

SOUTH AFRICA / JUDGMENT

Frikkie Pretorius Inc. and Another v Glass (AR528/09) [2010] ZAKZPHC 42; 2011 (2) SA 407 (KZP) (26 April 2010)

[2010] ZAKZPHC 42

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Steyn, Koen

CASE / FILE NUMBER

AR528/09

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REPORTABLE

IN THE KWAZULU-NATAL

HIGH COURT, PIETERMARITZBURG REPUBLIC OF SOUTH AFRICA

Case No:

AR528/09

In the matter between

Frikkie Pretorius

Incorporated First Appellant

Tomlinson Mnguni

James Second Appellant

and

Geoffrey Bruce

Glass Respondent

JUDGMENT

Delivered on: 26 April 2010

STEYN J

- [1] This is an appeal against a judgment of the Pietermaritzburg Magistrates' Court. The second appellant lodged a substantive application for condonation concerning its non-compliance with Rule 50(1) of the Uniform Rules of Court. That application was not opposed. We are satisfied that condonation should be granted and such non-compliance is accordingly hereby condoned.

- [2] The matter has a long history. In March 2008 the magistrate granted absolution from the instance in favour of the appellants. The respondent took that judgment on appeal and on 29 August 2008 the Court (Jappie and Msimang JJ) upheld the appeal and ordered that the matter be remitted to the magistrate for the trial to proceed.
- [3] The first and second appellants were respectively the second and third defendants in the Court a quo in an action instituted by the respondent against them for the recovery of a half share of the proceeds from the sale of an immovable
- property of which he was the co-owner. There is a nexus between the two appellants, other than them being law firms, in that both of the firms, at different times, employed Ms K Crouch, who acted for Mrs Glass, the former wife of the respondent and co- owner of the property in proceedings instituted against the respondent for arrear maintenance.
- [4] The first appellant received the proceeds of the sale of the property into its trust account at a time when Ms Crouch held employment with that firm. These funds could only have been received for the credit of the respondent and Mrs Glass. While employed with the first appellant Ms Crouch paid to Mrs Glass her half share of the proceeds. She also paid a further sum of R10 000 to Mrs Glass and appropriated some money for fees due to the first appellant from the remaining half share due to the respondent. The balance remaining (R27 000) was transferred to the second appellant's trust account when Mrs Crouch left the services of the first appellant and joined the second appellant on 3 March 2004. While employed by the second appellant, she paid an amount to Mrs Glass from the trust money held in trust.
- [5] All these payments from the respondent's share of the proceeds were purported to be made only pursuant to the terms of a garnishee order which Mrs Crouch had obtained on behalf of Mrs Glass from the Maintenance court in Newcastle. In sum the respondent received an amount of only R6 157-44.
- [6] The crisp issue to be decided is whether the order issued by the Maintenance Court in Newcastle on 3 November 2003, precluded the first and second appellants from paying to the respondent his half share of the proceeds of the sale (that is half of R173 567-69 which amounts to R86 783-84), which had been paid over by the conveyancing attorneys to the first appellant.
- [7] The following facts are important since it forms the basis for the garnishee order: Mrs Glass who was the first defendant in the Court a quo applied for an order for attachment of debt, arising from maintenance which should have been paid to her. In support of the application

Mrs Glass filed a sworn affidavit. The content of the affidavit is important, since it provides the basis for the Newcastle Magistrates'

Court exercising its discretion in terms of s 26 of the Maintenance Act No. 99 of 1998:

I, Laura Elizabeth Glass, an adult female residing at No. 29 Gazelle Avenue, Newcastle in the Province of KwaZulu-Natal hereby dispose as follows: -

Arrear maintenance owing in accordance with an order PRO 359/99 made on 11 November 1999 and amended order on the 14th March 2000 accumulated to date to the sum of

BF R87 313.00

Period August 2002 – Jan 2003 15 000.00

5 months @ R3 000.00pm

R102 313.00.

