



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 271//2016

In the matter between:

KARUNAGARAN GOUNDER

Appellant/Member

and

KWAZULU-NATAL LAW SOCIETY

Respondent/Complainant

Coram: Koen J (Maharaj AJ concurring)

Heard: 20/10/2017

Delivered: 27/10/2017

ORDER

- (a) The appeal succeeds.
 - (b) The orders granted by the disciplinary enquiry of the Respondent are set aside.
 - (c) Each party will be liable for his/its own costs.
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JUDGMENT

KOEN J

Introduction:

[1] In terms of a summons dated 7 March 2013 issued by the President of the Respondent the Appellant was advised that:

‘The KwaZulu-Natal Law Society Council has, in terms of Rule 15 of the Society’s Rules, appointed a Committee to enquire into your professional conduct arising out of a complaint made by Dr A R Cassim.

You are hereby summoned to appear before the Committee sitting at Society’s Durban Library Conference Centre, 11th Floor, Salmon Grove Chamber, 407 Smith Street, Durban on 8 April 2013 and commencing at 9.00 am and on such further dates and times and at such other venues as may be determined by the Committee to enable the Committee to enquire into the charge that –

“You are guilty of unprofessional, dishonourable or unworthy conduct in that –

1. The member is charged with contravening Rule 14 (b) (ii) in that the member, without lawful excuse, withheld payment of monies that were in trust and which monies were due to the complainant, (alternatively to which the complainant held an interest in), such monies being rentals of Hafiza Gaffoor’s (born Cassim) occupation of a tearoom situated at 4 Carden Crescent, Parlock, Durban KwaZulu-Natal.
2. The member is charged with contravening Rule 14 (b) (iii) in that the accused failed to respond to the complainant’s attorney and acted in contempt of paragraph 14 of a Settlement Agreement under case numbers 5065/2009 and 5608/2010 which was made an Order of Court.
3. By virtue of the foregoing in charges (1) – (2), the accused is charged with contravening Rule 14 (b) (xxv) read with Schedule 13 – items 2 (relating to independence only), 3 and 5 of the Rules

Please note that –

- (1) The members of the Enquiry Committee are-
 - (a) Mr U Jivan of Jivan & Co (Chairperson)
 - (b) Ms Khanyile Kheswa of Ngubane & Partners Inc
 - (c) Mr R Badal of Raj Badal & Associates
 - (d) Mr Y Hassan of Larson Falconer Hassan Parsee (Evidence Leader)
- (2) You are required to bring to, and to produce at, the Enquiry your file and all documents and accounting records in your possession or control relating to the complaint.

- (3) You are entitled to be represented at the Enquiry. Please let me know if you will be presented at the Enquiry and, if so, the names of your legal representatives.'

[2] He was subsequently convicted by a Committee consisting of Mr Badal, Ms Khanyile Kheswa and a Ms D Takalo of:

- (a) 'The charges contained in count 1';
- (b) 'The remainder of the charges in count 2 in that he was in contempt of not complying with the court order issued under Case No. 5056/09 and 5608/10'.¹

Taking the charges convicted of as one, he was fined 'R20 000 plus the costs of the enquiry and inspection if any inspection was carried out.' This appeal is against that conviction, and the fine and the direction to pay costs which followed thereon.

The complaint giving rise to the charges against the Appellant:

[3] The complaint by Dr A R Cassim which gave rise to the charges against the Appellant arose from litigation involving Dr A R Cassim, some of his siblings, his mother Mrs Sabira Bee Cassim, in her personal capacity and in her representative capacity as executrix to the joint estate of her late husband Abdul Mazid Cassim ('the deceased'²) and herself, and the Master of the High Court. This litigation was conducted under case no. 5056/09 and 5608/10. The Appellant acted as the attorney of Mrs Cassim in this litigation.

[4] The deceased and Mrs Cassim had executed a joint will dated 11 April 1991, *inter alia* appointing her as executrix, providing for a massing of the two halves of their joint estate, and stipulating that certain immovable properties were to be left to their three sons subject to a life usufruct and lifetime rights in her favour. Mrs Cassim initially adiated,³ but subsequently contending that

¹ The findings of the Committee recorded further that 'this report must be read together with the report already submitted to Council', and confirmed that the Appellant was found 'Not guilty of the charge that he failed to respond to the complainant's attorney'.

² The deceased died on 12 August 1993.

