



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

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Sub Office File: 7/1/1

17 July 2012

CIRCULAR ~~57~~ OF 2012
(HEAD OFFICE FILE 5/9/3/2 & 12/4/2)

CHIEF MASTERS DIRECTIVE 5 OF 2012 – Electronic Fund Transfers (EFT) and other payments by Estate Representatives

1. Your attention is drawn to the contents of the attached Directive with regards Electronic Fund Transfers (EFT) and other payments by Estate Representatives
2. This Directive is effective from ... **17 July 2012**..... and should be implemented as such.
3. Any enquiries should be addressed in writing to the Office of the Chief Master or per e-mail to chiefmaster@justice.gov.za
4. All previous Directives in this regard, are revoked.


Adv. L G Basson
Chief Master

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TO ALL OFFICES IN THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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CHIEF MASTER'S DIRECTIVE 5 OF 2012

Electronic Fund Transfers (EFT) and other payments by Estate Representatives

1 PURPOSE

The purpose of this directive is to ensure a uniform approach by Masters in respect of the way payments may be made from estate accounts. The aim is to include all Estate Representatives e.g. Executors, Masters Representatives, Insolvency Practitioners, Curator/Administrators, Tutors, Trustees of Trusts etc.

All previous Master's Directives on points addressed by this Chief Masters Directive are revoked.

2 MOTIVATION/BACKGROUND

- 2.1 The Payments Association of South Africa (PASA) issued a directive indicating that from 16 July 2012 banks will no longer accept cheque payments exceeding R500 000 from their clients.

After due consideration of a letter by PASA and a letter by the Reserve Bank endorsing the PASA directive (attached as Annexures to this Directive) I have decided that Estate Representatives should adhere to the PASA directive. Subject to the conditions set out in this Directive.

Masters should allow payments by Estate Representatives, other than by cheque, in order to enable the Estate Representatives to comply with the PASA directive and to reap the benefits of EFT and similar payments.

- 2.2 A number of role players have also approached my Office with a request that Estate Representatives should be allowed to make EFT payments out of estate accounts.

I am satisfied that the request is reasonable and I can in law accede thereto. As part of my statutory obligations, I have decided to provide the following guidelines to ensure a uniform approach by Masters to this matter.

3 PAYMENT OTHER THAN BY CHEQUE BY ESTATE REPRESENTATIVES

- 3.1 Estate Representative means –

- Executor of a deceased estate;
- Section 18(3) Masters Representative;
- Trustee of an insolvent estate;
- Liquidator of a company or close corporation;
- Trustee of a trust.
- Curator/Administrator/ Tutor

- 3.2 Payment by an Estate Representative, other than by cheque, (for instance EFT) is accepted subject to the following:

3.2.1 The Estate Representative is responsible to ensure that all payments made are lawful

3.2.2 Every payment must contain the name of the payee, the cause of payment and other requirements specific to that payment e.g. the reference number and name of Masters Office in respect of Masters Fees.

Payments may only be made to a bank account designated by the payee.

3.2.3 An affidavit contemplated by Section 35 (12) of the Administration of Estates Act 66 of 1965 by the Estate Representative in which he or she declares that a creditor was paid or that an heir received his or her share may be accepted by the Master in lieu of a receipt by the beneficiary.

4 EFFECTIVE DATE

This Directive will come into effect as from the date of signing hereof.

Signed on 17 July 2012



Adv L G Basson

Chief Master of the High Courts of South Africa



Mr L Basson
Chief Master
Office of the Chief Master
Department of Justice and Constitutional Development
Private Bag X668
Pretoria
0001
(Delivered by e-mail: lbasson@justice.gov.za)

16 July 2012

Dear Mr Basson,

CHEQUE ITEM LIMIT: PAYMENT METHODS PRESCRIBED BY LAW

I refer to two meetings at your office, the first of which took place on 28 June 2012 and attended by a representative of the Banking Association of South Africa and two PASA representatives, during which meeting the potential impact of the new cheque item limit of R500 000.00 on the provisions of several pieces of legislation was discussed. The second meeting took place on 16 July 2012 and attended by two PASA representatives. The purpose of the second meeting was to discuss our draft letter containing certain views and proposals.

Based on the feedback received from Messrs. Ismail and Coetzee from my office, it was agreed that the parties would consider briefing senior legal counsel for a legal opinion on the interpretation of the Administration of Estates Act, Act No. 66 of 1965 (the Act), as well as other pieces of legislation containing similar provisions regarding the use of cheques as a payment method.

