REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/14740

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

6/10/2014 .....
DATE

..... SIGNATURE

In the matter between:

FRANKLIN BRAIN	First Applicant
STEPHENS MICHEAL JOHN	Second Applicant
and	
SABY CHERALEE	Respondent
In re:	
SABY CHERALEE	Plaintiff
and	
FRANKLIN BRAIN	First Defendant
STEPHENS MICHEAL JOHN	Second Defendant

SUMMARY

Civil procedure – costs – party withdrawing action – institution of action in circumstances when plaintiff possessed all the information claimed in action – dilatory and lackadaisical approach adopted by plaintiff and attorney of record to litigation – subsequent withdrawal of action in terms Uniform Rule 41(1)(c) – punitive costs order on the scale as between attorney and own client or attorney and client – costs *de bonis propriis* against attorney – when to be granted – attorney protracting litigation unnecessarily and failing to attend arranged pre-trial conference.

J U D G M E N T

MOSHIDI, J:

[1] This is an application brought for costs in terms of Rule 41(1)(c) of the Uniform Rules pursuant to an action withdrawn by the respondent against the applicants. The full circumstances are set out below.

THE BACKGROUND

[2] The background is essential. The respondent's husband, Mr M B Saby, died during July 2007. A family trust, namely the Saby Family Trust ("*the Trust*") was established. The trustees appointed by the Master of the High Court in November 2008 comprised of Mr Brain Franklin ("*the first applicant*")

and Mr John Michael Stephens ("*the second applicant*"), and as well as the respondent.

[3] In due course there were a plethora of problems regarding the running of the affairs of the Trust, in particular the financial aspects. These problems were highlighted by an application brought by the respondent in the High Court during June 2011, for the removal of Mr Johan Michael Stephens, i.e. the second applicant, as trustee as well as the termination of the Trust. The second applicant had resigned as trustee during April 2010. In July 2011 the High Court issued an order terminating the Trust.

[4] Further developments came when the respondent during April 2012 instituted an action against the applicants under Case Number 14740/2012 ("*the action*"). In the action, the respondent sought a statement and debatement of account as well as payment of the sum of R2 645 000,00 (Two Million Six Hundred and Forty Five Thousand Rand). In essence, the basis of the action consisted of allegations of improper and dishonest conduct on the part of the applicants in running the affairs of the Trust. The action, which was defended by the applicants, was significantly protracted for various reasons. Some of such reasons, more fully set out later below, form the basis of the instant application. The trial was set down for hearing in this Court for the 8th May 2014. However, on the 24th February 2014, after nearly two years of litigation, the respondent, as plaintiff in the action, delivered a notice of withdrawal of the action unconditionally, and tendering costs as follows:

> *"Kindly take further notice that the plaintiff tenders the first and the second defendants' wasted costs as tax between party and party from 27 August 2013 (date of delivery of the defendants' pre-trial agenda and request) for further particulars for the purposes of trail* [sic] *to date hereof."*

[5] The applicants, unhappy with the inadequacy of the costs tendered above, launched the present application ("*the costs application*"). In the costs application the applicants seek an order that the respondent be ordered to pay the applicants' costs incurred in the action on the scale as between attorney and own client, alternatively on the basis to prevent the applicants from being out of pocket (prayer 1) and the costs of the costs application on the scale as between attorney and own client (prayer 2). In addition, the applicants seek an order that the respondent's attorney of record from inception, Mr L Oosthuizen ("*Mr Oosthuizen*"), pay the wasted costs occasioned by the postponement of the costs application *de bonis propriis*. This, on the basis that the costs application was originally set down for the 23rd April 2014 but had to be postponed at the instance of the respondent. On that occasion, Rautenbach AJ in postponing the matter, ordered the respondent to deliver her answering affidavit by no later than 14th May 2014. The learned Judge also made an order that:

> *"The respondent's attorney, Mr Louis Oosthuizen of the firm N Agnew Inc, is granted the opportunity to deliver by not later than 14 May 2014 an affidavit containing reasons as to why the costs wasted by this postponement should not be paid by him de bonis proprris."*

The costs of the postponement were reserved.

[6] The main contentions of the applicants in the costs application are that, in the first place, the respondent had no legal basis for instituting the action against them for reasons stated later in this judgment. In the second place, the applicants contend largely that both the respondent and her attorney displayed a lackadaisical approach in pursuing the action. It was vexatious and brought without any legal justification.

