Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No:6542/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing: 27 November 2018
Judgment: 27 November 2018

In the matter between:

JOAO GONSALVES JOSEPH DE GOUVEIA	Applicant
and	
THE MASTER OF THE HIGH COURT, CAPE TOWN	First Respondent
ABIGAIL MAGEE N.O.	Second Respondent
(in her capacity as executrix Estate late V.C. Coomber)	
ABIGAIL MAGEE	Third Respondent
WENDY RODRIGUES	Fourth Respondent

JUDGMENT

BINNS-WARD J:

[1] Application has been made in these proceedings for an order, in terms of s 35(10) of the Administration of Estates Act 66 of 1965 ('the Act'), setting aside the Master's decision to refuse to sustain an objection by the applicant to the first and final liquidation account, dated 28 September 2016, lodged by the second respondent in the deceased estate of the late Valda Catherine Coomber. The applicant also seeks orders directing the second respondent, qua executrix of the deceased estate, to amend the account by deleting the reference therein to

a claim *against the applicant* in the sum of R158 774,55 and '*making the consequential amendments to the L&D Account required by such deletion*'. The '*consequential amendments*' contemplated by the applicant would result in the account recognising a claim by the applicant in a virtually equivalent sum *against the estate*. The contemplated amendments would support the further order sought by the applicant directing the second respondent to pay him the sum of R158 865.58 together with interest thereon calculated from 22 July 2016 to date of payment.

[2] The founding affidavit in the application was made by one Freddie Lottering, and not by the applicant. Lottering purports to have been acting in this regard in terms of a power of attorney granted to him by the applicant. The second respondent, who is the only one of the respondents to have opposed the application, took a preliminary objection based on the absence of Lottering's authority to represent the applicant. The objection was predicated on what the second respondent contends is the proper construction of the power of attorney. The objection is devoid of merit. The application has been brought in the applicant's name, not Lottering's. The applicant made a supporting affidavit. It is evident from that that he is aware of the application brought in his name and endorses the evidence in support of it set forth in Lottering's affidavit. The power of attorney is quite irrelevant in the circumstances. (It does seem from various indications in the annexures to the founding papers that the attorneys who launched the application may well be Lottering's attorneys, rather than those of the applicant, but if the second respondent had sought to challenge the attorneys' authority to institute the proceedings in the applicant's name, she was bound to use the procedure in Uniform Rule 7 for that purpose; see *Ganes and Another v Telecom Namibia Ltd* [2003] ZASCA 123, [2004] 2 All SA 609 (SCA), 2004 (3) SA 615, at para. 19. In the event, she did not.)

[3] The issue in contention concerning the liquidation and distribution account arises from its treatment of the proceeds of the sale in execution at the instance of a judgment creditor of an immovable property that had been jointly owned in equal undivided shares by the applicant and the deceased. The free residue of the proceeds of the sale, after the sheriff had settled the judgment creditor's claim, was in the sum of R317 713.16. The sheriff was bound to account to the second respondent and to the applicant, respectively, for one half of the free residue. He was obliged to pay each of them the sum of R158 856,58. In error, however, the sheriff paid the entire amount of R317 713.16 to the second respondent.

[4] Upon appreciating his mistake, the sheriff wrote to the second respondent pointing out the error and requesting her to pay over the amount mistakenly paid to the estate into the sheriff's trust account. The sheriff's letter concluded:

> *We hereby wish to inform you that you have no right to withhold the abovementioned amount as it was paid purely in error and this must be paid immediately into our trust account.*
>
> *We confirm that should we be held liable by* [the applicant] *for this amount, we will have no choice but to take further action against you for the recovery of the monies and any damages caused as a result thereof, including costs.*

[5] The second respondent failed to comply with the sheriff's demand. She instead drew up a final liquidation and distribution account in the deceased estate in which the following items were reflected as assets in the estate: (i) (Item 3) '*Proceeds of the sale of fixed property sold by bond holder*' – R158 774.55 and (ii) (Item 4) '*Claim against* [the applicant] *in the amount of (reduced to R158 774.55*' (*sic*) - R158 774.55. Under liabilities, the account reflected (as Item 15) '*Claim by* [the applicant] *for ½ net proceeds of sale of house paid into estate by Sheriff (items 4 & 15 set off against one another*' - R158 774.55. Item 3 plainly referred to the estate's entitlement to half the proceeds of the sale of the immovable property by the sheriff and item 15 purported to reflect that the applicant had a claim against *the estate* for the amount mistakenly paid to the estate in respect of the amount due by the sheriff to the applicant.

