IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 5468/2016

Date: 12 February 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES/NO~~
(3) REVISED

12/2/2016 Pretoria
DATE ~~SIGNATURE~~

In the matter between:

J F H VAN DER WESTHUIZEN

FIRST APPLICANT

PROTEA AFTREE-OORD (VERWOERDBURG) (PTY) LTD

SECOND APPLICANT

And

ELMO-YORK STUART

FIRST RESPONDENT

EY STUART INCORPORATED

SECOND RESPONDENT

LAW SOCIETY OF THE NORTHERN PROVINCES

THIRD RESPONDENT

JUDGMENT

PRETORIUS J,

(1) The applicants request the court on an urgent basis to grant an interdict` against the first and second respondents to prohibit the manager and/or the body corporates and/or the alleged trustees of the Protea Aftree Oord Centurion to represent the Protea Aftree Oord Centurion. The court is also requested to prohibit the first and second respondents from divulging any information or documents they had received from the applicants to any third parties. Applicants' further request is for an order that the first and second respondents are ordered to provide the applicants with all the documents which relate to the applicants, without keeping any copies of these documents, within seven days of the date of this order, and costs on an attorney and client scale.

(2) According to the applicants, the first respondent published privileged information regarding the applicants in a letter on 26 January 2016, after this application had been served, which makes the application even more urgent.

BACKGROUND:

(3) The first and second respondents represented the applicants from January 2015 until August 2015 as attorney of record in disputes between the applicants and the alleged trustees of the Protea Aftree Oord, Centurion. This so-called dispute relates to the fact that the legal entities did not and do not comply with the provisions of the

Sectional Title Act. This was the initial complaint by the applicants. The legal entities, who became aware of this state of affairs approached the respondents to assist them to rectify these problems. There was no pending court case or any other facts which suggest a conflict of interest, according to the respondents.

(4) On 20 January 2016 the present attorneys of the applicants, Laas Doman Ingelyf, wrote a letter to the respondents, advising the respondents that the applicants ascertained that the respondent were advising the legal entities of Protea Aftree Oord and demanded that the respondents had to immediately withdraw as attorney for these entities, due to a conflict of interest.

(5) On 21 January 2016 the respondents replied to this demand as follows:

> *"Dit word ontken dat daar 'n botsing van belange is tussen die regsdienste wat tans gelewer word deur skrywer aan die Regspersoon.*
>
> ***Presies dit wat u kliënt deur bemiddeling van ons kantore op ons advies van die onderskeie Regspersone wou afdwing, is deur die Regspersone aanvaar en het hulle versoek dat ons behulpsaam sal wees om die proses te voltooi."*** (Court's emphasis)

And

> *"...maar gaan ons voort om die Trustees by te staan met die*

aanlê van 'n Spesiale Algemene Vergadering en van regsadvies te bedien om die sake van die Regspersone in orde te kry, ooreenkomstig die wense van u kliënt en ooreenkomstig u kliënt se destydse skriftelike opdrag aan ons."

(6) On the following day the attorneys for the applicants threatened to report the respondents to the third respondent and to launch an urgent application, should the respondent not terminate their mandate with the legal entities of Protea Aftree Oord. On the same day a complaint was sent to the third respondent.

(7) On 25 January 2016 the respondents addressed a letter to the applicants' attorneys and set out that according to them there was no conflict of interest as:

*"**Ons benadruk weer dat die Regspersoon slegs implementeer wat u kliënt verlang het en wat hulle wou afdwing en u kliënt sal weldra kennis ontvang van die Spesiale Algemene Vergadering wat aangelê word**. Die optrede wat die onderskeie Regspersone volg is in u kliënt se belang en in belang van alle lede van die Regspersone om te bewerkstellig dat die bepalings van die Deeltitelwet en Regulasies nagevolg word."* (Court's emphasis)

(8) Thereafter the urgent application was launched and served on 26 January 2016. The respondents raised a point *in limine* that the

applicants had not joined the manager of Protea Aftree Oord, Centurion, nor the three legal entities. Applicants contend that it was not necessary to join these entities as they did not exist at this time.

(9) The applicants admitted that the legal entities exist, but argued that no board of trustees had legally been appointed to represent the legal entities. Counsel for the respondents submitted that, at the very least, a *curator ad litem* should have been appointed to represent the three legal entities whose rights and obligations will be affected should a final interdict be granted to compel the respondents to withdraw as attorneys. This is even more so where the applicants admit the existence of the legal entities.

(10) There exist no disputes between the applicants and the respondents at present. The applicants did not set out which dispute is pending, nor did the applicants indicate which documents are still in the respondents' possession. This is important as the respondents argue that the problems that they are assisting the legal entities with the same problems which were the problems the applicants complained of, to legalize a board of trustees in this instance.

