REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE SIGNATURE

CASE NO: 32795/2017

In the matter between:

G S	1ST APPLICANT
A S	2ND APPLICANT

(Assisted by her father and natural guardian)

And

VASILIOS VARDAKOS N.O.	1ST RESPONDENT
M S	2ND RESPONDENT
O S	3RD RESPONDENT
G S	4TH RESPONDENT
THE MASTER OF THE HIGH COURT:	
JOHANNESBURG	5TH RESPONDENT

JUDGMENT

TSOKA J

[1] In this application, the two applicants, G S (G), the first applicant and A S (A), the second applicant seek an order against Vasilios Vardakos N.O. (Vardakos), the executor of the estate of F S (F), for the full details of the bank account/s opened in the name of the Estate late F S in terms of s28 of the Administration of Estates Act 66 of 1965 (the Act).

[2] The order sought by G and A against Vardakos is for the latter to also furnish the full details of the bank account/s into which Vardakos deposited the sum of R3 395 759.55 previously held by F as investment with Mercantile Bank. The full details of the account/s must state the account number; the type of the account as well as the percentage of interest offered by the bank into which the said sum

of R3 395 759.55 was deposited, supported by a complete set of invoices and vouchers for the period 3 June 2015 up to 31 August 2017.

[3] The facts underpinning the order sought are undisputed. On 21 February 2015 F passed away. He left a Will in terms of which Vardakos was appointed the executor. In terms of the Will, F bequeathed his entire estate to G while the residue of his estate was left to his grandchildren, including A. The residue was to be held in trust for the grandchildren.

[4] On 25 March 2015, pursuant to the death of F, the Master of the High Court, Johannesburg, in compliance with the terms of the Will, appointed Varkados, a practising attorney, as an executor of the estate. Three months after his appointment as executor, Vardakos on 3 June 2015 withdrew from Mercantile Bank, the amount in the sum of R3 395 759.55 from F' investment account with the said bank. Soon thereafter G, his attorneys and the Master requested Vardakos for the details and the bank statements of the estate and the account number into which the said moneys were deposited. This request was in terms of s28 of the Act which provides that –

'1. An executor –

(a) shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R1000, open a cheque account in the name of the estate with a bank in the

> Republic and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate'.

[5] Instead of complying with G' and the Master's directive, Vardakos failed to furnish the information so requested. The refusal was on the basis that the former had no locus standi to request the information. Responding to the Master with regard to the lodgement of the Liquidation and Distribution account, Vardakos stated that as there were properties outside the Republic of South Africa, he was unable to file the Liquidation and Distribution account which, in terms of s35 of the Act, should have been filed within a period of six months from 25 March 2015.

Vardakos' refusal to comply with G' request and the Master's directive.

[6] In terms of s36 of the Act, Vardakos was obliged to lodge an account with the Master as and when required to do so, or to lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under the Act or to perform any other duty imposed upon him by the Act or to comply with any reasonable demand of the Master for information or proof required by the Master in connection with the liquidation or distribution of the estate. The obligation on Vardakos is not only imposed on him when required to do so by the Master but is also imposed on him when directed

to do so by “any person having an interest in the liquidation and distribution of the estate”.

[7] G states that, as the legatee in terms of the Will of F, he is an interested party in the liquidation and distribution of the estate of F. As such an interested party, he was thus entitled in terms of s36 of the Act to request the information from Vardakos. That it is indeed so that G has interest in the liquidation and distribution of the estate, is apparent from the clear wording of the provisions of s36 of the Act. The inevitable conclusion is that, G’ request being reasonable, Vardakos was obliged to comply with the request. The fact that there were assets outside the jurisdiction of the Republic of South Africa that had not been accounted for, is irrelevant and of no consequence as G’ request was only with regard to the amount of R3 395 759.55 that should have been deposited into the Estate late Account F. A detailed and full settlement of account supported by vouchers from Mercantile Bank was all that was required. Anything else is irrelevant and a red herring.

[8] Having failed to comply with G’ request and the Master’s directive, on 31 August 2017, G and A launched the present application for Vardakos to comply with the provisions of s35 of the Act, namely to file the Liquidation and Distribution account together with the necessary vouchers explaining whether an account in the name of the estate was opened; the account no; interest earned by the

capital withdrawn from Mercantile Bank and whether any disbursements were made on behalf of the estate supported by documentary evidence.

[9] In an attempt to comply with the Master's directive, Vardakos on 31 August 2016 attempted to furnish the Master with a draft Liquidation and Distribution Account. The Liquidation and Distribution account furnished is unsupported by any vouchers or bank statements. What however emerges from the said account is that the amount of R3 395 759.55, instead of having increased by interest earned, has dropped. No explanation for the drop is explained other than that he, Vardakos, utilized some of the moneys withdrawn from Mercantile Bank to comply with Folios' oral wish to pay for the other grandchildren's medical, school expenses and day to day living expenses of the said grandchildren.