THE CONDUCT OF THE LITIGATION

[7] I deal briefly with the conduct of the action. The chronology has been fully set out in the applicants' papers and heads of argument. The events are largely common cause though the respondent disputed the reasons for some of the delay, such as the late filing of the applicants' plea on the 21st August 2012, pursuant to a notice of bar served on them on the 20th August 2012.

[8] Be that as it may, after the plea, the respondent took almost a year without making further progress in the conduct of the litigation. In May 2013 the respondent delivered notices in terms of Rule 35 and further notices in terms of Rule 37, and also applied for a trial date. In June 2013 the trial date of 8 May 2014 was allocated to the action. Also in June 2013 the applicants made discovery. In July 2013, the applicants' attorney of record, Mr C Brand of Brooks and Brand Inc ("*Brand*"), addressed a letter to the respondent's attorney, Ooshuizen, confirming that the allocated trial date was suitable. Mr Oosthuizen was also requested to set the matter down for trial on the allocated date. Mr Oosthuizen did not respond to the letter and failed to set

the matter down. In August 2013, Brand, on behalf of the applicants, set the action down for hearing on the 8th May 2014. On the 11th July 2013, the respondent having failed to deliver her discovery affidavit as required, was called upon by Brand to do so on or before Friday 26th July 2013. The respondent's attorney did not respond. As a consequence, on the 23rd August 2013, the applicants applied for and obtained an order compelling and directing the respondent to make discovery.

[9] On the 4th September 2013, Brand addressed a letter to Mr Ooshuizen, attaching a copy of the untaxed bill of costs in regard to the discovery compelling order of court, and requesting payment in terms thereof. Mr Oosthuizen, once more, failed to respond thereto. Thereafter, Brand was compelled to have and had applicants' bill of costs taxed for R3 647,09. Thereafter, more than a month later, and on the 25th October 2013, Brand addressed a further letter to Mr Oosthuizen this time enclosing the taxed bill of costs and demanding for payment thereof. There was no response. The applicants were forced to, and had a writ of execution issued against the respondent's assets. It was only once the sheriff had made an attachment of certain of the respondent's assets that she later paid the taxed bill of costs.

[10] On the 6th August 2013, Brand addressed a letter to Mr Oosthuizen in which he informed him that the action had been set down for hearing on the 8th May 2014. The various correspondence show that Mr Oosthuizen's conduct regarding the request for, and the holding of a pre-trial conference in

terms of Uniform Rule 37, was less than courteous and professional. The last-mentioned letter from Brand went on to state:

> *"In the interim, we wish to arrange a pre-trial conference in the matter and we request that you kindly furnish us with dates and times which will be suitable to you and your counsel during September 2013. Kindly also furnish us with the contact details of your counsel in order that we may instruct our counsel to liaise with him/her accordingly."*

Once more, Mr Oosthuizen did not respond. On the 21st August 2013 Brand addressed another letter to Mr Oosthuizen advising him that the pre-trial conference had been arranged for the 12th September 2013 at 11h00 at the applicants' counsel's chambers. The following day, and on the 22nd August 2013, Mr Oosthuizen wrote to Brand, informing him that he was not available to attend the pre-trial conference on the 12th September 2013, indicating that he would be available during the week of 16th September 2013. Mr Oosthuizen did not indicate why he was not available. For some reason, a suitable date could not be agreed on before the 27th September 2013.

[11] As a consequence, Brand sent an e-mail to Mr Oosthuizen on the 26th August 2013 in which he advised him that the pre-trial conference would be held on the 27th September 2013 at the applicants' counsel's chambers. On the 26th August 2013, Mr Oosthuizen responded and confirmed the date of the 27th September 2013 for the envisaged conference. On the 28th August 2013, a date which is of some significance in this matter, the applicants' pre-trial notice in terms of Rule 37(2)(a) confirming the pre-trial conference scheduled for the 27th September 2013 at 13h00 at applicants' counsel's chambers, was delivered to Mr Oosthuizen. On the same date, the applicants delivered their

request for further particulars for the purposes of trial, and their pre-trial agenda. The agenda as well as the annexures thereto, all of which I deal with later below, are also of some significance in this application.

