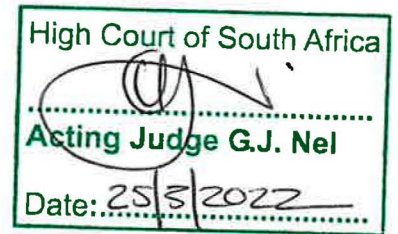


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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 19531/2020

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED: NO</u>
[25 March 2022]	
 SIGNATURE	

In the matter between:

T K PEARCE N.O.

Applicant

and

VAN DER WALT N.O.

First Respondent

**THE MASTER OF THE HIGH COURT,
GAUTENG**

Second Respondent

J U D G M E N T

INTRODUCTION

[1] This opposed application commenced as an application in terms of which the Applicant sought an order as follows:

- "1. *That the Second Respondent be and is hereby ordered to either endorse the Letters of Executorship to the effect that the surviving executor has authority to wind up the estate of the Late Raymond Bate (Master's Ref. No 17052/2018); alternatively, that the Second Respondent be and is hereby ordered to appoint new executors in the Estate of the Late Raymond Bate (Master's Ref No. 17052/2018).*
2. *That the executor/executors be and are hereby ordered to lodge a Liquidation and Distribution Account in the Estate of the Late Raymond Bate, together with supporting vouchers evidencing the value of all assets and liabilities, within thirty (30) days from date of the grant of this order failing which, the Applicant is given leave to apply on the same papers, supplemented where necessary, for an order that the executor/executors in the Estate of the Late Raymond Bate be and are hereby removed from office.*
3. *That the First Respondent is ordered to pay the costs of this application de bonis propriis."*

[2] The Applicant, who is a practising attorney, launched the application in his representative capacity as the executor of the Estate of the Late Justin Bate.

[3] The First Respondent is cited in his representative capacity as the executor of the estate of the Late Raymond Bate.

[4] By the time the application came before me for determination, the only issue that remained was the issue of costs.

RELEVANT BACKGROUND

[5] As the merits of the application no longer require determination I will briefly set out the background facts that remain relevant to the application, and in particular, to the issue of costs.

[6] Raymond Bate passed away on 18 June 2018.

[7] Justin Bate was an heir and appointed executor of the estate of Raymond Bate. The First Respondent was appointed as a joint executor with Justin Bate.

[8] On 29 September 2019 Justin Bate passed away.

[9] The Applicant was appointed as the executor of the estate of Justin Bate on 23 October 2019.

[10] During the period from 16 August 2019 to 11 September 2020 the Applicant communicated with the attorneys representing the First Respondent. The communications traversed a wide range of issues, including, *inter alia*, the appointment of an executor to replace the deceased Justin Bate, and the lodging of the Liquidation and Distribution Account in the estate of Raymond Bate. These two aspects were crucial, and resulted in this application being launched.

- [11] The responses to the numerous queries raised by the Applicant were generally vague, evasive and confusing, in circumstances where the responses to the specific aspects of the appointment of a replacement executor and the lodging of the Liquidation and Distribution Account could have been dealt with clearly and succinctly by the First Respondent.
- [12] The Applicant appointed an attorney in Johannesburg, Mr Monty Hacker ("Hacker") to attempt to resolve the issues that the Applicant had raised with the First Respondent's attorneys.
- [13] Mr Hacker in turn raised written queries with the First Respondent's attorneys relating to, *inter alia*, the lodging of the Liquidation and Distribution Account, which specific queries were not responded to in writing.
- [14] A meeting was held between Mr Hacker and the attorney representing the First Respondent, Ms Jeanie Afeltra ("Ms Afeltra") on 18 May 2020. What occurred at such meeting is disputed, and no confirmatory affidavit or explanatory affidavit was obtained from Mr Hacker, by either of the parties, which may have provided clarity, as to what occurred at such meeting. No minutes of the meeting appear to have been prepared. One of the crucial aspects relative to such meeting is that Ms Afeltra alleges that she advised Mr Hacker at the meeting that the Liquidation and Distribution Account had been lodged with the Master's Office during December 2019.

