IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A108/2016

In the matter between:

THE TRUSTEES FOR THE TIME BEING

OF THE ROY SEAWRIGHT TRUST Appellants

and

CAROLYN WINNIFRED ANNE SEAWRIGHT Respondent

Date of hearing: 26 July 2016

Date of judgment: 15 August 2016

JUDGMENT

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[1] In issue in this appeal is whether the trustees of the Roy Seawright Trust ('the Trust') should be ordered to pay costs *de bonis propriis* on an attorney and client scale to the 78-year-old respondent, Ms Carolyn Winnifred Anne Seawright, a beneficiary of the Trust, following the

withdrawal of an application to have the respondent placed under curatorship on grounds of alleged prodigality.

[2] The respondent's father, Mr Robert Morton Felix Seawright, established the Trust on 9 June 1994. On 11 June 2014 the appellants, namely Mr David Cosgrove, Mr John Seldon, Mr Richard Harris and the Nedgroup Trust Limited, as trustees of the Trust, instituted an application against the respondent to have her declared incapable of managing her affairs on the basis of her alleged prodigality. This application was made approximately a week before the respondent instituted an action for the removal of the appellants as trustees of the Trust on the grounds of their alleged misconduct. Following receipt of the answering papers, the appellants withdrew the curatorship application but their tender of party and party costs was refused by the respondent. This caused the issue of costs to be argued before the Court *a quo*, which ordered the appellants to pay the costs of the application *de bonis propriis* to the respondent on the scale between attorney and client. With leave granted on petition the appeal now turns on the costs order made.

[3] The Trust deed provides that:

'4. Disposal of Income and/or Capital

Until the termination date hereinafter referred to, the nett income and/or capital of the Trust Funds may in the absolute discretion of the Trustees, be used for the benefit or any one or more of the Donor, his descendants and their spouses or any Trust of which the aforegoing persons is or may become a Beneficiary, as the Trustees shall deem fit and they shall accumulate any income not so used.

5. Disposal of Capital at Termination Date

5.1 The Trust shall terminate upon the date (referred to as the "Termination Date") which shall be 50 (Fifty) years after the death of the Donor or such other date as determined in clause 5.3.

5.2 The balance of the capital (including any accumulated income) held by the Trust as at the Termination Date shall evolve upon the Donor's children, Carolyn Winifred Anne Seawright and Linda Veronica Seawright in equal shares, or if any one shall have predeceased the Termination Date, upon her issue per

> stirpes, failing issue, upon the surviving child of the Donor with issue of any predeceased child taking in place of the parent per stirpes.
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> If there are no such persons in esse, then the balance of the capital (including any accumulated income) shall evolve upon the Trustees for the time being of the Barton Mark Trust failing such Trust for whatsoever reason, upon the Trustees for the Time Being of the Clifford Harris Usufructuary Trust, to be dealt with by, and subject to, the possession and control of, the said Trustees in terms of the said Trusts. In the event of the latter Trust having terminated then the balance of the capital shall be distributed in accordance with the provisions of that Trust…'.

[4] By the time of Mr Seawright's death in 2001 the Trust's assets had a market value of in excess of R21 million and almost three times that by 2012. Mr Harris, the son of Mr Seawright's sister, who is a beneficiary of the Clifford Harris and Barton Mark Trusts, was appointed as a trustee of the Trust and after Mr Seawright's death, as executor of his estate. Neither the respondent, nor her sister who passed away on 17 September 2009, had children with the result that the respondent is currently the sole beneficiary of the Trust.

[5] During 2005 the respondent was declared incapable of managing her own affairs and was placed under curatorship following an application made by a close personal friend, without opposition from the respondent who took the view that it would free her from the burden of managing her financial affairs and enable her to pursue her artistic pursuits. The curatorship was chiefly the result of the respondent's unfortunate business dealings during 2004 which led to greatly increased costs being incurred by her in the renovation of her home. In 2010 the respondent was released from this curatorship following an application which was not unopposed.

[6] Mr Cosgrove, in his capacity as trustee of the Trust, deposed to the founding affidavit in support of the appellants' curatorship application. In this affidavit he stated that:

'8. *Harris is the respondent's cousin. He has known the respondent*

for his entire life. However, his relationship with the respondent has on occasion been difficult, and they have seldom agreed on the administration of the trust. It is fair to say that the respondent dislikes and does not trust Harris.

9. Harris is a beneficiary of the Mark trust and of the Harris trust. As the respondent has no descendants, pursuant to clause 5.2 of the trust deed, the Mark trust, or failing that, the Harris trust, will become the sole beneficiary of the trust's capital balance at its termination.

10. For these reasons, Harris and the other trustees are of the view that it is not appropriate for him to be directly involved in these proceedings, other then to authorise me to act on the applicant's behalf.

11. None of the other trustees are related to the respondent, nor have any of them ever met her. They do not have a personal interest in the outcome of this application. However, in their capacities as trustees, they have a direct interest in the relief sought.

12. The trustees' interest in this application arises from their position as trustees of the trust. The purpose of the trust is to benefit the donor (Roy Seawright), his descendants, and their spouses. Of these beneficiaries, only the respondent remains. The trustees are therefore under a duty to apply the assets held by the trust for the benefit of the respondent.'

[7] Apparent from the papers is that the respondent's access to funds from the Trust had long been an issue between the parties. The appellants contended that the respondent's demands for payment and the changes in her legal advisors caused '*alarm*'. Mr Cosgrove, who has not met the respondent, stated that she '*is a prodigal, and therefore incapable of managing her affairs. The reports of Doctors Rausch, Czech and Zabow and of Advocate Van der Westhuizen confirm that this is the case, as does the evidence that the respondent has squandered funds whenever they came to hand*'. There is no dispute that apart from the updated report received from Professor Tuviah Zabow, who had not consulted with the respondent since 2007, the remainder of the medical reports relied upon related to the first curatorship application and had not been updated. The appellants took issue with the fact that monies inherited by the respondent from her sister had been used, with R1.5 million

remaining in her attorney's trust account.

[8] From the correspondence attached to the founding affidavit it is apparent that on 17 November 2011 the respondent through her erstwhile attorney sought a significant increase in monthly maintenance from the Trust and access to various of its accounting records. The appellants refused to accede to the requests and sought information from her attorney as to the respondent's circumstances which was not forthcoming. On 7 September 2012 the appellants informed her attorney that Professor Zabow had been appointed to consider her position, particularly her ability to manage her affairs, and asked to report as to whether any of her conduct caused concern. In response the appellants were informed that the respondent refused to consult Professor Zabow and that she had engaged a financial advisor who was handling her financial affairs, with the inheritance received from her sister invested by the financial advisor. In addition, the appellants were informed that funds held by the respondent's previous attorney from her sister's estate were to be invested by attorney.

[9] On 19 April 2013 the appellants informed the respondent of their intention to bring an application to have her placed under curatorship and asked for information from her attorneys concerning the respondent's ability to manage her financial affairs. Concern was expressed that the respondent may dissipate her assets and '*cause harm and distress to herself*'. On 23 April 2013 her attorneys replied that there was no reason to suppose that the respondent lacked capacity to manage her affairs and that a financial advisor assisted her. Also on 19 April 2013 the appellants sought a report from Dr D Dennis, in whose care the respondent has been since 2007, as to his treatment of the respondent and her ability to manage her financial affairs. The appellants' attorneys informed Dr Dennis that they took the view that the respondent should not have been discharged from her earlier curatorship and that they had decided to approach the High Court to seek that she again be placed under curatorship. On 16 May 2013 Dr Dennis indicated his refusal to respond to the

appellants' enquiries on the basis of patient confidentiality. Shortly thereafter, on 22 May 2013, the appellants obtained a report from Professor Zabow who cautioned against the respondent's exposure to '*potential abuse/mismanagement*' and proposed that a full clinical report was warranted, although noting that '*the extent of financial affairs are not specifically of direct relevance to her mental capacity*'.

[10] Nine months later the appellants instituted the curatorship application. Mr Cosgrove stated in support of the application that -

> '*…the trustees have been disbursing funds to the respondent for many years. As a consequence they have become aware of her profligacy. In the past, they have attempted to address the respondent's problem by disbursing limited monthly amounts to her. This has not proven effective. The respondent spends funds the moment she received them. As a result, the trustees now have great difficulty in advancing funds to the respondent in good conscience, knowing that they will immediately be frittered away*.'

[11] He indicated further that the record was not overburdened with correspondence which was not relevant to the issues at hand but that such correspondence would be made available if required, continuing that:

> '*I am disclosing this fact lest it be contended by the respondent that the trustees are bringing this application in order to subvert her allegations of misconduct against them*.'

[12] The respondent opposed the curatorship application, disputed that she is a prodigal or that she is of unsound mind and took issue with the absence of evidence put up to support the application. She stated that the appellants had known for some time that she intended to take legal action against them based on her allegations of their serious misconduct related *inter alia* to the establishment of an offshore trust which was endowed with more than R8 million from the Trust, with a further distribution made from Trust assets of almost R2.5 million. On 13 September 2013 the respondent demanded that the appellants resign as trustees of the Trust on grounds of this misconduct and that

'*barely a week*' before she instituted summons on 18 June 2014 in her removal action, the appellants sought that she be declared a prodigal. This, she contended, was done with '*the manifest purpose*' not to safeguard her interests '*but to shield the* [appellants] *from an enquiry into their alleged gross misconduct as trustees*'. In her answering affidavit she took issue with their plea filed in response to her removal action in which the appellants claimed she is a '*spendthrift*' and made reference to their curatorship application. This, the respondent indicated, substantiated her belief that the application was an abuse of Court process. Given that she routinely acts upon the advice of a psychiatrist, a retired financial advisor and a firm of attorneys, the respondent stated that she has not felt or been vulnerable to financial exploitation and that the appellants' curatorship application was consequently one without merit.

[13] The respondent provided a history of limited payments she had received from the Trust from October 2004 when Mr Harris gave her two options: to sell her R2 million house and "go it alone" with R1759.00 per month made available to her after expenses, which she refused; or to take a loan from the Trust which included the payment of monthly expenses and R6000.00 for "discretionary spending". As a result a loan agreement was concluded, with the respondent supporting herself from the equity in her house, which she stated '*preserved the funds of the Trust…not for my benefit, but ultimately for the benefit of Harris and his family*'. This '*unfair financial regime*' imposed on her, the respondent stated, '*is certainly not what my father had intended'*.

[14] When her curator *bonis*, Mr Michael Lane, sought further funds for the respondent given the '*ample provision*' made for her by her father, this was denied by the appellants on the basis of an inheritance received by the respondent from her father which included an investment portfolio worth R2.4 million, which they claimed she had spent in a reckless and wasteful manner. On 6 March 2007, in response to Mr Lane, it was stated that the loans provided to the respondent were to address this and given that '*the capital was entrusted*

to the trustees not solely for the benefit of [the respondent and her sister] *but also for the benefit of the ultimate capital beneficiaries*' of which the '*trustees are mindful'*.

[15] In the appellants' replying affidavit Mr Cosgrove dealt with the respondent's claim that the trustees were motivated by an ulterior purpose in bringing the application by denying misconduct and persisting that the appellants' decision to launch the application was '*entirely reasonable*', lacked ulterior purpose and was brought about by the respondents refusal to deal with the applicants' enquiries. He stated that the application was made '*merely to ensure that the respondent was not - again improperly influenced by unscrupulous service providers. The respondent had been previously diagnosed with a mental condition that left her susceptible to same*…'.

[16] Having heard argument on the issue of costs, the Court *a quo* ordered the appellants to pay the repondent's costs *de bonis propriis* on the attorney and client scale. In doing so, regard was had to the decision of *Cooper NO v First National Bank of SA Ltd* [1] in which it was stated that '*(t)he general principle of the common law is that a trustee, who acts in a representative capacity, cannot be ordered to pay costs de bonis propriis unless he has been guilty of improper conduct*'. While finding that the trustees' failure to deal in its reply with the respondent's '*serious allegations'* on the part of trustees '*…regarding irregular dealings*' in transferring monies offshore '*by or from the Trust*' was not in keeping with their fiduciary duties and that they had not acted properly in this regard, the Court *a quo* found that the trustees '*cannot be blamed for their decision to bring the application*'. This was circumstances in which the Court was '*unable to make a finding…on the papers*' as to whether the application was a strategem to obstruct the respondent's application for the removal of the trustees.

[17] Regard was also had by the Court to the position of Mr Harris as a potential beneficiary under the Trust. In this regard the Court found that:

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[1] 2001 (3) SA 705 (SCA) at para 37.

> '*It appears clearly from the founding affidavit that respondent's attitude towards him was hostile. For that reason applicants created a façade which was calculated to conceal the fact that Mr Harris was one of the persons that instituted the proceedings against her. In my view this was also improper. They were acting jointly as trustees in this application and there were no grounds for attempting to conceal this fact from respondent'.*

[18] The appeal turns on whether the Court *a quo* erred in finding that the appellants had conducted themselves improperly in failing in their replying affidavit to deal with the respondent's allegations of their irregular dealings and whether the finding that a façade was created in their founding affidavit was calculated to conceal that Mr Harris was one of the applicants. The respondent opposes the appeal on the basis that the appellants acted improperly in bringing the curatorship application, which was aimed at disabling her a week before her prosecution of an action to have them removed as trustees of the Trust.

[19] Extensive heads of argument were filed in the matter. In argument Mr *Woodland* SC raised a number of reasons as why no impropriety on the part of the appellants existed in the matter. These included that there was no immediate harm to the respondent in bringing the application in that what was sought was an investigation into her position by a curator *ad litem* in circumstances in which she had previously been under curatorship for five years due to spending money unwisely. Mr Lane, as curator *bonis*, it was contended had in retrospect indicated that it was unwise to release the respondent from curatorship, although he did not confirm this view in a confirmatory affidavit. Professor Zabow reported on 22 May 2013 that a full clinical report was warranted and the respondent was vulnerable. After her release from curatorship the respondent had come into money from her sister which had been depleted and the appellants were concerned that '*history would repeat itself'.* The respondent's attorney had stonewalled the trustees when he had refused information sought regarding the respondent. It followed that when the answering papers came to light and 'the answer provided', the appellants withdrew the application.

[20] It was conceded for the appellants that while the application may have been unfortunate, with its timing a factor, the appellants had nevertheless acted prudently in bringing the application, given the respondent's past prodigality and there was no bar on the respondent pursuing a removal action. The decision of the Court *a quo* was, it was contended, arrived at upon wrong principle, unwarranted and had severe reputational consequences for the appellants whose professional integrity is at stake and who ought not to have been penalised for the manner in which they dealt with the conflict between Mr Harris and the respondent, or for their lack of reply to the misconduct allegations raised in the answering affidavit.

[21] In opposing the appeal Mr *Duminy* SC maintained that the Court *a quo* had not misdirected itself in its finding that a façade had been sought to be created, that Mr Harris was not involved in the proceedings when he was required, given his position as trustee, to act jointly with other trustees, failing which the proceedings would have been unauthorised. He contended that the evidence relied upon could never have sustained the application that the appellants' attempted improperly to preserve Trust assets through holding the respondent on a shoestring. The application was therefore *mala fide* and an abuse of process, aimed at preventing the respondent from pursuing her removal action when the improper offshore payments of Trust money had gone via Mr Cosgrove and his companies. It was factually incorrect that the respondent had not replied to the appellants' request for information concerning her position and the reliance placed on reports used in the 2005 application, with a supplemented report from Professor Zabow having been obtained in circumstances in which he had not since 31 July 2007 consulted with the respondent, were improper. As a result, a punitive costs order against the appellants was justified so as to ensure that the costs payable are not paid from Trust assets.

Evaluation

[22] The discretion of a court of first instance to impose costs is one in

the 'strict' or 'narrow' sense, with the result that a court of appeal is not entitled to substitute its decision for the decision of the court *a quo* simply because the appeal court considers its conclusion more appropriate. Instead, it may interfere with a costs order made only where there is good reason to do so:[2] where the court *a quo* did not exercise its discretion judicially; where the power conferred on that court is exercised capriciously or upon wrong principle; where a decision is reached which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles; or where it did not act for substantial reasons.[3]

[23] A trustee is required by s 9 (1) of the Trust Property Control Act 57 of 1988 to act '*…in the performance of his duties and the exercise of his powers …with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another*.' This is so in that the trust estate vests in the trustee who is required in the administration of the estate to exercise fiduciary responsibility over it on behalf of and in the interests of another.[4] The fiduciary nature of the position of a trustee makes the standard of conduct to be adhered to by a trustee higher than that which an ordinary person might generally observe in the management of his or her own affairs. [5] It requires the trustee to act in the manner of a prudent and careful person who is obligated to observe due care and diligence to protect the interests of the trust and its beneficiaries so as to avoid undue risk or a conflict of interests.[6] It follows as a general principle that a trustee who acts in a fiduciary position will not be ordered to pay costs in his or her personal capacity unless, having regard to the circumstances of the matter, there is shown to exist improper conduct;[7] a

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[2] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC) at para 29.
[3] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) at para 11; *Manong and Associates (Pty) Ltd v City of Cape Town and another* 2011 (2) SA 90 (SCA) at para 92, with reference to *Naylor and another v Jansen* 2007 (1) SA 16 (SCA) at para 14.
[4] *Land & Agricultural Bank of SA v Parker and others* 2005 (2) SA 77 (SCA) at para 20.
[5] *Administrators, Estate Richards v Nichol & another* 1999 (1) SA 551 (SCA) at 557D-F.
[6] *Ibid; Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178.
[7] *Cooper n 1* at para 37.

material departure from the responsibility of office;[8] a lack of *bona fides*;[9] conduct actuated by ulterior motives;[10] or due to the unreasonableness of his or her conduct.[11]

[24] Of the two findings of impropriety made by the Court *a quo* against the appellants to justify the punitive costs order imposed against them personally, one related to the attempt to create a façade which was calculated to conceal that Mr Harris, a potential beneficiary under the Trust, was one of the persons who had instituted the application against the respondent.

[25] It is trite that although trustees are required to act jointly in accordance with the provisions of the trust deed, they may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees.[12] When one trustee is authorised to act on behalf of the others, the effect is not that the other trustees are relinquished from their fiduciary duties or entitled to turn a blind eye to the actions or conduct of the representative trustee.

[26] Mr Cosgrove recognised in his founding affidavit that the appellants were under '*a duty to apply the assets held by the trust for the benefit of the respondent*'. His claim that it was '*not appropriate*' for Mr Harris to be directly involved in the matter given his at times '*difficult*' relationship with the respondent and that Mr Harris had done no more than authorise Mr Cosgrove to act in the application, was remarkable. This was so not only given Mr Harris' fiduciary duties and responsibilities as a trustee but also Mr Harris' involvement in the matter until that time. On 26 August 2010 Mr Lane wrote to Mr Harris confirming that he had spoken to Mr Harris, reconsidered his

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[8] *Blou v Lampert and Chipkin, NNO, and others* 1973 (1) SA 1 (A) at 14; *Du Plessis v Strauss* 1988 (2) SA 105 (A) at 119G-J; *Boyce, NO v Bloem* and others 1960 (3) SA 855 (T) at 865F-H, 875..

[9] *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 725A-C; *Weiner NO v Broekhuysen* 2001 (2) SA 716 (C) at 726F-G.

[10] Re Estate Potgieter 1908 TS 982 at 1003.

[11] *Jakins v Burton* 1971 (3) SA 735 (C) at 740B-H.

[12] *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at para 23.

position and that he would be willing to continue in his role as curator *bonis* '*should you require it'*. Thereafter, correspondence from the appellants' attorneys to the respondent's attorneys and Dr Dennis did not distance Mr Harris from the matter. The Court *a quo* was correct in finding that having decided jointly with the other trustees to institute the application, the suggestion that it was not appropriate for him to be directly involved in the proceedings sought to create a façade that Mr Harris had not been party to the decision to institute the application other than in authorising Mr Cosgrove to act.

[27] Turning to the misconduct allegations raised by the respondent related to the trustees' alleged irregular dealings in transferring trust monies offshore in contravention of the Trust deed, Mr Cosgrove stated no more than that the '*issues are all fully canvassed in the removal action, and will be dealt with in due course. I submit that no purpose would be served by dealing with them at this stage. To the extent necessary, the allegations are denied*.'

[28] The misconduct alleged was of a serious nature raised in the context of the respondent's contention that the curatorship application was a strategem aimed at incapacitating her from pursuing her removal action barely a week before that action was instituted. The Court *a quo* cannot be faulted for its view that serious trustee misconduct once raised warrants more than a denial which seeks to deflect the issue as opposed to one to be determined in other proceedings. This is all the more so in the context of an application to have a trust beneficiary declared incapable of managing her affairs. Having been raised in the manner it was, a court determining the curatorship application would necessarily have had regard to the fact that allegations of misconduct had been raised with the result that the basis for and motive behind the curatorship application would have come into issue. It was accordingly required of the appellants as trustees acting properly and in good faith to draw the court into their confidence and provide a susbstantive reply to the allegations raised.

[29] Where a trustee conducts litigation in bad faith, for example by concealing material information from the court, he or she may properly be mulcted in costs.[13] In *Cooper NO v First National Bank of SA Ltd* the majority judgment per *Smallberger JA* stated that:

> '*The general principle of the common law is that a trustee, who acts in a representative capacity, cannot be ordered to pay costs de bonis propriis unless he has been guilty of improper conduct. The Judge a quo found the appellant's conduct to be "unacceptable". Improper conduct is always unacceptable; but unacceptable conduct is not necessarily improper. While the appellant's conduct may have been ill-considered, and his application lacking in certain essential detail to the extent that it may be said that he did not make a full disclosure of all relevant facts, one cannot, in my view, go so far as to hold that his conduct was improper. It has not been shown that there was a conscious attempt on his part to mislead the magistrate or to use sec 69(3) unfairly to his advantage. In the circumstances the special costs order against the appellant was not justified and falls to be set aside."*[14]

[30] More than ordinary negligence is required before costs *de bonis propriis* will be ordered.[15] In *Re Estate Potgieter*[16] it was stated that such costs are justified on the basis that '*to be utterly and egregiously wrong-headed is a luxury for which a trustee may have to pay*'. Where litigation is conducted in the trustee's own interest rather than that of the trust,[17] where there has been '*a high or considerable degree of unreasonableness or negligence*'[18] or '*really improper conduct*'[19] and order of costs *de bonis propriis* have been found to be appropriate.

[31] From the founding papers it is apparent that there was perilously little in the way of factual material put up by the appellants in support of their curatorship application. They relied on outdated medical reports which related

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[13] Honore's South African Law of Trusts (5th ed) at 433; *Strydom en 'n ander v De Lange* en 'n ander 1970 (2) SA 6 (T) at 14H.
[14] Cooper n 1 at para 37.
[15] *Re Estate Potgieter* n 10 at 1009.
[16] *Ibid* at 1012.
[17] *Lindenberg v Giess, NO and Another* 1957 (3) SA 30 (SWA) at 33F-34A and *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C) at 943.
[18] *Re Estate Potgieter* n 10 at 1009-10
[19] Honore's (5th ed) at 435; *Natal Bank v Kuranda's Trustee* 1904 TS 586 at 592.

to the earlier curatorship application and an updated report by Professor Zabow, who had last consulted with the respondent in 2007 and had not consulted with her prior to providing such report. The '*alarm*' claimed and the statement made that the respondent '*is a prodigal, and therefore incapable of managing her affairs'* was unsubstantiated with no evidence put up to support a conclusion that the respondent had '*squandered funds whenever they came to hand*'. The inheritance which had been received by the respondent from her sister did not fall into the assets of the Trust and the appellants' concerns raised regarding such inheritance were answered when they were informed by her attorney that the respondent's financial matters were handled by a financial adviser and her erstwhile attorney had invested certain funds held. The application was subsequently withdrawn.

[32] Consequently, the conclusion reached by the Court *a quo* was one which could not reasonably have been made having regard to all the relevant facts and principles. A punitive costs order on an attorney and client scale against the appellants was warranted given the lack of a factual basis put up to support the application, which resulted in the subsequent withdrawal of an application which from the outset appeared to have lacked merit. However, it is material that the two instances of impropriety relied on to justify an order *de bonis propriis* did not lead the Court *a quo* to find '*a high or considerable degree of unreasonableness or negligence*'[20] or '*really improper conduct*'[21] on the part of the appellants when the application was instituted. The application could not have been lawfully instituted without Mr Harris acting jointly with the other trustees, and as much was stated on the papers. Furthermore, it was a relevant consideration that the replying affidavit had been filed following a decision taken to withdraw the application. The Court *a quo* did not find that there existed a high degree of unreasonableness or improper conduct required to warrant a *de bonis propriis* order being made against the appellants. No finding was made that the application was made in bad faith, that the appellants

[20] *Re Estate Potgieter* n 10 at 1009-10.
[21] *Natal Bank* n 19 at 592.

had concealed material information from the Court or that they had acted in an improper manner in instituting the application. The issue taken with their propriety in the two respects did not meet the threshold required to warrant a conclusion that the appellants' conduct was of such an improper nature and so unreasonable as to warrant a *de bonis propriis* order being made against them. In making the order that it did it follows that the Court *a quo* arrived at a result which cannot be sustained on the applicable facts and principles. It follows that the order of the Court *a quo* falls to be set aside and substituted with an order that the respondent's costs in the proceedings before that Court be paid on an attorney and client scale by the appellants from the assets of the Trust.

[33] For all of these reasons, the appeal against the judgment and order of the Court *a quo* must succeed. There is however no reason as to why the respondent, given the unique circumstances of this matter, should be required to bear any of the costs of the appeal, including her own costs in opposing the appeal. Given the facts of the matter and the basis for the appeal, I see no reason as to why all such costs should not properly be borne by the appellants on an attorney and client scale, payable from the Trust estate. Given the issues involved, there is no reason as to why costs should not include the costs of two counsel where employed.

Order

[34] In the result, I propose an order in the following terms:

1. The appeal against the judgment and order of the Court *a quo* is upheld.
2. The order of the Court *a quo* is set aside and substituted with the following order:

> "The appellants are to pay the respondent's costs on the scale as between attorney and client, including the costs of two counsel, where employed. Such costs are to be paid by the appellants from the estate of the Roy Seawright Trust."

3. The costs of the appeal, inclusive of both the appellants' and respondent's costs, are to paid by the appellants on the scale as between attorney and client from the estate of the Roy Seawright Trust. Such costs are to include the costs of two counsel, where employed.

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SAVAGE J

I agree and it is so ordered.

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GOLIATH DJP

I agree.

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CANCA AJ

Appearances:

For appellants: G W Woodland SC and N Traverso

Instructed by Norton Rose Fulbright

For respondent: W R E Duminy SC and T R Tyler

Instructed by Lampbrecht Attorneys