IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **4282/2017**
Date heard: 03 May 2018
Date delivered: 21 May 2018

In the matter between:

GEOFFREY MARTIN COOK Applicant

and

SEABUSH INVESTMENTS (PTY) LTD Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

[1] In this matter, and on 13 September 2017, Applicant launched an urgent application for 21 September 2017 giving effectively five court days in which the matter was to be dealt with. Respondent opposed the matter and filed affidavits on 18 September 2017, the matter coming before me on 21 September 2017. Respondent launched an urgent counter-application, seeking that the deponent to the founding affidavit, Murray Morrison *("Morrison"),* be joined as Second Respondent in the counter-application, and seeking that if the main application was dismissed with costs such costs be recoverable from Second Respondent on an attorney and client scale

– this counter-application being opposed. Having heard full argument, I found essentially that the matter, such as it may have been found to be urgent, was urgency largely self-created, and that the matter was to be struck from the roll. I made an order accordingly, making it clear that this carried with it an order as to costs against Applicant in Respondent's favour, but having regard to the counter- application, reserved the scale of these costs and whether or not Morrison should be ordered to pay these personally, should I find that he should be joined in terms of the counter-application.

[2] The reasons for my order above are fully set out in the *ex tempore* judgment which I gave on the day. On 7 December 2017 the matter came before me again, Applicant being of the view that there were two issues to be argued, the first being what it referred to as the main application (on the merits of that application on a non-urgent basis), the second those issues reserved as to costs, joinder and the scale thereof.

[3] In dealing with whether the main application had been properly set down before me at all, I ruled that this was not the case and I once again struck the matter from the roll with costs, making a further order in respect of the costs part of the urgent application:

> "1. THAT the *"main application"* is not properly before me and is to that extent a nullity. To the extent necessary it is struck from the roll with costs.
>
> 2. THAT the argument in respect of costs in the urgent application the joinder of Morrison, the scale of those costs and his liability in respect thereof are postponed *sine die* on the following terms and conditions:

2.1 Murray Craig Morrison is afforded the opportunity of filing a further affidavit relevant to the three issues raised in the counter-application alone and only those issues, should he wish so to do, particularly relevant to paragraphs 2 and 3 and their consequence in the counter-application, under Notice of Motion dated 18 September 2017, that affidavit to be filed on or before 15 January 2018.

2.2 Applicant in the counter-application is afforded an opportunity to reply thereto by affidavit should he wish to do so on or before 30 January 2018.

2.3 Either party is given leave to set the matter down for argument on an appropriate day and date, on notice to the other party and the registrar.

3. THAT the costs occasioned by the postponement of issues referred to in paragraph 2 above are reserved for further argument and decision on the resumed hearing relevant to costs in the urgent application."

[4] In due course, and in circumstances of some discontent, further affidavits were eventually filed, and indeed some additional affidavits which it was agreed were properly before me at the end of the day.

[5] In due course, and once again, the matter was set down for argument, Heads of Argument being filed. It was apparent that Applicant, right up until the day of argument, was of the view that the issues in the main application were to be argued, as also the question of costs. Respondent quite correctly pointed out that on what was before me, it was only the costs issue and joinder that were to be argued. In due course and apparently on the day prior to the application being argued, alternatively on the day of argument, Applicant's attorneys and counsel withdrew and Morrison appeared on his own behalf in the counter-application accepting that it was only joinder and costs that remained for argument on what was before me.

[6] To say the least, considerable argument was advanced on both sides of the matter continuing for some hours. I reserved judgment, and need deal only with the joinder of Morrison, the scale of costs relevant to the main application, and the subsequent applications, as also the issue as to whether or not Morrison, if joined, is liable to costs personally and on the attorney and client scale.

[7] I wish to make it clear, that I have already determined that costs of the two applications brought be awarded against Applicant in Respondent's favour, it only being the scale and from whom these were to be recovered which was left open. The costs of the final day of argument referred to above, as also from whom these are recoverable and on what scale, also required to be decided.

THE LEGAL ISSUES

[8] The legal principles governing costs *de bonis propriis*, in respect of companies, as an example, is fully set out in Van Loggerenberg *et al Erasmus Superior Court Practice* [Service 45, 2014] at E12-27:

> "It is unusual to order an unsuccessful litigant in a fiduciary capacity to pay out of his own pocket. The general rule is that a person suing or defending in a representing capacity may be ordered to pay the costs *de bonis propriis* if there is a want of *bona fide* on his part or if he acted negligently or unreasonably. No order will be made where the representative has acted *bona fide*: a mere error of judgment does not warrant an order of costs *de bonis propriis.*
>
> Whether a person who acts in a representative capacity has acted *bona fide*, with due care and reasonably, must be decided in the light of the particular circumstances prevailing in the case with which the court is concerned.
>
> The fact that the party has substantial personal interest in the outcome of the matter constitutes an important factor in shaping such a decision. In judging whether a representative party's

conduct is reasonable or not, one must approach the matter not from the point of view of a trained lawyer but from the point of view of a man of ordinary ability bringing an average intelligence to bear on the question in issue.

