IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **DURBAN** on 12 March 1999 **CASE NUMBER:** LCC9/98
before **DODSON** and **MOLOTO JJ**

In the case of

DHANPAUL SINGH AND 177 OTHERS Applicants

and

THE TWO COUNCILS, BEING THE NORTH CENTRAL AND THE SOUTH CENTRAL LOCAL COUNCILS First Respondent

THE INNER WEST LOCAL COUNCIL Second Respondent

THE COMMISSION ON THE RESTITUTION OF LAND RIGHTS Third Respondent

THE MINISTER OF LAND AFFAIRS AND AGRICULTURE Fourth Respondent

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JUDGMENT

DODSON J:

[1] I gave a judgment in this matter on 17 November 1998,[1] but left one issue outstanding. That was the question of whether the applicants,[2] their attorneys and counsel should be precluded from recovering their own costs, including disbursements in respect of counsel's

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1 *Singh and Others v North Central and South Central Local Councils and Others* [1999] 1 All SA 350 (LCC).

2 When I refer to applicants, I refer to those in respect of whom authority to bring the application was proved. Ibid at 375g to 378f.

fees, under the legal aid regime created by section 29(4) of the Restitution of Land Rights Act.[3] That issue is dealt with in this judgment.

[2] As will appear from the judgment handed down on 17 November 1998 (I will refer to this as "the earlier judgment"), the applicants applied unsuccessfully for wide ranging relief against the four respondents. The application related to alleged breaches by the respondents of a settlement agreement[4] reached with land claimants regarding the development of the Cato Manor area in Durban. The conduct of the applicants, their attorneys and their counsel in the course of the proceedings to which the earlier judgment refers was found to be seriously objectionable in various respects.[5] An order of costs de bonis propriis against the attorneys was sought. The Court declined to make such an order and ordered that the costs of the application be paid by the applicants on the scale of attorney and client. I went on to say the following:

> "That however is not necessarily the end of the matter in relation to the conduct of the applicants' attorneys and counsel and its impact on the costs order. The applicants and their attorneys allege that an agreement has been reached with the Chief Land Claims Commissioner to provide legal aid for these proceedings in terms of section 29(4) of the [Restitution of Land Rights] Act. This is disputed by the third respondent. It would appear that that dispute may have to be resolved in separate legal proceedings. It certainly does not fall to be determined here. For purposes of the costs order in this matter, I will assume, without in any way seeking to decide the issue, that there is an agreement or decision to provide legal aid for these proceedings. Where a litigant is funded by State legal aid, a court may none the less order that an attorney may not recover costs from the State's legal aid system. Section 29(4) represents part of the State's legal aid system. This may be a case where such an order should be made. However the applicants, their attorneys and counsel have not had an opportunity of being heard in this respect and no such order was sought at the hearing. I will therefore provide in the order that such an opportunity be afforded before this aspect is finally dealt with."[6]

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3 Act 22 of 1994. Section 29(4) provides:

> "Where a party can not afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission."

4 The settlement agreement is central to the entire dispute in this matter. The relevant parts are quoted in the earlier judgment where it is discussed at length. *Singh and Others v North Central and South Central Local Councils and Others* supra n 1 at 356c to 367c.

5 Ibid at 399e to 406g, where the matter of costs is dealt with.

6 Ibid at 406e to g.

[3] Pursuant to that paragraph, the Court made the following order (which formed part of the order made on 17 November 1998 dismissing the application):

> ". . . .
> 4. The applicants, the applicants' attorneys and counsel must show cause why an order should not be made that no costs, including disbursements in respect of counsel's fees, may be recovered by the applicants or their attorneys or their counsel from the State in terms of section 29(4) of the Act.
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> 5. Cause may be shown in terms of paragraph 4 by way of written or oral submissions. In the event that applicants or their attorneys wish to show cause by way of -
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> 5.1 written submissions,
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> 5.1.1 copies of such submissions must be served on the other parties to this application by no later than 27 November 1998; and
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> 5.1.2 such other parties may deliver written submissions by no later than 4 December 1998;
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> 5.2 oral submissions, steps must be taken within 5 days of the date of this order to arrange a hearing date with the Registrar."[7]

[4] The applicants, their attorneys and counsel elected to show cause by way of oral submissions. These were heard on 12 March 1999. Only the third and fourth respondents took up the opportunity of making submissions in support of an order as contemplated in paragraph 4 of the order of 17 November 1998. These were also oral submissions and were heard on the same day. Mr Ponnan appeared on behalf of the applicants, their attorneys and their counsel, Mr Moosa. Mr Mackenzie of the State Attorney in Durban appeared on behalf of the third and fourth respondents. After careful consideration of the matter, I have come to the conclusion that an order depriving the applicants, their attorneys and counsel of their legal aid costs is justified. I will set out my reasons in relation to each of the heads of argument[8] advanced by Mr Ponnan against the granting of such an order .

