



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 845/2023

In the matter between:

SHIRAZ SABDIA N O
(the joint executor of the estate of the
late Mahamed Faruk Sabdia)

FIRST APPELLANT

RIAZ SABDIA N O
(the joint executor of the estate of the
late Mahamed Faruk Sabdia)

SECOND APPELLANT

and

ANIEL KANJEE SOMA

FIRST RESPONDENT

THE TAXING MASTER OF THE
GAUTENG DIVISION OF THE
HIGH COURT, PRETORIA

SECOND RESPONDENT

Neutral citation: *Sabdia N O and Another v Soma and Another* (845/2023) [2024]
ZASCA 174 (12 December 2024).

Coram: MBATHA, HUGHES, KEIGHTLEY and UNTERHALTER JJA and
COPPIN AJA

Heard: 05 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 December 2024

Summary: Administration of deceased estate – s 51(1)(a) of Administration of Estates Act 66 of 1965 – freedom of testation – review in terms of rule 48 of the Uniform Rules of Court – whether executor is entitled to professional fees.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (N V Khumalo J, sitting as court of first instance):

- 1 The appeal succeeds with costs, including the costs of two counsel, where so employed.
 - 2 The order of the high court is set aside and replaced with the following:
 - ‘1 The decision and ruling of the Taxing Master to disallow the entire fee component of the bill of costs presented by the applicants for taxation under case number 75876/2013 is set aside.
 - 2 The allocator of the Taxing Master is set aside.
 - 3 The taxation of the bill of costs is referred to the Taxing Master. The Taxing Master is directed to re-enrol the taxation after notice to the parties and to proceed to tax the bill of costs on a scale as between attorney and client.
 - 4 The applicant is ordered to pay the fourth and fifth respondents’ costs in the high court.’
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JUDGMENT

Mbatha JA (Hughes, Keightley and Unterhalter JJA and Coppin AJA concurring):

[1] This matter concerns the following cardinal questions of law. First, whether the executor, who is an attorney and acts in his professional capacity, on behalf of the deceased estate in a lawsuit, was not entitled to remuneration as an attorney, notwithstanding the express provisions of the Last Will and Testament (the Will).

Second, whether the decision to disallow the payment of such fees falls within the discretion of a Taxing Master.

[2] In 2006, the late Dr Mahamed Faruk Sabdia (Dr Sabdia) instituted review proceedings against Mr Aniel Kanjee Soma (Mr Soma) in the Land Claims Court, relating to an immovable property in Marabastad, Pretoria. Dr Sabdia died on 5 November 2013, prior to the final adjudication of the review proceedings. His sons, Messrs Riaz and Shiraz Sabdia were appointed as executors of Dr Sabdia's estate (the executors). They were subsequently substituted as litigants in the Land Claims Court matter.

[3] On 13 December 2013, Mr Soma brought an eviction application against the estate of Dr Sabdia, the heirs and three tenants. The eviction application was successfully opposed by the executors, represented by the attorneys Mothle Jooma Sabdia Incorporated (MJS). The court dismissed the application with costs on a punitive scale (as between attorney and client).

[4] On 19 September 2019, MJS set down the bill of costs for taxation before the Taxing Master of the High Court (the Taxing Master). The Taxing Master upheld the objection by Mr Soma that the estate was not entitled to recover the costs awarded by the court, save for the out-of-pocket expenses. The Taxing Master ruled that Mr Shiraz Sabdia, who was also an attorney practicing at MJS, although he acted in his professional capacity on behalf of the estate in the lawsuit, was not entitled to remuneration as an attorney, notwithstanding his co-executor approval. The finding was in line with the decision in *Estate Fawcus v Van Boeschoten and Lorentz*

(*Fawcus*).¹ In addition, the Taxing Master found that the executor's remuneration covered all the work done on behalf of the estate, and that neither Mr Shiraz Sabdia nor MJS was entitled to recover legal costs for work done in their professional capacity. He found support for this conclusion in the judgments of the Gauteng Division of the High Court, Pretoria, *Nedbank Limited v Gordon N.O and Others* (*Nedbank*)² and *Die Meester v Meyer en Andere* (*Meester*).³ As a result, the Taxing Master disallowed the fees in the amount of R465 265.

[5] Aggrieved by the decision of the Taxing Master, the executors instituted review proceedings, challenging the decision of the Taxing Master. The Taxing Master filed a report in terms of rule 48 of the Uniform Rules of Court (the rules), in which he sought the dismissal of the review with costs. Mr Soma sought the same relief.

[6] The review application served before the high court (per N V Khumalo J). On 9 December 2022, the high court dismissed the application with costs. Dissatisfied with the outcome of the application, the executors sought leave to appeal the whole judgment and order of the high court. On 15 May 2023, the high court dismissed the application, with costs. Undaunted, the executors petitioned this Court for leave to appeal. The appeal served before us with the leave of this Court.

