

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH**

Case No: 1431/2011
1430/2011
1824/2011
2196/2011
Date Heard: 7 May 2012
Date Delivered: 15 May 2012

In the matter between

STEWART N.O. MICHAEL LAWRENCE

First Plaintiff

PARKER N.O. WAHIDA

Second Plaintiff

**(in their capacity as the duly appointed
joint trustees of the consolidated
insolvent estate of Graeme Minne and
Carolina Frederick Minne)**

and

PRINSLOO ETIENNE HENRY

First Defendant

PRINSLOO HESTER JOHANNA

Second Defendant

PRINSLOO STANLEY HENRY

Third Defendant

TRYTSMAN GERT JOHANNES

Fourth Defendant

HERSELMAN CHRISTO

Fifth Defendant

JUDGMENT

REVELAS J

This judgment concerns the question of costs after the parties had settled the matter.

[1] The plaintiffs instituted action against five defendants in four separate actions which were consolidated because the cause of action and the defences thereto were similar in all four matters. These matters were settled insofar as the merits and quantum were concerned and the Registrar was advised on 19 April 2012, that the only remaining issue to be determined between the parties would be the question of costs which would be argued on the trial date.

[2] The plaintiffs instituted their action against the defendants in their capacities as joint trustees of the consolidated insolvent estate of Graeme Minne and Carolina Frederika Minne, who were referred to in the pleadings respectively as Graeme and Erica and during argument as "the Minnes". The estates of Graeme and Erica Minne were provisionally sequestrated on 8 June 2010 and finally on 6 July 2010. Thereafter their estates were consolidated and administered as one estate.

[3] During the period 30 July 2002 to 27 November 2009 Graeme and Erica Minne conducted an illegal pyramid or Ponzi scheme in terms whereof they solicited and received loans from investors on the verbal representations of Graeme Minne. The loans were utilised in foreign currency exchange market trading. Investors would receive a fixed monthly or annual return ("the return payments") and the investors would be repaid the capital amounts of the loans at the end of the term of the loans. The period relevant to the action in question is 2006 to 2009, when the scheme was terminated in November, by the Reserve Bank under the Consumer's Affairs (Unfair Business Practices) Act, 71 of 1988.

[4] The money lent from investors was paid into a bank account which appears to have been in the name of Erica Minne trading as "Minne Opleiding" held at ABSA bank.

[5] In the plaintiff's particulars of claim it is alleged that the

representations made by Graeme Minne were false and with the intention to induce investors to deposit loans into the aforesaid account and, in fact caused the investors, some of whom were the defendants, to do so. The monies which were invested were applied for the personal benefit of Graeme and Erica Minne, to effect returns to some investors, and to repay certain investors their loans. The loans were documented by way of written loan agreements entered into between investors and Graeme Minne, who personally accepted liability for the repayment of the loans and the return payments of the investors. Due to the Minne's eventual insolvency, certain investors who made loans to them were never repaid. This the Minnes had done while their liabilities exceeded their assets.

[6] Because the return payments made in relation to the scheme were illegally made, the plaintiffs instituted the claims against the defendants based on section 26(1) of the Insolvency Act, No 24 of 1936 ("the Act") ("the section 26 claim") alleging the return payments constituted dispositions without value and, in the alternative thereto claims in terms of section 30(1) of the Act ("the section 30 claim") alleging the payments constituted undue preferences.

[7] In their particulars of claim the plaintiffs also alleged that Graeme and Erica Minne contravened the provisions of the Bank Act 9 of 1990 in soliciting and accepting loans from the general public. Another breach of the law allegedly committed, was conducting a harmful business practice under the Consumers Affairs (Unfair Business Practices) Act, 71 of 1988.

[8] The defendants pleaded that the loans were lawful and therefore the interest earned by them was lawful and the payments to them were not impugned dispositions as foreseen in the Insolvency Act.

[9] In the alternative, the defendants pleaded that should the Court

find that the agreements were illegal they were concluded in good faith without knowledge of the illegality. In their counterclaims the defendants claimed repayment of the capital amounts invested by them in the scheme. In the alternative, they pleaded (relying on the principle of *in pari delicto potior conditio defendentis*) that they were entitled to repayment of the capital amounts they had invested in the event of the court finding that the contracts were illegal.

[10] The effect of the settlement agreed between the parties was that the defendants had conceded that they were not entitled to the return payments (interest) but nonetheless insisted on their entitlement to the loans.