However, after extensive internal debate it was decided to provide you with a PASA view of these provisions, as well as other considerations which may give you the necessary sense of comfort in issuing a directive to allow executors to use other (electronic) payment methods.

I will deal with these considerations as follows:

PASA Mandate

The Payments Association of South Africa (PASA) is recognized by the SA Reserve Bank as a payment system management body in terms of the National Payment System Act, Act No. 78 of 1998 (the NPS Act). PASA is empowered to organize, manage and regulate the participation of banks in the National Payment System (NPS) and to issue policies and rules that are binding on such banks.

PAYMENTS ASSOCIATION OF SOUTH AFRICA

2nd Floor, 32 Princess of Wales Terrace, Sunnyside Office Park, Parktown
PO Box 61380, Marshalltown 2107
Tel (011) 645 6766 Fax (011) 645 6866



The reduction of the cheque item limit from R5M to R500 000.00 is just one example of such rules.

Decision to reduce the Item Limit

The decision to reduce the item limit of cheques was motivated by two primary factors, namely the inefficient nature of cheques, leading to high charges for their use, and secondly, the significant fraud risk that would be addressed in lowering the limit. On average more than 40% of the value of total industry fraud losses will be addressed by a decrease to the limit.

Additional factors were the very low customer impact (0.7% of customers issue cheques for more than R500 000), as well as the fact that cheques have been consistently declining in volume and value over the past decade or more. The decline continues at a steady rate of over 20% on average per annum. This is worldwide trend and is a market signal for preference of electronic payments. These more efficient and secure alternatives developed over the last 10 years include amongst others card, internet (EFT transfers, etc) and mobile payments.

There has been strong support for the change to the limit from many stakeholders aside from PASA member banks. Domestically, SARS has also informed the public that no cheque payments can be made for values greater than R100 000. Similarly in the Common Monetary Area, countries like Swaziland, Namibia and Lesotho have aligned cheque limits, with Swaziland also adjusting their limits to R500 000 in July 2012 and Namibia considering a further decrease to R100 000 in 2013. Lesotho is already on a R100 000 limit.

The promotion of secure and much more efficient electronic payments was thus inevitable.

Process

Once member banks, some governmental departments (such as National Treasury), private institutions and other industry stakeholders were consulted, a proposal was made to the SA Reserve Bank to formally support the reduction of the item limit. This proposal was subsequently endorsed by the SA Reserve Bank's Governor's Executive Committee. See copy of the accompanying SA Reserve Bank letter, dated 7 November 2011.

Administration of Estates Act, No. 66 of 1965 (the Act)

We have considered the specific provisions of the Act, as well as of the Insolvency Act, Act No. 24 of 1936 and the Companies Act provided to us at the aforesaid meeting.

We have also considered additional provisions of the Act to ensure our interpretation is consistent with the intention of the legislature and the Act as a whole.

We have concluded that:

1. The pieces of legislation in question were issued before electronic retail payment products systems were in place. As a result no specific reference was made in the Act to other payment products or methods other than cheques.
2. The Act, with the exception of cheques, refers generically to 'payment of money', without prescribing the method of payment.

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3. When reference is made to 'payment by cheque', certain requirements are however prescribed.
4. The reference to the opening of a cheque account should not be interpreted as though cheques are the only payment method allowed by the Act. Cheque accounts could also be described as transmission accounts or transactional accounts from which any EFT debit order or EFT credit transfer, or even debit/ cheque cards for that matter, can be processed.
5. Section 28(6) of the Act provides that the Master may in writing direct the bank with which an account has been opened, inter alia, to pay over into the guardian's fund all moneys standing to the credit of the account. This is equivalent to instructing a bank via the internet or any other electronic method to make a payment, such as an EFT credit transfer. An electronic instruction is equal to a written direction by the Master.
6. Sections 28 (11) – (13) make reference to payment without specifying the method of payment. Our view is that one can safely deduce that the Act is not prescriptive as far as the payment method is concerned, but only prescriptive when a certain payment method (such as a cheque) is used.
7. A similar interpretation should be given to other provisions of the Act using the same language.
8. Section 35(12)(c) provides that the executor shall pay creditors after the fulfilment of certain requirements. It states that **either** a cheque (purported to be drawn payable to a creditor or heir) **or** an affidavit by the executor in which he declares that a creditor was paid or that an heir received his share in accordance with the account, may be accepted by the Master in lieu of any such receipt or acquittance. This leaves room for an interpretation that alternative payment methods could be available to the executor. The fact that the affidavit does not have to state that payment was made by cheque is an indication of an interpretation in favour of alternative payment methods.
9. We attach the specific sections of the Act, together with some of our comments, for your convenience.

