IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG CASE NO.3260/10

In the matter between

NOKUTHULA CYNTHIA DLAMINI Applicant/Plaintiff

and

YUGANDRIE MAHARAJ Respondent/Defendant

J U D G M E N T

Delivered : 8 June 2010

WALLIS J.

[1] Yugandrie Maharaj practises as an attorney under the name Yugandrie Maharaj and Associates. Ms Nokuthula Dlamini became her client when she sought her advice on how to deal with a number of creditors. As a result of that advice on 1 July 2003 an administration order was made in respect of Ms Dlamini in terms of s 74(1) of the Magistrates' Courts Act 32 of 1944 (the MCA). Ms Maharaj was appointed as administrator in terms of that order. The administration order was rescinded in terms of s 74(q) of the MCA on 24 February 2009. The present dispute relates to the fees charged by Ms Maharaj for her services both as an attorney and as administrator.

[2] The dispute over Ms Maharaj's fees arose because of Ms Dlamini's assertion that by September 2008 she had made sufficient payments to Ms Maharaj as her administrator to settle all her debts. By contrast Ms Maharaj contended that Ms Dlamini had stopped making payments in terms of the administration order and therefore that its continuance was prejudicial to her creditors. Ms Dlamini's new attorneys accordingly set

proceedings in train to secure that Ms Maharaj produce bills of costs in respect of her services and to have these taxed. In the result she has tendered eighteen bills of costs in respect of her services as an attorney in respect of the application for an administration order in terms of s 74 of the MCA and eighteen further bills relating to her services as administrator in terms of s 74L of the MCA. The taxing master taxed these bills, but Ms Dlamini was dissatisfied with the result. She accordingly sought a review of taxation under Rule 35(1) of the rules promulgated under the MCA. The magistrate upheld her objections and it is Ms Maharaj's turn to be dissatisfied. She has accordingly required the magistrate to state a case for determination by a judge in terms of rule 35(5). That is what is before me.

[3] There are broadly speaking two issues to be decided. Both relate to the bills of costs rendered in respect of the application for an administration order. These fall into two categories. The first bill concerns the initial application and the second to eighteenth bills related to services rendered during the course of the administration. In respect of the first of the bills Ms Dlamini contends that a number of charges have been raised that are not permitted in terms of the tariff or are covered by items that have been allowed elsewhere and that these should be disallowed. In respect of the second to eighteenth bills she contends that they relate in their entirety to work performed by Ms Maharaj in her capacity as an administrator and are therefore not recoverable separately as legal costs, because Ms Maharaj is confined to charging fees in accordance with the provisions of and constraints in s 74L of the MCA. These two issues are distinct and need to be addressed separately.

[4] The tariff of fees relating to applications under s 74 is specified in Part III of Table B in Annexure 2 to the MCA. It is headed 'General provisions in respect of proceedings in terms of section 74 of the Act.' There are two preliminary paragraphs to which I will revert in dealing with the second question and a tariff of nine items, the first six of which relate to matters concerning the application itself and the remaining three to the provision of information and documents to creditors and to 'correspondence and attendances'. Item one also refers to attendances and correspondence and item three to attendances. The implication of these references will be dealt with below.

[5] The challenges raised by Ms Dlamini in respect of the first bill were expressed as follows:

'SECTION 74 BILL 1:

1. Items 3 to 43

In terms of item 1 of the tariff in respect of proceedings in terms of Section 74 of the Act, the instructions fee includes "the necessary perusal of summonses, demands etc. and ascertaining the amount of assets and liabilities including all attendances and correspondences necessary in connection therewith". Items 3 to 43 should be taxed off as they are included in the instructions fee (item 1 of the bill).

2. Items 45 to 53; 63; 65 to 75; 79; 81 to 82

In terms of the item 3 of the tariff in respect of proceedings in terms of Section 74 of the Act, the fee for drawing the application includes "all annexures thereto and all attendances excluding attendance at court". Items 45 to 53; 63; 65 to 75; 79; 81 to 82 should be taxed off because they are attendances as described in item 3 of the tariff.

3. Item 96

There is no provision for consultation fees in the tariff in respect of proceedings in terms of Section 74 of the Act. Item 96 should therefore be taxed off.'