- [15] Mr Hacker's mandate was terminated by the Applicant, and communications resumed directly between the Applicant and Ms Afeltra, in her capacity as the attorney for the First Respondent.
- [16] Despite the Applicant enquiring as to when the Liquidation and Distribution Account would be lodged, from Ms Afeltra, on a number of occasions after December 2019, in circumstances where the Liquidation and Distribution Account had been lodged on 4 December 2019, he was never advised that the Liquidation and Distribution Account had already been lodged.
- [17] Subsequent to the meeting held between Mr Hacker and Ms Afeltra, the Applicant addressed further correspondence, *inter alia*, threatening an application to Court, for an order compelling the First Respondent to lodge the Liquidation and Distribution Account.
- [18] It should have been obvious to the First Respondent (and his attorney) that the Applicant was not aware of the lodging of the Liquidation and Distribution Account.
- [19] At the very least, and even if it was not obvious to the First Respondent, I would have expected the First Respondent (or his attorney) to respond to the Applicant, advising him that the threatened application was ill-conceived, as the Liquidation and Distribution Account had been already lodged during December

2019, and that queries had been received from the Master, which were being dealt with.

[20] Instead, there was simply no response to such correspondence received from the Applicant. The correspondence from the Applicant, threatening the instituting legal proceedings, clearly called for a response.

[21] Ms Afeltra alleges in the Answering Affidavit filed in the application that at such time the Applicant had already received the Liquidation and Distribution Account, and that Mr Hacker had advised the Applicant of the queries raised by the Master, and for such reason she deemed it unnecessary to respond.

[22] It is however clear from the correspondence and the contents of the affidavits that the Applicant had received an unsigned copy of the Liquidation and Distribution Account, and was under the impression that he was in possession of a draft Liquidation and Distribution Account. Such misconception as expressed in correspondence emanating from the Applicant was never corrected by the First Respondent or his attorney, despite there being numerous opportunities to do so.

[23] The statement that Mr Hacker advised the Applicant of the queries raised by the Master or the lodgement of the Liquidation and Distribution Account is certainly a reasonable assumption, but the

statement that it factually occurred is simply speculation on the part of Ms Afeltra. The correspondence appears to indicate that the Applicant did not receive such advice from Mr Hacker. It appears that after the meeting Mr Hacker was also under the impression that a Liquidation and Distribution Account had not been lodged with the Master.

THE RELEVANT COMMUNICATIONS

[24] Having regard to the disputes and differing interpretations of the parties it is necessary to consider the relevant correspondence that passed between the parties.

[25] On 20 August 2019, Ms Afeltra informed the Applicant in writing that the Liquidation and Distribution Account had not yet been finalised.

[26] On 28 November 2019 the Applicant requested an explanation for the delay in lodging the Liquidation and Distribution Account, and enquiring as to who would be appointed as a replacement executor for Justin Bate.

[27] On 29 November 2019 (the day the Liquidation and Distribution Account was signed by the First Respondent) Ms Afeltra responded, advising that the First Respondent remained as the sole executor *"as provided for in the will of the deceased"*, and that the Liquidation and Distribution Account will be finalised *"shortly"*.

- [28] On 2 December 2019 the Applicant writes to Ms Afeltra, and records that he is of the opinion that application should be made to the Master for an executor to be appointed as replacement for Justin Bate, and requests that a copy of the Liquidation and Distribution Account is furnished to him at the time that it is lodged with the Master. Despite the Liquidation and Distribution Account been lodged on 4 December 2019, an unsigned copy is sent to the Applicant only on 23 January 2020.
- [29] On 4 December 2019 Ms Afeltra responds, recording that the Codicil to the Will of Raymond Bate states that the survivor of Justice Bate or the First Respondent would be the executor of the estate.
- [30] On 13 December 2019 the Applicant writes to the First Respondent's attorneys and enquires as to when he may expect to receive the Liquidation and Distribution Account. There is no response to such letter.
- [31] On 14 January 2020 the Applicant writes to the First Respondent's attorneys, enquiring as to whether the First Respondent had applied for an extension of time to file the Liquidation and Distribution Account, and informs the attorney that an application to compel the executor to file the Liquidation and Distribution Account is being contemplated, and accordingly enquires as to the date when the Liquidation and Distribution Account is expected to be lodged, and

