

Debunking the Master of the High Court's Assumed Approval Authority Over a Redistribution Agreement in a Deceased Estate

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Abstract

A redistribution agreement is one of the available methods to assist the executor in winding up a deceased estate. It may be used to overcome impractical situations and/or statutory limitations that might occur during the estate administration process. The heirs and legatees and, in some instances, a surviving spouse may then agree to the reshuffling of their inheritance awards. The Chief Registrar of Deeds issued a directive that places a burden on the Master of the High Court in approving the "acceptance" of the agreement as part of the registration application for the transfer of immovable inheritance property. This was in response to a legal opinion from the office of the Chief State Law Advisor, incorporated in a 2010 internal Master's directive on instruction of the Chief Master. It directed that a redistribution agreement is deemed enforceable only after the Master "duly examined and approved" its legality. However, the Master's practice of approving a redistribution agreement is not a rule of law and cannot supersede the provisions of a statute. This article investigates whether the Master, as a "creature of statute", is acting within the parameters of its statutory administrative acts and functions involving a redistribution agreement.

Keywords

Master of the High Court; redistribution agreement; deceased estate; executor; *Administration of Estates Act* 66 of 1965; Registrar of Deeds; deceased estate administration; acceptance certificate; administration method; liquidation method; inheritance.

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1 Introduction

During the winding-up of a deceased estate, the executor is obliged to choose the best possible method/s to resolve issues caused by statutory limitations,¹ or conflict and/or hardship, and/or impractical situations.² Proactive and timeous action is required to prevent unnecessary delays and/or financial losses.³ One option is to facilitate a redistribution agreement (hereafter "RDA") with the willing cooperation of the heirs involved and/or the legatees (hereafter "beneficiaries").⁴ In such instance, the beneficiaries, and in appropriate cases, a surviving spouse, may agree to the reshuffling of their inheritance property⁵ among themselves using the mechanisms of a sale, donation and/or exchange.⁶

In this article I will investigate the Master's statutory administrative acts and functions⁷ involving an RDA as prescribed in the *Administration of Estates Act* 66 of 1965 (hereafter "the *Estates Act*" or "Act") and regulation 5 to the

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¹ For instance, the *Subdivision of Agricultural Land Act* 70 of 1970 prohibits the transfer of farm property to more than one person.

² It may be impractical and/or impossible to transfer undivided shares in movable inheritance property such as household goods and jewellery.

³ *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 3 SA 295 (A).

⁴ The different administration methods derive from the South African common law. See Bouwer *Bestorwe Boedels* 98, while most of the procedures of the method are prescribed in the *Administration of Estates Act* 66 of 1965 (the *Estates Act*). In the article I prefer to use the term "administration" and not "liquidation" used by scholars and in law cases. In practice I found that sometimes the parties involved, not specialising in deceased estates, inappropriately assign its normal grammatical meaning to the term "liquidation method" as a method when the executor converts all non-liquid estate properties into cash. However, the duty of the executor is to apply the best possible lawful solutions during his/her administration of the properties and liabilities of the deceased estate. The sale of the property of a deceased estate is only one method and is allowed only under specific circumstances. See for instance, Meyerowitz *Administration of Estates* para 12.27.

⁵ Collectively referred to in this article as "inheritance property/properties" that include immovable and/or movable property of the deceased estate (after deductions of estate debts), awarded to beneficiaries as an inheritance in accordance with the South African rules of intestate succession and/or a valid will and/or an RDA (redistribution agreement).

⁶ *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) 630-631, the learned judge Dowling referred to these mechanisms as "vehicles of redistribution".

⁷ See my discussion of the types of administration acts and functions in para 6.2.

Act.⁸ Regulation 5(1)(e)(iii) to the *Estates Act* requires (if applicable) a signed RDA's attachment to the executor's formal report to the Master of the High Court (hereafter "the Master") concerning the winding-up of the estate.⁹ The wording of the regulation seems to imply that the Master should exercise a clerical function in its examination of the formal report in accordance with an attached RDA. In practice the Master assumes an additional supervisory role in assessing an RDA's correctness of facts and/or its legal validity of only those RDAs involving immovable inheritance property. In 2010 the former Chief Master requested a legal opinion (hereafter "the OCSLA's legal opinion") from the office of the Chief State Law Advisor (hereafter "the OCSLA").¹⁰ This was to assess the extent of the Master's administrative acts and functions in its evaluation of RDAs in two identified issues.¹¹ The legal opinion concluded that the Master holds the additional function of supervision, and that an RDA is "enforceable" only after the Master "duly examined and approved" its legality. On instruction of the Chief Master, all Master's branches follow the recommendations of the OCSLA's legal opinion. In the instance where the Master refuses to accept the legality of a consensually agreed RDA, the executor is left with two options. The executor may either proceed with an involuntary sale of the inheritance properties or apply to the High Court for the review¹² of the Master's decision. Whatever decision is taken, this results in a financial loss for the estate and its beneficiaries and/or possible extended delays in the finalisation of such an estate.

The purpose of this article is to raise the question of whether the Master, as a "creature of statute", is acting within the parameters of its statutory authorisation in assessing an RDA's correctness of facts and/or its legal validity.¹³ Is an RDA "enforceable" only after the Master's approval as

⁸ GN R473 in GG 3425 of 24 March 1972.

⁹ Section 35(1) of the *Estates Act* read with reg 5(1) to the Act. The formal report is called a Liquidation and Distribution account (L&D account).

¹⁰ The Chief State Law Advisor (OCSLA) provides legal advice, representation, and legislative drafting services to the executive and all state departments.

¹¹ See my discussion in para 5.3.

¹² Section 95 of the *Estates Act*.

¹³ The scope and length of the article does not allow an in-depth study of the Deeds Office administrative actions and the South African Revenue Service's (SARS's) position in its exercising of fiscal control relating to RDAs as well as all the responsibilities and liabilities of the executor and/or conveyancer. See for instance *West Practitioners Guide to Conveyancing* ch 13, 200ff; *Meyerowitz Administration of Estates* paras 12.1-12.46, 13.7; *Nel Jones Conveyancing* 80-84; *Bouwer Bestorwe Boedels* 121-127; *Kernick Administration of Estates* 58-59; Chief Registrar of Deeds *Practice Manuals* 1.384-1.392.

recommended in the OCSLA's legal opinion? Furthermore, what is the extent of the Master's statutory administrative acts and functions prescribed in the *Estates Act* and regulation 5 thereto that involve RDAs?

I will first provide a practical example of an RDA. Then I will give a brief sketch of an RDA's functionality in South African deceased estates from its roots in the Roman law, Roman-Dutch law, and its development of the common law in court cases. After that I will outline the statutory provisions related especially to a notarised RDA that also involves certain statutory offices and office-bearers. The outline will be followed by a discussion of the historical context of the Master's practices pertaining to an RDA. The greater part of the article deals with the extent of the Master's administrative acts and functions involving an RDA as set out in the *Estates Act* and regulation 5 to the Act. In this discussion I will consider the recommendations in the OCSLA's legal opinion. As a result of my conclusions, I will present alternative internal procedures to replace the Master's existing practice. This will relate to all RDAs for the Master to perform lawful administrative acts as required and empowered in terms of statute. Lastly, I will reflect on the consequences of unlawful administrative acts in the Master's assumption to approve the legality of RDAs.

2 Practical example of what an RDA entails

A, B and C are to inherit undivided shares in 5000 hectares of farmland and two motor vehicles after the payment of the estate debts of R500 000. However, the beneficiaries consider sharing co-ownership in two motor vehicles as impractical. Also, section 3 of the *Subdivision of Agricultural Land Act 70 of 1970* prohibits the transfer of the farm property to more than one beneficiary. As a solution, the beneficiaries could agree that the executor liquidate the estate properties¹⁴ and distribute the cash proceeds. As an alternative, the beneficiaries may opt to redistribute the inheritance property using the mechanisms of a sale, and/or donation and/or an exchange. They may agree that A receives the farmland in exchange for B and C each receiving a motor vehicle. A, who receives the property of

¹⁴ In the article "estates' property or properties" referred to the deceased estate's asset or assets.

greater value (the farmland) agrees to bring-in cash and pay the estate debts.¹⁵

3 The historical background to an RDA: Roman law, Roman-Dutch law, and court case development

Roman law is considered the forerunner of the South African RDA in its developing stage. Under Roman law, the relationship between beneficiaries who were co-owners of the same property continuously developed. In early Roman law, a co-owner could independently dissolve the co-ownership by means of an action called *actio familiae eriscundae*. Later, in the Justinian period, the mutual consent of all the co-owners was required.¹⁶

The Roman-Dutch law is, however, the South African common law source in so far as RDAs in their final developed form is concerned. Roman-Dutch law recognised the requirement of mutual consent and the option to bring-in movable property as a redistribution mechanism.¹⁷ Under Roman-Dutch law, family beneficiaries who shared in a family inheritance could opt to reshuffle their shared inheritance.¹⁸ The common law RDA served as a practical solution to avert undesirable consequences and situations resulting from the shared family inheritance of property.¹⁹

From the eighteenth century onwards, an RDA was initially referred to in South African court cases as a "family agreement". In these cases the court followed a stricter approach in applying Roman-Dutch law regarding the choices available pertaining to an RDA's terms and conditions.²⁰ In the

¹⁵ See practical examples in Meyerowitz *Administration of Estates* paras 12.31-13.7; Nel Jones *Conveyancing* 80-84; Bouwer *Bestorwe Boedels* 121-127; Kernick *Administration of Estates* 58-59.

¹⁶ Kaser 1984 *Römisches Privatrecht* 123, 225; Van Warmelo 1950 *THRHR* 217, 223-227, 232.

¹⁷ In Roman-Dutch law the consensual basis of an RDA was emphasised by Voet *Commentarius ad Pandectas* para 10.2.32. Also see Huber *Heedensdaegse Rechtsgeleertheit* para 3.29.16; Maasdorp *Hugo Grotius* 297-298.

¹⁸ Huber *Heedensdaegse Rechtsgeleertheit* para 3.29.16; Maasdorp *Hugo Grotius* 297-298. See the discussion in Claassens' published LLM thesis on the historical perspectives of South African RDAs (Claassens 2004-5 *Tydskrif vir Boedelbeplanningsreg* 38-45).

¹⁹ As Voet *Commentarius ad Pandectas* para 10.2.32, a Roman-Dutch legal scholar, stated: co-ownership is (or may be) "that mother of disagreement and carelessness".

²⁰ *Esterhuizen's Executor Dative v Registrar of Deeds* 5 Searle 124; *Testate Estate of John McDonald* (1897) 18 NLR 156. The latter case was confirmed in *Bydowell v Chapman* 1953 3 SA 514 (A) 523B (the *Bydowell* case) as a "case of schichten en delen between beneficiaries of full capacity".

majority of the decisions from the 1910s until the 1960s the court made a distinction between an RDA²¹ (later coined as such)²² and the Natal practice of entering into family arrangements, coined a family agreement.²³ The latter was practised in Natal for more than 80 years "in the same spirit" as those "supported by the English Courts".²⁴ The Natal family agreement "aimed directly or indirectly ... to alter or modify the effect of provisions contained in wills".²⁵ The family arrangements were usually agreed upon after the administration of the estate – even years after the death of the testator.²⁶ The family members would then approach the Natal court to grant the application for the incorporation of the family agreement.²⁷ In *Bydawell v Chapman*,²⁸ (hereafter "the *Bydawell* case") the Appellate division confirmed the position of most prior cases that the family agreement practised in Natal is "not warranted by our law and, when challenged, had no claims to recognition".²⁹ Unlike the family agreement, an RDA is a contract between the beneficiaries agreed upon during the administration of the estate.³⁰

As time passed, the court gave a wider interpretation to an RDA's application in South African law.³¹ This includes the purpose of resolving

²¹ See *Bydawell* case 515E-H, 516; *De Wet v De Wet* 1951 4 SA 212 (CPD). Also see *Ex parte Grant* 1952 4 SA 95 (N); *Ex parte Adams* 1964 2 SA 135 (CPD).

