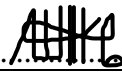
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 75876/13

(1)	REPORTABLE: YES / NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
DATE		SIGNATURE
9 **08 December 2022**		

In the matter between:

ANIEL KANJEE SOMA	**Applicant**
and	
YASEEN BEDRO YUSUF	**1st Respondent**
TRAVIS ASPENALD NDLOVU	**2nd Respondent**
FAIZAN MOHAMMED	**3rd Respondent**
SHIRAZ SABDIA, THE JOINT EXECUTOR OF THE ESTATE LATE MOHAMED FARUK SABDIA	**4th Respondent**
RIAZ SABDIA, THE JOINT EXECUTOR OF THE ESTATE LATE MOHAMED FARUK SABDIA	**5th Respondent**

This matter was dealt with or determined on the basis of the papers or record and written submissions filed on behalf of the parties, as per Rule 48 (6) (a) (1) of the Uniform Rules of the High Court.

DATE OF JUDGMENT: This judgment is handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **09 December 2022.**

JUDGMENT

N V KHUMALO J

Introduction

[1] This is a taxation review under the provisions of Rule 48 of the Uniform Rules of High Court ("the Rules") brought at the instance of the 4th and the 5th Respondent.

[2] The 4th and 5th Respondents, Shiraz and Riaz Sabdia, are sons of the late Dr Mohamed Faruk Sabdia (herein after referred to as "the late Dr Sabdia" or "the deceased") who were jointly appointed co-executors of Dr Sabdia's deceased estate ("the late estate") and are also, together with their mother Ms J Sabdia, the apparent testamentary heirs of the late estate.

[3] The cardinal question in this matter is whether the principle that a person acting as an executor for an estate can or cannot not receive both an executor's commission, that is remuneration payable in terms of s 51 (1) of the Administration of Estates Act 66 of 1965 for services he renders as an executor, and the attorney's legal fees for representing the estate, is applicable in this matter. Further whether such a decision falls under the taxing master's discretion.

[4] It is not a novel situation. The application of the principle has been challenged in many cases on different factual circumstances, including the taxing master's authority to interrogate the issue after liability has been pronounced upon. This matter is no different. In this division, the matter of *Nedbank Limited v Gordon N.O and Others*[1] seems still not to have settled the uncertainties in applying the principle.

Background facts

[5] In 2006, the late Dr Sabdia instituted review proceedings against the Applicant, Aniel Kajie Soma, in the Land Claims Court. The subject of the dispute is a property situated in Marabastad, Pretoria ("the property") that is used for business purposes and occupied by the family of the late Dr Sabdia. The property is registered in the name of the Applicant. The late Dr Sabdia launched an application in the Land Claims Court challenging the decision by the Tshwane Municipality to allow the Applicant to take transfer of the property whilst litigation on title was pending in that court. The late Dr Sabdia had, in the Land Claims Court matter appointed Mothle Jooma Sabdia Incorporated (MJS) (the 4th Respondent, a practising attorney, being a director at MJS), as his attorneys of record.

[6] On Dr Sabdia's demise on 5 November 2013, the 4th and 5th Respondent ("hereinafter together referred to as "the Respondents") as executors of his late estate, were substituted as the litigants in the Land Claims Court matter on behalf of the late estate.

[7] On 13 December 2013, a month after the demise of the late Dr Sabdia and whilst the Land Claims matter is still pending, the Applicant brought eviction proceedings against the late estate and heirs of the late Dr Sabdia including three other occupiers, that is the 1st, 2nd and 3rd Respondents (who were subtenants in the property).

[1] 8938/17) [2019] ZAGPPHC 460 (16 August 2019) (Unreported)

[8] The 4th and 5th Respondent who were also cited as occupiers of the property were then as the late estate's joint executors substituted for the late estate. The 1st and 3rd Respondents subsequently vacated the premises. The 4th and 5th Respondents proceeded to oppose the eviction application being legally represented by the 4th Respondent, acting in his capacity as an attorney at MJS.