to supply a copy thereof. There is no response to such queries raised in the letter.

[32] On 20 January 2020, the Applicant addressed a letter directly to the First Respondent advising the First Respondent that he is given one month to lodge the Liquidation and Distribution Account with the Master.

[33] On 23 January 2020 Ms Afeltra addressed an e-mail to the Applicant stating: "*Please find attached documents as requested*", to which e-mail an unsigned copy of the Liquidation and Distribution Account was attached.

[34] On 27 January 2020 the Applicant acknowledges receipt of the unsigned copy of the Liquidation and Distribution Account, and enquires as to when the First Respondent intends lodging the Liquidation and Distribution Account.

[35] On 5 February 2020 the First Respondent's attorneys respond to the letter of 27 January 2020, but do not answer the Applicant's queries relating to the Liquidation and Distribution Account.

[36] On 7 February 2020 the Applicant writes to Ms Afeltra, and requests clarity as to the estate of Raymond Bate. He specifically records that on 20 January 2020 Ms Afeltra advised him telephonically that the Liquidation and Distribution Account would be "ready" by 24 January 2020.

- [37] On 6 March 2020, Mr Hacker addressed a letter to the First Respondent, raising a number of queries, including when the “*draft*” Liquidation and Distribution Account would be submitted to the Master.
- [38] On 20 March 2020, Ms Afeltra responded to Mr Hacker and suggested a meeting to “*discuss the matter*”.
- [39] On 24 March 2020 the intended meeting was postponed but Mr Hacker requested “*so much of the information and documentation requested ... that you are presently able to supply.*” No documentation or information was supplied.
- [40] On 18 May 2020 a meeting was held, which was attended by Mr Hacker, representing the Applicant, and Ms Afeltra, representing the First Respondent.
- [41] On 26 May 2020 Mr Hacker addressed an e-mail to the Applicant, reporting on what occurred at the meeting. A copy of the e-mail was also sent to Ms Afeltra.
- [42] It appears from paragraph 1 of the e-mail from Mr Hacker that he reported to the Applicant that the Liquidation and Distribution Account had not been lodged.
- [43] On 26 May 2020 the Applicant addressed a letter in terms of Section 36 of the Administration of estates act, Number 66 of 1965, as

amended, to the First Respondent providing the First Respondent with one month to lodge the Liquidation and Distribution Account.

[44] In the same letter the Applicant required the First Respondent to submit his Letters of Executorship to the Master for endorsement, authorising the First Respondent to deal with the estate of Raymond Bate as the sole executor. The letter was not responded to.

[45] On 2 June 2020 the Applicant addressed a letter to Ms Afeltra drawing to her attention certain deficiencies in the "*draft account*".

[46] On 26 August 2020 the applicant addressed a letter to the First Respondent, advising of the launching of the application.

THE APPLICATION

[47] On 26 August 2020, the Applicant caused the service of this application on the First Respondent.

[48] Ms Afeltra then wrote to the Applicant on 28 August 2020 responding in detail to the contents of the Founding Affidavit, and pointing out clearly, for the first time, that a Liquidation and Distribution Account had been filed with the Master and that an amended Liquidation and Distribution Account had also been filed.

[49] There was still no confirmation that the First Respondent had been confirmed by the Master as the sole executor. Ms Afeltra also advises in such letter that the Applicant is requested to withdraw

the application, failing which an Answering Affidavit would be served, and a costs order *de bonis propriis* would be sought as against the Applicant personally.

