

SOUTH AFRICA / JUDGMENT

Bruintjies v Williams (3783/2015) [2015] ZAECHGHC 121 (23 October 2015)

[2015] ZAECHGHC 121

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket

CASE / FILE NUMBER

3783/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 3783/2015

Date heard: 22 October 2015

Date delivered: 23 October 2015

NOT REPORTABLE

In the matter between

TREVINO BRUINTJIES

Applicant

and

MARK WILLIAMS

Respondent

JUDGMENT

PLASKET J:

[1] The applicant, Mr. Trevino Bruintjies (Bruintjies) seeks orders against Mr. Mark Williams (Williams), his former attorney, in the following terms:

- ‘1. Directing the Respondent to repay the sum of R100 000,00 to the Applicant, as an interim payment, pending the taxation of the bills of costs, by depositing such amount into the Trust account of the Applicant’s attorneys of record, Messrs Wheeldon Rushmere & Cole, within seven (7) days of the granting of this Order ...;
2. Directing the Respondent to produce a bill on the High Court Scale on an attorney and own client basis, as promulgated from time to time by the Rules Board of Courts of Law, under Section 6 of the Rules Board for Courts Law Act, 1985 (Act No 97 of 1985), as approved by the Minister for Justice and Constitutional Development, within seven (7) days of the granting of this Order;
3. Directing the Respondent to produce and make available the Applicant’s litigation file and to account fully to the Applicant, within seven (7) days of the granting of this Order;
4. Directing the Respondent to pay the Applicant’s costs on the scale as between attorney and client.’
- [2] The facts giving rise to the application are these. After Bruintjies had been injured in a motor vehicle accident, Williams represented him in an action for damages against the Road Accident Fund. The claim was settled in the amount of R778 619,77 and payment of this amount was made into the trust account of Williams .
- [3] The closest thing to a statement of account that Bruintjies has received from Williams is a handwritten note on a plain piece of paper that states:

‘Loss of earnings

358 619,77

General Damages 420 000,00

Total

778 619,77

-25%

Due to claimant = 583 964,82’

- [4] Bruintjies has received payments from Williams that totalled R147 500. That is common cause. On Williams’ version, which I shall accept for present purposes (although I do not necessarily accept it to be true), he made a number of other payments either to Bruintjies or for his benefit from the funds that he held in trust on the instructions of Bruintjies. These further payments amounted, on my calculation, to R118 574,32. In other words, if it is accepted that Williams was entitled to 25 percent of the capital amount as a contingency fee (which is certainly open to doubt), he has, on his version, only paid R266 74,32 of the R583 964,82 that he owes to Bruintjies.

- [5] Before I deal with that issue any further, it is necessary to deal with three successive applications for the postponement of the matter, an application brought by Williams to transfer the matter from this court to another court and two preliminary points that Williams has taken.

The postponement applications

- [6] Mr Mpahlwa, who appeared for Williams, made three successive applications for the postponement of the matter. I dismissed two and one was not persisted with. My reasons for doing so follow.
- [7] In *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE), para 13, I set out the principles that apply to applications for postponements. I stated:

The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalized; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.'

- [8] The first application was made on the basis that an application for leave to appeal had been made against the judgment of Bacela AJ dismissing Williams' application to compel Brintjies to furnish security for costs. I dismissed this application for a postponement because it was clearly a delaying tactic because Williams, on his own version, holds in his trust account far more of Brintjies' funds than he asked for as security. Williams did not, in other words, establish good cause.
- [9] I was then asked to postpone the matter to allow Williams time to file an application that he wished to make to have the main application referred to oral evidence. This basis for a postponement was not persisted with but, in any event, I cannot imagine what he wanted referred to oral evidence. As will be seen, the matter can be dealt with on the papers.
- [10] Finally, I was asked to postpone the matter so that Mr Mpahlwa could prepare and file heads of argument. Why he had not done so was not explained but Mr Cole, who appeared for Brintjies was prepared to argue the matter despite the absence of his opponent's heads of argument. I dismissed this application because it too was nothing but a delaying tactic devoid of good cause.

Transfer of the matter

[11] An application was brought for the matter to be transferred to either the Eastern Cape Local Division, Bhisho or the East London Circuit Local Division of this court. I dismissed this application for the reasons that follow.

[12] Section 27 of the Superior Courts Act 10 of 2013 provides:

‘(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings –

(a) should have been instituted in another Division or at another seat of that Division; or

(b) would be more conveniently or more appropriately heard or determined –

(i) at another seat of that Division; or

(ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

(2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question.’

