IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 19 February 1999 **CASE NUMBER:** LCC27/99
before **Gildenhuys J**

In the case between

VELAPHI MANDLAKAYISE NTULI	First Applicant
OUPA MZIWONKE NTULI	Second Applicant
MPOMPOLANA NTULI	Third Applicant
GIDEON NTULI	Fourth Applicant
RAYMOND NTULI	Fifth Applicant
JABU NTULI	Sixth Applicant
MELTA NTULI	Seventh Applicant
ALWYNA NTULI	Eighth Applicant
ALEXINA NTULI	Ninth Applicant
ZANDILE NTULI	Tenth Applicant
ALPHEUS NTULI	Eleventh Applicant
MHUNUZI NTULI	Twelfth Applicant
EUNICE NTULI	Thirteenth Applicant

and

CAREL LEE SMIT	First Respondent
SHERIFF OF THE COURT VRYHEID	Second Respondent

JUDGMENT

GILDENHUYS J:

[1] This matter came before the Court by way of urgent application. There are thirteen applicants. They live on the farm Elim, in the district of Vryheid. The first respondent is the owner

of Elim. The second respondent is the Sheriff of the Court for Vryheid. The second respondent did not participate in the proceedings.

Litigation which preceded this application

[2] On 16 October 1996, summons was issued by the first respondent in the Magistrate's Court, Vryheid, against the first and second applicants for their eviction from Elim. Notices of intention to defend were filed on behalf of both applicants. On 7 October 1997, the case was heard in the Magistrate's Court. On that date, the attorneys for the second applicant withdrew from the case and default judgment was granted against the second applicant. The hearing of the case against the first applicant continued and oral evidence was led. The hearing could not be concluded on that day and was postponed. On 8 October 1997, a warrant for eviction was issued against the second applicant and his family, but not executed.

[3] On 21 November 1997, section 13(1A) was inserted[1] into the Land Reform (Labour Tenants) Act (hereinafter "the Labour Tenants Act").[2] The subsection reads as follows:

> " If an issue arises in a case in a magistrate's court or a High Court which requires that court to interpret or apply this Act and -
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> (a) no oral evidence has been led, such court shall transfer the case to the Land Claims Court and no further steps may be taken in the case in such court;
> (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act. "

[4] On 24 November 1997, the hearing of the case in the Magistrate's Court against the first applicant was resumed and concluded. The Magistrate ordered his and his family's eviction from Elim. On 27 November 1997, the first applicant's attorneys requested reasons for the Magistrate's order. On the next day, 28 November 1997, the Extension of Security of Tenure Act (hereinafter "the Tenure Act")[3] came into operation.

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1 By section 34 of the Land Restitution and Reform Laws Amendment Act, No 63 of 1997.

2 Act No 3 of 1996.

3 Act No 62 of 1997.

[5] On 18 February 1998, the Magistrate gave reasons for the order issued against the first applicant. On the same day, the attorneys for the first applicant asked the first respondent to consent to the rescission of the judgment given against the first applicant on the grounds that the judgment was granted contrary to the provisions of section 13(1A) of the Labour Tenants Act.[4] In a letter dated 25 May 1998, the attorneys for the first respondent pointed out that oral evidence was led in the case against the first applicant on 7 October 1997, before the amendment to the Labour Tenants Act and refused to agree to any rescission.

[6] On 22 October 1998, a warrant for eviction was issued against the first applicant and his family. The warrant was served on the first applicant on 14 December 1998, but was not implemented. The first respondent explained that he did not want to implement the eviction orders during the winter season for fear that the applicants might take revenge and burn down the farm.

[7] During December 1998, the first and third applicants instituted an action in this Court under case number LCC 156/98 for a declaratory order that they are labour tenants under the Labour Tenants Act. In the statement of claim it is alleged that both these applicants and their families resided on the farm as at 2 June 1995. This allegation forms part of the basis on which their claim is founded.