[9] The eviction application was dismissed with Applicant to pay (the 4th and the 5th Respondents' as the representatives of the late estate) the costs on a scale as between attorney and client. The reason for punitive costs being that the Application was premature as the dispute on title was still pending in the Land Claims Court.

[10] On 19 September 2019 MJS set down in terms of Rule 70 of the Uniform Rules of Court its Bill of Costs for taxation before the Taxing Master. The Applicant objected to the taxation of the Respondent's bill of costs on the basis that, the 4th Respondent had stated in his Supporting Affidavit that he is a director at MJS Inc whilst being, jointly with the 5th Respondent, an executor of Dr Sabdia's late estate (which he was representing in the matter). The Applicant contended that as an executor, the 4th Respondent was not entitled to fees for acting for the estate in his capacity as an attorney. He was not entitled to anything more other than the commission and his out of pocket expenses. Applicant argued it is so, even where the work is performed by another and the executor receives a share of the other's fees, or where the work is performed by a legal firm of which the executor is a partner. The objection was based on the principle as enunciated in the old authorities, *Estate Fawcus v Van Boeschen and Lorenzt*[2] and *Niewoudt v Estate van der Merwe*[3].

[11] The total fee in the amount of R465 265.00 was according to the Applicant to be taxed off. The Applicant as a result offered an amount in settlement (representing an out of pocket expenses) of the disbursement.

[12] The Respondents disagreed with the Applicant's objection, disputing that the taxing master has jurisdiction to make an order pertaining to dispute of facts,

[2] 1934 TPD 94
[3] 1928 CPD 486

particularly in light of the provisions of Rule 70 of the Uniform Rules of the High Court relating to her office and function. They alleged that the taxing master will be acting *ultra vires* her function if the factual argument (single argument of fact) presented by the Applicant is heard by her and a ruling is made in the Applicant's favour as a consequence of such argument.

[13] The taxing master, Ms Anusha Chetty, made a ruling upholding the Applicant's objection to the late estate being liable to remunerate JMS as a separate legal persona from the 4th Respondent, the executor, for the legal services that the 4th Respondent rendered to the late estate in the litigation proceedings. She duly taxed the Bill of Costs, disallowing payments of all fees to MJS and completing the allocator.

[14] The Respondents were dissatisfied with the taxing master's ruling, and called upon the taxing master to state a case for the judge's decision, declaring their objection to be based on the fact that taxing master:

> [14.1] failed to consider that the Applicant had no *locus standi* to contend that the 4th and 5th Respondents were not entitled to recover all of the reasonable fees of an attorney and client costs award as contained in the bill of costs. The taxing master therefore went beyond the scope of her powers in Rule 70 in disallowing the entire fees of MJS Inc in respect of the bill of costs in that by virtue of the court order which awarded costs on a punitive scale on the attorney and client scale in favour of the joint executors and therefore in favour of the late estate, the ruling of the taxing master usurped the function of the court and deprived the estate from recovering its full reasonable costs in the litigation against the Applicant which in turn flouted the interest of justice;
>
> [14.2] erred in not finding that MJS Inc as a firm of attorneys was a separate legal entity from one of the executors and that JMS' resources were employed in the conduct of the litigation. Also that the firm was not a partnership and that one of the executors, the 4th Respondent, by virtue of being a director did not share in the fees and that the fees raised by MJS Inc being that of the company accrued to the company. The taxing master failed to consider that the late

estate would have a liability to remunerate MJS Inc as a separate legal persona to the executor for the services MJS rendered in the litigation and as such, MJS Inc would have a claim for its fees and disbursements against the late estate which it was as per order of the court entitled to recover from the Applicant on an attorney and client scale by virtue of a taxed bill.