³ On 24 October 1995.

she had done so in error, commenced the proceedings under case no. 5065/09 for orders to set aside her adiation, declaring her repudiation of the last will and testament dated 14 April 1991 to be of no force and effect, and directing her as executrix to redraw the first and final liquidation and distribution account in terms of the said will, with the costs of that application to be borne from the proceeds of the estate of the deceased. Dr Cassim was the Second Respondent in that application.

[5] The immovable properties were in terms of the will of the deceased and Mrs Cassim to be transferred to Dr Cassim and two other sons of the deceased and Mrs Cassim namely Abdool Nubbee and Ibrahim Mazid Cassim. These properties which were registered in the name of the deceased and Mrs Cassim comprised commercial properties rented to tenants, one tenant being Hafiza Bee Gaffoor (born Cassim), a daughter of the deceased and Mrs Cassim who at some stage was paying rental for her occupation of part of the property directly to Dr Cassim. When the Appellant commenced acting as the agent of Mrs Cassim as executrix of the estate, he wrote to the all the tenants including Mrs Gaffoor advising them that all further rentals were to be paid to his firm. This was for such rental income to be paid into an estate account in the name of the estate of the deceased. This demand provided the impetus for the application brought under case no. 5608/2010. In that application Dr Cassim and his brother Abdool Nubbee Cassim as applicants applied for an order against Mrs Cassim, Ibrahim Mazid Cassim, Fathima Khan (born Cassim), Hafiza Gaffoor (born Cassim) and the Master of the High Court as Respondents, that Mrs Cassim in her personal capacity and as executrix personally or through any other party, be interdicted and restrained from collecting rentals from Mrs Gaffoor in respect of 4 Carden Crescent, Parlock, Durban, and demanding payment of rent from the tenant occupying the hair dressing salon at 473 Inanda Road, Durban. In addition an order was claimed that Mrs Cassim be ordered to pay to Dr Cassim within 3 days of the service of the order on her, all rent which she had collected from Mrs Gaffoor in respect of her occupation of the tearoom situated at 473 Inanda Road, Durban. An order was also sought for costs on the attorney and client scale.

[6] It is common cause, although the extent of the Appellant's participation therein is in dispute, that through the intervention of a mediator, a Mr A V Mohamed, settlement negotiations ensued shortly before the two applications were due to be heard in court at a pre-trial conference which was scheduled to have been held on 17 March 2011 which came to be converted into a mediated settlement process. It was at this pre-trial conference that the mandate held by the Appellant from Mrs Cassim was terminated ostensibly by her son. That notwithstanding, the Appellant and his counsel remained in attendance until the end of that meeting. The meeting ended with Mr S Khan, an advocate at the Durban Bar, assuming the responsibility to draft a settlement agreement for approval and signature by the parties to the litigation.

[7] A settlement agreement was signed by Mrs Cassim, Dr Cassim and the other family members who were parties to the litigation on 31 March 2011. The Appellant was not a party to the settlement agreement, nor did his firm represent the client at that time.

Clause 14 of the settlement agreement records:

'The monies collected by attorneys Gounder and Associates from Hafiza Gaffoor (born Cassim) in respect of her occupation of the Tearoom situated at 4 Cardin Crescent, Parlock, Durban, KwaZulu-Natal will be paid by them to Abdool Rahman Cassim, within 3 days of conclusion of this agreement.'

Clause 15 provided that:

'In the event of any breach of this agreement, the aggrieved party/parties will not be obliged to give any notice to remedy such breach prior to instituting legal proceedings.'

[8] The agreement was sent by Dr Cassim's attorneys to the Appellant on 4 April 2011 requesting 'implementation of Clause 14' of the agreement. On 5 April 2011 the Appellant replied to the complainant's attorneys advising that client's instructions were awaited. Unbeknown to the Appellant who was awaiting instructions, and without the Appellant being joined in the proceedings, on 6 April 2011 an order was taken, purporting *ex facie* the contents thereof to be by consent, *inter alia* providing in paragraph 9 thereof that:

‘The money collected by Attorneys Gounder and Associates from Hafiza Gaffoor (born Cassim) in respect of her occupation of the Tearoom situated at 4 Cardin Crescent, Parlock, Durban, KwaZulu-Natal will be paid by them to Abdool Rahman Cassim.’

[9] No moneys were paid by the Appellant to Dr Cassim.

[10] Instead, relying on a written authority to pay signed by Mrs Cassim in her capacity as executrix on 3 February 2011 authorising the Appellant to deduct all costs including disbursements in respect of the matters under case No. 5065/2009 and 5608/2010 ‘from the proceeds of the rental paid into the current account of the estate late Abdool Mazid Cassim’, the Appellant deducted fees and disbursements from the rental held which depleted those funds entirely and in fact leaving an amount due by Mrs Cassim in respect of legal fees and disbursements to the Appellant.