²² One may state that the naming of an RDA as a "redistribution agreement" relates to original inheritance awards that are *redistributed* with the conclusion of an RDA. Consequently, the inheritance awards in the *distribution* section of the L&D account should be in correlation with the *agreed redistributed awards* in the accompanied RDA.

²³ The length and scope of the article does not permit a discussion of the family agreement's historical development.

²⁴ *Ex parte Bloch* 1936 WLD 48; *Ex parte Mapherson* 18 CTR 154; *Ex parte Forbes* 1912 NPD 352; *In re Estate Linder* 1935 NPD 99. But see *Bydawell* case 518H-519A, 521A-C.

²⁵ *Bydawell* case 521B.

²⁶ In the *Bydawell* case 520H "the family agreement purports to effect substantial deviations from the testator's will" – almost 30 years after the death of the testator.

²⁷ *Bydawell* case 516A. See *Ex parte Forbes* 1912 NPD 352; *In re Estate Linder* 1935 NPD 99; but see *Ex parte Grant* 1952 4 SA 95 (N) and *Ex parte Trustees MH Adam* 1927 NPD 314.

²⁸ *Bydawell* case.

²⁹ *Bydawell* case 521C.

³⁰ *Bydawell* case 523H.

³¹ For instance, in *Ex parte Evans and Evans* 1950 3 SA 732 (T) the co-heirs agreed that each party receives one of the two co-shared immovable properties, and also takes over the liability of the bond registered to such property. In *Van den Berg v Registrateur van Aktes* 1974 4 SA 619 (T) the fiduciarius was allowed in an RDA to

issues in statutory prohibitions³² in the instance of a shared inheritance and/or other impractical situations³³ created by the provisions of a will or the rules of intestate succession.³⁴ Also, the conclusion of an RDA is a legal method that may be used to overcome the demands and constitutional developments in the field of the Law of Persons, Family Law, testate and intestate succession such as polygamous marriages with succession rights and/or maintenance claims by a surviving spouse.³⁵ This contributed to the development of an RDA that is now considered something more than a stereotype contract.³⁶ The beneficiaries have the option to agree to a certain extent to "trade" with their bequests.³⁷ They may agree by either a sale, exchange, or donation to reshuffle the inheritance bequests among themselves. They may also bring-in movables that do not form part of the estate to equalise the redistribution if the beneficiaries involved so wish.³⁸

4 Current legislation: directly related to the RDA written

The common law RDAs confirmed in court decisions were statutorily recognised on 11 September 1937 with the commencement of the *Deeds Registries Act* 47 of 1937 (hereafter "the *Deeds Act*").³⁹ Sections 14(1)(b)(iii) and (iv) of the *Deeds Act* applied only to those RDAs involved with the transfer of ownership of immovable inheritance property and/or rights in a

renounce his fiduciary rights to receive a usufruct. In *Ex parte Jooste* 1968 4 SA 437 (O) a personal servitude may be created in an RDA. See the discussion in Meyerowitz *Administration of Estates* paras 12.31, 13.7; Nel Jones *Conveyancing* 80-84; Bouwer *Bestorwe Boedels* 121-127; Kernick *Administration of Estates* 58-59. Eg s 3 of the *Subdivision of Agricultural Land Act* 70 of 1970.

³² Eg s 3 of the *Subdivision of Agricultural Land Act* 70 of 1970.

³³ *Klerck v Registrar of Deeds* 1950 1 SA 81 (T); *Klerck v Registrar of Deeds* 1950 1 SA 626 (T); *Ex parte Jooste* 1968 4 SA 437 (O); *Van den Berg v Registrateur van Aktes* 1974 4 SA 619 (T); *Ex parte Evans and Evans* 1950 3 SA 732 (T).

³⁴ *Lubbe v Kommissaris van Binnelandse Inkomste* 1962 2 SA 503 (O); *Ex parte Grant* 1952 4 SA 95 (N); *Van den Berg v Registrateur van Aktes* 1974 4 SA 619 (T). But see *Oertel v Pieterse* 1954 4 SA 746 (O).

³⁵ The length and scope of the article does not permit a discussion of the maintenance claim of a surviving spouse that may be incorporated in an RDA in terms of s 35(9) of the *Estates Act* read with s 2(3)(c) of *Maintenance of a Surviving Spouse Act* 27 of 1990.

³⁶ See the discussion by West *Practitioners Guide to Conveyancing* ch 13, 200ff regarding the practical considerations and implications of RDAs; *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) 630-631.

³⁷ *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) 630-631.

³⁸ *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) 630-631; *Cradock's Estate v Cradock* 1951 3 SA 51 (N) 59C.

³⁹ Denoon 1945 SALJ 312 the Chief Registrar confers at the time of the *Deeds Registries Act* 47 of 1937 (the *Deeds Act's*) promulgation, that "section 14 ... was intended to represent the general practice of the Deeds Office at the time of its drafting".

deceased estate.⁴⁰ The provisions is part of a list of exceptions⁴¹ to the general rule that the "transfer of land and cessions of real rights therein must follow the sequence of the successive transactions in pursuance of which they are made". Section 14(1)(b)(iii) allows for the redistribution of any portion or whole of the immovable inheritance property and/or rights. Section 14(1)(b)(iv) allows for the bringing-in of movable property not forming part of the estate to equalise the division.

Regulation 5(1)(e)(iii) to the *Estates Act*, published in 1972,⁴² is the only other statutory provision that applies to an RDA that includes immovable inheritance property as well as movable property. The only reference made to an RDA in the second proviso of regulation 5(1)(e)(iii) is the requirement that the executor must attached a signed RDA to the Liquidation and Distribution Account (hereafter "the L&D account")⁴³ with its submission to the Master. Neither the *Estates Act* of 1965 nor the repealed *Estates Act* 24 of 1913 (hereafter "the *Repealed Estates Act*") mentions an RDA.

The only statutory provisions, sections 14(1)(b)(iii) and (iv) of the *Deeds Act* and regulation 5(1)(e)(iii) to the *Estates Act*, pertaining to an RDA involve the Deeds Office and the Master as statutory offices. The Deeds Office of the Department of Rural Development and Land Reform holds a statutory duty to ensure an effective land registration system as directed in the *Deeds Act* and its regulations.⁴⁴ The Master, a functionary of the Department of Justice, exercises – in terms of section 4 of the *Estates Act* – statutory designated jurisdiction over the South African estates of deceased persons. As a "creature of statute", the Master's function, powers, and administrative acts are limited by South African national legislation such as the *Estates Act*

⁴⁰ The statutory exception seems to protect the State's fiscus whilst acknowledging the Roman-Dutch law RDA as a method of liquidation. See the discussion by Denoon 1945 *SALJ* 319. The earlier case in 1865 of *Esterhuizen's Executor Dative v Registrar of Deeds* 5 Searle 124 was concerned only with whether transfer duty should be paid. After *Lubbe v Kommissaris van Binnelandse Inkomste* 1962 2 SA 503 SA (O), s 9(1)(e)(i) of the *Transfer Duty Act* 40 of 1949 provides for an exemption from the payment of transfer duty on property if a redistribution of immovable property in a deceased estate takes place.

⁴¹ Exceptions are outlined in ss 14(1)(b)(i)-(iv), 33(1), 92(2) and 24bis(2) of the *Deeds Act*.

⁴² GN R473 in GG 3425 of 24 March 1972. Regulation 5(1) deals mainly with the required format of the executor's L&D account to the Master.

⁴³ See different examples of the L&D accounts in Meyerowitz *Administration of Estates* paras 15.84-15.87.

⁴⁴ Section 3 of the *Deeds Act*. See Chief Registrar of Deeds *Practice Manuals* 1-9.

and its regulations.⁴⁵ Some of the prescribed administrative acts of the Master are to examine the L&D account and to request documents and/or ask questions regarding the executor's winding-up of the estate.⁴⁶

As a representative of a deceased estate, an executor is appointed and authorised by the Master to administer an estate.⁴⁷ The executor's administrative acts, powers and functions are directed by South African statutory law⁴⁸ and court cases.⁴⁹ The executor acts so in a fiduciary capacity on behalf of beneficiaries and creditors.⁵⁰

When there is immovable property involved, the assistance of a conveyancer is required by statute. In South Africa only conveyancers⁵¹ may prepare documents for registration at the Deeds Office pertaining to the transfer of land, the registration of mortgage bonds and all other matters involving immovable property and/or rights thereto.

5 Guidelines and interpretations of statutory duties and administrative actions: registrars' conference resolutions and Master's instructions

Officials of the Master and Deeds Office differ at times in their interpretation of statute regarding their offices' practices and procedures relating to RDAs, especially those involved with immovable property. As a result, the Deeds Office and Master officially address at times some issues concerning RDAs and publish their resolutions in so-called directives. The main aim of these directives is to bring about uniformity in the practices and procedures due

⁴⁵ *Meester v Protea Assuransiematskappy Bpk* 1981 4 SA 685 (T) 690; *The Master v Talmud* 1960 1 SA 236 (C) 237-238; *Hartley v The Master* 1921 AD 403.

⁴⁶ See Meyerowitz *Administration of Estates* paras 15.1-15.2.

⁴⁷ See the discussion by Meyerowitz *Administration of Estates* paras 1.3-1.8 regarding the Master and paras 12.1-12.46 regarding the executor. See my discussion in paras 6.3.5 and 8.

⁴⁸ See my discussion in paras 6.3.5, 7 and 8.

⁴⁹ *Van Niekerk v Van Niekerk* 2011 2 SA 145 (KZP); *Reichman v Reichman* 2012 4 SA 432 (GSJ).

⁵⁰ *Malcomes v Kuhn* 1915 CPD 852; *Brink's Curator v Brink's Trustee* 5 Searle 329; *Commissioner of Inland Revenue v Emary* 1961 2 SA 621 (A); *Harris v Fisher* 1960 4 SA 855 (A); *Van Niekerk v Van Niekerk* 2011 2 SA 145 (KZP). See Meyerowitz *Administration of Estates* para 12.20.

⁵¹ Only an admitted attorney may qualify to be appointed by the court as a conveyancer in terms of the *Legal Practice Act* 28 of 2014.

to a disagreement or uncertainty relating to the officials' statutory administrative acts and functions.⁵²

The directives of the Deeds Office are 1) the registrars' conference resolutions known as "RCRs", 2) the circulars of the Chief Registrar known as "CRCs", and 3) legal opinions of the Chief Registrar. The RCRs issued by the Chief Registrar are agreed upon during the Registrar of Deeds' conferences attended by the Chief Registrar, Assistant Registrars, delegated legal practitioners, the Chief Master and senior Master's officials. The Master's presence at such a conference is only to assist with those issues that involve the transfer of estate immovable property and related estate matters. The CRCs compiled and issued by the Chief Registrar address immediate pending issues on practical problems in the Deeds Office. The Chief Registrar may suspend a RCR by issuing a CRC.⁵³ The RCRs and CRCs are published online and considered as "knowledge to the world".⁵⁴

The Chief Master's directives are like the CRCs issued by the Chief Registrar.⁵⁵ While the Chief Master's directives are applicable to all the Master's branches, each branch holds its own office instructions. They serve as guidelines for its personnel regarding certain practices and procedures applicable to that branch. The branch's office instructions cannot supersede or contradict the Chief Master's instructions. The branch office instructions are issued by the office manager (the Master or Deputy Master) of the branch office and sometimes on instruction of the Chief Master. Whilst the Chief Master's directives are published online, the office

⁵² Chief Registrar of Deeds *Practice Manuals* 1-1, 1-9 and especially 1-10(A). The *Deeds Act* is considered a procedural Act.

