

SOUTH AFRICA / JUDGMENT

Carelse v Stuurman N.O. and Another (17199/2022) [2023] ZAWCHC 193 (13 June 2023) [2023] ZAWCHC 193

COURT

Western Cape High Court, Cape Town

BEFORE

Mangu-Lockwood

CASE / FILE NUMBER

17199/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 17199/2022

In

the matter between:

NATALIE

ESTHER CARELSE

Applicant

and

RALPH

HELGAARD STUURMAN N.O.

First

Respondent

THE

MASTER OF THE HIGH COURT, CAPE TOWN

Second

Respondent

JUDGMENT

DELIVERED ELECTRONICALLY ON 13 JUNE 2023

MANGCU-LOCKWOOD, J

A.

INTRODUCTION

- [1] This is an application in terms of section 35(10) of the Administration of Estates Act 66 of 1965 for the review and setting aside of the second respondent's ("the Master") decision of 1 September 2022 to not uphold the objections of the applicant in respect of an amended first and final liquidation and distribution account ("the L&D account") filed by the first respondent in his capacity as an executor of the deceased estate of the late Ebrahim Jacobs ("the deceased estate").
- [2] The Master's decision, which was made on 1 September 2022, was that the objections required him to adjudicate factual disputes and complex legal matters which he is in no position to decide. Although the applicant disagrees with the Master's basis for the decision - that the issues involved are factually and legally complex
- the parties agree that this Court is entitled to decide the objections afresh and make any order it deems fit.[1]
- [3] The applicant's application was delivered out of time, approximately two weeks late, and condonation was sought in that regard. After considering the reasons given for the condonation application, as well as the fact that the condonation application is not opposed, I have decided to grant the condonation.

B. THE FACTS

- [4] By virtue of an order of this Court dated 1 March 2021 (under case number 18038/2018), the applicant was declared the only intestate heir in respect of the deceased estate. The court order was the culmination of an application she brought in 2018, and which was opposed by the first respondent in his capacity as the executor of the deceased estate. The opposition was, however, withdrawn on the day before the hearing of the matter, and ultimately, the court order was granted unopposed.
- [5] The L&D account that is the subject of these proceedings was lodged with the Master on 17 January 2022. The applicant objected to certain items included in the account, and those objections have solidified into four objections, which are the subject of these proceedings. In respect of all four objections, the Master had issued a letter to the first respondent dated 27 May 2022, requesting certain specified documents which are dealt with below. It was because the applicant was not satisfied with the first respondent's compliance with the Master's request that these proceedings were launched, and because of the Master's decision

referred to earlier.

- [6] The first two objections relate to two items listed as legal costs in the L&D account. The first is in relation to an invoice from David Sauls Attorneys for an amount of R90 000, which was describe as follows: “David Sauls attorney’s iro Natalie Esther Carelse vs Ralph Helgaard Stuurman N.O. & others - High Court case no. 18038/2018
- R90 000.00”. The second, for R120 000, was described as “Barns and Associate iro Linda Maurina Schericka & others including Ralph Helgaard Stuurman N.O. / Master of the High Court & Natalie Esther Carelse- High Court case no. 18038/2018”.
- [7] The chief complaint, when these proceedings were launched, was that the first respondent had failed to submit to the Master any taxed bill of costs in respect of the legal costs claimed for the amounts of R90 000 and R120 000, despite repeated requests to do so. This is common cause. The most readily apparent issue with the invoices submitted to the Master, copies of which were annexed to the papers, is that in both instances they fail to specify amounts or dates for individual items of work claimed, and simply list a wholesale range of work which was apparently performed over some years in each instance.
- [8] It is also not in dispute that the first respondent previously agreed, as far back as 28 September 2021, that the legal costs would be settled by taxation. The applicant’s frustration is that since then, the bills of costs have not been taxed, despite numerous requests for the first respondent to attend thereto. In addition, after the Master specifically requested the first respondent to submit taxed bills of costs in his letter of 27 May 2022, the first respondent responded by requesting an extension to 31 July 2022, stating that the bills of costs were with cost consultants. No bills of costs were submitted to the Master on 31 July 2022, or by 30 September 2022, which is the further extended date that the first respondent apparently requested from the Master

without the applicant’s knowledge. In fact, none had been submitted by 29 November 2022, the date of deposing to the replying

affidavit.