[7] It is against this common-cause background that I have to consider the following interconnected issues. First, whether the high court was correct in finding in favour of the Taxing Master. The high court did so on the basis that in terms of s

¹ *Estate Fawcus v Van Boeschoten and Lorentz* 1934 TPD 94.

² *Nedbank Limited v Gordon N.O and Others* [2019] ZAGPPHC 460 para 18.

³ *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 13A-B.

51(1)(b) of the Administration of Estates Act 66 of 1965 (the Estates Act) the executors were only entitled to their executor's remuneration and thus were not entitled to the punitive costs awarded in their favour. The second issue is whether the high court was correct in finding that this was so irrespective of the provisions of the Will.

[8] The high court in arriving at its decision placed significant reliance on *Fawcus*. The principles established in *Fawcus* were followed in *Meester* and in *Nedbank*. In *Fawcus*, the court ruled that an executor who is also an attorney and performs legal services in a professional capacity for the estate is not eligible to receive compensation for those services, notwithstanding his co-executor's approval.

[9] In *Meester*, that court determined the interpretation of the term 'remuneration' as set out in s 51(1) of the Estates Act. It followed the dictum in *Harris v Fisher N.O.* (*Harris*),⁴ where the court held that '[e]xecutors 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'.⁵ These decisions affirmed the principle that it is generally considered a conflict of interest for an executor, who is also an attorney, to act in his professional capacity for the estate and claim professional fees in addition to the fees due to him as an executor. In accordance with the *fiduciary* nature of the executor's responsibilities, if he were to act in his professional capacity, he would only be entitled to re-imbursement for out-of-pocket expenses incurred. His professional work as an attorney is remunerated by way of the fees to which he is entitled as an executor.

⁴ *Harris v Fisher N.O.* 1960 (4) SA 855 (A).

⁵ *Ibid* at 862E.

[10] Before this Court, the executors submitted that their case was distinguishable from the judgments relied upon by the high court. The distinction lay in the fact that Dr Sabdia had made provision in his Will for the payment of the executors' professional fees. The executors maintained that, consequently, there was no possible conflict of interest in this case. They submitted that this aligns with the exception established in *Edmeades, De Kock & Orffer v Die Meester (Edmeades)*,⁶ where the court quoted with approval the following from *Christophers v White* 50 E.R. 683 (footnotes omitted) '...[a] trustee is not allowed to act as his own solicitor and then charge his *cestui que* trust with the amount of his professional fees. *The rule admits of exception when the testator or creator of the trust expressly authorises the trustee to retain his professional costs, shewing thereby, that he would rather run the risk of abuse, by uniting the two characters, and pay the solicitor his costs, than lose his services as trustee*'.⁷ (Emphasis added.)

[11] The executors asserted that the entitlement to remuneration is supported not only by the terms of the Will but also by the provisions of s 51(1)(a) of the Estates Act, which permits the testator to determine the executor's remuneration. Furthermore, they posited that the context and purpose of clause 4 of the Will (the remuneration clause) should be the determining factors in its interpretation. Further, that this purpose and context is to be found in clause 5.3 of the Will, which should be read with the remuneration clause.

[12] The remuneration clause reads as follows:

⁶ *Edmeades, De Kock & Orffer v Die Meester* 1975 (3) SA 109 (O).

⁷ *Ibid* at 114H-115.

‘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.’

And clause 5.3 reads 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.’

The inescapable conclusion to be drawn from these provisions of the Will is that the executors were permitted to charge professional fees for services rendered. This was sanctioned by Dr Sabdia in his Will, even though they were also acting in their fiduciary capacity as executors.

[13] The principles of interpretation were settled in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*.⁸ *Endumeni* reiterated that the process of interpretation is a unitary and objective exercise that pays due regard to the text, context and purpose of the document or instrument being interpreted.⁹ Equally trite, is the general principle of statutory interpretation that the words used in the document should be understood in their normal grammatical sense, unless this would lead to absurdity. In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,¹⁰ this Court cautioned ‘that the triad of text,

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

⁹ *Ibid* paras 18 and 19.

¹⁰ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

context and purpose should not be used in a mechanical fashion'.¹¹ In that regard, I will consider the text in the Will 'in the light of all relevant and admissible context, including the circumstances in which the document came into being'.¹²

[14] Upon applying the aforementioned principles, I find that the language utilised in the remuneration clause is characterised by its clarity and directness. The direction provided is lucid and unequivocal, as it states that the '[e]xecutors shall be entitled to charge and shall be paid all usual professional fees and other fees and charges from business transacted'. The clause explicitly grants the executors the authority to charge for professional fees. In addition, it specifies that they have the right to charge for time spent and actions taken by them or their associates in connection with the administration of the estate.

[15] It is clear that the remuneration clause pertains to fees levied based on the duration of the professional services rendered. In other words, it is time based. Conversely, the statutory rate for executors is a fixed percentage rate, regardless of the time spent or the nature and amount of work performed by them. It is not time based, but performance based. This demonstrates that Dr Sabdia intended his executors to be recompensed for any professional, and hence legal, services actually rendered by them.

