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

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

Case number: 5049/2014

In the matter between:

VAUGH VICTOR	**First Applicant**
MARIA MAGDALENA CATHARINA VICTOR	**Second Applicant**
And	
WONDERHOEK FARMS (PTY) LIMITED	**First Respondent**
DONOVAN MAJIEDT N.O.	**Second Respondent**
KARIN FORTEIN N.O.	**Third Respondent**
JERRY SEKELE KOKO N.O.	**Fourth Respondent**
FIRSTRAND BANK LIMITED	**Fifth Respondent**
THE MASTER OF THE HIGH COURT, BLOEMFONTEIN	**Sixth Respondent**

HEARD ON: **THE PAPERS (For a Cost order *de bonis propriis*) Part of an Urgent Application of 04 June 2020**

JUDGMENT BY: **CHESIWE, J**

DELIVERED ON: **25 FEBRUARY 2021**

---

[1] This matter was an urgent application before Van Zyl, J, under case number 5049/2014, in which the applicants sought relief of Part A of the Notice of Motion. Van Zyl, J reserved judgment on Part A of the Notice of Motion. Before judgment could be handed down, the Applicants approached court on an urgent base for part B of the Notice of Motion. The First Respondent opposed the Application.

[2] I pause to mention the relief sought in Part A was as follows:

"2. That a rule *nisi* be issued with a return date 23 April 2020, at 09h30, calling upon the First to Fifth Respondents why the following order should not be made final:

2.1 The First Respondent and all those acting on instructions of the First Respondent who is present on portion 1 of the Farm Aanvang, District of Wepener, be interdicted and restrained, pending finalisation of the relief claimed in Part B hereof, from:

2.2 Breaking and entering any chalets, storerooms or any other buildings on the farm, or in any way interfering with the Applicants' undisturbed possession and occupation of the said farm;

2.3 Harassing, intimidating, victimising, and/or threatening the Applicants;

2.4 That the First to Fifth Respondents be interdicted from implementing the Settlement Agreement;

2.5 That prayers 2, 2.1 to 2.4 shall serve as an interim interdict with immediate effect, pending the return day;

2.6 Further and /or alternative relief."

[3] The Applicants in part B thereof sought the following relief:

" 3. That the court order under case number 5049/2014 dated 20 February 2020 be set aside;

4. That it is declared that the claim of the First Respondent, as the Plaintiff in the main action, lapsed, due to non-compliance with section 75 (1) of the Insolvency Act, Act 24 of 1936;

5. That the Settlement Agreement incorporated in the above Court order be declared null and void *ab initio;*
6. Alternatively, and in the event that the Court is not inclined to grant prayer 5 *supra*, that the First to Fifth Respondent be interdicted from implementing the Settlement Agreement, pending the institution and finalisation of an action, to declare the Settlement Agreement null and void, *ab initio*, which action must be instituted within 30 (thirty) days from date of this order;
7. That the First Respondent pays the costs of the Application on an attorney and client scale;
8. Further and/or alternative relief."

[4] Between the parties there is several litigation matters under the case number of 5049/2014, as well as case number 1634/2020, I only dealt with Part B of the Notice of Motion under case number 5049/2014. The application was dismissed for lack of urgency. Judgment was reserved in respect of costs as the First Respondent argued for cost *de bonis propriis* against the Attorney of the Applicants, in the alternative, costs to be paid by the Second Applicants, as the First Applicant's estate was insolvent.

[5] The issue for determination was whether the Applicants enrolled Part B prematurely, while Part A's judgment was still pending, resulting in unnecessary costs for the First Respondent.

[6] I pause to mention that Part A of the Notice of Motion was removed from the roll and the Applicants were ordered to pay the costs of the application.

[7] Adv. Janse Van Resburg, Counsel on behalf of the Applicants submitted in oral arguments as well as in the Heads of Argument that the relief sought in Part B relates to interim interlocutory in respect of prayers 2.3 of Part A. Whereas Part B relates to *locus standi*, occupation and access to Farm Aanvang. He further submitted that Part B should have been adjudicated first, before Part A proceeded under case 5049/2014 (the matter that was before Van Zyl, J). Counsel submitted that the Applicants' Attorney to bring the application for Part B to be heard urgently was not unreasonable under the circumstances and that a personal cost order against the Attorney of Applicants is unreasonable.