[8] On 22 December 1998, the first applicant's attorneys forwarded a letter to the first respondent's attorneys, seeking an undertaking that the warrant of eviction would not be executed. In response, they received a letter dated 2 February 1999 from the first respondent's attorneys, reading as set out hereunder. I quote extensively from the letter, because it impacts on subsequent events.

> "Soos u wel deeglik bewus behoort te wees is hierdie aangeleentheid in die Landdroshof Vryheid verhoor en het u kantoor die Verweerders se sake behartig vanuit die staanspoor. U sal bewus wees daarvan dat u kliënte spesifiek op hulle pleitstukke gepleit het dat hulle Huurarbeiders is.
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> Op datum van die verhoor het u kantoor onttrek namens die Tweede Verweerder en is Vonnis by Verstek op 7 Oktober 1997 teen hom toegestaan.

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[4] There is no indication that the amendment inserting section 13(1A) is intended to operate retroactively. See *Makhomboti v Klingenberg and Another* 1999 (1) SA 135 (T) at 141I.

> Wat Eerste Verweerder aanbetref was ‘n volskaalse verhoor gevoer met volledige getuienis aan beide kante en het die Hof bevind dat die Eerste Verweerder se verweer dat hy ‘n Huurarbeider is,
> verwerp word en is ‘n uitsettingsbevel verleen deur die Hof met inagneming van al die relevante wetgewing wat op datum van uitspraak enigsins op die aangeleentheid kon impakteer.
>
> U kantoor het op 27 November 1997 ‘n Kennisgewing in terme van Reël 51(1) afgelewer namens beide die Verweerders en het Redes gevra vir die uitspraak met die waarskynlike oogmerk om te appelleer. Geen appél het gevolg nie. Op 18 Mei 1998 het u aan ons geskryf en die bewering gemaak dat die Hof uitspraak gelewer het teenstrydig met die bepalings van Artikel 13 van Wet 3 van 1996. U het oënskynlik beweer dat die Landdroshof nie bevoeg was om die verhoor te doen nie en die saak moes oorplaas na die Grondeisehof.
>
> Ons het u op 25 Mei 1998 daarop gewys dat daar wel mondelingse getuienis gelei was soos wat u verseker veronderstel was om te weet aangesien u kantoor self die verhoor behartig het. Ons het u ook duidelik in kennis gestel dat ons kliënt nie bereid is om toe te stem tot Tersydestelling van die Vonnis nie.
>
> Ons kliënt is geregtig op die uitvoering van die vonnis en die uitsetting van u kliënte. ‘n Geldige Hofbevel bestaan in hierdie verband.
>
> . . . .
>
> Hierdie skrywe word aan u gerig in ‘n poging om u te oortuig om onmiddelik die aksie in die Grondeisehof terug te trek en ons kliënt se kostes tot datum aan te bied en daardeur te verhinder dat ons die verdere regskostes aangaan om ons enigsins te moet bemoei met die stappe wat u in die Grondeisehof aanhangig gemaak het.
>
> Dit is vir ons nodig om op rekord te plaas dat ons van oordeel is dat hierdie poging van u daarop dui dat u kliënte misbruik maak van die prosedures van die Grondeisehof welwetende dat ‘n bevoegdigde Geregshof reeds die dispuut tussen die partye bereg het en die Landdros ook in antwoord op u Versoek om Redes op 18 Februarie 1998 volledige Redes verskaf het.
>
> U as prokureurs van die Eiser in die Grondeisehof was ook die prokureurs van die Verweerders in die Landdroshofsaak en ons plaas op rekord dat u hierdie aksie van stapel stuur in die Grondeisehof welwetende wat die regsposisie is en moet ons op rekord plaas dat indien u ons gaan dwing om die aangeleentheid in die Grondeisehof verder te voer, ons verseker vir die Grondeisehof sal versoek om koste op die skaal soos tussen prokureur en eie kliënt teen u kliënte toe te staan alternatiewelik *de bonis propiis*. Dit spyt ons dat ons tot die stap moet oorgaan om hierdie aspek nou reeds op rekord te plaas.”

