

REPUBLIC OF SOUTH AFRICA



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

31/1/2014
CASE NO: 110/2011

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
31/1/2014	
DATE	SIGNATURE

In the matter between:

WARWICK BASIL DAWS JONES NO

Applicant

and

**THE MASTER, NORTH GAUTENG HIGH COURT,
PRETORIA**

First Respondent

ALISTAIR DALZIEL WILLIAMS NO

Second Respondent

MARGARET BATLEY

Third Respondent

CAROLINE WEEBER

Fourth Respondent

J U D G M E N T

DEWRANCE AJ

[1] This is an application to review and set aside the first respondent's (the Master's) taxation of the applicant's first to sixth curator's

accounts. The review is brought in terms of the provisions of section 95, read with section 1, of the Administration of Estates Act, Act 66 of 1965 ("the Administration of Estates Act"), and sections 6, 7, 8 and 9 of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

- [2] Section 95 of the Administration of Estates Act provides that:

"95. Review of Master's appointment, etc

Every appointment by the Master of an executor, tutor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be." (my emphasis)

- [3] The central question in this review is, firstly, whether the Master was correct in disallowing certain disbursements made by the applicant and, secondly, whether the Master was correct in not allowing all the time spent, and claimed, by the applicant in his second to sixth curator's accounts as an additional fee.
- [4] The Master disallowed the disbursements because the Master is of the view that costs expended on the disbursements are duties which are normally performed by a *curator bonis* and, therefore, the applicant cannot claim for them. The Master is of the further view that, when it decides to increase curator's fees, the actual time spent

by the curator is not the only factor which it takes into consideration. I will return to this aspect later.

[5] The applicant spent approximately 2058 hours over a period of five years in administering the estate of the patient.

[6] The Master increased the curator's fee of the applicant in respect of all his accounts. The main reason for allowing the increased fee, according to the Master,

"...was due to the fact that there was clearly sufficient evidence present to constitute special reasons as contemplated in section 84(2)(a) of the Administration of Estates Act..."

*The difficulty for me therefore, was not whether special reasons existed or not, as discussed in **Collie NO v Master 1972 (3) SA 63 (AD)**; but the basis on which to tax the fee of the applicant, taking the special circumstances into consideration.*

*In the unreported case of **Burne NO and Another v The Master of the High Court, Natal Provincial Division - Case No 2937/97** it was decided that 'income collected' as referred to in Regulation 8(3)(a) of the Administration of Estates Act 1965, means total or gross income from the estate under curatorship.*

I have exercised my discretion, as set out in section 84 of the Administration of Estates Act; and allowed 6% fee on all 'income' reflected by the applicant in the income and expenditure account for this specific period, and not only on income as set out in the invoice of the applicant..." (my emphasis)

[7] The Master also states:

"that an hourly rate, and time spent are not the only factors to be considered when deciding the increase of a fee of the Curator Bonis. Likewise this was

*emphasised...in the matter of **Nel and Another NNO v The Master 2005 (1) SA 276 (SCA)** which decision was followed in the later appellate court ruling of **Klopper v The Master of the High Court (643/07) [2008] ZASCA 155 (27 November 2008)**; albeit that these cases dealt with insolvencies. The legislation relevant to both companies (Companies Act No 61 of 1973), as well as to individual estates (Insolvency Act No 24 of 1936) that similar wording that used (sic) in the Administration of Estates Act with regard to a taxing of a fee and the simultaneous or pursuant reduction, increase or disallowance thereof."*

[8] It therefore appears to me that, in answering the central question whether special reasons exist for the increase of the fee, the Master has already conceded that special reasons exist. The only aspect then is whether the Master applied its mind to all the facts that were placed before the Master when the decision was made not to allow all the time spent by the applicant in the administration of the estate of the patient.

[9] Section 84 deals with the remuneration of tutors and curators and provides that:

"84. Remuneration of tutors and curators

(1) Every tutor and curator shall, subject to the provisions of sub-section (2), be entitled to receive out of the income derived from the property concerned or out of the property itself -

(a) such remuneration as may have been fixed by any will or written instrument by which he has been nominated; 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.

(2) The Master may -

- (a) *if there are in any particular case special reasons for doing so, reduce or increase any such remuneration; or*
- (b) *if the tutor or curator has failed to discharge his duties or has discharged them in an unsatisfactory manner, disallow any such remuneration, either wholly or in part."* (my emphasis)

[10] Section 103(e) of the Administration of Estates Act empowers the Minister of Justice ("the Minister") to make regulations prescribing a tariff of remuneration payable to any person performing any act relating to the liquidation or distribution of an estate on behalf of the executor of the estate in question and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed. The Minister has issued such regulations under Government Notice R473 in Government Gazette 3425 of 24 March 1972. The regulations have been amended from time to time. Regulation 8 deals with the tariff of remuneration of executors, interim curators, tutors and curators. Regulation 8(3) provides that:

"(3) The remuneration of tutors and curators referred to in section 84(1)(b) of the Act shall be assessed according to the following tariff:

- (a) on income collected during the existence of the tutorship or curatorship: 6 per cent;*
- (b) on the value of capital assets on distribution, delivery or payment thereof on termination of the tutorship or curatorship: 2 per cent."*

[11] Section 85 makes certain sections of the Administration of Estates Act, mainly dealing with deceased estates, applicable to tutors and curators. Section 85 provides that:

"85. Application of certain sections to tutors and curators

Sections 24, 26, 28 and 36, sub-section (2) of section 42, sections 46 and 48, sub-section (2) of section 49 and sections 52, 53, 54 and 56 shall mutatis mutandis apply with reference to tutors and curators: Provided that any reference in any of the said sections to a will shall, for the purposes of its application under this section, include a reference to any written instrument by which the tutor or curator concerned has been nominated."