⁵³ The Registrar can overrule a Circular of the Chief Registrar (CRC) or Registrar's Conference Resolution (RCR) only if such an official "lists the points of law" in so far as the CRC or RCR or legal opinion of the Chief Registrar "would result in constituting an invalid title or substituting applicable or existing legislation". Also, the official must "inform the Chief Registrar of Deeds, his/her colleagues and conveyancing fraternity why he/she found it necessary not to implement a directive" (Chief Registrar of Deeds *Practice Manuals* 1-10A-B).

⁵⁴ Chief Registrar of Deeds *Practice Manuals* 1-1, 1-9-1 and 1-10A.

⁵⁵ In terms of s 14(a) of the *Judicial Matters Amendment Act* 16 of 2003 the Chief Master is the "executive officer of the Master offices and exercise such supervision over all the Masters as may be necessary in order to bring about uniformity in their practice and procedure". The Chief Master's directives are a means to the end to exercise his/her statutory duty but still s 14(a) does not warrant the Chief Master to issue directives that are not in adherence with the law.

instructions of the branch are kept at the respective office. The instructions are not readily available to legal practitioners and the public.

To conclude, a directive is not a source of law. It is a written product of the offices' interpretation of statute giving rise to certain practices and procedures at a given time. However, Mr Dudley Lee, a conveyancer manager who was an Assistant Registrar of Deeds for more than sixteen years, remarked in an online conveyancer forum⁵⁶ that "(P)ractices often also find the basis for their existence in notes (meaning directives) with no basis in law". As time progresses, such "practices" may "become almost impossible to get rid of".⁵⁷ This seems to be the case in the sequence of events outlined in the next sections.

5.1 Registrars' conference resolutions (RCRs) directly related to RDAs

RCRs serving as guidelines to the Deeds Office practices hold no statutory authority over another state department's administrative acts and statutory functions. However, the registrars' conference resolution, RCR 2 of 1952, represents the first notarised practice that requires the Master's "acceptance", explicitly referring to those RDAs involving immovable inheritance property.⁵⁸ Neither the *Repealed Estates Act* nor the *Estates Act* place an obligation on the Master to abide by the Deeds Office's direct or indirect request to evaluate the validity of an RDA in its form and/or content involving immovable property.

In later years directives followed to either withdraw previous ones and/or to present clarification regarding practical procedures to be followed in RDAs. Notably, during the 2002 registrars' conference the previous Chief Master publicly affirmed the Master's limitations in giving effect to RCRs relating to RDAs. RCR 22 of 2002 notarised that the Chief Master at the time has

openly admitted that the (examination of the) contractual capacity of the

⁵⁶ These remarks were made on the Lexis Digest platform (previously *Ghostdigest*) with a readership of 10 000 per month that publishes articles on issues applicable to the conveyancing industry.

⁵⁷ Lee 2016 <http://www.ghostdigest.com/articles/transfer-of-shares-in-farms/54962>.

⁵⁸ It directs that an RDA presupposes a variation of the L&D account and in the instance of any transfer of immovable inheritance property, the agreed reshuffled awards in an RDA must be reflected in the L&D account. Otherwise, successive transfers contemplated by s 14 must be given effect. Also, the conveyancer must include in his/her registration application the original or certified copy (provided by the Master) of the "endorsed" RDA.

parties to an RDA is not the responsibility of the Master, irrespective of the ruling taken at a previous registrars' conference.

As a result, RCR 22 of 2002 directed that it is the duty of the Deeds Office in terms of section 3(1)(b) of the *Deeds Act* to examine documents lodged for registration such as an RDA.⁵⁹ In 2006 RCR 54 directed that the Master's so-called "acceptance" of an RDA is not a prerequisite for the agreement's validity when a master's representative in a section 18(3) estate⁶⁰ is appointed because "there is no legislation to enforce it".⁶¹ However, by implication this does not apply to an estate where an executor is appointed.

5.2 2010 OCSLA's legal opinion incorporated in a Master's instruction

In 2010 the Chief Master requested a legal opinion from the Office of the Chief State Law Advisor due to a "difference of opinion" amongst the Master's officials regarding the "correct legal position" of two issues involving RDAs.⁶² This request arose from a case where a "complaint" was lodged with the Master concerning an alleged undue influence in an agreed RDA.⁶³ The Master refused to accept the agreed RDA "even though the agreement itself appeared to comply with all the requirements for validity".⁶⁴ The OCSLA's legal opinion raised two questions, namely (1) "whether or not an executor of an estate must be a party to an RDA?" and (2) "when does an RDA become valid – on signature thereof by all the parties, i.e. meeting all the validity requirements, or on acceptance thereof by the Master?"⁶⁵ It seems that the OCSLA's legal opinion dealt with RDAs in general. The Chief Master distributed the OCSLA's legal opinion to all the Master's branches, instructing them to follow its recommendations as a

⁵⁹ For instance, the Deeds Office must inform the conveyancer if the contractual capacity of the parties is *ex facie* faulty.

⁶⁰ In terms of s 18(3), when the total value of an estate is less than R250 000 the Master "may dispense" with appointing an executor by appointing a master's representative instead. The Master "may give directions as to the manner in which such an estate shall be liquidated and distributed". In practice, the Master does not require the lodgement of a L&D account.

⁶¹ Later, RCR 68 of 2010 directed that an RDA in a s 18(3) estate must be accepted. Also see my discussion in para 5.3.

⁶² Master's Office Instruction 36 of 2010, Master of the Free State of 21st July 2010, wherein the OCSLA's legal opinion is reproduced (hereafter the OCSLA's legal opinion) para 1 at 1.

⁶³ OCSLA's legal opinion para 2 at 2. It is unclear if the complaint was considered an objection in terms of s 35(9). If so, the alleged undue influence is factually based, and the Master may not resolve or decide on it. See my discussion in para 6.4.

⁶⁴ OCSLA's legal opinion para 2 at 1.

⁶⁵ OCSLA's legal opinion para 1 at 1.

uniform practice. The OCSLA's legal opinion was incorporated in and annexed to the Bloemfontein branch's Office Instruction 36 of 21 of July 2010 (hereafter "Master's instruction of 2010"). The main findings of the OCSLA's legal opinion are outlined in the next sections.

5.2.1 Findings on the first issue: an executor need not be a party to an RDA

Whether an executor needs to be a party to an RDA had been debated over the years. RCR 34 of 2005 directed that an executor is not a party and that only beneficiaries who have vested rights⁶⁶ in their inheritance property can be parties to the contract. I agree with the OCSLA's legal opinion that legislation makes no mention of the requirement for an executor to be a party to an RDA.⁶⁷

5.2.2 Findings on the second issue: RDA enforced only after the Master's acceptance

Turning to the second issue, which is also the central theme of this article, the question was raised as to when an RDA becomes valid: on signature by all parties with the necessary legal capacity or on acceptance by the Master?

The OCSLA's legal opinion cited Kerr's stance,⁶⁸ that an RDA is deemed to be "contractual in nature" and the "general principles of the law of contract" are to be met.⁶⁹ Nevertheless, as a "case in point" OCSLA's legal opinion considered that the "situation ... [is] slightly different" regarding an RDA.⁷⁰ The Master's "duly examination and approval" of an RDA is considered a so-called "critical step" before the beneficiaries involved or the executor may "unilaterally enforce an RDA".⁷¹ It was considered "part of the Master's duty" to "oversee the L&D accounts in terms of section 35(2A) of the *Estates*

⁶⁶ Although not cited, see *Leach v Champion Estates Ltd* 1956 3 SA 647 (O).

⁶⁷ The OCSLA's legal opinion refers to a few court cases and the applicable statutory provisions. However, most of the arguments were substantiated by excerpts from estate administration handbooks, i.e., Kernick *Administration of Estates* 58; Abrie *et al Deceased Estates* 12, 114; Meyerowitz *Administration of Estates* paras 13.17, 12.24, 12.20, 12.31; Wiechers and Vorster *Administration of Estates* 5-16; Swart *et al Estates* 54; Bouwer *Bestorwe Boedels* 121; Kerr *Law of Contract* 41, 123; and an unaccredited journal article, namely Herbst 2010 *De Rebus* 17.

⁶⁸ Kerr *Law of Contract* 41.

⁶⁹ OCSLA's legal opinion para 6.1 at 9.

⁷⁰ OCSLA's legal opinion para 6.2 at 9.

⁷¹ OCSLA's legal opinion para 6.2 at 10.

*Act*⁷², and to reject or approve the attached RDA in the instance that "the Master may still find it wanting in some respects" (*sic*).⁷³ This is the case irrespective of whether a dispute⁷⁴ was submitted to the Master and/or if an RDA was procedurally and legally valid as a binding agreement.⁷⁵ The OCSLA's legal opinion referred to a situation when a minor's inheritance is involved. This was to illustrate why the Master's Office may "actually refuse to approve an RDA". The opinion provided the following scenarios as examples:

- "Where a minor is involved, the Master must still be satisfied that the minor is not placed at a disadvantage in the sense that the assets which the minor will receive are equivalent in value to his or her original undivided share in the inheritance",
- "if the Master considers it desirable, the Master may even require the High Court to approve a RDA in which minor beneficiaries have an interest."⁷⁶

5.3 Impact of 2010 OCSLA's legal opinion

The incorporation and adoption of the OCSLA's legal opinion as a Master's instruction resulted in a change not only of the Master's position, but also of that of the Deeds Office, which resonated in a later court decision.

Initially, RCR 52 of 2010, citing the *Bydowell* case,⁷⁷ stated that an RDA is nothing less than a contract. All contractual requirements must be adhered to. The RCR confirmed the position of RCR 22 of 2002 that it is not the Master's responsibility to assess the contractual capacity of the parties. However, in the same year RCR 68 of 2010 inferred the Master's new position based on the OCSLA's legal opinion. Reference is made to "a legal opinion's" view that an RDA is "only final when the Master has accepted such agreement". This seems to be in contradiction of RCRs 52 of 2010 and 22 of 2002. Also, that an "RDA needs not to be entered by the executor". RCR 68 of 2010 concluded that submitting a certified copy of the accepted RDA will not suffice anymore. Only the original RDA accepted by the Master

⁷² OCSLA's legal opinion para 6.2 at 10. However, s 35(2A) finds no application to RDAs as discuss in para 6.5.2.

⁷³ OCSLA's legal opinion para 6.3 at 10.

⁷⁴ OCSLA's legal opinion para 6.2 at 9.

⁷⁵ OCSLA's legal opinion para 6.3 at 10.

⁷⁶ OCSLA's legal opinion para 6.3 at 10. See my discussion in para 6.5.1 when a minor is involved.