(11) In any event, the respondents are not the legal entities' usual legal representative, but are advising the entities and persons involved and assisting them only to set up representatives for all three legal entities. The respondents addressed a letter to the Chairperson of the Board of Trustees on 26 January 2016 setting out:

"Ek verwys na u versoek om te adviseer oor stappe wat geneem moet word om die bestuur van die onderskeie Protea Aftree-Oord Regspersone ("Protea") in lyn te bring met die bepalings van die Wet op Deeltitels, Wet 95 van 1986 en die Regulasies daaronder uitgevaardig.

Vir doeleindes van diè oefening gaan dit nodig wees vir die Trustees om kennisgewing van 'n Spesiale Algemene Vergadering te gee, 'n Voorsittersverslag ter verduideliking van die proses aan die lede voor te hou en het ek dit derhalwe goed geag om met agtergrond-feite in die Voorsittersverslag (hierby aangeheg) te handel.

In kort kom dit daarop neer dat daar nie 'n geldige Samewerkingsooreenkoms vir die gesamentlike bestuur van die 3 Regspersone bestaan nie."

And

"Die probleem met die huidige bestuurstelsel en samewerking tussen die 3 Regspersone ondanks die feit dat die bestuur vir etlike jare vlot verloop het, is ongelukkig in stryd met die bepalings van die Wet en Regulasies en as voorbeeld kan 'n eienaar die locus standi van die Regspersoon betwis waar hy byvoorbeeld aangespreek sal word vir betaling van agterstallige heffings deur die Regspersoon. Dit kan geskied enersyds omrede daar nie 'n geldige verkose Raad van Trustees is ten aansien van elke spesifieke Regspersoon nie, dat begrotings en

derhalwe ook die bepaling van heffings, nie deur 'n geldige verkose Raad van Trustees ingestel is en soos voorgeskryf by Regulasie nie."

(12) The first respondent set out solutions to the Chairperson of how to solve the problem of installing a regular board of trustees in each instance and suggesting three options. There is no indication whatsoever that he was advising in any capacity against the applicants. He sets out in his opposing affidavit that the legal entities have their own lawyer who deals with all other aspects. I have scrutinized the letter carefully and can find no indication whatsoever that he was acting in conflict of interest of the applicants in this regard. There is no mention of the applicants in this letter.

(13) The legal position was set out in **Robinson v van Hulsteyn, Feltham and Ford 1925 AD 12 at 23** as follows:

"In such a case it is not enough to make a general charge against the solicitor that he must have become acquainted with the secrets of his client. Specific instances must be given of confidential information having been given to the solicitor and of this information having been utilised for the benefit of the new client.... He must show to the Court that the respondents did in fact become acquainted with his secrets and that they used the confidential information reposed in them to his detriment." (Court's emphasis)

(14) In **GL Wishart and Others v The Honourable J Blieden NO and Others 659/13 [2014] ZASCA 120 (19 September 2014)** Lewis JA held at paragraph 34, referring to English Law:

> *"While it is now accepted that the lawyers in this matter did not have access to confidential information in respect of the appellants, it is worth noting the English law which has been followed in several jurisdictions. The high court cited the locus classicus in this respect:* ***Prince Jefri Bolkiah v KPMG*** *(a firm) where, after discussing a lawyer's duty to a current client, Lord Millett said:*
>
> > *'Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.*
> >
> > ***Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is***

> ***in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.***'" (Court's emphasis)

And at paragraph 44:

> *"What the law seeks to do in these situations is to protect a former client of a lawyer from being prejudiced by having that representative, in whom trust has been reposed, and who is armed with information about that client, act against him or her."*

This is not the position in the present application, as the applicants did not show any information being used against them in any way. There is no pending application or action against the applicants.

(15) The Law Society of the Northern Provinces filed a letter dated 5 February 2016, after the matter had been heard. The letter takes the application no further and refers to the case law which the court had already dealt with. The only further aspect relates to a document attached to the application which deals with rulings of the Law Society. In paragraph (e) of the document it is set out:

> *"Where proceedings have terminated and the same attorney is thereafter instructed by the adversary in another matter, the former client is not entitled to object to the attorney accepting the brief solely on the basis that the attorney gave him/her legal*

advice and did formal legal work for him/her. ***Specific instances must be given of confidential information having been utilised for the benefit of the new client. It is incumbent upon a complainant to show that as a matter of substance real mischief has been done***" (Court's emphasis)

In this instance no specific instances were given of confidential information being utilised for the benefit of the present client, thereby causing prejudice to the applicants.

(16) I have carefully studied the affidavits, listened to counsel's arguments and applied the principles set out in the **Robinson case** (*supra*) and the **Wishart case** (*supra*). I can find no evidence that the respondents acted against former clients and they did not use confidential information. This is clear from the letter of 26 January 2016. The applicants do not pass the required test, as set out in the authorities, and therefore the applicant cannot succeed.

(17) Accordingly the application is dismissed with costs, including the costs of senior counsel.

Judge C Pretorius

Case number	: 5468/2016
Matter heard on	: 03 February 2016
For the Applicant	: Adv J Rust
Instructed by	: Pieterse & Curlewis Inc
For the Respondent	: Adv Q Pelser (SC)
Instructed by	: Bernhard Van Der Hoven Attorneys
Date of Judgment	: 12 February 2016