- [12] For the purposes of this review, section 52 is of importance. It provides that:

"52. No substitution or surrogation

It shall not be competent for any executor to substitute or surrogate any other person to act in his place."

- [13] In *Bramwell and Lazar, NNO v Laub* 1978 (1) WLD 381 at 384 A, it was held that section 52 of the Administration of Estates Act prohibits abdication but not delegation of duties (see also *Smit v Van de Werker NO en Andere* 1984 (1) 164 (TPA) at p 167 H).

- [14] At this point, it is appropriate to set out the duties and functions of a curator. They are: taking custody of property, books and documents; opening and dealing with bank accounts; filing inventories; lodging of curator's accounts with the Master; payment of surplus monies into the Guardian's Fund; alienation of immovable property; obtaining of the Master's certificate before transfer of immovable property; purchase of the property by the curator or a person connected with

him/her; compounding of debts (*Meyerowitz on Administration of Estates and Estate Duty (2007 Edition)*, para 22.8, p 22-9).

[15] Section 76(1)(b) provides that:

"76. Authority conferred by letters of tutorship and curatorship

(1) *The Master may--*

(a) ...

(b) *by any letters of curatorship granted by him, authorise the curator to do any one or more of the following, namely -*

(i) *to perform any particular act in respect of the property of the person concerned;*

(ii) *to take care of the said property;*

(iii) *to administer the said property; and*

(iv) *to carry on, subject to any law which may be applicable, any business or undertaking of the person concerned."*

[16] Although this section states that the Master may grant authority in respect of the above, where a court in appointing a curator has directed what powers the curator is to have, the Master must, in issuing letters of curatorship, authorise the powers directed by the Court (*Ex parte Ganga 1979 (1) SA 586 (N) at 588 E*).

[17] The applicant was appointed as the *curator bonis* of Margaret Irene Williams ("the patient") pursuant to an order granted by the South Gauteng High Court on 27 May 2005 ("the May 2005 Order").

As will be explained hereunder, that Court also granted the applicant certain powers. His appointment supersedes that of the interim *curator bonis*, Mr Lionel Karp, who is an attorney of this Court. The applicant's appointment was sought at the instance of the third and fourth respondents, who are the daughters of the patient. Mrs Williams passed away on 19 April 2010. The second respondent is the executor of Mrs Williams' estate. He abides by the outcome of the review. Although Mrs Williams is deceased, I will refer to her as the patient.

[18] The applicant states that the patient "*might fairly be described as having been a wealthy woman, with a large estate*". A fair valuation of her South African estate amounts to approximately R6 million.

[19] Until shortly before her death the patient lived at a luxurious retirement home, Leisure Gardens, which is situated in Knysna. During her stay at Leisure Gardens she had privately paid, semi-skilled caregivers 24 hours per day; one during the day and one during the night. In addition, two relief caregivers were on hand and a general practitioner (or a doctor) visited her regularly. She also had a manicurist care for her. A social worker visited her twice a week.

[20] The patient's day-to-day financial and other needs were administered by Leisure Gardens' general manager and accountant, Mrs Berrange, as well as her staff. The applicant paid Mrs Berrange for her services. The Master has disallowed the fees paid to her.

- [21] The patient's monthly expenditure was initially in the region of R25 000 per month and, towards the end, was approximately R40 000 per month.
- [22] The daughters of the patient, i.e. the third and fourth respondents, and one Mrs Rosamund Male ("Male") had an acrimonious relationship. As is apparent from paragraph 3.13 of the May 2005 order, the third and fourth respondents sought *"an accounting, together with all supporting and relevant documentation from Rosamund Male...in respect of...[her] administration of the capital and income of the patient from January 2000 to date of appointment of the curator bonis"*. When the May 2005 order was varied, as explained hereunder, Male was the applicant and the third and fourth respondents were respondents in those proceedings.
- [23] The Master is of the opinion that the estate of the patient was not a complex estate but, because of the litigious nature thereof, the estate demanded attention. This was caused, according to the Master, by the *"ongoing feud between the daughters"* of the patient.
- [24] The Master issued a letter of curatorship appointing the applicant as the *curator bonis* on 6 July 2005. The Master appointed Jones *"[w]ith the powers as set out in paragraphs 3.1 to 3.18 of the Court Order dated 27 May 2005 with Case no. 2005/5855, subject to the approval of the Master of the High Court."*

[25] The powers in paragraphs 3.1 to 3.18 of the May 2005 Order are set out hereunder:

- "3.1 *to receive, take care of, control and administer all property constituting the estate of the Patient;*
- 3.2 *to carry on or discontinue subject to any law which may be applicable, any trade, business or undertaking of the Patient;*
- 3.3 *to acquire, whether by purchase or otherwise, any property, whether movable or immovable, for the benefit of the Patient;*
- 3.4 *to let, exchange, petition, alienate and for any lawful purpose to manage or pledge any property belonging to the Patient in which she may have an interest;*
- 3.5 *to perform any contract relating to the property of the Patient entered into by the Patient before she was declared incapable of managing his (sic) own affairs, including revocation of all and any general powers of attorney given to any person by the Patient, including Rosamund Male;*
- 3.6 *to exercise any power or give any consent required for the exercise of any power, where such power is vested in the Patient for her own benefit, or the power is in the nature of a beneficial interest in the Patient;*
- 3.7 *to raise money by way of mortgage or pledge of any of the Patient's property for payment of her debts or expenditure incurred for the Patient's maintenance, or otherwise for her benefit, or for the payment of, or provision for, the expenses, of her future maintenance or for the improvement or maintenance of any of the Patient's property;*
- 3.8 *to apply any money for or towards the maintenance or the benefit of the Patient, including all and any medical treatment and related medical expenses such as ophthalmology, physiotherapy, hearing and walking aids;*
- 3.9 *to expend money on the improvement of any property of the Patient by way of building or otherwise;*

- 3.10 *to invest and re-invest monies of the Patient which may be available for investment and which are not immediately required for the purposes referred to in section 82(c) of the Administration of Estates Act;*
- 3.11 *to take any proceedings which may be necessary in the interests of the Patient or for the due and proper administration of her property;*
- 3.12 *to institute action on the Patient's behalf for recovery of any debts or monies, which he considers are owing to her;*
- 3.13 *to seek an accounting, together with all supporting and relevant documentation from Rosamund Male, daughter of the Patient, in respect of the said Male's administration of the capital and income of the Patient from January 2000 to date of appointment of the Curator Bonis;*
- 3.14 *to receive full policy information from Liberty Life Limited in respect of all and any policies held in the name of the Patient and/or in the name of Mr Robert Dalziel Williams;*
- 3.15 *to have full access to and be furnished with copies of all bank statements held by the Patient in her name at any financial institution in South Africa together with copies of all Internet banking transactions, written mandates by the Patient or anyone holding a general power of attorney in respect of the Patient's affairs, which mandates relate to the transfer of monies or withdrawal of monies from any of the said accounts, and copies of the entire and complete banker/client files, including all and any correspondence;*
- 3.16 *to [c]all for and obtain a copy of the general power of attorney granted by the Patient to the said Male and to call for and have sight of the original document;*
- 3.17 *to call for and obtain a copy of the following document in respect of the Patient's late husband:*
 - 3.17.1 *his death certificate;*
 - 3.17.2 *the cremation certificate;*

3.17.3 *the report of the post-mortem carried out on the Patient's late husband;*

and to call for and have sight of the original documents;

3.18 *to call for and obtain copies of all and any medical and hospital records for the Patient and for the Patient's late husband, Robert Dalziel Williams and to hand same to the Curatrix-ad-Personam"*

[26] Prayer 4 of the May 2005 Order provided that the powers conferred upon the applicant in prayers 3.1 to 3.12 shall be exercised subject to the approval of the Master.

[27] If regard is had to the powers conferred upon the applicant by the May 2005 order, the powers appear to be quite routine except for maybe paragraphs 3.2, 3.13, 3.17 and 3.18 (only insofar as they relate to Robert Dalziel Williams, the patient's late husband).

[28] Almost two years later, after further litigation between the daughters, the May 2005 Order was varied by the South Gauteng High Court on 28 March 2007 ('the March 2007 order). The powers of the applicant were extended in the following terms:

"3.19 to appoint accountants or forensic investigators or any other experts required to assist him to trace the alleged assets in the patient's estate, including all the patient's overseas assets (as alleged by either party or as uncovered during any investigation) as well as to assist him to trace the whereabouts of the proceeds of any assets (as alleged by either party or as uncovered by any investigation) that may have been disposed of from time to time that the patient and the late Robert Dalziel Williams took up residence in England to date;