[8] A maintenance order was issued in 1999, some four years before the divorce action was enrolled. The aforementioned order was amended on 14 March 2003 and provided for maintenance for Mrs Glass of R1 500 per month, R500 in respect of Mervyn and R1 000 per month for Alistair. In total it ordered that R3 000 per month be paid by the respondent per month. The first payment of R3 000 per month should have been made on 1 April 2000. It is common cause, however, that the respondent and Mrs Glass concluded an agreement, headed “Agreement of Settlement”, prior to the final decree of divorce being granted in which provision was made, inter alia, for custody and access to the minor child, Keith Alexander Glass and furthermore that the existing maintenance order in respect of the minor child would remain in force. The agreement was evidently concluded prior to the divorce action being finalised on the 19th February 2003. The divorce action was enrolled on the unopposed roll on the same day, and the terms of the order, correspond with the terms of the agreement of settlement. Relevant to this appeal is clause 8 of the said agreement that stipulates “Neither party shall be liable to pay maintenance to the other after the divorce”. Accordingly, from 19 February 2003 the respondent was no longer obliged to pay any maintenance to Mrs Glass, personally. It seems

that there was no “existing” order in respect of the minor child Keith which could remain in force. We were further told from the bar, when that was raised during argument, that Mervyn and Alastair is apparently one and the same person.

[9] Counsel for the appellants sought to rely on the garnishee order issued by the Newcastle Magistrates’ court in 2003 to justify the payments made to Mrs Glass. It has been submitted that the learned magistrate in the court a quo erred in finding that the garnishee order did not have the effect of a court order directing the first appellant to pay R88 500 to Mrs Glass.

[10] The first problem with this argument is that the garnishee order makes no reference to the respondent. In fact it refers to a debt that is owed by Keith Alexander Glass, who is the son of the respondent and Mrs Glass. Furthermore, ex facie the record, the debt was never attached by the sheriff as directed by the said order. Once faced with these dilemmas Ms Stretch, for the appellants, urged us to look at the surrounding circumstances that resulted in the garnishee order being issued. I am not persuaded that this is permissible or that it would assist the appellants, since it is evident that the process was entirely flawed.

- [11] Mr White, acting on behalf of the respondent, submitted that the garnishee order issued by the Newcastle Magistrates' court could never have served as a justification to attach any monies from the proceeds of the sale. His argument is: firstly, that the order was never issued against a debt owing to the respondent, secondly, that no attachment was effected as envisaged in terms of s 30(1)(a) of the Act, and to add to the irregular process, the order was not obtained for debt owing, but, at best in part, for future maintenance.
- [12] Before dealing with the issues raised on appeal it is necessary to briefly examine the relevant legislation applicable to maintenance and maintenance orders in general.
- [13] The Maintenance Act, 99 of 1998 provides for civil remedies against defaulters, which includes execution against property, the attachment of emoluments and the attachment of debt. Section 26, which deals with the enforcement of maintenance orders, provides:

(1) Whenever any person –

against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order; or

against whom any order for the payment of a specified sum of money has been made under section 16(1)(a)(ii), 20 or 21(4) has failed to make such a payment,

such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon –

by execution against property as contemplated in section 27;

by the attachment of emoluments as contemplated in section 28; or

by the attachment of any debt as contemplated in section 30.

- (2) (a) If any maintenance order or any order made under section 16(1)(a)(ii), 20 or 21(4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident –

for the authorisation of the issue of a warrant of execution referred to in section 27(1);

for an order for the attachment of emoluments referred to in section 28(1); or

for an order for the attachment of any debt referred to in section 30(1).

(b) The application shall be made in the prescribed manner and shall be accompanied by –

- (i) a copy of the maintenance or other order in question; and

(ii) a statement under oath or affirmation setting forth the amount which the person against whom such order was made has failed to pay.”

[14] In this matter Mrs Glass applied for a garnishee order in terms of s 26 of the Act. Pursuant to the application, the magistrate issued the following order on 3 November 2003:

- (1) that the said debt be attached.
- (2) that the garnishee pay to the applicant or maintenance clerk so much of the debt as may be sufficient to satisfy a judgment or order obtained against the applicant in the Maintenance Court at Newcastle on the 11th November 1999 for the amount of R3000 – 00 p.m. in which R88 500-00 remains due and unpaid and the costs of the proceedings of attachment amounting to R___ sheriff’s fees.