[12] On or about the 6th September 2013, the respondent served and filed a defective filing sheet for a discovery affidavit in terms whereof the respondent purported to deliver her discovery affidavit. An attempt was made later to rectify the discovery affidavit. More importantly, the respondent failed to respond to the request for further particulars and the pre-trial agenda. As a result, on the 11th September 2013, the applicants caused a letter to be addressed to the respondent calling for the necessary response to the request, failing which an application to compel was threatened. On the 16th September 2013, Mr Oosthuizen addressed an e-mail in the following terms:

> *"Your letter under reply refers. We are indeed in possession of your client's request for further particulars. We are only able to consult with our client in detail at the end of this current week. We do however undertake to serve the reply on your offices on or before the pre-trail* [sic] *that is scheduled for the 27th September 2013. The trail* [sic] *is only set down for May 2014 therefore your client will suffer no prejudice if the answers are provided at the pre-trail* [sic]. *If need be a further pre-trail* [sic] *can be held."*

The extension was granted.

[13] On the morning of the scheduled pre-trial conference i.e. 27th September 2013, Brand telephoned Mr Oosthuizen. The latter informed Brand that he was in the process of finalising the respondent's response to the pre-trial agenda and he would let Brand have same during the course of

that morning. Strangely, Mr Oosthuizen also informed that he saw no point in attending the pre-trial conference since he was going to have to 'revert' in regard to the questions contained in the applicants' pre-trial agenda. Mr Oosthuizen also reserved to himself the right to decide whether he would attend the pre-trial conference that day and to communicate with Brand in that regard. All of this, despite the fact that the pre-trial conference had been mutually arranged weeks before. On the same day of the pre-trial conference, Mr Oosthuizen addressed an e-mail to Brand as follows:

> "*... as advised telephonically this morning it is the writer's respectful opinion that a pre-tail* [sic] *at 13h00 today will not take the matter any further than the attached response. At this stage the plaintiff has nothing to add the writer told your Mr Brand's so. The pre-trail* [sic] *conference in any event is premature as the defendants have not yet discovered. A further pre-trail* [sic] *will have to be held once the Plaintiff is in possession of the Defendants discovered documents. You are referred to paragraphs 12.3 and 24.1 of the attached document. The writer is not able to attend the pre-trail* [sic] *at 13h00 today. Please prepare a minute as suggested in paragraph 25 the attached document. There is no purpose in attending to a conference wherein the writer will only confirm that which is already confirmed in writing. When can we expect delivery of your clients discover* [sic] *affidavit?*"

The contents of this e-mail made no sense since the applicants had already made discovery on the 27th June 2013. It also overlooked the purposes of a pre-trial conference, including, primarily to curtail the duration of the trial, to narrow down issues, to cut costs and to facilitate possible settlements.

THE PRE-TRIAL CONFERENCE SANCTIONED BY COURT

[14] As a result of the conduct of the respondent's attorney, and his client, the applicants applied to the Deputy Judge President on the 26th November 2013 that the action be case managed in accordance with the Practice Manual. On the 28th November 2013 the Deputy Judge President appointed Francis J as the case manager. On the 6th December 2013, Franchis J issued an order directing the parties to hold a further pre-trial conference within one month of the directive and file the minutes thereof on or before the 27th January 2014. The applicants proceeded to arrange the second pre-trial conference which took place on the 15th January 2014. It was attended by Mr Oosthuizen this time around. At this pre-trial it appeared that the disputed issues between the parties in the pending action had become resolved. Mr Oosthuizen indicated to the applicants' counsel and Brand that the matter had, for all intents and purposes become resolved in that the respondent had realised that she did not have a claim against the applicants. Paragraph 5.6 of the pre-trial minute read that:

> "*The plaintiff records that at the time when the defendants served their further requests for admissions together with all the annexures thereto the defendants in fact gave the statement and debatement of the accounts sought by the plaintiff and that in the pleadings as they currently stand no issue remains between the parties, save for the issue of costs. The plaintiff will revert to the defendants by 31 January 2014 with a proposal as to costs.*"

As stated before, the trial was set down for the 8th May 2014. However, instead of reverting to the applicants on the issue of costs, the respondent

proceeded to deliver her notice of withdrawal of the action mentioned earlier in this judgment.

