THE HIGH COURT OF SWAZILAND

CECIL JOHN LITTLER N.O

Applicant

And

OKH FARMS (PTY) LTD

1st Respondent

JEREMIA DE LA ROUVIERE RENS

2nd Respondent

EVERYBODY OCCUPYING THE FARM PORTION H OF
FARM 222 AT KUBUTA, SHISELWENI DISTRICT
THROUGH THE FIRST AND SECOND RESPONDENTS

3r Respondent

Civil Case No. 2454/2004

Coram: S.B. MAPHALALA – J

For the Applicant: Advocate P. Ebersohn (Instructed by P.M. Shilubane & Associates

For the Respondents: Advocate R. Wise SC (Instructed by Robinson Bertram)

RULING ON COSTS

(2nd May 2006)

[1] The Applicant and the 1st Respondent agreed that the rule *nisi* in this case should be discharged and the Applicant then withdrew the application. The only question which the court is asked to resolve presently is the issue of the costs of the application. There was no appearance on behalf of the 2nd and 3rd Respondents.

[2] The 1st Respondent seeks an order for costs on the scale of attorney and own client against the Applicant and his attorney Mr. P.M. Shilubane *de boniis propriis,* ordering them to pay the costs out of their pockets and an order to the effect that they may not recover costs they incurred from the estate of the deceased.

[3] Before dealing with the costs aspect further it is necessary to provide details regarding the background of the matter. The Applicant is the executor of the estate of the late Petrus Jourbert Van Der Walt ("the deceased"). The original joint executors of the estate were the 2nd Respondent and one Beukes Lodewikus Willemse. In terms of a codicil to the will of the deceased the right was bequeathed to a certain Gideon Truter Willemse to lease the farm from the estate for 5 years. It is common cause that this lease commenced in 1998 and that the said Gideon Truter Willemse took occupation of the farm then.

[4] In July 2002 the 2nd Respondent, leased the farm to one Barry Forbes. Gideon Truter Willemse and his workers were then forcibly evicted from the farm by Barry Forbes acting on behalf of the 1st Respondent.

[5] The co-executor Beukes Lodenikus Willemse then launched an application under Case No. 1973/2003 in this court to have the 2nd Respondent removed as co-executor on the grounds of misconduct. The co-executor launched a further application under Case No. 1974/2003 in this court for a declaratory to the effect that the **Roc Fund Trust** which the deceased purported to create in his will did not come into existence. The judgment in that matter appears in the record of these proceedings.

[6] Beukes Lodewikus Willemse then stayed on as sole executor but the Master of the High Court caused a Mrs Mthembu to be appointed execute *dative.* All along Gideon Truter Willemse maintained that he had a substantial claim against the estate for improvements to the farm of the deceased. The claim was lodged with Mrs Mthembu. Thereafter the matter

was taken to court by Mr. Willemse regarding his claim against the estate. Mrs. Mthembu defended the action and after she was barred she brought an urgent application in this court to have the claim of Willemse dismissed. Mr. Willemse on his part then brought an application under Case No. 4007/2004 in this court to have Mrs. Mthembu removed as executrix on the grounds of misconduct *inter alia,* for not acting against the 1st Respondent and the 2nd Respondent. In her Answering affidavit Mrs. Mthembu disclosed that she in fact entered into a Deed of Lease with the 1st Respondent leasing the farm to them for 2 years with an option to extend the lease for a further two years.

[7] The court then removed Mrs Mthembu as executrix on the grounds of misconduct *inter alia* for entering into the lease with the 1st Respondent and the court then, in terms of the powers granted by the Administration of Estates Act, ordered the Master of the High Court to appoint the Applicant as the executor. Mrs Mthembu's appeal against the order of the High Court was dismissed by the Court of Appeal which also ruled that the executrix did not have the power to enter into the lease with the Is' Respondent.

[8] The Master of the High Court eventually appointed the Applicant as executor of the estate.

[9] According to the Applicant after having been appraised of the fact that the farm of the deceased was being mismanaged, asked an expert, one Professor Holtzhausen for advise and Holtzhausen confirmed that the orchards on the farm were going to waste due to it not being irrigated and that trees thereon were dying on a large scale as a result thereof and that there was a prolific growth of grass and weeds on the farm creating a vast fire hazard, it being winter and the grass and, weeds being dry. Professor Holtzhausen thereafter personally visited the farm of the deceased and confirmed his initial opinion. Another expert, a Dr Lubbe, was called by the

Applicant and he also confirmed the opinion of Professor Holtzhausen and stated that the farm was a disaster in view of lack of proper management and lack of irrigation.

[10] The Applicant obtained an interim order and rule *nisi* on an urgent basis and without notice to the Respondents. The 1st Respondent in the Answering affidavit did not dispute the merits of the application it being clear that the lease agreement *Mrs Mthembu* entered into with the 1st Respondent being invalid. In that regard the court already removed her as executrix, *inter alia,* for entering into that agreement and the judgment was upheld by the Court of Appeal. The Applicant contended that he was entitled to a declaration in that regard as against the 1st Respondent and that the Respondents should be evicted from the farm so

that he could sell the farm without the burden of tenants thereon. The 1st Respondent raised two points in *limine* against the application firstly a lack of urgency and secondly that there was no valid basis far the matter to have been brought *ex parte* without notice to the Respondents having been heard first.

[11] In arguments before me on costs *Advocate Ebersohn* contended at paragraphs 12.1, 12.2, 12.3, 13.1, 13.2 of his Heads of Arguments that there was nothing sinister in the bringing of the urgent application and there are no grounds present upon which a special order for costs should be made. Further that the fact that Mr. Mofokong signed the Notice of Motion and Certificate of Urgency on behalf of attorney Shilubane and also as Commissioner of Oaths was explained satisfactory and one of those mishaps which occur irregularly and certainly did not warrant an interlocutory application consisting of 167 pages. Mr. Mofokeng's error certainly does not warrant a special order for costs. Instead the 1st Respondent should be sanctioned for unnecessarily burdening the record. Furthermore, that the 1st Respondent should also be sanctioned for raising points in the papers and then declaring that no relief would be sought in connection therewith. The Applicant further referred the court to the legal authority of *Cilliers, Law of Costs paragraph 2.07* thereof and the case of *Mizchell vs Mossel Bay Liquor Licensing Board 1954 (1) S.A. 398* at *417 - 418.*

[12] *Advocate Wise* for the 1st Respondent advanced arguments *au contraire* and filed very helpful Heads of Arguments for which I am indebted to Counsel, in fact to both Counsel because *Advocate Ebersohn* also filed very extensive Heads in which the historical background of this case in this judgment has been extracted. The 1st Respondent submitted that the appropriate scale of costs in the present matters is that between attorney and own client for the following reasons found in paragraph 12 of 1st Respondent's Heads of Arguments, thusly:

> 13.1 **It is well known that an award of costs on the party and party scale leaves the successful party having to pay a substantial amount of his own costs. This is considered to be acceptable and proper by the law and the courts when the cause has been conducted regularly and with all due propriety by the parties and the decision in the matter has been determined on the real issues.**
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> 13.2 **It is different, however, when the matter in which a party has conducted the case is regarded as having been improper and/or unacceptable for some reason or reasons. In such event it is considered just and equitable that costs be awarded on the attorney and client scale or on the attorney and own client scale. Frequently this is simply because it is considered inappropriate that the successful party should be out of pocket at all. In other instances it is to visit the court's displeasure with the manner in which the case has been**

conduct on the party who conduct has been irregular and unacceptable.