The order also stipulated that, should the garnishee fail to pay the applicant or the maintenance clerk, the garnishee should appear before the Court on 20th November 2003. The order, however, stipulated the debtor as Keith Alexander Glass.

[15] It is common cause that the writ issued by the Court in Newcastle, was issued against the wrong person.

[16] At this juncture it is relevant to consider how Ms Crouch dealt with this order despite it being granted against the wrong person. The following appears from the record, when she testified:

The application is quite clear. It’s against Geoffrey Bruce Glass and the order, this order here says Keith Alexander Glass so I take it that is an error of whoever’s handwriting this is. Keith Alexander Glass is one of the sons.

And he’s in fact the beneficiary of the maintenance order, is he not? --- That’s correct.

I think(?) dealing with this document, how did you go about dealing with something that misdescribes the person who apparently must foot the bill?” --- How do I go about dealing with?

How did you go about it? --- I actually didn’t realise there was an error until much later.

Until these proceedings? --- Until these proceedings. I did not check that closely. I just realised that the order had come through and dealt with the order. I did not check that closely to see that there was an error on the order. It was clearly an oversight on my part.

Now that order, apart from the misdescription of the name, contains Mr Glass, the plaintiff in these proceedings, it contains the identity number save for the last three digits ...(inaudible). --- Well again, I didn’t check the document that closely. I didn’t check for the names and I most certainly didn’t go and look for identity numbers and just follow up whether the ID number is correct or not.”

(My emphasis)

[17] The first demand for payment of his half share of the proceeds was made on behalf of the first respondent on 7 October 2003 by the attorneys Eugene Steyn and Co in the following terms:

You are also requested to furnish De Jager Steyn and Maritz before close of business today with the instruction to pay our client's share into our trust account.

On 8 October 2003 a further written demand was made, whereby the first appellant was asked to ensure that the respondent's share of the money be paid over to him.

On 11 December 2003 a third demand was made to the first appellant on behalf of the respondent, who at this stage was represented by Groenewald and Reed. Ms Crouch responded on 5 April 2004, as follows:

Maintenance:

2.1 Glass approached the Maintenance Court for maintenance prior to the demise of their marriage. An order was granted in favour of Mrs Glass as well as in favour of the minor children. Mr Glass never adhered to the order.

2.2 The order was amended at the time of the divorce whereby Mrs Glass waived maintenance in respect of herself. I stress again that this order was not adhered

2.3 I submit for your reference the relevant Maintenance Orders granted and I reiterate that Mr Glass has never paid according to the Orders.

2.4 Due to Mr Glass' non compliance with the orders the only remedy available to our client was to approach the Court for a Garnishee order in terms of section 26 of the Maintenance Act whereby Mr Glass' undivided half share of immovable property was attached to settle the arrear maintenance.

2.5 Mr Glass' Application to the Maintenance Court on the 20th November 2003 to have the Maintenance Order set aside was unsuccessful and the order R1,000.00 per month in respect of the minor son Keith Alexander Glass still stands. I reiterate Mr Glass despite all these orders has at to date not paid maintenance ever.

2.6 The calculation for the arrear and current maintenance was done according to the various Orders granted. The arrear maintenance was paid to our client immediately on transfer of the property and the balance of the money has been placed in trust for future maintenance. There is currently R26,000.00 in trust.

2.7 We have no Order in respect of future maintenance.

2.7 My concern needless to say taking into account the conduct of Mr Glass over the years is that Mrs Glass is going to once again start her battle from scratch to get the monthly maintenance in respect of the minor child.

2.8 We request an undertaking from your client that he shall pay the maintenance timeously failing such undertaking I will approach the Court for a necessary Order allowing Tomlinson Mnguni James to hold the R26,000.00 in trust for future maintenance.

The first appellant failed to provide any justification for refusing to make payment of what was demanded by the respondent. Even if it was permissible to go beyond the wording of the garnishee order, there remains the problem that there was apparently never a maintenance order made in respect of Keith Alexander Glass. Certainly none has been produced in the record, and the affidavit in support of the garnishee application did not provide particulars of what the amount claimed was comprised of, or how it was calculated. A large part thereof was simply stated to be an amount “brought forward”. With that kind of lack of detail the court could hardly have applied its mind properly as to whether there was in fact a debt owing.

