IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

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

(3) REVISED

[redacted]

DATE SIGNATURE

CASE NO: 2937/21

In the matter between:-

WILLEM FRANCOIS BOUWER N.O.

(in his capacity as appointed co-curator *bonis* of

JHJ VAN DYK, reference: MC 751/2017 First Applicant

ANNALI CHRISTELLE BASSON N.O.

(in her capacity as appointed co-curator *bonis* of

JHJ VAN DYK, reference: MC 751/2017 Second Applicant

and

THE MASTER OF THE HIGH COURT, PRETORIA Respondent

JUDGMENT

SKOSANA AJ

[1] The applicants in this matter are co-curators *bonis* on behalf of the estate of Mrs Johanna Hellena Jostina Van Dyk ("the patient"), having been appointed as such by the respondent on 13 June 2018. The second applicant is the daughter of the patient. The curators were appointed in terms of section 72(1) of the Administration of Estates Act 66 of 1965 ("the Act") and by virtue of a court order of this court dated 08 June 2018 ('the court order").

[2] The applicants seek a declaratory order relating to the proper interpretation of Regulations 7 and 8 of the Administration of Estates Regulations (1972) read with section 84 of the Act, namely whether in terms of such regulations, the proceeds from the realization of the capital

assets in the estate of the patient under curatorship should be reflected as income in the income account or as capital in the capital account of the curator's account to the Master if such asset is realized in order to provide for the patient and the required immediate use by the curator. In their notice of motion, the applicants framed the relief as follows:

[2.1] That they seek a declaratory order to the effect that the proceeds of ABSA current account and the vehicle of the patient reflected in the first curator's account is correctly reflected as income and that these assets are no longer capital assets in the curator estate;

[2.2] That an income earning asset reduced to cash by a *curator bonis* during an annual period be deemed to be income received during that period and be reflected as such in the curator's account;

[2.3] That a curator *bonis* is entitled to 6% fees on all funds reflected in the income account of an annual curator's account, regardless of the origin thereof.

[2.4] That the costs of this application be paid by the respondent.

[3] The applicants have now, during the course of argument, provided me with a draft order in terms of which certain adjustments have been made

to the original relief that they sought. The respondent, being the Master of the High Court, opposes this application.

[4] The relevant facts in this matter are as follows:

[4.1] The patient had 3 assets of a capital nature, namely an ABSA cheque deposit amount of R359 185-20, proceeds from the sale of a Honda motor vehicle to the amount of R50 000-00 and a debt recovered from one Dr Rita Nel to the amount of R13 899-40[1]. The total assets in question amounted to R423 084-50.

[4.2] It is common cause that the total amount collected by the curators according to the first curator's account for the period from 13 June 2018 to 12 June 2019 is R1 311 392-94 and this amount included the R423 084-50 referred to above. After the first account had been submitted to the respondent, which included the aforesaid amount of R423 084-95 ("the disputed amount") in the income account section of his account, the respondent objected in a letter dated 02 October 2019 stating that the disputed amount is not income and should form part of the capital and that therefore the fees of the curator as should be calculated on the basis of R885 503-41 in that account, i.e. an amount that excludes the disputed amount.

[1] The latter asset is not directly mentioned in the notice of motion.

[4.3] The applicants insist that, once the assets had been realized because there was no sufficient cash in the estate to cover the necessary expenditure, the amount was converted into income and could no longer be regarded as capital and therefore the first applicant was entitled to calculate his fees thereon at the rate of 6%.

[4.4] It is on the basis of the above that the first applicant has sought the interpretation of the relevant provisions of the Regulations and the Act to the effect that he was entitled to include the disputed amount in the income account.

[5] As is evident from above, the bone of contention in this matter is whether the curator is entitled to charge his fees in respect of the disputed amount at a rate of 6%. The determination of the dispute is dependent on the interpretation of the aforesaid prescripts, being Regulations 7 and 8 as well as section 84 of the Act.

[6] Regulations 7, 7A and 8 deal with the accounts by curators and provide as follows:

"7. Accounts by Tutors and Curators.