In summary then, it appears that the Act does not exclude the use of other payment methods such as EFT credit transfers, but is prescriptive regarding certain requirements when a cheque is used. The absence of wording explicitly prohibiting any other payment method, serves as a clear indication that any such other payment method may be used.

The fact that strict guidelines apply when cheques are drawn should also not be interpreted as limiting the payment method to cheques only.



Interim and Alternative Arrangements

Although we are confident that the Act allows for alternative payment methods, we would be agreeable to the splitting of cheque payments for payments in excess of R500 000.00 for a pre-defined and pre-agreed limited period. This is not ideal but could be considered in the event of a definitive interpretation to the contrary.

We suggest however, that you consider the above and advise whether you would be comfortable to adopt our view without contravening the provisions of the legislation in question.

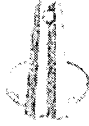
We further wish to offer our assistance in proposing appropriate changes to the Act and other relevant legislation to accommodate alternative methods of payment.

We look forward to your response and kindly request you to contact Pierre Coetzee or Arif Ismail should you need more information.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Walter Volker", with a long horizontal flourish extending to the right.

Walter Volker
Chief Executive Officer



South African Reserve Bank

National Payment System Department

Confidential

2011-11-07

File ref. no.:18/PASA/2011

Mr Walter Volker
Chief Executive Officer
Payments Association of South Africa
PO Box 61380
MARSHALLTOWN
2107


Dear Walter

Risk Reduction Measures for Cheques in the National Payment System

I refer to our communication and the National Payment System Strategy meeting relating to the reduction of the current cheque item limit.

I wish to advise that the Governors' Executive Committee of the South African Reserve Bank endorsed the reduction of the cheque item limit from R5 million to R500 000, as proposed by the Payments Association of South Africa.

Yours sincerely


Dave G Mitchell

Head, National Payment System Department



Section 26. Executor charged with custody and control of property in estate

1. Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment
- 1A) The executor may before the account has lain open for inspection in terms of section 35(4), with the consent of the Master release such amount of money and such property out of the estate as in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household.
2. If the executor has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in sub-section (3).
3. If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document in any deceased estate is concealed upon any person or at any place or upon or in any vehicle or vessel or receptacle of any nature or is otherwise unlawfully withheld from the executor concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document
4. Such a warrant shall be executed in like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the executor concerned.

Comment [PC1]: Does not prescribe the manner or method of payment

Section 28 Banking accounts

- An executor--
- a) shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R1 000, open a cheque account in the name of the estate with a bank in the Republic of South Africa and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate;
 - b) may open a savings account in the name of the estate with a banking institution or a bank and may transfer thereto so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate;
 - c) may place so much of the moneys deposited in the account referred to in paragraph (a) as is immediately required for the payment of any claim against the estate on interest-bearing deposit with a bank.
 - 4) Every executor shall whenever required by the Master to do so, notify the Master in writing of the bank and the office or branch thereof with which he or she has opened an account referred to in subsection (1), and furnish the Master with a bank statement or other sufficient evidence of the position of the account
 - 5) No executor who in compliance with a request of the Master under subsection (2), has notified the Master of the office or branch of the bank with which he or she has opened an account referred to in subsection (1) shall transfer any such account from any such office or branch to any other such office or branch, except after written notice to the Master.

Comment [PC2]: 1. At the time (in 1965) cheque accounts were the only type of accounts from which payments could have been generated as transmission accounts. 2. Such cheque accounts were later on used to make other payments from, such as stop order payments, EFT debit order payments and EFT credit transfers. 3. Reference to cheque accounts in this Act does not limit the manner or method of payment from such accounts to the use of cheques only.



- 4) All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by every executor or his duly authorized agent
- 5) The Master and any surety of the executor shall have the same right to information in regard to such account as the executor himself or herself possesses, and may examine all vouchers in relation thereto, whether in the hands of the bank or of the executor.
- 6) The Master may in writing direct the manager of any office or branch with which an account has been opened under subsection (1), to refuse, except with the consent of the Master, any further withdrawal of money from that account or to pay over into the guardian's fund all moneys standing to the credit of such account at the time of the receipt, by the said manager, of that direction, and all moneys which thereafter be paid into that account, and shall notify the executor of any such direction.