[50] There can be no doubt that until the written response of 28 August 2020 received from Ms Afeltra, the Applicant was entitled to have launched this application. The contents of paragraphs 31 and 33 of the Founding Affidavit clearly indicate that the Applicant was under the impression that the Liquidation and Distribution Account had not been lodged, and that the First Respondent had not been authorised to deal with the estate of Raymond Bate as the sole executor.

[51] On 3 September 2020, the Applicant responded, registering his shock at learning that the Liquidation and Distribution Account had already been lodged with the Master during December 2019. As set out above, the Liquidation and Distribution Account was lodged on 4 December 2019.

[52] The contents of the Applicant's letter evidences that the Applicant was under the impression (as at 28 August 2020) that no Liquidation and Distribution Account had ever been registered, hence the relief as sought in paragraph 2 of the Notice of Motion.

[53] The Applicant recorded in such letter that "*All you had to do is notify us that the estate account had been lodged with the Master ...*". The

Applicant pointed out that had this been done, the Estate of Justin Bate would not have incurred the costs of launching this application.

[54] The Applicant recorded that he was not prepared to withdraw the application, unless the First Respondent consented to an order for costs.

[55] In my view, such demand was certainly not unreasonable in circumstances where the Applicant had been labouring under the belief that no Liquidation and Distribution Account had been lodged despite the passing of a substantial period of time, and no steps had been taken to inform him of the true position.

[56] On 8 September 2020, the First Respondent's attorney responded, referring to the meeting with Mr Hacker and recording that at such meeting Ms Afeltra had advised Mr Hacker that a Liquidation and Distribution Account had been lodged, and referred to correspondence confirming such advice. Such correspondence has not been attached to any document or affidavit, unless it is intended to be a reference to the e-mail of Mr Hacker dated 26 May 2020, which does not confirm such contention.

[57] In the same letter, the First Respondent tenders to pay the "*reasonable party and party costs*" in the application, and requests that the application be withdrawn, as the issues to be determined in the application "*have already been dealt with*".

- [58] The Applicant responded on 11 September 2020, indicating that the relief sought in paragraph 1 of the Notice of Motion would be persisted with, as he did not agree with the First Respondent's interpretation of the Codicil in the Will.
- [59] In the Answering Affidavit, Ms Afeltra sets out that the Master authorised the First Respondent to proceed as the sole executor of the Estate of Raymond Bate, and that such authority had been conveyed to her personally.
- [60] Ms Afeltra also states that the relief sought by the Applicant in paragraph 1 of the Notice of Motion had already been dealt with, in that the Master had already determined that the First Respondent be authorised to proceed as the sole executor.
- [61] Ms Afeltra then strangely suggests that the Applicant ought to have objected to the appointment of the First Respondent being appointed sole executor, that he should have confirmed with her "agent" whether the Master had already considered the issue, and that he should have requested the Master, in writing, to consider "*the aforesaid facts*", prior to launching the application.
- [62] It is clear that the First Respondent (through his attorneys) seeks to cast blame on the Applicant for not being aware of the Master authorising the First Respondent to continue as the sole executor. Such attempt to cast blame is ludicrous, in circumstances where the

authority was conveyed orally to Ms Afeltra, and despite the Applicant raising this aspect in a number of letters, he was never advised of the Master's decision.

[63] Ms Afeltra specifically states that *"If the Applicant requested confirmation from our offices whether the Master authorised the First Respondent to continue with the finalisation of the estate, such information would have been provided to the Applicant"*.

[64] The Applicant was unaware of the authorisation of the First Respondent to continue as sole executor, so could never seek "confirmation" thereof. The Applicant did however raise the issue of a replacement executor being appointed on a number of occasions in correspondence, but was never advised of the Master's authorisation.