A person acting in a representative capacity who institutes an action in circumstances in which he can have no certainty that the action will be successful, and makes no provision for the defendant's costs, may be ordered to pay a successful defendant's costs *de bonis propriis.*"

[9] In *Law of Costs*[1], the following was said relevant to costs *de bonis propriis* and costs on the scale between attorney and client:

9.1 "**10.22 The underlying principle of awards of costs *de bonis propriis***

The principle of awarding costs *de bonis propriis* is applicable only where a person acts or litigates in a representative capacity.

It is unusual to order an unsuccessful litigant in a fiduciary position to pay costs *de bonis propriis*. There must be good reasons for such an order, such as improper or unreasonable conduct or lack of *bona fides.* In *Vermaak's Executor v Vermaak's Heirs*[2] Innes CJ said:

> "The whole question was very carefully considered by this court in *Potgieter's* case, 1908 TS 982, and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable."

The basic notion behind awards of costs *de bonis propriis* is material departure from the responsibility of office, which would include absence of *locus standi*. It seems that costs *de bonis propriis* will, however, be awarded against a person who, in a representative capacity, institutes action without making provision for the defendant's costs and then loses the case, where he or she had no certainty or could not have had any certainty of being successful[3].

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[1] AC Cilliers Butterworths

[2] 1909 TS 679 at 691

[3] *Venter v Scott* 1980 (3) SA 988 (O) 994, applying *Caldwell's Trustee v Western Assurance Co* 1918 WLD 146.

...

10.26 Other litigants

There are a number of other litigants, not dealt with above, whom the court will, in a proper case, order to pay costs *de bonis propriis.* These include company directors[4], liquidators, administrators and even insolvents.

9.2 "**4.09 Attorney and client costs are not readily granted**

The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs, and will grant such costs only on *"rare"* occasions. It is clear that normally the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present. Where the court would in the light of the other facts not have hesitated to make an award of attorney and client costs, it refused to do so where there were faults on both sides, as it considered itself not justified in penalising one side only. In *Van Wyk v Millington* it was pointed out that the court's reluctance to award attorney and client costs against a party is based on the right of every person to bring his complaints or his alleged wrongs before the court to get a decision, and he should not be penalised if he is misguided in bringing a hopeless case before the court. If, however, the court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs."

9.3 "**4.13 Vexatious and frivolous proceedings**

Conduct which is vexatious and an abuse of the process of the court may form the basis for an order that costs should be paid on an attorney and client scale, even though there is no intention to be vexatious. Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his harassed

[4] *Trek Tyres Ltd v Beukes* 1957 (3) SA 306 (W); *Registrateur van Banke v Clanwilliam-Eksekuteurskamer Bpk* 1972 (4) SA 387 (C); *Francarmen Delicatessen (Pty) Ltd v Gulmini* 1982 (2) SA 485 (W); *Corigrain Trading SA v Resora (Pty) Ltd* 2004 (2) SA 348 (W) 353. *Cf Huworths Property (Pty) Ltd v Poynton* 1962 (4) SA 117 (D) (order not granted); *BS Finance Corporation (Pty) Ltd v Trusting Engineering (Pty) Ltd* 1987 (4) SA 518 (W); *Crundall Brothers (Pvt) Ltd v Lazarus* 1991 (3) SA 812 (ZH) (Costs *de bonis propriis* can, in a proper case, be ordered against a director who has made an affidavit in legal proceedings); *Von M Schimper v Monastery Diamond Mining Corporation Ltd* par 32 (Free State Case No 551/2006, delivered 22/01/2006); *Venbor (Pty) LLtd v Vendaland Development Company (Pty) Ltd t/a Campstore* 1989 (2) SA 619 (V) (consideration given to ordering directors of a company to pay costs *de bonis propriis* when they acted frivolously and in total disregard of the rights of an applicant in litigation proceedings); *Coetzee v National Commissioner of Police* (7025909) [2010] ZAGPPHC 155 (par 74) (11 October 2010); 2011 (2) SA 227 (GNP) 259

opponent to be out of pocket in the matter of his own attorney and client costs, but this is not an exhaustive list."

9.4 "**4.16 Reckless or malicious proceedings**

Where a party has acted recklessly or maliciously in instituting proceedings the court will often award costs on an attorney and client scale against the unsuccessful litigant …. "
[Footnotes omitted]

[10] As was apparent from my two *ex tempore* judgments, I considered the urgent application brought by Applicant to have been launched with undue urgency, and in circumstances in which that urgency was largely self-created. I should mention, that the relief sought was wide ranging, and in point of fact went far outside that required for the purposes of the urgent application at all, more especially that this was sought pending the final determination of the Applicant's eviction application against Respondent under case number 3668/2014. At the hearing of the urgent application, counsel for Applicant made no attempt to limit the relief sought. In my assessment, on the facts of that urgent application, Applicant could in no circumstances have been successful in respect of the wide relief sought, and had any relief been justified on an urgent basis, this would have had to be much reduced in its terms.

