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REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

7/9/12

CASE NO: 33183/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

11 September 2012
DATE SIGNATURE

In the matter between:

MADIMETJA CHARLES LAMOLA	Applicant
and	
ALFRED SPHUMO MAHLANGU	First Respondent
MNISI ATTORNEYS	Second Respondent

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] This application is in two parts. Part A sought an order interdicting the Second Respondent " from paying out any amount received from the Road Accident fund in settlement of a claim by the First Respondent pending the finalisation of the B Part of this application." Part B concerns payment of an amount of R189.000.00 together with interest thereon to the Fidelity Fund by the First Respondent. The amount flows from the striking off of the First Respondent from the roll of attorneys. The Applicant in Part B also seeks payment to himself by the First Respondent of an amount of R74.996.30 together "with interest thereon at the rate of 15.5 % from 11 August 2009 to date of payment."

[2] **BRIEF FACTS**

The Applicant, the First Respondent and one George Edgar Ntshaupe Mokhuse were partners in a Law Firm in Pretoria which practised under the name and style of **Lamola Mahlangu and Mokhuse.** The three partners, due to the chaotic state of their trust account, were suspendered from practising for their own account. The Applicant and First Respondent did not oppose the application for their striking off while Mokhuse did. Mokhuse ended up being suspended from practising as an attorney for a period of six (6) months from 18 November 2005 while the names of the First Respondent and the Applicant were removed from the roll of attorneys. Paragraphs 1.2 and 1.3 of the order of court dated 3 September 2004 (suspending the three

partners), in terms of the court order of 18 November 2005 " shall apply *mutatis mutandis* " to the Second Respondent (Mokhuse). Paragraph 1.3 provides:

"1.3. that first and third respondents (i.e. the First Respondent and the Applicant in this matter) be and are hereby directed:

1.3.1. to pay, in terms of **section 78 (5) of Act No 53 of 1979,** the reasonable costs of the inspection of the accounting records of respondents.

1.3.2. to pay the reasonable fees and expenses of the curator;

1.3.3. to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

1.3.4. to pay the costs of this application on an attorney – and – client scale."

The Applicant paid the fees and costs incurred by the Law Society of the Northern Provinces in full. The Applicant contends that the Attorneys Fidelity Fund in Cape Town had informed him that he and the First Respondent were "*jointly and severally liable for the trust shortfall*". The First Respondent's attorneys in their letter dated 14 August 2009 stated:

" 1. *our client and yours are jointly and severally liable for the trust shortfall and for the costs of the*

application for their strucking (sic) from the roll of practicing (sic) as attorneys."

The First Respondent in his "without prejudice" letter dated 14 May 2008 and addressed to the Attorneys Fidelity Fund wanted to know if, indeed, the Applicant had paid an amount of R206.603.55 directly to the fund as well as costs to Rooth and Wessels Inc., acting for the Law Society.

The First Respondent, in the letter, further said:

"I await confirmation from your office whether the list of the claims loged against me and the amounts is exhaustive as indicated to me by Mr Lamola with a view to settle the amount by no later than the end of September 2008."

The Fund responded to the letter by way of annexure "C" on Page 88 of the paginated papers. This is the Fund's letter dated 4 June 2008. the Fund's letter is not *marked "without prejudice"*. The Fund then expected to recieve the First Respondent's "further advices" after confirming that the list of the clients that the First Respondent dealt with as advised by the Applicant had seemed to be correct. By that time, according to the Applicant. he had effected payment of the amount of R206.603.55. the Applicant expected the First Respondent to pay back to him half of the amount which he had paid which, according to him, was supposed to have been paid by the First Respondent. The

Applicant, knowing that the First Respondent had been involved in a motor vehicle accident in which he had been injured, and that the Second Respondent was handling his claim, wrote to the second Respondent asking for an undertaking that repayment of the amount would come from the money that was claimed once the MVA claim was settled or finalised. The Second Respondent in its letter to the Applicant's attorneys wrote:

> *"4. we wish to place it on record that our client is not in a position to make any undertakings based on his Motor Vehicle Accident claim because he does not know how and when the said claim will settle." This prompted the Applicant to bring this application which is opposed by the First Respondent. The Second Respondent on 21 June 2011 indicated that it would" "abide by the decision of the above Honourable court."*

[3] There have been problems relating to the firms of Phuti Manamela attorneys and Mnisi attorneys. The problem is dealt with by the Applicant in his supplementary affidavit. It is apparent therefrom that Ms Manamela was never the attorney and that Ms Mnisi had signed the documents utilising Ms Manamela's letterhead without her consent. The notice to oppose, too, according to the Applicant, seems to contain Ms Mnisi's telephone numbers and not Mr Kabini's. This, according to the

Applicant, led to the improper enrolment of the matter. Phuti Manamela attorneys. accordingly, withdrew as the First Respondent's attorneys and were substituted by Mogajane Attorneys.