[6] The magistrate upheld each of these objections. The question is whether she was correct in doing so. Item 1 in the first bill is a fee for

taking instructions on 15 April 2003. It is not clear what instructions are referred to as item 2 separately covers a consultation with Ms Dlamini on the same day. According to the details furnished in that item what happened was:

'Consultation with client – Perused her payslip and obtained copy of her ID asked client to get updated balances from creditors – Advised client to surrender her Sanlam policies and then settle her debts – client wants us to call all her creditors for settlement balance – client wants to think about this consult and she will call us – informed client of various options available to her and her advantages and disadvantages of placing her Estate under administration. One hr 30 mins – R67.00 per 15 mins.'

In the light of the separate charge for this consultation it is unclear to what the 'instruction fee' relates. However that fee has been allowed and it would not be correct to allow a further charge for any matter forming part of the process of obtaining instructions. It is against that background that I turn to consider items 3 to 43.

[7] Item 3 was a telephone call to Sanlam to obtain the surrender values for the insurance policies. This call proved fruitless, as Ms Maharaj did not have the policy numbers. Item 16 was a phone call to Ms Dlamini to get this information and item 18 is the return call in which she was told that Ms Dlamini could not locate the documents. Items 4 to 15 and 17 relate to phone calls to and from various creditors and item 19 is a report to Ms Dlamini on what had been ascertained. Clearly all these items reflect attempts to ascertain Ms Dlamini's assets and liabilities and were attendances consequent upon that exercise. So were the letters sent to various creditors on 13 May and reflected in item 34, which letters required updated balances and reference numbers. According to item 1 of the tariff the fee allowed for taking instructions includes 'ascertaining the amount of assets and liabilities' and includes all attendances and

correspondence necessary in connection therewith. Accordingly these items could not be charged for separately from the fee for taking instructions and they were properly disallowed.

[8] Items 20 to 26 reflect communications between Ms Maharaj and Ms Dlamini culminating in the decision to apply for an administration order. The first three are telephone calls to arrange the conference that took place on 8 May 2003, at which Ms Dlamini indicated that she wished to apply for an administration order. She confirmed that instruction in a telephone call on 9 May and, in turn, Ms Maharaj wrote to her on the same day confirming that she had received the instruction. On 13 May 2003 Ms Dlamini again telephoned Ms Maharaj telling her to contact her creditors and advise them that she was applying for an administration order. Taken as a whole all these attendances relate to the process of obtaining instructions to make the application for an administration order. They therefore all fall under the heading of taking instructions and could not be charged separately. They were properly disallowed.

[9] Items 27 to 33 reflect telephone calls to creditors to inform them that an application for an administration order would be made. The magistrate did not deal separately with these items but disallowed items 3 to 43 collectively as being part of item 1 in the tariff. Whether that is correct, however, depends upon the proper construction of item 1. The difficulty in construing item 1 relates to the words 'including all attendances and correspondence necessary in connection therewith'. Those words are capable of being read as qualifying either everything that precedes them or only qualifying the perusal of documents and the task of ascertaining the amount of the client's assets and liabilities.

[10] The problem can be illustrated by recasting the section slightly. It can either read:

'Instructions to apply for administration order (including the necessary perusal of summonses, demands, etc and ascertaining the amount of assets and liabilities) including all attendances and correspondence necessary in connection therewith.'

or it can read:

'Instructions to apply for administration order: including the necessary perusal of summonses, demands, etc and ascertaining the amount of assets and liabilities, including all attendances and correspondence necessary in connection therewith.'

Grammatically the latter construction is the more probable. However it is also the less sensible construction. I can see no good reason why attendances and correspondence relating to the perusal of summonses, demands and other documents and ascertaining the amount of assets and liabilities should be covered by the item but attendances and correspondence necessary in connection with obtaining instructions to apply for the administration order should be excluded. Indeed it is difficult to see how those could be excluded as it would be necessary for the attorney to attend upon the client in order to obtain those instructions. Whilst instructions might be given orally in consultation or telephonically or in writing each would involve an attendance upon the client and that attendance would be the most essential in the entire process of taking instructions. In my view therefore the first of the two possible constructions is to be preferred and item 1 is to be construed as covering the taking of instructions including all attendances and correspondence necessary in connection therewith.

