IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Application No.: 4338/2015

In the matter between:

ESKOM HOLDINGS BEPERK Applicant

and

CHRISTIAAN FREDERICK MARTHINUS NIGRINI NO First Respondent

MARIECHEN MARTINS t/a MARTINS ATTORNEYS Second Respondent

JUDGMENT

Delivered 5 January 2017

MOODLEY J:

[1] In this matter which served before me on the opposed roll on 2 June 2016, it was common cause that the issue which precipitated the urgent application on 9 November 2015, viz the preservation of the applicant's funds attached pursuant to the default judgment obtained against the applicant by the first respondent and paid over to him, had been resolved by the rescission of the judgment and the repayment of the attached funds. The interdict sought against the respondents had consequently become academic and would be of no practical effect.

[2] I therefore discharged the rule nisi issued on 9 November 2015 and reserved judgment on the sole issue for determination: the costs of the urgent application, including the costs reserved on 10 March 2016.

Costs: Legal Principles

[3] In *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another,*[1] the Constitutional Court reiterated the principle that costs are awarded to a successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

[4] The general rule is therefore that costs follow the event, that is the successful party should be awarded his or her costs, which should be departed from only where there are good grounds or special circumstances which warrant such departure.[2]

[5] The general rule is however subject to the overriding principle that costs are in the discretion of the court, which must be exercised judicially upon a consideration of the relevant facts and circumstances that prevail in a matter, and must be fair to the parties.[3] The main rules relating to awards of costs were stated by Van Reenan J in *Graphic Laminates CC v Albar Distributors CC*:[4]

> 'It is trite that liability for costs in civil proceedings is a separate issue that is governed by its own criteria. The fundamental principle is that liability for costs is in the discretion of the court that is called upon to adjudicate the merits of the issues between the parties on the basis of the facts and circumstances of each individual case. In the absence of express statutory

[1] 2002 (2) SA 64 (CC).
[2] *Fripp v Gibbon & Co* 1913 AD 354 363; *Sackville West v Nourse & Another* 1925 AD 516; *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC) 912; *Gauteng Provincial Legislature v Kilian & Others* 2001 (2) SA 68 (SCA) 76G–I.
[3] *Cronje v Pelser* 1967 (2) SA 589 (A) at 593; see also *Wanderers Club v Boyes-Moffat & another* 2012 (3) SA 641 (GSJ) at 643H-644B. : 'The general principle regarding the award of costs is well-settled: it is entirely a matter for the discretion of the Court which is to be exercised judicially upon a consideration of the facts of each case and in essence it is a matter of fairness to both sides.'
[4] 2005 (5) SA 409 (C) para 11 (footnotes omitted).

> provisions to the contrary, the general rule that costs follow the result is subservient to that fundamental principle.'

[6] Therefore, although I was not called upon to adjudicate the merits of the issues between the parties, an appropriate costs order can nevertheless not be judicially determined without a consideration of the relevant facts.[5]

[7] The applicant also seeks costs on a punitive scale as between attorney and client. In *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging*[6] Tindall JA clarified that:

> ' [t]he 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 means of such an order, to ensure more effectively than it can do by means of a 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.'

An award of attorney and client costs is used by the court in order to indicate its disapproval of the conduct of the party which bears the adverse costs order.[7]

Summary of Facts

[8] I have briefly summarized the events, as recorded in the affidavits filed by the parties and the correspondence annexed thereto, that culminated in the application which was moved urgently on 9 November 2015.[8]

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[5] *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 798
[6] 1946 AD 597 at 607
[7] *Koetsier v SA Council of Town and Regional Planners* 1987 (4) SA 735 (W) at 744J - 745A
[8] See also the judgment of Van Der Merwe J in the rescission application delivered on 25 February 2016.

[9] It is common cause that on 15 September 2012 a fault on an electricity transmission power line operated and maintained by Eskom Holdings (Soc) Limited ('Eskom') caused a fire which spread to properties owned by Chrismar Besigheids Trust ('the Trust').

