

**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

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**CASE NO: A279/2008**

In the matter between:

**NORMAN WOOLF SHARGEY, NO.**

**Appellant**

and

**THE MAGISTRATE, ATLANTIS**

10 **M H ALBERTUS, NO.**

**Respondent**

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**DRAFT JUDGMENT: 31 OCTOBER 2008**

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15 **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:

15 (a) 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)**).

20 (b) 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).

(c) 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.

10 (d) 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  
15 refused 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  
20 matter).

(e) 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  
25 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.

5 (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 reëling tussen die applikant en sy  
prokureur toelaatbaar en/of wenslik is nie."

10 [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).

15 [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-*

20 (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;*

25 (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  
5 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  
10 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  
15 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  
20 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  
25 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  
5 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  
10 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:

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“...‘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  
20 *their debt*.’”

[11] Counsel for the Appellant in argument said:

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“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..."*

5 [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.

10 [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  
15 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  
20 flout 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).

25 [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.*

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[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).

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I accordingly propose that the appeal be dismissed.

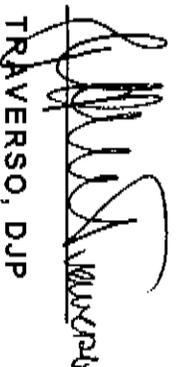
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BAARTMAN, AJ

20 I agree, and it is so ordered.

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TRAVERSO, DJP