IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

REPORTABLE

CASE NO: 70436/2010

JUDGMENT HEARD: 30 /11/2010

JUDGMENT DELIVERED:15/12/2010

In the matter between:

MARIA MAGDALENA STANDER — Applicant

And

DESIDERIUS RASMUS ERASMUS — 1st Respondent

SEC 74 ADMINISTRATOR CC — 2nd Respondent

NEDBANK, NELSPRUIT — 3rd Respondent

J U D G M E N T

LEDWABA J:

[1] This is an opposed urgent application wherein the applicant seeks a an order in the following terms:

"1. That the applicant's failure to comply with the Rules relating to times and service be condoned in terms of rule 6(12) and that the application be dealt with as one of urgency;

2. That, pending the finalisation of the action instituted by the fisrt and second respondents against the applicant under case number 67755/2010,

(a) the first respondent be ordered to forthwith take all steps necessary to restore the applicant's control over the trust account of the second respondent conducted under account number at the third respondent's Nelspruit branch;

(b) the first respondent be ordered to forthwith return to the applicant all documents and statements relating the aforesaid trust account;

3. That prayer 2 operate as an interim order with immediate effect;

4. the first respondent be ordered to forthwith, and at least within 30 days of the date of the order granted by this Court, to render a full account of the business of the second respondent and in particular of his contribution of the funds received by him since 11 March 2009."

[2] It is only the first and second respondents who filed opposing papers.

[3] The brief background of this matter set out below is important for the proper understanding of the matter and for the conclusion that I would read herein. The undermentioned facts are common cause:

3.1 The applicant was appointed as administrator in terms of section 74 of the Magistrates Court Act 32 of 1944 (the act) for one thousand one hundred (1100) estates.

3.2 The applicant and one Mrs. Haarhoff had formed a close corporation, the 2nd respondent, to be used as a juristic person for the management of the debtors estates under administration in respect of which the applicant was personally appointed as administrator in March 2009.

3.3 Mrs. Haarhoff and the applicant entered into an agreement of sale, (the agreement), with the respondent in terms whereof they ceded their rights, title and interest in the administration applications as per Annexure A attached to the agreement at a price of R500 000 to be paid by the first respondent to the sellers (see annexure FA1). Clause 1.1 of the agreement further states that the 1st respondent was appointed as administrator and/or was to be appointed as administrator. Clause 1.2 to 1.4 thereof reads as follows:

"1.2 THE Sellers confirms that with the respect to the Administration Applications which have already been granted and where M. M. Stander was appointed as Administrator, the Sellers confirms that in respect of the Applications as per ANNEXURE "A", the required emolument attachment orders have already been granted and have been served or are to be served at the relevant place of employment of the Administration Applicant, and confirms that the current state of the necessary service of the emolument attachment order is per file as per ANNEXURE "A".

1.3 M. M. Stander undertakes to sign all documentatition reasonably required and is obliged to give full co-operation to effect the necessary signing of all the required documentation to be replaced as Administrator of the Administration Applications.

1.4 THE Sellers and the Purchaser agrees that the Purchaser will substitute the current Administrator being M. M Stander by way of an Affidavit, as the Administrator."

(I will comment on the agreement latter).

3.4 There was a trust shortfall of second respondent R511 589,60 in the trust bank account of the 2nd respondent when the agreement was signed and Mrs. Hoorhof has been the bookkeeper of the 2nd respondent books.

3.5 The 1st respondent was registered as the sole member of the 2nd respondent on 21 April 2009. The 1st respondent became the signatory of the trust and business account of the 2nd respondent which account held with Nedbank, third respondent. Initially the applicant had signing powers on the trust accounts until July 2010 when her signing power were cancelled by the 1st respondent.

3.6 After the signing of the agreement and/or the transfer of membership to the 1st respondent, the applicant continued being an employee of the 2nd respondent as an office manager. The accounting and distribution to the creditors were done by one Kitty and first respondent was overseeing the business and would approve the transfers to be made. After April 2009 applicant was further appointed as administrator by the court in respect of other three hundred estates.

3.7 Between 1 March to 31st March 2010 an amount of about R9 781 207, 19 was paid into the second respondent's trust account by the debtors in the administration files wherein the applicant was personally appointed as administrator. The said monies were to be distributed to the creditors.