[5] The first head relates to the objectionable conduct of the applicants and their legal representatives in launching the most scurrilous attacks on the Regional Land Claims

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7 Ibid at 407b to e.

8 I have attempted to group the various arguments advanced by Mr Ponnan into a limited number of heads.

Commissioner for KwaZulu-Natal in the correspondence which led up to the application and in the affidavits filed by and on behalf of the applicants.[9] I will refer to the Regional Land Claims Commissioner as "the RLCC". Mr Ponnan argued that it was an adjunct of a modern constitutional democracy that robust criticism of functionaries in the courts should be tolerated. A costs order precluding the recovery of legal aid would be out of kilter with that trend. All that we had here, he argued, was robust criticism of a functionary.

[6] On the facts of this matter, this argument is without merit. Of course, if criticism of an official is relevant to a matter in dispute and has some reasonable foundation, it must be fully aired and the law protects the persons involved in making such criticism by way of the relevant privilege.[10] But this was not robust criticism of a functionary. It had no reasonable foundation whatsoever. It was a malicious and completely unwarranted attack on a party whose conduct in relation to the matters in dispute, when scrutinised in detail by the Court, could not be faulted in any way. The maintenance of the dignity of courts and the officials associated with them[11] is particularly important in a constitutional democracy. The case of *Protea Assurance Co Ltd v Januszkiewicz,*[12] to which I referred at some length in the earlier judgment, remains

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9 *Singh and Others v North Central and South Central Local Councils and Others* supra n1 at 400i to 402c, where details of the more serious attacks are set out.

10 The principle is set out in *May v Udwin* 1981 (1) SA 1 (A) at 20A to C as follows:

> "[P]ublic policy also requires that the courts and their process and proceedings should not be wantonly used by those who resort to them - witnesses, litigants, attorneys, and advocates - for the illegitimate purpose of defaming others (see *Findlay v Knight* . . .). Hence the protection of qualified privilege will only be accorded to such a person if the defamatory words were relevant to the case and found on some reasonable cause (. . . *Preston v Luyt* (. . . 1911 EDL at 309 - 310, 320); *Gluckman v Schneider* (. . . 1936 AD at 161 - 162)). Voet 47.10.20 (*Gane's* trans) says:
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> > 'This is to prevent a door being otherwise opened for mischiefs, and a freedom being granted apparently to fling and to heap up with impunity under the cloak of self-defence every kind of abuse against opponents and their witnesses like a waggoner from a wain.'"

11 *Singh and Others v North Central and South Central Local Councils and Others* supra n 1 at 405b.

12 1989 (4) SA 292 (W).

good authority in the constitutional era.[13] So too do those authorities dealing with the requirements for the qualified privilege to apply in relation to defamatory statements made by legal representatives and witnesses during legal proceedings.[14]

[7] The next head or argument is based on the fact that there was no application to strike out the offending material and that this somehow estopped[15] the third respondent from complaining about the "robust criticism" of the RLCC. There is no merit in this argument. Such an application to strike out would have extended the proceedings considerably and would have served no purpose. The applicants and their legal representatives cannot hide behind a failure to bring such an application.

[8] The next head consists of a number of related points argued by Mr Ponnan which I have grouped together. He argued that the applicants and their legal representatives were bona fide in bringing the application. There was no malice. This was backed up by the fact that an independent official at the Commission on the Restitution of Land Rights had scrutinised and approved their application for legal aid (on the version of the applicants and their attorneys, which I have assumed to be the case for purposes of this judgment). To the extent that it might appear that they had overstepped the mark in their criticism of the RLCC, so the argument went, one had to remember that the applicants' lawyers came from a background of fighting for the "underdog", particularly in the days of apartheid, and there was something of an understandable emotional outpouring in this case, which involved emotive issues. For this reason we were also asked to treat with sympathy the failure of the applicants' legal representatives to distance themselves properly from their clients. Again, these points cannot be sustained.

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13 See also *Crundall Brothers (Pvt) Ltd v Lazarus NO and Another* 1991 (3) SA 812 (ZH); *Chivinge v Mushayakarara and Another* [1998] JOL 4290 (ZS) at 11 to 12.

