

SOUTH AFRICA / JUDGMENT

Spruyt and Another v Gumbo N.O and Others ; Gumbo N.O v Spruyt and Another (71879/2017;68899/2018) [2019] ZAGPPHC 579 (1 November 2019)

[2019] ZAGPPHC 579

COURT

North Gauteng High Court, Pretoria

BEFORE

C J Van der Westhuizen

CASE / FILE NUMBER

71879/2017;68899/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE NO.: 71879/2017
68899/2018

In

the matter between:

STEPHAN
SPRUYT
SPRUYT
INC
First
Applicant
Second
Applicant
and
SG
GUMBO N.O.
GUY
GUMBO ATTORTNEYS
RAMAPUPUTLA
ATTORNEYS INC
MR
RAMAPUPUTLA
THE
MINISTER OF POLICE

the matter between: THE
MASTER OF THE HIGH COURT
In
SG
GUMBO N.O.
and
STEPHAN
SPRUYT
SPRUYT
INC
First
Respondent
Second
Respondent
Third
Respondent
Fourth
Respondent
Fifth
Respondent
Sixth
Respondent
Applicant
First
Respondent
Second
Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

[1] There are two matters before me. The first matter relates to an urgent application (under case number 71879/17) that was brought and where, by agreement between the parties, an interim order was granted that effectively addressed the applicants' concerns at that time. The second application (under case number 68899/2017) was brought by the first respondent in the urgent matter. The two matters are to an extent interrelated. I shall give a combined judgment, but the orders will be separately dealt with under the respective case numbers.

[2] The issues related to a monetary amount awarded in a damages claim against the Road Accident Fund. The recipient of the award of damages passed away (the deceased) before the monies due to him could be paid out to him by his attorney of record in the damages claim (the attorney). In that respect, and amount of R4 822 450.80

was paid to the deceased in lieu of his claim against the Road Accident Fund. That amount included an amount in respect of

past loss of medical expenses incurred as a result of the injuries in the collision and for which amount a claim was submitted and claimed in the action against the Road Accident Fund. The aforesaid amount awarded to the deceased included an amount of R1 399 390.25 in respect of the claim for past medical expenses.

- [3] The first respondent in the urgent application, being the applicant in the second matter, was appointed as executor of the deceased's estate (the executor). The estate claims payment of the whole amount awarded to the deceased. The attorney and his firm were the applicants in the urgent application.
- [4] The applicants in the urgent application served a third party notice upon the Assurer that funded the deceased's medical expenses incurred while the deceased was awaiting finalisation of the damages claim against the Road Accident Fund. The Assurer had an agreement with the deceased, in terms of the policy, that upon his damages claim being successful, he would refund it for the amounts expended on his behalf. The deceased in turn had issued written instructions to his firm of attorneys, who represented the deceased in the damages claim, to pay the amount due to the Assurer on receipt of payment of the damages award.
- [5] The instructed attorney, on receipt of payment of the amount awarded in damages to the deceased, paid the due amount to the Assurer. The payment due to the Assurer was paid in two instalments. The first instalment was an amount of R1 278 758.80. That payment was made prior to the attorney having knowledge of his client's, the deceased, passing away. A second amount, R120 604.45, being the balance of the awarded amount for past medical expenses and was also due to the Assurer. That amount was paid by the attorney to the Assurer after learning of his client's demise.
- [6] A dispute arose between the deceased's attorney and the appointed executor in respect of the payment to the Assurer of the aforesaid monies. At this point it is to be recorded that soon after the deceased's demise, an executor was appointed by the Master. There were some discussions and arrangements and the erstwhile executor's letters of appointment were withdrawn by the Master and new letters of appointment were issued by the Master in terms whereof the first respondent was appointed as executor.
- [7] The main dispute turns on the issue whether the monies paid to the Assurer was in contravention of section 13, when read with section 102 of the Administration of Estates Act, 66 of 1965 (the Act). It appears that in respect of the provisions of section 102 of the Act, the actual subsection is (g) thereof.
- [8] The third party notice referred to earlier was served upon the Assurer who received the aforementioned payments. It is conditional upon the attorneys being ordered to pay the amounts so paid to the estate. The Assurer disputes that it is or would be obliged to repay the amounts, should the attorney be so ordered.

