

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 09480/14

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
DATE	SIGNATURE

In the matter between:

WYCLIFFE THIBE MOTHULO

Applicant

And

EDMNO INVESTMENTS CC

First Respondent

SPOOR & FISHER

Second Respondents

MTN GROUP LIMITED

Third Respondent

SUMMARY

Attorney – investment of trust funds in terms of sec 78(1) of the Attorneys Act 53 of 1979 (*“the Attorneys Act”*) – attorney of record of plaintiff in pending action (*“the applicant”*), paying security for costs amount on behalf of plaintiff

in satisfaction of court order granted in terms of Uniform Rule 47(3) out of own funds pursuant to alleged agreement with client – applicant claiming refund of security amount from defendant’s attorneys of record on basis of *negotiorum gestio* – security amount already invested in interest-bearing account by defendant’s attorneys of record in terms of sec 78(2)(A) of Attorneys Act pending conclusion of action – applicant’s claim based on *negotiorum gestio* not competent – transactions by applicant in effecting payment of security amount possible contravention of sec 78(1) of Attorneys Act and Rules framed thereunder – alternatively misleading defendants and court.

J U D G M E N T

MOSHIDI, J:

[1] This was an unfortunate application which should never have come to court. The applicant is a practising attorney, and therefore an officer of court. So too, are the second respondents. The matter concerned the payment of funds as security for costs (*“the security amount”*) by an attorney on behalf of a client.

[2] In the notice of motion the applicant claimed relief in the following terms:

- “1. Respondents be and are hereby ordered to refund to the applicant the sum of R886,563.30, jointly and severally, the one paying the other to be absolved, plus interest on the said

amount that has accrued thereon from the date of investment thereof by the second respondent in respect of s 78(2)(A) of Act 53 of 1979, to date of payment.

2. *Costs of suit, such costs to be taxed on the scale applicable between attorney and client and to include the costs consequent upon senior counsel ..."*

THE FIRST AND SECOND RESPONDENTS' ATTITUDE

[3] The first respondent and the second respondents did not oppose the application and filed notices in terms of which they abided with the decision of the court.

THE BACKGROUND FACTS

[4] These are the background facts: The applicant is an attorney of this Court, duly admitted, and practising as such under the name and style, Mothuloe Attorneys, (*"the applicant"*). The applicant was the attorney of record for the first respondent, as plaintiff, in a pending action instituted against the third respondent in this High Court. The second respondent, Attorneys Spoor & Fisher (*"the second respondents"*) are still acting on behalf of the third respondent. The third respondent applied for security for costs in terms of Rule 47(3) of the Uniform Rules against the first respondent. On 18 May 2010, this Court (Horn J) granted an order compelling the first respondent to give security for costs. The action was also stayed pending the giving of such security for costs. The first respondent was ordered to pay the costs of the application.

[5] On 12 April 2011, the Registrar of this Court determined the security for costs in the sum of R886 563,30, to be paid into the trust account of the second respondents. It was also ordered that the said amount be invested by the second respondents in terms of the provisions of sec 78(2)(A) of the Attorneys Act 53 of 1979 (*“the Attorneys Act”*), pending the outcome of the action. On 1 June 2011, the second respondents provided the applicant with the Registrar’s *allocatur* and demanded payment from the first respondent of the amount of R886 563,30.

[6] The applicant contended that when he requested the security amount from his client, the first respondent, the latter did not have the funds available. The first respondent thereafter implored the applicant to accommodate it and paid the security amount in order to prevent its claim from being dismissed. The applicant agreed to pay the security amount to the second respondents. This, on the understanding that it was an interim bridging basis until his client could raise the required funds or upon the termination of his mandate.

[7] On 27 June 2011, the applicant drew a cheque from his trust account in the amount of R886 563,30 which he paid into the trust account of the second respondents. On the same day, it appeared to be, the applicant drew a cheque for the same amount from his personal banking account in order *“to replace the amount transferred from my trust account to the second respondent on the 25th June 2011 for the sake of proper records and bookkeeping”*.