[11] It is to be particularly noted, that at this stage of the proceedings, and in the further affidavits filed, the deponent Morrison indicated that it was no longer Applicant's intention to proceed with the eviction application under Case Number 3668/2014. In that event, the relief in the urgent application effectively thus fell away, it being dependent upon case number 3668/2014 being brought. Morrison further deposed to the fact that whilst he had at one stage believed it was the correct thing to do to bring

an eviction application, as matters developed and with the benefit of further advice it was decided to await the outcome of the Respondent having exercised his appeal remedies in other disputes between the parties. It was said in similar terms, that the intended liquidation of Applicant would also be abandoned as it had become apparent, so it was said, that the creditors of Applicant might be better served if the entity was not liquidated. This of itself demonstrates Applicant's and Morrison's willingness to rush into seeking relief on a tenuous basis.

[12] It is also highly relevant to state that in respect of the joinder application, Morrison deposed to the fact that in all previous proceedings, where Applicant was involved, he personally paid the costs when awarded against Applicant as *"Seabush has no funds with which to make payment of cost orders"*. He then said that if the Court made a costs order against Applicant in this matter: *"[applicant]… will not be able to have payment made to him out of the Seabush bank account.".* He said that he would not tolerate Applicant's immovable property being sold in execution which is why he had paid all previous cost orders out of his own pocket, as he put it. He then went on to say in the present matter: *"I therefore undertake in favour of Cook that I will make payment of any cost order which the Honourable Court seeks to award against Seabush. I would have done this even in the absence of such an undertaking in order to preserve the asset which I believe belongs not to Cook or to me but to the MMIP unit holders."*.

[13] What is apparent from this, is that the Applicant, does not have, and it was conceded in argument, never had funds from which a cost order could have been satisfied, save possibly by execution against the immovable property, which also turns

out to be in fact unattainable. In argument, Morrison backtracked from his undertaking, to the extent that he was unprepared to have that undertaking made an order of Court against him personally, he persisting in his effort to avoid the joinder application.

[14] In essence and contrary to the contents of his affidavit it was, he said, his intention, not to undertake in favour of Respondent that he would make payment of a cost order, but that he would make payment of those costs to Applicant which would in turn pay them, insofar as was awarded to Respondent.

[15] I have no intention of repeating what I said in my earlier judgments which speak for themselves. It need only be said that I concluded that in light of the relief sought in the urgent application, this could never have been granted in those terms against the background disclosed, and was doomed to failure on the merits in that regard. I also concluded that in the Morrison founding affidavit he had been coy in disclosing the relevant facts in respect of his discovery as to dates, times and places when Applicant had become aware of the party and the alleged risks to Applicant thereby. I found that Morrison had been deliberately vague on this aspect and that he had clearly been aware of the intended party well prior to the launching of the urgent application. Notwithstanding Morrison's attempts in argument, I am not persuaded that in fact he was only aware of the party itself at an earlier stage, and only became aware of the numbers of guests involved (this being the jurisdictional trigger to the application), shortly before it was launched. The supporting affidavit of Mrs Julie-Ann Hutchinson cuts across this suggestion and in my view falls to be accepted.

[16] In any event, even had that been the case, the application itself could not have succeeded in respect of the broad relief sought, and is at this stage entirely stillborn,

Applicant intending not to proceed with the eviction application upon which the entire matter hinges.

[17] Against this background and in the context of my criticisms of the application in my two judgments, and above, it is more than apparent that from the outset of the application, that it was fraught with difficulty on a number of levels, which went beyond merely the urgency issue, and at all times Morrison was aware that if Seabush's application was dismissed at any stage, Seabush itself would not be in a position to meet the costs, and that absent his standing in, the only possible source of satisfaction would have been the sale of the immovable property, which would in any event having regard to Applicant's financial position nevertheless remain unpaid.

[18] Both applications were misconceived, and it is more than difficult to conclude that they were brought *bona fide*.

[19] Against the tests set out above, and notwithstanding Morrison's attempts in argument, there can be no doubt that the counter-application must succeed, Morrison to be joined, and he be ordered to pay the costs of the application *de bonis propriis*, and further, in the circumstances, on the scale as between attorney and client.

[20] This must apply to all the costs occasioned in the matter, and in the circumstances the following order issues:

1. Murray Craig Morrison is joined as the Second Respondent in the Counter-Application;

2. In respect of the costs occasioned in this matter, Murray Craig Morrison is to pay those costs in his personal capacity on the scale as between attorney and client, such costs to include:

2.1 those occasioned in respect of the urgent Application on 21 September 2017;

2.2 those occasioned by the main Application on 7 December 2017;

2.3 such costs as was separately occasioned by Applicant having sought a postponement of the costs argument of the Application on 7 December 2017;

2.4 such costs as were occasioned in respect of the Counter-Application itself.

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M.J. LOWE
JUDGE OF THE HIGH COURT

Obo the Applicant: Mr Murray Morrison

Obo the Respondent: Adv K Hopkins
Instructed by: Denton's, Johannesburg

c/o Wheeldon Rushmere & Cole, Grahamstown