Comment [PC3]: 1. This section could be interpreted as saying that in the event of a cheque or order being used, such cheques or orders must comply with certain requirements. It does not exclude the use of any other payment instrument or mechanism.

Comment [PC4]: This section grants the Master the authority to instruct the bank to transfer money to the guardian's fund. This opens the door for the use of EFT credit transfers, whether instructed in writing or by electronic mandate as is the practice today through Internet or other EFT credit transfers.

34. Insolvent deceased estates

- 1) On the expiry of the period specified in the notice referred to in [section 29](#) the executor shall satisfy himself as to the solvency of the estate and, if the estate is found to be insolvent then or any time before distribution under subsection (12) of [section 35](#), he shall forthwith by notice in writing (a copy of which he shall lodge with the Master) report the position of the estate to the creditors, informing them that unless the majority in number and value of all the creditors instruct him in writing within a period specified in the notice (not being less than fourteen days) to surrender the estate under the Insolvency Act, 1936 (Act No. 24 of 1936), he will proceed to realize the assets in the estate in accordance with the provisions of subsection (2). Provided that—
- no creditor whose claim amounts to less than R1 000 shall be reckoned in number;
 - any creditor holding any security which a trustee would under section 83 of the said Act have been authorized to take over if the estate had been sequestrated, shall, if called upon to do so in writing by the executor, place a value thereon within the period specified by the executor, and shall be reckoned in respect of the balance of his claim which is, according to such valuation, unsecured; and
 - if any creditor fails to place a value on any such security within the said period, he shall not be reckoned as a creditor for the purpose of this subsection.
- 2) If after the expiry of the period specified in the notice under subsection (1) the executor has not in accordance with such notice been directed to surrender the estate, he shall, after the creditors have been notified in writing, for a period not being less than fourteen days, of the manner and conditions of the intended sale of the assets, sell the assets in the estate.
- 3) A creditor may at any time before the sale of an asset lodge with the executor an objection to the intended sale of that asset, and shall send a copy of that objection to the Master.
- 4) After considering the objection, any comment the executor may have made regarding the objection and the further particulars which the Master may have required, the Master shall order the executor to proceed with the sale or give any other order regarding the sale of the asset as he thinks fit.
- 5) In so far as a date of sequestration is relevant for the purposes of the distribution of an estate under this section, such date shall be deemed to be the date immediately following the date on which the period specified in the notice given in respect of the estate in question under subsection (1), has expired.



- 6) If any creditor has under paragraph (b) of the proviso to subsection (1) placed a value on any security, the executor may at any time within six weeks thereafter deal therewith *mutatis mutandis* in the manner provided in section 83 of the Insolvency Act, 1936.
- 7) An executor shall, as soon as may be after the expiry of the period specified in a notice referred to in subsection (1), but within--
- six months after letters of executorship have been granted to him; or
 - such further period as the Master may in any case allow,
- submit to the Master an account in the prescribed form, supported by vouchers, of the liquidation and distribution of the estate
- Such account shall provide for the distribution of the proceeds in the order of preference prescribed under the Insolvency Act, 1936, in the case of a sequestrated estate
- 7A) If at any time after the account contemplated in subsection (7) was submitted to the Master, additional assets are found in the estate and the account is not amended in terms of this section so as to provide for the application or distribution of the proceeds of those assets, the executor shall in respect of those assets submit to the Master a supplementary account in the prescribed form supported by vouchers.
- The provisions of subsection (7) (b) shall *mutatis mutandis* apply in respect of a supplementary account contemplated in paragraph (a) of this subsection.
- 8) The Master may at any time in any case in which he has exercised his powers under subsection (7) (a) (ii) or in which an executor has funds in hand which ought, in the opinion of the Master, to be distributed or applied towards the payment of debts, direct the executor in writing to submit to him within a specified period an interim account in the prescribed form, supported by vouchers.
- 9) The provisions of subsections (3) to (11), inclusive, of section 35 shall *mutatis mutandis* apply with reference to any account referred to in this section.
- 10) When an account has lain open for inspection and--
- no objection has been lodged; or
 - an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection and no application has been made to the Court to set aside the Master's decision,
 - an objection has been lodged but has been withdrawn or has not been sustained, and no such application has been made to the Court within the said period,
- the Master shall confirm the account and his confirmation shall be conclusive save as against a person in whose favour the Court may, before a dividend has been paid out in accordance with the account, have granted an order to reopen the account.
- 11) When an account has been confirmed by the Master, the executor shall forthwith pay the creditors and distribute the estate among the heirs, if any, in accordance with the account, and lodge with the Master the receipts and acquittances of the creditors and heirs, if any: Provided that a cheque purporting to be drawn payable to a creditor or heir in respect of any claim or share due to him and paid by the banker on whom it is drawn, may be accepted by the Master in lieu of any such receipt or acquittance.
- 12) The executor shall not later than two months after the estate has become distributable in terms of subsection (11), pay to the Master for deposit in the guardian's fund on behalf of the persons entitled



there to, all moneys which he has for any reason been unable to distribute in accordance with the account.