[9] The applicant’s attorney did not heed the warning given by first respondent’s attorney. He signed and served a notice of motion on 3 February 1999, asking this Court to make an urgent order that the first and second respondents be restrained from executing the warrant of eviction obtained against the first applicant. This application was later withdrawn and costs were tendered.

[10] During February 1999, an application was lodged with the Director-General of Land Affairs in terms of section 16 of the Labour Tenants Act for an award of land. This Court was not informed which applicant or applicants lodged the application.

The commencement of this application

[11] On 9 February 1999, the attorney for the applicants heard from the second respondent that the warrants for eviction will be executed on 11 February 1999. This led to the commencement of this application. The notice of motion was signed and served on 10 February 1999. In the notice of motion, the first and second applicants together with eleven other applicants (who are alleged to be members of their families) asked for a rule *nisi* why an order on the following terms should not be granted. I quote *verbatim* from the notice of motion.

> "2.1 That pending an application for a declaratory order regarding the Applicants' status as labour tenants to this Honourable Court issued under case number LCC 156/98 and;
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> 2.2 That pending an application in terms of Section 16 of the Land Reform (Labour Tenants) Act no 2 of 1996 to the Department of Land Affairs for the assistance towards the Applicant's to obtain a portion of the farm 'Elim' on which they have acquired certain rights on the Land Reform bullet Act:
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> 2.2.1 That the First and Second Respondents be and are hereby restrained and interdicted from executing the Warrant of Eviction issued under case number : 2448/96 on 22 October 1998 pursuant to a judgment by the learned Magistrate for the district of Vryheid held at Vryheid given on 24 November 1997 against the Applicants herein.
>
> 2.2.2 That the Warrant of Eviction issued pursuant to the abovementioned judgment in the aforementioned case be and is hereby stayed forthwith."

[12] The notice of motion is indicative of the confusion and imprecision which characterises the drafting of the papers on behalf of the applicants. Only the first and third applicant, and not all of them, applied for a declaratory order in case number LCC 156/98. There is no indication which of the applicants made an application in terms of section 16 of the Labour Tenants Act. From the context of the founding affidavit, it would appear that it might only be the first applicant and not the others. Two warrants of eviction were issued out of the Magistrate's Court: one against the first applicant (on 22 October 1998) and another against the second applicant (on 8 October 1997). The notice of motion only refers to the warrant against first applicant. In the notice of motion, relief is sought under the Labour Tenants Act. There is no prayer for relief under the Tenure Act, not even in the alternative, although heavy reliance was placed on that Act in the affidavits filed on behalf of the applicants.

[13] After service of the notice of motion, the execution of the warrants of eviction was held over and the parties agreed on time limits for the filing of further affidavits. The matter came before me on 19 February 1999.

[14] All the applicants face a basic difficulty in this case, about which I will say more later in this judgment.[5] None of the applicants filed affidavits in the matter. The founding affidavit and also the replying affidavit were attested to by Mr Weideman, their attorney, a professional assistant at the firm representing the applicants. In the replying affidavit, Mr Weideman states (again I quote *verbatim*):

> " . . . I have not been able to consult with the Second Applicant or the Third to Thirteenth Applicant and take thorough instructions regarding this Application regarding their rights as Labour Tenants, alternatively as occupiers in terms of the Extension of Security of the Tenure Act No 62 of 1997."

Mr Weideman does not attest to the necessary facts which are both within his personal knowledge and which indicate that the applicants are either labour tenants or family members and associates of labour tenants under the Labour Tenants Act or are occupiers under the Tenure Act.[6] Although this alone may be fatal to their claims, I will nevertheless proceed to examine their positions.

The position of first and second applicants

[15] The judgments given by the Magistrate against the first and second applicants are legal and binding. During argument, Mr Weideman on behalf of the applicants conceded this.[7] This Court

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5 Infra par [26].