[65] As appears from paragraph 1 of the Notice of Motion, the Applicant sought either confirmation that the First Respondent be appointed as sole executor or the appointment of a replacement executor. In the Founding Affidavit, the Applicant states that the Master was cited in order to consider and exercise a discretion as to, *inter alia*, the authority of the First Respondent to deal with the estate of Raymond Bate as the sole executor.

[66] In the letter from Ms Afeltra to the Applicant on 28 August 2020 in response to the receipt of the application, there was no indication

that the Master had already authorised the First Respondent to proceed as sole executor, despite the relief being sought by the Applicant in paragraph 1 of the Notice of Motion.

[67] Ms Afeltra ought to have been aware when the Applicant indicated that he intended to pursue the relief sought in paragraph 1 of the Notice of Motion, that he had no knowledge that the Master had already authorised the First Respondent to continue as sole executor. Even if Ms Afeltra did not realise that the Applicant was unaware of the Master's authorisation, she should have informed the Applicant that his intention to pursue such relief was ill-considered, as it had already been dealt with by the Master.

[68] Such correspondence would, in all likelihood, have resulted in the application being withdrawn.

[69] The First Respondent, rather than sending such a letter to the Applicant, elected to file an Answering Affidavit, deposed to by Ms Afeltra, which resulted in the incurring of substantial unnecessary costs.

[70] Despite Ms Afeltra contending on behalf of the First Respondent in the Answering Affidavit that all of the issues raised in the Notice of Motion had been finalised, and that the only aspect that required determination was costs, an Answering Affidavit containing 290 paragraphs was filed, in which numerous aspects totally unrelated

to the application were raised. The Answering Affidavit together with annexures constituted 435 pages.

[71] In the Replying Affidavit, the Applicant confined himself to dealing only with the question of costs.

THE COSTS ORDERS SOUGHT

[72] The Applicant seeks an order to the effect that the Estate of Raymond Bate, the First Respondent and Wynand Du Plessis Attorneys should jointly and severally pay the costs on a *de bonis propriis* basis, on the scale as between attorney and client.

[73] Such costs order is based on allegations that the First Respondent and Wynand du Plessis Attorneys actively sought to mislead the Applicant and abused the Court process by attempting to "*bury their misconduct in a mountain of paper*".

[74] The First Respondent, in his representative capacity, seeks a costs order that the Applicant should pay the costs on a *de bonis propriis* basis, on the scale as between attorney and client.

[75] The First Respondent seeks such costs order on the basis that the Applicant elected to proceed with the application despite all of the information being set out in the letter from Ms Afeltra on 28 August 2020, that the Applicant sought to proceed with the Application on

an unopposed basis despite it being opposed, and that the conduct of the Applicant amounted to frivolous and vexatious litigation.

[76] It is clear that there is acrimony within the Bate family, and that the collegial relationship between the Applicant and Ms Afeltra, in her capacity as attorney for the First Respondent, deteriorated over time.

[77] It is however also clear from the correspondence exchanged, and as referred to above, that the two issues that troubled the Applicant, being the lodging of the Liquidation and Distribution Account, and the appointment of an executor to replace Justin Bate, could have been dealt with clearly and conclusively by the First Respondent. Despite numerous opportunities to do so, these issues were never properly responded to.

[78] Had those issues been dealt with in correspondence, and particularly in response to direct queries raising the two issues, the application would never have been launched.

[79] The only indication that the lodging of the Liquidation and Distribution Account had been conveyed to the Applicant prior to the launching of the application was the statement by Ms Afeltra that she had conveyed such fact to Mr Hacker. There is no evidence to suggest that Mr Hacker conveyed such information to the Applicant. The e-mail of Mr Hacker indicates that Mr Hacker was under the

impression that the First Respondent had failed to lodge a Liquidation and Distribution Account.

[80] Ms Afeltra stated in a supplementary affidavit, that she assumed that the reference in Mr Hacker's e-mail to the Liquidation and Distribution Account having not been lodged, was a reference to the Amended Liquidation and Distribution Account. Ms Afeltra concedes that with hindsight it may "*have been an oversight not to correct what Mr Hacker placed on record...*".

