



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION)

CASE NO: J31738/2012

In the matter between:

DE JAGER, SANDRA LILIAN

Applicant

and

HEYMAN, ALAN CYRIL

Respondent

JUDGEMENT

FRANCIS J

1. This is an application to declare that the business relationship between the applicant who is a duly admitted attorney and the respondent, also a duly admitted attorney, from August 2000 to be a partnership and that the conditions of the verbal agreement between the parties, as varied between them from time to time, relating to their partnership is confirmed.
2. The exact nature of the relationship between the parties is in dispute. The applicant contended that the agreement entered was that of a partnership whereas the respondent contended that he was employed by the applicant as an independent contractor. A dispute arose between the parties about what the true nature of the agreement was that the parties had concluded which prompted the applicant on 23 August 2012 to make an application to this Court for the following relief:
 - “1. *That the business relationship existing between the parties from August 2000 is declared to be a partnership and that the conditions of the verbal agreement between the parties, as varied between them from time to time, relating to*

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their partnership is confirmed.

2. *That the respondent provide the applicant within a period of 30 (THIRTY) days from the date of the court order with a detailed list of all the De Jager – Du Plessis files, the R200 files and Heyman files in his possession:*

2.1 *which have been finalized and settled since 1 March 2012 to date of this order, and*

2.2 *In respect of all remaining files reflected on such list not finalized, indicate the names of the clients involved and the dates arranged for trials of such matters for the finalization thereof.*

3. *The parties thereafter debate the account between themselves;*

3.1 *that the respondent pay to the applicant whatever amount appears to be due to it upon debatement of the account;*

3.2 *that the respondent pay the costs of this application; and*

3.3 *that such further or alternative relief be afforded to the applicant as this Honourable Court may deem fit.”*

3. The application was opposed by the respondent. The matter was set down for a hearing before Hodes AJ on 10 June 2013. After the application was argued before him, he made the following order:

“1. No order is made in regards to prayer 1. Prayer 2 granted, prayer 2.1 granted, prayer 2.2. granted subject to be read with prayer 3.1, that the debatement applies only to files which were initiated in the offices of the Applicant, and that proceeded beyond the stage of the issuing of MVA Form having being duly received by the Road Accident Fund or any or other relevant applicable entity. In regard to the matters initiated before 28th February 2012 in terms of what is set out above. Applicant has to bare her share of the expenses in all matter relevant even if unsuccessful. The debatement of the account has to be held between the parties.

2. *Costs are reserved if the parties do not resolve the issue after the lapse of 6 weeks from today, can approach the Court again.”*

4. The respondent was unhappy with the order granted by Hodes AJ and filed an application for leave to appeal on 2 July 2013 against part of the judgment and all of

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the orders given on the following grounds:

“1. The Learned Judge erred in finding and ordering that:

- 1.1 The Applicant is entitled to receive an account from the Respondent;*
- 1.2 The Respondent is obliged to provide an account to the Applicant, which includes the files conducted in the name of Heyman Attorneys;*
- 1.3 The Respondent is to debate an account with the applicant, which includes the files conducted in the name of Heyman Attorneys;*
- 1.4 The Applicant has made out a case for the relief sought in her notice of motion; and/or*
- 1.5 The Applicant has established the elements entitling her to receive an account from the Respondent.*

2. The above Honourable Court (sic) to have found and ordered that:

- 2.1 The Applicant is not entitled to receive an account from the Respondent;*
- 2.2 The Respondent is not obliged to provide an account to the Applicant, which includes the files conducted in the name of Heyman Attorneys;*
- 2.3 The Respondent is not obliged to debate an account with the Applicant, which includes the files conducted in the name of Heyman Attorneys;*
- 2.4 The Applicant has not made out a case for the relief sought in her notice of motion;*
- 2.5 The Applicant has not established the elements entitling her to receive an account from the Respondent;*
- 2.6 The Applicant has failed to establish the existence of any form of partnership as a result of her failure to allege a common object of making a profit;*
- 2.7 That the relationship between the Applicant and the Respondent was one of a sub-contractor;*
- 2.8 The application ought to be decided on the Respondent’s version; and/or*
- 2.9 the Applicant’s application is to be dismissed with costs.*

3. The Learned Judge was misdirected in his findings in finding that a sharing of

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fees alternatively sharing of turnover was equivalent to a profit sharing arrangement.

4. *The Learned Judge erred in not finding Heyman Attorneys to be a separate legal entity from the entity alternatively the person of the Applicant in which the Applicant has no right, title or interest.”*

5. The applicant filed a notice of abandonment in terms of rule 41(2) of the Uniform Rules of this Court on 20 September 2013. In the said notice dated 4 September 2013 the applicant stated that she was abandoning part of the order granted by Hodes AJ on 10 June 2013 as follows:

“1. *Save for the order with reference to applicant’s prayer 1 the balance of the orders referring to applicant’s prayers 2 and 2.1, and 2.2 read with 3.1 granted as per numbered 1 of the order are abandoned by the applicant.*

2. *The orders granted as per numbered paragraph 2 of the order are to remain.*

TAKE FURTHER NOTICE that the applicant consents to payment of the respondent’s costs up to the time of service of this notice of abandonment excluding the costs of the application which remains to be decided upon in terms of numbered paragraph 2 of the order.”

6. The applicant re-enrolled her application that came before Hodes AJ and sought prayer 1 of her original notice for declaratory relief. The respondent had contended that since there was a material dispute of fact which the applicant should have anticipated, the application should be dismissed. In the alternative the respondent denied that the agreement that was concluded was that of a partnership.

