



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

Case No: 13619/2013

In the matter between:

BRUCE ROBERT SUTHERLAND

Applicant

and

**THE MASTER OF THE HIGH COURT
(KWAZULU-NATAL, PIETERMARITZBURG)**

First Respondent

ANNA NAOMI SURTHRLAND

Second Respondent

CHARLES FRANCIS REID N.O.

Third Respondent

GRANT ROY SUTHERLAND

Fourth Respondent

MOORE STEPHENS CJL PARTNERSHIP

Fifth Respondent

In the matter of the liquidation
and distribution account in
the **Estate of the Late Ian
Robert Bruce Sutherland**,
Estate Number 6568/2010/
Pietermaritzburg

ORDER:

- (a) The Master's decision in respect of paragraph 1(a) of the Notice of Motion is set aside and the matter is referred back to the Master of the High Court, KwaZulu-Natal, Pietermaritzburg, for reconsideration.
 - (b) The orders sought in respect of paragraphs 1(b) and (c) of the Notice of Motion are refused.
 - (c) The costs of this application shall be paid as a further administration cost in the deceased's estate.
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J U D G M E N T

K PILLAY J

[1] The applicant seeks an order setting aside or alternatively reviewing and setting aside the decision of the Master of the High Court in respect of three objections lodged against a liquidation and distribution account in the deceased estate of the late Ian Robert Bruce Sutherland (the deceased estate). More particularly the order sought reads as follows:

‘That the following decisions of the first respondent (which were made on 8 November 2013) are set aside, alternatively are reviewed and set aside:

- (a) sustaining an objection to compound interest being charged on the loan advanced by Bruce Robert Sutherland (the applicant) to the deceased (the late Ian Robert Bruce Sutherland, Estate Number 6568/2010) and the second respondent;
- (b) sustaining an objection against an increase in the remuneration of the executor (the third respondent) from the prescribed fee of 3.5% to 7.0946%; and
- (c) sustaining an objection to paying disbursements to Knight Turner Attorneys in the sum of R14 050.50 and allowing disbursements of only R9 177.00.

[2] In addition this court is asked to direct that the first and final liquidation and distribution account in the aforesaid deceased estate does not need to be amended and does not need to be open for inspection for any further period; that the costs of this application, if unopposed, be paid, on the attorney and client scale, as a further administration cost in the deceased estate and if opposed to be paid by any party who unsuccessfully opposes the application. The second respondent is the only party that opposes this application.

[3] The applicant’s *locus standi* is challenged by the second respondent on two grounds:

- (a) applicant's reliance on the provisions of Section 35(10) of the Administration of Estate's Act 66 of 1965 (the Act) in circumstances where the Master has given no direction contemplated in Section 35(9); and
- (b) applicant's *locus standi* as an aggrieved person in relation to objections (a) and (c) as referred to above.

[4] The second respondent, in addition, to the above, challenged this court's jurisdiction to hear this matter on two bases firstly, that the estate vests in the Master of the High Court, Pietermaritzburg. Secondly that in terms of Section 35(10) of the Act it is the provincial division which has jurisdiction to review the first respondent's decision because it is that court that has jurisdiction. It is instructive that the Master has not objected to the jurisdiction of this court to deal with a review of its decision.

[5] As regards the first objection, it is so that, no legal basis for the contention that the estate 'vests' in a Master is proffered nor why such 'vesting' would affect the jurisdiction of this Court. As was pointed out, although Section 6(4) C of the Superior Courts Act No 10 of 2013 provides for local seats of court with a limited area of jurisdiction it does not disqualify seats from being divisions of the High Court.

[6] Section 35(10) of the Act, does not refer to any provincial division but simply refers to "the court". Court is defined under Section 1 of the Act as "the High Court having jurisdiction, or any judge thereof".

[7] Given that the second respondent and the deceased lived within the jurisdiction of this court, the only assets in the estate, are situated in this jurisdiction, that the fifth respondent conducts business within this jurisdiction and that the first respondent is the Master of this Court, it follows that the most convenient and appropriate forum for this application is this court.

[8] It behoves mentioning that the second respondent did not persist with this ground of opposition during oral submissions at the hearing.

[9] The challenge against jurisdiction is therefore dismissed.

BACKGROUND

[10] The main dispute in this application arises out of the winding up of the estate of the late Ian Robert Bruce Sutherland ('the deceased') who died on 1 May 2010. The applicant is the deceased's son and a creditor of the estate. The first respondent is the Master of the High Court, KwaZulu-Natal, Pietermaritzburg. The second respondent is the deceased's surviving spouse to whom he was married in community of property and who is also the applicant's step-mother. The second respondent had also initially been the executor of the estate, until she was removed by the Master. The third respondent is the current executor of the estate, a chartered accountant by profession, who prepared the liquidation and distribution account. The fourth respondent is deceased's other son who is also a creditor. The fifth respondent is a partnership of chartered accountants through which the third respondent conducts business.

