IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION- EAST LONDON

Case no: EL: 197/2012
ECD: 497/2012
Date Heard: 15/05/2012
Date Delivered:
18/05/2012

In the matter between:

PATRICIA ANNE MOIRA NORRIS **1ST APPLICANT**

TONI NORRIS **2ND APPLICANT**

And

BELFA FIRE PTY (LTD) **1ST RESPONDENT**

THE SHERIFF OF THE HIGH COURT, EAST LONDON **2ND RESPONDENT**

JUDGMENT

SMITH J:

[1] The Applicants launched urgent motion proceedings for an order staying the execution of a writ pending the review of taxation in terms of Rule 48 of the Uniform Rules of Court.

[2] The pending review of the Taxing Master's *allocatur* relates only to the reasonableness of counsel's fees allowed by him. First Respondent has subsequently conceded the other items in dispute, which amounted to some R500, in the hope that the matter could be resolved amicably. I may also add that these costs were awarded in respect of the hearing of an exception and the main action between the parties is still pending.

[3] A dispute of fact has however arisen as to whether or not the parties have agreed that the costs of Heads of Argument should be taxed off counsel's fees, and that the balance being R16 500.00, should be allowed as counsel's fees for the day.

[4] The Taxing Master, Mr Ndlebe, has filed an affidavit wherein he confirms the assertion by the First Respondent that the fee had been agreed upon between the parties. The Applicants denied that such an agreement was concluded and averred that the decision had been taken by the Taxing Master. They have now applied for this issue to be referred for oral evidence.

[5] I am not called upon in this matter to rule on the merits of the Applicants' grounds of review in respect of the Taxing Master's *allocatur*, this being an application to stay the execution of a writ in respect of the costs

order pending such review. The Applicants will therefore, regardless of my finding in this matter, still be entitled to proceed with the review in terms of Rule 48.

[6] In terms of that rule the Taxing Master's report will be laid before a judge in chambers who may:

(i) decide the matter upon the merits of the case and submission so submitted;

(ii) require any further information from the Taxing Master;

(ii) if he or she deems it fit, hear the parties or the advocates or attorneys in his or her chambers; or

(iv) refer the case for decision to the court.

[7] The hearing of *viva voce* evidence on this issue will, apart from relating to a relatively small amount (being R11 500), not be dispositive of the review in terms of Rule 48. It will merely be relevant in establishing whether or not the Applicants' review has reasonable prospects of success, this being one of the factors that I am constrained to consider when deciding whether or not to grant the relief.

[8] I am satisfied that the facts and circumstances of this matter call for the adoption of a common sense and robust approach. While I am mindful of

the dangers of determining probabilities in the face of conflicting versions in affidavits, I am satisfied that the facts of this case present no such dilemma. (**Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd 2011 (1) SA 8 (SCA)** at 14D-F.)

[9] It is settled law that a court should not be reluctant to resolve disputes of fact in affidavits simply because it may be difficult to do so. (**Sofiantini v Mould 1956 (4) SA 150 E** at 154F)

[10] The Taxing Master has filed a detailed affidavit wherein he stated unambiguously that the parties had agreed on the amount to be allowed in respect of counsel's fees. His bold and unequivocal assertions in this regard leave no room for the possibility of a retraction during *viva voce* evidence on the basis that he had been mistaken. In order for the applicant to be successful nothing less than an admission by the Taxing Master that he had misstated the true facts in his affidavit would suffice. This is in my view a highly unlikely scenario.

[11] I am also mindful of the fact that a referral to oral evidence of this issue will entail additional costs for both parties which will, undoubtedly, exceed the amount which is in dispute.

[12] Motion proceedings are meant to facilitate expeditious resolution of disputes and in terms of Rule 6 (5) (g) I am required to make an order which will ensure a "*just and expeditious decision*".

[13] Having regard to, *inter alia*, the relatively small amount in dispute, the fact that the Applicants will not be precluded from pursuing their Rule 48 review and the considerable financial implications for both sides if the matter is referred for oral evidence, I am not persuaded that I should exercise my discretion in favour of the Applicants. In the result the application to refer the aforesaid issue for oral evidence is dismissed with costs.

[14] Both counsel agreed that in the event of the aforesaid application being unsuccessful, the matter should be decided on the basis of the facts alleged by the Respondent together with the facts alleged by the Applicants and which have been admitted by the Respondent. **(Plascon- Evans Paints LTD v Van Riebieck Paints (Pty) Ltd 1984 (3) SA 623 (A).**

[15] If the matter is decided on this basis the Applicants cannot succeed in the face of an unequivocal assertion by an objective and impartial deponent (who also happens to be the Taxing Master) to the effect that there had been an agreement in respect of counsel's fees. On the facts before me I am

therefore constrained to find that there are no reasonable prospects that the Applicants will succeed with the review in terms of Rule 48 and the application must therefore fail for this reason.

[16] In the result the following order shall issue:

1. The application is dismissed;

2. The Applicants are jointly and severally liable to pay the First Respondent's costs.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Brooks
Attorney for the Applicant	:	Cooper Conroy Bell & Richard Inc. 4 Epsom Road Stirling EAST LONDON Ref: G.S BELL/stuart/BC7376

Counsel for the 1st Respondent	:	Advocate Cole
Attorney for the 1st Respondent	:	Wylde & Runchman Inc. Motorland Building Cnr Oxford & Fleet Street EAST LONDON Ref: I Runchman/roenel/G10879
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