7. At the commencement of the proceedings, I raised with counsel that it was my *prima facie* view that the dispute could not be resolved on the papers and that the matter should be referred to trial on the issue of what the agreement was that the parties had concluded. Counsel for the applicant after he had obtained instructions indicated that

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the matter should be referred to trial. Counsel for the respondent indicated that he will not have any difficulty if the matter was to be referred to trial but that there would be no need to do so since, Hodes AJ has dealt with prayer 1 of the Notice of Motion and that the matter had become academic after the applicant had abandoned the relief that was granted by Hodes AJ.

8. I allowed for the matter to be argued and the sole issue was whether the relief sought by the applicant had become academic. The respondent submitted that in deciding this question, I will have to interpret what the order that was granted by Hodes AJ means.
9. The question that arises in this matter is whether Hodes AJ has made any order in respect of prayer 1 of the notice of motion which appears to have been the crux of the relief that was sought by the applicant. The dispute centred around whether the agreement that was concluded between the applicant and respondent was a partnership agreement or not. Many consequences will flow once a finding has been made that the agreement that was concluded between the parties was a partnership. It is not limited to prayers 2 and 3 of the notice of motion. This much was conceded by the respondent's counsel.
10. It was contended on behalf of the applicant that Hodes AJ did not deal with the application for a declarator. It was conceded that the applicant had abandoned the rest of the relief that was granted by Hodes AJ but importantly she did not abandon the relief sought about the declaratory. It was contended by the respondent that Hodes AJ dealt with the entire application and that a ruling that 'no order is made in regard

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to prayer 1' was akin to a finding that no order is made as far as costs are concerned.

11. The respondent's contentions are not correct. Whilst I agree that sometimes when no order is made as far as costs are concerned, the refusal to make no such an order for costs will be spelled out in the judgement. The difficulty in this case is that no written judgement or reasons for the order made was given by Hodes AJ. This Court is left to speculate why he made no such an order. It is clear that if he had made an order as far as prayer 1 was concerned, that would have been a ground for leave to appeal on the part of the respondent. It was not.
12. The fact of the matter is that no order was made in terms of prayer 1 of the notice of motion. This much is clear from the order. This much is also clear from the respondent's heads of arguments that were filed on 22 September 2014 a year after Hodes AJ had made his order. The respondent stated in his heads of arguments from paragraphs 1 to 8 that the applicant had launched the current proceedings during or on about August 2012 seeking declaratory and certain ancillary relief. The matter was accordingly set down and argued on 10 June 2010³ upon which Hodes AJ made an order granting all but prayer 1 (declaratory relief) in favour of the applicant. No order was made in respect of the declaratory relief, which was sought to declare the business relationship between the parties to be that of a partnership, and the parties were granted leave to approach the Honourable Court after 6 weeks should they fail to resolve this issue. The respondent filed an application for leave to appeal, upon which the applicant abandoned part of the order granted. All but the order relating to prayer 1 (declaratory order) and costs were abandoned. The only issue to be determined at

the hearing of this matter is prayer 1 of the Notice of Motion. It is not necessary to repeat this.

13. Both parties therefore knew that Hodes AJ did not deal with prayer 1 of the notice of motion. There is nothing to interpret about his failure to deal with prayer 1.
14. This brings me to the second argument raised by the respondent. It was contended that since the applicant had abandoned the relief that was granted in terms of prayers 2 and 3 which has to do with the debatement of the account, the handing over of certain files and the payment of the applicant's expenses, it has rendered the issue about the declaratory and in particular 1 as academic.
15. It is trite that this Court has a discretion whether it should or should not grant a declaratory order. The following dictum appears in the matter of *JT Publishing (Pty) and Another vs Minister of Safety and Security and Others* 1996 (12) BCLR 1599 (CC) at paragraph 15:

"The reversal of the decision reached in the Court below brings duly before us the claim for a declaratory order which the applicants wish us to grant on the constitutional issues presented by them. That does not necessarily mean, however, that we are now bound to resolve those issues. Whether we should say anything at all about them must be settled first. I interpose that enquiry because a declaratory order is a discretionary remedy in the sense that the claim lodged by the an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones."
16. The relief that was sought by the applicant in prayer 1 of the notice of motion, has not

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become academic after she had abandoned part of the relief that was granted to her by Hodes AJ. I have already indicated that prayers 2 and 3 of the notice of motion are not the only consequences that would flow from such a declaration. It therefore follows that it can hardly be contended that the relief sought for a declarator would render the matter academic, abstract or hypothetical. It remains a live issue that will have to be determined. The applicant would not be able to seek the relief that was granted to her which she had abandoned.

17. Both parties are *ad idem* that subject to what my findings were going to be on the issues that were raised by the respondent which I have now dealt with, that there is a material dispute of fact that cannot be resolved on the papers and that this matter should be referred to trial. I intend to do so.
18. This matter stands to be referred to trial and costs are to be reserved for determination by the trial court.
19. In the circumstances I make the following order:
 - 19.1 The application is referred to trial.
 - 19.2 The notice of motion will stand as a simple summons.
 - 19.3 The notice of intention to oppose shall stand as a notice of intention to defend.

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19.4 The applicant must file her declaration within 21 days from date of this order.

19.5 Thereafter the rules relating to actions shall apply.

19.6 The costs of this application are reserved for determination by the trial court.

FRANCIS J

HIGH COURT JUDGE

FOR APPLICANT : HB MARAIS SC INSTRUCTED BY KOBUS
BOSHOFF ATTORNEYS

FOR RESPONDENT : LJ MORISON SC WITH L STEYN INSTRUCTED
BY ALLIS ATTORNEYS

DATE OF HEARING : 13 OCTOBER 2014

DATE OF JUDGMENT : 24 OCTOBER 2014