- [9] The first issue to be decided relates to whether the urgent application was indeed urgent, that issue having been reserved when the agreed interim order was granted, and accordingly also the costs that were reserved in that regard. The former has become moot by virtue of the interim agreed order. However, it is a factor to be considered in respect of the issue of costs.
- [10] Secondly, the issue whether the attorney is to be ordered to pay the aforementioned amounts to the estate requires determination. This is the crux of the matters before me.
- [11] In the third place, it is consequential upon a finding that the attorney is to pay the said paid amounts to the estate. In that event it is to be decided whether the Assurer is to pay the said paid amounts back to the attorney.
- [12] Fourthly, it is to be determined whether the declaration sought by the executor of the estate that the attorney contravened the provisions of section 13 of the Act and, if so, whether the attorney has committed an offence as envisaged in section 102(g) of the Act.
- [13] The fifth issue is that of costs.
- [14] In respect of the first issue, it is submitted on behalf of the attorney that despite the executor's protestations to the contrary, the agreement to an order being issued on the urgent application puts paid to the issue of urgency. In terms of that order, the attorney (applicant in that application) succeeded in obtaining the relief it sought in the urgent application, albeit on a temporary basis. The sting in the executor's threat that was sought to be interdicted, was taken out of the bubbling pot. Counsel for the attorney further submitted that the executor must have been clearly of the view that, nevertheless opposition, the court would have granted the relief. The submission is further made that the attorney of the executor intended to, by issuing the threats of an arrest of the attorney in view of his contravention of section 13 read with section 102(g) of the Act, coerced the attorney in doing something with which the attorney did not agree, namely, that he was obliged to pay the paid amounts into the estate's account. In my view, the threat in the vexed letter is clear and unambiguous. The threat was real. It does not matter that the executor's attorney admitted that he was on a frolic of his own. The client, once he appointed an attorney, is bound by the actions, or inactions, of his attorney. That principle is trite.
- [15] It follows that the attorney was entitled to approach the court by way of an urgent application seeking an interdict, or an undertaking, to prohibit the laying of a charge and seeking a warrant for the arrest of the attorney. The negative publication of the arrest of the attorney in the news headlines of the following day is foreseeable. That much was known to the attorney acting for the executor, and very much appreciated by him, if not so intended. As some of the other issues in the urgent application may have a bearing those raised in the executor's application, the second application, I shall rule on the costs in the urgent application once a finding is made in respect thereof.
- [16] Section 13 of the Act provides as follows:

“13 Deceased estates not to be liquidated or distributed without letters of executorship or direction by the Master

- (1) No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master.
 - (2) No letters of executorship shall be granted or signed and sealed and no endorsement under section fifteen shall be made to or at the instance or in favour of any person who is by any law prohibited from liquidating or distributing the estate of any deceased person.
 - (3) The provisions of subsection (2) shall not apply to any person nominated as executor by the will of a person who dies before the first day of July, 1996.”
- [17] The executor and his attorney have subsequently accepted, and effectively conceded, that the amount initially paid to the Assurer clearly occurred before the attorney had or could have any knowledge of his client’s demise. That concession is wisely made.[1] In order to prove a criminal charge, one of the requirements to be proven is whether there was any wrongfulness, in the sense of

“wedereglikheids-bewussyn” on the part of the attorney. This acceptance or concession put paid to the claim for payment of that amount by the attorney into the estate account.

- [18] Furthermore, the first payment was made in compliance with the written instructions of the deceased, namely that the Assurer is to be compensated for its assistance in making payment of medical expenses that occurred subsequent to the accident, in terms of the deceased’s policy (Commuting Journeys Policy) with the Assurer, and prior to the award of damages claimed against the Road Accident Fund. Those instructions were given shortly after the appointment of the attorney to issue summons for a claim for damages and consequently long before the successful award in that regard. The payments to the Assurer were clearly founded in contract, in terms of the undertaking in the policy and in terms of the written instructions of the deceased to his attorney.
- [19] That being so, and in that respect, the attorney was well within his rights to decline the request for payment of first amount paid to the Assurer to the estate. The estate of the deceased had no claim to those monies that were clearly earmarked for the Assurer. The attorney readily concedes that the second payment was made after obtaining knowledge of his client’s demise. He explains that he was totally unaware of the provisions of section 13 of the Act and further that he made the second payment under the written instruction of his client, whilst in life. The payment was made effectively ex contractu. It follows that the second payment was made in error. Furthermore, the second amount was made in terms of his client’s undertaking under the policy to refund the medical expenses expended in terms of the said policy. The deceased was obliged to make the second payment, in the event that he was alive at that stage. It follows that the estate suffered no harm, and in any event, it would have been a liability of the estate. The same reasons thus apply as pronounced earlier

in this judgment.

- [20] If I am wrong in this regard, there is no harm to the estate and it would have no claim thereto, in that the Assurer would have ex contractu a claim against the estate for payment of the amounts expended on behalf of the deceased for past medical expenses flowing from the claim against the Road Accident Fund. In terms of the provisions of section 26 of the Act, the Assurer, and by implication the attorney, has the lawful right to retain the amounts due and paid to it in terms of the provisions of the policy of the deceased with it. Those monies would not be unlawfully retained by the Assurer. Further, the amount due to the Assurer would and could in no manner be used to be distributed to the heirs of the deceased. At best for the executor, the estate could possibly have a claim for damages against the attorney. In my view the estate would have no claim for damages against the attorney, nor for that matter against the Assurer. There are no damages. The amount paid to the Assurer was owed by the deceased in terms of the said policy and would have to be paid in the event of a claim by the Assurer, in the event that it did not receive the payment from the attorney in honouring the instructions to him as referred to earlier. The only advantage would be to

the executor. His estate fees would increase. That does not constitute or support a claim for damages.

- [21] It follows that in view of the concession in respect of the first payment, and further in view of the finding that the second payment was made due to a bona fide error and in terms of an undertaking, the payments by the attorney were justified, and no consequences flow therefrom.
- [22] It accordingly follows that the executor is not entitled to any payment of monies made by the attorney to the Assurer under the policy and in terms of the written instructions by the deceased, whilst in life, to the attorney.
- [23] The allegations relating to the appointment of a curator ad litem and trust allegedly to be established, the executor has not placed sufficient evidence before the court that at the time of the deceased's written instructions his mental abilities were questionable and hence of no force and effect. No evidence was led to explain the allegations. There is accordingly no merit in those contentions of the executor.
- [24] The executor further seeks the issuing of declarators. In that regard, if the amount claimed by the estate is to be paid to it, then the practical effect would be as stated in *Eagles Landing Body Corporate v Molewa NO et al*:^[2]

“The requirements to be met and the discretionary approach the Court must apply when the grant of a declaratory order is at issue, have been the subject of many decision. See, for example the comprehensive analysis undertaken by van Dijkhorst, J in Family Benefit Friendly Society v Commissioner for Inland Revenue et al 1995(4) SA 120 (T). Assuming, without deciding, that the other requirements are satisfied, the relief sought in casu will be of any practical significance. The rule remains that a party is not entitled to approach the Court for what amounts to a legal opinion upon an abstract or academic matter. ...”

- [25] The executor seeks inter alia a declarator that the attorney has contravened the provisions of section 13 when read with the provisions of section 102(g) of the Act. That relief constitutes a legal opinion sought of the court in the form of a declarator. The contravention or otherwise is something that is to be considered and determined by a criminal court, not a civil court. In the present matters it is only of academic interest. No declarator could thus be issued.
- [26] It follows that the executor has no right to any declaratory order.
- [27] In view of the finding that the amounts paid are justifiable, the amounts need not be paid to the estate as sought by the executor. Consequently, it is not required to adjudicate upon the issuing of the third party. The attorney ran the risk that the costs in that regard, it being conditional, may be payable by him.
- [28] It follows from all of the foregoing that the executor cannot succeed in his application against the attorney.
- [29] The issue of costs remains. In view of my finding in favour of the attorney on the issues raised by the executor, and further in view of my finding that the attorney was justified in launching the urgent application, the attorney is entitled to those costs reserved.
- [30] In view of my findings in respect of the executor's application and the relief sought therein, the normal rule should follow, namely that costs follow the result. I have already indicated that the attorney ran the risk of his conditional third party notice, it would be fair and just that the costs occasioned thereby be borne by the attorney, i.e. the first and second respondents in that application.

I grant the following orders:

Under case number 71879/2017:

- (a) The applicants' non-compliance with the Uniform Rules of Court as regard service, filing and prescribed time periods be condoned in terms of Rule 6(12) and that this matter be adjudicated upon as an urgent application as contemplated in the said Rule.
- (b) It is declared that the payments made by Spruyt Incorporated to Rand Mutual Assurance on 9 January 2015 in the aggregate amount of R1 278 758.80 were duly, properly and lawfully made;
- (c) An order interdicting and restraining the first to fourth respondents from:
 - (i) Lodging any criminal complaint concerning either or both of the applicants with the SAPS Commercial Crimes Unit or any other division of the SAPS in relation to the payment of the amount of R1 278 758.80

by second applicant to Rand Mutual Assurance;

- (ii) Making any derogatory statements concerning either or both of the applicants;

- (d) The first and forth respondents are ordered to forthwith cease any conduct in relation to the Estate Late Samuel Philemon that may prejudicially affect the rights and interests of either or both of the applicants;
- (e) The first to fourth respondents are to pay, jointly and severally, the costs of this (urgent) application, which costs shall include the costs consequent upon the employ of two counsel and to be taxed upon the scale as between attorney and client.

Under case number 68899/18:

- (a) The application is dismissed;
- (b) The applicants are ordered to pay the costs of this application, excluding the costs of the Third Party, Rand Mutual Assurance Ltd, jointly and severally, such costs to include the costs of two counsel, where employed, and to be taxed on the attorney and client scale;
- (c) The respondents are to pay the costs, jointly and severally, of the Third Party, Rand Mutual Assurance Ltd.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

On behalf of Applicant: T A L L Potgieter SC

Instructed by:

Maritz Smith Inc

On behalf of Respondent: A B Rossouw SC

Instructed by:

Ramapuputla Attorneys

On behalf of Respondent: M Majozi

Instructed by:

Van Velden – Duffey Inc

[1] See for example section 30 of the Act; See also section 102(i) of the Act.

[2] 2003(1) SA 412 (T) at [59]

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