[8] The applicant continued to allege that, *“the payment and transfer by me of the said amount to the second respondent was not by reason of any obligation upon me and due to the second respondent and/or third respondent, but merely by way of accommodation of first respondent on the terms as agreed between myself and first respondent”*.¹ The applicant continued to allege that:

*“The second respondent as stakeholder of the money has no greater rights to the money than the first respondent. The second respondent acquired no greater right to the money than the rights first respondent acquired thereto and subject to the same conditions as those agreed to between myself and the first respondent.”*²

In addition, the applicant alleged in the founding affidavit that:

*“If the money is repaid to me there can be no prejudice to the other parties as the consequences would be that first respondent will still be bound by the order should put up security, failing which it could have its claim dismissed. And pending provision of the necessary security, it cannot proceed with its case.”*³

[9] On 8 January 2014 (nearly 30 months after paying the security amount), the applicant served on the second respondents a notice of withdrawal as attorneys of record of the first respondent. At the same time, the applicant addressed a letter of demand to the second respondents, demanding repayment of the security amount. The response from the second respondents, which was later mirrored substantially in the answering papers, was that, that there was no legal basis upon which they should pay the money

¹ See para 8.10.2 of the founding affidavit.

² See para 8.10.4 of the founding affidavit.

³ See para 8.10.5 of the founding affidavit.

to the applicant's firm, as demanded. In a subsequent letter dated 21 January 2014, the second respondents stated:

*"The money that we have in Trust in this matter is earmarked for the defendant's costs in the event of the plaintiff not being successful with its claim. We have a duty not to deplete these funds unless for the purpose so earmarked. The fact that you have paid the money on your erstwhile client's behalf, i.e. you have loaned the money to the plaintiff, is irrelevant at this point in time as to whether we should pay the amount held in trust as security for the defendant's costs, to yourselves. A refund by ourselves to yourselves prior to a cost order from the High Court, apart from anything else, might be regarded as a waiver by our client of security or might give rise to an argument that our client is estopped from claiming security from the plaintiff ..."*⁴

THE THIRD RESPONDENT'S ANSWERING PAPERS

[10] The third respondent opposed the application through an affidavit filed by Mr Hugh Melamdowitz of the second respondent. The main contentions in the answering papers may be summarised as follows: The applicant's allegation that the security amount was paid by him, "*as an accommodation party for the first respondent ...*" was confusing and irrelevant; that the first respondent was ordered by the court to pay the security amount which amount was paid into the trust account of the second respondents without any reservation and/or condition; that the applicant failed to take the court into its confidence regarding the precise "*accommodation*" and "*arrangement*" with his client (first respondent), and the precise details giving rise to the deposit into his trust account; that the security amount was deposited into the second respondents' trust account at Standard Bank, which money has lost its identity

⁴ See Bundle p 36.

due to *commixtio*, and is now the property of Standard Bank; and that the security amount, paid pursuant to a court order, and held as security, not on behalf of the applicant, but for costs which may be due to the third respondent in the event that the first respondent's pending action against the third respondent failed.

THE REPLYING PAPERS

[11] The applicant filed a replying affidavit which was out of time, and for which he applied for condonation. The condonation, which was not seriously opposed, ought to be granted, in my view, which I hereby do.

[12] The replying affidavit did not really advance the applicant's cause in any material respect. He repeated the contention that he made the payment of the security amount on behalf of his client (the first respondent) in terms of what he termed, an agreement between himself and the first respondent. This was subject to a resolute condition that if the applicant's mandate as attorney of record for the first respondent be terminated, the payment would be refunded to the applicant, with the result that the first respondent would satisfy the court order himself. The applicant went on to contend that the second respondents knew at all times that the security amount had not been paid by the first respondent, but by the applicant as attorney of record of first respondent. I must observe that the latter allegation was not borne out by any credible evidence. What came as an surprising contention from the replying papers, was the applicant's assertion that the court order for payment of the

security amount did not apply to him, neither did it give the second respondents any right to the money as currently invested in an interest-bearing account. In his view, the security amount was invested for a specific purpose, and therefore has a separate and specific identity under the control of the second respondents, and not Standard Bank. The applicant insisted on a refund of the security amount.