[11] In pursuing the complaint before the committee of the Respondent Dr Cassim stated, as much as he is a lay person in legal matters, that:

‘...I would have no authority to enforce anything without a court order. I am dependant on the court order, on the settlement agreement being made an order of court, and ... I am enforcing my rights as per the court order...’

Some aspects of the law relating to the administration of deceased estates as they operated in respect of the Appellant:

[12] Only Mrs Cassim, as the duly appointed executrix acting under letters of executorship is entitled in law, in terms of section 13(1) of the Administration of Estates Act No. 66 of 1965 (herein after referred to as ‘the Act’) to deal with and liquidate or distribute the estate. She, (or her agent, the Appellant) was the only person entitled to collect rentals due to the deceased estate and to deal with the assets of the deceased estate.⁴

[13] In terms of section 28(1)(a) of the Act an executrix is enjoined by law to open an account in the name of the estate and deposit into that account

⁴ *Asmall v Asmall and others* 1991 (4) SA 262 (N).

moneys in hand and moneys received from time to time for the estate. In the event of a marriage-in-community of property the whole estate falls under the administration of the executrix who is the only person with *locus standi* to sue or be sued in regard to assets of the deceased estate. An executrix cannot substitute another to act in her place, but she can appoint an agent to administer the estate on her behalf and in her name.⁵ The executrix must recover all assets that belong to the estate if in the hands of or owed by third parties. Rental received in respect of a deceased estate after the death of the deceased, should be paid into the income account. That is because upon the death of the deceased the assets of the deceased estate do not vest in the heirs and legatees. What 'is vested in the heirs is the right to claim from the deceased executor at some future time, after confirmation of the liquidation and distribution account, satisfaction of their claims under the account.'⁶ Only once the liquidation and distribution account has lain for inspection without objection, and the executrix had completed the liquidation and distribution of the estate to the satisfaction of the Master and estate duty has been paid, may an executrix obtain her discharge from the Master. Such discharge from office be applied for and does not follow automatically.⁷

[14] The Appellant, as agent of Mrs Cassim, was simply collecting the rentals, as he was required in law to do, in respect of immovable properties of the deceased estate, for payment into the estate account.

[15] Although an estate liquidation and distribution account had previously lain for inspection in 1995, no distribution of the estate in accordance with that account had occurred. Indeed that account had been prepared on the basis that the client had adiated. When that adiation was set aside, a fresh account would be required to be drawn. No such fresh account had yet been prepared nor lain for inspection and accordingly no distribution was possible. Nor was

⁵ *Bramwell and Lazar, NNO v Laub* 1978 (1) SA 380 (W).

⁶ *Commissioner for Inland Revenue v Estate Crewe and another* 1943 AD 656 at 656 and 692.

⁷ Section 56(1) of the Act and Meyerowitz on *Administration of Estates and Estate Duty* para. 11.10.

there any suggestion that the settlement agreement amounted to a Redistribution agreement. The estate was still under administration.

[16] In these circumstances, I have some difficulty to determine on what basis the 'consent' order taken would be competent providing for the transfer of some of the properties into the name of Dr Cassim and providing for the payment of income of the estate (which might conceivably be required for other purposes) to be paid over to Dr Cassim before the estate was finalised. This aspect was however not addressed in the disciplinary inquiry and will not be considered further.

[17] Whatever knowledge the Appellant might have obtained about the settlement agreement signed by his former client, he wished to confirm the contents with his client, accordingly seeking an indulgence from Dr Cassim's attorney to obtain instructions in regard thereto.

[18] The simple reality is that the Appellant was never a party to the litigation, nor cited as a party to the 'consent order' which was granted.

Did the Appellant act in contempt of the court order?

[19] In *Sliom v Wallach's Printing and Publishing Company Limited*⁸ it was said that (at page 656):

'A judgment was thereby obtained against a person who had not been legally cited before the Court, and the effect of that judgment is that it is a nullity; it is invalid and of no effect ...'

This was also subsequently approved by the Appellant Division in *S v Absalom*⁹ which held that 'die uitspraak van 'n hof wat nie regsbevoegheid het nie, [het] geen regsrag nie en, kan dit eenvoudig geignoreer word'. Also in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motale N.O. and others* 2012 (3) SA 325 (SCA) para 12E at 332E-G held that a judgment given against a person not duly cited before the Court was of no

⁸ 1925 TPD 650.