- [9] In these proceedings, the first respondent has attached undated copies of itemised bills of costs in respect of both legal accounts to his answering affidavit. The answering affidavit is silent as to when the first respondent received them, or whether he forwarded them to the Master, and if so, when. What was common cause from the bar at the hearing was that a notice of intention to tax the bills was issued sometime in early April 2023 and that the taxation has been set down for 21 February 2024. In light of this development, I am of the view that the complaints raised by the applicant relating to whether the full amounts of R90 000 and R120 000 should be included in the L&D account are issues that may properly be dealt with at taxation. This includes the complaints regarding the discrepancies contained in the newly discovered bills of costs.

- [10] It also includes the first respondent's response to the applicant's objections, namely that he was entitled to his legal costs, on an own attorney and client scale, since he acted in his capacity as executor of the deceased estate. He also states that the basis for the legal costs at issue has already been determined by Courts and that the applicant's objections effectively seek to re-open the issue.
- [11] Although the failure to submit a taxed bill of costs had become a big part of the applicant's objection to the Master, in these proceedings the applicant has substantially augmented her objections to include serious allegations regarding the propriety of the first respondent's conduct in relation to both legal invoices. The applicant's attorney claims that in both instances the first respondent was not dealing at arm's length. There are also suspicions raised that in both instances these amounts were paid to the attorneys and then paid back to the first respondent, for as yet unexplained

reasons.

- [12] I consider it inappropriate to determine those aspects of the case at this point. In light of the fact that the main basis for the applicant's objection before the Master and which led to these proceedings was the first respondent's failure to submit taxed bills of costs, and that process is underway and the applicant is part of that process, it is preferable for that route to take its course. It may be that some of the additional complaints raised are obviated by the taxation proceedings.

- [13] I also take into account the fact that, although these allegations are serious, there is no indication from the record that they were ever raised with the Master so that

proper investigations may be conducted. The allegations also concern legal practitioners who should, when and if the issues are ripe for adjudication, be joined to such proceedings. In all those circumstances, it is rather appropriate to postpone this aspect of the case sine die, until the taxation has been dealt with. Should the additional complaints still be at issue after taxation the applicant has recourse in terms of the Act.

- [14] The third objection relates to an item listed in the L&D account as a liability of R36 000, and is described as "Estate Agent Commission of 5% to Senator Properties". Even before the issue of the Master's letter of 27 May 2022, the applicant had requested the first respondent to furnish the Fidelity Fund Certificate of the estate agent involved in the transaction described as well as the contact details of the purchaser

of the property, without success. In the letter of 27 May 2022 the Master requested the Fidelity Fund Certificate as well as the invoice supporting the transaction.

- [15] On 21 June 2022 the first respondent submitted a Fidelity Fund Certificate and an invoice. The Fidelity Fund Certificate was in the name of "Wheel House Trading" which is described in the certificate as a firm, whose full names are "Abdus Realtors". In addition, the first respondent submitted an invoice dated 14 February 2022 with the letterhead of Abdus

Realtors, which was addressed to one Abdus Sungay. The invoice states that it relates to the estate of the late Ebrahim Jacobs/Mark Peter May and was for an amount of R36 000.00. In respect of these documents the letter of the first respondent dated 21 June 2022 explained as follows: “Please note that the Senator Properties belongs to Wheel House Trading 113 CC”.

- [16] The applicant’s complaint is that the Fidelity Fund Certificate submitted has no bearing on the name mentioned in the L&D account, namely Senator Properties, apart from the first respondent’s explanation in his letter. In his answering affidavit, the first respondent has responded to this criticism as follows: “The said business of Senator Properties belongs to Abdus Realtors and as to how that business deals with its funds is none of my business. I am an experienced conveyancer and dealt with many estate agencies and they normally nominated an account into which the estate agent’s commission must be paid. I do not interfere with the running of their business and they nominate different accounts as to the name of their estate agencies”.
- [17] I am willing to accept that the letter of the Master dated 27 May 2022 simply requested him to provide an invoice and a Fidelity Fund Certificate of the particular estate agent of Senator Properties, and that this was the basis on which the Fidelity Fund Certificate and invoice were submitted. However, in these proceedings the applicant has gone further and stated that the certificate has no bearing on the estate agent mentioned in the deed of sale, and has also raised questions about why the money was to be paid into the personal account of A Sungay instead of Wheel House Trading 113 CC (which in any event is not the name mentioned in the liquidation and distribution account).
- [18] The answering affidavit has woefully failed to deal with these allegations. The Court is none the wiser as to the relationship

between Senator Properties and the documents submitted to the Master. It is not enough for the first respondent to simply state that the business of Senator Properties belongs to Abdus Realtors, without more. No windeed report or any other kind of document is attached support of this bald averment. As an officer of the Court and an executor of the deceased estate, I would have expected the first respondent to demonstrate the basis for his apparent satisfaction regarding the connection between Senator Properties and the business concerned.

