Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number 6900/2010

In the matter of:

SHOPRITE CHECKERS (PTY) LTD	Applicant
versus	
WESTACRE DEVCO (PTY) LTD	First Respondent
THE REGISTRAR OF DEEEDS CAPE TOWN	Second Respondent
PLOUGHMANN INCORPORATED	Third Respondent

Judgment: 25 August 2011

MOSES, AJ:

Introduction.

[1] On 7th April 2010 the applicant, (hereinafter "Shoprite Checkers"),

launched an urgent application against Westacre Devco (Pty) Ltd, (the first respondent), The Registrar of Deeds, Cape Town, (the second respondent) and Ploughmann Incorporated Attorneys, (the third respondent) to register transfer of immovable property situated at Portion 5 of Erf 16696, Somerset West in the Municipality of Helderberg, Division Stellenbosch, Western Cape Province (hereinafter "the Property").

[2] The specific relief that the applicant sought, were the following:

2.1 That a rule nisi be issued calling on the respondents to show why the following order should not be made;

2.1.1 That the Respondents be interdicted from registering the transfer of the immovable property situated at Portion 5 of Erf 16696, Somerset West in the Municipality of Helderberg, Division Stellenbosch, Province Western Cape (hereinafter "the Property") pending the institution and finalization of an action by the Applicant for specific performance of Clauses 10.1, 10.2, 10.3 and 11.2 of the deed of sale entered into for the property between Applicant and First Respondent on 8 May 2008;

2.1.2 That the First Respondent is interdicted from entering into a deed of sale for the property with any third party or to encumber the property in any manner pending the institution and finalization of the abovementioned action;

2.1.3 That First Respondent be ordered to pay the costs of the application on the scale as between attorney and client;

2.2 That paragraphs 2.1.1 and 2.1.2 above operate as an interim interdict pending the return date;

2.3 That Applicant institute the abovementioned action within 10 court days of the granting of a final order herein, failing which the interdict will expire;

2.4 That leave is granted to the parties to at the close of pleadings approach the Court for the allocation of an early court date.

[3] Both the first respondent and the third respondent opposed this application.

[4] Pursuant to this urgent application, and on 8 April 2010, the applicant and the first and third respondents reached an agreement, which was made an order of this court, that the application for the *rule nisi* be postponed for hearing on 23 April 2010 and that the first and third respondents give an undertaking to not register the transfer of the property to applicant or to alienate the property to a third party or to encumber it in any manner before 23 April 2010 and that cost stand over for later determination.

[5] The court order, dated 8 April 2010, reads as follows:

"By ooreenkoms tussen die Applikant, Eerste Respondent en Derde Respondent, word die volgende bevel geneem:

1. Die aansoek vir 'n bevel *nisi* soos geformuleer in die kennisgewing van mosie word uitgestel vir verhoor na **Vrydag 23 April 2010 on 10h00;** en
2. Die Eerste en Derde Respondente onderneem om nie voor of op 23 April 2010:

2.1 oordrag van die eiendom geleë te Gedeelte 5 van Erf 16696 Somerset-Wes, in die Munisipaliteit van Helderberg, Divisie Stellenbosch ("die eiendom"), aan Applikant te registreer nie; of

2.2 die eiendom aan 'n derde party te vervreem of enigsins te beswaar nie.

3. Koste staan oor vir latere beregting."

[6] On 23 April 2010, the application was again postponed to 20 August 2010, by agreement between the parties, which was also made an order of court, in the following terms:

"By ooreenkoms tussen die Applikant, Eerste Respondent en Derde Respondent, word die volgende bevel geneem:

1. Die aansoek vir 'n bevel *nisi* soos geformuleer in die kennisgewing van mosie word uitgestel vir verhoor na Vryday 20 Augustus 2010 ten einde die Eerste Respondent die geleentheid te gee om uitvoering te gee aan die bepalings van klousules 10.1, 10.2, 10.3 en 11.2 van aanhangsel ADT2 tot die funderende verklaring ("die kontrak"), wat betref die aansoek vir 'n vergunningsgebruiksreg vir die befryf van 'n drankwinkel ("liquor shop") op die betrokke eiendom ("die vergunningsgebruiksreg").
2. Die Eerste en Derde Respondente onderneem om nie voor of op die voormelde datum oordrag van die eiendom geleë te Gedeelte 5 van Erf 16696 Somerset-Wes, in die Munisipaliteit van Helderberg, Divisie Stellenbosch ("die eiendom"), aan Applikant te registreer nie, tensy:

2.1 Die vergunninsgebruiksreg vroeër toegestaan is en die proses

voorsien in voormelde klousules, insluitend enige appél, afgehandel is;

2.2 Alternatiewelik, indien die vergunningsgebruiksreg nie toegestaan is nie, die Applikant sy eleksie uitgeoefen het om met die kontrak voort te gaan ooreendomstig klousule10.2 daarvan.

3. Koste staan oor vir latere beregting.

[7] It is therefore evident from this court order that the hearing of the application was postponed, until 20 August 2010, to enable the first respondent to comply with clauses 10.1, 10.2, 10.3 and 11.2 of the deed of sale regarding an application by the first respondent to the relevant local authority on behalf of the applicant, for the use right in respect of the property to run a liquor store, in addition to the use right of a supermarket, (emphasis added). I return to this aspect hereunder.

[8] In addition, the first and third respondents also undertook, in terms of the above-stated court order, not to register transfer of the property before 20 August 2010 unless the said use right is granted earlier and the appeal process set out in the above-said clauses, including any appeal process, have been finalized, alternately if the use right is not granted, the applicant has elected to proceed with the deed of sale in terms of clause 10.2 thereof.

[9] Costs stood over for later determination.

[10] Subsequently and by August 2010 the use right for a liquor store to be run on the property had been applied for and granted by the relevant local

authority. In the circumstances the first respondent had, in accordance with the above-stated court order, obtained the use right for a liquor store to be run on the property in addition to the use right for a supermarket – in accordance with the relevant terms of the deed of sale, referred to above.

[11] The first respondent and the third respondent conceded in their heads of argument (paragraph 5 thereof) and during argument, that in the circumstances, and in any event, by and before 20 August 2010, the next court date for the hearing of the application, it (the application) had become academic except insofar as the costs are concerned.

The issues for determination.

[12] The crisp issue for determination by this court is therefore the question of costs. It is the applicant's case that, inasmuch as they are substantially the successful party having obtained the aforesaid court order, which is substantially in accordance with the relief it sought against the first and third respondents, that it is entitled to its costs on the principle that costs should follow the result. In addition, so the argument went, since these proceedings which the applicant was forced to institute against these two respondents on an urgent basis, were essentially proceedings pursuant to a breach of a term or terms of the deed of sale entered into between the parties (the applicant and first respondent) more particularly clause 7.3 thereof, the applicant is entitled to its costs "on the scale as between attorney and own client." Clause 7.3 reads as follows:

> "Should either party take steps against the other party pursuant to a breach of this agreement, such party shall be entitled to recover all legal costs incurred by it on the scale as between a attorney and own

client, including such pre-litigation charges, tracing fears and such collection commission."

The first and third respondents contended that, on the facts of this case, the applicant is not entitled to its costs, inasmuch as:

(a) The applicant created its own urgency, and was consequently not entitled to bring an urgent application;

(b) The applicant would have been unsuccessful on the merits, and

(c) With regards to the prayer for increased scale costs (attorney and own client scale) the applicant did not prove that this application was proceedings pursuant to a breach of the agreement between the parties, and

(d) That should the applicant rely on the relevant clause of the agreement, the terms of that agreement also requested of applicant to give the respondents 14 days written notice within which to remedy such an alleged breach of the contract, which they did not do. In the circumstance, so the argument went, the applicant is not entitled to any costs, least a cost order on the scale as between attorney and own client. It was submitted, in the alternative, that should the court exercise its discretion regarding costs in favor of the applicant, that such costs to on the ordinary party-and-party scale, allowing the costs of one counsel only.

The issues to be determined are therefore firstly, to whom should costs be awarded, secondly, whether costs should be awarded on the scale as between party-and-party, or on an attorney and own client scale, and thirdly, whether, if applicant is found to be entitled to its costs, such costs should include the costs of two counsel.

The applicable legal principles.