[15] I revert to the applicants' pre-trial agenda delivered on the 28th August 2013 for the pre-trial conference arranged for September 2013. The agenda contained annexures "A" to "J". These documents, dated 2008 up to the end of February 2009, can safely be called the historic documents dealing with the financial affairs of the Trust. Annexure "A" is a copy of attorneys Snymans Incorporated's Standard Bank Investment form, and was signed by the respondent as trustee when it was agreed to invest the Trust's funds with the said attorneys. Annexure "B" is a copy of a resolution passed at the meeting of the trustees of the Trust held on the 18th April 2008, and was, once more, signed by the respondent. Annexure "C" is a copy of proof of transfer of the sum of R4 645 000,00 from the respondent's banking account into attorneys Snymans' trust banking account for investment purposes. Annexure "D" is a copy of the resolution passed at the meeting of the trustees of the Trust on the 12th June 2008, and signed by the respondent. Annexure "E" is a copy of the minutes of the trustees of the Trust held on 15th August 2008 and signed by the respondent. Annexure "F" is a copy of a contract issued by Old Mutual on 27th June 2008 in confirmation of the resolution adopted as per annexure "E". Annexure "G" is a copy of the minutes of a meeting of the trustees held on 15th August 2008 in terms of which it was resolved to instruct attorneys Snymans Inc to transfer the balance of the funds of the Trust held in the Investec Money Market Account, including any interest earned, into the Trust. The annexure was similarly signed by the respondent. Annexure "H", more

importantly, to the present matter, is a copy of the Trust's financial statements for the year ended February 2009 and it was similarly signed by the respondent. Annexure "I" is a copy of the printout from the bank statement of the Trust held at Nedbank under account number 1286053374 for the period 15th August until 26th August 2008; and finally, annexure "J" is a copy of a bank statement of an account held at Investec Private Bank with account number 50002580727 for the period 23rd April 2008 to August 2008.

[16] In the submission of the applicants, and this was supported by the above documentation, annexures "A" to "J", constituted a complete answer to the respondent's claims and in fact, confirmed the withdrawn action to have been baseless and devoid of any truth. Despite that, the respondent and her attorney of record, Mr Oosthuizen, persisted with the action in the same nonchalant manner with which they had been conducting the action up to the last. There was no other credible evidence or documentary evidence to contradict the view of the applicants. The respondent's denial and opposing views were without merit. More improbable was her contention that she did not sign the annexures for the transfer of her personal funds. If this was in fact the case, i.e. that it was her personal funds, then the action was clearly brought on the incorrect basis, in my view. It is more than plain that if the respondent's attorney of record had studied more carefully the applicants' request for further particulars for the purposes of trial, as well as the applicants' pre-trial agenda, and had both he and the respondent attended the pre-trial of the 27th September 2013, they would have benefitted. It would have become clear to them that the pending action was baseless and a waste

of time and money. This was confirmed at the pre-trial conference held subsequently on the 15th January 2014 under the directive of Francis J. In any event, the contents of annexures "A" to "J", described above, were known to both Mr Oosthuizen and the respondent before the action was instituted.

MR OOSTHUIZEN'S CONTENTIONS

[17] In the answering affidavit to the present application, Mr Oosthuizen, in a rather scanty manner, raised certain unmeritorious defences. One would have expected a more detailed affidavit from a professional person who had been warned beforehand to advance reasons why he ought not be ordered to pay costs *de bonis propriis*. He alleged in the affidavit that although the instant application is brought under Rule 41(1)(c), the applicants' notice of application did not comply with the provisions of Rule 6 of the Uniform Rules. This, on the contention that the applicants had elected to file an affidavit in support of the present application. The crux of the contention was that the application was issued contrary to the provisions of Rule 6(5)(a) in that it did not follow Form 2A [*sic*] of the First Schedule. Mr Oosthuizen proceeded to argue that as a consequence, the respondent ought not to be penalised with costs. If this happened, so the argument proceeded, Mr Oosthuizen tendered to pay the wasted costs occasioned by the postponement of the application on the 23rd April 2014. This, on the party and party scale only. Mr Oosthuizen went on to make alternative suggestions regarding the costs of the postponement of the application on the 23rd April 2014. First, that it should be the applicants who should pay the costs. Alternatively, due to the alleged

uncertainty in regard to the provisions of Rule 6(5)(a), this Court should make no order as to costs regarding the postponement. I must observed that Mr Oosthuizen's answering affidavit was rather terse, consisting of a mere two pages, excluding one page on which Form 2(a) was attached.