[11] In relation to items 27 to 33 therefore the question is whether informing Ms Dlamini's creditors of her intention to apply for an administration order was an attendance necessary in connection with the

taking of instructions to apply for that order. In my view it was. The magistrate was accordingly correct to disallow these items.

[12] Items 38 to 40 and 42 relate to attempts by Ms Maharaj to check the balances owing to Nedcor and item 41 relates to similar further attempts in respect of other creditors. For the reasons set out in paragraph 7 they were correctly disallowed.

[13] The second set of items objected to in respect of the first bill of costs were items 45 to 53, 63, 65 to 75, 79 and 81 to 82. They all relate to telephone calls between Ms Maharaj and Ms Dlamini and between Ms Maharaj and various creditors. The basis upon which they were challenged was that these attendances related to the drawing of the application and were therefore covered by item 3 of the tariff. That is correct in regard to item 45, which was a telephone call to arrange for the client to come and sign the documents for the application. Items 46 to 53 however have nothing to do with the drawing of the application and are accordingly not attendances relating to that. As to the other items they occurred after the application had been prepared and the founding affidavit had been sworn. They cannot therefore be attendances relating to the drawing of the application. Accordingly they should not have been disallowed on this ground.

[14] Item 96 is the last challenged item under the first head. The magistrate disallowed it and no grounds have been set forth in the stated case or in the written submissions to me for reinstating it. There was accordingly no reason to disturb the magistrate's finding.

[15] To summarise in respect of the first issue, the magistrate's decision is upheld in relation to items 3 to 43, 45 and 96 and is set aside in regard to items 46 to 53, 63, 65 to 75, 79 and 81 to 82. The latter items are reinstated in the first bill of costs in respect of the application under s 74. The effect of this is to increase the costs allowed by R275.00, with a consequent adjustment in respect of drawing fees and attending taxation.

[16] I turn then to deal with the second issue. With the exception of the first item on the second bill in respect of s 74 proceedings every item on the remaining seventeen bills is objected to on the basis that each one falls in the category of 'expenses and remuneration' in s 74L(1)(a) of the MCA. Expenses and remuneration are limited in s 74L(2) to 12.5% of the money actually received from Ms Dlamini for distribution. As separate bills of costs have been taxed and allowed in respect of that 12.5% it is contended that no further charges may properly be raised by Ms Maharaj.

[17] The charges raised in these seventeen bills are all of the following type. First there are attendances on telephone calls from creditors enquiring about payments and the progress of the process of administration. Second there are telephone calls and letters to creditors directed at keeping them informed. Third there are consultations, both telephonic and face to face, with Ms Dlamini about the process of administration.

[18] The contentions on behalf of Ms Maharaj were set out initially in an affidavit to which she deposed. The relevant portions read as follows:

'13. It is respectfully submitted that the only authority pertaining to the question of **what** legal costs can be claimed by an attorney-administrator is that of AFRICAN BANK LTD v WEINER AND OTHERS 2005(4) SA 363 (SCA).

(a) The abovementioned case focused however only on an interpretation of Section 74L(1)(b). A reading of the judgment makes it clear in that the Court very often used the phrase "**for the purposes of s 74L(1)(b)".**

(b) By the same token the Court held that an attorney who is appointed as an administrator acts in the capacity of an attorney throughout.

(c) There is nothing in the Act prohibiting an administrator to appoint an attorney in circumstances other than that envisaged by Section 74L(1)(b). It can surely not be said to have been the legislature's intention that if a non-legal administrator instructs an attorney to for instance give an opinion on certain aspects of the administration which aspects do not deal with any default or disappearance of the debtor. It would not make sense to in such a case deny the administrator his/her costs.

(d) It is therefore respectfully submitted that two principles emerge from the above case, namely:

  (i) An administrator is entitled to act as an attorney (and of course likewise);

  (ii) An attorney-administrator is entitled to claim legal costs.

14. The second question this Honourable Review and Judicial Officer has to decide is therefore to what legal expenses an administrator is entitled. It is respectfully submitted that such legal costs are not limited to reasonable costs where there is a default but to **general legal work** done to the benefit of the administration. There were various consultations, letters and telephone calls that were part of the legal work done that were necessary to conduct the distribution and administer the Applicant's estate. What is reasonable or not should obviously be established by way of taxation.'