6 The terms "labour tenant", "associate" and "family member" are defined terms under section 1 of the Labour Tenants Act. The term "occupier" is a defined term under section 1 of the Tenure Act. Under the definitions, a "labour tenant" cannot also be an "occupier".

7 It is also conceded on behalf of first and second applicants in the replying affidavit, where the following is stated:

> "Regarding the First and Second Applicant there is no denial that the Honourable Magistrate's finding under case number, 2249/96, is legal and binding."

is a creature of statute. It has no jurisdiction beyond what is given to it in terms of a statute, expressly or by implication, to interfere with the order of another court.[8]

[16] On the facts before me, there is no basis on which this Court can interfere with the judgments of the Magistrate nor with the warrants of eviction issued pursuant to such judgments. In argument, Mr Weideman had to concede this. On behalf of the first applicant, he asked that the warrant of eviction be suspended pending an appeal. On behalf of the second applicant, he asked that the warrant of eviction be suspended pending an application for rescission of the judgment.

[17] The papers contain no allegation that the first applicant wishes to appeal to this Court against the judgment of the Magistrate, nor what the prospects of success for such an appeal would be. Similarly, there is no allegation that the second applicant intends to apply for the rescission of the default judgment given by the Magistrate, nor what the prospects of success for such a rescission application would be. Without this, there is no factual basis on which the warrants for eviction can be suspended, assuming (without deciding) that this Court has jurisdiction to suspend them.

[18] There is a bare allegation that the Tenure Act applies to the applicants. The eviction orders were, however, given before the Tenure Act came into force. There is no suggestion that the subsequent passing of the Tenure Act invalidates them. The Tenure Act gives occupiers some protection against eviction. An occupier (as defined in the Tenure Act) excludes a labour tenant.[9] I pointed out to Mr Weideman that although the applicants raised their alleged remedies under the Tenure Act as an alternative to remedies which they claim to have under the Labour Tenants Act, a finding by this Court that they are occupiers under the Tenure Act[10] might rule out a finding that they are also labour tenants. This would disentitle them to the award of land for which application was made under section 16 of the Labour Tenants Act. Possibly for this reason, Mr Weideman

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8 See *Mkwanazi v Bivane Bosbou (Pty) Ltd and three similar cases* 1999 (1) SA 765 (LCC) at 768E and the cases referred to therein.

9 Section 1 of the Labour Tenants Act, *sv* "occupier".

10 Although it was not argued, such a finding might have been based on section 3(2) of the Tenure Act.

(during argument) chose not to ask the Court to find that the first and second applicants are occupiers under the Tenure Act. There is also no prayer for relief under the Tenure Act in the notice of motion.

The position of the third to the thirteenth applicant

[19] Mr Weideman alleged in the founding affidavit that the third to the thirteenth applicants are members of the families of the first and second applicants. He did not say what the family relationships are. In the replying affidavit, Mr Weideman stated that the tenth, eleventh and twelfth applicants are minors and should not have been applicants at all. Their inclusion is indicative of the random manner in which the papers were prepared. The eviction orders against first and second applicants include the eviction of their families and this is presumably the reason why members of the families were included in the proceedings as applicants.[11]

[20] An attempt was made in the founding affidavit to prevent the eviction of the third to the thirteenth applicants by relying on the Labour Tenants Act, as follows:

> "It is however quite apparent that the applications to have the First and Second Applicants declared Labour Tenants, directly affect the Third to Thirteenth Applicants as they are family members and associates of the Labour Tenants, i.e. the First and Second Applicants.
> Therefor, it is my submission that the same argument pertaining to the First and Second Applicants regarding the pending Application to the Land Claims Court to have them declared as Labour Tenants, also pertain to the Third to Thirteenth Applicants in this matter."