- 3.20 *to appoint an attorney or any other suitably qualified person or persons overseas to assist him in tracing any will overseas of the late Robert Dalziel Williams, and to assist him in transferring such assets if any to the patient in accordance with any such will or, if such will exists, to assist him in transferring such assets to the patient as she may have inherited in accordance with the laws of the intestate succession, or alternatively in terms of his South African will;*
- 3.21 *to take all steps necessary locally and in any foreign jurisdiction in which the patient's assets (as alleged by either party or as uncovered during any investigation) may be situated to have this order of court recognised (if necessary) in such foreign jurisdiction so as to enable him to manage and administer all assets effectively;*
- 3A.1 *The curator bonis is granted the power to be exercised as this discretion, to trade and to launch investigations in connection with all alleged assets of the patient wherever situate (sic), including but not limited to, the assets referred to in this application, as well as all assets that the patient may have inherited from her late husband, Robert Dalziel Williams, whether by way of intestate succession or in terms of all his wills, including any overseas wills, and to receive, take control of, administer and deal with all such assets in terms of the powers set out in paragraphs 3.1 to 3.21 above.*
- 3A.2 *The curator bonis is granted the further power, to be exercised at his discretion, to take all necessary steps to recover any assets (whether overseas or in South Africa) of the patient that may have been misappropriated or unlawfully removed, or the value thereof, to institute all legal proceedings required in connection therewith and to invoke the assistance of any necessary experts in this regard.*
- 3B *The curator bonis shall, as and when he deems it appropriate, furnish the first and second applicants and the respondent with a written report as to the progress of his investigations in respect of matters referred to in paragraph 3A.*
- 3C *The curator bonis shall furnish the first and second applicants and the respondent with a copy of:*

3C.1 *all interim and final reports of any forensic investigators, accountants or other persons produced from time to time arising from the contents of paragraphs 3.13, 3.19 and 3.20 above, including any correspondence such persons may produce from time to time, including all correspondence and reports from the late Oliver Haigh pertaining to the respondent;*

3C.2 *his annual report to the Master."*

[29] The extended powers do not, in my view, constitute the normal powers of a *curator bonis*. The parties are *ad idem* on this point.

[30] With regard to the estate of the patient as a whole, the Master is of the view that, according to the applicant, as at 27 May 2005, the assets of the patient consisted of two immovable properties to the value of R2.3 million and a Liberty Life policy to the value of R4 million. The total value of the estate was therefore R6.3 million.

[31] The applicant, on the other hand, contends that it was a difficult and complex estate. The applicant conducted an investigation in search of the patient's and her late husband's assets which were located overseas. He even appointed solicitors in London and Jersey to assist him to trace the assets.

[32] In trying to trace the whereabouts of diamonds, held by the patient in Zurich, Switzerland, in a safety deposit box held in the names of the patient and her late husband, Mr Williams, at UBS Bank, he was required to travel to Zurich. The diamonds had been estimated in value to be R500 000. He discovered from the bank's register of

persons that the fourth respondent had accessed the safety deposit box years before. She was the last person to have done so prior to him accessing the safety deposit box which he found was empty. He wrote to her and informed her that the safety deposit box was found to be empty and that she was the last person prior to him to have had access to the safety deposit box.

[33] The applicant alleges that the fourth respondent admitted removing from the safety deposit box a sealed envelope and claimed to have handed it to her father without knowing its contents. However, according to the applicant, Mr Williams had written a letter, approximately a year subsequent to the fourth respondents' visit, to the UBS Bank to a diamond dealer in London referring to the diamonds as being in the safety deposit box at UBS Bank. The applicant alleges that the most reasonable inference in all circumstances is that the fourth respondent removed the diamonds from the safety deposit box and did not hand them to Mr Williams, who was under the mistaken belief that they were still in the safety deposit box at the time when he wrote to the diamond dealer. In this regard, I will refrain from expressing an opinion or making a finding.

[34] The applicant alleges that he was also required to travel to Jersey to investigate the disappearance of approximately R300 000 from an account held at the NatWest Bank jointly by Mr Williams, the deceased and Dr Weeber, the husband of the fourth respondent.

Dr Weeber had a power of attorney over this account, in respect of both the patient and Mr Williams at all relevant times.

[35] He also visited Harrogate in Yorkshire, England, to interview the Lloyds bank manager (to obtain bank statements for accounts held by Mr Williams and the patient, as well as to ascertain the existence of any safety deposit box held by the said bank), solicitors and others concerning the sale of the residences of Mr Williams and the patient at Harrogate. He then returned to London, to consult the estate's solicitor to report on his findings and to obtain advice.

[36] He also decided to pay an unannounced visit to Dr Weeber and Mrs Weeber in their Swiss chalet. He hoped that without the interruption of their Pretoria-based attorney he might confront them with what he had learned of the diamonds, the missing family jewellery, silver, valuable stamp collection and antique furniture as well as the missing funds from NatWest Bank account and the proceeds of the sale of the properties in Harrogate. Upon his arrival, the Weeber's were not home.

[37] His domestic investigations involved:

37.1. obtaining an accountant's report for the period 2000 until the date of his appointment in 2005 on the administration of the affairs by Mrs Male of both Mr Williams and the patient, which administration was in terms of a power of attorney granted to

her. This enquiry, according to him, lasted approximately eight months and exonerated Mrs Male from any alleged misappropriation;

37.2. enquiries concerning the alleged appropriation of Mrs Male of the contents of Mrs Williams' safety deposit box, held at Nedbank in East London, in the name of a company of her late father. However, in the interests of curtailing the possible legal costs of a defended matter, the Master forbade him from using estate funds to apply to the high court for a search and seizure warrant, as provided for in the Administration of Estates Act. His investigations were frustrated at that point;

37.3. enquiries at Liberty Life on the consolidation of numerous of the policies in the name of Mr Williams into one policy. This resulted in the cession of this consolidated policy from Mrs Male to the estate of the patient;

37.4. enquiries at the East London branch of Sasfin, concerning its transfer of large amounts of money from the joint account of Mr Williams and the patient to their Lloyds Bank joint account, held at Harrogate, Yorkshire and from there to their conveyancing attorneys at Harrogate; and

37.5. searching for jewellery at the patient's former common home at 7 Palm Place, Beacon Bay, East London. At the instigation

of the fourth respondent, charges of theft were laid against Mrs Male at the Palm Bay police station, but the state declined to prosecute and issued a *nolle prosequi*.

