

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

7/2/2014

CASE NO: 71030/2009

In the matter between:

VAN DER MERWE I NO.

and

JENSEN M & OTHERS

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE <i>only</i> NO	
(2) OF INTEREST TO OTHER JUDGES: <i>yes</i> NO.	
(3) REVISED.	
7/02/2014 DATE	<i>Malindi</i> SIGNATURE

Applicant

Respondents

JUDGMENT

MALINDI AJ

INTRODUCTION

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2014 -02- 07
REGTERS KLERK PRETORIA 0001 GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

[1.] On 9 November 2011 Izak van der Merwe (the Applicant) filed a Notice of Motion and affidavit seeking that the Respondents be held for committal of contempt of the Court Order by this Court delivered by Botha J on 29 November 2011 under Case No. 71030/2009.

[2.] If they were to be found guilty of such contempt:

- (a) That Respondents be committed to gaol on such conditions as the Court may deem fit.
- (b) That Respondents are ordered to comply with the aforementioned Court Order, including but not limited to the payment of all proceeds of the 10% member's interest of the deceased in the Third Respondent and pay to the Applicant, against transfer of such interest, the value of such interest which was determined by a chartered accountant nominated by the chairperson of the South African Institute of Chartered Accountants amounting to R2 800 788.00 including interest thereon at 15.5% a tempora morae to Applicant.
- (c) That Respondent pay the cost of the application on an attorney and client scale.

[3.] The relevant part of the Order reads as follows:

- (a) It is ordered that the third respondent alternatively the first and second respondents jointly alternatively the first respondent alternatively the second respondent buy the 10% member's interest of the deceased in the third respondent and pay to the applicant, against transfer of such interest, the value of such interest as determined by the chairperson of the South African Institute of Chartered Accountants.

- (b) The chairperson of South African Institute of Chartered Accountants is requested to nominate a chartered accountant to audit the financial statements and financial affairs of the third respondent to the extent that it may be necessary to determine the present value of the deceased's 10% member's interest in the third respondent.
- (c) The chartered accountant so nominated is to determine the present value of the deceased's 10% member's interest in the third respondent.
- (d) The said chartered accountant may, if the need arises, approach the court for directions.
- (e) The applicant, in his representative capacity, must pay the remuneration of the said chartered accountant.
- (f) The respondents must pay the costs of the applicant, which costs shall include the costs attendant upon employing senior counsel.

[4.] Wahl Schreuder (Chartered Accountants (SA)) were duly appointed and produced their assessment report. They valued the 10% share of Estate Late Paul van der Merwe in the 3rd Respondent as being worth R2 800 788,00 at 31 July 2011.

[5.] However, on 31 August 2011, after receipt of a demand by the Applicant that the Respondents pay the amount, the Respondents communicated to the Applicant

that they were not in agreement with the valuation. They sought an indulgence to discuss the valuation with Mr Schreuder and were granted the indulgence until 9 September 2011.

- [6.] They were warned by the Applicant by letter dated 21 September 2011 that failure to pay the amount constituted contempt of court and demand for payment was made. Legal proceedings were also foreshadowed in the letter.
- [7.] To cut a long story short, the Respondents sought and obtained their own assessment of the 3rd Respondent. The 10% value in the 3rd Respondent was evaluated at R1,27 million by Valbridge (a corporate finance company) in their report dated 6 September 2011.
- [8.] On 23 January 2012 the Respondents opposed the application to be held in contempt and simultaneously lodged a counter application seeking an order:
 - (a) That the above Honourable Court gives directions requiring the further conduct of the enquiry into the value of the deceased's 10% interest in the Third Respondent.
 - (b) Costs of the counter-application, such costs to include the costs of senior counsel on an attorney and own client scale.

[9.] On 29 February 2012 the parties reached a settlement agreement whereby the 10% deceased member's interest in the 3rd Respondent was valued at R1 650 000,00. R1 200 000,00 was paid over to the Applicant.

[10.] In the settlement agreement the parties incorporated clause 3 which reads as follows:

"The balance of R450 000-00 (Four Hundred and Fifty Thousand Rand) will only be payable on finalisation (either by settlement or taxation) of the legal cost on case 71030/2009. Any legal cost (agreed or taxed) in favour of the first and second respondents against the applicant will be set off against the amount of R450 000-00 (Four Hundred and Fifty Thousand Rand) before payment."

[11.] The Respondents contend that this clause is to be read in their favour as contemplating that the Applicant is to pay the Respondents' costs, hence the amount of R450 000 was held over in order to off-set the taxed or agreed costs of the Respondents.