[14.3] failed to consider that in terms of s 51 of the Administration of Estate Act 66 of 1965 the powers were vested in the Master of the High Court to increase the remuneration of the executors in particular with reference to any professional fees, where applicable, of one of the executors, the 4th Respondent, and therefore that it did not fall within the powers of the taxing master to decide upon and pre-empt any decision which the Master may make in the context of the matter. Further that the taxing master failed to consider that it was within the powers of the Master of the High Court to direct that the recovery of the fees by the estate from the Applicant may be set off against any remuneration in which one of the executors, S Sabdia may be entitled and not within her power to disallow the fees. By disallowing the fees, the taxing master deprived the estate to recover the remuneration of the executors from the Applicant which decision is unjust, unreasonable and not in the interests of justice;

[14.4] failed to consider and to take into account that the Application under case number 75876/2013 was a further sequel of litigation which had a long history dating from 2006 in the Land Claims Court when the deceased was alive and instructed MJS Inc to act as his attorneys and that it would not have been cost effective, or feasible, or in the interest of justice, or in the interest of the administration of the estate of the executors to appoint other attorneys to continue with the litigation on behalf of the estate. Also that the testator explicitly directed the following in clause 4 of his will:

> "*I hereby direct that my Executors shall be entitled to charge and shall be paid all usual professional fees and other fees and charges from*

business transacted, time spent and acts done by them or their associates in connection with the administration of my estate"

[14.4.1] Which clause did not limit the executors to their normal executor's remuneration to be fixed by the Master and that such professional fees and other fees and charges would be a claim against the assets of the estate and that such fees would include the professional fees of MJS Inc charged against the Applicant in terms of the attorney and client costs award made by the court;

[14.5] furthermore, failed to consider that clause 4 of the will had to be read also with clause 5.3 of the will wherein the testator explicitly expressed his wishes with regards to the pending litigation in the Land Claims Court as follows:

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

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

[14.6] In the circumstances the clause according to the Respondents explicitly signified the intention of the testator that the executors must upon his demise merely for all intents and purposes step into his shoes and continue with the litigation as before; (There is no clause 4 on the will attached).

[15] In regard to the aforementioned grounds the taxing master failed to consider that factually and legally the case of *Nedbank Ltd v Gordon N.O supra* delivered on

16 August 2019 which she relied upon was distinguishable from the matter *in casu* on that basis.

[16] It is common cause that not only is the 4th Respondent a joint executor to the late estate to which he rendered his fiduciary duties and for which he was remunerated by the late estate, he is also a director, practising as an attorney at MJS, the professional capacity in which he rendered the legal services to the late estate. The taxing master's stated case was that in disallowing the fees she considered the common cause factor and further that:

> [16.1] 'an executor who is an attorney, when acting in his professional capacity on behalf of the estate in a lawsuit is not entitled to remuneration as an attorney, notwithstanding that his co-executor approves of his doing so.' In this respect the taxing master referred and relied on ***Fawcus's*** from which the principle was recognized/established.
>
> [16.2] the 4th Respondent, who is an attorney at MJS acted in his capacity as an executor and not as an attorney. Hence she ruled to disallow all legal fees for the legal work done by the 4th Respondent in his capacity as attorney, based also on the *Nedbank* Judgment *supra.* Mabuse J in *Nedbank* held as according to the Applicant's argument that 'an executor's commission covers the whole of his work for the estate and that if the executor is an attorney, he or his firm is not entitled to recover any fees for the legal work done as an attorney.
>
> [16.3] The taxing master furthermore referred to the court's interpretation of the proper meaning of s 51 (1) of the Administration of Deceased Estates Act in *Meester v Meyer en Andere* [4] whereupon the meaning of the word "remuneration" as set out in the said section is defined with reliance on *Harris v Fisher N.O.*[5] and the court quoting the passage by the Equity Jurisprudence that reads:

[4] 1975 (2) SA (TPA) 1 and 13
[5] 1960 (4) at 862E,

> "Executors or administrators will not be permitted under any circumstances to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate."

[17] The Applicant, in its opposition or answer to the Respondent's notice of review and the taxing master's stated case noted that it was indeed common cause that the 4th Respondent, being the executor of the late estate, also acted in his professional capacity as the attorney of record on behalf of the executors of the late estate, in the application.