[4] The Applicant's supplementary affidavit also deals with the amended notice of motion relating to the amount claimed and the application for condonation for the late filing of the necessary documents. The further request is that the notice of motion be amended to reflect the amount of R166.639.89 as the amount which substitutes the amount of R74.996.30 in paragraph 2 of Part B of the notice of motion dated 10 June 2011. Mr Snyman, for the Applicant, and Ms Granova, for the First Respondent, agreed that as the parties were duly represented in court the matter had to proceed. It was further agreed that the court was to deal with the entire matter and thereafter give the judgment which would then deal with the relevant issues. That the matter was not properly enrolled was regarded as a non-issue as the parties were duly represented.

[5] With the problems that the court faced, and in the interest of justice, I decided to:

5.1. allow the documents that the court was furnished with

5.2. grant the amendment and the condonation.

[6] **THE ISSUES**

These are:

6.1. whether the Applicant is entitled to an order in terms of prayer 1 of Part B of the notice of motion.

6.2. whether the Applicant is entitled to an order in terms of prayer 2 of Part B as amended of the notice of motion.

6.3. the question of costs.

[7] The court experienced endless problems because of the nature of the papers that had been presented by the Applicant. The supplementary affidavit by the Applicant bears testimony to this. The court ended up asking the parties to assist it with the calculations of the amount which the First Respondent would be liable to pay the Applicant in the event that the court found that the First Respondent was liable for his share of the amount that the Applicant had paid arising from the fact that the three partners (as shown above) had practised in partnership as attorneys. This, Mr Snyman and Ms Granova gladly did and I am thankful for that. Three calculations were produced, one by the Applicant's counsel and two by the First Respondent's counsel.

[8] **CALCULATIONS OF THE FIRST RESPONDENTS LIABILITY.**

These calculations were given as follows:

8.1. **APPLICANT'S COUNSEL'S CALCULATIONS**

I am here repeating verbatim what the parties' counsel say and do in arriving at the amount that the First Respondent should be liable for.

"2. The Applicant's counsel proposes the following calculations to be followed:

2.1 Amount paid is R333.079.78 (if Annexure "R4" and specifically pp 124 of the Bundle be accepted as proof that the Applicant paid all the amounts reflected there as paid);

2.2 From that is to be deducted R76,834.90 which is clearly fees including that to be paid by the third partner = R256,244.88

2.3 We should also deduct the amounts in respect of the court order dated 18 November 2005 against Mokhuse. The amount of those costs is R27,981.50 plus R39,492.45 = R67,473.95 = R188,770.93

2.4 R67,473.95 divided by 3 = R22,491.32

2.5 Then we need to add the amount of the taxed costs as against our clients R49,647.15 The total is then R238.418.08.

2.6 Decided (sic) by 2 = R119 209,04

2.7 Plus R22,491.31 (⅓ of the curator and inspection costs)

2.8 The total payable by the First Respondent is R141,700.35 according to these calculations."

8.2. **FIRST RESPONDENT'S COUNSEL'S CALCULATIONS**

"3. The First Respondent's calculations are as follows:

Scenario One - premised on the payment by Applicant to the Law Society and the Fidelity Fund:

3.1 Annexure "A6" (pp 41 – 43 of Bundle):

3.1.1 R17,500.00 ("less payment received") + R32,546.15 (on 26 Junly *(sic) 2006 you* paid the outstanding balance of R32,546.15");

3.1.2 R20,000.00 ("to the Fund on 22 December 2006")

3.1.3 TOTAL: R70,046.15, and the First Respondent will be liable for R23,348.71

3.2 Respondent aver that the letter of 14 November 2007, Annexure "R1" pp113 does not say from whom the amount of R141,193.55 was received. Applicant states that the letter was clearly addressed to the applicant and this question does not arise from the papers. The court is to determine if this amount is to be added to this calculation in the light of the

following. If this is added the total will come to R211,239.70. In that case, ⅓ liability of the First Respondent will be R70,413.23"

"**Scenario Two** - premised on the fact that " Costs recoveries" and " CLM [claim] recoveries" were all paid by the Applicant to the Fidelity Fund for the account of all three partners as partners as appears on pp 124 of the Bundle

3.3 R269,079.78 *("Costs recoveries")* + R 64,000.00 ("CLM [claim] recoveries") = R333,079.78,⅓ of which is R111,026.59;

3.4 R17,500.00 ("less payment received") + R32,546.15 *("on 26* Junly *(sic)* 2006 you paid the outstanding balance of R32,546.15") (Annexure "A6", pp 41 -43 of the Bundle) = R50,046.15 ½ of which (because it was only for the striking of the Applicant and the First Respondent) is R25,023.08.

3.5 In light of the above, the total payable by the First Respondent to the Applicant would be R136,049.66."

[9] On 10 June 2011 Ranchod J granted prayer 2 of Part A of the notice of motion and reserved the costs.

[10] The question I need to answer is whether the Applicant is indeed entitled to prayers 1 and 2 as amended of Part B of the notice of motion.

Ms Granova holds the view that the First Respondent is not liable to pay the Applicant because the claim has prescribed. Her further view is that the Applicant cannot act on behalf of the Attorneys Fidelity Fund without the necessary authority. The further submission seems to be correct. If correct the Applicant will not be entitled to prayer 1 of Part B of the notice of motion.