[13] In *Davis v Denton* ECD 7 August 2008 (Case no: 630/2008) unreported, after a survey of the authorities on the issue, I concluded that ultimately whether a matter should be transferred from one court to another involves a determination of the balance of convenience. While that matter concerned s 9(1) of the Supreme Court Act 59 of 1959, I am of the view that the same approach holds good under the current legislation.

[14] In most of the cases dealing with the transfer of matters from one court to another, trials were involved where the convenience of witnesses often assumed some importance. This matter is different. It is an application and the parties do not have to be present. Indeed, neither of them was present when the matter was argued. The papers were complete and the matter was ready to be argued. An interlocutory application in which Williams sought an order directing Bruintjies to furnish security for costs had already been argued and decided in this court.

[15] If the matter was to be transferred to either the Bhisho or East London courts, it would not be finalised but would have to be postponed and set down on the roll of one of those courts to be heard some time in the future. In these circumstances, the balance of convenience was firmly against the matter being transferred and in favour of this court hearing the application.

[16] The application in terms of s 27 of the Superior Courts Act was accordingly dismissed with costs.

Prescription

- [17] Williams claims that he owes Bruintjies nothing because the latter's claim has prescribed. I do not intend mincing my words. It is simply disgraceful, and it ill- behoves an officer of this court, to take a point like this particularly when, on his own version, he owes his former client a substantial amount of money. What is worse, he holds the money in trust for Bruintjies.
- [18] There is, in any event, no merit in the prescription point. The balance of Bruintjies' money was held in trust by agreement between him and Williams and there has never been a proper accounting. If prescription ran at all, it would only have commenced running when Williams' mandate was terminated on 24 October 2012 and would have been interrupted by the issuing of the notice of motion on 21 July 2015.

Security for costs

- [19] The application for security for costs was argued before Bacela AJ on 15 October 2015. She dismissed the application on 21 October 2015 and ordered that the costs of that application be costs in the cause.

Defects in the notice of motion

- [20] It is asserted by Williams that the notice of motion is 'vague, reckless and embarrassing.' I have no idea what is intended by this assertion but it clearly is devoid of any merit whatsoever.

The merits

- [21] It is clear from what I have said above that even on Williams' version, he has not paid Bruintjies what he is owed and he has not accounted to him. On his own version, more than R100 000 is owed.
- [22] There is no reason why the interim payment should not be ordered, as applied for in paragraph 1 of the notice of motion. As Williams has fallen so far short of what can legitimately be expected of an attorney in relation to his duty to account to Bruintjies and has not drafted a bill, he must do so, produce and make available Bruintjies' litigation file and account to him, as applied for in paragraphs 2 and 3 of the notice of motion.
- [23] As his conduct, as disclosed in the papers, and on his own version, is so outrageous and his conduct of this case so opportunistic and disgraceful, an attorney and client costs order, as applied for in paragraph 4 of the notice of motion is entirely appropriate and justified. Indeed, his conduct is such that it needs to be brought to the attention of the Cape Law Society. I intend making an appropriate order in that respect.

The order

- [24] I make an order:

- (a) directing the respondent to repay the sum of R100 000,00 to the applicant, as an interim payment, pending the taxation of his bill of costs, by depositing such amount into the trust account of the applicant's attorneys of record, Messrs Wheeldon Rushmere & Cole, within seven days of the granting of this order, the trust account details being:

WHEELDON RUSHMERE & COLE

TRUST ACCOUNT

ABSA Bank

Grahamstown

Account number: [.....]

Branch code: 420517;

- (b) directing the respondent to produce a bill on the High Court Scale on an attorney and own client basis, as promulgated from time to time by the Rules Board for Courts of Law, under section 6 of the Rules Board for Courts Law Act 97 of 1985, as approved by the Minister of Justice and Constitutional Development, within seven days of the granting of this order;
- (c) directing the respondent to produce and make available the applicant's litigation file and to account fully to the applicant, within seven days of the granting of this order;
- (d) directing the respondent to pay the applicant's costs on the scale as between attorney and client;
- (e) requesting the Registrar of this court to despatch a copy of this judgment and the papers in this matter to the Cape Law Society.

C. PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: S Cole instructed by Wheeldon Rushmere & Cole

For the respondent: M Mpahlwa instructed by Mqeke Attorneys

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Prepared on 11 October 2026 · Esheria