

# BEXs Knowledge Sharing Initiative



**BESPOKE EXECUTOR SERVICES**  
Customised Fiduciary Solutions

## Lodging and Recovery of Claims

With particular reference to  
the validity of  
“Late Claims”

## Lodging and Recovery of Claims

(With particular reference to “Late Claims”- portion highlighted in bold italics done by BEXs)

The Act provides that the executor must give notice, by way of advertisement in the Gazette and one or more newspapers, to creditors to lodge their claims within the period specified in the notice.<sup>1</sup> A creditor's claim is not required to be lodged in any particular form, but it is advisable for the creditor to set out his claim with reasonable particularity to enable the executor to give it proper consideration.

***If a creditor does not lodge his claim within the period specified in the notice, he does not thereby lose the right to claim but—***

- (a) if he lodges his claim thereafter and does not satisfy the Master, that he has a reasonable excuse for the delay, he will be liable for any costs payable out of the estate, in connection with the reframing of any account or otherwise, as a result of the delay; and***
- (b) whether or not he lodges his claim thereafter, he is not entitled in respect of his claim to demand restitution from any claimant of any moneys paid to such other claimant at any time or before he lodged his claim, as the case may be, in pursuance of a valid claim against the estate.<sup>2</sup>***

***Under (a) the only disadvantage in lodging a late claim is the liability to pay any additional costs which may be occasioned thereby. Such costs are hardly likely to arise before the executor has framed his liquidation and distribution account. If the claim is lodged at any time before the executor has distributed the assets dealt with under an account lodged by him, and the claim is a valid one, it will be the executor's duty to reframe his account to include the claim. Any costs entailed in doing so, readvertising the account etc. will have to be borne by the creditor unless the Master considers he has a reasonable excuse for the delay, e.g., he was out of the country at the time of the notice to creditors.***

***If, however, the executor has made a distribution. under an account before the creditor has lodged his claim, the creditor will not be able to recover anything from any claimant against the estate who has been paid out on a valid claim by the executor. Section 31(b) speaks of moneys paid to such other claimant at any time and not necessarily after the executor's account has lain for inspection. Even in this case, the creditor lodging his claim late has no recourse against the claimant who has been paid.***

***As far as the executor's personal liability is concerned, s 50(a) provides makes a distribution otherwise than in accordance with the provisions of s 34 or 35 (i.e., in terms of an account which has lain for inspection) he is liable to make good any loss to any claimant, whose claim was lodged within the period specified for lodging claims, as a result of his failure to make a distribution in accordance with the relevant section. This provision is intended to safeguard those creditors who lodged their claims timeously. But if a creditor's claim has been lodged, even out of time, and brought up in the liquidation account, the executor will be personally liable to the creditor if he does not pay him pursuant to the account. If this were not so, the creditor lodges his claim late not only has no recourse against the Other creditors but also would have no recourse against an executor who***

*deliberately or otherwise does not pay out in terms of the account. It is hardly to be imagined that the legislature intended this result.*

*Where a creditor has lodged his claim late and after the distribution of assets by the executor, although he cannot recover from other creditors or the executor, he is not remediless. In the first instance he will still be entitled to participate in the distribution of any further assets of the estate which have not yet been distributed or which may later be discovered.<sup>3</sup> Secondly, he can recover from the heirs and legatees to the extent of their inheritances and legacies.<sup>4</sup>*

*The action for recovery against heirs and legatees is based on the *condictio indebiti*,<sup>5</sup> namely, on the ground that because of the non-payment of his claim they have received more than they are entitled to. This action is prescribed in three years.<sup>6</sup> But in order to claim from the heirs and legatees the creditor must allege and prove an enforceable claim against the deceased. If, at the time the creditor sues the heirs or legatees, his claim against the deceased has become prescribed, he cannot succeed even though the period of three years from the time the heirs and legatees received payment from the executor has not yet expired.<sup>7</sup>*

*It is submitted that a creditor will not be able to proceed against a legatee unless the amount received by the heirs is insufficient to meet the claim, since it cannot be said, unless the residue is exhausted, that the legatee has received more than he is entitled to, and this is so even if the creditor is unsuccessful in recovering from the heirs.<sup>8</sup> It follows, too, that where there is more than one heir the creditor can only recover a pro rata share of his claim from each heir.*

*This claim under the *condictio indebiti* which a creditor has against heirs and legatees exists even if the creditor-at no time lodges his claim with the executor.*

<sup>1</sup> See 12.4. There appears to be no obligation upon an executor to take cognisance of a creditor's claim which he is aware exists but is not lodged with him by the creditor, but see 16.5.

<sup>2</sup> Section 3 1. In respect of secured creditors, see 16.5.

<sup>3</sup> *Estate Stanford v Kruger* 1942 TPD 243.

<sup>4</sup> *Laing v Le Roux* 1921 CPD 745; *De Villiers v Bullbrand Fertilizers Ltd* 1941 TPD 131; *Frasers Ltd v Estate Cohen* 1965 (3) SA 271 (0).

<sup>5</sup> *De Villiers's case (supra)*.

<sup>6</sup> Prescription Act 68 of 1969 s II(d). Prescription begins to run from the date of payment to the legatee or heir; see *Liquidators of Paarl Bank v Roux* 8 SC 205 at 208; *Mosam v De Kamper* 1964 (3) SA 794 (T).

<sup>7</sup> *Mogam v De Kamper* 1964 (3) SA 794 (T); *Fraser's case (supra)*. But see 16.16 as to interruption of prescription by the filing of a claim with the executor.

<sup>8</sup> See *Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N).

(Extracted from Meyerowitz on Administration of Estates and Their Taxation)