[4] Personal problems between the applicant and the 1st respondent started in about September 2010.

[5] In September 2010 and November 2010 the second respondent did not make any distributions to the creditors as required by the Act.

[6] In April 2010 the 1st respondent requested that the applicant sign an affidavit for the applicant to be substituted as administrator in the files under administration wherein she was appointed as administrator as per clause 1.3 and 1.4 of the agreement. Applicant refused to sign.

[7] The issue between the 1st respondent and the applicant culminated in the first respondent issuing summons against the applicant in November 2010 in this court under case number 67755/2010 seeking an order to compel the applicant to sign the required documents to effect the substitution of the first respondent as the administrator in the files under administration where the applicant was appointed as administrator, failing which the sheriff be authorised to sign the said document.

[8] The applicant is defending the action and the proceedings it has not been finalised.

[9] The 1st and 2nd respondents and the second respondent again on 1 November 2010 filed an urgent application in this court under case number 67754/2010 seeking an order in that:
(i) the applicant herein should have over all the keys for the business of the 2nd respondent situated at 66 Ferreira street, Nelspruit, Mpumalanga;

(ii) Her services with the 2nd respondent be immediately suspended pending the outcome of a disciplinary hearing and; that

(iii) She should be interdicted from:
a. entering the premises of the 2nd respondent;

b. interfering in any way with any of the staff the 2nd respondent;
c. removing anything at all from the premises of the 2nd respondent.

[10] The applicant opposed the urgent application and on 9th November 2010 Hiemstra AJ dismissed the application with costs.

[11] The 1st and 2nd respondents have filed a notice of application for leave to appeal the judgment of Hiemstra AJ.

[12] I did not see the judgment of Hiemstra AJ. However, in clause 2 and 4 of the notice opposing the first and second respondents are also appealing against the finding of Hiemstra AJ that the agreement (Agreement of Sale) is not agreement at all and that it was unlawful.

[13] The 1st and 2nd respondents' counsel submitted that the finding of Judge Hiemstra should be regarded as being suspended because the notice application for leave to appeal has been filed. In my view, there is no merit in the respondents submission furthermore, the respondents did not make a counter-application for the enforcement of the agreement. (See Plettenberg Bay Entertainment (Pty) ltd v Minister van Wet en ander 1993 (2) SA 323 (W).

[14] Against the aforesaid background I must now determine if the applicant is entitled to the relief sought. I pause to mention that during the proceeding, because my roll was heavy, I had about sixty-five matters on the roll for that day, I instructed counsel for the parties to take further instruction from their instructing attorneys to see if the matter could not be settled because the interest of the debtors and creditors had to be protected. Unfortunately the parties could not reach an agreement.

[15] In my view, the matter is urgent because there is an amount of about R5 million in the trust account of the second respondent which is at

risk and the administrator appointed by the magistrate has no control over the said monies.

[16] I will start by quoting the provisions of section 74 E (1)-(4) of the Magistrates Court Act 32 of 1944 which reads as follows:

"74 Appointment of Administrator-

(1) When an administration order has been granted under section 74 (1), the court shall appoint a person as administrator, which appointment shall become effective only after a copy of the administration order has been handed or sent to him by registered post and, in the event of his being required as administrator to give security, after he has given such security.

(2) An administrator may on good cause shown be relieved of his appointment by the court, and the court may appoint any other person in his place.

(3) An administrator who is not an officer of the court or a practitioner shall, before a copy of the administration order is handed or sent to him by registered post, give security to the satisfaction of the court and thereafter as required by the moneys which come into his possession by virtue of his appointment as an administrator.

(4) An administrator shall not be obliged to give security in respect of his appointment as an administrator of the estate of any particular debtor if he has given or gives security to the satisfaction of the court for the due and prompt payment by him to the parties entitled thereto of all moneys which may come into his possession by virtue of his appointment as administrator of the estate of any debtor, irrespective of whether such appointment was made before or after the date on which the said security was given." (own underlining).