[38] The applicant further alleges that his extensive investigations and investigatory work produced the following result:

- 38.1. the transfer from UBS Bank in Zurich of approximately R310 000 into the patient's account held at Nedbank in East London;
- 38.2. despite attempts to settle the issue early on by him, a summons was prepared for an action against the third and fourth respondents to be instituted by the solicitors employed in London for the patient. The claim was approximately R6 million, inclusive of costs, and concerns their appropriation of the proceeds of the second and final home of their parents at Harrogate, Yorkshire;
- 38.3. his request to Interpol for assistance in enquiries against Dr Weeber and the fourth respondent arising out of his investigations concerning withdrawals from the patient's NatWest Bank at Jersey, which are unaccounted for and amount to approximately R3 million; and

- 38.4. the fourth respondent's visit to the safety deposit box held at UBS Bank in Zurich and the removal of the "*sealed envelope*", containing approximately R500 000 worth of diamonds from the safety deposit box;
- 38.5. again, despite attempts by him to settle the matter, the service of summons against Mrs Male, for approximately R750 000 relating to an Old Mutual policy of the patient, which was for the benefit of her estate, and which funds had been improperly transferred into Mrs Male's name. This is a defended matter and summons was served to stop prescription; and
- 38.6. the cession by Mrs Male of a consolidated Liberty Life policy, formerly consisting of the policies of Mr Williams to the estate and worth approximately R2.5 million.

[39] The applicant alleges that he was unable to trace the antique furniture, silver and valuable stamp collection taken to the United States by Mr Williams and the patient or to obtain convincing explanations of their whereabouts from either the third or fourth respondents. To take this further would require incurring considerable legal costs.

- [40] The applicant is of the opinion that he successfully executed his duties and powers through the exercise of great care, skill and endeavour.
- [41] The applicant has lodged seven curators' accounts (which the applicant refers to as invoices). The curators accounts are for the periods 27 May 2005 to January 2006 (the first account); 1 February 2006 to 27 July 2006 (the second account); 1 August 2006 to January 2007 (the third account); 1 February 2007 to 31 July 2007 (the fourth account); 1 March 2008 to 28 February 2009 (the fifth account) and 1 March 2009 to April 2010 (the sixth and final account).
- [42] The Applicant brought this review in his official capacity as *curator bonis*. The third and fourth respondents take issue with this and contend that, as a result of him launching this review in that capacity, he has no *locus standi*.
- [43] In addition, so they contend, the application is clearly one in respect of his personal or own benefit and to the detriment of the estate of the third and fourth respondents' mother over which he was the curator. He has, accordingly, conflated his personal interests with that of the estate of the third and fourth respondents' mother.
- [44] Accordingly, the review, so they contend, ought to have been brought in his own name and costs only against such parties as unsuccessfully oppose the application.

- [45] They contend that one of the injudicious consequences of having brought the application as he has is that, in the event that the third and fourth respondents are successful, they cannot obtain a costs order against him. Even if a costs order is awarded in favour of the third and fourth respondents, they cannot recover it from the applicant as cited. Ultimately, even if they did recover it, it would be from the deceased estate of their mother.
- [46] The third and fourth respondents contend that, for this reason alone, the application should be dismissed.
- [47] The Master, on the other hand, in paragraph 14 of the Master's report dated 30 June 2011, also takes issue with the applicant launching this review in his official capacity. However, the Master does not contend that the applicant has no *locus standi* to launch his review but that this aspect should be taken into consideration when costs are being considered. The Master says the following:

"I would like to direct the attention of the Honourable Court to the fact that this application has been brought by the Applicant in his official capacity (nomino officio), although there is no advantage to the estate herein; nor is he acting on behalf of or in the interests of the estate in this regard. An application of this nature is solely for the benefit of the appointee in his personal capacity. The Honourable Court is humbly requested to consider this when the aspect of costs is being considered."

- [48] The applicant, on the other hand, contends that he has been correctly cited, since he continues to hold the office of *curator bonis*, until such time as he has been discharged by the Master on application made to him. No application has been made to the Master and the Master has made no publication, as required in terms of section 75, of the fact that the applicant has been discharged as *curator bonis*.
- [49] I find myself in disagreement with the point *in limine* raised by the third and fourth respondents that the applicant has no *locus standi*. The applicant is quite clearly an aggrieved person as contemplated by section 95 of the Administration of Estates Act and accordingly has *locus standi* to launch this review.
- [50] The term "*nominee*" indicates a person who is specifically nominated or appointed in respect of a certain function (*Burman v Teiman 1975 (1) SA 756 (W) at 757 C*).
- [51] It appears to me that the correct approach is that although the applicant launched this application in his capacity as *curator bonis* this should be taken into consideration when determining costs.
- [52] In *Nel and Another NNO v The Master (Absa Bank Ltd and Others Intervening)* 2005 (1) SA 276 (SCA) at p 298 D - G), that Court stated the following:

"[43] As I have indicated above, the appellants purported to bring their review application in their capacity as the duly appointed joint liquidators of Intramed, contending that they were duly authorised in such capacity to institute the review proceedings. As correctly pointed out by the Master in his answering affidavit, the appellants failed to annex any evidence which supported this contention. The review proceedings were in fact proceedings which should obviously have been brought by the appellants in their personal capacity and not their capacity as joint liquidators - the proceedings relate to their entitlement to remuneration and not to a matter falling within the ambit of their role as liquidators of the Intramed estate. As contended by counsel for the Master and the intervening respondents, the appellants were simply seeking to secure a higher fee for their services than that fixed by the Master. In doing so, they were acting in their personal capacities and not in any sense in the interest of the creditors of the Intramed estate. Indeed, the appellants were - and still are - acting against the interests of the creditors, solely for their own benefit. This being so, there is no reason whatsoever why the costs of the review application or the appeal should be borne by the company in liquidation." (my emphasis)

[53] The next issue with which the third and fourth respondents take issue is that the applicant unduly delayed bringing this review.

[54] The third and fourth respondents contend that the first account was, to the knowledge of the applicant, taxed on 27 July 2007. However, he waited some three and a half years before launching an application to review the taxation, namely, until January 2011. During the period after the account was submitted there were several items of correspondence between the applicant and the first respondent.

[55] The explanation that "[t]he drafting of his voluminous and complicated application has been exceedingly time consuming..." cannot ever

explain a delay of three and a half years in respect of the review of taxation of the first account.

[56] The third and fourth respondents contend that the applicant's explanation gets no better when he explains that he had to conduct extensive searches for documents and some of his files were in the hands of costs consultants and his accountant. This information the third and fourth respondents contend is bald and sparse and falls short of what is required of the applicant for condonation. Accordingly, his application for condonation in respect of the review regarding the taxation of his first account must fail hopelessly.

[57] The third and fourth respondents advance the same reason why the review in relation to the second account should also be refused.

[58] In relation to the third and fourth accounts, the third and fourth respondents contend that at the very latest the applicant was aware of the taxation of the third and fourth accounts on 20 April 2010 when he was furnished with the report regarding the application for the removal.

[59] In that report, the first respondent's decisions regarding the third and fourth accounts are clearly communicated.

[60] Despite such knowledge, some nine months elapsed before he launched his application, which is three months past the deadline of

the 180-day period in which he ought to have launched this application.

[61] The third and fourth respondents contend that the applicant gives a generalised explanation that is unconvincing, bald, vague and sketchy. They also contend that the applicant's attitude to this entire matter has been lackadaisical. His explanation is not only unconvincing but lacks the detail one would expect of an applicant who is seeking a potential indulgence from this Court. Accordingly, the review of the third and fourth accounts should also fail.

[62] I agree with the third and fourth respondents that the reasons for the late delay for the launching of this application are sketchy. However, I do not intend closing the door on the applicant. As will become apparent hereunder, there is some merit in the review by the applicant.

[63] Accordingly, condonation for the late bringing of this review is granted.

[64] In the first account the applicant sought a "*supplementary fee*" for accounting services rendered by one O D Haigh ("Haigh") in the amount of R10 746.06 and R Harris ("Harris") in the amount of R2 500.00. The applicant also sought a supplementary fee in the amount of R3 920.00 for the services of Mrs S Berrange for "*the day to day payments of the patient's needs at Knysna and production of*

monthly payment schedules and administration of the patient's private day and night staff and liaising with the curator bonis and curator ad personam Johannesburg".

[65] The applicant also sought a "*supplementary fee*" of R260 016.66 for 520.03 hours (at R500 per hour) spent on the administration of the patient's estate.

[66] The first account was lodged with the Master on 13 December 2006. On 27 July 2007, an estate controller in the curatorship section of the Master, S Maloa, approved the account. The letter provides the following:

"RE: CURATORSHIP: MARGERET IRENE WILLIAMS

1. *Your letter dated 15 June 2007 refers.*
2. *Queries 1.1-9 on my query sheet dated **28 May 2007** has been deleted.*
3. *The First Curators (sic) account is in order.*

Yours faithfully"

[67] However, in a letter dated 9 November 2005, more than a year before the first account was lodged with the Master, it appears that the Master informed the applicant that the duties performed by Mrs Berrange form part of the applicant's duties and therefore the applicant is welcome to pay her fees from his fees. This appears to

be a response to a letter from the applicant to the Master dated 6 September 2005.

[68] It is apparent that the decision by the Master not to allow the fees of Mrs Berrange was made as early as 9 November 2005, before the first account was lodged.

[69] Paragraph 3 of the 9 November 2005 letter, importantly, states the following:

"3. ***Your letter dated 13 October 2005 refers***

Kindly provide me with a summary of the expenditure that is payable every month, to enable me to approve a monthly allowance for monthly expenses only. Extra expenses will be dealt with separately, on receipt of applications."