[10] It appears that the applicants' and the Master's concern with regard to the proper administration of the estate of F is not misplaced. There appears to be something that Vardakos is not open about with regard to the money withdrawn from Mercantile Bank. Instead of an estate account being opened, the moneys were deposited into his trust account contrary to the provisions of s28 of the Act. If indeed the difference between the money withdrawn from Mercantile Bank was utilized for the benefit of the grandchildren, one would have expected Vardakos to have complied with the provisions of s26(1A) of the Act which provides that such expenses were only to be incurred with the consent of the Master. Such consent was however, not sought and obtained from the Master. The explanation

is that some moneys were utilized for the support of the grandchildren, is contrary to the terms of the Will and the express provisions of s26A of the Act. The utilization is thus unlawful.

[11] It is apt to restate the duties of executors of deceased estates. In *Lockhat's Estate v North British & Mercantile Insurance Co Limited*[1] at page 302E-F, the Appellate Division, as it then was, had this to say –

> 'The duty of an executor who has been appointed to administer the estate of a deceased person is to obtain possession of the assets of that person, … to realise such of the assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding-up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid among the legatees under the will …'

[12] Clause 8 of the Will of F is of crucial importance. It bears repetition. It provides –

> 'As soon as possible following the winding-up of my estate to the satisfaction of the Master of the High Court the residue of my estate consisting of the immovable property situate at SE3 and SE4, Vanderbijlpark, all my bank accounts that I have with Mercantile Bank of Lisbon that have been opened by me, my 50% (fifty percent) members

[1] Lockhat's Estate v North British & Mercantile Insurance Co Limited 1959 (3) SA 295 (A)

interest in Corpus Properties CC and my shares in Liberty Life and Standard Bank shall devolve upon our trustee in trust for the benefit of my grandchildren or their issue per stirpes still under the age of 25 (twenty five) years, subject to the terms, conditions and powers more fully set out hereafter'.

[13] Vardakos' contention that he paid school and medical fees and the day to day living expenses of the grandchildren is at odds with the clear wording of F' Will. These expenses, in terms of clause 8 quoted above, were only to be utilized for the benefit of the grandchildren only after the winding-up and from the residue of the estate. The estate not having been wound up, there cannot be any utilization of the residue for the grandchildren. The contended utilization of part of the investment at Mercantile Bank is a diversion. Vardakos is obliged to account to both the Master and the applicants as to how the investment withdrawn from Mercantile Bank was utilized.

[14] In argument, counsel for Vardakos submitted that as Vardakos was not given a months' notice prior to the launching of the application, the application deserves to be dismissed with costs.

[15] The submission is without merit. On 2 June 2017 and 14 July 2017 the Master directed Vardakos to lodge the Liquidation and Distribution account of the Estate late F on or before 28 July 2017. The Liquidation and Distribution Account was

not lodged. It was only on 31 August 2017 that the present application was launched. That Vardakos was granted more than a month's notice to comply with the directive, is clear. The submission that the application is premature is therefore incorrect. In any event, on several occasions prior to the directive, both the applicants and the Master demanded of Vardakos to comply with the provisions of s35 of the Act, i.e. to lodge the Liquidation and Distribution Account within a period of 6 months from his date of appointment. The 6 months having come and gone, he was again directed to comply by 28 July 2017, a period of 2 (two) years after his appointment. The result is that the application is therefore not premature.

[16] In the event that Vardakos was not afforded a month's notice prior to the application, I find that there has been substantial compliance with the provisions of s36(1) of the Act. Sight should not be lost that Vardakos does not complain of any prejudice in this matter. In any event, in *Robinson v Randfontein Estates GM Co. Ltd*[2], the Appellate Division, at p198 stated that the purpose of pleadings is to define the issues between the parties and that as long as the issues are defined, in the absence of prejudice, one must remember that "… pleadings are made for the court, not the court for pleadings".

[17] The complaint of both the applicants and the Master having been properly defined and there being no prejudice to Vardakos, any short notice, if any, is of no moment. The application, having regard to evidence in this matter, is not

[2] Robinson v Randfontein Estates G.M Co. Ltd 1925 Part II SA Law Reports (1925), AD

premature. Vardakos was granted more than enough time to comply with both the applicants' and Master's request. He having failed to comply, the applicants as interested parties in the administration of the estate of F were entitled to approach this court for the relief sought.

[18] In the result the following order is made –

18.1 Vardakos is ordered to forthwith furnish the applicants with full details of the bank accounts he has opened for the estate of the Late F S;

18.2 Vardakos is further ordered to furnish full details of the bank accounts into which he deposited the amount of R3 395 759.55 withdrawn from Mercantile Bank Account No. […] together with the type of account into which the moneys were deposited and the interest earned by the said deposit;

18.3 Vardakos is further ordered to furnish the applicants and the Master with complete Bank statements from 3 June 2015 to date, supported by vouchers for any moneys distributed on behalf of the estate.

18.4 It is ordered that Vardakos bears the costs of this application in his personal capacity on the attorney and client scale.

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M. TSOKA

JUDGE OF THE HIGH COURT

Date of hearing:	11 September 2018
Date of judgment:	20 September 2018
Appearances:	
Counsel for the Applicants:	Adv H van der Vyver
Instructed by:	Ayoob Kaka Attorneys
Counsel for the Respondent:	Adv Peter (SC)
Instructed by:	Vardakos Attorneys