

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

9 November 2016
CASE NO: 90428/2015
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

DAVID ANGUS DEWAR

APPLICANT

And

**THE LAW SOCIETY OF THE NORTHERN PROVINCES
(THE FEE ASSESSMENT COMMITTEE)**

FIRST RESPONDENT

HELEN ELLIS ATTORNEYS

SECOND RESPONDENT

JUDGMENT

PRETORIUS J,

- (1) The second respondent launched an application in the Gauteng Local Division, Johannesburg of the High Court under case number 2014/45199 ("the main application"), against the applicant seeking to recoup monies due, owing and payable by the applicant to the second respondent for services rendered as an attorney. The second respondent was the attorney of record mandated by the applicant in divorce proceedings to which the applicant was a party. The applicant is an attorney.
- (2) On 30 March 2015 the applicant, as defendant, requested a postponement in the

application in the Gauteng Local Division, which was granted by agreement between the parties. The order was *inter alia*, "*The Respondent is to pay the wasted costs*". These costs were taxed by the taxing master on 23 June 2015. The amount payable to the second respondent is R3 206.48. On 2 July 2015 a fax was sent to the applicant's erstwhile attorney demanding payment of the said amount by close of business on 6 July 2015.

- (3) On 19 October 2015 the main application was postponed *sine die* after the applicant had launched a substantial application for postponement, which was opposed. The taxed bill of costs remains unpaid. The applicant launched the present application on 9 November 2015.
- (4) Kathree-Setiloane J made the following order:
 - "1. *The application is postponed sine die.*
 2. *The Respondent shall, subject to the provisions of this Order, launch his intended Review Application against the fee assessment of the Law Society of the Northern Provinces within a period of 15 days, or such longer period as this Court on application and on good cause shown may allow, failing which the Applicant may set the Application down for hearing on the opposed motion court roll.*
 3. *The Applicant shall not be required to deliver an Answering Affidavit to the review application until such time that the **Respondent has satisfied the costs order of both this order as well as the order by the Honourable Judge Lamont dated 30 March 2015, provided that the Respondent shall pay the costs orders within 30 days, or such longer period as this Court on application and on good cause shown may allow, of the aforesaid costs being agreed to or taxed, failing which the review application will automatically lapse...***" (Court emphasis)
- (5) On 26 January 2016 the second respondent filed an answering affidavit to try and finalize the proceedings, although the costs had not been paid. On 16 February 2016 the applicant served and filed a replying affidavit.
- (6) Counsel for the second respondent argued a point *in limine* that the application for review had lapsed as the applicant had not paid the taxed bill of costs subsequent to the court order of Lamont J as set out in the court order of Kathree-Setiloane J. All parties agreed that the court should first rule on the point *in limine*. Although counsel for

the applicant made much of the fact that the applicant had not known that the bill of costs had been drawn and taxed and had not received the letter of demand, it is clear that both these documents were attached to the second respondent's opposing affidavit to the application for postponement before Kathree-Setiloane J.

- (7) The applicant had known that the bill of costs had been taxed since the answering affidavit had been filed. His further contention is that by filing the answering affidavit the second respondent has waived his right to have the costs paid. This can never be the case that a court order can be disobeyed where there is a valid court order which the applicant chooses to disregard.
- (8) The further contention is that he had tendered payment in the replying affidavit. Counsel for the applicant had to concede that the tender was not made on condition that the second respondent furnishes her banking details. The applicant set out:
- "... I herewith tender payment of such costs and I will instruct my attorney of record to make payment to the Second Respondent forthwith upon her furnishing my attorney with her banking details*
- ...I point out with the greatest of respect to the Second Respondent that she has failed to demonstrate to this Honourable Court that the taxed bill has been brought to my attention ...*
- As a matter of fact, on a proper consideration of the wording of the order under consideration, it is patently obvious that a taxation that is still to occur is envisaged."*
- (9) This is obviously not true as the taxed bill of costs were attached to the answering affidavit in the Gauteng Division of the High Court when the second respondent opposed the application for postponement.
- (10) The defence that the applicant does not know the second respondent's banking details is devoid of all truth as it is set out in the mandate signed by the applicant as:
- "Helen Ellis Attorney Trust Account No. 2 ABSA Bank, Ferndale Branch*
- Account no.: [...]*
- Branch code: 630-905 Reference: DEWAR"*
- (11) A tender is not payment and the applicant has had ample time to comply with the court order of Kathree-Setiloane J, but chose to ignore it. It is even worse where the applicant, who is an officer of the court, merely disregards a court order.

- (12) The further proof of the applicant's disregard and contempt for court processes can be seen by the applicant's actions by failing to adhere to the Practice Directives of this court. The applicant did not index and paginate the application, which was done by the second respondent to try and finalize the application. Furthermore the applicant failed to serve heads of argument as prescribed in the Practice Manual. The second respondent prepared heads of argument without being in possession of the applicant's heads of argument.
- (13) I have considered all the arguments by counsel. I cannot find that the applicant had or has any intention to pay the taxed bill of costs. Due to the fact that he did not comply with the court order of Kathree- Setiloane J I find that the application for review has lapsed.
- (14) In the result I make the following order:
1. The application is dismissed;
 2. The costs to be paid by the applicant on an Attorney and Client scale.

A handwritten signature in black ink, appearing to read 'C Pretorius', is written over a horizontal line.

Judge C Pretorius

Case number	: 90428/2015
Matter heard on	: 8 November 2016
For the Applicant	: Adv Thompson
Instructed by	: KAWT Attorneys
For the First Respondent	: Attorney PJ Smith
Instructed by	: Rooth & Wessels Attorneys
For the Second Respondent	: Adv PA Venter
Instructed by	: MacRobert Attorneys
Date of Judgment	: 9 November 2016