[70] It is also not clear whether the applicant provided the Master with a summary of the monthly expenditure payable every month as requested by the Master.

[71] The 9 November 2005 letter also mentions a "*misunderstanding*" relating to the accountant's fee. This also appears to be a response to a letter from the applicant to the Master dated 26 September 2005. Unfortunately, the 26 September 2005 letter does not form part of the record before me.

[72] In a letter dated 20 April 2010 by the Master to attorneys VFV Mseleku Attorneys (this is in response to the attorneys'

application to remove the applicant as *curator bonis*), the Master said the following regarding the curator's fees on the first account:

"FIRST ACCOUNT:

This account was only for a period of six months.

Mr Jones requested a fee of R303 893-97.

His motivation is his time sheet. He is a senior attorney and requested that R500 per hour, be approved. He has rendered a vast amount of services.

The Master approved the account on 27 July 2007.

The Master has in several letters, even as early as 2005 informed Mr Jones that if he wishes to utilize (sic) the services of an accountant, he must provide for it out of his fees. The estate will not be liable. See letters dated 9/11/2005; 26/9/2007; 17/10/2008 & 28/8/2009. The Master did not approve these expenses.

Decision:

The Master approved the account on 27 July 2007. Mr Jones are (sic) entitled to his fee of R303 893-97.

The fees of Mrs Berrange will not be paid by the estate.

Although Mr Jones and I disagree about his fees, it is not a sufficient reason to remove Mr Jones as Curator Bonis. There are other remedies - he can take my decision on review or lodge an additional motivation with new facts etc."

- [73] It is apparent that the Master is reconfirming a decision, firstly, that if the applicant wishes to utilise the services of an accountant, he must pay for it out of his own fees (the decision was communicated to the applicant in the letter referred to) and, secondly, that the fees of Mrs Berrange will not be paid by the estate.

[74] In this court, the Master reconfirmed the aforementioned reasons for the decisions taken in the first to fourth accounts. The Master also provides reasons why the accounting and financial fees and Mrs Berrange's fees will not be allowed. With regard to the fees of Mrs Berrange (which were claimed in the first to sixth accounts), the Master provides the following reasons why he disallowed this fee:

- 74.1. section 52 read with section 85 of the Administration of Estates Act states that it shall not be competent for any executor to substitute or surrogate any other person to act in his place, in line with the principle of *delegatus delegare non potest*. This reason is obviously wrong in line with the authorities already mentioned which allow for delegation but not abrogation of duties;
- 74.2. her services as "accountant" for the applicant, also constitutes a conflict of interest between her position as general manager of Leisure Gardens, for which she received a salary and that of an "accountant" of the late patient. I do not understand this reason; and
- 74.3. the "Curator ad Personae, who could fill these duties, was also appointed in this matter. She also lodged a complaint, dated 13 February 2010, against the applicant; with regard to the fact that Mrs Berrange may sign cheques on behalf of the estate without any control";

74.4. the Master is then of the opinion that these fees are excessive, not properly motivated, unnecessary and not in the best interests of the curatorship estate.

[75] If regard is had to the argument by the Master that a *curator ad personae* was appointed who could fulfil these duties, it is apparent to me that the fees were unnecessary and that the Master was correct in disallowing the fees of Mrs Berrange. Accordingly, the review to set aside the decision by the Master not to allow Mrs Berrange's fee fails.

[76] The fees of Haigh and Harris would appear to me to be warranted in the event that the services were incurred with the specific aim of exercising the extraordinary powers and duties which were conferred on the applicant. It appears me that initially certain accounting work was done by the accountants in this regard. However, there is certain accounting work performed by the accountants which is not specifically aimed at exercising the extraordinary powers and duties conferred upon the applicant. An example hereof is the drafting of the curator's accounts.

[77] In this regard, the Master states the following:

"In most of these matters, the Curatores Bonis (attorney, accountant or layman) compiles the administration account themselves, as it is not such a complex to compile an administration account.

Usually accounting fees are allowed for income tax purposes, and then only if a specific account is lodged by the accountant giving a detailed description of the

accounting work done, as well as a motivation as to why these services were a necessity; and in the best interests of the Curatorship estate. The expense is usually not more than R700 per year."

- [78] I agree with the Master that the applicant is not entitled to claim the accounting fees of Haigh and Harris insofar as they relate to the drafting of the curator's account. However, work performed by Haigh and Harris in relation to the exercise of the powers and duties conferred by the applicant should, however, be allowed. This includes work performed by them to assist the applicant to trace assets of the patient.
- [79] However, this Court is not in a position to analyse each minute spent by the accountant in relation to work performed. The Master is best suited to do this. Accordingly, this aspect is referred back to the Master and the Master is specifically ordered to reconsider the accounting fees of Haigh and Harris and allow the fees only insofar as they relate to the exercise of the extraordinary powers and duties of the applicant.
- [80] In relation to the increased fees, the Master took the following factors into consideration: the provisions of Section 84, read with Regulation 8 of the Administration of Estates Act; relevant case law; the complexity of the estate in question; the degree of difficulty encountered by the Applicant in the administration thereof; the amount of work done and the time spent by the Applicant in the discharge of the duties involved; particular difficulties which were

experienced by the Applicant, due to the nature of the assets; the First administration account of the Applicant only covered a period of six months, and not a year, as is required in terms of Section 83 of the Administration of Estates Act and, therefore, the period for the account was taken into account; the time sheet of the Applicant, as well as, whether he had performed his duty satisfactorily. The value of the estate; the fact that this was the first administration account, as well as the work involved at the commencement of an estate under Curatorship.

