

SOUTH AFRICA / JUDGMENT

# Bekker and Another v Stewart N.O and Another (A263/2013) [2014] ZAFSHC 210 (10 December 2014) [2014] ZAFSHC 210

## COURT

Free State High Court, Bloemfontein

## BEFORE

Ebrahim, Jordaan, Moeng

## CASE / FILE NUMBER

A263/2013

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION: BLOEMFONTEIN

Appeal Number: A263/2013

DATE: 10 DECEMBER 2014

In the matter between:

THELMA BEKKER.....Appellant

JOHAN BEZUIDENHOUT.....Appellant

And

MICHAEL LAWRENCE STEWART N.O.....1st Respondent

WAHIDA PARKER N.O.....2nd Respondent

(In their capacity as the duly appointed joint trustees

of the consolidated insolvent estate of Graeme Minne and

Carolina Frederika Minne)

CORAM: EBRAHIM, J et JORDAAN, J et, MOENG, AJ

JUDGMENT: JORDAAN, J

HEARD ON: 10 NOVEMBER 2014

DELIVERED ON:

- [1] The appellant's, with leave of the Court a quo appeals against certain orders granted by the Court a quo, namely the order compelling the defendants to pay the qualifying costs of the expert witness Spies, including the preparation of his report and attendance on 6th of November 2012 and the order compelling defendants to pay interest on the amounts of the judgment from issue of summons.
- [2] The respondents filed a cross appeal with leave of the Trial court against the judgment to the effect that each party is to pay his own costs.
- [3] Initially the respondents to which I will refer as plaintiffs, issued summons against various defendants including the first and second appellant to whom I will refer to as the first and third defendants.
- [4] The different cases were consolidated so that there were five defendants in the consolidated matter. It is only in respect of the first and third defendants that this appeal is concerned with.
- [5] The claim of the plaintiffs as trustees in the insolvent estate of the two insolvents, were based on Section 26(1)(a) and (b), alternatively Section 30 of the Insolvency Act 24 of 1936. As will later appear, the allegations were that the insolvents ran an illegal Ponz-scheme / pyramid scheme in which the various defendants invested money. It was alleged that the defendants received payments out of the scheme which were to be set aside in terms of the aforesaid provisions of the Insolvency Act, for the benefit of the insolvents' estates.
- [6] The defendants defended the matters on the basis that they entered into lawful agreements with the insolvents whereby they loaned money to the insolvents and received interest from the insolvents. They denied that it was an illegal scheme or dispositions without value or dispositions made with the intention of preferring one creditor above others. They also filed counter claims in which they alleged that, over and above the interest they received, they were still owed the capital amount of the loans which they claimed, with interest, in the counter claim.
- [7] The costs of the expert witness: J Spies;

Mr Spies is a qualified chartered accountant specializing in forensic accounting investigation. He was mandated by plaintiffs to do a forensic analyses of the flow of funds and determine whether the insolvents were insolvent during the period that the scheme was conducted and if so, for which part of that period. He was also asked to investigate the scheme with the view of confirming that it amounted to a so-called Ponzi-scheme. For that purpose he inter alia had to determine who invested which amount into the scheme, which amounts were paid to each of the investors and in the result, who of those investors would be liable to the estate and in what amount.