[19] It is not entirely clear from the magistrate's reasons and the stated case how the argument proceeded before her. The focus appears to have been on the judgment in *African Bank Limited v Weiner and Others*[1] and the effect of s 74L(1)(b) of the MCA. However that is a red herring. That sub-section deals not with the entitlement of the administrator to charge

[1] 2005 (4) SA 363 (SCA).

and recover fees and expenses, but to a separate entitlement to retain a small sum (R30.00) from each distribution to be held as a reserve against the possibility of the debtor disappearing and this occasioning costs to the administrator. That is factually not the situation in the present case and s 74L(1)(b) therefore has no bearing on the present problem.

[20] The real issue is whether an administrator who is also an attorney is entitled to be paid anything more than the amount provided in s 74L(2) for their services. That section provides that:

'The expenses and remuneration mentioned in sub-section (1)(a) shall not exceed 12.5% of the amount of collected monies received …'

S 74L(1)(a) provides that:

'An administrator may, before making a distribution:

(a) deduct from the money collected his necessary expenses and their remuneration determined in accordance with the tariff prescribed in the Rules.'

Accordingly the 12.5% cap in ss (2) relates to the necessary expenses and remuneration to which an administrator is entitled under s 74L(1)(a).

[21] That takes one to the tariff. Some confusion is occasioned by paragraph 1, which provides that:

'The following fees shall be allowed in addition to those laid down in the Tariff to this Part

(a) all necessary disbursements incurred in connection with the proceedings.

(b) In addition to the fees stated below, the administrator shall be entitled to a fee of 10% on each instalment collected for the redemption of capital and costs.'

This gives the impression that an administrator is entitled to recover under three heads, namely, disbursements, payment in respect of any item falling under the appended tariff, which includes attendances and correspondence, and fees. The items in the disputed seventeen bills are all items relating to attendances and correspondence. For some unexplained

reason, whilst item 9 provides that these should be charged for at a rate of R11.00 where the attendances involved consultations with Ms Dlamini they are charged at a rate of R67.00 per fifteen minutes. It is not, however, necessary to explore the reasons for this in any detail.

[22] The fact that the tariff appears to contemplate payment being made under three heads was considered by the Supreme Court of Appeal in *Weiner NO v Broekhysen*[2]. Cameron JA who gave the judgment of the court said the following:

'[23] The problem in reconciling Part III with s 74L is this. Section 74L(1) gives an administrator an entitlement to necessary expenses and a remuneration determined in accordance with the prescribed tariff, while s 74L(2) states that the "expenses and remuneration mentioned in ss (1)(a) shall not exceed 12.5 % of the amount of collected monies received". But Part III appears to contemplate recovery for the items expressly specified under the tariff, *plus* necessary disbursements, *plus* in addition to the tariff fees, a fee of 10% on each instalment collected. This led the administrator to contend that he was entitled to a 10% fee on collections over and above his necessary expenses and the allowances specified under the tariff. In effect, the administrator contended while the statute caps his expenses and tariff items at 12.5 % of monies collected, his 10 % allowance is additional to that.

[24] The creditor, contended conversely, that the 10 % fee Part III allows must be reckoned as part of the 12.5% cap s 74L(2) imposes.'

[23] Cameron JA pointed out that the difficulty arose from the fact that Part III seemed to create three heads of recovery, namely (i) tariff fees; (ii) necessary disbursements; and (iii) and an additional 10 % fee, while s 74L contemplated only necessary expenses and remuneration with a total being limited to a 12.5 % cap. He held that as a matter of interpretation the tariff needed to be reconciled with the terms of the authorising statute and came to the following conclusion:

[2] 2003 (4) SA 301 (SCA)

'[26] I therefore conclude that the creditor's contentions must prevail, and Part III must be read as subordinating the administrator's entitlement to a 10 % fee on monies collected to the 12.5 % total cap the statute lays down. Put differently, the "tariff" referred to in s 74L(1) is Part III in its entirety, and not just the nine item list headed "tariff".'