[10] On 10 September 2015 the Trust, represented by its sole trustee, Mr C F M Nigrini ('the Trustee') instituted an action for damages in the sum of R4 061 329 plus costs against Eskom, alleging that the fire was caused by the negligence of Eskom.

[11] The second respondent, Ms Mariechen Martins, who practices as Martins Attorneys, ('Ms Martins') represented the Trust when the action was instituted and continued to do so at all times material to this application. It is common cause that Ms Martins is the wife of the Trustee.

[12] Eskom failed to defend the action, and default judgment was obtained by the Trustee against Eskom for its claim and costs on 22 October 2015, and a warrant of execution was issued on the same date.

[13] On 23 October 2015, the Sheriff of the High Court, Bloemfontein West ('the sheriff'), executed the writ and attached the amount of R4 061 329 from funds in four bank accounts of Eskom held with First National Bank ('FNB').

[14] When the default judgment came to the attention of Eskom on 23 October 2015, Eskom instructed its attorneys to take the necessary steps to remedy the situation. The attorney representing Eskom, Mr D Kapelus, contacted Ms Martins telephonically on 26 October 2015 and advised her that Eskom intended launching an application for the rescission of the default judgment.

[15] Mr Kapelus met Ms Martins and the Trustee at her offices on 27 October 2015 and again advised Ms Martins that the rescission application by Eskom would be launched timeously. He requested that the Trustee agree to take no further steps in the execution of the writ and attachment order pending the application for the rescission and to consent to the rescission. Ms

Martins responded that it was not in the Trustee's interest to comply with such request, and no agreement was reached with the Trustee.

[16] Neither Ms Martins nor the Trustee informed Mr Kapelus that Ms Martins had, on 26 October 2015, instructed the sheriff to pay the attached funds, when received, directly to the Trust.

[17] First National Bank made two payments to the sheriff in satisfaction of the amount attached in Eskom's accounts. On 27 October 2015 and 30 October 2015 the sheriff paid, after deduction of his costs, the total sum of R4 058 859.19 into the bank account of the Trust as instructed by Ms Martins

[18] On 29 November 2015 Mr Kapelus wrote to Ms Martin referring to their meeting on 27 November 2015 and again requested that the Trustee consent to the rescission.

[19] Ms Martins responded to his letter on 3 November 2015 indicating, *inter alia,* that without the application for rescission and supporting documents, she was unable to take instructions from her client. Referring to the certificate of balance reflecting the interest and balance due to the Trust which she had forwarded to the sheriff on 3 November 2015 and annexed to her letter, Ms Martins recorded that the sheriff had been instructed to uplift the attachment once the balance due to the Trust had been paid, subject to reservation of the execution creditor's right to execute on the writ again as soon as the legal costs were taxed. She recorded further that she held no funds in trust on behalf of the Trust.

[20] Mr Kapelus thereupon attempted to ascertain telephonically from Ms Martins whether she held the attached funds in trust, but was unable to reach her.

[21] On 4 November 2015 Ms Martins sent three letters to Mr Kapelus. On receipt of the application for rescission, she responded:

> 'In die lig daarvan dat u aansoek om tersydestelling van die vonnis nou vir die eerste keer na 'n aansienlike tydsverloop realiser onderneem ons om alle gelde wat ons van die Balju Bloemfontein Wes ontvang in trust te hou hangende die uitslag van die aansoek om tersydestelling van die vonnis. Indien die vonnis tersyde gestel sou word en verlof aan u klient verleen word om die aksie te verdedig sal ons sodanige fondse in terme Artikel 78(2)A van die Wet op prokureurs bele hangende die uitslag van die hoofaksie. Die balju Bloemfontein Wes het reeds opdrag om in die lig van voornoemde nie met die beslaglegging voort te gaan nie hangende dan die uitslag van die aansoek om tersydestelling van die vonnis.'