[18] As a result Applicant argued that for the reason that the executor occupies a fiduciary position, he must not therefore engage in a transaction by which he will personally acquire an interest adverse to his duty. This was mentioned with reference to Meyerowitz on '*Administration of Estates and Their Taxation, Remuneration of Executors,* Chapter 14.6 *Executor Acting in Professional Capacity.*' Also Hern's Executors. The executor was therefore not entitled to anything more than his commission and this is so even when the work is performed by another but the executor receives a share of the other fees, or where the work is performed by a firm of which the executor is a partner.

[19] Further, on the ground that an executor's commission covers the whole of his work for the estate, and if the executor is allowed a fixed commission for the time and trouble he devotes to the estate, but above that he would be allowed nothing more than his out of pocket expenses, a stance that is outlined in *Nedbank supra*. In the absence of any provision to the contrary in the will, each executor is entitled to an equal share of the commission and this is so even if only one of the co-executors is the administering executor. In the instance only one executor administers the estate it is usually for him to agree with the remaining executors to take a bigger proportion of the commission for his work.

[20] The Applicant also disputes that in instances where the executor who is an attorney also doing legal work for the estate, is sanctioned by the testator in his will to charge extra remuneration for the legal services, that such practice must then be

allowed, arguing that it is against the principle laid down by the law that an executor should not be subject to a conflict of interest, as a result the testator's direction should be invalid, being *contra bonos mores* and argued that it will lead to practical difficulties.

[21] Although the Respondents acknowledged the principle and reasoning behind it that it is to avoid the conflict that may arise whereby the executor upon finalisation of the Liquidation and Distribution would raise a claim against the estate for his remuneration and at the same time be a creditor against the estate for the legal fees, where he has effectively appointed himself to render additional services, their response to the stated case remained the same. They insisted to allege that the circumstances of this matter are distinguishable, in that the 4th Respondent as a director is a separate legal *persona* from MJS, being a director with no interest in the fees raised which fees they allege to have instead accrued to MJS, the Company.

[22] The Respondents also persisted in their submission that 4th Respondent's involvement was in the interest of the late estate and justice, which was also the testator's wish as ascertained from the use of the words "or their associates" in clause 4 of the will and about the master being the one to ultimately approve the account for services rendered following the outcome of the litigation. They argued that the taxing master's decision precludes the late estate from recovering the legal costs from the unsuccessful party causing the estate to be out of pocket which is not what was envisaged by the court's special award of attorney and client costs especially in circumstances where it is not the executor who benefitted but his firm which they allege to be a separate legal entity.

[23] The Respondent's final argument was that when the relevant authorities were decided, specifically *Estate Fawcus v Van Boeschoten & Lorentz,*[6] attorneys could only practice for their own account (as a sole proprietorship or in partnership). The Amendment to the Attorneys, Notaries and Conveyancers Admission Act of 1934 was introduced by s 28 that allowed a private company to conduct a practice of an attorney, notary or conveyancer, that only occurred in 1968. Also s 23 of the Attorneys Act 1979 made similar provisions. The same is with s 51 (3) of the Administration of Deceased

[6] 1934 TPD 94

Estate Act 1965 which was not yet enacted. So the Respondents argue that the two judgments that were referred to by the taxing master and the Applicants were decided long before the position of attorneys was changed.

Analysis

[24] It is noted that even though the Respondent had argued that *Nedbank* was distinguishable to the matter *in casu*, in response it conceded that to some extent that the authority is analogous to the matter *in casu* in so far as it was confirmed that an executor who is an attorney and acts in his professional capacity as an attorney on behalf of the estate in a law suit is not entitled to be remunerated as an attorney notwithstanding that his co-executor approves. The Respondents however argued that the distinction is in the fact that it is MJS the company that acted as attorney for the executors and the late estate, whilst confirming that the executor rendered the attorney services. It also pointed out that in *Nedbank* the executor employed as a consultant was an employee and not a partner of the firm. He was therefore not charging any fees but the Company did. JMS was therefore entitled to submit its account to the executors in the late estate. In turn the Master has the power to disallow the fees in the Liquidation and Distribution (L and D) account should it be in conflict with the principle and or in terms of s 51 (3) allow it. The Respondent argued on this point that taxing master decision was wrong whilst the Applicant has raised the *stare decisis* principle.