[11] The settlement agreement in question was handed up in terms whereof the defendants would pay to the plaintiffs certain amounts. The amounts appear to represent the amount received by the defendants as gains, returns or interest, and not the loans (or investments) to the Minnes.

[12] The plaintiff's submitted that in the light of the pleadings and the settlement itself, they had succeeded on all the broad issues raised, and therefore the defendants should pay their costs. According to the plaintiffs, the issue whether the defendants were only entitled to the amount of the loans, could not by itself have caused the incurrence of any appreciable expense, bearing in mind that those amounts were stated to carry interest which, at best for the defendants, meant repayment of, alternatively retaining the full amounts repaid to them. Since this issue is not one wholly distinct from and unconnected to the issues on which the plaintiffs have succeeded, the plaintiff contended, the defendants "conceded a substantial right on the part of the plaintiff".

[13] The plaintiff also emphasized the fact that the defendant never

tendered the amounts for which they settled, either through the tender process or in their pleading and that they would not concede that any repayments have been received by them. The plaintiff also submitted that the fact that the settlement amount is R214 000.00 as opposed to the amount of R1 160 000.00 should not play a significant role as it is a settlement amount.

[14] The defendants argued that the theme which ran through their defence like a golden thread, was that they were entitled to repayment at least of their loans or the amount they had invested in the scheme which they did not concede. As a result, the plaintiffs were not as successful as they had maintained.

[15] It is trite law that the award of costs is a matter which falls within the court's wide discretion, which must be exercised judiciously and with due regard to the facts of the case and fairness to the parties. This discretion is also subject to certain limitations. There is also the general rule that the successful party should be awarded its costs, except in special circumstances.

[16] Another factor to be considered is that the amount settled upon, is one which could have been awarded by the Magistrate. The plaintiff contended that in view of the complexity of the matter, the question of costs on the magistrate's scale does not find application.

[17] The facts and questions of law in this matter were very similar to those in the matter of *Fourie NO and Other v Edeling NO and Others* 2005[4] All SA 393 (SCA), known also as the *Krion* judgment. The parties made various submissions about the *Krion* judgment. The defendant submitted the judgment is very clear on the aforesaid questions. The plaintiffs argued that it "does not afford a complete

answer”, particularly in respect of a claim in terms of section 30 of the Insolvency Act. Save for the aforesaid, I do not intend to elaborate on their submissions in this judgment.

[18] The matter became settled. The mysteries of the *Krion* judgment were not explored in relation to the facts of the matter. No experts testified. I also have to take into consideration that the plaintiffs’ claims are based monies paid out in the course of an illegal scheme and that the Minnes, on the plaintiffs own version, were fraudsters and some of the defendants (at least), their victims.

[19] All the trite principles pertaining to the award of costs lose much of their force and import when parties settle a matter. Broadly speaking neither party showed a great degree of success in this matter. I was not persuaded to exercise my discretion in the plaintiffs’ favour.

[20] In the circumstances I decline to make any costs order.

[21] The following order is made:

1. The first defendant is to pay to the plaintiff the sum of R90 000.00.
2. The second and third defendants are to pay to the plaintiffs the sum of R62 000.00.
3. The fourth defendants is to pay to the plaintiffs the sum of R44 000.00.
4. The fifth defendant is to pay to the plaintiffs the sum of R14 000.00.

5. Payment of the aforesaid amounts are to be made by the defendants to the plaintiffs by close of business on or before 21 May 2012 into the following banking account:

Name: The Consolidated Insolvent Estate of G
and CF Minne

Bank: Nedbank Current Account

Account Number: 1514276690

Branch Code: 15140500

Branch Name: Randridge

6. Should the defendants neglect to pay the aforesaid amounts to the estate as aforesaid, then the amounts as claimed by the plaintiff in the particulars of claim in the actions as consolidated, together with the interest thereon and costs will become immediately due, owing and payable by the defendants to the plaintiffs.
7. The fees in respect of the expert witness, Mr J Spies, shall be allowed which shall include, but not be limited to, his report as well as his fees in respect of his preparation and reservation for trial.
8. Each party is to pay its own costs.

E REVELAS
Judge of the High Court

Counsel for the plaintiff's:

Adv JH Dreyer SC

Instructed by:

Brooks & Brand Inc
c/o Rushmere Noach
Corporated

Counsel for the defendant's

Adv B Pretorius SC

Instructed by:

Roelofse Meyer Inc

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