[17] On the facts of this case, it is common cause that the applicant is the appointed administrator in respect of about one thousand four

hundred (1400) files. The management of the said files is operated through a close corporation (second respondent) which initially had two members (Applicant and Mrs. Haarhoff) who transferred their membership to the second respondent.

[18] In terms of the act, a person who has been appointed administrator has a duty to render services set out in the act, if he fails to perform accordingly, the court may order the administrator to pay the costs of the creditor(s) *de bonis propriis.*

[19] I know that there is a practice of establishing juristic person through which files under administration are administered. The legitimacy of such practice, in my view, it raises serious concerns because the said juristic persons have not been appointed by the court.

[20] In terms of the provisions of section 74 (4) of the Act the appointment of an administrator is done by the court. If such a person is to be relieved of his/her appointment it is the court that must sanction same and the new appointment or substitution should be done by the court.

[21] I have serious doubts about the legitimacy of the practice of appointed administrators in using close corporations and companies to do administration without the approval of the court.

[22] The interests of debtors and creditors are of paramount importance hence in section 74 J (1) of the act the debtors and creditors have the right to inspect the list of all payments and other funds received by the administrator. Now if the payments are going to be received by a person not appointed by the court, the rights and interests of debtors and creditors are going to be compromised.

[23] The need for the protection of the payments of the monies paid by the debtors is shown by the requirement that an administrator must deposit all monies received in a separate trust account with a bank in

the Republic and such monies, including the interests thereon, shall not form part of the assets of the administrator.

[24] On the facts of this case, the applicant and the first respondent dealt with the files of the debtors under administration matter as if they are their personal assets without the approval of the court. Their personal interest and the interest of the second respondent are given preference over that the interest of the debtors and the creditors.

[25] It is also clear that there was misappropriation of monies in trust hence a shortfall of R511 589, 60 before membership in the 2nd respondent was transferred to the 1st respondent.

[26] There is now a credit balance about five million in the trust account and distribution to the creditors has not taken place since September 2010. This matter needs urgent attention.

[27] What is intriguing in the matter is that the relationship between appointed administrator, applicant, and the 1st respondent who is in control of the trust account has broken down to the extent that the respondents further wanted the applicant to be out of the premises where they manage the debtors file.

[28] It is the applicant who has been appointed as administrator and who bears the responsibility of complying with the act. One of the duties of an administration is to take expeditious steps to distribute the monies. The applicant as an administrator has no control of the trust monies.

[29] The money in trust is mainly for the benefit of the creditors of the debtors.

[30] The applicant in allowing the trust account to be conducted and controlled by another person acted contrary to her duties and responsibilities as administrator.

[31] The respondent's counsel argued that the applicant's application should be dismissed because the respondent paid the applicant an amount of R1174 563, 18 which is more than what she was entitled to in terms of the agreement. In other words he paid her an extra R207 444, 67.

[32] She further submitted that this court should consider appointing the respondent as the administrator to substitute the appointment of the applicant since a similar order was granted in other cases. I cannot do that because there is no proper application by the respondents. Furthermore, the respondents have issued summons to protect his right regarding him being appointed as an administrator.

[33] It is abundantly clear that the 1st respondent has not been appointed as an administrator and he is the one who has the signing powers to the trust account held at the bank of the 3rd respondent. The applicant contributed and caused this unhealthy situation. The trust monies need protection. The order to be made herein is done with the purpose of protecting the monies in the trust and the interest of the debtors and the creditors.

[34] The applicant and respondent were the authors of the situation they presently find themselves in and in exercising my discretion on the costs, I think the costs should be reserved.

[35] I therefore, make the following order:

(i) Applicant's appointment as administrator in respect of the estates referred to in the agreement is set aside.

(ii) The monies in the trust banked with the third respondent is freezed pending the appointment of an independent and competent administrator by a competent court.

(iii) The Trust account held by the 3rd respondent should be administered by a new administrator to be appointed by the court who shall urgently make a report to the court regarding the status of the trust account and effect a distribution to the creditors.

(iv) The creditors should not take any steps against the debtors pending the directions of the court.

(v) The administrators remuneration in the account to be kept in trust pending the finalisation of the action proceedings between the applicant and the respondent.

(vi) Costs reserved.

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A. P. LEDWABA

JUDGE OF THE HIGH COURT