⁹ 1989 (3) SA 154 (A) at 164F-G.

force and effect whatsoever and was to be disregarded and accordingly where not complied with, and would constitute no basis to find that the party not cited had acted in contempt of the court order.

[20] There was no basis for the committee to have found that the Appellant had acted 'in contempt of not complying with the Court order issued under case no. 5056/09 and 5608/10.' The Appellant was not a party, cited as such, to that order. Mr Flemming, who appeared for the Respondent, fairly accepted that the Appellant could not have been in contempt of a court order to which he or his firm had not been cited as a party. It follows therefore that the Appellants conviction on Count 2 was wrong.

Was the Appellant rightly convicted on count 1?

[21] As regards the Appellant's conviction on count 1, the basis of that conviction is sought to be found in a contravention of Rule 14(b)(ii) of the Rules of the Respondent.

[22] The relevant parts of that Rule provide:

- '(b) Unprofessional, dishonourable or unworthy conduct on the part of a member shall, without restricting the generality of those terms, include:
 - (i) ...
 - (ii) Withholding the payment of trust monies without lawful excuse.
 - (iii) ...'

[23] The elements of the conduct in that category appear to include at least:

- (a) That the moneys concerned must be trust moneys;
- (b) That the attorney must have withheld the payment of such moneys from the person on whose behalf they were held in trust;
- (c) That such withholding of payment must be without lawful excuse.

[24] In *casu*, the rental payments received into the estate account do not appear to qualify as trust money.¹⁰

[25] But in any event I have considerable difficulty with the proposition, even assuming the monies, being rentals, paid into an estate account to be 'trust moneys', that not paying such moneys to a third party (except on an express instruction of the client who entrusted such moneys to an attorney) could ever amount to withholding payment other than for a lawful excuse.

[26] However even if I was wrong in the above regards and assuming that Dr Cassim could establish some legal entitlement to payment directly from the Appellant (as opposed to the Appellant being directed by his client to make payment to Dr Cassim), then ultimately the issue also remains one of the terms of mandate given to the Appellant by Mrs Cassim as the client. In *Joubert Scholtz Incorporated (supra)* after an analysis of the evidence and documentation, the Supreme Court of Appeal held that there was no duty to return the surplus funds to the Plaintiff (the client in that matter) if payments were made in accordance with the mandate granted by it. In the present matter such mandate included the authority to pay granted by Mrs Cassim to the Appellant on 3 February 2011. There was no evidence given that such authority had been revoked or would terminate at a time other than after the full discharge of payment of fees and disbursements occurred by the Appellant.

[27] I am very mindful of the *dicta* in *inter alia Blakes Maphanga Inc v Outsurance Insurance Company Limited*¹¹ which reiterated that it followed from a client's entitlement to taxation of legal costs and disbursements that the amount of an untaxed disputed bill of costs was not a liquidated debt, but one yet to be ascertained by the taxing master, and hence not capable of setoff against funds held. That principle however is confined to the situation where a client disputed the quantum of the fees. The SCA in *Blakes*

¹⁰ The position was different in *Joubert Scholtz Incorporated and others v Elandsfontein Beverage Marketing (Pty) Limited* [2012] 3 All SA 124 (SCA) where the client was claiming the money.

¹¹ 2010 (4) SA 232 (SCA).

Maphanga quoted *inter alia* with approval from *Benson and another v Walters and others*¹² that'

'... there was no reason why a judgment could not be given for an attorney if the client was satisfied with the quantum of the bill but defended the action on some other ground.'

[28] In the present matter, much of the enquiry's time was spent dealing with the reasonableness of charges and counsel's disbursements. However no evidence was led that Mrs Cassim, the client, was dissatisfied or in any way objected to these fees and disbursements. The party who would be a true complainant and objector to the fees and disbursements namely Mrs Cassim, was never called as a witness. Nor was there ever any suggestion that she was dissatisfied with the amount of the fees and disbursements. Indeed her silence and acquiescence would appear to suggest the contrary.

[29] Mr Flemming on behalf of the Respondent nevertheless contended that the terms of the court order (assuming its validity) referring to the Appellant (who was not a party thereto) nevertheless gave the obligation to pay the rentals received by the Appellant on behalf of the estate to Dr Cassim some imprimatur from a court which would give it standing above the mere contractual entitlement to set off fees in terms of the 'authority to pay'. He was however unable to point to any authority in this regard.