[13] It is trite that a successful party is entitled to his/her/its costs on the basis that, as a general rule, which will not be departed from lightly and without justified grounds, costs should follow the result, and that such a party should be compensated for the expense to which he/she/it has been put through having been unjustly compelled to initiate or defend litigation. See *Fripp v Gibbon & Co.* 1913 AD 354 at 363; *Texas Co. (SA) Ltd v Cape Town Municiplaity* 1926 AD 467 at 488. *Joubert t/a Wilcon v Beachmen* 1996 (1) SA 500 (C) at 502 D-F.

The court is vested with a wide discretion with regards to awarding a cost order, which discretion must be exercised judicially, taking into account all the relevant facts and circumstances of a particular case, which essentially is a matter of fairness to both parties. Where an application has been prepared but not yet issued, or where a matter has been settled, the applicant would be entitled to his or her or its cost if such an application would have been successful had it been prosecuted. *See First National Bank of South Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd* 1999 (4) SA 1073 (SE) at 1079 G – 1080 G; *SACCAWU v Lehapa NO & Another (Mostert NO Intervening)* 2005 (6) SA 354 (W) at 361 A-G.

[14] The approach towards costs where the merits of the dispute between the parties had been settled, except the issue of costs, had been formulated as follows:

> "When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are

applicable to the situation. This is much to be preferred to laying down a principle which requires courts to investigate dead issues to see who would have won on such issues. In most such cases the litigants would be required to incur far greater costs than those at stake." (See Jenkins v S A Boiler Makers, Iron & Steel Workers & Ship Builders Societ 1946 WLD 15 at 18). This approach found favour with this court, and was in fact followed in, the case of *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 700 G – 701D wherein it was stated, with reference to the Jenkins case, *supra*, that:

> "Where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the court must, with the material at its disposal, make a proper allocation as to costs. (At 700 G-H; emphasis added).

[15] It is in the context of the above-stated crystallized legal principles, and guided by them, that this court now turns to the issues at hand (as set out above), with the material at its disposal.

A brief factual background.

[16] On or about 8 May 2008 the applicant (Shoprite Checkers), and the first respondent (Westacre Devco) – hereinafter the "contract-parties") entered into an agreement in terms whereof in essence, the applicant bought the property from the first respondent for a total amount of R25 million, plus VAT, and pursuant thereto, paid R1 million to the first respondent as a

deposit. The balance of the purchase price, amounting to R27,5 million, VAT included, was paid to the first respondent in an around August 2008.

[17] The respective rights and obligations of the contract parties are set out and reflected in the written "Agreement of Sale", ("the Agreement"), signed by them on 8 May 2008, to which was also annexed, the Sub-divisional Plan (in respect of the property) marked "A", a site development plan, marked "B", and an Annexure "C". Annexure "C", as part of the "Special Conditions" listed in clause 10 of the agreement, imposed further specific obligations upon the first respondent, which included *inter alia* to apply to the relevant local authority for certain "use rights" in respect of the property, such use-rights to include the consent use "for super market and liquor shop" [Annexure C, Record page 43]. The agreement is annexed to the applicant's founding affidavit as annexure marked "ADT2".

[18] In terms of the agreement the first respondent would therefore be obliged to secure, as use rights in respect of the property, *inter alia,* the "Approved Application for consent-use for super market and liquor store" (emphasis added).

[19] Such approval had to be obtained by the first respondent, prior to the registration and transfer of the property to the applicant. In the event that the first respondent would fail to comply with its obligations in terms of the agreement or act in breach thereof, the applicant would be entitled, in terms of clause 10.2 *inter alia,* to exercise an election: it could either cancel the agreement, or: in the event that the seller (first respondent) not securing the use-rights referred to above, or that the relevant local authority deciding not

to approve the application by the first respondent for such use-right, including the consent use of a liquor store on the property, in such event, the applicant (the purchaser) "shall be entitled to accept or reject the decision of the Relevant Authorities."