- [8] It goes without saying that his services and in particular his report, served the interest of the estate as a whole and of the creditors and debtors involved. It was necessary, inter alia, to enable the plaintiffs to identify and recover from those investors who received more than their investments in accordance with the principles established in the so-called Krion-matter, (*Fourie N.O. & Others v Edeling N.O. & Others* 2005 (4) ALL SA 393 (SCA) at page 402).
- [9] In regard to his fees and costs including the preparation of his report the Court dealt with it as follows; “lastly, in my view, the appointment of Spies was necessary. These fraudulent pyramid schemes come in different forms. Trustees appointed to recoup the moneys from investors in pyramid schemes are not experts in pyramid schemes. The schemes need to be thoroughly investigated and researched before the trustee can confidently say they have a claim against anyone. The interrogation against the third defendant was but part of an investigation which still needed to be considered by an expert in this field in order to give the plaintiffs sound advice on what step(s) to take. ... Furthermore, based on the defendants not being prepared to settle the matter soon, Spies had to be available for dates set down for trial. Had, the third defendant, for example, not taken so long to settle the matter, Spies would have been released from the committed trial dates as early as the pre-trial conference on the 12th of September
2012. It is only fair that the defendants bear these costs, ie costs of preparing the report and his probable attendance for one day on a party to party scale.”
- [10] This order in effect meant that the three defendants were to pay the total costs pertaining to Spies’s report, in total disregard of the fact that the same report served a much wider purpose and, in result enable the plaintiffs to issue summons for the recovery of debts against 240 different defendants. It appears that plaintiffs’ counsel during the trial even conceded that the defendants in this matter should only be held liable for an apportioned share of the costs of the report, namely one two hundred and fortieth.
- [11] The order is so glaringly improper that I have great doubt whether the Court a quo realized what the impact of that order really was. There is no doubt that that part of the order has to be set aside and a more appropriate order substituted in its place.
- [12] As far as the qualifying costs of the expert is concerned, most of it would have consisted of preparing his report, which has been dealt with already. His consultation with legal representatives for the purposes of testifying in Court, however, also forms part of qualifying costs and should be allowed insofar as it was necessary. In this regard the first defendant conceded her liability already on the 4th of October 2012, more than a month before the trial. It was only the third defendant who still disputed his liability until the 5th of November 2012, the day before the trial, when he also conceded his liability. At that stage, the attendance of Spies would have been already arranged and consultations with him held.
- [13] In view of that, only the third defendant ought to be held liable for his attendance and qualifying fees in respect of pre-trial consultations.

## CROSS APPEAL

- [14] Notwithstanding the Trial court's order in regards to the costs pertaining to the expert witness Spies, for the rest of the costs, the Court order each party to pay its own costs.
- [15] It is trite law that a Trial court has a discretion in awarding an appropriate order as to costs. Being a discretionary matter, a Court of Appeal will not likely interfere with the exercise of such discretion. To justify interferences, it must be showed that the Trial court has not exercised its discretion judicially.
- [16] To decide whether the trial court has exercised its discretion judicially, all the relevant circumstances pertaining to the question of costs should be considered.
- [17] As a starting point the general rule is that a successful party should be awarded his costs. That rule should only be deviated from in special circumstances or good grounds justifying such departure.

See: Joubert t/a Wilcon v Beacham & Another 1996 (1) SA 500 (C) as at 502 d – f. Letsitele Stores (Pty) Ltd v Roets and Others 1995 (4) SA 579 (T) at 579 h – 580 a.

- [18] I have already precluded to the broad background of the plaintiffs' claims being based on either section 26 or 30 of the Insolvency Act. It was also based on the allegations that the insolvents conducted an illegal pyramid scheme in contravention of the Banks' Act and the Consumer Affairs (Unfair Business Practice) Act no 71 of 1988 and that it was declared unlawful. The plaintiffs also alleged that the insolvents, through the means of the unlawful scheme, made dispositions to the defendants which constituted disposition without value alternatively made in insolvent circumstances with the intention to prefer some creditors above others.
- [19] The defendants denied almost all of the plaintiffs' allegations and filed a counter claim wherein they alleged that they entered into a lawful loan agreement with the insolvents, loaned certain capital amounts to the insolvents, received interest from the insolvents but were still entitled to the capital amounts of the loans which were not repaid to them.
- [20] As the pleading stood, the plaintiffs thus had to proof, inter alia:
- 1.The insolvency of the insolvents at the time of the dispositions.
  - 2.The illegality of the scheme.
  - 3.The amounts of the dispositions paid to the defendants.
  - 4.That the payments were dispositions made not for value or with the intention to prefer some creditors.
- [21] The defendants had to prove their counter claim to the effect that they entered into lawful loan agreements with the insolvents, that the amounts received were received as lawful interest payments and that the capital amounts where still due and payable to them.