[22] Mr Kapelus replied to the correspondence from Ms Martins, 'confirming' her advices, *inter alia,* that she had received payment of the full judgment debt excluding interest and costs and that she had given 'an unequivocal undertaking' to retain the aforesaid amount in her trust account pending the finalisation of the rescission application. He also advised her that if the rescission were granted, Eskom would require immediate reimbursement of the full judgment debt, and would not agree to her proposal that the funds be retained by her in an interest bearing trust account in terms of s78(2A) of the Attorneys Act, 1979.

[23] In response thereto, in an email dated 5 November 2015 delivered on 6 November 2015, Ms Martins informed Mr Kapelus that the sheriff had paid the amount of R4 058 859.19 directly to the Trustee as judgment creditor, and denied strenuously that she had confirmed that she was holding the aforesaid funds or the full judgment debt in trust, or that she had given any undertaking in respect of the judgment debt, or that she had made any proposal about retaining the full judgment debt in a Section 78(2A) account.

[24] Ms Martins referred further to her statement in her letter of 3 November 2015 that she did not hold any funds for the Trustee in trust, and 'clarified' that in her letter dated 4 November 2015 she had only referred to the outstanding amount of R48 984.91 which was reflected in her certificate of balance sent to the sheriff. She however, also pointed out that as that sum had had not

been collected from FNB, the undertaking was of no force or effect, and any contemplated action would be opposed, with a prayer for an adverse costs order.[9]

[25] Subsequent to the receipt of this letter by Mr Kapelus, Mr P Fischer SC who had been briefed by Mr Kapelus to attend to the urgent application, communicated on 6 November 2015 with Ms Martins about the intended urgent application. This and the discussions that followed between Mr Fischer and Ms Martin in respect of the urgent application are in dispute.

[26] It is nevertheless common cause that after the discussion between Mr Fischer and Ms Martins, in an email dispatched on the evening of 6 November 2015, Mr Kapelus 'confirmed' that Ms Martins had telephonically undertaken that the funds paid by the sheriff to the Trustee as at 17h45 on that date would not be disbursed, and requested a detailed response as to whether the Trustee would, on 9 November 2015, pay the funds he had received into the trust account of Martins' Attorneys pending the finalisation of the rescission application, and to his questions about the payments effected by the sheriff to the Trustee.

[27] Mr Kapelus recorded further in his email that, in the absence of a detailed response by 10h00 on 9 November 2015, his instructions were to proceed with an urgent application for 'the appropriate relief, and with an appropriate costs order.'

[28] Ms Martins received the email from Mr Kapelus on Monday 9 November 2015 at 8h20. The urgent application was served at her offices at 12h26 which reflected that the application was set down at 14h30. After receipt of the application, Ms Martins wrote to Mr Kapelus informing him that the undertaking as recorded in his letter of 6 November 2015 was not in

[9] 'Gemelde bedrag is toe nie van die beslagsskuldenaar gevorder nie en vind die balans van u paragraaf 6 geen inslag nie en soos reeds genome any aksie wat u goeddink om in te stel geoppeneer word met 'n gepaste kostebeval.'

accordance with the undertaking she had discussed with Mr Fischer. She also advised him that she had been unsuccessful in contacting counsel who had represented the Trustee and that she would call the local correspondent for the applicant and Mr Fischer. Her letter was not marked urgent.

[29] According to Ms Martins[10] she subsequently spoke to Mr Fischer at approximately 13h51 on that day and discussed the undertaking which she had conveyed to him on 6 November 2016 and the difficulty she had with briefing counsel. She then proceeded in accordance with the discussion between them.

[30] At 14h55 on 9 November 2015 Mr Fischer moved the urgent application in which the applicant sought an interim order interdicting the respondents from disbursing any portion of the funds paid to them by the sheriff pursuant to the attachment orders served on FNB on 23 October 2015, and directing them to retain all the funds received in an interest bearing trust account of the second respondent pending the finalisation of the application for rescission, before Rampai J, who issued a rule nisi and granted the interim relief sought.