[20] The property was at all relevant times zoned what is referred to as a Business Zone 1, which would qualify it for an application for the consent use and operation of a liquor shop on and in respect of, the property. It is perhaps necessary to quote the relevant clauses of the agreement, which also constitute to a large extent, the dispute that had arisen between the parties: The relevant clauses read as follows:

> "10.1 The SELLER will, at its own cost and expense, apply to the Relevant Authorities for the increase of the Bulk allocated to the PROPERTY so as to allow for a minimum ground floor (one level) GLA of 6 000 (six thousand) square metres and for the balance of the incumbent rights a detailed in the schedule attached hereto marked Annexure C ("the incumbent rights") to the extent that such incumbent rights do not currently find application to the Property. The aforementioned application will be lodged by the SELLER as soon as reasonably possible after the date of signature of this Agreement and be pursued with the necessary expedience. The SELLER will provide the PURCHASER with a copy of this application to be lodged with the Relevant Authorities and will advise the PURCHASER in writing on any progress made in this regard at intervals of not less than 30 (thirty) days. The SELLER will inform the PURCHASER of the decision of the Relevant Authorities within 7 (seven) days after it has been made known to the SELLER.

10.2 In the event of the Relevant Authorities not approving the SELLER's application in terms of Clause 10.1 above and/or allowing a lesser Bulk allocation to the PROPERTY shall be entitled to accept or reject the decision of the Relevant Authorities. In such event the PURCHASER shall be entitled to a cancellation of the agreement unilaterally by written notice to the SELLER in which case neither of the Parties will have any claims against the other and the deposit referred to in clause 2.2.1 above together with accrued interest thereon will be repaid to the PURSHASER forthwith. In either event, the PURCHASER's decision shall be conveyed to the SELLER in writing within a period of fourteen (14) days after the outcome of the said appeal have been made known to the PURCHASER.

10.3 The SELLER shall be liable, at its sole cost and expense, to comply with any conditions that may be imposed by the Relevant Authorities in connection with the increase of Bulk and the incumbent rights. The SELLER records that the correct applicable zoning of the PROPERTY has already been granted by the Relevant Authority. To the extent that further conditions are imposed by the Relevant Authorities as a result of the application for increased bulk in terms of Annexure C, the SELLER undertakes to, at its own cost and expense prepare and procure, if required, environmental impact assessments, traffic impact studies, and all such additional research required by the Relevant Authorities.

11.2 The SELLER shall cause the PROPERTY to have incumbent

rights as indicated on Annexure C, provided that if the SELLER has not accomplished this purposes, then the PURCHASER shall be entitled (but not obliged) to accept such lesser rights by written notice to the SELLER."

[21] What transpired subsequently was that the first respondent, being of the view that it had complied with all its obligations in terms of the agreement, notified the applicant that it was ready to lodge the papers with the second respondent for registration and transfer of the property to the applicant. The applicant, however, on perusal of the relevant papers and documents for purposes of the registration of transfer of the property, on or about 16 February 2010, realized that the application for the use-rights and consent use of the liquor shop was not included in its file and documents. One of its officials, Adriana du Toit, who was also the deponent to the founding affidavit, thereupon enquired from the third respondent, the legal representative of first respondent, via e-mail, on 16 February 2010, whether such an application was indeed lodged with the local authority. She was informed on 25 February 2010 also via e-mail, by the third respondent that such an application was in fact not lodged, at the time. This was followed by various correspondence between the parties, the upshot whereof was, that the third respondent asked the applicant on 5 March 2010 to waive its right to apply for consent-use of the liquor shop and to allow third respondent in effect, to proceed with the registration of the transfer of the property. The applicant however, insisted that such an application be brought, on its behalf, by the first respondent, claiming that it was entitled thereto on the basis of the provisions of the above-stated clauses and terms of the agreement. In the circumstances the applicant's position, which it conveyed to the first and

third respondents on 19 March 2010, was that it would not agree to and accept transfer and registration of the property in its name until and unless the first respondent has complied with its obligations in terms of the agreement, more particularly, to bring an application and secured approval for the said use-right, and particularly the consent use of the liquor store.

[22] On 19 March 2010 the third respondent reacted to the applicant's above-stated stance by letter, wherein it is alleged *inter alia* that applicant had effectively waived its rights to apply for such use-right, including the consent-use of a liquor shop on the premises, to which the applicant responded, by way of a letter dated 23 March 2010, that it persists with its stance as above-stated. On 30 March 2010, the third respondent gave notice that it will lodge and proceed with the registration of transfer of the property and on 6 April 2010, via e-mail, alleged that the applicant's attempts to delay transfer are "neither *bona fide* nor contractually permissible", and repeated its notice to applicant that "... if Shoprite attempts to interdict or further delay the transfer now scheduled for 8 April 2010, our client will cancel the sale without further notice." (Record page 92, emphasis added.)