[18] Turning to the position of the second appellant, in preparing this judgment we became increasingly concerned about the apparent lack of any legal basis on which the second appellant could be held liable to the respondent. We requested counsel to file supplementary heads on the following issue:

In light of the judgment by Jappie J, delivered on 29 August 2008, that the Appellant (Mr Glass in case AR142/08) was ex lege entitled to payment of half the amount standing to the credit of Mr and Mrs Glass in the trust account of the First Appellant, on what legal basis, having regard to the pleadings – could the Second Appellant be held liable in law to the Respondent for payment of any amount.

Supplementary heads were filed by both the second appellant and respondent, but not the first appellant. In the supplementary heads the respondent relies purely on the decision of Jappie J as establishing legal liability on the part of the second appellant. The second appellant submitted that the respondent did not at any stage become a trust creditor of the second appellant, since the funds that were transferred from the first appellant’s trust account were at that stage held for the benefit of Mrs Glass and not the respondent. The second appellant placed reliance on the testimony of Ms Crouch at page 169:

I left Pretorius Attorneys and I forget now which month it was but I then took up employment with Tomlinson Mnguni and James and I liaised – a number of my clients went with me so we liaised with whatever monies there were. Our funds were transferred from Pretorius Attorneys to the trust account of Tomlinson Mnguni James.

[19] In considering the duty of an attorney in dealing with trust money the Court in *Aeroquip SA v Gross and others*² held:

[13] The applicant has not referred to any authority that an attorney becomes personally liable for payment of a debt where he fails to pay over to a client’s creditor an amount held by him on behalf of his client in his trust account. The contrary appears to be true. An attorney who holds an amount of money in his trust account on behalf of a client is obliged to use it for no other purpose than he is instructed by the client. It is trite that it must always be available to

the client. In *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394 [also reported at [1989] 2 All SA 195 (T) – Ed] the court said:

‘I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount ... It is significant that in terms of s 83(13) of the Attorneys Act a practitioner who contravenes the provisions relating to his trust account and investment of trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice.’

These principles obviously apply to any person who deposits funds in an attorney’s trust account – see *Flionis v Bartlett* and another [2006] ZASCA 23; 2006 (3) SA 575 (SCA) [also reported at [2006] 3 All SA 95 (SCA) – Ed] and *Du Preez v Zwiegers* [2008] ZASCA 42; 2008 (4) SA 627 (SCA).

[20] Hathorn J in *Incorporated Law Society v Stalker*³ stated that it is imperative that trust money in the possession of an attorney should be available to his clients the instant they become payable.

Kirk-Cohen J in *Law Society, Transvaal v Matthews*⁴ stated:

The relationship between an attorney and his client was considered and discussed in *Goodrick & Son v Auto-Protection Insurance Co Ltd (in Liquidation)* 1967 (2) SA 501 (W). At 504G the Court referred with approval to the following statement by Van Zyl in his work *Judicial Practice of South Africa* 4th ed:

‘The law extracts from an attorney *uberrima fides* – that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth;

there must be a vigorous accuracy in minutia, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently. . . .’

To these authorities I add only the words of the late Mr Justice Davis in the foreword to the first edition of *Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa* (Introduction at vi):

‘“The precepts of the law are these” says Justinian at the beginning of the Institutes, “to live honourably, to injure no one and to give everyone his due”. It is obviously impossible for anyone, who is not himself prepared at least to try to order his life in accordance with these precepts, to make even a pretence of practising the law.’⁵

The conduct of attorneys handling business matters should be judged in the light of the foregoing. More recently *Howie P in Du Preez and Others v Zwiegers*⁶ dealt more specifically with deposits into a trust account of an attorney as follows:

An attorney into whose trust account money is paid owes a duty to the depositor even if the depositor is not an existing client of the practice.⁷

[21] Jappie J was clearly correct when he held that, once the respondent became a trust creditor he was entitled to payment. It must however be borne in mind that Jappie J's judgment only dealt with the evidence adduced on behalf of the respondent. The evidence adduced on behalf of the first and second appellants was only introduced after the absolution order was set aside by the appeal court. The evidence tendered before the court a quo reveals that the position of the second appellant differs vastly from that of the first appellant. A close scrutiny of Exhibits "L" and "N" shows that the funds were transferred from the first appellant to the second appellant's trust account for the benefit of Mrs Glass. The respondent was not a trust creditor of the second appellant in the books of the second appellant.