[18] The contentions of Mr Oosthuizen regarding the format of the application had no merit as argued, correctly so in my view, by the applicants in the replying papers. The application brought by the applicants in terms of Rule 41(1)(c) of the Uniform Rules was an interlocutory application which did not require the "*long form*" notice of motion prescribed by Rule 6 as read with Form 2(a) of the Uniform Rules of Court. It was not to be brought on notice as prescribed in terms of Form 2(a) of the First Schedule to the Uniform Rules of Court.

[19] In Erasmus, *Superior Court Practice,*[1] and with reference to *Nel v OVS Staalkonstruksie en Algemene Sweiswerke,*[2] and *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Perspublikasies (Edms) Bpk,*[3] it was said that:

> "*An applicant for an order for costs need only deliver a notice of his or her intention to ask for an order as to costs – no affidavit is required since all the relevant material is already before the Court.*"

For this reason, Mr Oosthuizen's reliance on Form 2(a) of the Uniform Rules was misplaced, alternatively, a misinterpretation thereof.

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[1] Service 45, 2014 – B1 – 305.
[2] 1977 (3) SA 993 (O) at 996H.
[3] 1972 (1) SA 773 (A).

THE CHRONOLOGY OF THE COSTS APPLICATION

[20] Mr Oosthuizen, and his client's opposition to the application need to be seen in the context of the chronology of events, as succinctly set out by the applicants. This was that, the application was served on the respondent on the 31st March 2014, and the notice of motion stated that the applicants would apply for the relief sought in terms thereof on Wednesday the 23rd April 2014. On the 10th April 2014, the applicants caused a notice of set down to be served on the respondent setting the application down for hearing on the 23rd April 2014. Some six days later, the respondent delivered a notice of her intention to oppose the application. On that day, Mr Oosthuizen was warned by Brand that should the application be postponed as a result of his dilatory response, a punitive costs order would be sought against him personally. On the day of the hearing, i.e. the 23rd April 2014, the applicants' counsel was at court. He, out of sheer courtesy, phoned Mr Oosthuizen and enquired from him as to the details of the respondent's counsel. Mr Oosthuizen said that he did not intend to briefing counsel, and further indicated that he was not aware of Brand's letter of 16th April 2014 addressed to him and in which Mr Oosthuizen was specifically warned about a punitive costs order in the event the application had to be postponed. It was, once more worrisome that Mr Oosthuizen made this allegation despite the fact that the e-mail was sent to him on the 16th April 2014 in the same manner, i.e. the same e-mail address and telefax number used by Brand throughout the litigation. In the end, an

order was issued by Rautenbach AJ when postponing the matter, as described above.[4]

THE RESPONDENT'S CONTENTIONS

[21] This whole matter was about the investment of the funds of the Trust in the sum of R4 645 000,00 (Four Million Six Hundred and Forty Five Thousand Rand). The respondent's answering affidavit to the costs application, in essence took the matter no further save that it lent credence to the applicants' allegations in regard to her action against them. For example, she pleaded ignorance in the running of the affairs of the Trust; the absence of adequate information when issuing the summons; and that the funds invested with attorneys Snymans Incorporated were her personal funds and not the funds of the Trust. She made some interesting concessions. The respondent clearly did not read or study carefully all the documentation in her possession from when she first became a trustee of the Trust. She said that if the applicants had provided her with the accounting earlier i.e. the 23rd July 2011, or later, the action would not have been commenced. In para 18 of the answering affidavit,[5] she stated:

> "... *Out of desperation and being unsure as the whether* [sic] *the money was actually received and how it was accounted for, I consulted my attorney of Record. The summons was accordingly issued and served on the First and Second Applicant under the above case number.*" (underlining added).

[4] See p 231 of bundle – annexure "CB15".
[5] See p 111 of the record.

The respondent also repeatedly bemoaned the fact that the applicants should have provided the information she claimed in her summons when they delivered their plea during August 2012. The respondent, however, admitted that she signed the financial statements of the Trust for end of February 2009. She, however, advanced some incredible reason why she did so. The respondent admitted that the documentation provided by the applicants in the request for further particulars for the purposes of trial, as well as the pre-trial conference agenda during August 2013, in fact, contained adequate accounting. This led her to give instructions to her attorney of record to withdraw the action.