This is especially so given that the first respondent himself states that he is not aware of the business structure and dealings of the estate agencies that he often deals with. It goes without saying that if Senator Properties did not possess a valid Fidelity Fund Certificate at the time of the sale of the

immovable property, the agent is not entitled to the commission. The first respondent’s response in this regard does not assist, and does not rise to the test in *Plascon-Evans*[2], and the applicant’s objection in this regard is upheld.

- [19] The fourth objection relates to plumbing and electrical fees amounting to R38 485.00 in favour of Edwin's Electrical. On 21 June 2022 the first respondent submitted 3 invoices for plumbing and electrical work, as well as a bank statement of the deceased estate reflecting that the payment of R38 485.00 was made. The applicant complains that the invoices are not sufficiently detailed and are not clear as to what work was done or material used. As a result, it is not possible to verify the reasonability of the prices reflected therein. In any event, she complains that the amounts stated seem unreasonably high. She also complains that she was not first approached before the work was conducted.
- [20] The invoices and bank statements which were submitted to the Master are attached as annexures to the answering affidavit. The 3 invoices are for plumbing, wood and beetle, and electrical work. Each invoice describes the work being invoiced as "inspection/defects" in a list format, and at the bottom, a globular amount for "material and labour" is inserted together with an inspection fee, whereafter a total amount is inserted. In the case of the plumbing invoice, 17 items of work are listed, with no specified amount in respect of each entry. The same applies to the wood and beetle invoice, in respect of which 5 items are listed, and the electrical invoice in respect of which 17 items are listed. This is the essence of the applicant's complaint - that there is not specific amount stated in respect of each of the items listed in each invoice.
- [21] Upon perusal of the invoices, it is clear that the listed items are details of work forming the basis for the invoices, contrary to a suggestion made by the applicant that the list is a pro forma list. Although the invoices may be criticized for failure to specify the specific amounts in respect of each work itemised, there is no reason to conclude that the amounts stated in the invoices are without basis and to exclude them from the L&D account.

There is furthermore no indication that Edwin's Electricals was ever approached to verify or explain the invoices, or that the work was never done. I am of the view that there is no basis upon which to uphold the applicant's objection in this regard.

- [22] As regards costs, the applicant seeks a personal costs order against the first respondent based on his alleged failure to act with the required degree of care, skill and diligence required of him and in accordance with his fiduciary duties towards the deceased estate. Many of the allegations relied upon by the applicant in this regard, although serious, do not specifically relate to the relief sought in these proceedings, and some relate to the first and second objections relating to legal costs. Although the first respondent may be criticized for dilatoriness in responding to the applicant's requests and queries via her legal representative, in many of the instances forming part of the applicant's objections, the first respondent did respond to the letter of the Master dated 27 May 2022 by letter dated 21 June

2022. I do not consider it appropriate to grant a punitive cost order against him.

C. ORDER

- [23] In the circumstances the following order is granted the relief sought in relation to:

- a. The application concerning the first and second objections relating to the legal fees in the amounts of R90 000.00 and R120 000.00, is postponed sine die.
- b. The applicant's third objection relating to the estate agent's commission in the amount of R36 000.00 is upheld.
- c. The applicant's fourth objection relating to the invoices of Edwin's Electrical is dismissed.
- d. There is no order as to costs.

N. MANGCU-LOCKWOOD

Judge of the High Court

APPEARANCES For the applicant Adv P. Gabriel Instructed by Andre van Rhyn Attorneys For the first respondent Adv M Ipser Instructed by R. H. Stuurman & Co.

[1] See *Freidrich and Others v Smit NO and Others* (1028/2015) [2017] ZASCA 19; 2017 (4) SA 144 (SCA) (23 March 2017) para [14].

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E–635C.

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