICANT

RIAZ SABDIA, THE JOINT EXECUTOR  
OF THE ESTATE OF THE LATE MOHAMED FARUK  
SABDIA

SECOND APPLICANT

and

ANIEL KANJEE SOMA

FIRST RESPONDENT

THE TAXING MASTER OF THE HIGH COURT

SECOND RESPONDENT

In Re:

ANIEL KANJEE SOMA

APPLICANT

and

YASEEN BEDRO YUSUF

FIRST RESPONDENT

TRAVIS ASPENALD NDLOVU

SECOND RESPONDENT

FAIZAAN MOHAMMED

THIRD RESPONDENT

SHIRAZ SABDIA, THE JOINT EXECUTOR OF  
THE ESTATE OF THE LATE MOHAMED  
FARUK SABDIA

FOURTH RESPONDENT

RIAZ SABDIA, THE JOINT EXECUTOR OF  
THE ESTATE OF THE LATE MOHAMED  
FARUK SABDIA

FIFTH RESPONDENT

**DATE OF JUDGMENT:** This judgment is handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **15 May 2023**.

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## LEAVE TO APPEAL JUDGMENT

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**N V KHUMALO J**

### Introduction

[1] This is an Application for leave to appeal against the judgment of this court delivered on 09 December 2022, dismissing an Application by the Applicants for a review of the taxing master's decision upholding the Applicants' objection under the provisions of Rule 48 of the Uniform Rules of the High Court ("the Rules").

[2] The test whether leave to appeal should be granted has been settled on, inter alia, the fact that the court must be of the belief that a different court would reach a

different conclusion, which is that the appeal would have reasonable prospects of success<sup>1</sup>.

[3] The use of the word “would” indicating that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against<sup>2</sup>. The test therefore excludes trivial considerations of mere possibility of success, an arguable case or one that is not hopeless, but a sound, rational basis to conclude that there is a reasonable prospect of success on appeal must exist<sup>3</sup>.

[4] The cardinal question that was to be decided upon by the court is whether the principle that a person acting as an executor for an estate cannot receive both an executor’s commission, that is remuneration payable in terms of s 51 (1) of the Administration of Estates Act 66 of 1965 (“AEA”) for services he renders as an executor, and the attorney’s legal fees for professional services he rendered representing the estate, is applicable in this matter which the court has found in the positive that it does.

[5] The Application for leave to appeal the court’s finding is based on two primary arguments set out by the Applicants in their heads of argument. The first being that the circumstances in *casu* are different from those of Nedbank and Fewcus in that:

[5.1] The capacity for the Applicants to charge for the professional services rendered, even though acting supposedly in their fiduciary capacity as executors, was sanctioned by the deceased testator in his will. The Applicants argued, understandably so, considering the historical fact that the 1<sup>st</sup> Applicant and his company have acted on behalf of the deceased since 2006 on the inception of the litigation involving the property at the Land Claims

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<sup>1</sup> Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013

<sup>2</sup> *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC)

<sup>3</sup> *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015[2015] ZASCA 176 (25 November 2016) at par [17]

Court. Also mindful of the fact that the Application in *casu* is a sequel of that litigation with its long history dating from when the deceased was alive. They argued that it would therefore not have been cost effective, or feasible, or in the interest of justice, or in the interest of the administration of the estate for the executors to appoint other attorneys to continue with the litigation on behalf of the estate. As a result, the Applicants point out that the testator explicitly directed the following in clause 4 of his will<sup>4</sup>:

*“I hereby direct that my Executors shall be entitled to charge and shall be paid all usual professional fees and other fees and charges from business transacted, time spent and acts done by them or their associates in connection with the administration of my estate”*

[6] The Applicants argued on the interpretation of clause 4.1 pointing out that it did not limit the executors to their normal executor’s remuneration that is to be fixed by the Master, and that such professional fees and other fees and charges would be a claim against the assets of the estate and that such fees would include the professional fees of MJS Inc charged against the Applicants in terms of the attorney and client costs award made by the court.

[7] It further argued that clause 4 of the will had to be read also with clause 5.3 thereof wherein the testator explicitly expressed his wishes with regards to the pending litigation in the Land Claims Court as follows:

*“I direct my Executors to do everything necessary to retain possession of the property for the benefit of my wife or other beneficiaries (in the event of my wife predeceasing me or in the event of our simultaneous death) until such time as the dispute in relation to the title of the property is resolved at the Land Claims Court.*

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<sup>4</sup> I have previously indicated that there is no clause 4 in the will that has been uploaded on caseline. The situation has not been rectified. According to the Index there is supposedly a will uploaded on caseline 005-134-136 .however those pages constitutes arguments by the Respondent. I therefore continue to consider the matter on the basis that the existence thereof has not been disputed by the Respondent.

