IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE: 29734/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

14/6/17 .....

Date **ML TWALA**

In the matter between:

TSHABALALA: KHAYA STOFFEL **FIRST APPLICANT**

MNISI: THOKOZANI PELINGTON **SECOND APPLICANT**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG **FIRST RESPONDENT**

MRS. V.D MERWE (REGIONAL MAGISTRATE, LENASIA) **SECOND RESPONDENT**

JUDGMENT

TWALA J

1. In this application, the applicants seek to review the decisions of the first and second respondents handed down on the 14 June, 05 July and 19 July 2016 respectively, in terms of Rule 53 of the Uniform Rules of this Court.

2. It is common cause that the applicants made representations to the Senior Public Prosecutor, Lenasia ("SPP") for a withdrawal of the charges on the basis that there was insufficient evidence against them to sustain a conviction. The SPP declined the applicants request and ordered that the trial should be proceeded with. The SPP did not furnish the reasons for her decision.

3. The applicants duly aggrieved by this decision demanded that they be furnished with the reasons for ordering that the trial be proceeded with. However, the SPP did not oblige in this regard.

4. The second respondent who was presiding over this matter postponed it on two occasions when it served before her. On the second occasion she advised the applicants once again "to bring an application to compel the State to supply reasons and that the court cannot otherwise interfere with administrative procedures of a case outside of court"[1]. This is, as

[1] Case proceedings on 19/07/2016 – page 112 and 113 (paginated bundle)

contended by the applicants, what triggered the bringing of this application to review both the decisions of the first and the second respondent.

5. It is opportune for me, at this stage, to give a brief background of this matter. The applicants, according to the record, issued this application on 29 August 2016 and served their replying affidavit on the offices of the State Attorney who was representing the first respondent on 13 October 2016. However, the applicants only filed the notice of motion and their replying affidavit during the afternoon of 01 June 2017, barely a day before the hearing of the matter on 05 June 2017.

6. Realising this ineptitude of the applicants in the litigation of this matter, the Court requested the attorney for the applicants to appear in Court on the 05 June 2017, in order to explain the flagrant disregard and non-compliance with the rules and the practice directives of this Court.

7. On the 05 June 2017 counsel for the applicants appeared and informed the Court that his attorney was unavailable as he was attending a funeral in Polokwane and would only be back later that day. This necessitated the Court to roll the matter over to 06 June 2017. I pause to mention that when the instructing attorney appeared on the 06 June 2017, he half-heartedly and unconvincingly apologised for his laxed attitude in the handling of this matter. He advised that he was in Polokwane the previous week and not at a funeral as submitted by the applicants counsel, during the proceedings of the 5th instance. He submitted that he was in Johannesburg on 05 June 2017, but did not receive the message to appear in Court on the said day.

It is noteworthy to mention that the general practice of the High Court is succinctly clear, in the main the instructing attorney is to accompany counsel to court and further, in the instance wherein he/she is unable to do so for legitimate reasons, the attorney is to ensure that he/she is able to be contacted by counsel for purposes of providing detailed instructions at all material times.

8. I now turn to deal with the merits of the application for review.

9. When engaged by the Court on the issue of jurisdiction, counsel for the applicants conceded that the applicants did not follow the correct procedure in bringing this matter before the Court. The applicants did not exhaust all the internal remedies available to them before approaching this Court. Counsel conceded that the applicants have not made out a case against both the first and second respondents.

To this end, I deem it important to point out that the applicants failed to cite the Senior Public Prosecutor, Lenasia as a party in these proceedings, but proceeded to cite the First Respondent. The correct procedure to have followed would have been for the applicants to have escalated the matter first to the Chief prosecutor, and thereafter the Director of Public Prosecutions, Gauteng. In the absence of a satisfactory response therefrom to have brought their application under the attention of the National Director of Public Prosecutions for due consideration.

Section 6 of Act 3 of 2000[2] provides that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. Section 1 defines administrative action, but excludes "(ff) a decision to institute or continue a prosecution".

Accordingly, it is clear from the aforementioned that the application is ill conceived and bad in law.

10. I now turn to deal with the issue of costs. Counsel were specifically engaged regarding the manner in which this matter was handled and in this regard the grant of a punitive cost order aganst the instructing attorney. The applicants counsel contended that no costs order should be made against the applicants in favour of the second respondent, for she did not participate in these proceedings. The second respondent only filed a notice to abide. Further, arguing that this Court should not order costs *de bonis propiis* against the instructing attorney as he made a genuine mistake in his handling of this case.

