IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 18741/2007

DATE: 10 DECEMBER 2008

In the matter between:

MICHAEL CECIL ROOME Applicant

and

JURINDA ROOME Respondent

JUDGMENT

DAVIS, J

This is an application for a punitive costs order which has been brought by the applicant (respondent in the main proceedings) pursuant to a dispute of a matrimonial nature which was ultimately resolved on the 21st of December 2007 when an order was granted by this Court. After negotiations had taken place between the parties, having been urged to do so by this Court. The gravamen this present dispute is that, in the replying papers pursuant to the principle dispute, the respondent (applicant in the main application) on these three separate occasions made scandalous

and personal attacks on the legal representatives of the applicant. In particular he averred:

> "ek vermoed dat respondent tydens die opstel van haar antwoordende eedsverklaring besluit het en geadviseer is om hierdie sowel as al die ander aspekte van die ooreenkoms te ontken en daardeur poog respondent om hierdie Agbare Hof te mislei ten opsigte van die waarheid".

Further;

> "Die inhoud van hierdie paragrawe word ontken en word respondent se onwaarhede weer hier ontbloot. Ek neem aan dat die respondent het met hierdie innoverende weergawe vorendag gekom nadat sy met haar huidige regsverteenwoordiger konsulter het."

It appears that, at some point, respondent realised that these constituted egregious attacks on the legal representatives who were but discharging their mandate. Accordingly, in a further affidavit, of which I only now have sight (by agreement between

the parties it was handed to me), respondent sought to explain away these attacks through the old excuse that "it was a typing error". The bizarreness of this excuse is perhaps best illustrated in the following passage from this affidavit:

> "In paragraaf 144 het daar weereens 'n onduidelik ingeglip as gevolg van 'n tikfout aangesien hierdie paragraaf verwys na die woord nadat terwyl die korrekte woord alvorens moes wees, met ander woorde voordat die konsultasie plaasgevind het. Hierdie paragraaf moet as volg lees:
> "144. Die inhoud van hierdie paragrawe word ontken en word die respondent se onwaarhede weer hier ontbloot. Ek neem aan dat die respondent het met hierdie innoverende weergawe vorendag gekom alvorens sy met haar huidige regsverteenwoordiger gekonsulteer het."

With the greatest respect to this explanation, it is disingenuous in the extreme. Consider what has been attempted to be conveyed in this amendment. The initial passage in the affidavit was that untruthful averments were made by respondent, pursuant to or after she had consulted with her legal representatives, with the

direct and obvious implication that the legal representatives had instigated averments which were blatantly false. By changing the word "nadat" to "alvorens", the passage is meaningless. What is the point of explaining to a Court that a person makes incorrect and dishonest allegations before she consulted with her legal representatives? The only possible justification for such a paragraph would to argue in mitigation of applicant and hence the converse of what the deposer to the affidavit was clearly seeking to intend: She did not know what she was doing, because she had not the benefit of proper legal representation. That surely was the exact opposite of what he intended to convey in vigorous and somewhat fiery and angry affidavit deposed to pursuant to the principal dispute.

Mr Zazeraj, who appeared most ably on behalf of the responden' raised two arguments in this regard: one that an apology had been proffered and two, that over a year had taken place since a substantive dispute had been resolved and accordingly tempers should have cooled. The problem about the first aspect is that no apology by way of a letter has ever been forthcoming from the attorney who acted on behalf of the respondent, or alternatively respondent himself. In relation to the second issue, while tempers might have cooled in my view, the fact that a further affidavit was

generated to try to explain away this conduct, disingenuously, only caused tempers to be further heated rather than cooled.

I do take seriously the fact that a long time period has ensued. Mr Verster explained that the delay was partly due to his own error in that he had been instructed by his attorney to approach this Court earlier, and I have no reason to take issue with this account.