[6] The applicant, represented by the aforementioned Lottering, lodged an objection with the Master to item 4 of the liquidation and distribution account. The objection was lodged in terms of s 35(7) of the Act. The Master's office responded to the objection in a letter dated 15 March 2017 (apparently only received by the appointed attorneys 12 days later) as follows:

> *Previous correspondence refers.*
>
> *I am of the opinion that there is a dispute of facts and I am accordingly unable to make a ruling herein, as I am not a Court of Law.*
>
> *I hereby overrule the objection. If you are not satisfied with my ruling, you have 30 days to make an Application to the High Court to set aside my decision.*

(The response was somewhat self-contradictory. If the Master was unable to make a ruling, it is difficult to follow how she felt able to overrule the objection.)

[7] Although the objection was directed, according to its tenor, only against item 4 of the account, by necessary implication it also engaged item 15 because of the purported set off of the debt purportedly acknowledged in the latter item against the claim reflected in the former. It was only by way of a recognition of the set off that the claim identified in item 4 could be regarded for the purposes of the account to have been liquidated. If the claim identified in item 4 had not been liquidated, the second respondent would have been obliged to explain the position in the manner required in terms of s 35(3) of the Act, and the account could not properly have been characterised as a final account, and would have served only as an interim account. [1]

[8] On the basis of the facts described thus far, it is clear that the account was not properly drawn, for the applicant did not have a claim against *the estate* for half the net proceeds of the property that he had jointly owned with the deceased. His claim for payment of his share of the proceeds of the immovable property lies against the sheriff. He does not enjoy an unjust enrichment claim against the estate (as suggested in the papers[2]); the sheriff does. In my view, the Master should have been able to identify these problems with the account upon the most superficial enquiry. It is unfortunate that that was not undertaken. The consequence has been expensive and unnecessary litigation.

[9] In the circumstances it follows that the objection to the liquidation and distribution account must be upheld, even if to a different effect to that contended for by the applicant. It will be necessary for the account to be redrawn.

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[1] Section 35(3) provides:

The executor shall set forth in any interim account all debts due to the estate and still outstanding and all property still unrealized, and the reasons why such debts or property, as the case may be, have not been collected or realized.

[2] The applicant's counsel sought in argument to support the notion that the applicant had an unjust enrichment claim against the estate. He called in aid of his argument the judgment in *Nissan South Africa (Pty) Ltd. v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd. Intervening)* [2004] ZASCA 98, [2006] 4 All SA 120 (SCA). That judgment is, however, entirely distinguishable both on the facts and in principle from the current matter. That case concerned the liability of a bank on grounds of unjust enrichment to a person who had paid monies mistakenly into the account of a customer of a bank in circumstances in which the bank was not bound to its customer to account for the proceeds of the incorrectly paid deposit. In the current matter it was the sheriff who made an incorrect payment by mistake. The mistaken payment would give rise to a *condictio indebiti* at the instance of the sheriff against the estate that had been unduly enriched thereby. The sheriff would have been impoverished because he remained accountable to the applicant for the mistakenly paid amount. The applicant, on the other hand, was not impoverished by the incorrectly made payment by the sheriff, for he was not deprived thereby of his claim against the sheriff. His patrimony was therefore in no way diminished by reason of the erroneous payment.

[10] If the estate has a claim against the applicant, as alleged by the second respondent, it is for the executrix to pursue it. If the claim is disputed, as it appears to be, it will be necessary for the executrix to litigate or to cede the claim to the heirs before she will be able to file a final account.[3] It is also clear that the second respondent is, on her own version of the facts, not yet in a position to lodge a final liquidation and distribution account. She will only be in a position to do so once she has realized or disposed of the claim she says the estate has against the applicant.[4] It seems to me that, apart from the applicant, the only persons who might have an interest in the redrawn account would be the second respondent herself in her personal capacity as co-heiress, the fourth respondent (as the other co-heiress to the free residue in the estate) and the Sheriff, Kuilsriver North. Therefore, should the fourth respondent and the Sheriff consent in writing to the amended account being acted upon, it would not be necessary for the amended account to be advertised: see s 35(11) of the Act.

