IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A130/14

In the matter between:

JILL ABRAHAMS Appellant

And

NORMAN WOOLF SHARGEY N.O. First Respondent

(In his capacity of Administrator of the estate of the Appellant, in terms of section 74 of the Magistrates' Courts Act 32 of 1944)

VARIOUS CREDITORS Second Respondents

Before: BINNS-WARD et BOQWANA JJ

JUDGMENT DELIVERED: 18 DECEMBER 2014

BOQWANA, J

[1] The appellant was placed under administration by the Paarl Magistrates' Court in terms of section 74 of the Magistrates' Courts Act 32 of 1944 ('the Act') on 12 September 2007 and the first respondent appointed as the administrator of here state. The appellant was ordered to pay an amount of R250.00 per month to the first respondent for distribution to her creditors. The first payment was to be

made on or before the last day of September 2007 and thereafter before the last day of every subsequent month for *pro rata* distribution to the creditors.

[2] The appellant brought an application to the Paarl Magistrates' Court seeking, amongst others, the removal of the first respondent as administrator. The application came about as a result of her professed displeasure with the manner in which the first respondent administered her estate, which, she alleged made him unfit to act as administrator of her estate. She alleges in her application that: the first respondent deducted fees and expenses in excess of the limit of 12.5% plus VAT provided for in the Act; he made payments without the necessary accounts being taxed; he made payments that were not due and owing; he failed to account to her regarding attorney's fees or legal costs reflected in the distribution accounts; he held back more monies for security purposes than required by the Act and did not respond to her queries. She accordingly did not trust him to handle her estate.

[3] It appears from the judgment in the court *a quo* that points *in limine* were raised on behalf of the first respondent regarding the competence of the orders sought by the appellant in her application. It was submitted on behalf of the first respondent that prayer 3 was not sought as an alternative to prayer 2 and that prayers 1 and 3 were irreconcilable. Secondly, prayers 3(a)(ii) and (iii) were *ultra vires* the powers of the magistrate in that the court was asked to order that creditors who were willing to write off 50% of their claim would have the balance of their claim treated preferentially, which a magistrate could not do if one had regard to the provisions of section 74J of the Act. The third issue was that an assumption was made that excessive costs were deducted without any taxation having been done.

[4] The magistrate gave a judgment upholding the points *in limine* and did not deal with the merits of the application. He further found that the allegation that the first respondent charged excessive costs was premature in that no taxation had been done of the costs. He held that the appellant could still approach the Court once taxation had been carried out.

[5] It was submitted on behalf of the appellant that the magistrate failed to apply his mind to the seriousness of the allegations made by the appellant against the first respondent. The magistrate was further criticised for expressing a view that taxation should be pursued as a remedy before an application is brought to court for the removal and replacement of the first respondent as an administrator. Ms Williams SC, who appeared on behalf of the appellant, argued that the magistrate's view was disquieting in circumstances where the first respondent simply took fees without the appellant's knowledge and consent, and without having produced a single bill, let alone a taxed bill. She submitted that there was no requirement that an application for the removal of an administrator can only be made after a bill has been taxed and that the court *a quo* had incorrectly side-stepped the merits in this matter. Ms Williams further argued that the first respondent offered no explanation in his papers to account for the discrepancy between monies received by the first respondent and those reflected in the distribution account.

[6] It is perhaps appropriate to outline the relevant orders sought by the appellant in the court *a quo* at this stage as the judgment of the magistrate centred around them. The relief sought by the appellant was, *inter alia*, the following:

1. *That the first respondent be removed from his appointment as administrator in the estate in terms of section 74E(2) of the Act;*
2. *That the court appoints another person in the place of the first respondent as administrator of the estate;*
3. *That the administration order granted by the Magistrates' Court be re-opened on terms of section 74Q(1) of the Act;*
    a) That the administration order be amended as follows:
        (i) The first respondent's appointment as administrator of the estate in terms of section 74E(2), alternatively section 74Q(1), further alternatively section 74J(11) of the Act, in terms of the Court order be suspended;

(ii) That the administrator be authorised to redeem the indebtedness of any creditor where the debt is less than the amount paid over to him by the appellant;

(iii) That any creditor willing to write off 50% of his debt, be listed as a preferent creditor and that such creditor's debt, be paid prior to those of other creditors.