In this connection, I must to point out that it is the first and third applicants who instituted action in this Court under case number LCC 156/98 for declaratory orders that they are labour tenants, not the first and second applicants. None of the applicants have placed any factual evidence before this Court on which it can be found that any of them is a family member or an associate of a labour tenant (as defined in the Labour Tenant Act) and as such entitled to protection against the pending eviction under the Labour Tenants Act. "Associate" and "family member" are defined terms under the Labour Tenants Act. The third to thirteenth applicants presented no evidence, apart from Mr

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[11] I use the words "members of the families" in their ordinary sense. It does not imply a finding that they are "family members" as defined in section 1 of the Labour Tenants Act.

Weideman's bare and unsubstantiated allegation, that any of them comply with any of those definitions.

[21] In the replying affidavit, it was submitted that the third to thirteenth applicants are occupiers in terms of the Tenure Act and as such entitled to the protection given to occupiers under the Tenure Act. I quote *verbatim* from the replying affidavit:

> "It is expressly submitted that these, the Third to Thirteenth Applicants are occupiers in terms of Extension of Security of the Tenure Act no 62 of 1997 as:
>
> 71.1 They were living on the farm ' Elim' in the district of Vryheid, Kwazulu Natal on 04 February 1997 with the explicit, alternatively implied, alternatively tacit consent of the First Respondent.
>
> 7.1.2 they are not labour tenants or economical farmers as per the abovementioned act."

A party who wishes to prevent ejectment proceedings on the basis that he or she is an occupier under the Tenure Act and entitled to the protection given to occupiers under that Act, must set out specifically the facts upon which he or she relies.[12] His or her *ipse dixit* is not sufficient. Nor is it sufficient merely to repeat the wording of the applicable statutory requirements in an affidavit.

[22] The original reliance by the third to the thirteenth applicants on the Labour Tenants Act contrasts sharply with the alternative submission that they are occupiers under the Tenure Act and entitled to protection under that Act. If I find that they are occupiers under the Tenure Act, it might jeopardise remedies they might otherwise have had under the Labour Tenants Act.[13] When I asked Mr Weideman under which Act and on what basis he would ask me to grant relief to the third to thirteenth applicants, he asked for a postponement to place additional evidence before the Court and to obtain instructions. This being the case, I cannot decide for the third to thirteenth applicants what form of relief I should consider granting to them,[14] assuming that they are entitled to some form of relief. The fact that Mr Weideman finds himself not adequately instructed constitutes, against the backdrop of how this case was conducted, no reason for granting a

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12 Compare *Mosehla v Sancor* CC 1999 (1) SA (T) 614 at 618J-619A.

13 Supra par [18].

14 No relief under the Tenure Act is claimed in the notice of motion.

postponement. He must have anticipated the difficulties which I put to him. It involves the very basis on which the Court is asked to grant relief.

[23] If the third to thirteenth applicants occupy the land as members of the families of the first and second applicants, they are also subject to the warrants of eviction. If not, the warrants of eviction do not apply to them. There is no allegation that they have any right of residence separate from the first and second applicants. There is a "submission" by Mr Weideman that the third applicant (who is the mother of the first applicant) is the head of the kraal at which the first applicant lives and that summons in the Magistrate's Court was issued against the wrong party. There is no evidence to sustain the submission. On the contrary, the first respondent stated under oath that the first applicant informed him that he is the head of the kraal.

Delay in executing the warrants of eviction

[24] I need to deal with one last submission made by Mr Weideman. During argument, Mr Weideman relied on the delay of the first respondent to have the warrants of eviction executed. In the founding affidavit, this is dealt with as follows:

> "I wish to refer the Honourable Court to the fact that 16 months has lapsed since the issue of the Warrant of Eviction and actual Eviction which has been organised for 11 February 1999."

He goes much further in the replying affidavit and states:

> "I submit that this action by the First Respondent constitutes a form of permission to the Applicants to reside on the farm and that the First and Second Applicant are therefor occupiers in terms of the Extension of Security of the Tenure Act No 62 of 1997."