[8] Adv. Kloek, Counsel on behalf of the First Respondent in oral argument as well as written Heads of Argument submitted that the Attorney of the Applicants was requested not to set down the application for 4 June 2020, as it was without merit, nor was it accompanied by a founding affidavit. Counsel submitted that Mr Willers (Attorney for the Applicants) though he acted on instructions of his clients, he should have advised the clients accordingly and not act on instructions that are irregular and irresponsible. He submitted that a *de bonis propriis* cost order against Mr Willers would be more appropriate, as his conduct, was unprofessional and improper.

[9] Generally, costs follow the event. The court's discretion is wide, though unfettered and must be exercised judicially upon consideration of the facts. In essence, the court must be fair to both parties. On the

other hand a litigant should avoid unduly and unnecessary lawsuits that will increase its expenses.[1]

[10] The First Respondent contended that the Applicants' Attorney was warned in a letter dated 3 June 2020, in which certain issues were raised as follows:

"15.1 The intended Anticipatory Application is fatally flawed in that Judge Van Zyl already gave an order in respect of Part A prayer 2.4 and the whole of Part B as per annexure A was not urgent, and as consequence dismissed and struck of the roll, refer to paragraph 7.1 and 7.2 above.

15.2 The intended condonation application (point 2 of Annexure B) for the late file of your clients 'replying affidavit is irregular as the matter for Part A was already argued on the papers. The Respondents in the Judge Van Zyl Application have not filed their answering affidavits in respect of Part A prayer 2.4 and the whole of Part B as per Annexure A.

15.3 The unsigned Notice of Motion (Annexure B) was not accompanied by a founding affidavit…Again, as was the case with the Judge Van Zyl Application, your office has not afforded our client and other Respondents with reasonable time periods to file their responses.

15.4 The unsigned Notice of motion (Annexure B), which is in fact nothing more than a set down for relief under Part A prayer 2.4 and the whole of Part B as per Annexure A, is irregular and we hereby afford you an opportunity of withdrawing the set down for Thursday, 4 June 2020 at 09:30. Your conduct as an officer of this court is grossly irregular and your actions constitute an abuse and we hereby give you notice that costs *de bonis propriis* will be sought against yourselves, which will include all wasted costs of attendance of Thursday, 4 June 2020, travelling costs and the like on attorney own client scale.

[1] Scheepers and Nolte v Pate 1909 TS at 356.

15.5 We therefore afford you until 12:00 Wednesday, 3 June 2020 to notify all the relevant parties of your withdrawal of your irregular set down for Thursday, 4 June 2020 at 09.30. Upon your failure to do so, this letter constitutes a notice in terms of Rule 30(1) read with 30(2)(b) of the Uniform Rules of Court."

[12] The Legal Representative of the Applicants instead of addressing the issues raised in the letter from the First Respondent's Legal Representative, proceeded to launch the urgent Notice of Motion in respect of Part B thereof, apparently on instruction from his clients (the Applicants). The First Respondent continued to raise issue with the Applicants in respect of the anticipatory application, being fully aware that Part A of the Notice of Motion has not been dealt with. The Applicants pursued that Part B be heard as the relief sought in Part A had nothing to do with Part B. However, as correctly submitted by the First Respondent, the Notice of Motion was unsigned, the Respondents were served on the 3 June 2020, Part B was filed with no affidavit and that the dispute with regard to the settlement is still unresolved. In spite of all the concerns that were raised, the Attorney accordingly on instructions of the Applicants proceeded to enrolled the matter on an urgent basis.

[13] It is trite that an award of costs is in the discretion of the Court and that such discretion must be exercised judicially upon a consideration of the facts of a case. In this instance, the Respondents argued for costs *de bonis propriis* against Mr Willers, in the alternative, against the Second Applicant. The general principles of awarding costs *de bonis propriis* is applicable when a person acts or litigate in a representative capacity.[2] Failure of a party to incur unnecessarily steps or adopted the wrong procedure could result in that party be liable for the costs. In

[2] Moller v Erasmus 1959 (2) SA 465 (T) 467 C.

the well-known case of **Scheepers and Nolte v Pate**,[3] Innes CJ held that it is the duty of a litigant to avoid any course which unduly protracts a law-suit, or unduly increases its legal fees.

[14] In **SA liquor Traders 'Association and Others v Chairperson, Gauteng Liquor Board and Others**,[4] the court said the following:

> "an order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."

[15] In **Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited**, the following was said:[5]

> "Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the cots out of his own pocket. The obvious policy consideration underlying the court's reluctance to order costs against legal representative personally, is that attorneys and counsel are expected to pursue their client's rights and interest fearlessly and vigorously without due regard for their personal convenience. In that context, they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal Practitioners must present their case fearlessly and vigorously, but always within the context of a set ethical rules, that pertain to them, and which are aimed at preventing practitioners from becoming party to deception of the court. It is in this context that society and the courts and professions demand absolute personal integrity and scrupulous honesty of each practitioner."