[12.] The Applicant contends, on the other hand that no agreement was reached as to costs and therefore that if a costs order is made in their favour then the Applicant is entitled to both the R450 000 plus such costs as may be ordered in his favour.

[13.] The Notice of Motion issued on 9 November 2011 was directed at seeking relief for the committal of the Respondents to gaol and that they simultaneously be

ordered to comply with the Court Order, especially the Applicant's claim of R2 800 788,00 as valued by a firm of chartered accountants that was appointed in terms of that Order. The merits of the main application and the counter application are relevant only for consideration of an appropriate costs order should I come to the conclusion that the Notice of Motion dated 21 October 2013 is in respect of determining the question of costs only.

[14.] The Respondents' Answering Affidavit contends that the Court Order envisaged the appointment of an expert or referee as contemplated in S19(bis) of the Supreme Court Act 59 of 1959. The section reads as follows:

"(1) In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer-

(a) any matter which requires extensive examination of documents or scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or

(b) any matter which relates wholly or in part to accounts; or

(c) any other matter arising in such proceedings,

For enquiry and report to a referee, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such

referee, or make such other order in regard thereto as may necessary or desirable.

(2) *Any such report or any part thereof which is adopted by the court, whwter with or without modifications, shall have effect as if it were a finding by the court in the civil proceedings in question.*

(3) *Any such referee shall for the purpose of such enquiry have such powers and shall conduct the enquiry in such manner as may be prescribed by a special order of court or by rules of court".*

[15.] It is contended that the conduct of such expert in the event of a disagreement with his/her report *"will act reasonably and apply his/her mind fully, and, in particular, address concerns raised by a party affected by the expert's opinion- and when such concerns cannot be addressed- approach the Above Honourable Court for directions, particularly when such an option has been granted, in an excess of caution to him/her, by the Above Honourable Court. This the Applicant's expert conspicuously failed to do."*

[16.] In the counter application the Respondents contend that:

"...the applicant was duly bound to have approached the above Honourable Court not only for directions, once the referee's was disputed, but only to request the Court to adopt Mr Schreuder and Mr Crawford's report if the applicant wished it to be enforced."

[17.] When giving judgment Botha J stated:

"Sect 35 does not determine how a forced sale should be effected, but guidance can be obtained from section 36, which deals with a cessation of membership by order of court. No doubt a court must have the power to give appropriate directions for the determination of the value of a member's interest of a deceased member."

[18.] The terms of Botha J's order are manifestly clear. The Respondents were neither entitled to challenge the report of the chartered accountants nor to review the report. If anything was brought to their attention they would have had to approach the court for further directions. They were only confronted with the Valbridge report and had to defend their own report. Nobody suggested that they seek further directions nor did the Respondents approach the court for an order that Wahl Schreuder be compelled to consider the Valbridge report. The court would, in all likelihood, have given further directions, if necessary, to Schreuder. The review application was directed at setting the report aside not for further directions.

[19.] The counter application was aimed at requesting the court to give further directions as to the conduct of the enquiry. This was done on 23 January 2012, nearly 5 months after the report dated 1 August 2011.

[20.] It is clear from the judgment that the appointed chartered accountants would *"approach the court for directions, should the need arise"* in their view. None of

the requirements of S19 (*bis*) (i)(c) were imposed. There was no requirement for the report to first be adopted by the court or for it to be subjected to modification as the court pleases such as when an expert report is presented under Rule 36(9) of the Uniform Rules.

[21.] In fact, the Respondents did not behave as if S19 (*bis*) applied. They did not seek the consent of the Applicant that the report be “*reviewed*” by the Court in view of their disagreements therewith. Instead they sought a second opinion. Even after receipt of their report they did not approach the court with a view of applying subsect (1)(c).

[22.] On 29 February 2012 the parties settled.

[23.] The notice of set down filed on 21 October 2013 and delivered to the Respondents on 22 October 2013 makes reference to the Applicant’s Heads of Argument delivered on 25 September 2013. These Heads of Argument were filed on 21 November 2013.

[24.] In the Applicant’s Heads of Argument and his practice note the relief sought is for the court to make an order as to costs.

[25.] On the other hand, as stated before, the Respondents have argued that from a plain reading of clause 3 of the settlement agreement, it is clear that the Applicant was to pay the Respondents’ costs, and that the amount of R450 000,00 was specifically held over to effect such payment of the agreed or

taxed costs of the Respondents. First, they dispute the competency of setting this matter down for costs when the parties have agreed that the Applicant will pay the costs, and secondly, when clause 3 can only be read to mean that costs were agreed in favour of the Respondents.