- 13) The provisions of this section shall not prevent the sequestration of any estate in terms of the Insolvency Act, 1936

Comment [PC5]: These Section makes reference to payment without specifying the method. Our view is that one can safely deduce that the Act is not prescriptive as far as the payment method is concerned, but only prescriptive when a certain payment method (such as a cheque)

Section 35. Liquidation and distribution accounts

- 1) An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within—
- six months after letters of executorship have been granted to him; or
 - such further period as the Master may in any case allow,
- submit to the Master an account in the prescribed form of the liquidation and distribution of the estate.
- 1A) If at any time after the account contemplated in subsection (1) was submitted to the Master, additional assets are found in the estate and the account is not amended in terms of this section so as to provide for the application or distribution of the proceeds of those assets, the executor shall in respect of those assets submit to the Master a supplementary account in the prescribed form.
- 2) The Master may at any time in any case in which he has exercised his powers under paragraph (b) of subsection (1) or in which an executor has funds in hand which ought, in the opinion of the Master, to be distributed or applied towards the payment of debts, direct the executor in writing to submit to him an interim account in the prescribed form within a period specified.
- 2A) The Master may in respect of an account contemplated in subsection (1), (1A) or (2) 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.
- 3) The executor shall set forth in any interim account all debts due to the estate and still outstanding and all property still unrealized, and the reasons why such debts or property, as the case may be, have not been collected or realized
- 4) Every executor's account shall, after the Master has examined it, lie open at the office of the Master, and if the deceased was ordinarily resident in any district other than that in which the office of the Master is situate, a duplicate thereof shall lie open at the office of the magistrate of such other district for not less than twenty-one days, for inspection by any person interested in the estate.
- 5)
- The executor shall give notice that the account will be so open for inspection by advertisement in the Gazette and in one or more newspapers circulating in the district in which the deceased was ordinarily resident at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he was so resident in any other district, also in one or more newspapers circulating in that other district, and shall state in the notice the period during which and the place at which the account will lie open for inspection.
 - If, in the case of a supplementary account contemplated in subsection (1A), the value of the assets concerned is in the opinion of the Master too small to justify the cost of publication of the notices contemplated in paragraph (a) of this subsection, that paragraph shall not apply in respect of such supplementary account and the Master may, if he finds it necessary, direct the executor to



give notice, in such manner and to such persons as the Master may determine, of the place at which and the period during which the account will lie open for inspection in terms of subsection (4)

- 6) The magistrate shall cause to be affixed in some public place in or about his office, a list of all such accounts lodged in his office, showing the date on which each such account will be transmitted to the Master, and, upon the expiry of the period allowed for inspection, shall endorse on each account his certificate that the account has lain open in his office for inspection in accordance with this section and transmit the account to the Master.
- 7) Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefor, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.
- 8) 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.
- 9) If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-founded or if, apart from any objection, he is of opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit
- 10) Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.
- 11) If any such direction affects the interests of a person who has not lodged an objection and the account is amended, the account as so amended shall, unless the said person consents in writing to the account being acted upon, again lie open for inspection in the manner and with the notice and subject to the remedies hereinbefore provided.
- 12) When an account has lain open for inspection as hereinbefore provided and--
 - a) no objection has been lodged; or
 - b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in subsection(11), and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master's decision; or
 - c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor: Provided that--

- i) a cheque purporting to be drawn payable to a creditor or heir in respect of any claim share due to him and paid by the banker on whom it is drawn;
- ii) an affidavit by the executor in which he declares that a creditor was paid or that an heir received his share in accordance with the account;

Comment [PC6]: This clearly provides v for an alternative payment method. Once again it is prescriptive in the sense that when a cheque is used to make payment it has to comply with certain criteria.

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may be accepted by the Master in lieu of any such receipt or acquittance.

- (1) The executor shall not later than two months after the estate has become distributable in terms of subsection (12), pay to the Master for deposit in the guardian's fund on behalf of the persons entitled thereto, all moneys which he has for any reason been unable to distribute in accordance with the account.

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