- [22] On the 12th of September 2012, at a pre-trial conference, the plaintiff's recorded that they would only persist with their claims in accordance with the principles set out in the Krion (supra) matter and seek orders for payment of the amounts they alleged each defendant received in excess of their capital investment, with costs. The minutes also record that no settlement could be reached.
- [23] In response to the above the first defendant on the 4th of October filed a response intimating that the first defendant agree that plaintiffs are entitled to orders for payments of the amounts recorded by plaintiffs, being the balance received in excess of the investments. At that stage the third defendant still maintained that he received less than his investment and is entitled to payment from plaintiffs in the amount of R164 000,00 with costs.
- [24] On the 5th of November, the third defendant in effect withdrew his stance and admitted to the amounts as recorded by plaintiffs in the Rule 37 minutes. Thus the first and third defendants in effect abandoned their counter claims and consented to judgment in the amounts recorded by plaintiff.
- [25] The only remaining issue therefore at that stage was the costs of suit. Plaintiffs maintained that they are entitled to costs and defendants stance was that each party should pay its own costs, relying on a judgment in the Eastern Cape in a similar matter by the Honourable Revelas J.
- [26] The trial court dealt with the question of costs as follows;
- "(22) When one applies the principals set out in FOURIE vs EDELING, the plaintiffs where entitled to claim and receive back moneys from defendants as follows; ... first defendant: R30 000,00. ... third defendant: R136 000,00.*
- (23) Yet in their summons the plaintiffs claimed R536 000,00 from the third defendant without making any reference to the amount of R400 000,00 which he had invested originally. In other words the plaintiffs claimed what the third defendant had invested (R400 000,00) plus what he had received in return (R136 000,00).
- (24) It is clear that when the plaintiff instituted these proceedings against the defendants they were themselves, not certain of the amounts they were entitled to claim. They thus claimed all the moneys, ie the invested amount plus what the defendants had received in return.
- (25) In my view, had the plaintiffs not insisted on the return of all the moneys, but only the moneys the defendants received in addition to the investment, in line with the FOURIE vs EDELING decision, the defendants would not have contested the plaintiffs' case as vigorously as they did and correctly so.
- (26) The negotiations that were undertaken during the pre-trial meetings indicated that the parties only came to a common understanding on 12th September 2012 during the pre-trial conference. The plaintiffs' case was not as clear and crisp as on the day on which the first, second and other investors accepted their responsibility and undertook to return what was

due to the estate. Even in the third defendant's case, the plaintiffs were persisting with their claim for R536 000,00 instead of claiming only the returns regardless of his counter claim to that effect.

- (27) The general rule applicable in civil matters is that the successful party should be awarded its costs except in special circumstances. It is trite law that the award of costs is a matter which falls within the Court's discretion, which must be exercised judiciously and with due regard to the facts of each case and fairness to the parties.
- (28) It is correct that the matter became settled but to the limited extends as set out in paragraph [9] above. This is where this matter differs from that decided by Revelas J in STEWART N.O. MICHAEL LAWRENCE AND ANOTHER vs PE HENRY & 4 OTHERS... . In the Revelas matter the settlement was an outright settlement between the parties. In this case the settlements where reached piece-meal until the day of the commencement of the trial on 6 November 2012. The argument that, at the end of day, the defendants were successful in there counter claim cannot take away the reality that the plaintiffs had to come to Court to get the estate's money back. In the same breath, the defendants had to come to Court to protect their rights as plaintiffs made claims contrary to the FOURIE vs EDELING decision. In my view both parties were relentless and not prepared to make concessions as and when the correct information became available. Both are to blame for this protracted litigation. This is a classic case where each party

must bear its own costs.