[26.] This submission is made on the basis of their interpretation of Clause 3.

[27.] They submit further that the relief sought by the Applicant is for the court to interpret Clause 3 and therefore an application seeking such a declaratory order should have been brought instead of setting the matter down for costs. It is submitted that since the settlement agreement was an *inter partes* agreement and never made an order of court in terms of Rule 41(4), the Applicant cannot get the relief sought without taking this step first.

[28.] Lastly the Respondents submit that the issue of costs was agreed in favour of the Respondents and that they require an opportunity to prove this. They therefore seek a postponement in order to place before court facts that will prove the settlement on costs.

[29.] I am of the view that the Respondents knew from the Applicant's Heads of Argument that this matter is set down for determination of an appropriate costs order in respect of the main application and the counter application. The Respondents have referred to their review application filed on 12 February 2012, before the settlement agreement on 29 February 2013. They contend that had it been heard it would have wiped off the Applicant's assessment of the

10% value in 3rd Respondent and therefore of the underlying *causa*. The review application was not part of the papers before court. Its existence is common cause and will therefore be taken into account if costs have to be considered as prayed for by the applicant.

[30.] I will therefore consider Clause 3 alone and decide whether it settles the issue of costs in favour of the Respondents. If it settled the issue in favour of the Respondents then their taxed or agreed fees will be off-set from the amount of R450 000. If it does not settle the issue in favour of the Respondents then I have to make an order as to costs.

[31.] As already stated, it is common cause that Clause 3 formed part of the settlement agreement. It is also common cause that the agreement did not contain a self-standing clause setting out which party will be liable for costs. At least none of the parties have pleaded such a clause.

[32.] On the plain reading of clause 3 of the settlement agreement it is contemplated that the Respondents are to hold-over R450 000 from which their costs would be off-set in the event of a favourable costs order. Since the parties have not reached agreement on which party should pay the costs, either party is entitled to approach the court for an order.

[33.] This plain interpretation arises from the fact that no specific agreement as to costs was contained in the settlement agreement. Had it been so agreed the clause would have read something to the effect that the Applicant is to pay the

agreed or taxed costs and that the amount of R450 000,00 would be held-over to off-set such costs.

[34.] In view of the conclusion that I have reached that this court must make an order as to costs I need not traverse the other contentions by the Respondents.

[35.] The only contention that I need to deal with is whether the Applicant ought to have set the matter down first for the settlement to be made an order of court and only thereafter seek an order for compliance therewith.

[36.] Rule 41(4) provides that: *"Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties"*.

[37.] This is an interlocutory application brought on notice¹.

[38.] In this case the agreement between the parties has been carried out, save for the question of costs. The Applicant need not apply for judgment in terms thereof, because the rule applies to a party who has failed to comply with the terms of a settlement.

¹ Massey-Ferguson (SA) Ltd v Ermelo Motors Ltd 1973 (4) SA 206(T) at 214.

[39.] In addition, besides making the settlement an order, the Applicant could also seek judgment for the outstanding obligation². Therefore the Applicant could seek judgment for payment of the R450 000,00 as an outstanding obligation.

[40.] This court is therefore seized with the issue of costs only.

[41.] In the circumstances I find that the Respondents were the cause of the Applicant having to launch this application. The Applicant's conduct therein was not unreasonable. On the other hand, opposition to the application was ill-conceived and would not have succeeded.

[42.] Having considered the events preceding the settlement of this matter out of court, and thereafter, I am inclined to order the Respondents to pay the Applicant's costs incurred in the process of asserting compliance with the Order of Botha J.

[43.] Since the Applicant was justified in approaching the court as he did, and since the Respondents' misunderstanding of Clause 3 caused these proceedings I find that the Applicant should not be made to pay costs thereof. I also take into account that even though the settlement resulted in the amount of R2 800 000,00 being reduced by some 41% to R1 650 000,00 he is the substantial winner because he obtained the order, that the deceased's share in the 3rd Respondent be sold to the Respondents.

² See Joffe et al: High Court Motion Procedure: A Practical Guide, LexisNexis [Issue 1] at 1-74

[44.] I therefore order as follows:-

- 44.1. The 1st and 2nd Respondents are to pay the costs in the main application under case No. 71030/2009 on a party-and-party scale.
- 44.2. The 1st and 2nd Respondents are to pay the costs of the counter - application on a party-and-party scale.
- 44.3. The 1st and 2nd Respondents are to pay the costs of today on the party-and-party scale.

SIGNED AT PRETORIA ON THIS 27th DAY OF FEBRUARY 2014.


Malindi, AJ

Acting Judge of the North Gauteng High Court of South Africa