LOM Business Solutions t/a Set LK Transcribers/pj

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 27836/09

DATE: 2009-06-11

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~
(3) REVISED

DATE 2009/08/06 SIGNATURE

In the matter between:

FREDERIK RUDOLPH BOTHA N.O. Applicant

and

SMITH & ASSOCIATES, A P P SMITH,

N J WOLMARANS Respondent

J U D G M E N T

LEGODI, J: In this matter the applicant seeks relief on an urgent basis stated in Afrikaans as follows:

> *"1. Dat daar ingevolge die bepaling van reël 6(12) van die Eenvormige Hofreëls afgesien word van die bepalings wat betref tye en betekening en dat hierdie aansoek aangehoor word as een van dringendheid.*

in existence.

The third respondent is sued in his capacity as an employee of the first respondent, although it is alleged by the first and second respondents that at all material times hereto the third respondent acted as an executor of the estate of the deceased, the third respondent having been appointed as such by the Master of this court on 13 September 2007.

I have reluctantly decided to deal with this matter on an urgent basis, the parties having agreed that it is urgent. Having regard to the merits of the matter I eventually find it necessary to deal with this matter on an urgent basis.

At the start of the hearing, counsel for the applicant handed in a draft order which is stated in Afrikaans as follows:

"1. Dat die naam van die eerste respondent word gewysig na Van Zyl Smith en Assosiate Ingelyf;

2. Die eerste en tweede respondente word gelas om onverwyld alle dokumentasie wat betrekking het op die boedel wyle David Piercy, Meestersverwysingsnommer 3644/09 aan die eerste applikant te oorhandig.

3. Die eerste en tweede respondente word gelas om onverwyld volledige rekenskap van hulle administrasie van die boedel aan die eerste applikant te verskaf.

4. Die eerste en tweede respondente word gelas om alle gelde wat deur hulle ingevorder is op die boedel aan die eerste applikant oor te betaal insluitend, maar nie beperk nie tot die bedrae van R4,1; R1,392 863.90.

R2 497,00

R34 300,00

Rente op die voormelde bedrae teen 14.5% per jaar vanaf 12 Mei 2009 tot datum van betaling

Dit word verklaar dat die derde respondent nie geregtig is op 'n eksekuteursloon ten aansien van sy aanstelling as sodanig nie en dat –

5.1 Die eerste en tweede respondente nie geregtig is om enige eksekuteursloon te ontvang of dit te behou nie.

5.2 Die eerste en tweede respondente gelas word om die bedrag van R170 173-50 aan die eerste applikant te betaal tesame met rente daarop teen 14,5% per jaar vanaf 12 Mei 2009 tot datum van betaling

6. Die eerste en tweede respondente word gelas om die koste van die aansoek te betaal op 'n skaal soos tussen prokureur en kliënt insluitende die koste van die twee advokate.

7. Die regshulp wat in hierdie bevel verleen word is gesamentlik en afsonderlik met die regshulp wat reeds teen die derde respondent verleen is".

The draft order is marked Annexure X.

Counsel for the respondents indicated that paragraphs 4 and 5.1 and 5.2 of the draft order are not acceptable to the respondents. As regard paragraph 5 which relates to the third respondent an order has already been made against the third respondent under case number 27856/2009.

The real issue as I see it is whether the third respondent acted in his capacity as an employee of the third respondent or as an executor independantly from the first and second respondents or to put it differently, whether the first respondent is entitled to receiving the amount as indicated in para. 4.1 to 4.3 and 5.2 for the services rendered to the third respondent, the third respondent having given the first respondent instruction to assist in the winding up of the deceased estate.

The point taken by counsel on behalf of the respondents was that the third respondent in dealing with the estate of the deceased, never acted as an employee of the first respondent but rather in his own capacity as an executor of the deceased estate and that therefore the first respondent or second respondent cannot be held liable on the basis of vicarious liability arising from the actions of the third respondent.

A further contention was that the amounts referred to in para. 4.1, 4.2, 4.3 and 5.2 of the draft order was for services rendered to the third respondent in his capacity as a representative of the deceased estate. These contentions should in my view, be seen in the light of two factors.

Firstly, the averment made by the first applicant in the founding affidavit suggesting vicarious liability and the response thereto by the respondents. Secondly, the nature of the relationship between the first, second and third respondents. In para. 43.2 and 44.3 of the founding affidavit, the following are stated:

"43.2 Die derde respondent het ten alle tye opgetree in sy diensbestek as werknemer van die eerste respondent in die uitvoering van sy pligte as sulks

43.3 Die eerste en tweede respondente is aanspreeklik vir die dade *van die derde respondent as leerklerk."*

An answer to para. 43.2 and 43.3 was stated as follows:

"AD PARAGRAPHS 43.2 TO 43.5 THEREOF

5.1. It is not denied that the third respondent was during the relevant stage in the employ of the first respondent;

5.2 The first respondent, however, left the employ of the first respondent during the beginning of 2009"

I take it, it was meant to be the third respondent left the employ of the first respondent.

