

FREE STATE HIGH COURT, BLOEMFONTEIN
(REPUBLIC OF SOUTH AFRICA)

Case No.: **4479/09**

In the matter between:

SYBRAND PETRUS NICHOLAS SMITH

Plaintiff/Applicant

and

WILLEM LODEWYK PRETORIUS N.O.

First Defendant/Respondent

MASTER OF THE HIGH COURT,

BLOEMFONTEIN

Second Defendant/Respondent

GENE UNDERAY

Third Defendant/Respondent

SHARON DUTLY

Fourth Defendant/Respondent

CHARMAINE WATERSON

Fifth Defendant/Respondent

SURIANA THOMPSON N.O.

Sixth Defendant/Respondent

DELIVERED BY: SNELLENBURG, AJ

HEARD: 21 JUNE 2012

DELIVERED: 26 JULY 2012

[1] This is an application for an order that

- (a) the first defendant/respondent be compelled to deliver to the plaintiff/applicant the documents requested in terms of the notice delivered in terms of Uniform Rule 35(3) and (6), dated 7 March 2012, within ten days from date of service of the order on first defendant/ respondent's attorney, by hand;
- (b) leave be granted to the plaintiff/applicant to apply to Court, on the same papers, duly amplified, for an order striking out the first defendant/respondent's defence, in the event of first defendant/respondent failing to comply with the terms of the order; and
- (c) directing the first defendant/respondent to pay the costs of the application.

[2] The plaintiff/applicant, **Sybrand Petrus Nicholas Smith**, issued summons, amongst others, against the first defendant/respondent in his capacity as duly appointed executor in the estate of the late **Raymond Henry Gleimius** (the deceased).

[3] I will henceforth refer to the applicant as the plaintiff and likewise to the respective respondents as they have been cited in the main

proceedings [the action], for example to the first defendant/respondent as the first defendant.

[4] The action was preceded by the following events and circumstances:

- 4.1 On 10 October 2006 the deceased and his mother **Christina Yvonne Smith** (the deceased's mother) passed away in an aircraft accident as a result of the injuries sustained by them;
- 4.2 The second defendant, the Master of the High Court, ruled the deaths of the deceased and the deceased's mother to have taken place simultaneously;
- 4.3 In terms of the deceased's last will, dated 13 October 1999, his mother was nominated by him to inherit certain specified items, as well as the residue of his estate;
- 4.4 In terms of the last will of the deceased's mother, the plaintiff is nominated as her heir;
- 4.5 It is the plaintiff's case, in the action, that as a matter of medical fact, the deceased passed away before the deceased's mother;

4.6 In such event, by reason of the provisions of the deceased's will, read with the provisions of the last will of the deceased's mother, the specified items that was to dissolve to the deceased mother in terms of his will, as well as the residue of his estate, is to dissolve to the plaintiff through the last will of the deceased's mother in the event that the deceased passed away prior to his mother passing away;

4.7 As a result of the second defendant's ruling, however, the part of the deceased's will that made provision for the portion of the estate dissolving on the deceased's mother is to be dealt with as intestate and the third, fourth and fifth defendants stand to inherit that portion of the deceased's estate.

4.8 The issues in the pleadings, as they stand in the main action, involve the determination of the afore-mentioned.

[5] The notice in terms of Uniform Rule 35(3) and (6) is, according to the plaintiff's case, premised on the following facts and circumstances:

5.1 There is no duty on first defendant to actively oppose the

relief sought by the plaintiff in the main proceedings and it is, indeed, not desirable and to the benefit of the deceased's estate and its potential heirs for the first defendant to become so involved and to incur expenses in the estate in this regard;

- 5.2 That, notwithstanding, first defendant chose, out of own volition, to become actively involved in the main proceedings and to appoint the same attorney that represents the third, fourth and fifth defendants in the main proceedings, as well as the employment of the same counsel that are employed by the last mentioned defendants;
- 5.3 It is, as a result of the aforementioned, impossible to distinguish between the portion of legal costs that are incurred by First defendant (if any) and the portion of legal costs that are incurred by third, fourth and fifth defendants (if any) in the main proceedings;
- 5.4 It is of pertinent importance to the plaintiff, with regards to the issue of costs against the first defendant, to ascertain whether the first defendant pays all the legal expenses and costs from the estate (with or without separate agreement with third, fourth and fifth defendants to recover the same)

and by so doing whether he assists and enables the third, fourth and fifth defendants, by making use of the estate's resources, to defend the main proceedings; and (or) whether the first defendant pays only a portion of the expenses and legal costs (with or without a separate agreement with the third, fourth and fifth defendants to recover such portion) and by doing so, whether he, in part, assists or enables the third, fourth and fifth defendants, by making use of the estate's resources, to defend the main proceedings;

- 5.5 Should the Plaintiff ascertain that the first defendant, as a fact, pays all the legal costs and expenses in the main proceedings, or a portion thereof (with or without a separate agreement with third, fourth and fifth defendant to recover the same, whether it be all or a portion) the plaintiff will rely, amongst other facts, on that fact in seeking an order that the first defendant be ordered to pay the costs of the main proceedings in his personal capacity on a punitive scale.