*In this regard it is my wish that my executors and/or my wife and/or my other beneficiaries as the case may be assume my position as the Applicant in the matter before the Land Claims Court or in any other proceedings relating to the property, upon my death”*

[8] According to the Applicant the master was in terms of s 51 of the Administration of Estates Act 66 of 1965 vested with the power to can remunerate the executors for, in particular with reference to any professional fees, where applicable. It therefore did not fall within the powers of the taxing master to decide on and pre-empt any decision which the Master may make in the context of the matter.

[8] On the other hand, the Respondent contended that as an executor, the 1<sup>st</sup> Applicant was not entitled to fees for acting for the estate in his capacity as an attorney. He was not entitled to anything more other than what was to be the commission and his out of pocket expenses. Understanding that no matter how the remuneration is constituted.

[9] The Respondents disagreed with the Applicants’ interpretation of clause 4 of the will. According to Respondent the Applicants would be entitled to their commission as executors even though they might be involved as members of his family and or heirs to his assets. It was not by any intention to get them to get paid more than what would be regarded as commission. The Respondents argued that the estate is obliged to pay commission to its executors and not entitled to be reimbursed for paying the commission which is a statutory requirement.

[10] Taking into consideration that the court has in *Harris v Fisher N O*<sup>5</sup> interpreted s 51 (1) of the AEA as follows:

“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.”

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<sup>5</sup> 1960 (4) at 862E

[11] The will, as a result cannot sanction anything more except the payment of fees as referred to it as part of the commission payable to the executors and not as a payment over and above or separate from the commission. Each executor entitled to an equal share of the commission and this is so even if only one of the co-executors is the administering executor. In the instance only one executor administers the estate due to him or her expertise, it is usual for the executors to agree with the remaining executors to take a bigger proportion of the commission for his work.

[10] The fact that the executor's extra commission for the professional services he might render is sanctioned by the testator in his will does not mean that the executor can then charge separately over and above the commission, for the legal services he has rendered. The sanction intended by the will can nevertheless not be against the legal principle applicable that an executor should not be subject to a conflict of interest. If meant to be, the testator's direction would then be invalid, being *contra bonos mores*.

[11] The Applicants had acknowledged the principle and reasoning behind it that is to avoid the conflict that may arise whereby the executor upon finalisation of the Liquidation and Distribution would raise a claim against the estate for his remuneration and at the same time be a creditor against the estate for the legal fees. The applicable principle should therefore not be displaced by the provisions of the will.

[12] The fact that, he was effectively appointed by the will to render additional services should not render the principle inapplicable but confirm a commission that might include an amount that might be considered to reimburse the executor for the professional services rendered. Alternatively, the extra commission *in lieu* of the services rendered can ultimately still be approved by the master.

[13] Section 51 (1) reads:

- 1) Every executor (including an executor liquidating and distributing an estate under subsection (4) of section 34) 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 have been fixed by the deceased by will; 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.

Whilst section 51 (3) reads:

(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

[14] s 51(3) allows the master to reduce or increase such remuneration, so as to circumvent an executor being subject to a conflict of interest and to act *contra bonos mores* by charging the estate separate for professional services rendered. Except the provision in the will in casu sanctioned the payment of professional fees as part of the commission or remuneration payable to the executor and not as a separate fee, that is to be paid over and above the commission. As a result, a provision that sanctions a charge which is not to be paid as part of the executor's remuneration by the master is invalid for wanting to enforce and or allow disreputable behaviour that is against the principle laid down by the law; see *Law of Attorneys Costs and Taxation Thereof* Jacobs and Ehlers, page 191 par 257. The taxing master is empowered to enquire into the reasonableness of such a sanction.

[15] Mabuse J correctly decided the issue in *Nedbank Limited v Gordon NO and Others (GP)*<sup>6</sup>. It is only the 2<sup>nd</sup> Applicant that was appointed as executor and the person that has also rendered the services to the estate. The company was not appointed as executors in the estate so they were not entitled to the fees or to submit anything to be considered by the Master of the High Court. Further that the 2<sup>nd</sup> Applicant as executor and renderer of the professional services that was required could as per Rule be entitled to an extra remuneration within the realm of s 51 (1). The principle being applicable that due to his fiduciary position to the estate he is not to engage in a transaction in which he personally acquires an interest in conflict with his duties.

[16] The taxing master's decision is as a result justifiable. The Respondents could not prove that the taxing master acted *ultra vires* her powers, or that the principle is not applicable in this matter as the facts are distinguishable. There are therefore no prospects of another court arriving at a different conclusion.

[17] It is therefore ordered that:

1. The Application for leave to appeal is dismissed.

**N V KHUMALO J**  
**JUDGE OF THE HIGH COURT,**  
**GAUTENG, PRETORIA**

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<sup>6</sup> (unreported case no 8938/17, 16-8-2019) (Mabuse J)



and to:

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