11. Counsel for the first respondent argued that the applicants were informed of the date of hearing of this matter from 06 March 2017 and not on the 09 May 2017, as alleged by both the instructing attorney and the applicants counsel. On 24 April 2017 an e-mail was sent to the applicants attorneys requesting them to forthwith file their heads of argument and alerting them to the date of hearing of 05 June 2017.

12. Having realised that there was absolutely no response from the applicants attorneys, the State attorney on behalf of the first respondent sent the notice of set down to the applicants *domicilium* addresses, per

[2] Promotion of Justice Act

sheriff for service on the applicants. Upon receipt thereof the applicants then approached their attorneys who in turn sent a letter to the first respondent's attorney on the 02 May 2017, suggesting that the matter be removed from the roll. Needless to say that this request was not acceded to by the office of the State Attorney.

13. Counsel for the first respondent contended that they are entitled to a punitive costs order under the circumstances of this case. This matter was not supposed to be brought before this Court prior to the applicants having exhausted all the internal procedures, and including following the advice of the Magistrate to bring an application to compel the prosecution to furnish the reasons for its decision.

14. The general principle at common law is that a party who litigates in a representative capacity (such as a trustee) cannot be ordered to pay the costs *de bonis propriis* unless he or she has been guilty of improper conduct.[3] Such party may however be ordered to pay such costs where there is a want of *bona fides* on his or her part of if he or she has acted with gross negligence.[4]

15. Orders of this nature have been made against attorneys where, in the prosecution of an appeal, there has been a flagrant disregard of the rules applicable to such appeals and in particular the preparation of the record.[5] Where a legal practitioner has conducted himself in an

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[3] Cooper NO v First National Bank of South Africa Limited 2001 (3) SA 705 (SCA)
[4] Blou v Lampert and Chipkin NNO and Others 1973 (1) SA 1 (A)
[5] Jeebhai and Others v Minister of Home Affairs and Another 2009 (4) SA 662 (SCA)

irresponsible and grossly negligent manner in relation to the litigation such a cost order marks the Court's disapproval of the conduct.[6]

16. In *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board and Others*[7] it was stated (at paragraph 54) that: "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."

17. I am unable to agree with counsel for the applicants with regard to the issue of costs. In my view, there was a flagrant disregard of the rules and practice directives of this Court and the applicants attorney simply did not care. Of note is the fact that counsel for the applicants was involved in this matter, as it appears on record, since its inception in the Magistrate's Court. It is surprising that on the hearing of this matter, counsel readily concedes that the application before this Court is premature and has no merit. In my view the bringing of this review application was nothing else but a deliberate ploy to delay the prosecution of the applicants. That is in essence an abuse of the Court process.

18. Some degree of care is expected from an attorney in the handling of the case of his client. The rules of Court and practice directives are there to obviate the processing of cases before the Court expeditiously and need

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[6] Khunou and Others v M Fihrer & Son (Pty) Ltd and Others 1982 (3) SA 353 (W)
[7] 2009 (1) SA 565 (CC)

to be guardedly observed by all, including attorneys of this Court. It is disconcerting for an attorney to flagrantly disregard the rules and practice directives of this Court.

19. Further, when asked by the Court if he was going to bill his clients for the hearing of this matter, the attorney answered positively that he will bill his clients for a days work. I do not agree that the attorney and his counsel are entitled to any fees from the applicants due to the manner in which they handled this matter. In my view, it was abundantly clear that they were not prepared for the hearing of this matter – hence their letter of the 02 May 2017, proposing that this matter be removed from the roll. In the circumstances, it would be clearly unfair to mulct the applicants in the costs of this application.

20. I am in agreement with counsel for the first respondent that an appropriate order in these circumstances would be punitive costs against the applicants attorney, on the scale as between attorney and client.

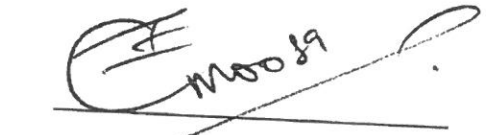
21. In the circumstances, I make the following order:

I. The application for review is dismissed

II. The attorney for the applicants to pay the costs of this application for two (2) days hearing on an attorney and client scale *de bonis propiis*

M L TWALA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree:



C I MOOSA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing:	**5 June 2017**
Date of Judgment:	**14 June 2017**
For the Applicants:	**Adv. Matimbi instructed by H R Munyai Attorneys, Johannesburg**
For the Respondent:	**Adv. Barnard instructed by State Attorney, Johannesburg**