14 *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 1998 (4) SA 890 (C) at 896C to D and at 901B to C where the Court applied the test as formulated in *Pogrund v Yutar* 1967 (2) SA 564 (A) and *May v Udwin* supra n 10.

15 This was not the precise term used by Mr Ponnan, but it conveys the argument he sought to make out.

[9] This Court found in the earlier judgment in this matter that the attitude of the applicants and their legal representatives resulted in an approach to the matter, both before and after the commencement of legal proceedings, which was "obstructive, unco-operative and unnecessarily confrontational".[16] Also of importance in this respect is that it was the completely indefensible attitude of the applicants and their attorneys regarding legal aid which finally sparked off the launch of legal proceedings. As at 15 October 1997, the applicants were prepared to participate in the implementation of the next phase of the agreement, notwithstanding the other alleged breaches of the settlement agreement of which they complained. The next phase involved the participation by a number of the applicants in a process of compulsory mediation.[17] However, it was when their subsequent, unjustified demand that third and fourth respondents provide legal aid for the mediations was not acceded to, that the refusal to participate in the compulsory mediations was resurrected and the countdown to the legal proceedings began.[18] I say that their demand was unjustified because the settlement agreement which regulated the rights and duties of the parties quite clearly did not oblige any of the parties to provide legal aid for the mediation process. The third and fourth respondents were only obliged to provide legal aid for any arbitrations which followed the mediations. In fact, by that stage, the applicants' attorneys had already acknowledged in a letter that this was the case.[19] Despite this, they then, together with the applicants, refused to co-operate in the implementation of the settlement agreement by refusing to participate in the mediations. This conduct amounted to a breach of the settlement agreement by the applicants which has caused enormous disruption.[20] To compound matters, once the Chief Land Claims Commissioner agreed to provide legal aid for the mediations (on the version of the applicants and their attorneys, which I have assumed to be the case for purposes of this

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16 *Singh and Others v North Central and South Central Local Councils and Others* supra n 1 at 400f to h.

17 On 15 October 1997, the applicants' attorneys wrote to an official of the third respondent, after a meeting with the official earlier that day, from which it is clear that the applicants were, at that stage, willing to proceed with the mediations. Ibid at 370d to e.

18 Ibid at 370d to 371c.

19 Ibid at 402h.

20 Ibid at 393g to 394f.

judgment), there was no change in their attitude regarding non-participation in the implementation of the settlement agreement. This conduct was anything but bona fide.[21]

[10] Turning to the other points made under this head, the fact that an official of the office of the Chief Land Claims Commissioner may have considered the matter and agreed to provide legal aid for the proceedings (as I have said, on the applicants' version) does not assist the applicants and their legal representatives. It is well known that any legal aid system places substantial reliance on the assessment of the prospects of success by the legal representative of the person seeking legal aid.

[11] It is also not an acceptable excuse for the conduct of the applicants' legal representatives that they came from the background to which I have referred. As was pointed out during argument by my colleague, Judge Moloto, there were many lawyers who represented the victims of apartheid who did so with dignity and without disrespect to the officials associated with the legal system. It is also extraordinary that such an argument should be raised in this day and age and in relation to a Court which was established specifically to address the injustices of apartheid. The applicants' legal representatives would have done well to heed the advice of Daniels in the work *Morris: Technique in Litigation* where he refers to the following extract from Voet:

> "It is in accord with this oath that they gave an assurance that they will not undertake the patronage of an unjust lawsuit, nor pursue one once undertaken when its injustice becomes evident; . . . nor either openly or covertly rave with invectives to the insulting of the opposite party beyond what the advantage of lawsuits demands . . . but will essay every path and catch at every chance of heightening their true honour." [22]

[12] The next head which must be considered is that which suggests that a costs order of this nature would have an excessively deterrent effect on persons wishing to approach this Court for relief. The excessively deterrent effect of costs orders is something which this Court

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21 Ibid at 402g to 403b.

22 4 ed (Juta, Cape Town 1993) at 49. The reference which he gives for the extract is Voet 3.1.9 (Gane's translation vol I 505 to 6).

has taken into account in declining to make a costs order.[23] However, as I pointed out in the earlier judgment,[24] the Court will still grant costs orders in appropriate cases. In my view, a costs order of the type under consideration here will not deter indigent persons from approaching the Court. Rather it would serve as a reminder to any litigants and lawyers contemplating conduct of the type engaged in in this matter that legal aid funds should not be abused and that the Court and its associated officials must be accorded appropriate respect.