[22] In regard to the costs, the respondent repeated her inadequate tender as contained in the notice of withdrawal. The respondent contended that her action was not vexatious, malicious or frivolous as submitted by the applicants, and that the latter should pay the costs. Interestingly, in regard to the costs occasioned by the postponement on the 23rd April 2014, the respondent contended that:

> "*I submit that the applicants, save for the wasted costs occasioned by the postponement on the 23rd April 2014, should pay the costs of this application under Rule 41(1)(c).*"[6]

I have tried as best I could to summarise the respondent's contentions. These contentions had no merit at all. The applicants have correctly pointed out that the respondent had signed the majority of the documentation,

[6] See para 43 of the answering affidavit – record p 115.

including documentation from independent parties such as attorneys Snymans Incorporated. I may add that the auditors of the Trust also presented the financial statements for end of February 2009. These were also signed by the respondent. All the documents showed that there was in fact no need for the institution of the action in the first place.

THE ISSUE FOR DETERMINATION AND SOME LEGAL PRINCIPLES

[23] As a result, the applicants seek costs on a punitive scale. The pertinent issue for determination is whether costs on the attorney and own client scale against the respondent, on the one hand, and costs be *de bonis propriis* on the scale as between attorney and own client against Mr Oosthuizen for the postponed application, on the other hand, was justified. These are special costs orders.

[24] There is no doubt that where a party withdraws an action the other party is entitled to costs unless there are good reasons for not doing so. In *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari Interested Party)*[7], Lewis J said:

> *"Where a party withdraws a claim the other party is entitled to costs unless there are good grounds for depriving him: Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC) and Sentraboer Kooperatief Bpk v Mphka 1981 (2) SA 914 (O)."*

[7] 2003 (2) SA 590 (W) 597.

In fact, the facts in that case were to an extent similar to the facts in the present matter. There, the plaintiff had during a trial produced transcripts of the telephone conversations which it had intercepted, and which indicated that the defendants were interfering with evidence. The transcripts implicated the defendants' attorney in the falsification of evidence in that the attorney was either a party thereto or had knowledge of it. Upon the transcripts being discovered, the defendants successfully applied for a postponement. The costs were reserved. The plaintiff then indicated that it would apply for costs of the application for the postponement against the attorney *de bonis propriis*. The attorney withdrew later as attorney of record. At a pre-trial conference just before the commencement of the trial, and at which the attorney was represented, the plaintiff changed its attitude and indicated that it would no longer pursue the claim for costs against the attorney. The latter applied for an order for his costs in defending the claim for costs against him. In the end, and for present purposes, the Court in that case held, *inter alia*, that injustice would result if the plaintiff were not awarded the costs of the application on the attorney and own client scale.

[24] In *Eloff v Road Accident Fund*,[8] the Court ordered that all the costs of the application to compel the defendant to reply to the plaintiff's rule 35(3) notice were to be paid by the defendant on the scale as between attorney and client. At para [37] of the judgment, the Court went on to say that:

[8] 2009 (3) SA 27 (C).

> "*In considering the scale on which such* [costs] *should be awarded, I bear in mind the defendant's quite unexplained initial delay in responding to the rule 35(3) notice and the subsequent letter requesting compliance; its initial opposition to the application based on a misguided reliance on rule 6(5); and its subsequent affidavit, in which its representatives displayed a regrettable lack of familiarity with the case, compounded by misinformed and nigh reckless averments against the plaintiff's attorney, all in an attempt to justify its default.*" (my insertion).

The question of the award of costs on the scale as between attorney and client was discussed as far back as 1946 in *Nel, Appellant v Waterberg Landbouwerkers Kooperatiewe Vereniging Respondent*[9], at 608 the Court said:

> "*The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action from the conduct of the losing party, the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. See Hearle and McEwan v Mitchell's Executor (1922 TPD 192). Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say 'as far as it can' because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party ...*"

[9] 1946 AD 597.

In *Cadac (Pty) Ltd v Weber Stephen Products Co and Others,*[10] the Court, at para [24] did not condone the lackadaisical manner in which the appellant dealt with the matter.