[25] The principle is settled as far as the position of the estate's executor that also acts as an estate attorney is concerned, as in the old matter of *Fawcus' Estate,* where a single executor also performed professional duties in relation to the estate he had been appointed in his capacity as *nomine officio*. It was held that the estate was not liable to pay the fees of the trustee due to him, for acts performed on behalf of the trust in his professional capacity as an attorney. Also reference is made to the recent matter of *Nedbank.* As the Respondents disputed that such a finding applies in this matter on the basis that the facts are distinguishable from the facts in *Nedbank,* arguing that it would therefore not pass Constitutional muster, the Respondents carried the onus to prove the distinguishable circumstances that merits a contrary outcome and a review

of the taxing master's decision. It should therefore be determined if the Respondents have discharged such an onus.

[26] In a nutshell the Respondents made three main contentions in an attempt to make a convincing argument that the position *in casu* is distinguishable from *Nedbank* and *Fawcus* and therefore merit the review of the taxing master's decision. The contentions are addressed individually:

The authority of the taxing master vis a vis the order of the court

[27] The first contention is that the taxing master went beyond her powers as derived from the terms of Rule 70, usurping the decision of the court by taking a decision to follow the established principle and disallow the legal fees payable to JMS, submitting that the taxing master was precluded by (a) the court's order (Liability being not an issue to consider), from interrogating the circumstances of the parties to determine if the costs are payable by the Applicant. Accordingly, submitting that the taxing master lacked the authority to ignore or vary the decision of the court.

[28] The nature and the ambit of the taxing master's discretion is clearly outlined in Rule 70 of the Uniform Rules of Court whereupon details of the functions and duties of the taxing master, including factors and circumstances he or she is entitled to take into account are expounded.

[28.1] Rule 70 (1) (a) reads:

> (a) The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work and such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff: Provided that the taxing master shall not tax costs in instances where some other officer is empowered so to do.

[28.2] Whilst Rule 70 (3) reads:

> With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.

[28.3] Rule 70 (5) reads:

> The taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extra ordinary or exceptional cases, were strict adherence to such provisions would be inequitable.

[29] Subsection 70 (1) authorises the taxing master to tax costs that have been incurred by a litigant for legal services rendered to it by an attorney who was acting in his capacity as an attorney when rendering such services, which is not a situation where the litigant rendered services in his professional capacity being conflated with his fiduciary duties; see also Nieweudt, as in this case.

[30] The purpose of taxation is to determine the reasonable charges and disbursements the successful party can fairly claim from the unsuccessful party; see *Castelo v Registrar of the High Court, Salisbury*[7]. It is therefore a function of the taxing master to determine if in fact the costs allegedly incurred by a party have been proven and her discretion to decide if to be reimbursed.

[7] 1974 (3) SA 289 (R) 290

[31] It is correct that the taxing master is authorised to tax the bill of costs, carrying out the court's order, not to vary it; see *Vercuiel v Magistrate of Wynberg*[8]. The taxing master can therefore not vary the order for costs as granted by the court. Equally, an order is not to be read to usurp the taxing master's function. The courts are therefore on the same breath very reluctant to interfere with the exercise of the taxing master's discretion, when taxation of the bill of costs takes place, as a result will not readily do so; see *Kloot and Interplan Inc*[9]. It will only do so on certain, well -known but limited grounds: see *Aaron's Whale Trust V Murray & Roberts Limited*[10]. In outlining instances (yet not exhaustive) when such interference may be justified, in *Pallo v Jordaan*[11] it was held that such interference will not take place:

> "unless it is found that he [ie, the taxing master] has not exercised his discretion properly, as for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given."