[31] Subsequent to the issuing of the rule nisi, at 15h19 Ms Martins furnished to Eskom's correspondent attorney an undertaking by the Trustee to pay R3 300 000 to the trust account of Ms Martins.

[32] Mr Kapelus confirmed shortly thereafter that his firm instructions to Mr Fischer prior to the hearing of the application were to proceed with the urgent application, despite any difficulty Ms Martins had with briefing her counsel.

[33] On 10 November 2015 Mr Kapelus wrote to the sheriff requesting information on the payments received from FNB and the amount of R4 058 859.19 paid to the execution creditor. The sheriff confirmed that Ms Martins had on 26

[10] Para 6.2 of Ms Martins' answering affidavit

October 2015 instructed him to pay the funds directly to the execution creditor, which he had effected on the 27th and 30th November 2015.

[34] On 10 November 2015 the sum of R3 300 000 only was deposited by the Trust into Ms Martins' trust account. The balance of the funds paid by the sheriff to the Trust had already been spent by the Trustee.

[35] On 28 January 2016 the rescission application was argued before Van der Merwe J, who reserved judgment and extended the rule nisi to 10 March 2016. On 25 February 2016 Van der Merwe J handed down a judgment in terms of which the default judgment was rescinded, the writs of execution and notices of attachment (including the notice in terms of rule 45(12)(a)) were set aside and the Trustee was ordered to repay the amount of R4 061 329 to the applicant. Eskom was ordered to pay the costs the rescission application.

[36] On 1 March 2016, Ms Martins wrote to the Judge President requesting that a judge from another jurisdiction hear the opposed application on 10 March 2016, because of the parties involved in the disputed discussions and the nature of their allegations. On receipt of a copy of this letter, the applicant's correspondent attorneys also wrote to the Judge President, confirming that they were in agreement with the request by Martins Attorneys, but because their counsel was not available on 10 March, they proposed that the application be adjourned and the rule extended. On 10 March 2016 the application was adjourned to 2 June 2016, the rule extended to that date and the costs reserved.

<u>The Hearing: 2 June 2016</u>

[37] At the hearing Mr *Snellenburg* SC argued that Eskom was entitled to costs of the application, including the reserved costs of 10 March 2016, on the scale as between attorney and client, as it had been compelled to bring the urgent application to preserve the attached funds by the failure of the respondents to disclose that the attached funds had been paid to the Trust and that a

portion of the funds had been utilised by the Trustee, and to furnish a satisfactory undertaking to retain the funds so paid in the second respondent's trust account pending the finalisation of the rescission application. He contended that as an attorney, Ms Martins had a duty to disclose the facts when Mr Kapelus informed her that Eskom was going to apply for rescission as well as when he twice requested an undertaking that no further steps would be taken in execution until the rescission application was finalised. Mr *Snellenburg* submitted that even when Ms Martins did give an undertaking on 4 November 2015, it was 'an empty undertaking which had no practical value' as she was not holding the funds. She had further failed to provide Mr Kapelus with the required information on 9 November 2015. Eskom was consequently compelled to move the application urgently in order to preserve the attached funds and its counsel was instructed accordingly. He contended that the respondents' version of the disputed discussions with Mr Fischer was improbable and that they should not be permitted to avoid liability for costs through the alleged disputes.

[38] In his heads of argument, Mr *Williams* who represented the respondents stated:

> 'The main reason for the opposition to the urgent application was *not so much on the merits* but based upon the assertions of the Second Respondent that the application should never have been sought nor moved in the light of a prior agreement reached between Second Respondent (as attorney for First Respondent) and the counsel for the Applicant.'[11] (My emphasis)

During argument, Mr *Williams* conceded that the applicant was entitled to the costs consequent to the preparation and drawing of the application and placing it on the urgent roll, up until the point when Mr Fischer communicated with Ms Martins on the afternoon of 6 November 2015 and indicated to her that the matter was capable of resolution. He contended however that a punitive order for costs was not warranted as the

[11] This submission is consistent with para 6.1 of the answering affidavit.

respondents had not acted *mala fide* and Ms Martins was not obliged to disclose the status of the attached funds to Mr Kapelus or to provide an undertaking as he requested.