[7] I start with the points *in limine* relating to insolvency laws. Section 74J(1) requires the administrator to distribute payments *pro rata* among the creditors at least once every three months, unless all the creditors otherwise agree or the court otherwise orders in any particular case. The appellant's counsel argued that the magistrates' court had powers to order preference of creditors based on the provisions of sections 74J(1) and 74C(1)(v). The submission made on behalf of the appellant is in conflict with the provisions of section 74J(3) which prescribes that a scheme of preference is to be followed in accordance with the insolvency laws. That provision specifically stipulates that -

> 'Claims that would enjoy preference under the laws relating to insolvency shall be paid out in the order prescribed by those laws.'

[8] Therefore the scheme of preference provided for in the Insolvency Act is the scheme that the administrator must follow. Furthermore in terms of section 74J (2) a claim may only be paid in full if the balance thereof is less than R10.00. The magistrate was therefore correct that preference to creditors had to be given as prescribed by the insolvency laws and not by way of a *mandamus* inviting creditors to agree to a scheme in terms of which they would be given preference, if they were willing to give up 50% of their claim. The relief sought on that basis was correctly held to be *ultra vires* the magistrate's powers.

[9] As regards the second point *in limine*, *s*ection 74Q of the Act deals with suspension, amendment or rescission of an administration order. The difficulty that the magistrate had was that the relief sought in terms of that section had not been sought in the alternative to the removal of the first respondent in terms of section

74E and appointment of a new administrator. He found prayers 1 and 3 to be irreconcilable and not capable of being granted at the same time. That finding seems to be in order in my view. That, however, does not mean that prayers 1 and 2 could not be considered on their own.

[10] Turning to the third issue, which was central to the application before the magistrate. The allegation against the first respondent is that he deducted excessive costs to which he was not entitled. The issue is whether the magistrate was wrong to have held that taxation ought to have been done before an application for the removal of the first respondent was brought to court.

[11] Section 74L of the Act deals with the remuneration and expenses of the administrator. It provides as follows:

> **'74L. Remuneration and expenses of administrator.**—(1) An administrator may, before making a distribution—
>
> (a) deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules;
> (b) retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.
>
> (2) The expenses and remuneration mentioned in subsection (1) (a) shall not exceed 12½ per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer. (Own emphasis)

[12] The appellant alleges that the first respondent has taken fees amounting to R5 413.82 whereas he was entitled to only 12.5% plus VAT which amounts to R2 072.50. It is alleged that he has taken R 3 341.62 more than he had been permitted to in terms of the Act. The administrator is also criticised for deducting an amount of R1000.00 to bring an application for administration without sending the appellant notice of such an account and subjecting it to taxation so she could ascertain how the amount was calculated. Furthermore in distribution accounts

numbers 1 to 4 under the heading *'Attorneys' charges in terms of section 65'* no indication was given as to what the payments referred to related and to whom they were paid. Similarly with distribution accounts 5 to 16 under heading *'Legal costs'* no indication is given as to what these payments were for and to whom they were paid.

[13] The first respondent's response to these allegations is that an administrator who does legal work himself for an estate under his administration is entitled to charge recoverable legal costs and those are not capped by 12.5%.

[14] Both counsel referred to the Supreme Court of Appeal decision in **African Bank Ltd v Weiner and Others 2005 (4) SA 363 (SCA).**At paragraph 46 of that judgment Cameron JA held as follows:

> '46.1 The 'costs' the administrator may have to incur in terms of s 74L (1) (b) are separate and distinct from the ordinary expenses of an administration. They are not included under 'necessary expenses and remuneration'. The 12.5% cap does not apply to them. They can be separately re recovered.
> 46.2 The R30 retention permitted in terms of s 74L (1) (b) does not limit the costs that can be recovered under that provision.
> 46.3 Where a debtor defaults or disappears, and the administrator employs an attorney, the latter's reasonable charges for the authorised steps, duly taxed and scrutinised, will be 'costs' under s 74L(1)(b).
> 46.4 An attorney who is appointed as an administrator in terms of s 74E (1) acts in the capacity of an attorney throughout: he or she does not dispense with professional functions or duties at any point in the administration. He or she takes both the benefits and the burdens of an attorney's professional position and responsibilities.
> 46.5 For the purposes of s 74L(1)(b) this means an attorney-administrator can carry out the legal work required by the section, and charge the reasonable costs so incurred to the administration...' (Own emphasis)

[15] It is quite clear from the **African Bank** decision above that the first respondent, who is also a practising attorney, is permitted to charge reasonable amounts as fees over and above the 12.5% cap allowed in the Act, for work

performed as an attorney. On perusal of the distribution accounts remuneration and expenses are listed separately from legal costs. On the face of it, it seems that the appellant has combined the two items dealing with the amounts paid to the administrator, in her calculations, in coming to the conclusion that there has been an overreach. If the item on remuneration and expenses is looked at separately from the item on legal costs, it may well be that there is no breach of section 74L, as the bulk of the 'contested' fee appears to be under 'legal costs'.

[16] The appellant's contention is that the first respondent should have given an explanation as to what legal work he actually did as the appellant has no knowledge of it and never consented to such legal work. According to her, the first respondent is not entitled to simply take an amount as fees. Whether or not the first respondent did any legal work or whether the amount charged for that legal work is excessive is a separate issue which does not fall under section 74L in my view. It is an issue that ought to be resolved by utilising section 74J (6). That section states that -

> '(6) A distribution account referred to in subsection (5) shall at the request of any interested party **be subject to review free of charge** by any judicial officer.(Own emphasis)

[17] Section 74J(6) provides a mechanism that is free of charge, which is aimed at avoiding unnecessary expenses when an interested party, such as the appellant, has queries with the distribution account having inspected it. Furthermore, such inspection is also free of charge as provided for in section 74J (5). The appellant did not utilise section 74J (6) and her reasons for not doing so are not very clear apart from the submission that there was no taxed bill of costs and that it was the responsibility of the first respondent to provide invoices and to tax the bill for the legal work that he did (seemingly before any deductions could be made).

[18] There is no legal requirement for the administrator to provide a taxed bill before deductions are made, nor is it required of an attorney to tax an invoice before he or she can charge a client. Section 80(3),which the appellant's counsel

relied on, does not apply in this case as costs were not awarded by a court. In **Chapman Dyer Miles v Moorhead Inc v Highmark Investment Holdings CC and Others1998 (3) SA 608 (D) at 610 D - E,** the Court held that:

> 'It is settled law that taxation is not a prerequisite for the institution of action on a bill of costs but that, if a client insists on taxation, the action cannot proceed until the bill has been taxed, and that this applies in cases in which fees were not agreed between the parties.'(Own emphasis)

[19] We know in this present matter that the appellant did not request taxation of the costs. She was well within her rights to have required taxation of the 'disputed' costs but she failed to do so. In the absence of taxation how was it expected of the magistrate to determine that costs charged by the first respondent were excessive, warranting his removal? The request for taxation would trigger an obligation from the first respondent to produce a bill. The submission that the appellant was prevented from requesting for taxation because there was no bill of costs is not sustainable.

[20] I am in agreement with the magistrate that the appellant should have first followed the taxation route followed by a review, I should add, before bringing an application for removal of the administrator. This would have been beneficial not only because it is cheaper but also because the court on review would be able to ascertain whether or not there was an overreach. Once that had been established, the appellant would have objective grounds of bringing the application for the first respondent's removal as the administrator.

[21] It was submitted on behalf of the appellant that an amount of approximately R1000 is unaccounted for. A schedule prepared by the appellant's attorney, Mr Matthee, was attached to the founding affidavit. It is alleged by the appellant that the administrator received an amount of R 14 541.75 from the appellant, but only accounted for R13 431.25 in his distribution account as the amount received. From my own calculation of amounts received in the distribution account I get a total

figure of R13 411.25. That is not material in that I read the amount for 31 October 2011 to be R965.75 whereas Matthee recorded it as R985.75.

