

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

Case No.: 14555/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ YES
(3) REVISED.	
6 November 2012	
DATE	SIGNATURE

7/12/2012

In the matter between:

KENNETH ALFRED JONES

Applicant

and

RICHARD POTGIETER

1st Respondent

JOHANNES PETRUS LOMBARD

2nd Respondent

MILKOR (PTY) LTD

3rd Respondent

ANDRIES CHRISTOFFEL PIEK

4th Respondent

WELMA JOUBERT

5th Respondent

ANDRIES CHRISTOFFEL PIEK N.O

6th Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] The applicant is seeking an order on the following terms:

- 1.1 that the warrant of execution issued by the Registrar under Case number 77059/2009 on 24 February 2011, against the applicant for payment of the sum of R134 427.95, together with interest

thereon at the rate of 15,5% per annum, calculated from 15 June 2011, be set aside;

- 1.2 that the first respondent, alternatively second respondent, alternatively first and second respondents, jointly, be ordered to pay to applicant the sum of R134 427.95;
- 1.3 In the alternative, that third, fourth, fifth and sixth respondents pay to applicant the sum of R107 542.36, jointly and severally, the one paying the other to be absolved;
- 1.4 That the first and second respondents, alternatively third, fourth, fifth and sixth respondents pay the costs of this application.

[2] The first and second respondents had instituted proceedings against the applicant and the third to sixth respondents under case number 77059/2009. On 24 February 2011 Judge Claassen granted an order under case number 77059/09 which provided, inter alia, that:

- "1. DAT die eerste applicant 'n 40% aandeelhouer is van eerste respondent.
2.
3.
4. DAT die prys moet bepaal word deur 'n onafhanklike ouditeur deur die partye aangewys. By gebrek aan ooreenkoms, moet die voorsitter van die ouditeursberoep/-vereniging, of 'n person deur hom aangewys, 'n person aanwys.
- ...
7. ...
- 7.4 Origens word die koste van die aansoek deur die respondent betaal, gesamentlik en afsonderlik."

- [3] The first and second respondents were the applicants and the applicant and the third to sixth respondents were the respondents in the application.
- [4] On 15 June 2011 the first respondent caused the costs to be taxed and a costs *allocatur* was issued in the amount of R134 427.95.
- [5] The first respondent issued a warrant of execution against the applicant which was executed on 23/9/2011 for the total amount of the costs *allocatur*.
- [6] The applicant paid the R134 424.95 to the sheriff under protest on 11 October 2011.
- [7] In pursuance to paragraph 4 of Judge Claassen's order of 24 February 2011, the first respondent and the third to sixth respondent concluded an agreement. The applicant refused to sign the agreement and was therefore not a party thereto.
- [8] Portions of the agreement reads as follows:

" ...

And whereas the first party and second party instituted legal proceedings in the High Court in Pretoria under case number 77059/09 against the other parties to this agreement in which case judgment was delivered on 24 February 2011 and where the Court found that the first party in fact is the owner of the shares in the company (which had previously been disputed by the third to fifth party);

And whereas the Court ordered that the first party's shares be bought by the remaining shareholders of the company, but which matter has now become settled as contemplated in the settlement agreement as recorded hereunder;

And whereas the parties are desirous to finalize and settle all disputes between them all;

And whereas the third party is prepared to pay an amount to the first party for such settlement of all disputes and for the first party to resign as director of the company;

And whereas the parties are desirous to record their settlement in written document;

NOW THEREFOR THE PARTIES AGREE AS FOLLOWS:

1.

2.

The first party herewith withdraws all legal actions against the other parties to this agreement and the parties record that all disputes and legal actions or applications between them all have become settled. For this settlement and for this first party's resignation as director of the company, the third party will pay to the first party the amount of R2 000 000.00 (Two Million Rand). (It will be an internal matter and between the third party and the company if anything will be refunded to the third party for this amount that is being paid on everybody's behalf)."

[9] It is not in dispute that the third respondent paid the first respondent the amount of R2 000 000.00 and that the first respondent resigned as director of the third respondent.

[10] It is the applicant's contention that the agreement concluded between the first respondent on the one hand and the third to sixth respondents on the other, is a compromise which extinguished all liabilities and claims, including the cost order under case number 77059/09, the first respondent had against the applicant and the third to sixth respondent. Further, the applicant contends that the warrant and writ of execution issued by the first respondent for the total amount of the costs *allocatur* was therefore unlawful, in the alternative that the third to sixth respondents were liable to pay him 4/5 of the costs *allocatur*.

