

SOUTH AFRICA / JUDGMENT

Shargey NO v Magistrate Atlantis; Albertus NO (A279/2008) [2008] ZAWCHC 282 (31 October 2008) [2008] ZAWCHC 282

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman, Traverso

CASE / FILE NUMBER

A279/2008

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A279/2008

In the matter between:

NORMAN WOOLF SHARGEY, NO. Appellant

and

THE MAGISTRATE, ATLANTIS

M H ALBERTUS, NO. Respondent

DRAFT JUDGMENT: 31 OCTOBER 2008

BAARTMAN, AJ

- [1] On 30 August 2002, an Atlantis magistrate placed the estate of Miss M Africa (Africa) under administration in terms of Section 74 (1) of the Magistrate's Court Act 32 of 1944 (the Act). The Court appointed Mr Melvyn Weiner (Weiner), an attorney, as administrator over Africa's estate. Weiner wished to be relieved as administrator of Africa's estate. On 29 February 2008, Appellant applied, with the consent of Weiner, to replace him as administrator. This is an appeal against the refusal to appoint the Appellant as administrator over the estate of Africa, in terms of Section 74E(2) of the Act.

[2] Appellant is a non-practicing attorney. He does not keep a trust account. He told the Court a quo that he would use the trust account of the attorney who appeared for him in the administration application. He intended to instruct that attorney to hold in his trust account and distribute money collected in the administration. Appellant further told the Court a quo that the Attorney's Fidelity Guarantee was applicable to the account he intended to use.

[3] The magistrate in refusing the application held:

The Appellant as a non-practicing attorney was exempted from providing security to the satisfaction of the Court as required in terms of Section 74E(3) of the Act: (see *Weiner NO. v Broekhuysen* 2002(2) All SA 231(C)).

The duties of an administrator in terms of Section 74J of the Act include collecting money from the debtor, exercising control over it and its subsequent distribution. Money collected must be deposited in an account as set out in Section 74J(7)(a) or (b).

Section 74J(7) made provision for only (a) an administrator who is a practicing attorney (attorney-administrator). He must deposit money collected in the course of the administration into a trust account kept in terms of the Attorneys Act and (b) one who is not a practicing attorney (non attorney-administrator). He must deposit all money collected into a separate trust account held at any bank in the Republic of South Africa.

The Appellant relied on his status as an attorney for exemption from providing security and he further denied the obligation to hold a separate trust account. The Magistrate likened the Appellant to the Respondent in the *African Bank* matters in that he claimed exemption but refuted the obligation incumbent upon being an attorney in such a matter. He referred to the matters of *African Bank Ltd v Weiner and Others* 2004(6) SA 570 CPD (the first *African Bank* matter) and *African Bank Ltd v Weiner and Others* 2005(4) SA 363 SCA (the second *African Bank* matter).

The Court had a discretion over whom to appoint as replacement for an existing administrator. In terms of the Act, a non-attorney

administrator must provide security to satisfy the Court that money collected will be properly administered, therefore Appellant, as an attorney-administrator, has to satisfy the Court that he is able to ensure due compliance with the duties of the administrator.

(f) The Court doubted whether Section 26 of the Attorneys Act 53 of 1979 (the Attorneys Act) covers persons such as Africa. In his

judgment

the magistrate said: "...is die hof nie oortuig dat die reeling tussen die appiikant en sy prokureur toelaatbaar en/of wenslik is nie."

[4] The issue in this appeal is whether the use of another attorney's trust account over which an administrator has no control satisfies

the provisions of Section 74J(7).

[5] Section 74J(7) provides as follows:

"An administrator shall deposit all monies received by him from or on behalf of debtors whose estates are under administration-

- (a) if he is not a practicing attorney, in a separate trust account with any bank in the Republic, and no amount with which any such account is credited shall be deemed to be part of the administrator's assets or, in the event of his death or insolvency, his deceased or insolvent estate;
- (b) if he is a practicing attorney, in the trust account that he keeps in terms of Section 33 of the Attorneys, Notaries and Conveyancers

Admission Act, 1934 (Act 23 of 1934)."

[6] An attorney, "encompasses practicing as well as non-practicing attorneys" as described in Section 74E subsection (3).

[7] The language of the section is clear. The legislature intended Section 74J(7)(a) to be applicable only to non-practicing attorneys.

The language of the section clearly indicates that only practicing attorneys are bound by the provisions of Section 74J(7)(b). The Court a quo correctly found that Appellant was bound by the provisions of Section 74J(7)(a).

[8] I now consider whether the arrangement to pay the money into the administrator's attorney trust account, over which the administrator

has no control, satisfies the duty imposed on a non-practicing attorney-administrator. I considered why administration orders are

enacted. Cameron JA in the second African Bank matter approved what was said by Griesel J in the first African Bank matter. He says at page 368 D - F;

"It was never the intention of the Legislature that a debtor should be bound up indefinitely in an administration order: on the contrary, 'The mechanism of an administration order is intended to provide a debtor with a relatively short moratorium to assist in the payment of his or her debts in full and to ward off legal action and execution proceedings.

[9] The learned judge describes the role and function of an administrator as:

"...akin to that of the trustee in an insolvent estate': in collecting and distributing payments, the administrator occupies a position of trust vis a vis both the debtor and his or her creditor, and must carry out the duties of administration in the interest of creditors and the debtor

independently and impartially.' "

[10] He also concluded that:

"...'an administrator occupied a fiduciary position in relation to moneys collected and, like a trustee, should take expeditious steps for the purpose of enabling the creditors to obtain as extensive a payment as possible of their debt'. "

[11] Counsel for the Appellant in argument said:

"As a consequence, it is respectfully submitted that the Respondent's concern regarding the Appellant and his attorney's arrangement is misconceived as it is an arrangement that the Appeal Court considered and accepted as valid..."

[12] The Respondent in the African Bank matters deposited money collected in the course of various administrations into a separate trust account over which he had control. However, the Appellant in this matter will have no control over funds once paid into the attorney's trust account he intends using.

[13] Therefore, I am of the view that the proposed arrangement between Appellant and his attorney does not advance the purpose of the legislation since the proposed arrangement undermines the legislation because Appellant will incur an extra expense with each distribution, which means the attorney's costs incurred in each distribution will reduce the money available for distribution. The Act envisages that an administrator may, in appropriate circumstances, engage the services of an attorney although not to do what the administrator is essentially appointed to do. By acting in the manner proposed by the applicant he will flaunt all the safeguards provided for in the Act. Therefore, the magistrate correctly found the arrangement unsatisfactory. I am of the view that what is contemplated by the Appellant will subvert the clear language of Section 74J(a).

[14] As indicated above, the administrator has to take "...expeditious steps for the purpose of enabling the creditors to obtain as extensive a payment as possible of their debt." I am also of the view that opening a separate trust account with any bank in the Republic is a necessary and expeditious step that

Appellant must take.

[15] It could never have been the intention of the legislature to impose upon a practicing attorney the duty to deposit money into a specified account, whilst, simultaneously intending that once that attorney ceases practicing as an attorney to absolve him from the burden of both section 74(7)(a) and (b).

I accordingly propose that the appeal be dismissed.

I agree, and it is so ordered.

TRAVERSO, DJP

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Prepared on 14 October 2026 · Esheria