[26] Punitive costs orders are considered by the courts, in appropriate cases, all the time. See for example, *Jeebhai and Others v Minister of Home Affairs and Another,*[11] where, in a dissenting judgment, Cameron and Cachalia JJA, suggested that the non-compliance with the Court's rules could be dealt with by means of a punitive costs order. See also *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government,*[12] where on appeal, the respondent was ordered to pay the costs of the application on the attorney and client scale.

[27] In the present matter, the punitive costs order, *de bonis propriis*, sought against Mr Oosthuizen in respect of the postponed costs application is equally a severe one. It is not easily granted by the courts. However, circumstances may warrant it. On the facts set out in *Waste Products Utilisation (Pty) Ltd (supra)*, the learned Judge at 597E-F said:

> "*The plaintiff was most certainly then entitled to ask that the attorney bear the costs of the application de bonis propriis and it was entitled to persist in this request.*"

[10] [2011] 1 All SA 343 (SCA), also reported at 2011 (3) SA 570 (SCA).
[11] [2009] 2 All SA 330 (SCA) para [21]
[12] [2013] 3 All SA 370 (SCA).

In *Jwili v Road Accident Fund*,[13] the Court had to deal with the conduct of the defendant's attorney which was disturbing in several respects during the trial. This included laxity in disposing the litigation, failing to prepare for trial, fabricating a plea to avoid being barred, and proceeding to trial when lacking proper instructions. The Court granted a special costs order in terms of rule 37(9)(a)(ii) of the Uniform Rules because the attorney had failed to a material degree to promote the effective disposal of the litigation. The Court noted that it had given "*serious consideration to making a de bonis propriis costs order against the attorney, but declined to do so because, if the attorney had been unable to pay, the plaintiff would have been out of pocket*". See also *Multi-Links Telecommunications v Africa Prepaid*,[14] and *Tasima (Pty) Ltd v Department of Transport*.[15]

[28] In applying the above legal principles to the facts of the present matter, I was more than convinced that the respondent ought to pay the costs of the withdrawn action on the scale, not as between attorney and own client, as sought by the applicants, but rather on the scale as between attorney and client only. It will also be just and equitable that the respondent should pay the costs of the present application on the scale as between attorney and client. I say this because it was clear from the chronology of the events of the litigation set out above, that she was clearly either misled by her attorney Oosthuizen, or she gave unreasonable instructions. I am, however, more than convinced that Mr Oosthuizen ought to pay the wasted costs occasioned by the postponement of the matter on the 23rd April 2014 *de bonis propriis* on

[13] 2010 (5) SA 32 (GNP).
[14] 2014 (3) SA 265 (GNP).
[15] 2013 (4) SA 134 (GNP).

the scale as between attorney and own client. There were numerous reasons for the proposed costs orders.

[29] The defendant was a trustee of the Trust since inception. She signed most of the documentation as trustee and on which her action was based between August 2008 and end of February 2009. These included the annual financial statements. She ought not to have instituted the action against the applicants. She had all the information at her disposal about the financial status of the Trust.

[30] If this was not the case, then at least by July 2011 when on the information supplied to her, she would have been appraised of the complete financial affairs of the Trust. This was long before she instituted summons in April 2012. The respondent's assertions that it was only when she was placed in possession of the documentation attached to the request for further particulars for the purposes of trial, and the applicants' pre-trial agenda in August 2013, and that she then realised, as set out in the minutes of the second pre-trial conference, as ordered by Francis J, that no issues remained between the parties to the litigation, save for costs, were unconvincing to say the least. Still she did not make any attempt through her attorney of record to withdraw the action. The same applied to her contentions that the applicants should have alerted her to the true state of affairs of the Trust when they subsequently pleaded. Once more, it was clear that the respondent, as she claimed now, was either strongly guided and under the influence of Mr

Oosthuizen, or she herself was mischievous in her instructions to him from inception.