- [6] The issue of costs in the pleadings, as they stand, embraces nothing more than that the plaintiff seeks an order that costs of the main proceedings be paid out of the estate or, in the alternative

thereto, that such of the defendants that opposes the relief sought, be ordered to pay the costs, jointly and severally. The first defendant, together with the third, fourth and fifth defendants pray that the action must be dismissed with costs.

[7] On 20 October 2011 the plaintiff's attorneys of record addressed a letter to the first plaintiff's attorneys of record, in which was sought the following documents and information:

- a) The most current and up to date copy of the liquidation and distribution account;
- b) Confirmation that the estate does not pay any legal fees and/or disbursements in the pending litigation under case number 4479/2009 on behalf of **Gene Underay** (third defendant), **Sharon Dudly** (fourth defendant) and **Charmain Waterston** (fifth defendant) and that each of the defendants are paying their own legal costs;
- c) In the event that the confirmation sought in (b) cannot be given, full particularity of all legal fees and disbursements paid by the estate on behalf of the defendants, **Underay**,

Dudly and **Waterston**, is requested;

- d) Full particularity of any oral agreement or copy of any written agreement between the executor and the three defendants with regard to the payment of legal fees and disbursements in the pending litigation.

[8] On 25 October 2011 the first defendant's attorneys of record replied that the estate does not pay any legal fees for any third party except for the executor. The plaintiff submits that this reply does not constitute an answer to the matters set out in par [5.4], above.

[9] In terms of the notice in terms of Rule 35(3) and (6) the Applicant requires the following:

9.1 All source documentation (inclusive of, but not limited to, invoices and/or receipts (in respect of the income accrued from 6 November 2006 to date in the estate of the late **HR Gleimius** – estate no. 12031/2006);

9.2 All source documentation (inclusive of, but not limited to,

invoices and/or receipts and/or cheques issued and/or documentary proof of electronic funds transfers (“EFT’s”)) in respect of the expenditure expended and/or incurred from **6 November 2006** to date in the estate of the late **RH Gleimius** – estate no. 12031/2006;

9.3 All bank statements, to include current account bank statements and investment account bank statements in the estate of the late **RH Gleimius** – estate no. 12031/2006 from 6 November 2006 to date;

9.4 All vouchers numbered 1 to 88 as reflected in the liquidation and distribution account dated 10 March 2009;

9.5 Documents evidencing any loans or advances made to any party or entity from the estate of the late **RH Gleimius** – estate no. 12031/2006.

[10] The first defendant refused to make discovery on the basis that the documents requested are not relevant to the issues in dispute on the pleadings.

[11] The plaintiff does not contend that the documents requested in

terms of the said notice are documents that are or may be relevant to the aforesaid dispute, namely whether the deceased passed away before the deceased's mother did. This is not contended directly or indirectly.

[12] The plaintiff contends that the documents requested may be relevant to the issue of costs. The plaintiff postulates that, to be able to assess whether valid grounds exists to hold the first defendant liable for costs in personal capacity (as opposed to in his representative capacity), it is required that he be placed in possession of the documents requested in the notice in terms of Uniform Rule 35(3) and (6).

[13] The plaintiff relies on the first defendant's conduct pursuant to the commencement of the main proceedings. The main thrust of the plaintiff's argument is premised on the principle that, where an executor is properly a party to legal proceedings in his/her representative capacity, the executor will be held personally liable for costs if he/she acted *mala fide* or unreasonably or improperly in bringing or defending the proceedings. This is undoubtedly

correct. The same principles apply to an executor in such instance as would apply to a trustee in this regard. The case law regarding the position with trustees is therefore equally applicable to an executor. Regarding trustees see **STANDER AND OTHERS v SCHWULST AND OTHERS** 2008 (1) SA 81 (C) at 94B - D; Regarding executors see **VAN NIEKERK v VAN NIEKERK AND ANOTHER** 2011 (2) SA 145 (KZP) at 149G - 150G, paras [10], [11] and [12].