—The account referred to in section 83 (1) and (2) of the Act shall—

(1) contain a heading which shall—

(a) describe it as a tutor's or curator's account, as the case may be;

(b) reflect the ordinal number of such account and, when it is a final account, state such fact;

(c) specify the full name of the minor or other person concerned and, in the case of a minor, also the date of birth;

(d) specify the period in respect of which the account is rendered and state whether it is an account in terms of section 83(1) or (2) of the Act; and

(e) reflect the Master's reference number;

(2) contain a money column;

(3) specify under a subheading "Income and Expenditure Account"—

(a) any credit balance of income or a deficiency brought forward from a previous account lodged with the Master in respect of the administration of the property concerned;

(b) all income actually collected reflecting the source from which it is derived;

(c) any money transferred from the "Capital Account" referred to in subregulation (4) to meet debts and charges;

(d) all debts and maintenance charges paid by the tutor or curator during the period in respect of which the account is rendered, specifying the nature thereof and the name of the payee;

(e) all administration expenses, separately reflected, the name of the payee and the nature of the charge;

(f) the debit or credit balance, as the case may be, which shall, in the case of a debit balance, contain a statement whether this has been paid out of the "Capital Account" referred to in subregulation (4) or is being carried forward to the next account;

(g) whether any credit balance has to be carried forward to the "Capital Account", so referred to, or will be required for immediate use; and

(h) in parentheses next to each item a consecutive number;

(4) specify under a subheading "Capital Account"—

(a) an accurate description of all property under the control of the tutor or curator at the end of the period in respect of which the account is rendered;

(b) *the rate of interest on all investments bearing a predetermined rate of interest;*

(c) *any credit balance shown under the subheading "Income and Expenditure Account" and brought forward as provided in subregulation (3) (g);*

(d) *a description of any property leased, with a reference to the lease, the full name of the lessee, the period of the lease and the annual rental thereof;*

(e) *the amount of any capital asset or part thereof realised, with a description of such asset, and the amount of any money transferred to the "Income and Expenditure Account" as provided in subregulation (3) (c), with reasons for such transfer;*

(f) *all capital debts owing by the person for the administration of whose property the tutor or curator has been appointed; and*

(g) *in a footnote under this subheading any income due but not collected, the reason why such income has not been collected and the steps taken by the tutor or curator to collect such income;*

(5) *under a subheading "Cash Reconciliation Statement" reconcile the cash reflected under the subheadings "Income and Expenditure Account" and "Capital Account" with the banking account as at the end of the period in respect of which the account is rendered, and every voucher, receipt or acquittance supporting such account shall bear a number corresponding to the number of the item in the account in support of which it is lodged;*

(6) *conclude with a certificate by the tutor or curator in which he declares that—*

(a) *the account is to the best of his knowledge and belief a true and proper account of his administration of the relative property of the minor or other person during the specified period in respect of which the account is rendered; and*

(b) *to the best of his knowledge and belief the account reflects all property of and all debts owing by the person for the administration of whose property he has been appointed and all income collected and debts, expenses and charges paid by him during the period covered by the account and that he is not aware of any disputed right to assets or liabilities.*

7A. *If the Master is satisfied that the non-compliance with any of the requirements mentioned in regulation 7 is not material, he can waive compliance therewith.*

8. ***Tariff of Remuneration of Executors, Interim Curators, Tutors and Curators.*** *—(1) The executor's remuneration referred to in section 51(1) (b) of the Act shall be assessed according to the following tariff:*

(a) On the gross value of assets in an estate: 3,5 per cent;

(b) on income accrued and collected after the death of the deceased: 6 per cent:

Provided that the remuneration in respect of any deceased estate shall not be less than R350.

(2) An interim curator appointed under section 12 of the Act shall be entitled to a remuneration of one-eighth per cent on the gross value of the estate under his custody on the date upon which letters of executorship are granted or signed and sealed or upon which any person is directed to liquidate and distribute the estate."

(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.

[7] In addition section 84 of the Act provides:

*"**84. Remuneration of tutors and curators.**—(1) Every tutor and curator shall, subject to the provisions of subsection (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."

[8] The application, so the applicants contend, has been brought in terms of section 95 of the Act which provides:

"***95 Review of Master's appointments, etc.***

Every appointment by the Master of an executor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to the appeal to or the review by the Court upon motion at the instance of any person agreed 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"

[9] Over and above the opposition of the application on the merits, the respondents have raised three points *in limine*, namely that the application does not comply with the requirements for a declaratory order in terms of section 21(1) of the Superior Courts Act 10 of 2013, that there is a non-joinder relating to other provincial offices of the Master as they have a direct and substantial interest in this matter and that the applicant did not

exhaust an internal remedy provided in section 95 of the Act. The respondent attempted to adjust this point *in limine* during oral argument. I deal briefly with these points as follows:

[9.1] With regard to section 21(1)(c) of the Superior Courts Act, it is my considered view that the declaratory order sought in relation to the interpretation of these prescripts is not academic but relates to the rights of the first applicant as a curator *bonis*. The interpretation of the section affects the manner in which the curator will in the present case and in the future be entitled to render his fees for the services that he provides. My view in this regard, however, is subject to the circumscription of the wide relief sought by the applicant. In other words, it applies to the relief sought by the applicants in relation to the curator's first account rendered in this case. Subject to the latter qualification, I find no merit in this point.