[13] Mr Ponnan's next head of argument was to the effect that the novelty of an order depriving the applicants and their legal representatives of their legal aid costs and the fact that no party had sought such an order, meant that it would not be fair to make such an order in this matter. The answer to this is that the novelty of such an order is no bar to its being made. In any event, I do not accept that the order is completely novel. There is a reference to the possibility of such an order in the reported case of *Ex Parte Jordaan: In re Grunow Estates (Edms) Bpk v Jordaan*[25]. The applicants' legal representatives were also aware from a relatively early stage in the proceedings that an order of costs de bonis propriis would be sought against them. This was sufficient warning that they could be affected personally if they persisted with the litigation.

[14] The next head of argument related to the severity of the penalty. Mr Ponnan suggested that the criticism of the applicants and their legal representatives in the earlier judgment was a sufficient penalty for them. I do not agree. The seriousness and the nature of their misconduct warrants the type of order which is contemplated here. As far as the applicants themselves were concerned, it was argued that in the absence of legal aid they might have to pay the fees and disbursements of their attorneys and counsel and this together with the attorney and clients costs order would mean that they would suffer a double penalty. I do not know what the details of the legal relationship are between the applicants and their attorneys and whether the absence of legal aid will mean that the applicants themselves are liable for their

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23 *Hlatshwayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 642b to f.

24 *Singh and Others v North Central and South Central Local Councils and Others* supra n 1 at 399f to h.

25 1993 (3) SA 448 (O).

fees and disbursements. If this is the case, the answer to this argument is that whenever there is a costs order in a non-legal aid matter, the losing party always pays the costs of both the other parties and his or her own attorney and counsel. There is therefore nothing unusual in this result.

[15] Alternatively Mr Ponnan suggested that the Court should issue a warning to the applicants and their legal representatives to the effect that a further infringement would lead to the type of order contemplated here. He referred in this regard to the case of *Webb and Others v Botha*[26] where an order of costs de bonis propriis followed only after a number of warnings by various judges of the Natal High Court to the legal practitioner concerned. However, the circumstances there differed. The complaint was that the attorney had a propensity to take highly technical and unmeritorious points. This propensity manifested itself in a number of different appeals and reviews, despite repeated warnings from the High Court that he might face an order of costs de bonis propriis. It seems from the *Webb* case that in the earlier cases where he had been warned only, the attorney had sailed very close to the wind, but had not gone quite far enough to warrant a costs order de bonis propriis.[27] The misconduct was spread over a number of cases and included his failure to heed the Court's warnings. This is not the case here. The misconduct of the legal representatives has been concentrated in one case and is of a particularly serious nature.

[16] The final argument which must be considered was to the effect that the test to be applied in relation to an order depriving persons of their legal aid costs was the same as that for an award of costs de bonis propriis. In the earlier judgment, the Court declined to award costs de bonis propriis against the applicants' legal representatives. Therefore, it was argued, the Court had already, by implication, found that the conduct of the applicants legal representatives was not sufficiently serious to warrant the type of costs order contemplated in

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26 1980 (3) SA 666 (N).

27 In fact, by the time of the *Webb* case, there had already been one order of costs de bonis propriis against the attorney concerned in another matter. Ibid at 672H to 673A.

this part of the proceedings. Mr Ponnan refered to the *Ex Parte Jordaan*[28] case where the court did apply the test for a de bonis propriis costs order in deciding whether or not to make an order depriving a party of their legal aid costs. This argument also stands to be rejected. The premise which underlies it is incorrect. The test for a de bonis propriis costs order referred to in the *Ex Parte Jordaan* case of "reasonably serious cases, such as dishonesty, wilfulness, or negligence in a serious degree"[29] is a necessary condition for the grant of a de bonis propriis costs order, but it does not mean that one will always follow. The Court, at the end of the day, exercises a wide discretion to make a costs order which is just in all the circumstances. Despite the fact that the case may be one of dishonesty, wilfulness or negligence in a serious degree, the Court may, for other reasons, decline to make a de bonis propriis costs order. The Court's primary motivation in declining to make a de bonis propriis costs order in the earlier judgment was that the applicants themselves had sanctioned the obstructive approach adopted by their legal representatives. Justice could therefore be served as between the parties to the case by awarding costs on the punitive attorney and client scale against the applicants.

[17] In deciding on the costs order relating to the recovery of legal aid costs, this Court must exercise its wide discretion afresh. There are particular factors which it must consider which are specific to the type of order under consideration here. Firstly and most importantly, when dealing with legal aid, one is dealing not with the costs of another party, but with scarce public funds. Secondly, those funds are made available to lawyers in the context of a relationship of trust and good faith as between the lawyers and the legal aid grantor. The question which must be asked is whether there was such a serious misuse of those public funds and such an abuse of that relationship of trust, and of the judicial process commenced pursuant to the legal aid instruction, that it would be unconscionable for the applicants' legal representatives to recover their fees and disbursements from the legal aid grantor.