[11] The applicant lodged a claim against the estate in an amount of R439 607.33 being the capital amount of loans he had advanced to the deceased and the second respondent. He also lodged a claim in an amount of R240 514.02 being the interest owing on these loans at the time of the deceased's death. These amounts were reflected in the First and Final Liquidation and Distribution account ('the account') dated 31 January 2013 as claims against the estate. In the Income and Expenditure section of the account, three further amounts were reflected in favour of the applicant, these being R55 977.97 for the period from 1 May 2010 to 28 February 2011, R68 739.47 for the period 1 March 2011 to 29 February 2012, and R54 594.95 for the period 1 March 2012 to 31 January 2013. These amounts reflected interest accrued on the loans for the respective periods whilst the estate was being wound up which had been calculated on the basis of the interest being compounded.

[12] Under the heading 'Administration Costs' in the liabilities section of the account, an amount of R173 818.50 was reflected as due for the executor's remuneration, being 7.0946 per cent of the value of the assets, instead of the

standard rate of 3,5 per cent. The fifth respondent had in an Annexure to the account, requested the increase on the basis that 'the Estate has been the subject of a prolonged acrimonious dispute between residual heir [the second respondent] and two of the creditors' being the applicant and fourth respondent.

[13] The account also included, as a claim against the estate, an amount of R14 050.50 being a disbursement payable to Attorneys Knight Turner on behalf of the deceased for the drafting of the will prior to his death.

[14] The second respondent, through her attorney, lodged an objection with supporting documentation (which included a copy of the loan agreement as well as schedules drafted by the third respondent reflecting payments) dated 22 May 2013 in terms of s 33(7) of the Act. The objection was essentially three-fold in that she objected to:

1. The increase in the executor's remuneration. The basis of this objection was that the executor had not advanced any extraordinary circumstances whilst dealing with the estate to justify such an increase;
2. That the loan agreement stated that interest on the loans was to be calculated at 'the prime overdraft rate', but did not state that the interest was to be compounded. The interest should therefore have been calculated on the basis that it was simple interest; and
3. That the disbursement to Attorneys Knight Turner should not be allowed at all. In support of this an account from Knight Turner was submitted reflecting an amount of R9 177.00 in respect of attendances to drafting the will. The second respondent further argued that should the claim be owing, which she disputed, it should be for this amount and not R14 050.50 as reflected in the account.

[15] On 8 November 2013, the Master issued a memorandum containing his decision in respect of these objections, in which he sustained the first and second objections, and partly sustained the third, finding that the amount of R9 177 was to be paid. These decisions shall be referred to as the first, second and third decisions respectively. In respect of the second objection the Master decided as follows:

'The loan agreement states, the loan will bear interest at the prime overdraft rate and is silent with regards to the basis upon which interest is to be calculated. If it was the parties' intention that interest be compounded, same should have been inserted in the agreement. In the absence of the contrary, the claim for compounded interest is rejected. Accordingly, the objection is upheld.'

[16] Having considered and ruled on the objections raised, the Master concluded as follows:

'VI. REMEDIES

In terms of section 35(10) of the Administration of Estates Act any person aggrieved by the Master's decision may take it on review to the High Court. The proceedings must be instituted within 30 days from the date of this letter.'

[17] The applicant then launched these proceedings in terms of s35(10) of the Act, seeking the setting aside of the aforesaid decisions. Only the second respondent opposed the application, and objected to the applicant's *locus standi* in respect of the first and third issues. The issue of jurisdiction, which was also raised, has already been dealt with.

Locus standi

[18] With regard to the first challenge to *locus standi* the second respondent submits that the applicant cannot invoke Rule 35(10) of the Act as the first respondent:

- (a) did not give any direction as contemplated in section 35(9); he only ruled in relation to the objections raised; and
- (b) did not refuse to sustain an objection lodged; he upheld each of the objections raised.

[19] Section 35(9) of the Act provides:

'If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of the opinion that such objection is well-founded or if, apart from any objection, he is of opinion that the account is in any respect incorrect and should be

amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.’

[20] The Master’s upholding of the objections will result in the account having to be amended. The absence of a specific direction in this regard does not in my view non-suit the applicant to institute these proceedings in terms of Section 35(10). In any event, the Master directed in his/her memorandum that any person aggrieved by the Master’s decision may take it on review.

[21] Section 35(10) of the Act provides that ‘any person aggrieved’ by the direction of the Master to sustain an objection may apply to court to have the Master’s decision set aside. The second respondent argued that, in respect of the Master’s first and third decisions, the applicant is not a ‘person aggrieved’ and therefore has no *locus standi* to bring an application in terms of s35 (10) in respect of these decisions.

[22] The applicant argues that he has an interest in these decisions and therefore has the requisite *locus standi* to institute this application.

[23] The Act does not contain a definition of the term ‘aggrieved person’ but the courts have on occasion dealt with the meaning of the term or a similar term in various other statutory contexts.¹ In *Jeeva and another v Tuck NO and others* 1998 (1) SA 785 (SE), dealing with the term in the context of s151 of the Insolvency Act, the court said that although the interest need not be measurable in money,² a legal right must still be proved:³

“Aggrieved” means injured or wronged in one's rights (see *The New Shorter Oxford English Dictionary*). It follows that any person who was so injured or wronged may take the matter on review in terms of s 151, and that is no different from the position at common law. The expression “aggrieved person” was defined by James LJ in *Ex parte Sidebotham* (1880)14 ChD 458 (CA) at 465 as follows:

¹ See *Valentino Glove BV v Phillips and another* 1998 (3) SA 775 (SCA) at 780 - 781

² At 792A

³ At 792I – 794C

“It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words “person aggrieved” do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A “person aggrieved” must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title to something.”

[24] This definition was approved and adopted in *Friedman's Trustee v Katzeff* 1924 WLD 298 at 304--5 in construing the expression “aggrieved person” in s 151 of the previous Insolvency Act 32 of 1916 which corresponds to s 151 of the present Act. (See also *De Hart NO v Klopper and Botha NNO and Others* 1969 (2) SA 91 (T) at 99H--100A.) In *De Hart's* case the Master issued certificates in terms of s 23(11) of the Insolvency Act that certain property belonged to the estate of one Kleynhans. The applicant was the trustee in the liquidation of certain companies formed after the insolvency of Kleynhans and before his rehabilitation. The trustee in the liquidation of the companies claimed to be entitled to the property involved. It was held by Trollip J (as he then was) that the effect of the Master's decision was that the property belonged to the insolvent's estate and that anyone who claims to be entitled to the property would suffer a legal grievance as long as that decision stands, for he would thereby be wrongfully deprived of his legal right to assert his claim to the property and as that would apply to the trustee in the liquidation of the companies, they were persons aggrieved by the Master's decision (at 100A). It seems clear, therefore, that Trollip J in arriving at the aforesaid conclusion applied the definition of an “aggrieved person” as stated by James LJ in *Ex parte Sidebotham* (*supra*) and approved and adopted in *Friedman's Trustee v Katzeff* (*supra*).

[25] In *Francis George Hill Family Trust v South African Reserve Bank and Others* 1992 (3) SA 91 (A) the Appellate Division considered the meaning to be attached to the words ‘. . . any person who feels himself aggrieved by the attachment of money . . .’ appearing in reg 22D of the Exchange Control Regulations promulgated in terms of s 9 of the Currency and Exchange Act 9 of 1933 in order to decide whether the appellant in that case had *locus standi* to apply for the review of an attachment of certain moneys by the Reserve

Bank, Hoexter JA, who delivered the majority judgment, agreed with a statement by Lord Denning in *Attorney-General of the Gambia v N'jie* [1961] 2 All ER 504 (PC) that the definition of aggrieved person given by James LJ in the *Sidebotham* case was not exhaustive. As to the meaning to be attached to the words “person aggrieved” Hoexter JA said the following at 102C:

“Leaving aside the significance of statutory context in particular cases, the tenor of decided cases in South Africa points, I think, to the general conclusion that the words “person aggrieved” signify someone whose legal rights have been infringed - a person harbouring a legal grievance. The current of judicial interpretation would appear to run in the same direction in the decisions of the English Courts - see the remarks of Donovan J in *Ealing Corporation v Jones* (*supra* at 392). Viewed against the background of the regulations as a whole, that is the proper meaning which in my judgment should be assigned to the words in reg 22D in the present case. I have indicated my view that what was said by the Privy Council in its judgment in the *N'jie* case *supra* is not irreconcilable with the South African decisions which require a legal grievance before the objector can qualify as a “person aggrieved”. However, if in this respect I am mistaken, and if upon a true appraisal of the *N'jie* case its tendency should run counter to the definition propounded by the South African Courts, then, with respect, I would not be disposed to be guided by it in determining the issue in the present appeal. The critical question in the present case is whether the attachment by the Reserve Bank of the assets of Phoenix represents an invasion of the legal rights of the Hill FT.”