- [14] The first defendant opposes the application on the basis that only documents, relevant to an issue between the parties, as appear from the pleadings, may be requested in terms of Uniform Rule 35(3) and (6), therefore that the fundamental starting point should be the pleadings. See **COPALCOR MANUFACTURING (PTY) LTD AND ANOTHER v GDC HAULIERS (PTY) LTD (formerly GDC HAULIERS CC)** 2000 (3) SA 181 (WLD) at 193 par [24] and [25]. First defendant submits that the plaintiff's request amounts to nothing more than a so-called fishing expedition.

- [15] The parties are not at odds regarding the principles applicable to

discovery and supplementary discovery. The crux of the dispute revolves around whether the costs, as it presently appears from the pleadings, constitutes an issue between the parties.

[16] As point of departure the provisions of the Uniform Rule 35(3) must be evaluated. The Rule provides:

“If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings that may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.”

[17] Uniform Rule 35(6) provides for production of documents and/or tape recordings so disclosed. Uniform Rule 35(3) provides for a procedure for a party dissatisfied with discovery of the other party. See SWISSBOROUGH DIAMOND MINES (PTY) LTD AND OTHERS v GOVERNMENT OF THE REPUBLIC OF SOUTH

AFRICA AND OTHERS 1999 (2) SA 279 (T) at 321F - G. It is undeniably a procedure to supplement discovery which has already taken place, but which is alleged to be inadequate. It does not afford a litigant a licence to fish in the hope of catching something useful. See **THE MV URGUPOWERS OF THE MV URGUP v WESTERN BULK CARRIERS (AUSTRALIA) (PTY) LTD AND OTHERS** 1999 (3) SA 500 (C) at 515D.

- [18] It is not the plaintiff's case that the first defendant has or had documents in his possession or power that was not discovered in terms of Rule 35(1) when called upon. On the contrary, it is quite clear that the plaintiff seeks additional discovery based on the first defendant's perceived conduct since commencement of the proceedings, by, *inter alia*, choosing to defend the matter. This is the crux of the matter to my mind. The issues are exactly the same as they were when discovery was called for and made. If the plaintiff concedes that the first defendant did not fail to discover documents in his possession or under his control, when discovery was made and the issues that appear from the pleadings are still the same, then clearly the plaintiff has not made out a case that he is entitled to the order sought.

[19] Clearly the rule on supplementary discovery does not envisage what the plaintiff, by its own admission, is employing it for.

[20] Furthermore, and notwithstanding the concession during argument regarding the fact that the notice is much too wide, that does not address the reason why the notice was served in its present form. It was clearly intended to elicit information not relevant to the issues in the pleadings. The first defendant would have been justified to refuse to comply with the notice, regardless of the finding regarding whether the plaintiff may, or may not be entitled to further discovery regarding the issue of costs.

[21] The plaintiff submits that it may seek a cost order in personal capacity against the first defendant, amongst others, on the grounds set out in par [5] above. By implication the plaintiff submits that other grounds exist or may exist in future, which would entitle it to seek costs against the executor in personal capacity, notwithstanding or regardless of the grounds on which it relies in this application. As the matter stands, it seeks a cost

order against the first defendant in his representative capacity and only as an alternative to the main order that the estate pay the costs. The plaintiff is therefore, on his version, not debarred from seeking such cost order eventually, should he be able to make out a case that the executor has acted in bad faith.

[22] I do not agree with the plaintiff's submission that any inferences can be made, at this stage, by the mere fact that the first defendant is actively defending the action. It would be inappropriate to make any such finding. The Trial Court would be in a much better position to evaluate the *bona fides* of absence of *bona fides* in the defence of the action. Suffice to say that the first defendant was cited as a defendant and he has the rights that any other litigant has, save that his conduct may be measured at the end of the trial. These facts do not entitle the plaintiff to the relief sought.

[23] In so far as necessary, I also disagree that the first defendant's reply did not address the issue adequately. The plaintiff will not be without remedy if it succeeds and it appears that the first

defendant has in any manner acted to his prejudice in the conduct of this case.

[24] The question is simply whether the first defendant must be compelled to comply with the notice for supplementary discovery. To my mind the plaintiff has failed to make out a proper case for the relief.

[25] On behalf of the plaintiff it was conceded during argument that in the event of a cost order being granted in favour of the first defendant, that such order may include the costs occasioned by the employment of two counsel.

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

The application is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

SNELLENBURG, AJ

APPEARANCES: On behalf of the applicant:
Adv PG Cilliers SC
Instructed by:
Eugene Attorneys,
Bloemfontein

On behalf of first respondent:
Adv JY Claasen SC,
assisted by
Adv CD Pienaar
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