[18] In this particular matter, the funds have been used to wage completely unwarranted litigation against the third respondent which is itself (on the assumption underlying this

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28 *Ex Parte Jordaan: In re Grunow Estates (Edms) Bpk v Jordaan* supra n 25.

29 Ibid at 455F to G.

judgment) the legal aid grantor.[30] In the course of that litigation, they have unjustifiably vilified one of the third respondent's most senior officials. They have burdened the papers with unnecessary material. In a number of the steps taken by them in the course of the proceedings they conducted themselves in the most cavalier manner. They went so far as to breach the express terms of a court order in relation to matter contained in affidavits which they were allowed to file after the conclusion of argument.[31] It is also noteworthy that there is no clear indication of any apology or remorse on the part of the applicants or their legal representatives. In the circumstances, this amounts to a serious abuse of the type to which I have referred in the previous paragraph. It would certainly be unconscionable for the applicant's legal representatives to recover their fees and disbursements from the legal aid grantor.

[19] In the course of argument I put to both Mr Ponnan and Mr Mackenzie the suggestion that an order might be made depriving the applicant's legal representatives of part of their legal aid costs, given that the degree of culpability of the applicants and their legal representatives varied in relation to the various respondents. However, both agreed that the issues were so intermingled that it was not possible to find any rational basis for such a division.

[20] There is a final matter which I must clarify in relation to the order I intend making in this matter. Counsel who appeared in the earlier proceedings (ie Mr Moosa) was not an innocent victim of the attorneys' objectionable conduct. On the contrary, he made common cause with them. On a conspectus of the papers, it is clear that he was involved in advising and assisting them and the applicants throughout the lead up to the proceedings and during the proceedings themselves. He himself must take most of the responsibility for breaching the Court's order in filing affidavits after argument dealing with matter which the Court had expressly provided should be excluded. There was, quite correctly, no attempt by Mr Ponnan to distinguish Mr Moosa's conduct in relation to the matter from that of his instructing attorneys. It is therefore my view that he too should not be allowed to recover his fees and disbursements from the State. On the other hand, I decline to make any ruling regarding the

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30 I e the third respondent through the office of its Chief Land Claims Commissioner.

31 *Singh and Others v North Central and South Central Local Councils and Others* supra n 1 at 374f to h.

recovery of costs by the attorneys and counsel from the applicants, or by counsel from the attorneys. That must be resolved in terms of the legal relationships between them. I should add that nothing in this judgment is intended to reflect in any way on Mr Ponnan, or to affect his right to recover any of his fees or disbursements. His involvement has only been in relation to this part of the proceedings and he has conducted himself quite properly.

[21] In the circumstances, I make the following order:

(i) No fees or disbursements, including counsel's fees and disbursements, may be recovered by the applicants, their attorneys or counsel, from the State under any legal aid regime provided for in section 29(4) of the Restitution of Land Rights Act 22 of 1994 in respect of the proceedings before this Court under case number 9/98.

(ii) The costs of the proceedings relating to the order in paragraph (i) above are subject to the same costs order as that set out in paragraph 2 of the order dated 17 November 1998 in this matter, which reads:

> "Applicants 1, 2 ,3, 5, 7, 12, 13, 17, 18, 22, 25, 30, 31, 33, 37, 39, 43, 45, 47, 48, 49, 52, 53, 54, 55, 57, 67, 68, 69, 70, 71, 74, 77, 79, 84, 91, 92, 94, 97, 101, 102, 105, 106, 111, 112, 113, 114, 115, 116, 117, 119, 122, 123, 129, 130, 132, 134, 138, 139, 141, 144, 146, 148, 149, 150, 154, 156, 157, 159, 160, 163, 165, 168, 169, 170, 171, 173, 174 and 178 (being those applicants found to have proved that they authorised Balakrishna, Naidoo and Partners to represent them in these proceedings) must pay the costs of the application, including the costs of the preliminary application and the hearing on 9 March 1998, on the scale of attorney and client."

JUDGE A DODSON

I agree

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JUDGE J MOLOTO

Heard on : 12 March 1999 **Handed down on :** 29 March 1999

For the applicants:
V Ponnan instructed by *Balakrishna, Naidoo & Partners*

For first and second respondents:
No appearance.

For third and fourth respondents:
Mr G Mackenzie of the *State Attorney (Durban)*