[26] Thus, in *Janse Van Rensburg v The Master and others* 2004 (5) SA 173 (T), where the court was considering the phrase in terms of company legislation, the court said that such a person:⁴

‘must surely be a person who has a legitimate legal grievance, for example, a person against whom a decision has been pronounced that wrongfully deprives him or her of something, for instance an entitlement, benefit or right, or unlawfully accuses him or her of something, or wrongfully affected his or her title to do something.’

[27] I do not think the term ‘person aggrieved’ in s35 (10) of the Administration of Estates Act has any meaning substantially different from that which has been laid down by the cases in respect of other statutory provisions.

[28] In paragraph 18 of his replying affidavit the applicant states:

‘As the son of the deceased, an admitted creditor of the estate, a potential heir had the estate been intestate and a person involved in the transactions, I submit that I

⁴ Para 23

have a sufficiently close interest in the proper winding up of the estate to qualify as an aggrieved person in respect of the executor's remuneration and attorney's fees claim. Apart from anything else, I do not want my father's legacy to be that of a person who failed to pay his professional advisors.'

[29] However, none of this gives rise to a legal right that is 'invaded' by the Master's first and third decisions. For the purposes of the winding up of the estate, the applicant's relationship to the deceased, particularly in circumstances where the will's validity remains unchallenged, is irrelevant and he is merely a creditor with a proved claim. The Master's decision effectively reducing the amount of remuneration payable to the executor and the disbursement payable to the attorneys has no impact on his proved claim.

[30] The applicant therefore is not 'an aggrieved person' in so far as the Master's first and third decisions are concerned, and he therefore has no *locus standi* to challenge them.

COMPOUND INTEREST

[31] The second respondent objected to the calculation of the interest owing on the loans to be based on compound interest, which the Master sustained on the basis that:

'The loan agreement states, the loan will bear interest at the prime overdraft rate and is silent with regards to the basis upon which interest is to be calculated. If it was the parties' intention that interest be compounded, same should have been inserted in the agreement. In the absence of the contrary, the claim for compounded interest is rejected.'

[32] The applicant argued that interest at the 'prime overdraft rate' would always be compounded, and thus the ordinary meaning of the phrase 'at the prime overdraft rate' would encompass interest compounded. He further argued that in order to raise the funds to advance the loans, he had to resort to drawing on his home loan facilities, and was thus himself paying compound interest on the funds. He argued that he would never have agreed to place himself in a position where he would be repaying interest on more onerous terms than that which he was receiving.

[33] The applicant also referred to schedules drafted by the third respondent during 2008 and which were included in the formal objection as supporting documentation by the second respondent. These schedules reflect amounts bearing interest that have been compounded, and which schedules were accepted in the loan agreement and signed by both the second respondent and the deceased. The argument was that by accepting these schedules reflecting the interest amounts which had been compounded, the deceased and second respondent had accepted that the interest was to be compounded.

[34] The argument that the term 'prime overdraft rate' encompasses compound interest, either as part of the ordinary meaning of the phrase or by implication, cannot be sustained. By arguing that such interest is 'always compounded', the applicant is in essence relying on a banking practice. Such an argument would require evidence of banking practices⁵ and cannot be something that the Master could assume or the courts take judicial notice of. Even if this court could do so, it would still not be relevant given that the applicant is not a bank. The Master's decision therefore cannot be set aside on the basis that the term 'prime overdraft rate' in itself would show interest was compounded.

[35] However, the loan agreement expressly stated that the deceased and second respondent 'accept the schedules of the loan as supplied by [the third respondent]' and which agreement bears both their signatures. This shows an understanding at the time the loan agreement was signed, that interest was to be compounded. However, although these documents were before the Master, he does not refer to them in his memorandum; he instead confined himself to the actual contract. The lack of reference to these schedules by the Master in his memorandum indicates that he did not take them into account when determining the terms of the loan agreement in order to reach his decision to sustain the objection. His decision was therefore not properly exercised and ought to be set aside.

⁵ As was done in *Barclays Bank International Ltd v Smallman* 1977 (1) SA 401 (R)

[36] As far as the costs are concerned my view is that, neither party has been substantially more successful than the other.

[37] In the circumstances I make the following order:

(a) The Master's decision in respect of paragraph 1(a) of the Notice of Motion is set aside and the matter is referred back to the Master of the High Court, KwaZulu-Natal, Pietermaritzburg, for reconsideration.

(b) The orders sought in respect of paragraphs 1(b) and (c) of the notice of motion are refused.

(c) The costs of this application shall be paid as a further administration cost in the deceased estate.

K PILLAY J

Date of Judgment	:	12 May 2015
Applicant's Counsel	:	G D Goddard
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