13.3 **Because the Applicant brought the application nominee officio, i.e. not in his personal capacity but in his capacity as the executor of the deceased estate of the late Johannes Van Der Walt, an order for costs would in the ordinary course mean that the costs would be payable out of the assets of the deceased estate.**

13.4 **The question that arises is whether, in the light of the peculiar facts and circumstances of this matter, it is just and equitable that the deceased estate be burdened with such costs. It is submitted that the answer is that in the first instance the costs should be payable by the Applicant *de bonis propriis.***

13.5 **In the case of deceased estates the correct approach to the award of costs on a special scale like the attorney and client scale has long been settled by the judgment in the cases of *Nel v Waterberg Landbouwers Ko-operatiewe Vereeninging, 1946 AD 597.* At page *607* of the judgment it was stated:**

"The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by reason of such an order, to ensure more effectively than it can do by means of the judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation".

13.4. It is respectfully submitted that both the circumstances which gave rise to the present application and the conduct of the losing party (i.e. the Applicant) justify this court in awarding costs on the attorney and own client basis.

[13] On the costs to be paid by the Applicant *de bonis propriis Mr. Wise* relied on the *dicta* by Innes CJ in the case of *Vermaak's Executor vs Vermaak's Heirs 1909 T.S. 679* at *691* where the learned Chief Justice adopted with approval the approach and analysis set out in the judgment in the case of *Re - Estate Potgieter 1908 T.S. 982* where he stated as follows:

"The whole question was very carefully considered by this court in *Potgieter's* case, *1908 T.S. 982* and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in question must be *mala fide,* negligent or unreasonable".

[14] In paragraphs 16.1, 16.2, 16.3, 16.4 and 16.5 of the 1st Respondent's Heads of Arguments Advocate Wise referred to Applicant conduct which according to him was demonstrably and plainly *mala fide,* negligent and unreasonable.

[15] On costs against attorney Mr Paul Shilubane Counsel contended that given that on the

papers it is clear that Mr. Paul Shilubane was complicit in all wrong doings of the Applicant mentioned in paragraphs 16 of his Heads of Argument, and given his very inadequate attempt to justify having had Mr. Mofokeng take the oath of deponents to affidavits whilst signing the Notice of Motion and Certificate of Urgency as the attorney of the Applicant, it is clear that he too should be ordered to pay the costs *de bonis propriis* on the attorney and client scale such liability to be joint and several with that of the Applicant.

[16] In the leading South African case of *Nel vs Waterberg Landbouwers Ko-operative Vereeniging 1946 A.D. 597, (interpreted* in *Mudzimu Chinhoyi Municipality and another 1986 (3) S.A. 140 (ZH) at 143 D - I) Tindall JA* ^Schreiner JA. *and* Feetham AJA concurring) stated that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party-and party costs that'a successful party will not be out of pocket in respect of the expense caused to him by the litigation. An award of attorney and client costs cannot, however, be justified merely as a form of compensation for damage suffered.

[17] According to *Herbstein et al, The Civil Practice of the Supreme Court of South Africa 4th edition* at page *717* an award of attorney and client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loathe to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have (see *De Villiers vs Murraysburg School Board 1910 CPP 535 and 538).* On the circumstances of the matter I have come to the considered view that there was nothing sinister on the part of the Applicant in bringing of the urgent application and there are no grounds present upon which a special order for costs should be made. The fact that Mr. Mofokeng signed the Notice of Motion and Certificate of urgency on behalf of attorney Shilubane and also as Commissioner of Oaths was explained satisfactorily and was one of those mishaps which occur regularly and certainly did not warrant an interlocutory application consisting of 167 pages. In this regard I agree with the Applicant's submissions that Mr. Mofokeng's error certainly does not warrant a special order for costs. I have also considered in arriving at a proper order for costs that 1st Respondent unnecessarily burdened the record and certainly did not warrant an interlocutory application consisting of 167 pages

[18] In the result, for the afore-going reasons the following order is accordingly recorded:

(i) Leave is granted to the Applicant to withdraw the application and the

rule is discharged;

(ii) The Applicant in his representative capacity is to pay to the 1st Respondent its taxed costs of the main application;

(iii) The Applicant in his representative capacity to pay one half of the 1st Respondent's taxed costs of the interlocutory application;

(iv) The costs of Counsel are certified in terms of the Rules of court.

S.B. MAPHALALA
JUDGE