⁷⁷ The court confirmed that when an RDA is included "... it must be plain that any rights acquired during the agreement are contractual they may contract to render to each other the fruits of the devolution, if and when they mature or accrue, but cannot alter the devolution by contract". *Bydowell* case 523G-H.

must be submitted for registration purposes. This implies that an original RDA submitted to the Master is to be removed from the Master's file and placed in the possession of the Deeds Office. However, with a section 18(3) appointment, a certified copy of a "duly accepted" RDA would suffice, because "the section 18(3) estate is not advertised".⁷⁸

The current practice by both the Deeds Office and the Master presumes that the Master's so-called acceptance (or approval) of an RDA is a prerequisite for the agreement to be deemed "final" and "enforceable". This position seemed to be adopted in a 2016 unreported case of *Van der Merwe v De Klerk*.⁷⁹ The court held that if the Master did not "approve" an RDA, then the submitted RDA is regarded as "invalid".⁸⁰ Neither the court nor RCR 68 of 2010 indicate what "approve" or "acceptance" means and/or entails, nor did they cite authority for any of the conclusions reached.

6 Master's role and administrative acts involving an RDA: Estates Act and Regulations

The role of the Master, as a creature of statute, the administrative acts and functions in the examination of RDAs may be gleaned only from the wording of statutory provisions and not from any directive issued by the Master and/or Deeds Office. Thus, what is and/or should be the Master's role,

⁷⁸ The scope and length of the article does not allow a discussion if s 42(1) applies to a s 18(3) estate when the lodgement of the L&D account and its advertisement are not required. Section 42(1) requires the conveyancer's certification of the correctness of the L&D account. As good practice, the master's representative should submit an informal L&D account to the beneficiaries. I propose that the master's representative should also present to the conveyancer the original informal account and signed RDA to assess if the liquidation and distribution was done correctly and to provide certified copies thereof for registration purposes.

⁷⁹ *Van der Merwe v De Klerk* (82534/2016) [2017] ZAGPPHC 593 (12 September 2017). The court states that "no reasons were advanced as to why the agents proceeded to implement the terms of the unauthorised RDA without the necessary authorisation by the Master" and of which the "terms were against the provisions of the will" as well as to the fact that the one executor (applicant) objected against the agreement.

⁸⁰ It is clear from the facts in the case that the so-called "unauthorised" RDA is invalid. Since the appointment letter of the trustees of the testamentary trust (the main beneficiary and party to an RDA) was not issued before the conclusion of an RDA. Consequently, persons purported to act as trustees (before their appointment letter is issued) do not have the necessary capacity to enter into an RDA. Any such act is considered be null and void and incapable of ratification. See *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W).

functions and administrative acts as a statutory-created entity and public service office pertaining to RDAs?

6.1 Master's role involving an RDA in adherence to its constitutional duty

The OCSLA's legal opinion inferred that Master's officials should understand their prescribed statutory functions and administrative acts through the lens of their assumed duty "to protect" the interests of the parties involved.⁸¹ As far back as 1892 in the case *Wessels v The Master of the High Court*⁸² the court held that the Master's "sole interest is to protect the interests of heirs, legatees, creditors and all other persons having any claim upon the estate". However, since 1994⁸³ public officials have had to uphold an imposed constitutional duty. Section 8(1) read with sections 195(1) and 195(2) of the *Constitution of the Republic of South Africa, 1996* (hereafter "the Constitution") demands that the exercise of public administrative acts must be transparent, responsible, open and accountable.⁸⁴ Public officials are obliged to maintain a high standard of professional ethics and to perform their public administrative acts efficiently and effectively.⁸⁵ Legislation is enacted to promote these values and principles, such as the *Promotion of Access to Information Act 2 of 2000* (hereafter "PAIA") and the *Promotion of Administrative Justice Act 3 of 2000* (hereafter "AJA").⁸⁶

I propose that the Master's presumed role of protector on behalf of the interest of all parties involved could compromise the fulfilment of the Master's constitutional duty. On the other hand, if the Master acts in the role of an adjudicator, he/she would be better equipped to act impartially, reasonably, and procedurally fairly – refraining from giving the impression of descending into the arena. This was also the stance of the 2005 Law Commission Report.⁸⁷ The mandate of the Law Commission was to make

⁸¹ OCSLA's legal opinion para 6.3 at 10. Also see my discussion in para 6.5.

⁸² *Wessels v The Master of the High Court* (1892) 9 SC 18.

⁸³ In September 1997 the Batho Pele White Paper "People First" was issued in the spirit of the *Promotion of Administrative Justice Act 3 of 2000 (AJA)* and s 33 of the *Constitution of the Republic of South Africa, 1996* (the Constitution). It consists of a set of eight principles to guide the public service by calling for a change in the public service's systems, procedures, attitudes, and behaviour to serve all of the people of South Africa. DPSA 1997 <http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/frameworks/white-papers/transform.pdf>.

⁸⁴ See Van Heerden 2009 *Politeia* 53-58.

⁸⁵ These values are addressed in the eight principles of the Batho Pele Paper.

⁸⁶ See Kotzé 2004 *PELJ*; Thornhill 2011 *Journal of Public Affairs* 80-81.

⁸⁷ SALRC *Administration of Estates*.

recommendations for proposed draft legislation and review of the administration of estates to create a unitary system for all South Africans.⁸⁸ The Law Commission recommended that the "role" of the Master is that of an "independent adjudicator". The Law Commission warned that relying on the Master to protect the interest of parties involved "creates a false sense of security and discourages beneficiaries and creditors from protecting their own interests".⁸⁹ On the other hand, "in principle" it is the executor's responsibility to administer the deceased estate in a fiduciary capacity.⁹⁰ The Law Commission pointed out that the executor has no general duty to administer the deceased estate as the Master directs.⁹¹ Also, section 99 of the *Estates Act* directs that "no Master in his official capacity shall be capable of acting as executor, tutor or curator".

6.2 Master's administrative acts involving an RDA: clerical and quasi-judicial functions

Turning to the question as to what the extent of the Master's administrative acts are: in *Nedbank Ltd v Mendelow*⁹² (hereafter "the *Nedbank case*") it was held that all acts of a Master official are "administrative acts" as "empowered" by statute. However, "not every act of a Master official amount to an administrative action that is reviewable under *AJA* or otherwise".⁹³ The court distinguished between an administrative act holding a "quasi-judicial" function that involved a decision reviewable under *AJA* and one that is "purely clerical".⁹⁴

In this article the coined term "clerical act" refers to an administrative act holding a clerical function that excludes the involvement of a judgment. It

⁸⁸ The thirty-four commentators were representatives from the different sectors in the deceased estate industry including SARS, a trust company, the law society, the magistrates' commission, six senior level Master officials, two attorneys, a professor of law, an appraiser and eleven magistrates (*SALRC Administration of Estates* annex 4 at 129).

⁸⁹ *SALRC Administration of Estates* para 5.2.13 at 20.

⁹⁰ *SALRC Administration of Estates* para 5.2.14 at 20.

⁹¹ Compare Meyerowitz *Administration of Estates* para 1.7 at 1-5 and *The Master v Van Zyl* 1944 TPD 211 215.

⁹² *Nedbank Ltd v Mendelow* 2013 6 SA 130 (SCA) (the *Nedbank case*). In this case the Master signed a certificate in terms of s 42(2) as a statutory prerequisite for the transfer of sold estate property. However, the signature of the seller had been forged. The court held that the signing of the s 42(2) certificate is an administrative action which was reviewable under *AJA*.

⁹³ *Nedbank case* para 24.

⁹⁴ The term "clerical function" was referred to in the OCSLA's legal opinion and the *Nedbank case* para 25.

relates to the Master's routine documentation and administrative tasks as directed by statute.⁹⁵ An administrative act, denoted as a clerical act,⁹⁶ occurs for instance when the Master points out *bona fide* (mostly thoughtless) mistakes during the official's examination of the L&D account.⁹⁷ Although the Master's clerical acts are not reviewable under *AJA*, they should adhere to the values and principles of the Constitution. This entails that the Master must act in a transparent, responsible, and open manner and, if so requested, should provide reasons for its clerical acts.⁹⁸ The coined term "administrative action", also directed by statute, holds a quasi-judicial function.⁹⁹ In the latter instance the Master (and Deeds Office) are "called upon to make evaluations of the documents presented to them and to exercise some judgment or choice".¹⁰⁰

The schematic outline *infra* is in support of the following discussion to classify a Master's administrative act involving an RDA as either a clerical act holding a so-called clerical function or an administrative act holding a quasi-judicial function.

⁹⁵ *Nedbank* case para 25

⁹⁶ See *Nedbank* case paras 11, 28.

⁹⁷ SALRC *Administration of Estates* para 5.2.14 at 20.

⁹⁸ Section 8(1) read with ss 195(1) and 195(2) of the Constitution.

⁹⁹ *Kuzwayo v Representative of the Executor in the Estate of the Late Masilela* (28/2010) [2010] ZASCA 167 (1 December 2010).

¹⁰⁰ *Nedbank* case paras 11, 28.

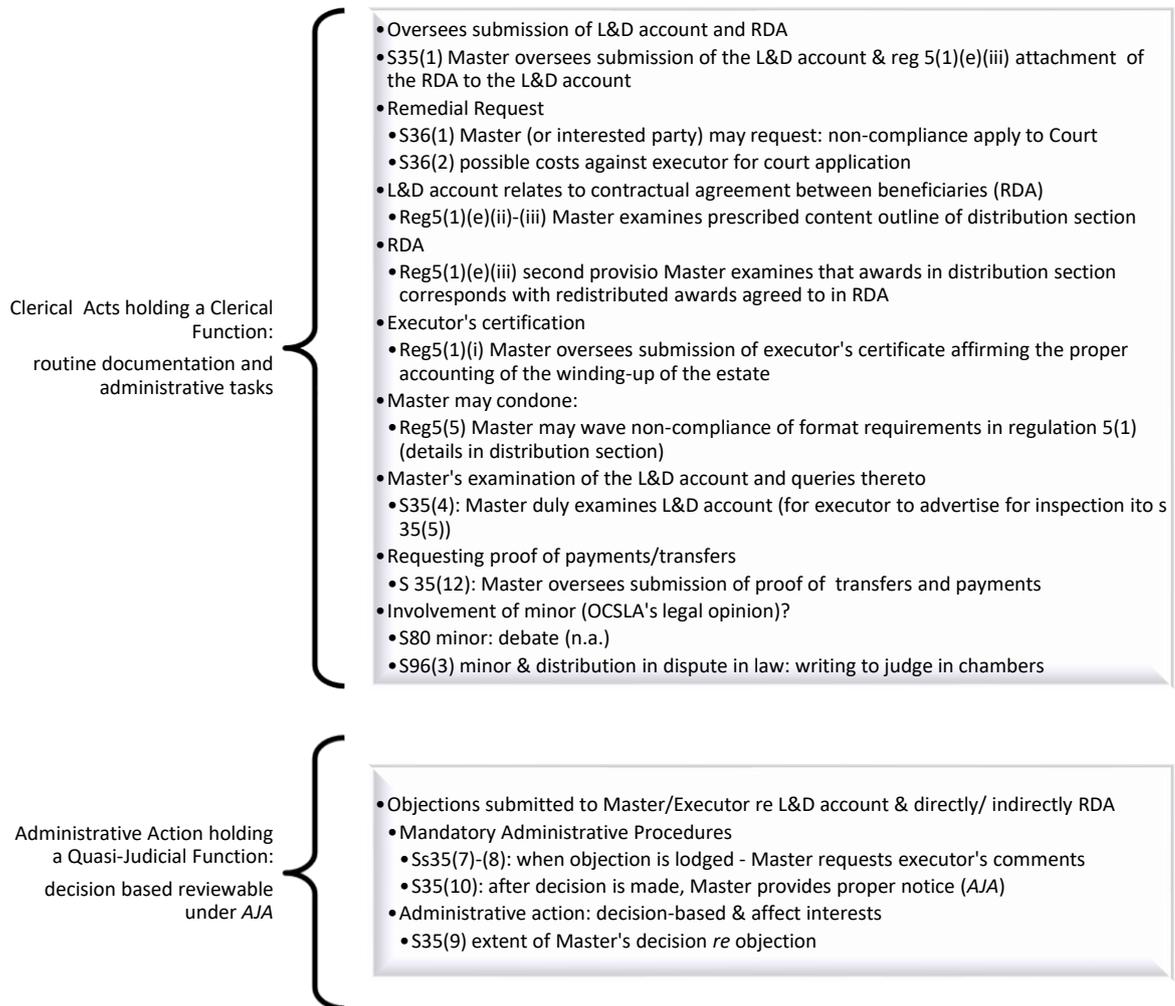


Figure 1: Classification of Administrative Acts

6.3 Clerical acts from the Estates Act and Regulations relating to an RDA

The provisions discussed, prescribed in the *Estates Act* and regulations thereto, embody the extent of the Master's clerical actions involving an RDA. These prescribed administrative acts are exercised during the process of the Master's due examination of the L&D account. In the L&D account the executor reflects in a prescribed format all the inheritance properties collected and awarded, as well as the administration costs and creditor claims accepted during the winding-up of the estate.