[31] Even when the respondent continued with the litigation, her approach thereto was plainly lackadaisical and in which her attorney, Mr Oosthuizen, clearly acquiesced. After all, he was the professional, controlling and guiding the litigation. There was no suggestion at all that there was a conflict in the instructions. All of this were borne out by the almost undisputed chronology of events set out above. As argued by the applicants, if she had then taken the trouble of considering the documentation timeously, most of which she signed herself, before issuing the summons, she would have realised, that which she realised later, namely, that she had no claim at all against the applicants. The approach of the respondent and that of her attorney of record, resulted in the applicants incurring unnecessary costs in defending themselves as set out in *Nel Appellant v Waterberg Landbouwerkers Kooperatiewe Vereniging Respondent*, (*supra*). A costs order on the party and party scale will undoubtedly be inadequate in the circumstances. On the other hand, as stated above, a costs order on the attorney and own client scale will be excessive and too punitive. Finally, on this aspect, the respondent ought to have been aware or made aware by her attorney of record that she in fact had no case as the founding affidavit and particularly the replying affidavit, removed any doubt by providing a full explanation of the documentation she received by no later than 31st January 2011. A full description of the documents was made available to her. This constituted sufficient ground for this Court to order costs on a punitive scale on the basis that she nonetheless

proceeded with the action thereafter. The action was groundless, vexatious and/or frivolous.

[32] I must, in fairness to him, deal in more specific terms about the conduct of Mr Oosthuizen in this application. The chronology of events sketched above, revealed it all. His response thereto was less than frank and lacked credibility. This was not easy to articulate in respect of a professional person. The approach he adopted throughout the litigation simply prolonged the litigation unnecessarily. His conduct leading up to the first and the second pre-trial conferences, until forced by a court order to do so, was by far less than the high standards of professionalism expected of him. This was simply reprehensible conduct entitling this Court to show its displeasure by a punitive costs order. See *Tasima (Py) Ltd v Department of Transport and Others (supra)*. It is by now accepted that litigation is not a game (*cf Cadac (Pty) Ltd v Weber Stephen Products Co and Others (supra)* at para [10]). Mr Oosthuizen's telephonic discussion with applicants' counsel on the day of the hearing of the application at court on the 23rd April 2014, appeared totally irresponsible, devoid of any professional responsibility, and indeed, somewhat bewildering, to say the least.

[33] In addition, Mr Oosthuizen, it seemed to me, deliberately chose to deliver a notice of intention to defend the costs application at his own time and at the very last minute. In addition, discovery had to be compelled, further particulars for the purposes of trial had to be threatened with an application to compel, and he had to be forced by the directive of Francis J before attending

the second pre-trial in January 2014. He was granted an opportunity by Rautenbach AJ to provide reasons why he ought not pay the wasted costs *de bonis propriis* as a result of the postponement. He failed dismally to advance any acceptable explanation, as indicated above. The chronology of events outlined above said it all. The arguments advanced in the respondent's heads of argument that she merely exercised her constitutional right to have the dispute resolved by the Courts in terms of sec 34 of the Constitution, and that the action was not frivolous, had no merit at all. This also applied to the argument that the respondent should be ordered to pay the costs of the application from 28th August 2013 to date of the withdrawal of the action only. The respondent deemed it necessary to continue with the litigation and did not withdraw the action instantly when she should have done so. When the withdrawal eventually came, it contained an inadequate costs tender in the circumstances of the case. It will, for all the above reasons, not be inequitable to order that Mr Oosthuizen must bear the costs of the postponement of the 23rd April 2014 *de bonis propriis*, and on the attorney and own client scale. The applicants, on the other hand, must accept that in the circumstances of this case, they have not made out a case for the costs on the scale as between attorney and own client in respect of the respondent, to which aspect of the matter I had devoted serious an agonising consideration in the interim. This kind of costs orders are only granted by courts in exceptional circumstances and by reason of special considerations either from the circumstances which give rise to the action or from the conduct of the respondent. See for example, *Nel v Waterberg Landbouers Kooperatiewe Vereniging (supra)*. The applicants have not made out such a case, in my

view. There were no adequate exceptional circumstances and special considerations to warrant a costs order on the attorney and own client scale. The applicants will be adequately recompensed for the unnecessary expense they incurred.

ORDER

[34] In the result the following order is made:

1. The respondent is ordered to pay the applicants' costs incurred in the action instituted by the respondent under case number 14740/2012 on the scale as between attorney and client.

2. Mr L Oosthuizen, respondent's attorney of record from inception, shall pay the wasted costs occasioned by the postponement of the application on the 23rd April 2014 *de bonis propriis* on the scale as between attorney and own client.

3. The respondent shall pay the costs of this application on the scale as between attorney and client.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	23 JULY 2014
DATE OF JUDGMENT	6 OCTOBER 2014