[22] The first respondent alleges in his answering affidavit that the total received was R14 781.25. He attaches a list of payments received by him in terms of section 74J (1) which reflects amounts received from the period of 28 September 2007 to 7 August 2013. In terms of that list, the total received for that period is R16 881.25, of which R 2100.00 comprised payments returned unpaid, leaving the net amount actually received as 14 781.25. A similar list ending 27 May 2013 was received by the appellant from the first respondent and attached to the founding affidavit (JA 4.1 and JA 4.2). The net received according to the first respondent in that list of payments as at 27 May 2013 was R14 531.25. An amount of *R850* is added in handwriting (presumably by the appellant or her attorney) next to the date of 27 May 2013. The same amount of R850 appears on Matthee's schedule as part of what adds up to the total of the alleged R14 541.75 paid to the first respondent. The list of payments schedule attached to the founding papers reflects a net amount of R1100.00 as an amount received between the periods of 28 September 2012 to 27 May 2013, leading to the total of R14 531.25.

[23] It is important to note that the last distribution account attached in the founding papers **is for the distribution period ending on 31 July 2012** whereas the list of payments both in the founding and answering papers end in May and August 2013 respectively. The total payments received in terms of the list of payments received and the distribution account schedule compiled by Matthee do not correlate. Firstly, because the last distribution account is as at 31 July 2012 whilst the list of payments goes to payments made up to May 2013. Secondly there are a number of payments returned after July 2012 which, understandably, are not reflected in the distribution accounts. The appellant did not disclose the non-payment periods in her founding papers. It also appears that an application to rescind the administration order was issued due to the appellant's alleged default.

[24] The allegation that an amount of approximately R1000 of payments received is unaccounted for may or may not be correct. Whilst an amount of R1100 is disclosed in the payments received schedule compiled in terms of section 74J(1) in respect of the period post 31 July 2012, it is not clear whether or not it was distributed and whether a distribution account was prepared. Be that as it may, it seems to me that the most sensible route of dealing with this would be for the appellant to apply to the magistrate for an order in terms of section 74J (11) directing the administrator to produce the distribution account to the clerk of the court before taxation of costs and/or review of the distribution account whichever route the appellant chooses to follow. If an amount which should have been distributed has not been, the first respondent must give reasons why. The actual position is not clear enough on the papers to have warranted the court *a quo* drawing an adverse inference against the first respondent on the papers such as to justify relieving him of his office as administrator.

[25] The appellant's counsel referred us to the unreported decision of **Coetzee v Erasmus N.O. & Others, case number A682/10** in which a similar application was brought. In that matter Le Grange J (Zondi J concurring) upheld the appeal against the dismissal of an application for the removal of an administrator and ordered costs to be paid by the delinquent administrator *de bonis propriis*. Although the court in **Coetzee** took a dim view of the inconsistencies appearing in the distribution accounts, the issue that seemed to have particularly troubled it was the breakdown that had occurred in the relationship between the parties borne out by the scathing remarks reflected in the first respondent's answering papers and the conflict of interest between first respondent and a certain creditor by the name of Omnifin. The distribution account and Omnifin's account both had the same reference numbers. It appeared that Omnifin charged the appellant for preparing papers in the application for administration. There was nothing to suggest that Omnifin was entitled to do legal work. The court found it untenable that both the administrator and Omnifin could charge for the same work. The administrator's

impartiality and independence were highly questionable. The facts in this case are distinguishable.

[26] For these reasons, I find no basis to interfere with the magistrate's judgment.

[27] I therefore propose an order in the following terms:

1. The appeal is dismissed with costs.

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N P BOQWANA

Judge of the High Court

I agree, and it is so ordered

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A G BINNS-WARD

Judge of the High Court

APPEARANCES

FOR THE APPELLANT: Advocate RT Williams SC

Instructed by: Matthee Attorneys, Somerset West C/O MacRoberts Inc., Cape Town

FOR THE FIRST RESPONDENT: Advocate J De Pontes

Instructed by: Van Eeden Beirowski Inc., Goodwood