---

[3] 1909 TS 353 at 356
[4] 2009 (1) SA 565 (CC) at para 54
[5] 2013 (4) ALL SA 346 GNP at para 34.

[16] It is apparent from the conduct of the Applicants and their Attorney, that they had totally disregarded the outstanding judgment in case 1634/2020, which was dismissed by Van Zyl, J. To worsen the situation of the Applicants, the First Applicant has been sequestrated. The issue of *locus standi* comes into play. The First Respondent further questioned the Second Applicant's financial status. One would expect the Legal Representative of such clients to take extra precautionary measure before instituting proceedings that will influence negatively on the parties. It was further not a secret that the judgment of Part A was still outstanding. Logic dictates that a litigant will have to wait to see which way the judgment will go, before placing the matter on the roll. Indeed, part A of the Notice of Motion still had to be dealt with as judgement was reserved. A Legal representative who pursues a meritless case even though he/she should know better and should advise the client accordingly should take note of such kind of advice. As correctly stated by Counsel on behalf of the First Respondent, Mr Willers is the legal expert and should not merely just act on instruction, but should be able to advise his clients accordingly. Mr Willers as an Officer of the Court, has an obligation to advise his clients, especially where a matter has a pending reserved judgment.

[17] Before judgment could be delivered, correspondence was received from Mr Willers, dated 16 February 2021, and it reads as follows:

> "The above matters and correspondence from Messrs MDP Attorney of even date refers.
>
> We take note of the contents thereof and reserve our and our clients [sic] rights in totality in this regard.

We however with respect wish to bring to your Ladyships attention that Mr Victor has made an Offer of Composition to the Liquidators in his Estate, which has been blatantly refused.

Our client will now proceed with an application regarding his rehabilitation, which will be served in due course.

We lastly request Messrs MDP Attorneys to provide the documentation referred to which has not been annexed to their correspondence."

[18] The Legal Representative of the First Respondent, MDP Attorneys, responded with a letter dated 18 February 2021, and it reads as follows;

"1. ……

2. We do not intend to litigate by way of correspondence and do reserve our client's rights to address the averments made by Mr willers [sic] at the appropriate time and in the appropriate forum, if need be.
3. We do however wish to point out to your Ladyship that all the averments made in Mr Willers' letter is ex post facto the conduct that lead to a *de bonis propriis* costs order being seeked [sic] by not only my client, but also the trustees of Mr Victor's own estate and the Trustees of the VVOT1 and VVOT2 trusts' estates. We still persist with the view that the cost order *de bonis propriis* is warranted and should be awarded in this instance.
4. Accordingly, the irrelevant contentions in the letter of Mr Willers ought to have no influence on the matter."

[19] In **Solidarity and Others v South African Broadcasting Corporation**[6] the court was of the view that reckless disregard for pending applications and with little regard for relative costs should be frowned upon.

[20] *Cost de bonis propriis* are not easily awarded. It is usually awarded under exceptional circumstance where the negligence is of a serious

[6] 2016 (6) SA 73(LC); (2016) 37 ILJ 2888 (LC); [2017] 1 BLLR 60 (LC)

degree. In **Louw v Road Accident Fund**,[7] Bekker AJ held that where an attorney's conduct accords with the type of professional misconduct, cost are to be awarded on a *de bonis propriis* scale. In my considered view, Mr Willers continued to disregard the letters from the Legal representative of the First Respondents that the matter is not to be placed on the roll, in spite of that request, Mr Willers enrolled Part B of the Notice of Motion. As already stated above, he is an Officer of the Court and has an obligation to advise his clients accordingly.

[21] Indeed, it is true that legal representative sometimes makes mistakes of law, or omit to comply with the rules of court,[8] but these mistakes should not be blatant, obvious or litigating recklessly. Bearing in mind that the Notice of Motion was serve on the Respondents unsigned and not accompanied by a founding affidavit. In my view, Mr Willers' conduct warrants a cost *de bonis propriis.*

[22] I accordingly order as follows:

1. That costs be ordered *de bonis propriis* against Mr Willers on a party and party scale in favour of the First Respondent.

_____

S. CHESIWE, J

[7] 2012 (1) SA 104.
[8] Multi-Links supra.

On behalf of Applicant:	Adv. FG Janse Van Rensburg
Instructed by:	Willers Attorneys BLOEMFONTEIN
On behalf of First Respondent:	Adv. JW Kloek
Instructed by:	MDP Attorneys BLOEMFONTEIN