[13] In the heads of argument the applicant made several submissions. These may be summarised as follows: There is no *vinculum juris* between the applicant and the second respondents; that the security for costs order obtained by the third respondent against the first respondent has no application to the applicant; the applicant's case against the first respondent was a clear cut matter of contract subject to a resolutive condition which had now occurred entitling the applicant to payment of the security amount paid to the second respondents on behalf of the first respondent; the security amount in the hands of the second respondents as stakeholders has not lost its identity since it is clearly earmarked and identifiable in the investment account in terms of sec 78(2)(A) of the Attorneys Act; by instructing second respondents as its attorney of record to defend the pending action against it by first respondent, third respondent incurred an obligation and liability in respect of legal costs toward second respondents; and that by paying the security amount on behalf of first respondent to second respondents as security for cost (fees) of third respondent, the applicant was in fact also managing the affairs/interests of third respondent for the benefit of third respondent, which brought the situation squarely within *negotiorum gestio*.

SOME LEGAL PRINCIPLES

[14] The starting point seemed to be the provisions of sub-secs 78(1) and (2) of the Attorneys Act, which provide as follows:

“(1) Any practising practitioner shall open and keep a separate trust banking account at the banking institution in the Republic and shall deposit therein the money held in or received by him or her on account of any person.”

(a) Any practitioner may invest in a separate trust savings or other interest-bearing account opened by him or her with any banking institution or building society any money deposited in his or her trust banking account which is not immediately required for any particular purpose.

(b) Any trust savings or other interest-bearing account referred to in paragraph (a) shall contain a reference to this sub-section.

(2A) Any separate trust savings or other interest-bearing account –

(a) which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his or her trust banking account; and

(b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity,

shall contain a reference to this subsection.” (underlining added)

[15] For his reliance on the *negotiorum gestio*, the applicant relied on the contents of LAWSA, Vol 17 Part 1 paras 19 to 21⁵. However, the applicant

⁵ At pp 19 to 21.

omitted to refer to para 22 of the same authority⁶. The latter para reads in part that:

“The dominus must be absent or, if not absent, at least *unaware and ignorant of the fact that his or her affairs are being managed by another*. If the dominus is aware of or consents to it, it is no longer negotiorum gestio but may be mandate. The very essence of negotiorum gestio is that there can be no authority of any nature granted to the conduct of affairs, albeit by way of implied or tacit consent ...” (underlining added)

As to the other requirements of *negotiorum gestio*, see *Turkstra v Massyn*⁷.

See also *Amler’s Precedents of Pleadings*⁸, where it is repeated that one of the essentials of *negotiorum gestio* is that:

“The domunus must have been ignorant of the fact that he or his affairs are being managed.”

From the above, and when regard is had to the common cause facts and the founding affidavit, the argument based on the *negotiorum gestio* must be dismissed for lack of merit. On his own version, the applicant paid the security amount as “*an accommodation*”, and pursuant to an alleged loan agreement between him and the first respondent. The details of the alleged agreement were very sketchy, and highly questionable, to say the least. The alleged agreement was in any event, peculiar to the applicant and his client, and any notion of *negotiorum gestio* is inapplicable to the circumstances of this case. The security amount was paid to the second respondents pursuant to a court order in terms of an application brought under Uniform Rule 47(3).

⁶ See LAWSA, *ibid*, p 24.

⁷ 1959 (1) SA 40 (T) at 47.

⁸ 7ed at 296 to 297.