6.3.1 Clerical request of a L&D account and RDA: section 35(1) and second proviso to regulation 5(1)(e)(iii)

A redistribution of the inheritances as a course of action¹⁰¹ may delay the finalisation of the estate. This necessitates the timeous cooperation and consent of the terms and conditions of an RDA by the parties involved. Owing to the direction in section 35(1)(a) read with the second proviso to regulation 5(1)(e)(iii), the Master oversees the executor's submission of the L&D account with its attached RDA within six months after the issuing of the executor's appointment letter. The executor must inform the Master if he/she is unable to lodge the L&D account and/or fully report on the estate property and debts of the estate. This entails the submission of a formal written application to the Master providing "good reasons" and certain information prescribed in regulation 6 read with section 35(1)(b). The Master will then consider granting a limited period of extension taking into regard that the executor holds the duty of finalising an RDA and the winding-up of the estate as soon as possible.¹⁰²

6.3.2 Remedial request (including the submission of an RDA): section 36(1)

The Master and/or a party having an interest in the L&D account can make an application to the court in terms of section 36(1)¹⁰³ compelling the executor to comply with a reasonable demand by the Master¹⁰⁴ and/or to provide relevant information and documentation pertaining to the winding-

¹⁰¹ See *Commissioner South African Revenue Service v Estate Late Streicher* (194/03) [2004] ZASCA 126 (31 May 2004).

¹⁰² *Punshi v Greene* 1965 2 SA (NPD) 489 502-504; Meyerowitz *Administration of Estates* para 12.10.

¹⁰³ This is gleaned from the reading of the ordinary words of s 36(1). It reads: "If any executor fails to lodge any account with the Master as and when required by this Act, 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 this Act or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of the estate, the Master .. or any person having an interest ... may ... apply to the Court for an order ... to comply with such demand".

¹⁰⁴ As an alternative, in terms of s 54(1)(b)(v) the Master may remove the executor from office "if the executor fails to perform satisfactorily any duty imposed upon him ... or to comply with any lawful request of the Master". This is a quasi-judicial act, and its mandatory procedure is outlined in s 54(2)(iv) as sending the executor "by registered post a notice setting forth the reasons for such removal and informing him that he may apply to the Court within thirty days from the date of such notice for an order".

up of the estate.¹⁰⁵ Section 36(1) also implies requests for information or documentation relating to an RDA, but only insofar as they are reasonable.¹⁰⁶ A penalty clause is built into section 36(2) in that the executor may be held liable for the costs of the application to ensure timely compliance to a reasonable request.¹⁰⁷ Nevertheless, the executor, acting in a fiduciary position, may choose the *bona fide* lawful method and manner of dealing with challenges that may occur during the winding-up of the estate. This is for as long as it is to the overall advantage of the beneficiaries and creditors.¹⁰⁸ For instance, the executor may present to the beneficiaries the various possibilities in a redistribution of their inheritances, if the option reasonably calls for it, as a mechanism to wind-up the estate.

6.3.3 Clerical examination of the L&D account to comply with the format requirements: regulation 5(1)

The L&D account and RDA are usually drafted by the attorney appointed as the executor or who assists the layman executor. The Master ensures that the executor's L&D account complies with the prescribed format¹⁰⁹ outlined in regulation 5(1).¹¹⁰ There is no standardised prescribed form for an RDA. In general, the executor follows the best practice in drafting an RDA to be signed by the contracting parties and two competent witnesses. However, certain statutory provisions are provisional in the manner and formalities involving immovable property and the contractual capacity of the parties.¹¹¹ It is the duty of the executor to ensure that an RDA complies with the

¹⁰⁵ See Meyerowitz *Administration of Estates* para 12.11.

¹⁰⁶ The Master or the interested party must give one month's notice to the executor to comply.

¹⁰⁷ Section 100 of the *Estates Act* 24 of 1913 (the *Repealed Estates Act*) was similar to s 36, but only in the instance when an executor failed to lodge an L&D account. However, the *Repealed Estates Act* had no penalty/sanction clause for non-compliance. Section 36(2) of the *Estates Act* reads: "The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the executor, *de bonis propriis*".

¹⁰⁸ *The Master v Van Zyl* 1944 TPD 211.

¹⁰⁹ Section 35(1)(b) explicitly stated that the L&D account must be framed in a "prescribed form". However, in the *Repealed Estates Act* no format requirements were prescribed.

¹¹⁰ Published by the Minister of Justice in GN R473 in GG 3425 of 24 March 1972 as granted to do so in terms of s 103.

¹¹¹ E.g., s 2(1) of the *Alienation of Land Act* 68 of 1981; s 15(2) *Matrimonial Property Act* 88 of 1984. In the instance when a minor's movable inheritance is involved, the permission of one parent/guardian is necessary and with immovable inheritance the permission of both parents/guardians is required in terms of s 18(3)(c) read with s 18(5) of the *Children's Act* 38 of 2005.

contractual requirements as to its legality in form and content.¹¹² Likewise, the conveyancer responsible for the registration of the immovable inheritance property in the Deeds Office must assess the correctness and accuracy of the facts in all documentation submitted, including the certified copy of the RDA.¹¹³

6.3.3.1 Distribution account format and reference to an RDA: regulation 5(1)(e)(iii)

The Master ensures that the L&D account complies with regulations 5(1)(e)(i)-(iii). The regulations prescribe a description of the inheritances and the status of the named beneficiaries in one of the sections to the L&D account, called the "distribution account" (hereafter the "distribution section"). Regulation 5(1)(e)(iii) finds special application to an RDA.¹¹⁴

Regulation 5(1)(e)(ii) directs the executor's identification of the beneficiaries in the distribution section. The details required are the full names of each beneficiary, if such a beneficiary is a minor or a major, and the beneficiary's marital status. This would show that the beneficiaries are indeed the lawful beneficiaries entitled to their inheritances. Likewise, in an RDA it is the duty of the executor to ensure that the beneficiaries in their full capacity consensually agree to an RDA. For example, a third party other than an entitled beneficiary cannot be a party to an RDA.

Regulation 5(1)(e)(iii) may be divided into two distinctive parts. The first part directs that the executor reflects certain details of the inheritance awards in the distribution section. The regulation requires the documentation of

... details of the property included in every award and the reason for every award and if the award to any beneficiary or administrator is subject to any condition in the will, stating that it is made subject to and in terms of such condition without specifying or summarising the terms of the condition.

The regulation implies that the inheritance awards in the distribution section should be in accordance with the provisions of a will and/or intestate succession rule and/or the terms of an agreed attached RDA. Likewise, an

¹¹² *Bydawell* case 523G-H, 515E-H, 516. Also see *Ex parte Grant* 1952 4 SA 95 (N); *Ex parte Adams* 1964 2 SA 135 (CPD).

¹¹³ Section 42(1) of the *Estates Act* as well as s 15(A) read with reg 44A of the Regulations to the *Deeds Registries Act* 47 of 1937 (GN R474 in GG 466 of 29 March 1963).

¹¹⁴ In terms of reg 5(1), the executor is obliged to ensure that the submitted L&D account contains specific headings. Each sub-section of reg 5(1) prescribes the content of such a heading, for example its wording and manner of columns.

RDA deals with the reshuffling of the original inheritance awards as directed in the provisions of a will, and/or intestate succession rules. As previously stated, the parties may also bring in movable property.¹¹⁵ Consequently, the executor must ensure that the agreed redistributed awards in an RDA are possible and lawful.

The second part of regulation 5(1)(e)(iii) directly refers to an RDA and reads

... and where any redistribution agreement was entered into by the heirs and distribution has been made by the executor pursuant to such an agreement, the redistribution agreement shall accompany the account.

It is implicit from the second part that the Master oversees the attachment of all types of RDAs to the submitted L&D account and not only when an RDA involves immovable inheritance property.

However, it is the duty of the executor to ensure that an RDA should have been "entered into by heirs". This is supported in the ordinary meaning of the words of section 14(1)(b)(iii) of the *Deeds Act* that the attached RDA as an agreement is entered into by beneficiaries and/or the surviving spouse.¹¹⁶ Also, the executor is the one who will make the "distribution ... pursuant to such an agreement". The wording suggests that the executor holds the duty to carry out the terms and conditions agreed upon between the beneficiaries and/or the surviving spouse whilst, during the Master's examination of the L&D account, in terms of section 35(1) read with regulation 5(1), the Master ensures that the details in the distribution section correlate with the redistributed agreed awards in the attached RDA in terms of regulation 5(1)(e)(iii).

6.3.3.2 Clerical request for the executor's certification of accurate reporting: regulation 5(1)(i)

In terms of regulation 5(1)(i), the Master oversees the required submission of the executor's certificate to the L&D account. In the certificate the executor affirms compliance with his/her duty to have given to the best of

¹¹⁵ *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) 630-631; *Cradock's Estate v Cradock* 1951 3 SA 51 (N) 59C and s 14(1)(b)(iv) of the *Deeds Act*.

¹¹⁶ The sub-section reads: "if in the administration of the estate of a deceased person (including a fiduciary) any redistribution of the whole or any portion of the assets in such estate takes place among the heirs and legatees (including ascertained fideicommissary heirs and legatees) of the deceased, or between such heirs and legatees and the surviving spouse, the executor or trustee of such estate may transfer the land or cede the real rights therein direct to the persons entitled thereto in terms of such redistribution".

his/her knowledge a true and proper account of the winding-up of the estate.¹¹⁷ The certification implies that the executor considers the attached RDA as a valid agreement and that the agreed redistributed awards are correctly reflected in the distribution section.