[39] Mr *Williams* submitted further that, in the light of the disputed discussions and events that subsequently transpired, it was not appropriate that the respondent be ordered to bear the costs incurred thereafter, as Ms Martins had not acted *mala fide* but in accordance with her discussions with Mr Fischer. He suggested that it was appropriate that no costs be ordered against either party from the afternoon of 6 November 2015. Alternatively he proposed that the disputed issue of the discussions between Ms Martins and Mr Fischer be referred to oral evidence.

[40] In respect of the reserved costs, Mr *Williams* argued that the application was enrolled on the opposed roll for 29 March 2016 and the respondents had filed heads of argument timeously while the applicant had failed to comply with the relevant practice directive by not filing heads of argument. Therefore the respondent was entitled to the reserved costs.

The Costs of the Urgent Application: 9 November 2016

[41] In the light of the concession by Mr *Williams*, the costs that remain in dispute are the reserved costs and the costs incurred by Eskom from the afternoon of 6 November 2015, and the appropriate scale of costs.

[42] The urgent application was precipitated by the failure of the respondents to furnish an undertaking to invest the attached funds which had been paid to the Trust in an account held in terms of s78(2A) of the Attorneys Act pending finalisation of the rescission application, and to provide the details required by Eskom's attorney in respect of the attached funds. It is therefore relevant to consider the communications between the parties as summarised in this judgment, and the attitude of the respondents towards the undertaking requested by Eskom's attorney.

[43] Although the respondents correctly argued that there is no statutory provision which prescribes that a sheriff must pay attached funds into the trust account of the execution creditor's attorney, it is common cause that this is the general practice followed by attorneys. Ms Martins acknowledged this general practice when she stated in her answering affidavit that there were two reasons why the money was paid directly to the Trustee:

1. The Trustee is her husband so it was not necessary to hold the funds in trust pending the collection of fees, because she knew that he would pay for the legal services rendered.

2. Having the funds paid into trust and then paying it to the Trustee would have involved a great deal of administration and incurred high bank fees.[12]

[44] As an attorney, Ms Martins would be aware of the *dies* prescribed for the filing of the rescission application by the Uniform Rules of this court and that Eskom therefore had adequate time to deliver its rescission application timeously, as advised by Mr Kapelus. She would also know that should the rescission be granted, the Trustee would be obliged to pay back any money received in satisfaction of the judgment so rescinded. It was therefore in the interests of the Trustee not to expend the funds received from the sheriff.

[45] However, on 26 October 2015, when Mr Kapelus first advised Ms Martins that he had been instructed to apply for the rescission, she instructed the sheriff to pay the funds directly to the Trustee. At the meeting on 27 October 2015, although Ms Martins informed Mr Kapelus that it was not in the interests of the Trustee to consent to the rescission, she did not inform him of her instructions to the sheriff. Again, as submitted by Mr Williams, Ms Martins was not compelled to disclose her instruction by any rule or legislation, although the

[12] In accordance with the rules of the Law Society, bank charges incurred for transactions through a trust account may be paid from the attorney's trust interest account. There is no explanation why the administration would have been extraordinarily burdensome, given the usual procedures regulating attorneys' trust accounts.

ethics of permitting a colleague to labour under a clear misapprehension is questionable.