PRESCIPTION

[11] Prescription does not seem to have been raised in any of the correspondence at the court's disposal. Prescription is raised for the first time in the First Respondent's opposing affidavit. The First Respondent addressed a letter to the Attorneys Fidelity Fund wanting to satisfy himself that the Applicant had infact paid the amount that he claimed to have paid. The Fund responded to the First Respondent's letter. The Applicant, at the time of preparing the founding affidavit, stated in paragraph 6.24 of the founding affidavit that he, at the time, had already paid in excess of R209.000.00 in respect of fees and the amount payable to the Fidelity Fund. This was never controverted. The First Respondent's attorney K Mnisi of Mnisi Attorneys on 14 August 2009 addressed a letter to the Applicant's attorneys confirming, at the time, that their clients. (referring to the First Respondent and

the Applicant) were *"jointly and severally liable for the trust short falls and for the costs of the application for their strucking (sic) from the roll of practicing (sic) as attorneys."* This statement in so many words, stresses and emphasises that liability at the time existed. The statement further stresses that the two parties were liable jointly and severally. That meant that if the one paid the other would be absolved. The nub of the matter is that if the one party paid he then would have recourse to the other party who then would have to repay the paying party his share of the debt. This is Mr Snyman's submission which, in my view, is correct. The acknowledgment of liability by the First Respondent simply means that prescription started to run from the day that the First Respondent acknowledged his liability to pay the money which was due owing and payable. This again is Mr Snyman's submission which again, in my view, is correct.

In Cape Town Municipality v Allie NO 1981 (2) SA 1 at 1E the following was said:

> *"Any acknowledgment of liability which would have served to interrupt the running of prescription at common law will serve to interrupt it in terms of* ***Section 14(1) of the Prescription – Act 68 of 1969."***

In Petzer v Radford (Pty) Ltd 1953 (4) SA 314 (N) at 317 H to 318 A Broome, JP said:

> *" To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence*

and that he is liable therefor. An admission that the debtor had incurred the obligation, coupled with an assertion that the obligation has been extinguished, will not interrupt prescription. The sub-section requirea an "acknowledgment" by the debtor! This is what the First Respondent did in this matter.

[12] The acknowledgment by the First Respondent is very clear. He stated that the debt existed and that he was liable therefor. Mr Snyman's submission that the debt never prescribed is therefor, correct. The First Respondent is. indeed, liable to repay the amount which represents his share in the debt that they both had to pay. The letter of 14 August 2009,due to the nature of the case, was properly admitted.

[13] This then takes me to the determination of the amount that the First Respondent is liable for. Evidence has disclosed that an amount of R333.079.78 was paid. This amount could only have been paid by the Applicant because no one else has claimed to have paid the amount. The Applicant in his founding affidavit said that he had paid in excess of R209.000.00 in respect of fees and amounts payable to the Fidelity Fund. This was never controverted. Rooth Wessels Maluleke acting for the Law Society and the Fund itself support the Applicant in this regard. (See pages 41 and 124 of the paginated papers).

[14] I have had a proper consideration of the calculations of the First Respondent's liability provided by Ms Granova and Mr Snyman for which I again sincerely thank them, and have found the calculation in scenario two more acceptable. This then means that the First Respondent is liable to pay the Applicant the amount of R136.049.67 which is arrived at by adding together the two amounts namely R111.026.59 and R25.023.08 which then gives us the amount of R136.049.67.

[15] Ranchod J granted prayer 2 of Part A of the notice of motion which effectively means that the interdict and restraint should lapse as soon as the First Respondent pays the amount of R136.049.67 to the Applicant.

[16] The Applicant has not made out a proper case to be entitled to an order in terms of prayer 1 of Part B of the notice of motion as amended. There is no cession that the Applicant proved or authority to act on behalf of the Attorneys Fidelity Fund. Prayer 1 should accordingly fail.

[17] **COSTS**

Costs, in my view, should follow the result. The circumstances of the case are such that costs on a punitive scale are warranted.

[18] I in the result make the following order:

18.1 The First Respondent is ordered to pay the amount of R136.049.67 to the Applicant.

18.2 The First Respondent is ordered to pay interest on the said amount of R136.049.67 at the rate of 15.5 % per annum from 11 August 2009 to date of payment.

18.3 The First Respondent is ordered to pay the costs of the application on the scale as between attorney and client which costs include the reserved costs of 10 June 2011.

18.4 Upon payment of the amount of R136.049.67 by the First Respondent to the Applicant Ranchod J 's order of 10 June 2011 will lapse.

MSIMEKI J
JUDGE OF THE HIGH COURT
NORTH GAUTENG, PRETORIA

Counsel for applicant :	Advocate Snyman
Counsel for respondent :	Advocate Granova
Attorneys for applicant:	Ralesela Rufus Ramonetha Attorneys
Attorneys for 1st respondent :	F..S. Kabini Inc.
Attorneys for 2nd respondent:	Mnisi Attorneys
Date heard:	23 April 2012
Date of judgment:	