[9.2] As to the point relating to internal remedies, the respondent's counsel rightly conceded that this point was ill-conceived as section 95 does not deal with internal remedies. The applicants' counsel, Mr Oosthuizen submitted that the present application constitutes an appeal under section 95 of the Act as it seeks to question the correctness of the action and/or decision of the respondent. I am in agreement with this submission. There was no indication by the

respondent in the communication addressed to the applicants that it conducted a taxation of the account. All that was pointed out by the respondent was that the disputed amount should not part of the income account. The present application therefore constitutes an appeal in the broad sense and which appeal does not necessarily require a Full bench of this court as would be the case with an appeal from the Magistrates' court or other statutory appeal processes.

[9.3] It is also evident from section 95 that the appeal referred to therein is to be brought by way of motion at the instance of the agreed party. It follows therefore that the appeal referred to therein is not a normal appeal to the Full bench as envisaged in other statutory instruments. I am consequently satisfied that in the present proceedings constitutes an appeal as contemplated in section 95 of the Act.

[9.4] As regards the non-joinder, besides the fact that this point was not pertinently raised in the opposing papers of the respondent, it also has no merit. Again, my view is subject to the limitation of the relief sought by the applicants as indicated above. In the present case, the respondent who is the Master of the High Court, Pretoria, has made a decision or issued a directive in respect of the account of

the first applicant. Such direction has necessitated a declaratory order in terms of which a proper interpretation of the relevant provisions of the Act and Regulations is to be made. In my view that does not render necessary the joinder to the present proceedings of all the provincial Masters in all divisions. In any event the interpretation to be accorded to these prescripts, if at all, may be subjected to scrutiny by other Divisions of this court and to which it will merely have a persuasive effect. I therefore find no merit in this point as well and accordingly dismiss it.

[10] This brings me to the merits of the matter. The respondent objected to the disputed amount on the following basis:

[10.1] That the amount remains part of the capital and should not form part of the income account. This appears from the respondent's letter of 02 October 2019. Counsel for the respondent, Mr Dube, insisted that the amount should have appeared under the capital account first even if it was later to be recorded under the income account.

[10.2] The respondent also maintained that even if an asset is realized for whatever purpose, the proceeds thereof remain capital and should be recorded under capital income. Only interest derived from the

investment of such capital asset can be regarded as income to be recorded under the income account.

[10.3] The respondent finally contended that the realization of the capital asset required the pre-approval and consent of the Master as per the court order of 08 June 2018, particularly paragraph 5 thereof which records that "*[T]he powers conferred upon the said Curatores Bonis in paragraphs 2.1 to 2.13 above are subject to the prior consent and approval of the Master of the High Court.*"

[11] What appears from the above is that section 84(1) entitles a curator to remuneration out of either the income derived from the property or out of the property itself. This to me already presupposes that the curator will be paid whatever he is entitled to from the income produced by the estate or from the property or assets of the estate. The remuneration out of the property can only mean remuneration from realized or sold property.

[12] Further, section 84(1)(b) of the Act provides that, where remuneration has not been fixed as in the present case, it shall "*be assessed according to a prescribed tariff and shall be taxed by the Master*" [my emphasis]. To me this sub-section signifies the role of the Master which is not only to tax the remuneration account but also to assess it. However, such assessment must relate to a prescribed tariff.

[13] The tariff in this regard is prescribed by Regulation 8(3) being 6% on the income collected during the existence of the curatorship and 2% on the value of capital assets on distribution, deliver or payment thereof on termination of the curatorship. In my view, the phrase "or payment thereof" in Regulation 8(3)(b) connotes that capital assets may be in the form of cash which is paid instead of being distributed or delivered.

[14] The central question in this case is whether the curator was empowered to convert the three capital assets referred to in paragraph 4.1 above into income and record them under the income section of the account as contemplated in Regulation 7(3) and which would entitle him to charge 6% thereon. The second equally-important enquiry is whether he could do so without the pre-approval of the respondent. It must be noted that the ABSA cheque account related to a cash amount but was still regarded as a capital asset to be recorded under capital account in terms of Regulation 7(4). Undoubtedly, the Honda motor vehicle was a capital asset.

[15] In my view, the proceeds from the sale of a capital asset are not income in the ordinary sense of the word. So too is a recovered debt which constitutes part of the original estate. If such debt is not recovered, the estate is, in my view, incomplete. None of these assets had the effect of increasing the value of the estate and therefore don not constitute income.