[23] It was against this background and in this context that the applicant then launched and issued its urgent application, for the relief as set out above (in paragraph 2) on 7 April 2010. The subsequent developments are recorded and set out in the court orders of 8 April 2010 and 23 April 2010, referred to above. It is common cause between the parties that by 20 August 2010, which was the next date for the hearing of the application, the use-right for a liquor store to be run on the property had been applied for and obtained by the first respondent and registration of the property in the name of the

applicant, and transfer thereof to the applicant had taken place. However, prior to this hearing date, and on 16 July 2010, the applicant brought a chamber book application to compel the first and second respondents to file their opposing papers, which was granted. (See the court order by Blignaut, J dated Friday 16 July 2010, record page 108).

[24] As a result, and on 12 August 2010, "... the first and third respondents filed a short opposing affidavit in the application on 12 August 2010." (Respondents' heads of argument page 4 paragraph 6, emphasis added.)
This then constitutes the material at the disposal of this court, which should be used to make a fair and proper allocation as to costs. (See Jenkins *supra*; Gamlan Investments (Pty) Ltd, *supra*.)

The submissions and findings.

Urgency.

[25] It was contended on behalf of the first and third respondents, both in its heads of argument (page 7, paragraph 16) and during oral argument, that the application ought to have failed, and in the result, that the applicant should not be awarded any costs for lack of urgency because the urgency was self created. The applicant on the other had contended that, given the facts of this case, and more particularly third respondent's threatening attitude as displayed in its letter of 19 March 2010 (annexure ADT14 to the applicant's founding affidavit, record page 71-74) to proceed with the registration and transfer of the property "in the course of the next week or so" (ibid paragraph 8), and which intention was again manifestly displayed in a letter sent to the applicant on 6 April 2010 via electronic mail (annexure ADT18, to the applicant's founding affidavit, record page 91-92)

to proceed with the registration which was set down for 8 April 2010, it had no other alternative than to approach this court for a temporary interdict on an urgent basis. On the facts of this case and based on the material at my disposal, I am inclined to agree with this submission advanced on behalf of the applicant. Moreover, neither the first respondent nor the third respondent specifically disputed the urgency of the application when it was launched and issued. They also did not reserve their rights to dispute the urgency of the application, in any of the abovementioned court orders – all whereof were by agreement between the parties (except for the chamber book order of Blignaut, J on 16 July 2010). This is indicative of the fact that these respondents appreciated and accepted the urgency of the application. In the result this court is satisfied that the applicant was justified to bring this application as one of urgency.

[26] The second ground on which the first and third respondents disputed the applicant's claim that it is entitled to its costs, is on the basis that the applicant, on a proper construction of the terms of the agreement between the parties, would not have been successful in this application. Given the conclusion at which this court has arrived, it is not necessary to deal with this ground in detail. In short it was these respondents' contention that the first respondent only had to apply for use-right for a supermarket in which liquor can be sold to be run on the property. According to them this was done, and hence the first respondent had complied with its obligations in terms of the agreement, more particularly with those obligations as set out in Annexure "C" referred to in paragraph 17 above. It was contended on behalf of the applicant that in terms of the agreement between the parties the first respondent had to apply for use-rights in respect of the property including

the consent use for a supermarket and a separate liquor shop. If one has regard to the relevant part of Annexure C, setting out the respondents further obligations to the applicant in respect of the property, it reads as follows under the heading Zoning:

> "Use-rights: Approved application for consent use for supermarket and liquor shop" (emphasis added).