[11] It also follows that the applicant's claim for an order sounding in money against the second respondent is misconceived. He must look to the sheriff for payment of the amount that is due to him.

[12] Although the relief sought by the applicant was misconceived in material respects,[5] he has nonetheless been substantially successful in these proceedings. Had the second respondent repaid the sum mistakenly paid to her by the sheriff, as she should have done, the basic cause of the current litigation would not have arisen. Her failure to comply with the sheriff's demand for repayment of the money mistakenly paid to the estate was not only wrong, but unreasonable. She had no legally valid grounds upon which to effectively appropriate the money paid in error by the sheriff for use as security for the claim she maintains that the deceased estate enjoys against the applicant. It is also apparent from her description of the character of that claim (being premised on the damages allegedly suffered by the estate as a consequence of the breaches by the applicant of various agreements between himself and the deceased concerning their co-ownership of the fixed property) that it is not a liquidated claim, and was therefore in any event not capable of being set off against

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[3] The parties traversed the merits of the disputed claim by the estate against the applicant at some length in the answering and replying papers. This was wholly inappropriate as this court is not concerned with that in these proceedings.

[4] The second respondent has averred in her answering papers that she has '*already commenced with instructing* [her] *attorneys of record to prepare a Summons to commence the action proceedings for recovery of this debt and believe*[s] *that the prospects of the claim succeeding is* (sic) *very good*'. She had requested the applicant to suspend the current application pending the determination of the contemplated action. Nothing about that proposal would remedy the defective nature of the liquidation and distribution account that is in issue.

[5] See note 2 above.

any claim that she might have considered the applicant had against the estate. It is evident that the second respondent took what she thought was the law into her own hands to most unfortunate effect. In my assessment, fairness requires that she should be liable in the circumstances for the applicant's costs of suit. I am not persuaded, however, that there should, as suggested in the applicant's papers, be an order that the second respondent should pay the costs *de bonis propriis*.

[13] There was an application to strike out various passages in the second respondent's answering affidavit. That application was not argued at hearing, and I find it unnecessary to enter into it. Even were it to have been sustained in full, it would have made no difference to the substantive outcome of the case. It was one of several red herrings in the matter. There shall be no order in the striking out application.

[14] The following order is made:

a. The decision of the Master to overrule the objection by the applicant to the first and final liquidation account, dated 28 September 2016, is set aside and substituted by a decision upholding the objection and directing the second respondent to amend the account as provided below in paragraph (b) of this order.

b. The second respondent is directed to amend the aforementioned account within 15 days of the date of this order by –

    i. deleting the words '*First and Final*' in its heading and substituting them with the words '*First Interim*';

    ii. deleting the description of item 15 in the account and replacing it with '*Claim by the Sheriff, Kuilsriver North, for repayment of monies erroneously paid to the estate in respect of half of the net proceeds of fixed property sold by the bondholder actually accrued to J.G.J. De Gouveia*';

    iii. setting forth in the amended account, in a manner compliant with s 35(3) of the Administration of Estates Act 66 of 1965, the reasons why the claim described in item 4 of the account has not been collected or realized;

    iv. consequently to sub-paragraphs (ii) and (iii) hereof, appropriately amending the 'Recapitulation Statement' and 'Distribution Account'.

c. The account as so amended shall, unless the fourth respondent and the Sheriff, Kuilsriver North, within 10 days of having been so requested to do, consent in writing

to it being acted upon, again lie open for inspection in the manner and with the notice and subject to the remedies provided in terms of s 35 of the Administration of Estates Act 66 of 1965.

d. The second respondent shall pay the applicant's costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**J.B. Engelbrecht**
Applicant's attorneys:	**Bisset Boehmke McBlain** **Cape Town**
Second respondent's legal representative:	**M.A. Oosthuizen (Attorney)**
Second respondent's attorneys:	**Shalene Schreuder Attorneys** **Durbanville**
	Van der Spuy Attorneys **Cape Town**