REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19500/15

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

18/02/2016
DATE

Malindi
SIGNATURE

In the matter between:

BRANDIE MABOYA Applicant

and

NORMAN BERGER & PARTNERS INC Respondent

J U D G M E N T

MALINDI, AJ:

INTRODUCTION

[1] This application has been set down for the determination of the issue of costs only.

[2] The applicant filed a notice of motion in this matter on 28 May 2015, seeking the following order:

> "1. *The file retained by the Respondent be delivered to the Applicant's attorney of record within 5 (five) days from date of granting of this Order;*
>
> 2. *The Respondent to pay costs of this application on the attorney and own client scale;*
>
> 3. *Further and/or alternative relief.*"

[3] The notice is dated 26 May 2015 and issued by his attorneys of record, Hauptfleisch Inc.

[4] However, the founding affidavit was deposed to on 2 June 2015 at Fairland Police Station in Johannesburg. I note this because the respondent has argued that the application is fatally flawed for this reason.

[5] The applicant sets out a full history of how the respondent became his legal representatives after he was involved in a motor vehicle accident on 26 March 2008. He proceeds to set out his complaints about how his claim lodged by the respondent against the Road Accident Fund was handled, including unprofessional conduct, touting for his clientele and other dishonourable and unworthy conduct.

[6] The applicant states that his litigation was concluded during 2011. As a result the respondent's mandate has been concluded, alternatively, he terminates the mandate and requires the respondent to return his file to him.

The respondent had formally withdrawn as the applicant's attorney on 8th June 2010 and the matter was settled out of court by Freeman Attorneys on the 4th of March 2011.

[7] As a result of the applicants complaints referred to above on 21 May 2015 his attorney demanded the delivery of his file. On 25 May 2015 the applicant's attorney's messenger attended at the respondent's offices but the applicant's file was not handed over to him. The respondent states that this was merely as a result of the respondent not yet having had the opportunity to check their archives and that they would let the offices of Hauptfleisch know once they had.

[8] The applicant avers that as a result of not having received any correspondence from the respondent at the time of launching this application he was compelled to pursue the return of his file through the legal route.

[9] It is noted that a period of three days had passed from 25 May 2015, when the applicant's attorney's messenger returned from the respondent's offices without the requested file, and 28 May 2015 when the application was launched.

[10] On 17 June 2015 the respondent filed its notice of intention to oppose and filed its answering affidavit on 26 June 2015. The applicant filed his replying affidavit on or about 21 July 2015.

[11] From the outset, the respondent attacks the application on the basis that it appears to have been brought "*for no purpose other than to bring the respondent into disrepute and to harry and otherwise inconvenience the respondent*".

[12] The respondent tendered that the applicant's file may be collected from its office.

[13] Furthermore, the respondent states that the applicant's case was not concluded by them but by Freeman Dube Attorneys as stated in paragraph 5 above.

[14] Regarding the applicant's complaint that he was compelled to bring this application because of the respondent's failure to deliver his file, the respondent states that the applicant has ignored the respondent's letter of 22 May 2015 wherein it states, *inter alia*, that:

> "*Our mandate on behalf of this client was finalised some years ago and so we need to check to see whether we still have the file.*"

[15] Reference is made to the fact that the fax transmission record shows that the letter of 22 May 2015 to the applicant's attorneys was received on the same day at 15:23. After a further letter from the respondent on 29 May 2015 the applicant's attorneys responded to this letter stating that they had not received the respondent's letter of 22 May 2015. A copy thereof was resent

but no response thereto was received. Instead the Sheriff served the present application on the respondent on 4 June 2015.

[16] The respondent concluded in its answer that the costs of the application should be borne by the applicant's attorney *de bonis propriis* because of his conduct. It submits that it was entitled to a reasonable period of time to ascertain whether the file was still available but the applicant's attorney acted with haste, driven by an improper motive.

[17] In his replying affidavit signed on 17 July 2015 but filed on 21 July 2015 the applicant persists that the respondent was "*obstructive, uncooperative and (acted) in the interest of self-preservation after a potential malpractice claim was identified to prolong the handing over of the file ...*". He states that the file was only delivered on 1 July 2015.

