court File

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6638/2006

DATE: 5 MARCH 2009

In the matter between:

ALLIE GANIEF N.O. APPLICANT

versus

THE MASTER OF THE HIGH COURT RESPONDENT

JUDGMENT

LE GRANGE, J:

In this matter the Applicant seeks *inter alia* an order setting aside the sale and transfer by Second Respondent acting as First Respondent's ("the Master's") representative, to Third and Fourth Respondents of the immovable property known as erf 132808, Cape Town, situated at 14 Fontein Road, Steenberg, Cape Town ("the immovable property").

First and Second Respondents do not oppose the main relief sought by Applicant, but only oppose the application insofar as it relates to the cost order sought against them. Third and Fourth Respondents appeared in person and recorded that they will abide by the decision of this Court. The rest of the

Respondents did not oppose the application.

The undisputed facts of this matter can briefly be summarised as follows. The mother of the Applicant, the late Asia Ganief, passed away during the course of July 2001. The deceased was survived by nine children, all who are majors. Some of the deceased's children have also passed away pursuant to her death and are survived by their children. The deceased's late estate was reported to the Master by Seventh Respondent. The Master then appointed the Second Respondent, ("Smit"), a practising attorney of this Court, by virtue of a letter of authority dated 10 March 2005, on the assumption that the Applicant's mother died intestate. The letter of authority, in terms of Section 18(3) of the Administration of Estates Act No 66/1965, reports the following relevant information in Afrikaans:-

> *"Hierby word gesertifiseer dat Sybrand Smit bewillig en bemagtig word om die bates in die boedel van w00yle Asier Ganief, identiteitsnommer 0505070050081, wat oorlede is op 12 Julie 2001, soos aangedui in hierdie magtigingsbrief, vermeld, onder beheer te neem, die boedelskuld te vereffen, die eiendomsreg van die restant aan die erfname in gevolge die geldende reg oor te dra:-*

Bates 1 - erf 132808, Kaapstad, Retreat, R85 000,00.

Bate 2 - meubels en ander effekte, R1 500,00.

Totaal R86 500,00."

Pursuant to Smit's appointment as administrator, a valid will attested to by the late Ganief was lodged with the Master on 1 February 2005. The Applicant, in terms of the will, was nominated as the sole and universal heir of the late mother's estate and executor. The Applicant was willing and capable to act as executor or the Master's representative in respect of the estate.

On 3 June 2005, the Master, after applying his mind to the existence of the will, addressed a letter to the Applicant's attorney of record which records the following relevant information:-

"ESTATE LATE: A GANIEF

I acknowledge receipt of your letter dated 21 April 2005 with annexures.

Please be advised that the will referred to was only registered by me on 18 April 2005. I can offer no explanation why it appears that the will was lodged with me on 1 February 2005 already.

My letter of authority to Sybrand Smit issued on 10 March 2005 will therefore now be withdrawn."

Despite this letter to the Applicant's attorney, a letter of authority in terms of Section 18(3) of the Administration of Estates Act was only granted to the Applicant on 3 February 2006. Smit in the meantime purportedly concluded an agreement of sale with Third and Fourth Respondents on 19 August 2005 for the purchase and sale of immovable property. Notwithstanding the decision by the Master to terminate Smit's authority as early as June 2005, Smit was only formally notified in writing of the withdrawal of his authority on 20 February 2006. The immovable property in question was registered and transferred in the names of Third and Fourth Respondents on 7 February 2006. A mortgage bond in favour of Fifth Respondent was also registered over the property.

Smit also, purportedly on instructions from certain of the intestate inheritors, paid an amount of R10 000,00 to a firm of attorneys for the eviction of persons who allegedly occupied the premises of the late Ganief unlawfully. Smit apparently was not aware of the existence of the Applicant. It was only after the Applicant was appointed as the administrator that he

became aware that the immovable property was sold to the Third and Fourth Respondents.

Against this factual background, the Applicant launched these proceedings.

Mr Warner appeared on behalf of the Applicant, Mr Madima appeared for the First Respondent and Mr Benade for the Second Respondent. Mr Madima and Benade correctly conceded from the outset that the main relief should succeed.

The only dispute for determination now remains who should be liable for the costs of the Applicant in these proceedings. Mr Warner intimated that applicant will not seek a costs order against Third and Fourth Respondents. Mr Madima in brief contended that the Master is not solely to blame for the state of affairs where Applicant finds himself and that Smit should jointly be held liable for the costs incurred by the Applicant as he exceeded his mandate of the Master in selling the immovable property of the estate. Mr Benade argued that Smit did not oppose the main relief sought by Applicant, but was compelled to oppose the costs order sought against him. He further contended that Smit, at the time of entering into the deed of sale with Third and Fourth Respondents, was under a *bona fide* impression that he was still duly appointed and

authorised by the First Respondent to act in accordance with his mandate. It was further contended that the Applicant or the Master should bear the Second Respondent's costs incurred in this application.

The general rule is that costs follow the event, subject to the basic principle that costs are in the Court's discretion. This discretion must be exercised judicially upon a consideration of the facts of each case and to ensure basic fairness to both sides. The following dictum in Re Alluvial Creek Limited, 1929 CPD 532 at page 535, is also instructive:-

> *"There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of the courts, yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."* See also Johannesburg City Council v Television and Electrical Distributors (Pty) Limited, [1997]1 All SA 455 (A) at 472E – F / 1997(1) SA 157 (A).

In *casu* the approach and attitude adopted by the First Respondent to oppose the costs order sought by the Applicant, having regard to the undisputed facts in this case, borders in my view to be vexatious. In the answering affidavit filed on

behalf of First Respondent by the assistant Master of the High Court, the following, at paragraph 23 are recorded:-

"23.2 First respondent has to deal with voluminous amount of files on a daily basis. First respondent faces problems of lack of human resources, infrastructure and a paucity of experienced staff in the performance of its duties.

23.3 When the estate filed in question was initially opened, first respondent administered it on the basis that the deceased had died without a will. Second respondent was then appointed as administrator of the estate. All first appointments are dealt with by a particular section of first respondent.

23.4 When it was discovered that a valid will indeed exists, applicant was to be appointed as executor and second respondent's appointment was to be terminated. The file was then moved to yet another section that deals with subsequent appointments.

23.5 It was during this period that the file became victim of the poor infrastructure of first respondent and its concomitant lack of

experienced staff and other resources.

23.6 The appointment of an executor and the removal of second respondent had to be done at the same time. The law does not allow for a vacuum to exist. The removal of second respondent as administrator and the appointment of applicant were effective on 2 and 3 February 2006 respectively.

23.7 I wish to reiterate that the delay was not wilful and mala fide in any way. First respondent's main deliverable is the service to members of the public. Any undue delay is greatly regretted by first respondent."

It is evident from these admitted facts that as a direct result of the Master's systemic problems in its office it failed to perform its functions with due care and diligence. It took the Master's office almost six months to terminate in writing Second Respondent's authority and no plausible reason for this delay has been advanced, other than what Mr Madima in his heads of argument stated, namely *"In first respondent's office, it is rare to find that the left hand knows what the right hand is doing, let alone where the right hand is at any given time. This is typical of the most State departments. It is not acceptable, it is a legacy of the past, and is being addressed."*

It is as a direct result of this inexcusable state of affairs that the office of the Master has caused the Applicant, including Third and Fourth Respondents, to incur unnecessary costs. Moreover, if it is so rare in the office of the Master to find, and I quote the words of Mr Madima *"That the left hand knows what the right hand is doing, let alone where the right hand is at any given time"* then it is difficult to comprehend on what possible grounds did the Master oppose the costs order in this instance other than to protract this matter and incurring further unnecessary costs. The attitude adopted by the Master in this matter was so unnecessary that it will only be just equitable to make an appropriate costs order against the First Respondent.

The contention by Mr Madima that Mr Smit should also bear the brunt of an appropriate costs order is without substance. I cannot find, on a conspectus of the papers filed in this case, that the Second Respondent acted unreasonably or *mala fide* in the execution of his duties as administrator. It will be unreasonable and unjust to burden him with a costs order.

In the result, the following order is made:-

1. Rescinding and setting aside the sale and subsequent transfer of the property known as erf 132808, Cape Town

at Retreat, situated at 14 Fontein Road, Steenberg, Western Cape, ("the immovable property"), from the estate of the late Asier Ganief, the Third and Fourth Respondents.

2. Sixth Respondent is directed, subject to due compliance with all his reasonable and/or statutory requirements, to amend its records to reflect the late Asia Ganief or her estate as the owner of the immovable property.

3. Third, Fourth and Fifth Respondents are respectively directed to, against a refund of the purchase price paid for the property or any monies lent in advance by it, sign all documents and to do all things necessary to:-

3.1 give effect to the provisions of paragraph 1 and 2 above; and

3.2 cancel the mortgage bond registered over the property.

4. The sheriff of this court is authorised to take all such steps contemplated in paragraph 3 on the Respondents' stead and behalf in the event of the latter failing to do so within seven (7) days of demand.

5. The First Respondent is liable for the payment of any such shortfall in the event that any of the proceeds of the abovementioned sale of the property having been utilised and not available for refund to Third, Fourth and/or Fifth Respondents.

6. First Respondent to pay the costs of Applicant and Second Respondent in this matter, including the costs of the Applicant under case No 5373/2006 in this division.

LE GRANGE, J