[32] Rule 70 (3) requires that an expenditure of a type which it was reasonable by a party to incur must be allowed. A clear intention expressed by the rule that, granted that litigation is expensive, "the ultimate winner should not have the fruits of his victory bitten into by the necessity of paying too high a proportion of his costs". On the other hand, the interests of the loser should also be protected: it is true that a successful party should have a full indemnity in respect of costs reasonably incurred, but it is equally important to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The taxing master is therefore cautioned to be mindful thereof that the taxation of costs is a *regulating procedure based upon notions of* fairness and practicality and designed to effect a balance between the fruits of victory and the burden of defeat in the sphere of litigation expenses.' See *van Rooyen v Commercial Union Assurance Co of SA Ltd*[12] . *Grancy*

[8] 1928 CBD 532 at 538
[9] 1994 (3) SA 236 SE at 238I-239B
[10] 1992 (1) SA 652 (C) at 661F-H
[11] 1957 (3) SA 201 (O) at 203 C-E
[12] 1983 (2) SA 465 (0) at 467 D

Property Limited and Another v Taxing Master of the High Court of South Africa (Western Cape Division, Cape Town) and Others[13].

[33] The order *in casu* for costs incurred on attorney and client scale was granted in favour of the Respondents executors in the late estate. Mindful that the award is to a party to litigation for costs such a party has incurred not his attorney; see *Niewoudt supra.* The order was therefore for the recovery of any legal costs that the late estate incurred for which it was entitled to be reimbursed. The legal services to be taxed were rendered to the late estate by an attorney who was acting not only in his professional capacity as an attorney but in a situation where his capacity was conflated with his fiduciary duties as an executor. The taxing Master was as a result still required, and within her discretion to decide if it was proven that the costs to be taxed were incurred by the late estate, it being within the taxing master's authority to establish if the services reimbursable. The taxing master correctly found that the estate cannot pay for the legal services rendered by an executor, in addition to the remuneration to be paid for the same services by way of an executor's commission. Therefore (principle applicable) the Respondent executor is not entitled to any further payment than his remuneration/commission for the services he rendered. In so deciding, the taxing master did not usurp the power of the court that granted the order or vary its order but her decision sensible and within her powers.

[34] Correspondingly, the court order clearly did not debar the taxing master from exercising her taxation powers in that regard and she could not be found to have exercised her discretion improperly in any of the ways suggested in Pallo. As a result, in making the decision not to allow or disallow the double dipping, the taxing master was actually acting within her functions and right to afford the successful party full indemnity for all the costs *de facto* incurred.

The 4th Respondent to be regarded as a legal persona separate from JMS

[35] The Respondents' further contention was that the 4th Respondent as executor, was to be regarded to be a separate legal persona from his legal company JMS, for

[13] (1961/10; 12193/11) [2018] ZAWCHC 92 (26 June 2018)

the purpose of payment of fees for the specialised legal services rendered to the late estate. According to the argument the fees are payable to JMS and to be separated from the executor's commission (the matter distinguishable from the Nedbank matter), especially also due to JMS being a private company therefore the principle not applicable.

[36] Respondents maintain their argument on the basis that the fees accrued to MJS, as according to them it is JMS that has rendered the legal services to the estate and that due to 4th Respondent being a director with no interest in the fees raised by JMS, he is a separate legal *persona* from MJS. The argument is clearly flawed. The costs first of all accrue to the late estate as it is the one that would have incurred the costs, the question is then whether further costs have indeed been incurred for services rendered to the late estate by an executor (4**th** Respondent) who is to be remunerated as such for his time spent on the matter. The remuneration that is payable by the late estate to the 4th Respondent as executor covers for all services rendered by the 4th Respondent. No further costs can be charged for the same services now allegedly payable to a different person or entity in a different capacity. The commission has got to cover for the whole services rendered by the executors even those rendered in a professional capacity as a legal practitioner as correctly decided in Nedbank.

[37] Nevertheless, the 4th Respondent cannot be regarded as a separate legal persona from JMS his company, for the purpose of enabling JMS to also charge for the services 4th Respondent had rendered to the late estate and for which he would be remunerated as executor. It is also not factually and or legally correct that the 4th Respondent is a separate legal person from JMS with no interest in the fees due to JMS being registered as a private company in terms of the new Companies Act. The 4th Respondent is a director at JMS a private company which is indeed not a partnership. The Respondents' allegation that the 4th Respondent, one of the directors, by virtue of being an executor did not share in the fees and that the fees were raised by MJS Inc therefore accrued to MJS the company, ignores the fact that the 4th Respondent as a director of MJS is part of the company and the basis upon which JMS had attempted to claim fees for the professional services the 4th Respondent had

rendered. The taxing master was therefore correct in finding that the estate was not liable to remunerate MJS Inc as a separate legal persona to the executor for the specialised legal services he had rendered to the late estate and for which he was to be paid a commission; see *Nieuwedt supra*.

[38] Furthermore, the 4th Respondent cannot be regarded as having no interest in the fees made on behalf of JMS as alleged. Moreover, the professional services for which JMS wanted to charge the fees were rendered by the 4th Respondent, the director of JMS, even though of a legal nature and rendered in his capacity as an attorney, whilst wearing his hat as an executor fulfilling his fiduciary duties to the late estate at the time, that being his key function for which he is entitled to be remunerated a commission. JMS cannot be remunerated for the same services now alluded to have been rendered by JMS the Company separate from the 4th Respondent (which is referred to as double dipping). In the matter of *Robinson v Randfontein Estates Gold Mining Company Limited*[14], the court held "that a man in a fiduciary relationship is not allowed to place himself in a position where his own interest and fiduciary duties come into conflict"; *Veide Phillips vs Fieldstone Africa Pty Ltd & Another* 2004 (3) SA 465 SCA 478H-479C.

[39] Accordingly, the Respondents' argument would mean that the 4th Respondent must be separated from his *locus standi* as the executor of the estate when he is rendering services of a legal nature and be viewed as JMS attorney/director acting in his capacity as JMS, contrary to Veide Phillips. As a result, JMS to be regarded to be the renderer of those services and thus the deserving recipient of the legal fees payable for such services. In essence arguing that JMS be separated from the 4th Respondent, who, purportedly will not receive any payment from such fees. A weird and an illogical proposition that the 4th Respondent could earn fees for his company, JMS, from the late estate (as this would have been fees incurred by the estate) whilst also earning a commission for himself from the estate for rendering the same service. A very conflicting set-up between his own interest and his fiduciary duty, which would not have been envisaged by the order of the court and therefore to be discouraged.

[14] 1921 AD.168

[40] In *Transvaal Cold Storage Co Ltd v Palmer, supra* at 20 Innes CJ said:

> 'I should here like to quote two passages – one from the *Encyclopaedia of the Law of England* (vol. 10, p.355): "Whenever an agent in the course or by means of the agency acquires any profit or benefit without the consent of the principal, such profit or benefit is deemed to be received for the principal's use, and the amount must be accounted for and paid over to the principal." The other from *Story's Equity Jurisprudence* (sec. 329 (a)): "Where one sustains any such fiduciary obligation to another, that such other is fairly entitled to his advice and services, either for the joint benefit of the two, or the exclusive benefit of himself; and the party sustaining such relation, in violation of his obligations and duty, enters into any subsidiary contract, with a view to his own advantage, all profits thus resulting belong to the party for whose benefit he ought to have acted." These passages seem to me to contain an accurate statement of the law applicable to the present dispute.'.

[41] The argument by the Respondents that in that instance the 4th Respondent is also to be regarded as a separate legal persona from his company JMS, based on the narrative that the principle of avoiding conflict with one's fiduciary duties applied by the taxing master was established following *Fawcett*, being a long time ago before the attorneys were allowed to practice through a private company and now outdated, lacks substance. Post 1934 and *Fawcett,* although legal practitioners with the introduction of the New Companies Act were from then allowed to conduct other practices through a private company, they were *sui generis* as they were classified as personal liability companies. The directors and the company are therefore *singuli et in solidum* for the contractual debts and liabilities of the company. It therefore did not change the situation. The 4th Respondent cannot be regarded as a separate entity from his business or company.

[42] Finally, the Respondents alleged that the applicable principle is *in casu* displaced by the provisions of the will in which the executor is as in terms of s 51 of the Administration of Estates Act sanctioned by the testator to charge extra remuneration for the legal services, which then makes the circumstances in this matter

further distinguishable as the will entitles the 4th Respondent and his firm to charge fees for the legal services rendered, in instances where the executor who is an attorney also doing legal work for the estate, is allowed to charge extra remuneration for the professional services rendered.

[43] Section 51 (1) reads:

> 1) Every executor (including an executor liquidating and distributing an estate under subsection (4) of section 34) shall, subject to the provisions of subsections (3) and (4), be entitled to receive out of the assets of the estate—
>
> (a) such remuneration as may have been fixed by the deceased by will; or
>
> (b) if no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master.

Whilst section 51 (3) reads:

> (3) The Master may—
>
> (a) if there are in any particular case special reasons for doing so, reduce or increase any such remuneration;
>
> (b) disallow any such remuneration, either wholly or in part, if the executor or interim curator has failed to discharge his duties or has discharged them in an unsatisfactory manner; and

[44] I have tried to follow the provisions of the will referred to by the Respondents, I could not find a direct provision that allows the executors to act in conflict of their position by charging fees for the same services that they would be remunerated or receiving a commission from the late estate on the basis that the professional services rendered in their professional capacity could be payable separately and be taxable by the taxing master instead of being assessed by the master. That is so even with s 51 (3) that allows the master to reduce or increase such remuneration.

[45] I nevertheless agree with the Applicant that an executor should not be subject to a conflict of interest and be permitted to act *contra bonos mores* through following a provision or direction in the will. Such a provision even though sanctioned by the testator would be invalid for wanting to enforce and or allow disreputable behaviour that is against the principle laid down by the law; see *Law of Attorneys Costs and Taxation Thereof* Jacobs and Ehlers, page 191 par 257. The taxing master is empowered to enquire into the reasonableness of such a sanction.

[46] Furthermore, JMS is not entitled to submit its account to the executors in the estate nor does the Master have the power deemed to be in terms of s 51 (3) to consider such fees in the Liquidation and Distribution (L and D) account for the purpose of determining if it should be payable to JMS or in conflict with the principle. Mabuse J correctly held in *Nedbank* that 'the company has not been appointed as executors in the estate so they were not entitled to the fees or to submit anything to be considered by the Master of the High Court. Further that the Respondent executor was not entitled to generate any fees from the estate that is outside his fees as set out in s 51 (1) of the Act'. The principle being applicable that due to his fiduciary position to the estate he is not to engage in a transaction in which he personally acquires an interest in conflict with his duties.

[47] The Respondents have therefore besides having failed to prove that the taxing master acted *ultra vires* her powers, also failed to discharge the onus to prove that the facts in this matter are distinguishable and consequently the principle not applicable. A contrary outcome and a review of the taxing master's decision is as a result not merited.

[48] Under the circumstances the following order is made:

1. The Application for review of the taxing master's decision to uphold the Applicant's objection is dismissed;

    a. The ruling by the taxing master stands.

2. Respondents to pay the costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT,

GAUTENG, PRETORIA

On behalf of Applicant:	L L M Hurter Attorneys Ref: L Hurter Email:leon@llmhurter.co.za lara@lexacosts.co.za
On behalf of 4th & 5th Respondents:	Mothle Jooma Sabdia Inc Ref: E Jooma/ S Sabdia SAB14/0001 Email: ShirazS@mjs-inc.co.za
AND TO:	
The Taxing of the High Court:	Adv A Chetty Email: achetty@judiciary.org.za Ref: Adv A Chetty