[18] The rest of the replying affidavit continues to attack the respondent's conduct in handling the matter, including that the file was culled of accounting records, invoices and proofs of payments.

ISSUES FOR DETERMINATION

[19] After setting out the history and contentions made by the respective parties, I am convinced that this matter did not require to be ventilated in 93 pages of affidavits and annexures. In addition the respondent filed heads of

argument accompanied by a list of 12 authorities in a bundle of authorities comprising 131 pages.

[20] Both parties correctly identified the issue for determination as which party should bear the costs of this application and at what scale.

[21] The questions are therefore whether:

21.1 the application was premature, in the sense that the respondent was not afforded a reasonable period of time to locate the applicant's file;

21.2 after receipt of the application on 4 June 2015 the respondent should have filed an answering affidavit; and

21.3 after the respondent had tendered the delivery of the file in its answering affidavit and in its letter of 22 May 2015 (received by the applicant allegedly only on 29 May 2015), the applicant should have filed a replying affidavit.

21.4 The application as a whole is fatally flawed for the reason that the notice of motion was not accompanied by an affidavit.

[22] The respondent persists that it be determined whether the application is irregular and therefore null and void, and also that the application is *mala fide* and an abuse of court process.

[23] I agree with Mr Block who appeared for the respondent that the respective attorneys steered away from their mandate to request or demand the applicant's file (on the applicant's attorneys part), and to ensure that it is so delivered expeditiously (on the respondent's part), since it is common cause that the respondent's mandate had terminated. Instead they engaged in a "*needle match*". The applicant's allegations of improper conduct on the part of the respondent were unnecessary for the purpose of obtaining his file and the respondent in turn entered this fight which was not germane to the application. The affidavits traversed issues that are not relevant for resolution by this court and they turned the process to ventilate what seems to be the enmity between the two law firms. They descended to the level of attempting to manipulate the court's process so that the true issue to be resolved is muddied in the process.[1]

[24] I take a dim view of the conduct of both the attorneys in this regard.

[25] The applicant persisted with legal action, including filing a replying affidavit in circumstances where the respondent had on 22 May 2015 (letter allegedly only received on 29 May 2015 by the applicant) called upon the parties to discuss the basis of the delivery of the file and had tendered to deliver it at two places of the answering affidavit. Equally, the respondent missed the opportunity to bring this dispute to an end when it filed intention to oppose on 17 June 2015 after having received the application on 4 June 2015. The only reason he did so, I presume, was more to deal with allegations

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[1] See *Brenner's Service Station and Garage (Pty) Ltd v Milne and Another* 1983 (4) SA 233 (W) at 239H-240B.

of improper conduct on his part than the obligation and duty to focus on the real issue.

[26] Regarding whether the application is irregular and therefore null and void, I take the view that the respondent proceeded with taking further steps without objecting to the applicant's failure to file the notice of motion together with a supporting affidavit as an irregularity. The complaint was merely raised in the answering affidavit at paragraph 6 thereof without a clear indication that there would be a challenge to its admissibility. The point was raised at the hearing and therefore there was not a proper opportunity for the applicant to make proper submissions on whether the irregularity is one that a court may condone. I therefore make no decision in this regard.

[27] The applicant had prayed for the costs to be borne by the respondent's instructing attorney *de bonis propiis* but asked for ordinary costs in argument. The respondent prayed that the applicant's attorney pay the wasted costs on the scale as between attorney and client *de bonis propriis.*

[28] A punitive costs order whether costs *de bonis propriis* or costs on the attorney and client scale is awarded as a measure of displeasure with the conduct of a party or the party's attorney in court proceedings.[2] In this case I find that both sets of attorneys acted deplorably in the circumstances

[2] *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at 624 paras [51] and [52]; *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T) at 692.

CONCLUSION

[29] In the circumstances I find both parties to have acted unreasonably. Having taken into account each party's conduct I have come to the conclusion that neither is entitled to recover any costs.

[30] Accordingly, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

G MALINDI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG