IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 13282/18

In the matter between:

CHRISTIAAN ERNST VAN TONDER	Applicant
and	
THE PRESIDING MAGISTRATE, SOMERSET WEST	First Respondent
JURGENS STEENKAMP N.O	Second Respondent
JOHAN THERON	Third Respondent

Coram: P.A.L.Gamble, J
Date of Hearing: 7 November 2018
Date of Judgment: 5 March 2019

JUDGMENT DELIVERED ON TUESDAY 5 MARCH 2019

GAMBLE, J:

INTRODUCTION

[1] This is a judgment about the liability for the payment of costs which were reserved on 7 November 2018 after an order was made directing the applicant ("*Van*

Tonder") to attend an insolvency interrogation by the second respondent ("*the trustee*") before the first respondent ("*the Magistrate*"). Because it is only the determination of costs which falls to be considered it is trite that the court will decide the case along broad and general lines without a full hearing on the merits. That having been said, an award for costs remains within the discretion of the court, which discretion must be exercised judicially after consideration of all the relevant factors.[1]

BRIEF SYNOPSIS OF BACKGROUND FACTS

[2] Van Tonder was previously a director of 2 companies – The Buying Exchange Company (Pty) Ltd and Neonbel 21 (Pty) Ltd – which had a business relationship with a Mr. L.J.J Grobbelaar and his wife Ms. E.E Grobbelaar who were both sequestrated. In accordance with his statutory functions the trustee sought to interrogate van Tonder before the Magistrate in terms of s65 of the Insolvency Act specifically with reference to the activities of the Grobbelaar's.

[3] From a relatively early stage it seems that van Tonder exhibited some reluctance to be interrogated. For example, at a meeting before the Magistrate on 29 September 2016 his attorney, Mr. Hurter, indicated that before any interrogation could commence van Tonder required a list of relevant documents so as to adequately prepare himself. At reconvened meetings before the Magistrate on 12 December 2016 and 26 January 2017 van Tonder was apparently present but was not called to testify.

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[1] Gamlan Investments (Pty) Ltd and another v Trillion Cape (Pty) Ltd and another 1996 (3) SA 692 (C) at 700C – 701H

[4] On 20th April 2017 certain of the parties (excluding van Tonder) were not present and the matter was further postponed to 10 August 2017. Van Tonder says that he was not specifically warned by the Magistrate to appear again on that date but only informed of the necessity for a postponement. Van Tonder was irked by this because he had had to return from his holiday home to attend the enquiry only to be told that the matter could not continue due to the absence of some of the lawyers. In the result, Mr. Hurter took up the question of witness fees and travelling expenses with the trustee's attorney, Mr. Theron (the third respondent herein) in a letter dated 26th May 2017.

[5] After much to-ing and fro-ing the trustee's attorney eventually paid an amount of R4518 into Mr. Hurter's trust account on 11 August 2017 in settlement of witness fees. This was the day after the proposed resumption of the enquiry at which van Tonder was not present. Van Tonder did not attend further meetings 9 November 2017 or 14 December 2017, alleging that he had not been advised thereof and so the matter dragged on without his appearance being secured.

[6] Eventually, the Sheriff was instructed to serve a fresh subpoena on van Tonder to appear at the enquiry on 1 March 2018. His attempt to do so at van Tonder's business premises in Bellville on 13 February 2018 was only successful to the extent that an employee (who refused to furnish her name) told him that van Tonder was overseas and that the date of his return was unknown.

[7] On 22 February 2018 a further attempt at service of the subpoena was made at van Tonder's residential address in Durbanville by affixing it to the front gate after access to the premises could not be obtained. The return of service reflects 6

previous attempts at service when the premises were locked and one occasion upon which the Sheriff was informed by an unknown woman that van Tonder was away. A photograph of the subpoena attached to the founding papers shows that it was firmly secured to the gate and could hardly not have come to the attention of the occupants of the house. Notwithstanding these returns, the Magistrate declined to issue a warrant for the arrest of van Tonder when he failed to appear on 1 March 2018 and directed that a new subpoena be served.

[8] Fresh documents were drawn requiring van Tonder's appearance before the Magistrate on 20 April 2018. Attached to that subpoena was a list of documents that he was required to bring along. Once again an attempt at service at the commercial premises associated with van Tonder was stymied on 6 April 2018 with a similar response as before, while service at his residence in Durbanville on 5 April 2018 was again effected by attachment to the gate. When van Tonder did not appear on 20 April 2018 the Magistrate issued a warrant for his arrest and postponed the interrogation to 31 May 2018.

[9] On that day van Tonder did not appear either and the Magistrate chairing the interrogation (a different person to that that who had presided on 20 April 2018) cancelled the existing warrant and issued a fresh warrant of arrest, directing the Sheriff to bring van Tonder before the Magistrate on 26 July 2018 when the enquiry was scheduled to continue. The Sheriff duly complied with the directions of the Magistrate and took van Tonder into custody on 26 June 2018 under the supervision of the SA Police Services. He was taken through to the Somerset West Magistrates' Court where he was held in a communal cell with ordinary awaiting trial prisoners.

Later that day van Tonder appeared before the Magistrate who ordered his release from custody and warned him to appear again on 26 July 2018.

[10] Van Tonder relates how he was threatened with violence and sexual assault while in the communal cell and says that he ultimately consulted a psychologist, Dr Rossouw, as a consequence thereof. The upshot of that intervention was a diagnosis of Post Traumatic Stress Disorder ("*PTSD*") and a recommendation by Dr Rossouw that Mr. van Tonder not return to court as he might suffer further psychological stress by being associated with that venue and, in addition, that he not be interrogated until his condition had been treated – a period of 10 to 14 weeks was envisaged in that regard.

[11] Mr. Hurter therefore communicated with Mr. Theron in an endeavor to secure an undertaking that van Tonder be excused from attendance before the Magistrate on the 26th July 2018. He was unsuccessful in that regard and Mr. Theron demanded that van Tonder present himself as instructed by the Magistrate. Fearing the worst and anticipating further psychological injury if he were to return to the environs of the Somerset West court, van Tonder launched an urgent application in this court on 26 July 2018 seeking relief to the following effect.

(1) That the trustee and Mr. Theron be prohibited from applying for a warrant of arrest for van Tonder's failure to appear for interrogation before the Magistrate on 26th July 2018 until such time as Dr Rossouw had furnished a report that he was fit to attend such a meeting;

(2) That the Magistrate be directed not to issue such a warrant in the event that van Tonder failed to appear; and

(3) That the trustee and Mr. Theron be directed to pay the costs of the application *de bonis propriis* in the event of opposition.

[12] The matter was heard urgently during the winter recess and the presiding judge required the attendance of Mr. Theron and the trustee's counsel, Mr. van der Walt, before an order would be considered. After discussing the matter with the judge in chambers the parties took an order by agreement which provided for –

(1) An undertaking by the trustee and Mr. Theron not to apply for the arrest of van Tonder to his failure to appear at the Magistrates Court on 26 July 2018 pending the further hearing of this application;

(2) A timetable for the filing of supplementary founding papers and answering and replying affidavits;

(3) The reservation of costs; and

(4) The postponement of the matter to the semi urgent roll for hearing on 7 November 2018.

[13] As set out above, the main issue was resolved in terms of an agreed order on 7 November 2018 - essentially that the trustee would interrogate van Tonder at the offices of his attorneys in the presence of a presiding officer duly appointed by the Master. One would have hoped that such an order would have put paid to the

dispute but of course as is so often the case the ever-important question of costs remained and was hotly debated by counsel before me.

CONSIDERATION OF AN APPROPRIATE ORDER

[14] Mr. van der Merwe, counsel for van Tonder, asked for the costs order to incorporate the following.

(1) Firstly the costs of the urgent application of 26 July 2018 were sought on the scale as between attorney and client;

(2) Then the costs of opposition of the application were sought but not on the scale as between attorney and client;

(3) Finally van Tonder sought the costs of the day on 7 November 2018 (including the costs of opposition) on the party and party scale; and

(4) It was said that any such costs orders should be made against the trustee and Mr. Theron jointly and severally but not *de bonis propriis.*

[15] Mr. van der Walt submitted on behalf of the trustee and Mr. Theron, firstly, that there was no basis at any stage for a claim for costs *de bonis propriis.* It was further submitted that, insofar as the claim for such costs was only abandoned by van Tonder during the course of the hearing on 7 November 2018, it was reasonable for those parties to have opposed the application and to have appeared at the hearing through counsel to resist both the costs orders and the signification of opprobrium which would have accompanied the making thereof. I agree.

[16] In my view, there was nothing in the conduct of either the trustee or Mr. Theron which warranted a personal costs order being made against two professional persons acting in their respective representative capacities. Indeed such an order is not readily made and, when it is, it will only be granted in circumstances where the representative concerned has exhibited a material departure from the responsibility of office.[2] Little surprise then that Mr. van der Merwe smartly abandoned that prayer when pressed by the court to motivate it.

[17] In the result, there is much to be said for an order that, notwithstanding a measure of overall success in the application, van Tonder should carry the costs can by virtue of his unwarranted brinkmanship against his opponent's attorney. However, that is not the end of the affair.

[18] One must also ask whether the bringing of the urgent application on 26 July 2018 could have been avoided. I have little doubt that van Tonder's prevarication and patent attempts to evade service of the subpoenas on him were a contrivance to avoid the inevitable. And, it may be said that he received his comeuppance in spades when he was eventually arrested and taken through to the Magistrate under the warrant of arrest of 20 April 2018. On that score it should be pointed out that the instructions of Mr. Theron to the Sheriff were expressly to avoid the incarceration of van Tonder in the police cells, no doubt mindful of the horror stories which abound about the fate of white collar criminals being attacked and molested by the common or garden variety when in collective custody.

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[2] Blou v Lampert and Chipkin NNO and others 1973 (1) SA 1 (A) at 14A – 15C

[19] The diagnosis of PTSD by Dr Rossouw was attacked in the answering papers by Dr Panieri-Peter, an eminent forensic psychiatrist in the city. She points out in an affidavit dated 20 September 2018 that Dr Rossouw was initially consulted by van Tonder in a therapeutic capacity and that any confirmed diagnosis of PTSD ought thus to have been left up to an independent psychiatrist with forensic experience. Dr Panieri-Peter also highlights concerns regarding van Tonder's potential for malingering, not an unreasonable position to take in light of the background circumstances of the matter.

[20] But at the end of the day, the launching of this application achieved two results. Firstly, it ensured that van Tonder was not exposed to any risk whatsoever of potential psychological harm by being excused from attending at the alleged source of his alleged injury. To that extent I suppose it may be said that the application was warranted. However, as a consequence of that which transpired subsequent to the initiation of this application, van Tonder's reluctance to be subjected to lawful insolvency interrogation was overcome. In this regard it might therefore be said that on the first outcome van Tonder has achieved a fair measure of success while on the other hand the trustee has been able to discharge his statutory function and has similarly been successful in his overall stratagem.

CONCLUSION

[21] In the result there are those (other than the legal representatives who, no doubt, have been handsomely rewarded for their professional services) who will claim to have been successful in this spat. In my view, the applicant's measure of success falls to be off-set by the unwarranted step of persisting in a claim that

contemplated that personal costs orders should be made against professionals acting in their representative capacities. In the result, it seems to me to that the fairest and most equitable order is that no party be mulcted in costs.

ORDER OF COURT:

THERE WILL BE NO ORDER AS TO COSTS.

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GAMBLE, J