6.3.3.3 The Master may waive non-compliance of format requirements: regulation 5(5)

Prior to the issued regulation 5(5) in 1985,¹¹⁸ the Master could not waive non-compliance of any format requirement directed in regulation 5(1).¹¹⁹ In terms of regulation 5(5), the Master's discretion to waive non-compliance is limited to instances when it is deemed "not material". In practice the Master does not require the submission of an RDA that involves only movable inheritance property. Some officials may request the executor's written confirmation that the beneficiaries are satisfied with the agreed redistribution of the movable inheritance property. One may assume that the Master's (explicit or implicit) waiver considers the submission of an RDA (involving only movables) as "not material". This differs from the recommendation of the OCSLA's legal opinion (in the Master's office instruction) that an RDA should be submitted.¹²⁰ In my view, the lodgement of any type of RDA is an essential requirement. This is because the L&D account, in terms of section 35(1) read with regulation 5(1) and its attached RDA in terms of regulation 5(1)(e)(iii), comprises of the executor's formal accounting of the estate's winding-up.

6.3.4 *Master's clerical examination of the L&D account: section 35(4)'s "permission" to advertise it for inspection*

The recommendation of the OCSLA's legal opinion that the Master must "duly examine *and* approve" the L&D account (and the RDA)¹²¹ holds no

¹¹⁷ The *Repealed Estates Act* provided for an almost similar certificate as a prerequisite for the executor. However, this was to affect the transfer of immovable inheritance property.

¹¹⁸ GN R2482 of in GG 9986 of 1 November 1985 read with GN 125 in GG 5618 of 27 January 1956.

¹¹⁹ Reading the wording of reg 5(1)(e)(iii).

¹²⁰ OCSLA's legal opinion para 6.3 at 10. On this basis the OCSLA's legal opinion recommends that because an RDA affects the interest of involved parties, the Master's "duly examination and approval" of an RDA is a prerequisite for its enforcement.

¹²¹ OCSLA's legal opinion para 6.2 at 10.

basis in law. Firstly, section 35(4)¹²² only directs the Master's "examination" of the L&D account before the executor can proceed with the advertisement of the L&D account for "its inspection by interested parties".¹²³ The Master in his/her examination ensures that the L&D account's format complies with the prescriptions of regulation 5(1). Secondly, the verbs "examine" and "approve" are peremptory. "Examine" refers to an inspection or observation of a document, whilst "approve" refers to an authorisation or a formal statement of acceptance of the document as correct.

In practice the Master grants written permission to proceed with the advertisement of the L&D account.¹²⁴ Notwithstanding, the Master does not have the statutory authorisation to prohibit the executor from advertising.¹²⁵ The Master's "permission" refers to the point in time when the Master finalises the "examination" of the L&D account and after the executor has complied with the Master's enquiries and/or call for documents relating to the L&D account.

6.3.5 Clerical request for the proof of payments and transfers: sections 35(12)

The Master ensures that the executor carry out the terms and conditions agreed upon in terms of regulation 5(1)(e)(iii) and section 35(12) in the instance when:

- no objection was received; or
 - such an objection was withdrawn/sustained; or
- the objection was lodged, and the L&D account was amended and laid for inspection in terms of section 35(5) free from any objections; and
- when the estate becomes distributable in terms of section 35(12): two months¹²⁶ from the last day of the inspection period of the section 35(5)

¹²² Section 35(4) reads "Every executor's account shall, after the Master has examined it lie open at the office of the Master ... for inspection by any person interested in the estate".

¹²³ In accordance with the procedures outlined in ss 35(5) and 35(6) of the *Estates Act*.

¹²⁴ See Meyerowitz *Administration of Estates* para 1.7.

¹²⁵ Meyerowitz *Administration of Estates* para 12.13.

¹²⁶ In terms of s 35(13).

advertisement.¹²⁷

In terms of section 35(12) the Master oversees the submission of proof of payments and transfers (including those agreed upon in an RDA). This serves as confirmation that the executor has complied with his/her statutory obligation to proceed with such payments and transfers of claims. In general, it is the duty of the executor to adhere to the statutory administration processes and fulfil his/her statutory obligations.¹²⁸ For instance, section 39(1) read with section 35(5)(12) obliges the executor to proceed with the registration of immovable inheritance property in the name of the beneficiary.¹²⁹ This includes the submission in terms of section 42(1) of a "certificate" by a conveyancer "that the proposed transfer or endorsement is in accordance with the liquidation and distribution account".¹³⁰

6.4 Administrative actions hold a quasi-judicial function from the Estates Act relating to an RDA

Section 35(9) directs the Master's only administrative action when objections have been lodged against the L&D account that involved an RDA.¹³¹ It is a decision-based action that holds a "quasi-judicial" function and has a direct legal effect on an individual.¹³² The Master may still withdraw or amend his/her administrative action. Also, in terms of section

¹²⁷ It is at this time that a beneficiary obtains a vested right regarding his/her inheritance and becomes entitled in law to demand delivery/transfer of the inheritance. See *Greenberg v Estate Greenberg* 1955 3 SA 361 (A) and *Commissioner of Inland Revenue v Estate Crewe* 1943 AD 656.

¹²⁸ Most of the procedures and obligations to administer a deceased estate are prescribed in the *Estates Act*, such as s 26 to take control over estate's properties, s 29 to advertise for lodgement of claims for and/or against the estate, s 28 to open an estate late banking account, s 34 to assess if the estate is solvent; s 27 to submit the inventory to the Master; s 35 the lodgement of the L&D account, to comply with Master requests/enquiries.

¹²⁹ Read with ss 14(1)(b)(iii) and (iv) of the *Deeds Act* and the second proviso of reg. 5(1)(e)(iii) also applies.

¹³⁰ In terms of s 42(2) the legislature explicitly directed the only instance when the Master's signed certificate is required confirming that no objections were received against the sale of immovable inheritance. Section 42(2) reads: "An executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists".

¹³¹ *Wessels v The Master of the High Court, Pretoria* (83560/17) [2018] ZAGPPHC 892 (18 December 2018) para 26; *Master of the Supreme Court v Stern* 1987 1 SA 756 (T); *Ferreira v Die Meester* 2001 3 SA 365 (O); *Gray v The Master* 1984 2 SA 271 (T). Also see the discussion in Meyerowitz *Administration of Estates* para 16.19.

¹³² See the *Nedbank* case paras 11, 28 and see s 1 of *AJA*.

35(10) the administrative action is subject to review by the court and/or which the Master can withdraw or amend.¹³³

The Master is obliged to comply with certain mandatory provisions prior and after the section 35(9) administrative action that holds a "quasi-judicial" function. Section 3 of *AJA* read with section 35(7)¹³⁴ direct that the Master is obliged to give adequate notice to the executor that an objection against the L&D account and RDA (directly or indirectly) was submitted and by providing a copy of the received objection.¹³⁵ Section 3 of *AJA* read with section 35(9) direct that the Master shall afford written reasons for his/her administrative action to the executor.¹³⁶

Section 35(9) identifies two grounds upon which the Master "may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit", namely (1) if the "objection is well-founded" (2) or if "apart from any objection, he (the Master) is of opinion that the account is in any respect incorrect and should be amended". A well-founded objection is, for instance, when a redistributed award mentioned in an RDA is not reflected in the distribution section. Another example is when the value of the redistributed award mentioned in an RDA differs from the value in the distribution section. The legislature intended, as Meyerowitz recommends, that the "Master should use his power *mero motu* to direct an

¹³³ Section 35(10) directs that "any person aggrieved by any such direction" may apply to the High Court "to set aside the Master's decision and the Court may make such order as it may think fit". See discussion in Meyerowitz *Administration of Estates* para 16.20. Also see the *Nedbank* case para 25 read with s 95 of the *Estates Act*.

¹³⁴ The prescribed procedure entails that "... the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with the copies of any documents ... submitted to the Master in support thereof".

¹³⁵ Section 35(8) directs that the executor "shall within fourteen days after receipt by him of the copy of the objection, transmit two copies of his comments thereon to the Master". Section 3 of *AJA* read with s 35(8) suggest (as followed in practice) the sending of one of the two copies to the objector to provide him/her the opportunity to reply. It also suggests (as followed in practice) that a reasonable period must be afforded for the executor to reply to the objector's comments. Also see *Götz v The Master* 1986 1 SA 499 (N).

¹³⁶ This include that the executor and the person who lodged the objection should be informed in a clear statement of the administration action taken by the Master, and the Master should give adequate notice of any right of review and internal appeal. Also, any review of the Master's administrative action is a review under *AJA* that constitutes a constitutional issue when deciding the issue of costs. *Niekara Harriell v University of KwaZulu-Natal* (100/2017) [2017] ZACC 38 (31 October 2017) 17, 18. The court finds that the *Biowatch Trust v Registrar, Genetic Resources* 2009 6 SA 232 (CC) should have been followed by the High Court and the Supreme Court of Appeal when deciding the issue of costs.

amendment sparingly and only in cases where the L&D account is clearly wrong".¹³⁷

The Master's administrative action in making a decision¹³⁸ involving an RDA may also include a refusal to make a decision, (1) due to either having no authorisation to decide on a case with a factual basis,¹³⁹ or (2) if the objection is deemed frivolous and/or (3) the objection is not well-founded.¹⁴⁰ A factually based objection is, for instance, when there is a dispute concerning the meeting of the minds of the parties in an RDA. This is because the Master has no suitable procedures or structures available such as cross-examination to establish facts when they are *bona fide* in doubt.¹⁴¹

The Master may amend or vary its decision if further information should affect his prior decision.¹⁴²

6.5 Critical discussion of two recommendations in the OCSLA's legal opinion

The OCSLA's legal opinion focusses on two aspects in their recommendation that the Master's examination *and* approval of an RDA is a requisite. The first issue is that of a minor's involvement and the second issue involves the Master's request for vouchers in section 35(2A) of the Act.

6.5.1 Involvement of a minor's inheritance in an RDA: sections 80 and 96(3)

The OCSLA's legal opinion emphasises the Master's role as a protector – especially protecting a minor's interest in an RDA.¹⁴³ The Master should

¹³⁷ Meyerowitz *Administration of Estates* para 16.18.

¹³⁸ See s 1 of AJA.

¹³⁹ *Ferreira v Die Meester* 2001 3 SA 365 (O); *Broodryk v Die Meester* 1991 4 SA 825 (C).

¹⁴⁰ *Master of the Supreme Court v Stern* 1987 1 SA 756 (T).

¹⁴¹ *Ferreira v Die Meester* 2001 3 SA 365 (O); *Broodryk v Die Meester* 1991 4 SA 825 (C); *Master of the Supreme Court v Stern* 1987 1 SA 756 (T).

¹⁴² *Gray v The Master* 1984 2 SA 271 (T); *Van Niekerk v Van Niekerk* 2011 2 SA 145 (KZP).

¹⁴³ "... [it] does not appear that one may lightly assume that the role of the Master is no more than that of a passive observer ...", adding that the Master has a "right to refuse to approve such agreements if they are unfair or would be prejudicial to a beneficiary who is a minor" (OCSLA's legal opinion para 3.13 at 5).

indeed act in this capacity, notwithstanding if an RDA is valid in its form and content.¹⁴⁴

Initially, in *Ex parte Smith, Ex parte Meyer*¹⁴⁵ the court stated that of the multitude duties of the Master one of the important social welfare duties is to look after the interest of the minor and the minor's property.¹⁴⁶ However, later court decisions¹⁴⁷ confirm that the onus of protection rests with the executor, irrespective of any established practice exercised by the Master.¹⁴⁸

The Master's presumed duty to protect the interest of a minor in an RDA has given rise to an ongoing debate. The debate started in the 1980s amongst the officials of the Master and Deeds Office. The question was raised as to whether the Master's approval in terms of section 80 is required when a minor is a party to an RDA. Section 80 requires the Master's (or court's) authorisation before immovable property belonging to a minor can be alienated. The unreported Gauteng case of *Boedel Wyle PM Venter*¹⁴⁹ held in its interpretation of section 80 that the Master's consent is necessary. The judgment was followed by Gauteng officials. However, the Cape officials followed the unreported Cape court decision in *Ex parte Fuad Tofie*,¹⁵⁰ that the Master's consent is unnecessary. The decision was supported by RCR 30 of 2010 to uniform the practice, at least amongst the officials of the Deeds Office.¹⁵¹ It was argued that the general meaning of the word "belonging" in section 80 refers only to "immovable property belonging to such minor" and at the "time of the conclusion of an RDA the

¹⁴⁴ OCSLA's legal opinion para 6.3 at 10.

