

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021/14237

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED NO

13 March 2024

In the matter between:

**INTERNATIONAL PENTECOST HOLINESS
CHURCH (IPHC)**

Applicant

and

K J SELALA ATTORNEYS

Respondent

IN RE

**INTERNATIONAL PENTECOST HOLINESS
CHURCH (IPHC)**

Applicant

and

THE MINISTER OF POLICE

First Respondent

THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE

Second Respondent

THE PROVINCIAL COMMISSIONER,
NORTH WEST

Third Respondent

CAPTAIN LETSOKO

Fourth Respondent

TSHENOLO PHASHA

Fifth Respondent

CHIEF KABELO NAWA

Sixth Respondent

OCCUPANTS OF THE APPLICANT'S
NAZARETH CHURCH IN LEBOTLOANE

Seventh Respondent

JUDGMENT

Mdalana-Mayisela J

- [1] The applicant seeks the order directing the respondent to be liable *de bonis propriis* for the costs incurred in an application for leave to appeal brought by the 6th respondent. The application is opposed by the respondent.
- [2] The background facts are as follow. The applicant brought an application for a spoliation order as it had been deprived of possession of a church in Lebotloane Village ("spoliation application"). The seven respondents cited above were joined in the spoliation application. It is common cause that the respondent in this application represented the 6th respondent in the spoliation application. The 6th respondent opposed the spoliation application.

- [3] The spoliation application was argued before Moorcroft AJ. The judgment was delivered on 2 February 2023. The spoliation application was granted. The 1st and 6th respondents were ordered jointly and severally to pay the costs of the spoliation application including the costs of two counsel, the one paying the other to be absolved ("spoliation judgment").
- [4] It is common cause that on 6 February 2023 the respondent filed a notice of the application for leave to appeal the spoliation judgment on behalf of the 6th respondent. The application for leave to appeal was opposed by the applicant.
- [5] Moorcroft AJ's registrar informed the parties that the leave to appeal application would be heard on 26 April 2023. It is common cause that the applicant's attorney caused a notice of set down for the leave to appeal application to be served on the respondent on 19 April 2023.
- [6] The application for leave to appeal was argued on 26 April 2023. It is also common cause that when it was argued the respondent was the 6th respondent's attorney of record. During the hearing, the representative of the applicant advised the applicant's attorney that the 6th respondent passed away on 25 March 2023. This was conveyed to counsel for the 6th respondent and the Court. The respondent was not in court during the hearing. His counsel conveyed the news to him telephonically. The respondent enquired from Reverend Wessie, who deposed to the answering affidavit in the spoliation application, whether the 6th respondent passed away, and he confirmed. Afterwards, the respondent confirmed to the 6th respondent's counsel that he passed away.
- [7] Moorcroft AJ dismissed the application for leave to appeal on 3 May 2023. The costs of the leave to appeal application were reserved. The following was stated in the leave to appeal judgment:

"It would seem that no executor has been appointed yet and a cost order against the estate would not be appropriate. At the same time the applicant's attorneys wish to investigate the circumstances under which the matter came before court after the death of the 6th respondent and they should be allowed this opportunity."

- [8] The respondent in his answering affidavit confirmed that he filed the application for leave to appeal on behalf of the 6th and 7th respondents. He stated that he handled this matter on the instructions of the church (Silo faction).
- [9] He contended that there is no reason why the applicant should not wait for the appointment of the executor of the 6th respondent's estate to bring a claim for costs against it.
- [10] He submitted that the application should fail because he was not informed about the 6th respondent's death by his family or the church in March 2023. He did not act capriciously, dishonestly or negligently.
- [11] A personal costs order against a litigant occupying a fiduciary capacity is justified where his conduct in connection with the litigation in question has been mala fide, negligent or unreasonable.¹ In *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others*² it was held as follows:
- “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.”
- [12] The applicant submitted that the respondent had a duty to advise the 6th respondent that his application for leave to appeal had been set down for 26 April 2023. By failing to do so, the respondent breached his duty of care towards the 6th respondent, court, applicant's attorneys, and applicant. In making this submission the applicant relied on *Barlow Rand Limited v Lebos and Another*³ where the court held that:

“... Some of the duties of an attorney are by lawyers better understood than can be fully described. There are many canons of duty which have not yet been in print, but (apply) not only to oneself and to one's client, but also to the Bench and to the public. This duty on the part of an attorney is not a servile thing ... He must, when reasonable and necessary, communicate with his

¹ In re Potgieter's Estate 1908 TS 982

² 2009 (1) SA 565 CC para 54

³ 1985 (4) SA 341 (T) at 347F – 348A

client on all matters concerning the case; keeping his advocate well posted on all the facts and assist the client and counsel in devising what, in any honourable way, can tend to the advantage and defence of the rights of his client."

- [13] I agree with the applicant's submission that the respondent had a duty, after he was served with the notice of set down, to advise the 6th respondent of the date of hearing of the leave to appeal application. Had he made an effort to contact the 6th respondent at that time, he would have been advised by the family or Reverend Wessie that he passed away. Afterwards, he would have communicated with the applicant's attorneys and the Judge's registrar for the stay of the leave to appeal application pending the appointment of an executor. The executor would then make a decision whether to proceed with the leave to appeal application or to withdraw it. I find that the respondent breached his duty of care towards the Court and applicant.
- [14] The respondent further contended that the applicant failed to show how the death of the 6th respondent would impact on the application for leave to appeal since the 7th respondent also had a substantial interest in the outcome of that application.
- [15] This contention is without merit because Moorcroft AJ made the following remarks in respect of the 7th respondent:
- "[4] This is an application for leave to appeal by the 6th respondent cited above. The 7th respondent was also cited as an applicant in the application for leave to appeal but no names and personal details are reflected on the record. They are individuals who reside at the Church property that is the subject of the application and no order was granted against them. I pointed out in the judgment I handed down on 3 February 2023 that they have not been identified and are not properly before court, and despite pointing this out, it has still not been done and an application for leave to appeal is purportedly brought on their behalf. It is however not really apparent that any of them joined the 6th respondent in bringing this application and if they were co-applicants, no reason why they are not named in any affidavit. Whoever they are, they should also not be liable for any costs."*
- [16] I find that the respondent was negligent and unreasonable. I find that his negligence was of a serious degree because his conduct caused the applicant to

incur unnecessary legal costs for the hearing of the application for leave to appeal. Mistakes made by an attorney in litigation, which result in unnecessary costs, should not lightly be overlooked. And a litigant should not always be obliged himself to pay costs which have been caused by the negligence of his attorney.⁴

[17] The application for leave to appeal was dismissed by Moorcroft AJ. There is no apparent reason from the judgment why the costs should not follow the result. The applicant is entitled to be awarded costs of the leave to appeal application. However, the respondent is not liable for the costs of the application for leave to appeal incurred before the death of the 6th respondent.

[18] The applicant's attorney made enquiries about the appointment of the executor to the estate of the 6th respondent. He stated that the death of the 6th respondent has not been reported to the Master of this Court and accordingly no executor has been appointed. It has been a year now since the 6th respondent passed away. The applicant submitted that it is not possible to claim the reserved costs from the 6th respondent's estate. In the circumstances, the respondent is liable for the applicant's costs of the hearing of the application for leave to appeal on 26 April 2023.

ORDER

[19] I make the following order:

1. The respondent is ordered to make payment *de bonis propriis* of the costs occasioned by the hearing of the leave to appeal application on 26 April 2023 before Moorcroft AJ, brought on behalf of the 6th respondent, including costs of two counsel.
2. The respondent is ordered to pay the costs of this application, including costs of two counsel.

⁴ Waar v Louw 1977 (3) SA 297 (O)



MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of judgment: 13 March 2024

Appearances:

Counsel for Appellant: Adv. N Segal with Adv VJL Mthunzi

Instructing Attorneys: S Twala Attorneys

Counsel for Respondents: Mr K J Selala

Instructing Attorneys: K J Selala Attorneys