The issue does raise an important point of principle. Attorneys are officers of the court. Advocates are officers of the court. They owe a fidelity to the legal system of which their colleagues and the presiding officers are integral parts. Mr Zazeraj correctly pointed to the fact that all legal officers work in an adversarial system, a vigorous opponent yesterday, a supportative colleague today. I understand the nature if the task. I also accept that matrimonial disputes by their very nature, raise emotions. Hurtful, nasty and truly depressing allegations are hurled from one party to the other, backwards and forwards.

But legal representatives are not the aggrieved parties. It is not their marriage that has fallen apart. It is not their emotional psyche that has been scarred by the break-up of what was once a

loving relationship. It is not their children who constitute the battleground for further emotional conflagration. Legal representatives should remain calm, dispassionate, pursue their clients' interests within the context of being officers of the Court. All too often in matrimonial cases, which I have come across, the nature of the litigation leads to speculation as to who real source of the problem; that is – would the matter better be resolved without the lawyers rather than with the lawyers? Are the lawyers maintaining a dispassionate barrier to which I made reference earlier?

The point is well made in a forward to Herbstein and Van Vincent's Civil Procedure of the Supreme Court of South Africa, by Mr Justice Davis (no relation) cited in 2008 De Rebus 22

> "In which the learned judge warned against the practitioner who takes up the utterly wrong attitude that his sole duty is to his client ... as if he were that client's mere hireling."

It is for that reason that Goldstone, J, (as he then was), made an adverse cost order in the case of Protea Assurance Company Limited v Januszkiewikz 1989(4) SA 292 (W). In that case an

attorney had made scandalous allegations about the integrity of a plaintiff and his opponent. The learned judge then said;

> "In my opinion these attacks made upon Jordan on the evidence placed before the Court by Mr Eiser in his affidavit are scurrilous. It is wholly unjustified by anything stated or done by Mr Jordaan. If attorneys as officers of the Court behave in such a fashion towards each other such conduct can only reflect upon the dignity of the whole legal profession. Furthermore, such conduct brings not only the profession into contempt but indeed the whole system of justice and the Courts." at 298E.

In that case, the application for costs *de bonis propriis* was not pursued and the Court, in order to indicate its extreme displeasure, made an award of attorney and client costs.

In my view, this case is no different. These allegations should not have been made against lawyers trying to represent their client, legal to the best of their ability. The deponent should have respected their integrity, which they deserve. Legal

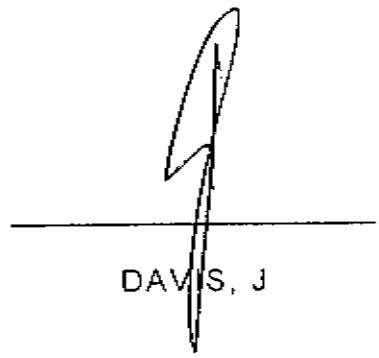
representatives, being attorneys and advocates, have only one component of trading stock. That is their integrity. Without integrity, no attorney, nor advocate can continue to practice successfully. Tell a judge that an attorney or an advocate is dishonest and that label sticks. A sense of doubt may be created in the judicial mind, however unfair that might subsequently prove to be. This kind of conduct cannot be allowed. I express the hope that in making these comments practitioners, particularly in the area of matrimonial disputes, will bear in mind the necessity to keep a proper balance between being officers of the court doing proper duty to their clients.

In this case legal representatives, who are entitled to hold on to their hard earned integrity were entitled to approach this Court. To the extent that there has been a delay, that may be partly due to my own fault, in that, upon reflection, I should have dealt with the cost issue on the day, but there was a desire to deal with the substantive questions, particularly bearing in mind the pressure of the roll duty of a duty judge.

I cannot make a clear and definitive ruling that the blame lies so clearly with the legal practitioners as to justify an the award of costs *de bonis propriis*.

/ds

Accordingly, following the approach of my esteemed colleague, Goldstone, J, the order that is made is that costs of 21 December 2007 are awarded in favour of the applicant (respondent in substantive case) on an attorney and client scale together with the costs of this hearing of this morning, being 10 December 2008. Those costs are on the ordinary scale because I did not see any reason why Mr Zazeraj could not have been permitted to argue the matter as eloquently as he did.



DAVIS, J

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