THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1368/18

In the matter between:

MATSATSI DINAH TINY MONYEPAO **APPELLANT**

and

MOKGAETJI MARIA LEDWABA **FIRST RESPONDENT**

MASTER OF THE HIGH COURT, POLOKWANE **SECOND RESPONDENT**

ELMARIE BIERMAN **THIRD RESPONDENT**

MATUBA MAPONYA **FOURTH RESPONDENT**

Neutral citation: *Monyepao v Ledwaba and Others (No. 2)* (Case no 1368/18) [2020] ZASCA 71 (19 June 2020)

Coram: PETSE DP and SALDULKER, PLASKET and NICHOLLS JJA and KOEN AJA

Heard: No hearing. Disposed of after parties were given an opportunity to make written representations.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 19 June 2020.

Summary: Costs – most of record consisting of irrelevant documents – neither party entitled to charge a party and party or attorney and client fee in relation to perusal of irrelevant portions – provisional order to this effect made final.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Nair AJ, Makgoba JP and Phatudi J concurring, sitting as court of appeal):

Paragraph 3.1 of the order granted on 27 May 2020 is made final.

JUDGMENT

Plasket JA (Petse DP, Saldulker and Nicholls JJA and Koen AJA concurring)

[1] In the judgment dealing with the merits of this appeal, we made a provisional order concerning the costs associated with the record. That order read as follows:

'3.1 It is provisionally ordered that no fee or disbursement may be levied, whether on a party and party basis or on an attorney and client basis, by the attorneys and correspondent attorneys of the parties in respect of any part of the record except for pages 1 to 125, the judgment of the court of first instance (eight pages) and the judgment of the full court (14 pages).

3.2 The parties are granted leave to make representations on affidavit, within ten days of the date of this order, as to why the order in paragraph 3.1 above should not be a final order. If no such representations are received within the time stipulated above, it shall thereafter become a final order.'

[2] The order was made because the large majority of the record was irrelevant and should not have been before us. Indeed, of the 544 pages that comprised the record, only 147 pages were relevant. Most of the record comprised of such documents as a transcript of the argument in the application for leave to appeal in the court of first instance, practice notes and heads of argument in the court below. They clearly had nothing to do with the appeal. During the course of my judgment, at para [9], I said:

‘As most of the record is obviously irrelevant, and ought to have been recognised as such by the legal representatives of both sides, I can see no reason why any legal representative on either side should be entitled to charge anyone, be it their clients or their opposition, in relation to the irrelevant portions of the record. At the end of this judgment, I shall make a provisional order to that effect, and give the parties an opportunity to make any representations they may wish to before the order may become final.’

[3] The parties were given ten days to file representations. The first respondent has done so, but the appellant has not. It is now necessary to decide whether the provisional order should be made final.

[4] In respect of the appellant, as no representations have been made, there is no reason why a final order should not be made. The appellant’s attorney was responsible for the filing of the defective record. He ought to have familiarised himself with what the rules of this court require and, by filing so defective a record, clearly did not do so. There is no reason why the provisional order should not be made final as against the appellant’s attorney and his correspondent.

[5] The first respondent argued, in a nutshell, that the fault lay with the appellant’s attorney, that her attorney ought to be able to charge her a fee for perusing the whole of the defective record, and that it would be unfair to deny him the right to charge her this perusal fee: he had to peruse the defective parts of the record to prepare properly for the appeal.

[6] While it is so that the fault lay primarily with the appellant’s attorney, I do not believe that it is unfair to deny the first respondent’s attorney the costs of perusing the irrelevant parts of the record. He would, without any doubt, have been able to see at a glance that the disallowed documents were irrelevant. He would have concluded from this that their perusal was unnecessary. This is all the more so having regard to the fact that the first respondent’s attorney had been involved in the matter from soon after its inception in the court of first instance.

[7] If the first respondent’s attorney, despite this, perused the irrelevant documents, he wasted his time and has only himself to blame. I can see no reason

why his client, or the deceased estate from which the costs of the appeal will be paid, should foot the bill. If he did not peruse the documents because he correctly identified them as irrelevant, there is no basis for charging a fee. In either case, the first respondent's attorney and his correspondent are not entitled to charge for perusing the irrelevant documents.

[8] In the result, I conclude that paragraph 3.1 of the order we issued should also be made final as against the first respondent's attorney and correspondent.

[9] I make the following order.

Paragraph 3.1 of the order granted on 27 May 2020 is made final.

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C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	N L Skibi Instructed by: Legal Aid South Africa, Johannesburg Legal Aid South Africa, Bloemfontein
For the first respondent:	M Maponya Instructed by: Matuba Maponya Attorneys, Polokwane E G Cooper Majiedt Inc, Bloemfontein