In fact, the security amount was not paid by the applicant, but by the first respondent in accordance with a court order. In these circumstances, there was simply no basis upon which the applicant could contend that he intended to 'manage the affairs' of either the second or third respondents, as was correctly, in my view, argued by the third respondent. At best for the applicant, he may have a claim against his client based on, *inter alia*, unjust enrichment. See in this regard, *Odendaal v Van Oudsthoorn*⁹.

[17] In addition, and in my view, there was something worrisome about how the applicant handled the transactions in question. He transferred funds from his own business banking account, into his trust account. Thereafter he issued a trust cheque for the security amount paid to the second respondent. It was unclear from the founding papers which transaction occurred first. It appeared that "*trust funds*" were transferred before the applicant replaced the security amount with his own funds. Whichever way one looked at it, the conduct described appeared to be not in accordance with the provisions of sec 78(1) of the Attorneys Act (*supra*) quoted above. The latter sec provides that a practitioner, like the applicant, "*shall open and keep a separate trust banking account ... and shall deposit therein the money held or received by him or her on account of any person*". On the papers before me, there was admittedly no funds 'received' or 'held' by the applicant on behalf of the first respondent when he wrote out the trust cheque to the second respondents in satisfaction of the security amount. In the same breathe, there was no way in which the second respondents, on receipt of the trust cheque, could have

⁹ 1968 (3) SA 433 (T).

known or reasonably suspected that the funds belonged, not to the first respondents, but to the applicant as attorney of record. If the latter was the case, surely the second respondents could not have accepted the security amount which was subject to a suspensive condition between applicant and his client. It simply made no sense at all to now demand a refund from the second respondents. The transactions described may easily be construed as a violation of Rules 68.3 and 68.6.1 of the Law Society Rules framed under the Attorneys Act. However, I was unable to make a definitive finding in this regard. What was clear, however, was that the security amount, once paid into the second respondents' trust account at Standard Bank, lost its identity due to *commixtio*, and is now the property of Standard Bank. See in this regard, *Louw NO and Others v Coetzee and Others*¹⁰.

[18] Before I conclude, there was one other matter that needed mention. This was that, the applicant appeared to be completely unaware of the purpose and reasons for payment of security for costs. Rule 47(3) of the Uniform Rules provides that:

“If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar’s decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.”

This is exactly what transpired in the present matter. The applicant for security for costs, such as the third respondent, must have a valid reason to make

¹⁰ 2003 (3) SA 329 (SCA) para [12].

such application which is a matter in which the court has a discretion. As for the purpose of the applicable provisions, the Court in *Kini Bay Village Association v Nelson Mandela Metro*¹¹ said:

“These provisions are intended to protect persons against liability for costs relating to litigation instituted by impecunious companies by deterring such companies from litigating vexatiously or in circumstances where they have poor prospects of success, thus exposing their opponents to unnecessary irrecoverable legal expenses. The party seeking security must, however, first establish, by credible testimony, that its opponent, if unsuccessful, will be unable to meet an adverse costs order.”

The validity of the court order in respect of the security amount was not challenged in the present matter. It was also common cause that the action between the first respondent and the third respondent was still pending. In fact, the first respondent had done nothing significantly so far to have the action finalised. Should the applicant’s claim for the refund of the security amount be allowed, this would clearly defeat the whole purpose of the court order requiring that security for costs be given.

CONCLUSION

[19] For all the above reasons, I concluded that the application had no merit at all, including any claim for further or alternative relief, as relied on in closing argument.

¹¹ [2008] 4 All SA 50 (SCA) para [12].

COSTS

[20] I deal briefly with the question of costs which is a discretionary matter. As stated at the commencement of this judgment, this matter ought not to have been brought to court in the first place. The respondents opposing the application asked for costs on the attorney and client scale. However, I did not agree that such order was justified in the circumstances of the case. Both counsel appearing were in agreement that costs to be awarded should include the costs consequent to the employment of senior counsel. I agreed.

ORDER

[21] In the result I make the following order:

1. The application is dismissed with costs.
2. The costs shall include the costs occasioned by the employment of senior counsel.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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