[16] This conclusion is underscored by the term 'associates' in the remuneration clause. Executors do not usually have 'associates', although they can exercise their powers through an agent in the administration of the estate. However, Dr Sabdia

¹¹ Ibid para 25.

¹² *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

knew that one of his sons was an attorney, whose associates had already provided litigation services to him in the Land Claims Court matter.

[17] Clause 5.3 expressly directs the executors to do everything necessary, until such time as the dispute in relation to the title of the property is resolved in the Land Claims Court. It explicitly directs that the executors or wife or beneficiaries should assume Dr Sabdia's position as an applicant in the pending Land Claims Court matter. The purpose of clause 5.3 was clearly to mandate the executors diligently to pursue legal proceedings in the Land Claims Court until a final resolution was reached. This is an important indicator that Dr Sabdia's intention was that the executors would be entitled to recoup their professional fees for the work performed in this regard by the associates in the legal firm.

[18] Clause 5.3 further authorised the executors to take action or defend any ancillary proceedings pertaining to the property. It specifically authorised the executors to seek recourse in the courts of law. In this regard, the high court respectfully overlooked clause 5.3. It failed to ascertain the primary objective of clause 5.3. This clause effectively illustrates the intention of the testator and the primary objective of the remuneration clause. In order to fulfil his directions, the testator directed that the attorneys even though Mr Shiraz Sabdia is an executor, should be compensated for their professional services.

[19] In the context of the review application in the Land Claims Court, it is important to note that Dr Sabdia had consistently been represented by MJS. It is evident from the remuneration clause and clause 5.3 that Dr Sabdia desired the continued legal representation of MJS in the Land Claims Court litigation, even after his demise.

[20] Section 51(1) of the Estates Act regulates the payment of an executor's remuneration. Section 51(1) reads as follows:

'Every executor (including an executor liquidating and distributing an estate under subsection (4) of section *thirty-four*) shall, subject to the provisions of subsection (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 [W]ill; 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.'

[21] Section 51(1)(a) expressly makes provision for the payment of remuneration, as may have been fixed by the deceased in his Will. It negates the conclusion reached by the high court that such remuneration is *ultra vires* the settled principles, *contra bono mores* and in conflict with the fiduciary duties of an executor. The high court unfortunately did not construe s 51(1) correctly. It ought to have recognised that there are two distinct legislative frameworks in s 51(1) that govern the payment of an executor's remuneration. Section 51(1) permits a testator to determine remuneration of an executor, including the remuneration that may be earned by an executor who renders professional services to the estate.

[22] In *Fawcus*, in highlighting the inherent nature of the duties of the executor, the court held that even if the estate was successful in litigation, costs awarded against the other party cannot be recovered by the legal representative except for out-of-pocket expenses.¹³ It is unfortunate that the high court rigidly applied the principle in *Fawcus*. It is unnecessary to decide upon the ambit of the principle enunciated in *Fawcus* because s 51(1)(a) of the Estates Act determines the issue before us. Consequently, *Fawcus* does not find application in this matter as Dr

¹³ *Estate Fawcus v Van Boeschoten and Lorentz* 1934 TPD 94 at 96.

Sabdia had expressly determined the remuneration of the executors in his Will.¹⁴ One of those exceptions is where the Will authorises the payment of such fees in terms of s 51(1)(a) of the Estates Act.

[23] In conclusion, I find that the legislative scheme clearly envisages two fee payment regimes, namely, the one determined by the testator or the one prescribed by the statute. The remuneration clause and clause 5.3 of the Will sanctioned the payment of professional fees due to the executors and MJS.

[24] The question whether the decision to disallow the payment of the fees falls within the discretion of the Taxing Master, raises a very important issue. Though this issue was extensively dealt with in the judgment of the high court, it was not fully ventilated before us. And given the conclusion to which I have come as to the primacy of clause 5.3 of the Will in determining the remuneration of the executors, it is not necessary to deal with this aspect of the appeal.

[25] In the result, I make the following order:

- 1 The appeal succeeds with costs, including the costs of two counsel, where so employed.
- 2 The order of the high court is set aside and replaced with the following:
 - ‘1 The decision and ruling of the Taxing Master to disallow the entire fee component of the bill of costs presented by the applicants for taxation under case number 75876/2013 is set aside.
 - 2 The allocator of the Taxing Master is set aside.

¹⁴ Ibid at 98.

3 The taxation of the bill of costs is referred to the Taxing Master. The Taxing Master is directed to re-enrol the taxation after notice to the parties and to proceed to tax the bill of costs on a scale as between attorney and client.

4 The applicant is ordered to pay the fourth and fifth respondents' costs in the high court.'

Y T MBATHA
JUDGE OF APPEAL

Appearances

For the appellants: A T Lamey and C van Schalkwyk
Instructed by: Mothle Jooma Sabdia Incorporated, Pretoria
Matsepes Inc., Bloemfontein.

For the respondents: C A Da Silva SC
Instructed by: LLM Hurter Attorneys, Pretoria
Symington De Kok Attorneys, Bloemfontein