- (29) The issue of the counter claims as well as the costs related thereto fell by the sideways as a result of the settlement set out above in paragraph [9].”
- [27] One must immediately note that the trial court correctly found that the reality is that plaintiffs had to come to Court to get the estate’s money back. I, however, disagree that defendants also had to come to Court to protect their rights because of the fact that the plaintiffs claimed more than they were entitled to.
- [28] This argument is based on the one-sided view that it was the plaintiffs’ persistence in claiming more than they were entitled to until the 12th of September 2012 which lead to the matter not being disposed of earlier. It loses sight of the fact that:
- 1.Defendants, from the outset, persisted in their denial of the illegality of the scheme.
  - 2.They persisted in their stance that the loans were lawful, that they could retain what they received and in addition claim payment of the capital amounts of the loans by way of the counter claims.
  - 3.They never availed themselves of the opportunity to safeguard themselves against a cost order by making use of the process of tender in accordance with the principles of the Krion (supra) matter which were open to them.

4. In effect they were unsuccessful in their counterclaims and their defence.

5. The mere fact that the plaintiffs succeeded in a lesser amount than originally claimed is not a sufficient ground to disentitle them to their costs.

See: Letsitele Stores (Pty) Ltd v Roets (supra) at 582 page 582 e – h Joubert t/a Wilcon v Beacham & Another (supra) at 502 e – f Jonker v Schultz 2002 (2) SA 360

(0) at 366 e – g.

[29] In my view, on the totality of facts, the trial court did not exercise its discretion judicially and for just reasons. The plaintiffs were successful in all material respects, although to a lesser amount than originally claimed. They should have been awarded their costs.

[30] As far as the first defendant is concerned, it was argued that the first defendant's cost should only be on the Magistrate's Court scale since the claim against the first defendant fell within the jurisdiction of that Court. The counter side of that, however, is that there was also a claim in terms of section 30 of the Insolvency Act for an amount exceeding the Magistrate's Court jurisdiction, although not proceeded with. What is more, five different matters have been consolidated so that the first defendant would in effect only be liable for a fifth of the costs of the consolidated action. The matter was of sufficient importance to have been heard in the High Court and with the advantage of having all five matters adjudicated upon by one court at the same time. I am therefore not convinced that the costs in regard of the first defendant should be limited to magistrate court's scale.

[31] The respondents proposed that the costs order should be altered to compel the first and third defendants to pay the costs of the matter jointly and severally. I am of the view that that would not be in accordance with justice. In so far as the orders granted by the Court a quo did not differentiate between the different cases that made up the consolidated matters and therefore the different defendants and insofar as those orders are altered in this decision or set aside by this Court, it will only relate to the applicable cases of the first and third defendants, namely case 2349/2011 in respect of the first defendant and case 3008/2011 in respect of the third defendant.

[32] As far as the costs of appeal is concerned, the appellants are substantially successful in their appeal and the respondents in their cross appeal. I am of the view that, in those circumstances, each party should bear their own costs of appeal.

[33] In conclusion, I am of the view that the following orders should be granted:

A. The appeal and cross appeal succeeds to the extent set out in the following paragraphs.

B. 1. In respect of case number 2349/2011 and 3008/2011, paragraph 1, 3 and 4 of the orders of the Court a quo are set aside, and substituted with the following:

2. In case 2349/2011;

2.1 Defendant is ordered to pay plaintiff the sum of R30 000,00 with interest at the legal rate calculated from the 4th of October 2012.

2.2 Defendant is ordered to pay the costs of suit which will include one 240th of the costs pertaining to the report of the expert witness, Mr J Spies.

3. In case 3008/2011;

3.1 Defendant is ordered to pay plaintiffs the sum of R136 000.00 with interest at the legal rate calculated from the 5th of November 2012.

3.2 Defendant is ordered to pay the costs of suit, which will include one 240th of the costs pertaining to the report of the expert witness, J Spies, as well as his additional qualifying fees and attendance at Court for one day.

4. Each party is to bear its own costs of appeal.

A. F. JORDAAN, J

I concur, and it is ordered accordingly.

S. EBRAHIM, J

I concur.

L. B. J. MOENG, AJ

On behalf of the appellant: Adv. W.G. Pretorius

Instructed by:

Christo Dippenaar Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. B. Pretorius

Instructed by: Honey Attorneys

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