5.3 I reiterate that if the third respondent make himself guilty of any irregular or unlawful behaviour neither the first respondent nor myself were aware thereof"

Remember, in para. 43.2 of the founding affidavit, the allegation is that at all material times the third respondent acted within the cause and scope of his employment as an employee of the first respondent and in the execution of his obligation as such.

To say "it is not denied that the third respondent was during relevant stage in the employ of the first respondent" in my view is an acknowledgement of what is stated in 43.2 of the founding affidavit or to put it differently, it was not a denail trial at all relevant times thereto, the third respondent acted within the course and scope of his employment withe the first (?) respondents. An admission to this averment is an admission of being liable on the principle of vicarious liability.

Again to say "I reiterate that if the third respondent made himself guilty of any irregular or unlawful behaviour neither the first respondent nor myself were aware" does not relieve the respondents of liability arising from improper actions by the third respondent.

As an attorney and worse as a principal you have a duty and obligation to be aware of what your candidate attorney is doing. For example any money debited against a trust account or paid out of a trust account, is the principal's responsibility to ensure that such payment is properly done or fees if debited is properly earned. In any event being unaware of what a candicate attorney is doing in an attorney's office would amount to negligence on the part of the principal unless such negligence is dispelled by credible evidence. This is lacking in the respondent's answer.

I therefore find that by their own admissions as set out above the respondents, that is the first and second respondents should be held liable for the actions of the third respondent.

Assuming for a moment that such a concession, that is a concession relating to the capacity in which the third respondent acted, was not made in response to paragraphs 43.2 and 43.3 of the founding affidavit, and also perhaps paragraphs 43.4 to 43.5 of the founding affidavit one would still have to look at the nature of the relationship between the first respondent and the third respondent. Such relationship is governed by the Attorneys Act and applicable rules thereto, for example in terms of section 6(1)(a) of the Attorneys Act any candidate attorney shall during the whole term of service specifically in terms the articles of clerkship, serve in the office of his principal under his direct personal supervision or under that of an attorney who is a partner or a manager of

his principal. I have already
earlier in this judgment referred to the obligation of an attorney with regard to supervision of candidate attorneys.

In terms of section 9 of the Attorneys Act, the candidate attorney shall not have any pecuniary interest in the practice and service of an attorney or in the organisation or institution where he performs community service and shall not without the prior written consent of the counsel of the society or the province in which he performs service, under the articles or contract of service hold or occupy any office or engage in any other business other than that of a candidate attorney.

The suggestion by counsel on behalf of the first and second respndents was that the third respondent was a candidate attorney in practice and service of the first respondent on the one hand and an executor on the other hand. If this was to be correct, it would have blatantly constituted a contravention of the provisions of section 9. But, of course this should also be seen in the light of the amounts which were debited or received by the first respondent in or out of the trust account allegedly as being payments on behalf of the estate or as services rendered by the respondents to the estate. You render a service to an estate as an executor. Thereafter prepare a liquidation and distribution account and only then would one be entitled to be paid executor's fees. This did not happen in the instant case or in this case as at the time the amounts indicated in paragraphs 4.1 to 4.3 and 5.2 of the draft order was paid to the respondents. That is, these payments were made without a liquidation and distribution account duly approved by the Master.

Remember, secton 51(4) of the Administration of Estate Act, provides that an executor shall not be entitled to receive any remuneration before the estate has been distributed as provided for in sections 34 (1) or 35 (12) as the case may be, unless payment of such remuneration has been approved in writing by the Master. None of this has happened in the instant case and therefore irrespective of the nature of the relationship between the first respondent and the third respondent, the latter was not entitled to any payment.

All of the factors mentioned above, that is, the respondents were under obligation to supervise the third respondent in terms of section 6 of the Attorneys Act, that the third respondent was not entitled to have any pecuniary interest using the first and second respondents practice as a base during the period of his articleship as envisaged in section 9 of the Attorneys Act and lastly the fact that to date the respondents did not account for the money received, makes the respondents' version more improbable.

If indeed one was to go by what respondents are alleging, then their conduct in dealing with the matter should be found to have been more wanting in the extreme. Such conduct could constitute no valid defence to the claim by the applicants. Having said this, I must also find that there was no basis for the respondents to oppose the application. Their attempts to thwart the relief sought by the applicants, in my view, were unreasonable.This should justify a punitive order for cost.

ORDER

Consequently an order is hereby made in terms of a draft order,