[46] Had Mr Kapelus been informed of her deviation from the usual practice followed by attorneys, it is improbable that his conciliatory attitude would not have been superseded by alacrity in bringing the rescission application and taking any concomitant action required to keep the attached funds intact. However, despite his attempt to ascertain the status of the funds by telephone on 3 November 2015, Mr Kapelus remained unaware that the funds had been paid to the Trustee until Ms Martins advised him on 5 November 2015 of the direct payment by the sheriff.

[47] In my view, it was disingenuous on the part of Ms Martins when on 4 November 2015, she gave an undertaking on receipt of the rescission application to hold in trust *all monies received from the sheriff* pending the outcome of the application for rescission and thereafter, if the rescission were granted, to invest the *same* funds in a s78(2A) trust account pending determination of the action.[13] This undertaking served only to perpetuate Mr Kapelus' misapprehension, because he had not yet been made aware of Ms Martins' instructions to the sheriff or that the money had already been paid out to the Trust.

[48] Further her undertaking must be viewed in context: an amount in excess of R4.5 million had already paid to the Trust and all that was outstanding in respect of the judgment debt was interest of approximately R48 000. Ms Martins could have been under no illusion that Eskom or its attorney would have found an undertaking to hold R48 000 in an investment account acceptable. It is also relevant that Ms Martins must have known that the Trustee had already spent a portion of the attached money. I am in agreement with Mr *Snellenburg* that by her undertaking and proposal, Ms Martins attempted to conceal the fact that the Trustee was not in a position to pay back immediately the full amount he had received from the sheriff.

[13] See para 21 of judgment *supra*

[49] Mr *Snellenburg* also contended, with a measure of merit, that by the use of the word ‘ons’ in her undertaking, Ms Martins deliberately conveyed that the undertaking referred to the money received by both respondents, albeit the ‘ons’ could have referred to an undertaking by her firm and not the respondents.

[50] Ms Martins nevertheless attributed Mr Kapelus’ ‘misunderstanding’ of her undertaking to his inability to comprehend the Afrikaans language, and advances the same reason for his ‘misunderstanding’ of the undertaking given to Mr Fischer on 6 November 2015. But she has failed to explain why Mr Kapelus would have not have properly comprehended the terms of the undertaking tendered on 6 November 2015, when he was advised of the undertaking by Mr Fischer, and not in Afrikaans by Ms Martins.[14] On her own version that Mr Fischer was aware of Mr Kapelus’ limited comprehension of Afrikaans, it is improbable that Mr Fischer would have communicated the undertaking by the respondents to Mr Kapelus in Afrikaans, thereby perpetuating his ‘misunderstanding’. No such problem in respect of communication existed between Ms Martins and Mr Fischer.

[49] But it is apparent that Mr Kapelus was not satisfied with the undertaking by the respondents, as communicated to him by Mr Fischer on the late afternoon of 6 November 2015, because in his email transmitted to Ms Martins shortly thereafter, he recorded the terms of the undertaking but nevertheless placed the respondents on terms to respond to his queries by 10h00 on 9 November 2015, failing which his instructions were to proceed with the urgent application. In short, the undertaking Mr Kapelus required was in accordance with the interim relief sought in the urgent application.

[50] Despite her receipt of this letter from Mr Kapelus at 8h20 on the morning of 9 November 2015, Ms Martins failed to respond or to communicate with Mr

[14] Answering affidavit para 5.3: ‘Soos duidelik uit paragraaf 1 van vermelde skrywe blyk, het Kapelus weereens nie dis Afrikaanse onderneming behoorlik begryp nie, aangesien hy van mening was dat alle fondse wat deur die Balju aan die Eiser oorbetaal is soos op 6 November 2015 om 17:45, nie uitbetaal sal word nie.’

Kapelus in order to 'rectify' his misunderstanding, until after the urgent application was served. She has offered no cogent explanation for this failure or why she conceived that the applicant would change its instructions in respect of the urgent application in the absence of compliance by the respondents, as required by Mr Kapelus. To the contrary, she ought to have realised that unless a clear and unequivocal acknowledgement of the amount to be held in trust and an undertaking for that amount was furnished by the respondents, Eskom would pursue the urgent application, particularly because of the disputes which had arisen in respect of Ms Martins' previous undertaking on 4 November 2015.