It is therefore clear that upon the plain meaning of this obligation, the construction and interpretation thereof as contended for by and on behalf of the first and the third respondents cannot hold water. This phrase is clear and simple: the first respondent had to apply to the relevant local authority for use rights which include consent use of a supermarket and consent use of a separate liquor shop. It is common cause that the first respondent did not do that. It is common cause furthermore that subsequently, after the applicant launched its urgent application as above-stated, and before the next hearing date of 20 August 2010, the first respondent had indeed applied for and obtained the use right for consent use of a liquor store, separate from, and in addition to, the consent use of a supermarket, in respect of the property. In other words by 20 August 2010, that issue, which was at the centre of the dispute between the parties, became academic as correctly pointed out by counsel for the first and second respondents. As it therefore stands, this court is literally required now, "... to investigate a dead issue" to borrow and paraphrase from Price J in the Jenkins matter (*supra*). In the circumstances and for the reasons that follow, this court is not inclined to conduct such an investigation, the main dispute between the parties having been settled and hence became a dead issue. The settlement that was reached between the parties was recorded in the court order of 23 July 2010 (referred to in paragraphs 6 and 7 above). The effect of this court order read with the court

order of 8 April 2010, both of which were taken by agreement between the parties, was

a) That the transfer of the property, scheduled for 8 April 2010 was not effected;

b) To enable the first respondent to apply to the relevant local authority for the required use-right, namely, the consent use of a liquor store in respect of the property, which was subsequently done and obtained by the first respondent; and

c) That the first and third respondents gave an undertaking, not to register transfer of the property before 20 August 2010 unless the said use-right is granted earlier and the appeal process provided for in the agreement having been finalized, alternatively if the use-right is not granted, the applicant has elected to proceed with the deed of sale in terms of clause 10.2 thereof.

[27] Objectively, the terms of this court order are, substantially in accordance with the relief that the applicant had asked when it approached this court on an urgent basis on 8 April 2010. In the circumstances, it follows that the applicant had established on a balance of probabilities that it was the successful party and is therefore entitled to its costs. In any event, and as set out above, it is clear, on the material placed before this court, that the applicant would have been successful on the merits of this application.

[28] The remaining issue is whether costs should be awarded on an attorney and client scale, as contended for by the applicant. As pointed out above, the applicant relies on clause 7.3 of the agreement between the parties for costs to be awarded to it on the attorney and client scale. It was

contended on behalf of the first and third respondents that the applicant is not entitled to costs on this scale, for essentially three reasons:

a) there was no breach of any term of the agreement by the first and third respondents, at the time when the applicant launched and issued its urgent application – there was only an alleged threatened breach of the agreement to transfer the property to the applicant without obtaining the disputed use-right;

b) the applicant is/was required, in the event of an alleged breach of the terms of the agreement, to give to the first respondent 14 calendar days notice to remedy the alleged breach, which it had not done; and

c) the first respondent had, at the stage of bringing the application, not yet transferred the property to the applicant, nor had applicant put the first respondent on terms to remedy any breach regarding the use-right, therefore the urgent application was not steps taken against the first respondent pursuant to a breach of the agreement as required by clause 7.3 of the deed of sale.

[29] These are cogent submissions, with which this court agrees. In any event, it is clear on the available material that, to date, no court, including this court, has made any finding that any of the parties acted in breach of any of the terms of the agreement between the parties. In the circumstances this court is not inclined, in the exercise of its discretion, to award costs on the attorney ad client scale.

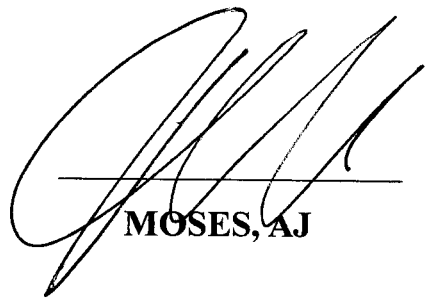
[30] It has also been contended, on behalf of the applicant, that inasmuch

as the applicant initially had to use the services of two counsel, that same was justified by the huge amounts of money involved in this transaction, and the relative complexity of the matter. Therefore should this court order costs in favour of the applicant, such costs should include the costs of two counsel. Counsel for the first and third respondents vehemently opposed such an order, arguing and submitting that both the first and third respondents only used the services of one counsel, and that the matter was not of such a complexity to warrant two counsel. This court is not persuaded to exercise its discretion in favour of allowing costs of two counsel.

Conclusion.

[31] In the circumstances of this case and in the exercise of my discretion, the following order is therefore made:

> The applicant is awarded the costs of its application, including the costs occasioned by the postponements on 8 April 2010, 23 April 2010 and 20 August 2010, such costs to be on the scale as between party and party; and such costs to include the costs pursuant to the employment of one counsel.



MOSES, AJ