[16] Another crucial aspect of this enquiry is the powers and the supervisory role of the Master. The point of departure is that the court order clearly subjected the powers of the applicants to the prior consent and approval of the respondent. So too did the applicants' appointment letters. I am not impressed by argument that clause 5 of the court order contained merely a conventional phrase into such court orders. The clause forms an integral part of a valid and enforceable court order. The applicants are obliged to comply with the terms of the terms of the both the court order and their letters of appointment.

[17] Moreover, as pointed out earlier, section 84(1)(b) empowers the Master to assess the first applicant's remuneration according to the applicable tariff. The respondent has a duty to ensure that the remuneration paid to the first applicant accords with the requirements of Regulation 8(3). Put differently, when Regulation 8(3) states that the remuneration shall be assessed, it is a reference to an assessment by the Master as unambiguously stated in section 84(1)(b) of the Act. That much is clear.

[18] It is common cause in this matter that no prior consent and approval of the respondent was obtained in respect of the following:

[18.1] When the decision was taken to realize the capital assets allegedly in order to meet the immediate expenses of the estate. It must be

noted that the respondent has vehemently disputed that this course was necessary. That dispute would have been eschewed had prior approval been obtained from the respondent as required by the court order and their appointment letters. Actually, the applicants were trying to get an *ex post facto* approval from the respondent which was unfortunately met with a negative response. This evenly applies to paragraphs 18.2 and 18.3 below.

[18.2] When such assets were recorded under the income and expenditure account.

[18.3] When the first applicant decided to include such assets as income in relation to the percentage charged for his remuneration.

[19] First, when regard is had to the powers of the applicants as contained in the court order, I could not find any paragraph which directly empowers the applicants to take the above decisions or to implement them.

[20] Paragraph 2.6 of such court order empowers the applicants to raise money for the payment of debts or any expenditure incurred or to be incurred for the personal maintenance of the patient or her property. It however specifies that such funds may be raised by way of mortgage or pledge of the property, not through the sale of capital assets. Neither does

paragraph 2.11, in my view, confer such power. This latter paragraph of the court order confers the power to apply income or capital for the maintenance or support of the patient and to pay her debts. It does not confer a power to convert capital into income.

[21] It is my view that the applicants were not entitled to take the decisions referred to in paragraph 18 above and to implement them at least not without the prior consent and approval of the respondent. I am not unmindful of other alleged non-compliances by the applicants with the requirements of the afore-mentioned prescripts. To mention but one, the respondent's counsel pointed out that the disputed amount ought to appear in the capital account before being recorded under the income account. I agree. The fact that the capital account may be rendered on the termination of the curatorship does not justify a deviation from this requirement nor was an waiver granted by the respondent in terms of Regulation 7A. Regulation 7(4)(e) requires the specification under capital account of such assets.

[22] The provisions of Regulation 7A are not unimportant. The fact that the Master may waive what he considers to be non-material non-compliances implies that he may disapprove material ones. In the present case, it is clear that the respondent considers the non-compliance as material and has not waived the required compliance therewith.

[23] As evident from the above, I am of the view that the applicants have failed to make out a case.

[24] Regarding costs, the applicants instituted the proceedings in their official capacities as curators *bonis*. The application is driven by the first applicant but supported by the second applicant who is the daughter of the patient. In his heads, the respondent's counsel referred me to a case of **Nel & Another NNO. v the Master**[2] to support his submission that the present application was merely for the first applicant to assert his entitlement to a higher fee and not for the benefit of the patient's estate and therefore the applicants or the first applicant should be ordered to pay the costs of the application personally.

[25] It is true that the present case, to a large extent, relates the first applicant's entitlement to charge at a higher tariff. However, there are material distinguishing factors in the present case. As indicated above, the second applicant who is the daughter of the patient is in full support of the application. The present case also raises fairly complex issues of law. The applicants genuinely needed the guidance of the court in relation to the issues raised in this application and concerning the implementation of the court order. I am not persuaded that either of the applicants should be mulcted with costs either personally or otherwise. This is also not a case

[2] 2005 (1) SA 276 (SCA) para 43

where the general principle should apply that the costs must follow the result.

[26] In the circumstances, I make the following order:

[26.1] The application is dismissed;

[26.2] There is no order as to costs.

DT SKOSANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv MM Oosthuizen SC
Instructed by:	WFB Attorneys Inc
Counsel for the First & Second Respondents:	Adv P Dube
Instructed by:	The State Attorney
Date heard:	24 January 2022
Date of Judgment:	January 2022