[30] I have difficulty with the suggestion that what purports to be a provision in an court order against a person not a party to that litigation could take precedence over a client's direct undisputed mandate to an attorney to deduct his fees and disbursements from funds received. If the terms of the settlement agreement and court order were not complied with, then in terms of clause 15 of the settlement agreement the appropriate remedy for Dr Cassim was to sue his mother (no demand to place her in *mora* being required). The present is not a situation where recognising her legal obligations in terms of the settlement agreement and/or court order, Mrs Cassim had directed or mandated the Appellant to pay whatever funds were held in the estate

¹² 1984 (1) SA 73 A at 85C – D.

account to Dr Cassim. Non-compliance with such a direction or part of the mandate if granted would obviously afford certain remedies to Mrs Cassim not only contractually in law, but potentially also as the basis of a complaint for unprofessional conduct by her against the Appellant. That is however not the situation arising in the enquiry.

[31] In my view, the Appellant was also entitled to have been discharged on the first count.

A peripheral issue:

[32] The Appellant also raised as a complaint that the enquiry had not been properly constituted pursuant to a report to the council of the Respondent, as any such report was never produced. That issue was however not persisted with as it was never pertinently raised before the enquiry.

[33] I also pointed out to counsel, that the enquiry committee might not have been properly constituted, as the original decision as conveyed in the summons had been that the three members of the committee would include Mr Jivan as chairperson, and did not appoint Ms D Takalo to the committee. This aspect had however also never been raised, whether at the enquiry stage or thereafter and it might be that whatever shortcomings might appear had subsequently been remedied by an appropriate resolution and/or the necessary reports having been made to the council. In the light of the conclusion reached the issue has no further relevance. No decision is accordingly made in respect thereof.

Costs:

[34] Finally, as regards costs, the Appellant requested that the appeal be upheld with costs. Although ordinarily costs are not ordered in matters of this nature in recognition of the role played by the Respondent and that it should not be discouraged to bring matters of this nature as the custodian of the *mores* of the profession before court, the Appellant's submission was that

there was not even a *prima facie* case made out against him, that he should not be mulcted in having to pay his own costs, that the costs should follow the result, and that such costs should include the costs of senior counsel, and two counsel where so employed. Mr Flemming on behalf of the Respondent stressed that the Respondent was simply performing its duty in opposing the appeal, but that in any event the complexity of the matter was not such as to warrant senior counsel and certainly not two counsel where employed.

[35] The fact that this appeal has been upheld obviously results in the conviction of the Appellant on the two counts now being set aside, which will also include the ancillary directions relating to the payment of the fine of R20 000.00 and that the Appellant pay the costs of the enquiry and inspection. That follows axiomatically.

[36] The costs in issue are therefore only the costs of the present appeal.

[37] There is no doubt that the matter was one of considerable importance to the Appellant as it affects his professional reputation and integrity. To that extent he was justified in employing counsel. The complexity, or more correctly lack of complexity, however did not justify the employment of two counsel and indeed made it a matter which should never have been pursued to this level of an appeal. At best if any cost order in favour of the Appellant was considered then I would have directed that the costs of counsel be included in such costs but I would have left it to the taxing master as to whether it would include the costs of senior counsel.

[38] I am however of the view that although the Respondent's prospects of successfully resisting the appeal were limited, and although such opposition should possibly not have been persisted with, that it cannot be said that the opposition to the appeal was other than *bona fide*, or otherwise motivated. I would be loathe in those circumstances to grant an order for costs in favour of the Appellant against the Respondent having regard to the important function which Law Societies play, and from which they should not be discouraged, to bring potential unprofessional or otherwise unworthy conduct before this

court. It seems to me appropriate in the exercise of my discretion on costs that no order as to costs be made. To the extent that this may impact negatively on the Appellant, it is regrettably a consequence in the larger exercise of this court's discretion in matters of this nature that a Law Society should not be discouraged from pursuing a full ventilation before the court of its member's conduct.

[39] The following order is therefore granted:

- (a) The appeal succeeds.
- (b) The orders granted by the disciplinary enquiry of the Respondent are set aside.
- (c) Each party will be liable for his/its own costs.

KOEN J

MAHARAJ AJ

Appearances

For the Appellant/Member

Instructed by:

c/o Essack, A K Morgan

Naidoo & Company

Tel.: 033 387 7090

Ref.: Mr Gounder/E701/NM

Ms. J Julyan SC

Zayeed Paruk Incorporated

For the Respondent/Complainant

Instructed by:

Tel.: 033-342 9636

Ref.: Mr S N Chetty/Genevieve/KZN311

Mr. A G Flemming

Messrs Siva Chetty & Company