- [81] The facts of this case are similar to the case of *Johannes Klopper v The Master of the High Court Case No 2475/2008 (CPD)*, delivered on 13 June 2008 by Thring J. The facts of this case are distinguishable from the case of *Klopper NO v the Master 2009 (3) SA 571 (SCA)* which is one of the cases which the Master relied on in only partially increasing the fee of the applicant (see para [17]).
- [82] In the unreported case, there were about 13 points which warranted an increased fee. They were: the administration of estates spanning a period of more than five years; the winding up process was multifaceted, complex and difficult; there was a dispute with the South African Revenue Service (SARS) about custom duties relating to company stock; there were cross-border matters in respect of Australian suppliers; there were objections by creditors; legal proceedings were instituted against the liquidator; there were negotiations in regard to the sale of stock and the company trade

mark in South Africa and Australia as well as negotiations in respect of the release of lien over stocks; the company's book debts had been factored to Nedbank Ltd; VAT claimed by SARS required extensive investigations.

- [83] Although these cases deal with the increased fee of a liquidator, the principles in relation to the increased fees of trustees (in terms of the Insolvency Act, 1936) and liquidators (in terms of the Companies Act) are equally applicable to the increase of fees of executors and trustees (in terms of the Administration of Estates Act).
- [84] In the matter at hand, the applicant had, with his extraordinary powers, to do extensive work to trace and preserve the assets of the patient, both locally and overseas.
- [85] Although a Court is usually slow to interfere where disputes concerned the *quantum* of liquidators and, in this case, curator's fees, it will do so where the Master was clearly wrong (see *Nel's case supra* at 287P-288G and *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC) at 73C-F).
- [86] In the matter at hand, in the first report filed by the Master, the following is said:

"The time sheet lodged by the applicant, as motivation for his increased fee...He did not provide clear indication as to the specifics of what had transpired during the period of this administration account. Most of the items

listed in his time sheet, namely; considering letters, consulting, correspondence, attending court, uplifting assets, telephone calls, paying accounts etc fall within the scope of the normal duties of a Curator Bonis these actions do not constitute additional duties performed by the applicant."

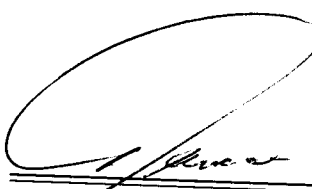
- [87] In my view, the reason is flawed. The Master should at least have considered whether the hours claimed for by the applicant had any relation or bearing to the extraordinary duties or powers performed by him. Accordingly, it appears to me that the Master did not apply her mind.
- [88] It follows, in my judgment, that the decision of the Master must be set aside on review. However, it does not necessarily follow that I, sitting as a court of review, should fix the applicant's remuneration as claimed for in his invoices. The Court is not an expert in the practical *minutiae* of the administration of curatorship estates and other tasks which such work involves. The Master and the applicant have far more expert knowledge on these matters than I have.
- [89] The precise determination of remuneration for the applicant which would be reasonable in all the relevant circumstances is, in this case, best left to the Master, in my view. I therefore do not propose to embark in this matter on a minute examination of each item in respect of which the applicant claims to be entitled to be remunerated. It may be that in other cases situations may arise where it will be both possible and desirable for a court on review to perform the function of the Master and to fix the precise amount which represents reasonable

remuneration for the curator. In such cases, the court would have to be in a good position, as the Master was. However, in this case, it is impossible to examine 2000 hours and ascertain whether they were maybe claimed or not. On the other hand, it may be that the Master finds that the time spent was excessive.

[90] For these reasons, the following order is made:

- 90.1. condonation for the late launching of this application is granted;
- 90.2. the decision by the Master not to allow the fees of Mrs Berrange is upheld;
- 90.3. the decision by the Master to disallow the accounting fees of Haigh and Harris is upheld only insofar as they relate to costs incurred in the drafting of the curator's accounts;
- 90.4. the decision by the Master to partially increase the fees of the applicant is set aside;
- 90.5. the matter is referred back to the Master for reconsideration, bearing in mind what has been said in this judgment;

- 90.6. the Master should, if necessary, call for additional evidence in assessing whether all the hours spent by the applicant relate to the performance of his extra duties and powers;
- 90.7. the Master is ordered to reconsider its decision within 60 days from date of this order;
- 90.8. the third and fourth respondents are ordered to pay 50% of the costs of the applicant but only the cost of one counsel.


DEWRANCE, AJ
Acting JUDGE OF THE NORTH & SOUTH
GAUTENG HIGH COURTS, PRETORIA