¹⁴⁵ *Ex parte Smith, Ex parte Meyer* 1976 2 OPA 95 98H.

¹⁴⁶ However, see *Du Toit v Thomas* (635/15) [2016] ZASCA 94 (1 June 2016), where the Appellate Division decided that it is to the advantage of the minor that the executor should use the more expeditious remedy provided by the *Maintenance Act* 99 of 1998 rather than the *Estates Act*, whereby the minor may claim maintenance against the estate.

¹⁴⁷ *Bank v Sussman* 1968 2 SA 15 (O); *Liquidators of the Union Bank v Watson's Executors* 8 SC 300 306.

¹⁴⁸ The executor's duty is extended to s 28(2) of the Constitution, that gives it a wider application, as confirmed in s 9 of the *Children's Act* 38 of 2005 in that every child's best interest is paramount in all matters concerning the child's care, protection, and well-being.

¹⁴⁹ *In re Boedel Wyle Petrus Martinus Venter* (unreported) case number 6647/84 of 19 April 1984.

¹⁵⁰ *Ex parte Fuad Tofie* (unreported) case number 11191/1989 of 3 November 1989.

¹⁵¹ The ensuing debate on s 80 may be resolved only with a higher court decision.

(inheritance) property does not belong to the minor".¹⁵² Presently it seems that the Master does not hold the jurisdiction over the minor's right to inheritance in a deceased estate involving an RDA. However, the Master holds jurisdiction over the administration of a minor's property in terms of section 4(2) and chapter IV of the *Estates Act*.

On the other hand, in terms of section 96(3)¹⁵³ the Master and the executor may refer a dispute over a minor's inheritance to a judge of the court in chambers. The section seems to provide a cost and time relief, especially because a dispute may have an undesirable cost and time effect on the minor's interest as well as the estate's interest. In fact, section 96(3) may serve as an alternative to the executor's option to apply to the High Court for the review of the Master's decision.

The executor and the Master should take into regard the following:

- the Master and the executor's difference of opinion must be that of a question of law excluding any factual point in the dispute;
- the dispute shall be about the distribution of an estate and when a minor's interest is involved, implying the inclusion of a redistribution of inheritance awards in the instance of an RDA;
- the dispute could have taken place at any given time before the distribution of the estate in terms of sections 35(11-13);
- the matter referred to the judge in chambers shall be presented in writing by both the executor and the Master by outlining the dispute as a question of law and providing their conclusions or findings;¹⁵⁴
- the judge's decision is binding in so far as it is applicable to the minor,

¹⁵² Some officials occasionally raise the issue that s 94 finds application in the instance where the minor heir's immovable inheritance is subdivided in an RDA. However, the wording of s 94 includes only the minor's property or rights thereto and does not explicitly include the minor's inheritance before it is vested as enforceable. *Rabie v Die Meester van die Hooggeregshof* 1960 3 SA 848 (T).

¹⁵³ Under s 96 titled "Proceedings by the Master" in ch VI "Miscellaneous Provisions". Section 106 in the *Repealed Estates Act* was reinstated almost verbatim in s 96(3) of the *Estates Act*.

¹⁵⁴ If the executor refuses to submit his/her written reasons, s 36(1) may find application for the Master and/or interested party to apply to court. This may put the executor at risk of being penalised with the costs if failure to comply is unfounded.

but without prejudice to the rights of other parties; and

- if it appears that the dispute is factual of nature, "the judge may refer the matter to the High Court for argument".

6.5.2 *Clerical request of vouchers and do they relate to an RDA?: section 35(2A)*

As previously mentioned, the OCSLA's legal opinion states that the Master must "duly examine and approve" an RDA "as part of his duty to oversee the estate accounts in terms of section 35(2A)".¹⁵⁵ Section 35(2A) has to do with the submission of vouchers. This raises the following questions: what type of document constitutes a voucher, what is the rationale for section 35(2A)'s inclusion in the Act, and is the OCSLA's opinion correct that section 35(2A) relates to an RDA's examination and approval by the Master?

In practice a voucher¹⁵⁶ is the documentary evidence of an estate's property, administration cost or creditor's claim reflected in the liquidation section of the L&D account (hereafter "liquidation section").¹⁵⁷ Initially, when the *Estates Act* came into operation on 2 October 1967, section 35(1) required the lodgement of all vouchers.¹⁵⁸ The Master became overburdened with the clerical function of correlating (in practice called "ticking-off") basic information in the voucher with the description and amount of the item reflected in the liquidation section.¹⁵⁹ In 1984 relief was given with the deletion of the section 35(1) requirement¹⁶⁰ and the insertion of section 35(2A).¹⁶¹ The Master now has the discretion to request such vouchers which he deems necessary "for the purpose of performing his functions in

¹⁵⁵ OCSLA's legal opinion para 6.2 at 10.

¹⁵⁶ For example, a valuation certificate of a motor vehicle or an invoice of a creditor.

¹⁵⁷ Also see Meyerowitz *Administration of Estates* paras 12.2-12.10, 12.20 read with 12.24, 12.42.

¹⁵⁸ The *Repealed Estates Act* made no such a provision.

¹⁵⁹ As a practical requirement to ease the Master's examination, reg 5(2) directs the numbering of every voucher submitted in accordance with the numbering of the item reflected in the liquidation section.

¹⁶⁰ In terms of s 4(a) of the *Administration of Estates Amendment Act* 12 of 1984.

¹⁶¹ Section 35(2A) reads: "The Master may ... direct the executor to submit to him within a period determined by him such voucher or vouchers in support of the account or any entry therein as he may require for the purpose of performing his functions in connection with the examination or amendment of the account".

connection with the examination or amendment of the L&D account".¹⁶²

The reference in the OCSLA opinion to section 35(2A)¹⁶³ seems to imply that an RDA is a voucher. In my view an RDA does not fall within the description of a voucher. An RDA is an attachment to the L&D account and the agreed redistributed awards should be shown in the *distribution* section as implied in the second proviso of regulation 5(1)(e)(iii),¹⁶⁴ whereas a voucher is documentary evidence of an item shown in the *liquidation* section. Also, the regulation relating to an RDA had already been issued¹⁶⁵ prior to the replacement of section 35(2A) that relates to vouchers. In practice the executor may request the temporary removal of a voucher submitted on condition that the executor will re-submit it,¹⁶⁶ whereas, in terms of section 103(1)(a), an RDA as an attachment to the L&D account cannot be temporarily removed because it falls under the description "written instruments" in terms of section 5(1) of the *Estates Act*.¹⁶⁷ For these reasons, section 35(2A) does not find application as inferred in the OCSLA's legal opinion. Also, as previously stated, no mention is made in the Act of an "approval" of the L&D account and/or an "examination and/or approval" of an RDA. I propose a rephrasing of the recommendation in the OCSLA's legal opinion to read as follows: the Master must *examine* that the redistributed awards in the distribution section of the L&D account correlate with the redistributed awards agreed to in the attached RDA in terms of section 35(4) read with regulation 5(1)(iii) as part of the Master's duty to oversee estate accounts in terms of section 35(1) read with regulation 5(1).

7 Proposed alternatives for the replacement the Master's existing practice to examine and approve an RDA

The *Estates Act* and its regulations do not authorise the Master as a

¹⁶² See Meyerowitz *Administration of Estates* para 1.7. SALRC *Administration of Estates* 20 recommends that the Master's examination of the L&D account lodged with its supporting documents and vouchers must be "weighed" against the "disadvantage of delays and costs". In practice the Master usually requests vouchers when there is a minor or absentee beneficiary involved, or when the estate seems to attract estate duty, or when a dispute is lodged: see Meyerowitz *Administration of Estates* para 12.10.

¹⁶³ OCSLA's legal opinion para 6.2 at 10.

¹⁶⁴ Regulation 5(1)(e)(iii).

¹⁶⁵ GN R473 in GG 3425 of 24 March 1972.

¹⁶⁶ Usually for the purpose of re-numbering the vouchers when the L&D Account is to be amended, because the numbering of the vouchers differs from the numbering of the items in the L&D account submitted.

¹⁶⁷ See my discussion below, in para 7.

creature of statute to consider weighing the legality of an RDA in its form and content.¹⁶⁸ As a replacement of the Master's weighing of an RDA's so-called approval, the Master should provide information, if so requested¹⁶⁹ in terms of section 3 of *PAIA* relating to RDAs.¹⁷⁰ I recommend that the Master's confirmation should include the following essential information:

- if a L&D account and its attached RDA were submitted;
- if such an account was advertised in terms of sections 35(4) and 35(5); and
- if objections were lodged against the L&D account.

The wording may read:

In re: Confirmation as requested in terms of section 3 of *PAIA*

The following information corresponds with the contents of the estate file in the Estate Late, Estate number kept at this branch Office.

In terms of regulation 5(1)(e)(iii) to the Administration of Estates Act 66 of 1965 the Redistribution Agreement dated was attached to the submitted Liquidation and Distribution Account and the signed executor's certificate thereto in terms of regulation 5(1)(i) dated the

The said Account was in terms of section 35(5) Act 66 of 1965 advertised for the lodgement of objections.

*No objection was received

or

*An objection was received against the referred Account in this branch Office before and/or during the 21-day inspection period

¹⁶⁸ Regulation 5(1)(e)(iii).

¹⁶⁹ Anyone can direct a reasonable request to the Master to retrieve essential information kept in the Master's public records. The Master's decision to grant or to refuse a request for information falls under the *Promotion of Access to the Information Act 2 of 2000 (PAIA)* and as an administrative action is subject to the provisions of *AJA*. See Kotzé 2004 *PELJ*; Thornhill 2011 *Journal of Public Affairs* 80-81.

¹⁷⁰ The applicant (the conveyancer or executor) completes a prescribed form and sometimes there are prescribed fees to be paid. See ss 22 and 54 of *PAIA*. There are different types of fees to be paid by either a public or a private body.

in terms of section 35(7) of Act 66 of 1965

Master of the High Court (name of branch)

Date and Signature of the Assistant Master

*Delete the section which is not applicable

In addition, an RDA, as documentary evidence, is part of the registration application for the transfer of immovable inheritance property in an RDA in terms of section 14(1)(b)(iii) read with section 3(1)(b) of the *Deeds Act*. Notably, the attached RDA submitted by the executor is deemed a public document to be preserved by the Master as an "Office of Record". No public document may be removed from the Master's files unless so authorised in regulations issued by the Minister of Justice in terms of 103(1)(a) of the *Estates Act*. Nevertheless, when a conveyancer or Deeds Office requires an RDA for registration purposes, a request may be directed to the Master in terms of section 5(2) of the *Estates Act* for a copy or certified copy of the filed RDA.