[51] It is therefore common cause that when the application was moved at 14h55 on 9 November 2015, the undertaking given by the respondents on 6 November 2015 remained in dispute, and no further undertaking by the respondents in accordance with the relief sought by the applicant, had been received by Mr Kapelus or his local correspondent in Bloemfontein, and there was no reason for Mr Kapelus to withdraw his instructions to Mr Fischer to move the application as enrolled.

[52] Consequently, the contention by Mr Williams that the respondents should not be mulcted with costs of the application incurred on 9 November 2015 because they had consented to the application cannot be sustained.

[53] I am, in the premises, satisfied that the merits of the urgent application are clearly in favour of the applicant. The disputes about the controversial discussions between Ms Martins and Mr Fischer do not impinge on or detract from such merits and are consequently not relevant to the present enquiry in respect of the costs of the application.

[54] I therefore make no determination or even express a *prima facie* view on the disputes, nor do I find it necessary to refer the issue to oral evidence, as suggested by Mr Williams. I am of the view that this is a matter in which the court should make a proper allocation as to costs with the material at its disposal, and not 'permit the question of such costs to become an occasion

for incurring a great many further costs and, incidentally, occupy the time of the Court'.[15] The respondents are consequently not precluded by this judgment from availing themselves of any recourse they deem appropriate to the disputed discussions and conduct of Mr Fischer.

[55] Adverting to the costs, had the concession made at the hearing by the respondents in respect of their liability for costs, albeit limited to the costs incurred up to 6 November 2015, been made earlier, the matter may have been resolved, thereby pre-empting the costs incurred by the opposed hearing on 2 June 2016. Instead the respondents persisted that they would resist any costs order because of the disputed discussions with Mr Fischer and not 'so much' because of the merits of the application. An award for costs is intended to indemnify the successful *party* against costs incurred in the course of initiating of defending litigation, and in the absence of an order for costs *de bonis propriis*, costs are borne by the *party or parties*, and not their legal representatives. Hence the resistance by the respondents to an order for costs was ill-founded and they must bear the adverse consequences of their belated concession.

[56] I am also satisfied that the conduct of the respondents, to which I have alluded in paragraphs 47 – 50 *supra*, warrants a costs order on a punitive scale.

Reserved costs: 10 March 2016

[57] Although Eskom did not file its heads of argument by 2 March 2016 in compliance with the practice directive when the matter was enrolled for argument on 10 March 2016, it was apparent that the matter would not proceed on that day because of the respondents' allegations against Mr Fischer. Ms Martins expressed the reservation that the matter ought not to be heard by a 'local' judge in her letter dated 1 March 2016 to the Judge President. In its letter to the Judge President, the applicant agreed with her reservation and also indicated that counsel who had been

[15] AC Cilliers *Law of Costs* para 2.20 issue 32; *Mashaoane v Mashaoane & another* 1962(2) SA684 (D) at 687G-H.

briefed in the place of Mr Fischer was not available to argue the matter on 10 March. It is also apparent that it would not have been possible on such short notice to arrange for a judge from another jurisdiction to hear the matter on 10 March 2016. The costs of the hearing on that day could have been avoided if the parties consented to the removal of the matter from the roll timeously. Consequently, in my view, the appropriate order is that each party bears its own costs in respect of the costs reserved on 10 March 2016.

Order

[58] I therefore make the following order:

1 The respondents are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the urgent application on 9 November 2015, such costs to include the opposed hearing on 2 June 2016, on the scale as between attorney and client.

2 The parties are to bear their own costs occasioned by the adjournment on 10 March 2016.

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Moodley J

APPEARANCES

For the Applicant	Advocate N. Snellenburg SC
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Date of hearing : 2 June 2016

Date delivered： January 2017