

SOUTH AFRICA / JUDGMENT

Qhalo v Road Freight & Logistics Industry Provident Fund (36271/16) [2018] ZAGPJHC 492 (19 April 2018) [2018] ZAGPJHC 492

COURT

South Gauteng High Court, Johannesburg

BEFORE

SM Wentzel

CASE / FILE NUMBER

36271/16

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

number: 36271/16

In

the matter between:

MONYANE
QHALO APPLICANT
AND
ROAD FREIGHT
& LOGISTICS
INDUSTRY
PROVIDENT
FUND RESPONDENT

JUDGMENT

WENTZEL, AJ:

1. This is an application for rescission of a cost order granted against the applicant on 29 March 2017. It is sought that the respondent pay the costs of the application on the attorney and client scale.

2. The applicant is an attorney who represented his client, Michael David Khumalo, in an action against the respondent in which he claimed benefits due to his client at the time of the termination of his employment. This payment was sought to be paid into the applicant's trust account.
3. After instigation of the application, the applicant was informed that his client was no longer a member of the fund as, since 2 years had elapsed since the termination of his employment, his claim had been transferred to the Unclaimed Fund. He was informed that the administration of this latter fund was transferred to the SALT Employees Benefits in September 2012 and he was directed to submit any claims on behalf of his client to such body. This was done, albeit that the form was incomplete as a result of which, the claim could not be processed.
4. Assuming that as the applicant had been informed that he had instituted action against the incorrect entity, he would not proceed, on behalf of his client, against them, the Fund did not oppose the application.
5. However, the applicant proceeded with the action and obtained a default judgment against the Fund on behalf of his client.
6. I believe that the Fund was utterly irresponsible in simply assuming that the matter would not be proceeded with against them,

without securing a formal notice of withdrawal from the applicant on behalf of his client, or at the very least confirmation in writing to this effect and not attending court on the day of the hearing to ensure that a judgment was not taken.

7. That being said, having prepared an application of rescission, Khumalo quite rightly did not advise his client to oppose it. However, he avers that had he realised that, notwithstanding that there was no prayer in the notice of motion for costs de bonis propriis to be granted against him, such relief was set out in the affidavit and persisted with in argument, he would have opposed the relief

sought.

8. The basis for punitive costs was, not only the fact that Khumalo proceeded against the respondent when he had been told that the

action had been instituted against the wrong party, but on the basis of a submission made at the hearing that the applicant was more evidently more interested in Mr Khumalo's benefit being paid into his trust account from which he could deduct legal fees that had been incurred in pursuing the unnecessary court application. This is an extremely serious averment that should have been made in the papers and not simply in argument. What was said in the papers was subtly different- that the applicant was "evidently more interested in legal fees to be occasioned by pursuing the unnecessary application." In these circumstances I believe that the notice of motion should have alerted the applicant to this fact as if it had, he most certainly would have

opposed the application.

9. I am mindful that it is probably negligent for an attorney not to peruse the application for rescission before advising his client not to oppose it. However, that is a matter for the Law Society and a matter between the applicant and his client.
10. However, the notice of motion is designed to alert the other parties to the relief sought and where costs *de bonis propriis* are sought against an attorney, although he need not be formally cited, this should be drawn to his attention. I accept that where there was no such prayer and he accepted that rescission should be granted, he did not see the necessity for reading the supporting affidavit. Had he seen the prayer for costs against him personally, he would have read it and opposed the application on this ground. A fortiori where it was expressly stated in the notice of motion that costs would only be sought if opposed. Where the matter was not opposed, I can see no basis upon which costs could be sought.
11. The respondent tried to distinguish between the costs which would be sought against Mr Khumalo had he opposed, and that it intended to pursue against the applicant in any event, even if the matter was not opposed. This is a fallacious argument; *de bonis propriis* costs are the costs sought against an attorney in circumstances where it is felt it would be unfair to mulct the client with costs. I believe that this may have been such a case, subject to what I have said with regard to the respondent's own negligence in not securing a notice of withdrawal. However, where it is stated that costs will not be sought against Khumalo if he does not oppose the application, and there is no indication that costs will nevertheless be sought against his attorney, this should have been explicitly sought. It is not enough that these averments were made in the affidavit.
12. Accordingly, without in any way condoning the applicant's negligence in not even bothering to peruse the supporting affidavit, without an appropriate amendment to the notice of motion, I accept Khumalo's explanation for not opposing the relief sought.
13. In the circumstances, I believe that rescission of the order sought only in so far as costs are concerned, should be granted. Should the respondent wish to pursue its costs application against the applicant, it should do so in terms of a properly amended notice of motion. I am of the view that his client should not be mulcted with these costs.
14. As I am not satisfied that the applicant did not act properly in failing to read the affidavit annexed to the application, I am not inclined to award him the costs of this application. As there was no prayer for costs *de bonis propriis*, I believe that the respondent should not have opposed the application and thus should not recover its costs.
15. In the circumstances I rescind the cost order granted on 29 March 2017 against the applicant and make no Order as to costs.

SM WENTZEL, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Counsel for the Excipient: Adv D Prinsloo

Counsel for the Plaintiff: Adv G Amir

Date of hearing: 15 November 2017

Date of Judgment: 19 April 2018

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