8 Consequences of an unlawful administrative act

The Master's recent practice of weighing the validity of an RDA as to its form and content constitutes an administrative action that is reviewable under *AJA*.¹⁷¹ It is evident that the Master holds no statutory authorisation to exercise such an administrative action. Still, a lawful or unlawful¹⁷² administrative act produces legally valid consequences and generally cannot be ignored for so long as the administrative act is not set aside.¹⁷³ If the decision of the Master is set aside by judicial review proceedings, section 100 of the *Estates Act* exempts the Master from liability for acts or omissions. However, this is only insofar that the act or omission is not *mala fide* or if the Master during his administrative actions or functions acts with reasonable care and diligence.

¹⁷¹ *Nedbank* case paras 11, 28. The affected party has the right to the Master's written reasons regarding any of its administrative actions executed in terms of the provisions of the *PAIA* and ss 33(1) and (2) of the Constitution. The sections stipulate that administrative action that materially and adversely affects the rights or legitimate expectations of any person must be lawful, reasonable, and procedurally fair.

¹⁷² This includes circumstances where the Master acted without legal authority or in the parlance of administrative law or committed a jurisdictional error. See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA).

¹⁷³ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA).

More specifically the Master's unauthorised approval of an RDA that is valid in its form and content is a redundant practice. The unlawful act does not affect the valid registration and distribution of the redistributed inheritance awards to the beneficiaries. Still, engaging in a redundant practice is in contradiction of the guidelines of the Batho Pele White Paper.¹⁷⁴ Public officials should avoid wasting taxpayer's money in following redundant and expensive internal procedures and should deliver authorised quality services.

Also, the Master's unauthorised approval of an invalid RDA may elude the public and the parties involved, who may think that the "authorised" RDA is valid. The executor (and conveyancer) may wrongly rely on the Master's approval to serve as a guarantee as to an RDA's presumed validity. An invalid RDA approved by the Master would produce a faulty distribution and registration of unlawful redistributed awards – if the action is set aside in judicial proceedings. Any established practice by the Master to presume the examination of the RDA to approve the legal validity of an RDA cannot replace or ease the burden of the executor's and conveyancer's statutory duty to assess an RDA's validity in its content and form. In terms of the *Estates Act* the executor may be held liable by a court¹⁷⁵ (and/or by the Master) in the event of maladministration or failure to exercise the necessary degree of care.¹⁷⁶ Also, the executor is the representative taxpayer of the estate and holds the duty to comply with the various tax administration acts in terms of section 1 read with sections 25 and 96 of the *Income Tax Act* 58 of 1962. In terms of section 97 of the *Income Tax Act* the executor shall be personally liable for any tax payable in his/her representative capacity while it remains unpaid. This may be the case in the event of a faulty distribution. Thus, the executor in his/her fiduciary capacity must take into consideration the implications of donations tax, capital gains tax, income tax and estate duty¹⁷⁷ in the correct redistribution of the

¹⁷⁴ See principle 8. DPSA 1997 <http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/frameworks/white-papers/transform.pdf>.

¹⁷⁵ *Feldman v Migdin* 2006 6 SA 12 (SCA); *Gory v Kolver* 2007 4 SA 97 (CC).

¹⁷⁶ For example, s 50 with overpayment/wrong distribution; s 54 not fulfilling administrative actions; s 46 when failing to deposit money in the estate bank account or adhering to the Master's reasonable request. See Meyerowitz *Administration of Estates* paras 11.1-11.10.

¹⁷⁷ In the past, the Master held a statutory delegated supervisory position in the assessment of estate duty against a deceased estate. The Chief Master's Directive 2 of 2016 confirms that SARS and the Master "have entered into an interim phase

inheritance awards.¹⁷⁸ If an unlawful distribution results in an overpayment to the beneficiary, the executor may incur personal liability to correct the overpayment.¹⁷⁹ In the event of such an overpayment, the executor can recover the excess from the beneficiary.¹⁸⁰

9 Conclusion

It is implicit from regulation 5(1)(e)(iii) to the *Estates Act* that an attached RDA, as part of the winding-up of an estate, is a contract between beneficiaries.¹⁸¹ Also, from the ordinary meaning of the words of section 14(1)(b)(iii) of the *Deeds Act* it can be deduced that an attached RDA as an agreement is entered into by beneficiaries and/or the surviving spouse. Thus, an RDA as a contract becomes valid on signature by all parties with the necessary legal capacity and not as recommended by the OCSLA's legal opinion on acceptance by the Master. Subsequently, an RDA cannot be altered unless the beneficiaries as the contractual parties have agreed thereto.¹⁸²

Regarding the extent of the Master's statutory administrative acts and functions: Neither the *Estates Act* of 1965 nor the repealed *Estates Act* 24 of 1913 mentions an RDA. Only regulation 5(1)(e)(iii) to the *Estates Act* makes a direct reference to any type of RDA. The explicit reference to an RDA in regulation 5(1)(e)(iii) read in context with regulations 5(1)(i) and 5(5), sections 35(1), 35(4), 35(5), 35(12) as well as sections 36 and 96(3) embody the extent of the Master's prescribed clerical acts involving RDAs. These administrative acts are exercised during the process of the Master's examination of the L&D account, whilst section 35(9) read with sections 35(7), 35(8) and 35(10) directs the Master's decision-based administrative action when an objection has been lodged against the L&D account involving an RDA.

agreement whereby SARS will take over most of the estate duty powers and functions from the Master pending the promulgation of the termination of the Master's delegation with regard to estate duty matters". The Directive is effective from the 1st of April 2016, and the Master's supervision over estate duty matters is now limited to listed "procedural" acts that are purely clerical in nature.

¹⁷⁸ See Meyerowitz *Administration of Estates* para 15.72.

¹⁷⁹ See s 50 of the *Estates Act* with overpayment/wrong distribution.

¹⁸⁰ *Stapelberg v Schlebusch* 1968 3 SA 596 (O).

¹⁸¹ *Bydowell* case 523G.

¹⁸² See the *Bydowell* case 523G; *Estate Smith v Estate Follett* 1942 AD 383; *Greenberg v Estate Greenberg* 1955 3 SA 361 (A); *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) 630-631.

The Master oversees the executor's submission of the L&D account with its attached RDA in terms of section 35(1)(a) read with the second proviso to regulation 5(1)(e)(iii). In terms of regulation 5(5) the Master cannot waive an RDA's attachment, irrespective of the type of redistribution of the estate's properties involved. This is because the L&D account and the attached RDA are the executor's formal accounting of the winding-up of the estate. It is evident that the Master's examination of the L&D account in terms of section 35(4) read with regulation 5(1)(e)(iii) involves an assessment that the redistributed awards in the distribution section of the L&D account correspond with the agreed awards in the attached RDA. As a result, the attached RDA validates a redistribution inheritance award and supports the details shown in the distribution section of the L&D account. In terms of regulation 5(1)(i) the executor's certificate to the L&D account affirms the true and proper accounting of the winding-up of the estate. To this end the certification serves as a confirmation that the valid RDA is attached and that the agreed redistributed awards are correctly reflected in the distribution section. For this reason, the Master should ensure that the executor has submitted his/her certificate as a format requirement in terms of regulation 5(1)(i). After the Master examines the L&D account in terms of section 35(4) the executor proceeds to advertise the L&D account for inspection by interested parties for submission of objections. Notably, in terms of section 35(9) a well-founded objection involving an RDA is limited to details of the L&D account, especially the distribution section, that do not correspond with the agreed RDA. The Master may then instruct the executor to amend the L&D account in accordance with the agreed terms and conditions in the attached RDA.

It is evident that the OCSLA's legal opinion that the Master must "duly examine and approve" the L&D account and its attached RDA before an RDA is "enforceable"¹⁸³ has no basis in law. Section 35(4) directs only that the Master shall "examine" the L&D account for its compliance with the format requirements outlined in regulation 5(1). The *Estates Act* and its regulations grant no statutory authorisation to "duly examine and approve" an RDA. Also, it is the executor's responsibility to assess (accept) the validity of the attached RDA. This includes the duty of ensuring that beneficiaries in their full capacity consensually agreed to an RDA that complies with contractual requirements as to its legality in form and

¹⁸³ OCSLA's legal opinion para 6.2 at 10.

content.¹⁸⁴ Likewise, it is the duty of the conveyancer to assess the correctness and accuracy of the facts in all documentation submitted, including the certified copy of the RDA for the purposes of the registration of the immovable inheritance property in the Deeds Office.¹⁸⁵ Regarding when an RDA is enforceable and by whom: regulation 5(1)(e)(iii) directs that the executor must enforce an RDA. Notably the executor must have adhered to his/her statutory obligations and followed the statutory processes. In terms of section 35(12), an RDA becomes enforceable on the last day of the inspection period when the L&D account is laid free from any objection. It is also directed in section 35(12) that the executor is statutorily obliged to finalise within two months payments and transfers of claims and inheritance awards. Furthermore, the Master ensures the submission of proof of such to ensure that the executor complied with his/her obligations.

It is evident that the OCSLA's legal opinion inferring that the Master is a protector of the minor's inheritance in an RDA holds no authority in law. As a statutorily created public service officer, the Master holds the constitutional duty to act in a transparent, responsible, and open manner to all beneficiaries.¹⁸⁶ Where a minor's inheritance is involved, the duty lies with the executor to protect the interest of the minor. Section 96(3) may serve as cost and time relief concerning a dispute involving a minor's interest. The Master and the executor may then present a dispute of law to a judge in chambers.

It is evident that the Deeds Office holds no statutory authority to impose a burden on the Master to investigate an RDA that includes complying with any clerical and/or quasi-judicial function on behalf of the Deeds Office, although in terms of section 14(1)(b)(iii) and (iv) of the *Deeds Act* an RDA (involving immovable property) is part of the registration process. In terms of section 5(2) of the *Estates Act*, the RDA filed falls within the definition of a "public document" under the control of the Master as an "Office of Record". For this reason, the RDA filed cannot be removed. However, in terms of section 3 of *PAIA* read with section 5(2) of the *Estates Act*, any person or a state organ (Deeds Office) may make a reasonable request and upon payment of the prescribed fees for retrieving information held by the Master request copies or certified copies such as an RDA and L&D accounts lodged

¹⁸⁴ *Bydowell* case 523G-H, 515E-H, 516. Also see *Ex parte Grant* 1952 4 SA 95 (N); *Ex parte Adams* 1964 SA 135 (CPD).

¹⁸⁵ Section 42(1) of the *Estates Act* as well as s 15(A) read with reg 44A to the *Deeds Act*.

¹⁸⁶ Section 8(1) read with ss 195(1) and 195(2) of the Constitution.

with the Master.

To conclude, the Master's acceptance and/or approval of an RDA does not guarantee or confirm the legality of an RDA in its form and/or content. Notably, the Master's assumed weighing of the acceptance and/or approval of an RDA's validity is a redundant practice, also given that the responsibility to assess an RDA's correctness of facts and its validity rests solely on the shoulders of the executor and/or the conveyancer.

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List of Abbreviations

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| AJA | Promotion of Administrative Justice Act 3 of 2000 |
| CRC | Circulars of the Chief Registrar |

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|-------------|---|
| DPSA | Department of Public Service and Administration |
| L&D account | Liquidation and Distribution account |
| OCSLA | Office of the Chief State Law Advisor |
| PAIA | Promotion of Access to Information Act 2 of 2000 |
| PELJ | Potchefstroom Electronic Journal |
| RCR | Registrars' Conference Resolution |
| RDA | redistribution agreement |
| SALJ | South African Law Journal |
| SALRC | South African Law Reform Commission |
| SARS | South African Revenue Service |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal for Contemporary Roman-Dutch Law |