[24] It follows that an administrator is entitled to raise charges for her or his services in respect of each relevant item in the tariff. In practice this will predominantly relate to attendances and correspondence under item 9. Over and above that they may charge for necessary disbursements, such as the cost of making telephone calls. Finally they may add a fee of 10 % of the amount of each instalment collected for distribution. Overall, however, the total charge may not exceed 12.5 % of that amount. Of course, it will be rare for the amount of the administrator's disbursements, plus their charges for the tariff items to be equal to or less than 2.5 % of the amount of each instalment, and in that event the full 10 % will not be recoverable. One can either view that situation as being one where the 10 % fee is diminished or where there is an under-recovery in respect of disbursements and tariff items. Those are but two sides of the same coin. However that is the necessary effect of a statutory cap on the amount that an administrator may recover in respect of their services.

[25] It is unhelpful in this regard for Ms Maharaj to contend that she is both an administrator and an attorney and to draw attention to those passages in the SCA judgment in *African Bank Limited v Weiner* where the court pointed out that an attorney appointed as an administrator does not thereby cease to be an attorney or dispense with professional functions. Thus Cameron JA said:

'[21] It is obvious that an attorney who is appointed as an administrator in terms of s 74E(1) acts in the capacity of an attorney throughout. He or she does not dispense with professional functions or duties at any point in the administration. The attorney-administrator takes both the benefits and the burdens of a practitioner's professional position and responsibilities.'

However that proposition related to legal work undertaken in the circumstances contemplated in s 74L(1)(b), that is, in circumstances where the administrator incurs costs as a result of the debtor's default or disappearance. Similarly, where in paragraph [34] of that judgment Cameron JA again refers to the attorney appointed as an administrator acting in a professional capacity throughout, he is doing so in the context of a claim to recover the costs of the application for an administration order. That has nothing to do with the situation during the administration when the attorney is acting as an administrator.

[26] The work reflected in the seventeen disputed bills, which involves responding to queries from creditors, providing information to creditors and discussions with Ms Dlamini about the implementation of the administration order, was all work that Ms Maharaj was obliged to perform in her capacity as administrator. She is wrong to suggest that they constitute 'general legal work done to the benefit of the administration'. The proposition can be tested quite simply. Had Ms Maharaj not been an attorney she would still have been required, as part of the task of administration, to attend to these matters. She cannot, by virtue of her status as an attorney, convert them into legal work that is separate from the work of administration and for which additional fees can be charged.

[27] In the written submissions before me it was suggested, on the strength of *African Bank Limited v Weiner,* that there is a distinction to be drawn between expenses and remuneration on the one hand and costs on the other. However, that distinction is the distinction between what is recoverable under s 74L(1(a) and the costs that may be incurred under s 74L(1)(b). As I have mentioned the latter section is not applicable in the present case.

[28] The attorneys representing Ms Maharaj were alive to the case of *Weiner NO v Broekhysen.* As I understand their contention in paragraph 11(c) of their submissions, they suggest that there may be an entitlement on the part of Ms Maharaj to recover certain items as legal costs for the period of the administration prior to that judgment being delivered. In other words the suggestion is that the judgment altered what was then thought to be the position and should only be prospective in its operation. There is no merit in that submission. The judgment authoritatively interpreted s 74L and it is that interpretation that I must apply in these proceedings.

[29] Bar item 1 in the second of the seventeen disputed bills all of the items contained in those bills relate to work done by Ms Maharaj pursuant to the administration order. She is not entitled to claim remuneration for that work over and above the remuneration under s 74L(1)(a) which is subject to the 12.5 % limit in s 74L(2). Her claims in regard to that amount were the subject of the eighteen separate bills, which have been taxed and are not in dispute before me. It follows that the magistrate was correct in disallowing these items.

[30] In the result I make the following orders:

1. The review succeeds in respect of items 46 to 53, 63, 65 to 75, 79 and 81 to 82 of the first s 74 bill of costs. Those items are to be re-instated in the taxation of the bill and the drawing fees and fee for attending taxation are to be adjusted accordingly.

2. In respect of all other items in the first bill and bills 2 to 18 the magistrate's decision is upheld.

3. In view of the limited success that Ms Maharaj has had in these proceedings it is appropriate that she pay Ms Dlamini's costs consequent thereupon.

APPLICANT'S ATTORNEYS	JON WHITE ATTORNEYS
RESPONDENT'S ATTORNEYS	CHETTY ASMAL & MAHARAJ ATTORNEYS