[81] The authorisation by the Master that the First Respondent should deal with the estate of Raymond Bate as sole executor was only conveyed to the Applicant in the Answering Affidavit. Rather than deal with this clearly in correspondence, the First Respondent (through his attorney) elected to rather "debate" the interpretation of the Codicil to the Will of Raymond Bate.

[82] The two issues that concerned the Applicant could have been dealt with categorically and clearly, and the understanding of the Applicant that the unsigned copy of the Liquidation and Distribution Account sent to him was a draft, could have been clarified. As already set out above despite numerous opportunities to do so, the First Respondent (and his attorney) failed to do so.

[83] Having regard to the correspondence and the contents of the affidavits filed in this application, it is clear to me that the cause of

the application being launched, and the costs that arose from the launching of the application are solely attributable to the conduct of the First Respondent (represented by his attorney).

[84] The submissions made at the hearing of the application that the motive of the Applicant should be taken into account, based on the insinuation that he wished to be appoints executor to the estate of Raymond Bate is entirely speculative.

[85] Whilst the conduct of the First Respondent and his attorney leaves much to be desired, I am however not convinced that the First Respondent's attorney should be ordered to pay the costs of the application. The First Respondent's attorney clearly acted upon instructions from the First Respondent.

[86] In the circumstances, I am satisfied that the costs of the application should be paid by the First Respondent. There is no reason to visit the costs of this application on the estate of Raymond Bate, as the First Respondent determined his own conduct.

[87] The overall conduct of the First Respondent in dealing with this matter, including, *inter alia*, failing to deal pertinently with the two issues raised by the Applicant, and filing a lengthy Answering affidavit, in which unnecessary issues are set out, and irrelevant annexures attached (certain of which annexures were duplicated on more than one occasion), and quoting the entire contents of letters

already attached to the Answering affidavit, in the body of the Answering Affidavit, justifies the award of a punitive costs order.

[88] As regards the reserved costs of 15 September 2020, such costs would not have been incurred had the First Respondent advised the Applicant that the Master had already authorised the First Respondent to deal with the estate as sole executor. When the First Respondent received the notification that the Applicant intended to proceed with the relief sought in paragraph 1 of the Notice of Motion on 15 September 2020, the First Respondent should have immediately advised the Applicant that such aspect had already been finalised.

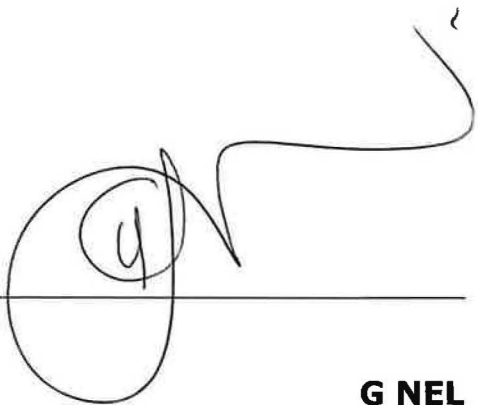
[89] The Applicant is not entirely blameless in respect of the costs incurred on 15 September 2020, as despite the Applicant's understanding that the contents of paragraph 1 of the Notice of Motion was a purely procedural aspect, the application had been opposed.

THE ORDER

[90] I accordingly make the following order:

[90.1] The First Respondent, in his personal capacity, is to pay the costs of the application on the scale as between attorney and client;

[90.2] The Applicant and the First Respondent are to pay their own costs in respect of the reserved costs of 15 September 2020.



G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Judgment: 25 March 2022

APPEARANCES

For the Applicant: Adv. K O Moodley

Instructed by: Wright, Rose-Innes Incorporated

For the Respondent: Adv. A R Van der Merwe

Instructed by Wynand Du Plessis Attorneys