[11] Nothing turns on whether the agreement concluded by the first respondent and the third to sixth respondents was a settlement agreement or a compromise. The real issues to be determined are the following:

11.1 whether the writ of execution was validly issued against the applicant;

11.2 whether the agreement extinguished the applicant's liability for costs; in the alternative

11.4 whether the third to sixth respondents' liability for costs was extinguished by the agreement.

[12] In support of the relief claimed, the applicant initially contended that he paid the amount in the costs *allocatur* under duress. However, at the hearing of this application, the applicant abandoned his reliance on duress for the relief sought.

[13] It is the applicant's contention that the agreement concluded by the first, third to sixth respondent was a compromise agreement which settled all disputes between the parties, inclusive of the cost order against the applicant and the third to sixth respondents. It was submitted on behalf of the applicant that in view of the fact that the costs *allocatur* was issued before the agreement was concluded, all disputes between the parties were settled, and the writ of execution issued against the applicant was unlawful.

[14] In the alternative, the applicant contends that should this court conclude that the costs *allocatur* did not form part of the settlement agreement, and in view of the applicant and the third to sixth respondents joint and several liability for the costs in terms of the order of 24 February 2011, the third to sixth respondents should be held liable for the amount of R107 542.36, being their share of the costs paid by him.

[15] The following submissions were made on behalf of the first respondent. It is the first respondent's contention that the order of 24 February 2011 had settled all the disputes between the parties. That the agreement concluded between the first respondent and the third to sixth respondents was only a vehicle used to calculate the value of the first respondent's 40% shareholding in the third respondent. Furthermore, it is the first respondent's contention that since the applicant was not party to the agreement, he could not claim any benefit coming out of the agreement of settlement.

[16] On behalf of the third to sixth respondents it was submitted that the aim of the agreement was to settle all disputes between the parties, in particular, between the first respondent and the third to sixth respondents. Further it was submitted that in terms of clause 2 of the agreement, all disputes and legal actions between the parties to the agreement had become settled on signature of the agreement. It is the contention of these respondents that it was opportunistic for the first respondent to have issued a writ of execution against the applicant for the entire amount of the cost *allocatur*. It was submitted that since the debt to the first respondent had been extinguished by the payment of the R2 000 000.00, which amount included the costs, the first respondent no longer had a claim against the third to sixth respondents and the applicant. In the alternative, it was submitted on behalf of the third to sixth respondents that since the agreement extinguished the *pro rata* liability of the third to sixth respondents towards the first respondent, the applicant was liable only for his portion of the costs *allocatur*.

[17] I am of the view that it cannot be disputed that the applicant was not a party to the agreement reached by the first respondent and the third to sixth respondents. Therefore, the applicant cannot claim any benefit arising from the agreement.

[18] The order of 24 February 2011 finally determined the first respondent's share in the third respondent. The order left open the value of the first respondent's 40% shareholding in the third respondent and directed

that the value of the shares should be determined either by an indent auditor or by a third party nominated by the auditors association.

[19] It would appear that when the parties concluded the agreement, their intention was mainly to give effect to Judge Claassen's order with regard to the value of the first respondent's 40% share in the company. This value was determined and agreed upon to be R2 000 000.00 in final settlement. Nothing in the agreement suggests or can be interpreted to mean that when the parties agreed that all disputes, actions or applications between the parties have been settled, the parties had in contemplation the order as to costs. A cost order can never be interpreted to be a 'dispute', an 'action' or an 'application'. The cost order was not in dispute at the time the agreement was concluded. It was a final directive by the court that the applicant and the third to sixth respondents are liable for the first respondent's taxed costs, jointly and severally as the first respondent was successful in the application. I am satisfied that the terms of the agreement did not extinguish the applicant and the third to sixth respondents' liability for the cost order.

[20] A creditor is within his or her rights, where there are co-debtors, to pursue payment of the debt against any of the co-debtors. There is no obligation on the creditor to pursue each co-debtor for his or her portion of the joint debt. Any of the co-debtors who ends up paying has a claim against his or her co-debtors for their portions of the debt. By paying the third respondent's taxed costs, the applicant can claim as against the third to sixth respondents their share of the taxed costs.

[21] I am therefore of the view that the writ of execution issued against the applicant was valid. It was not necessary for the first respondent to have issued a writ against the applicant for his portion of the taxed costs.

[22] Accordingly the following order is made:

1. The third, fourth, fifth and sixth respondents are to pay applicant the sum of R107 542.36, jointly and severally, the one paying the other to be absolved;
2. The applicant and the third to sixth respondents to pay the first respondent's costs, jointly and severally, the one paying the other to be absolved.
3. The third to sixth respondents to pay the applicant's costs, jointly and severally, the one paying the other to be absolved.


NP MNGQIBISA-THUSI
Judge of the High Court