[22] Accordingly, there is no basis in law upon which the second appellant could have been held liable to the respondent for payment of money. The learned Magistrate was misdirected when he held that the respondent also became a trust creditor of the second appellant, especially when he stated:

Likewise, once the R27 000 was transferred by Frikkie Pretorius Attorneys to Tomlinson Mnguni James Attorneys, the appellant became – that is Mr Glass the plaintiff, became a trust creditor for the amount of R27 000.00 of the third respondent. It's my understanding that the third respondent succeeds in title as a trust debtor to the second defendant – the third defendant succeeds in title as trust debtor to the second defendant, and the trust creditor is the present plaintiff. That resolves the first issue.

[23] The crux of the matter is that numerous demands were made to the first appellant to make payment to the respondent, who was a trust creditor of that firm. The respondent, absent any lawful reason such as a valid garnishee order, was entitled to payment forthwith of whatever stood to his credit. Not only was the respondent not a trust creditor of the second appellant in its books, but no such demands were made of the second appellant. The evidence adduced does not show any awareness on behalf of the second appellant that the money in trust was held on behalf of any person other than Mrs Glass.⁸In fact what was represented to it by Ms Crouch was that Mrs Glass was the trust creditor. It might be that it could be argued that her knowledge was also that of the second appellant, but that was not the case pleaded and in any event her belief, wrong as it may be in law, was that these funds had been "attached" in terms of the garnishee order and now were due to Mrs Glass.

[24] The plaintiff's claim in the below included:

(a)

(b) As against the first and second defendants, jointly and severally, the one paying, the others to be absolved, for:

Payment in the sum of R53 626.40.

Interest on R80 626.40 at 15.5% per annum from 28 October 2003 to 4 December 2003.

Interest on R53 626.40 at 15.5% per annum from 4 December 2003.

As against the first and third defendants, jointly and severally, the one paying, the others to be absolved, for:

Payment in the sum of R27 000.

Interest at 15.5% per annum from 4 December 2003.

(d) As against the first, second and third defendants, jointly and severally, the one paying, the others to be absolved, for the costs of the action.

[25] The demand for half of the proceeds of sale, when made to the first appellant, should have been paid. This court is however bound in what it may order to what was claimed in the court a quo.

[26] The following order is made:

1. The appeal by the first appellant is dismissed with costs.
2. The appeal by the second appellant succeeds with costs.
3. The order of the Magistrate is amended to read as follows:

Judgment is granted against the second defendant for payment of the sum of fifty-three thousand, six hundred and twenty-six rand and forty cents (R53 626.40) together with interest on the sum of eighty thousand, six hundred and twenty-six rand and forty cents (R80 626.40) at fifteen-point-five percent (15.5%) per annum from 4 March 2004 to date of payment.

The second defendant is ordered to pay the plaintiff's costs.

The plaintiff's action against the third defendant is dismissed with costs.

Steyn, J

Koen, J

Date of Hearing: 8 February 2010

Date of Judgment: 26 April 2010

Counsel for the first appellant: Adv I Stretch

Instructed by: Attorneys Geyser Liebetrau Du Toit & Louw

Counsel for the second appellant: Adv I Stretch

Instructed by: Attorneys Tomlinson Mnguni James Inc.

Counsel for the respondent: Attorney J M White

Instructed by: Jon White Attorneys

1 Hereinafter referred to as 'the Act'.

2

[2009] 3 All SA 264 (GNP).

3 1932 NPD 594 at 606.

4 1989

(4) SA 389 (T).

5 Op cit at 396E-H.

6

[2008] ZASCA 42; 2008

(4) SA 627 (SCA).

7 Op cit at para 21.

8 See s 78 of the Attorneys Act, No. 53 of 1979, that provides:

- (1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person. (My emphasis).

8 See s 78 of the Attorneys Act, No. 53 of 1979, that provides:

- (1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person.

(My emphasis).

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