He gives no factual basis for this "submission". I am mindful of the provisions of section 3(4) of the Tenure Act to the effect that, for purposes of civil proceedings under the Tenure Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent, unless the contrary is proved. The first respondent deposed under oath that he had never had any intention to give up his rights under the judgments for eviction and that he had never consented to the applicants remaining on the land. He gave an explanation for the delay in

executing the warrants for eviction.[15] Mr Weideman submitted that the explanation is unconvincing. Be that as it may, there is no evidence to the contrary from the applicants and the explanation is not such that I must reject it out of hand. In the absence of evidence to the contrary, I have no option but to conclude that the first respondent has shown that he did not give the applicants permission to reside on the land after obtaining the eviction orders in the Magistrate's Court.

Costs

[25] Mr de Wet, who appeared on behalf of first respondent, asked for the application to be dismissed and for an award of costs *de bonis propriis*, on the scale of attorney and own client, against the firm of attorneys representing the applicants. I have already indicated that this application cannot succeed. Both the Labour Tenants Act and the Tenure Act are social litigation. Provided litigation under those Acts is reasonably justified and properly conducted, this Court will usually not make a cost order.[16] In this case, I cannot hold that the litigation was reasonably justified nor that it was properly conducted. Consequently, a cost order against the applicants must follow. To determine on what basis costs should be awarded, it is necessary to consider the instructions given to Mr Weideman and how he went about implementing those instructions. He acted on instructions of the Legal Aid Board. He has had instructions to represent the first applicant for some time. He recently received instructions from the Legal Aid Board to represent the second applicant "in opposing his eviction from the farm Elim" and also instructions "regarding the third applicant and seven others to assist them in opposing the pending eviction".[17] This he did by launching a hit-and-miss application to this Court, raising every point he could think of, without proper regard as to whether there was evidence to establish the necessary factual basis and without proper consideration of the inherent contradictions between the various positions taken up by him.

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15 Supra par [6].

16 *Hlatswayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 639h, 642c, 642f, 643f-644c.

17 In addition to the first, second and third applicant, ten other applicants (and not seven, as stated in the instructions from the Legal Aid Board) participated in the application. It was not explained how this came about.

[26] Mr Weideman had to act quickly, because the eviction was imminent. He explained, during argument, that he was unable to consult with the second to thirteenth applicants on the preparation of the papers for this application because they live in a remote rural area and it is difficult to get in touch with them. This might afford some excuse in relation to the founding affidavit but not in relation to the replying affidavit. He said in argument that he relied on information gleaned from previous consultations (mainly with the first applicant) and from existing files in his office dealing with the affairs of the Ntuli family for preparing the affidavits, to which he deposed himself. He cannot possibly have personal knowledge of much of the information so obtained. His course of conduct also raises doubt as to whether the proceedings were properly authorised by all the applicants. To avert difficulties such as these, and also to protect their position as independent advisers, attorneys should avoid making the main affidavits in application proceedings lodged on behalf of their clients. I do realise that, in exceptional cases, there may be no viable alternative.[18]

[27] Mr de Wet pointed out that the futile attempts to suspend the warrants of eviction (this is the second attempt)[19] immerse the first respondent in unnecessary costs which he is unlikely to recover, the applicants being indigent. These attempts, so he argued, should not have occurred at all, it being improper for an attorney to commence and prosecute a case which he knows (or should know) has no prospects of success. In this case the founding affidavit, as well as the replying affidavit, both deposed to by Mr Weideman, are full of errors and contradictions. Some of these are apparent from the portions which I have quoted. Some paragraphs make no sense at all. Factual evidence which are necessary for any relief which the Court could possibly grant, are either absent or are presented as "submissions". This is aggravated by the fact that Mr Weideman was warned by first respondent's attorneys of some of the difficulties which his clients would face if they were to apply for an order suspending the warrants of eviction.[20]

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18 The undesirability of the attorney of record in a case being an important witness in that case is expressed by Wessels J in *Elgin Engineering Co (Pty) Ltd v Hillview Motor Transport* 1961 (4) 450 (D&CLD) at 454F-H.

19 The first attempt is described in par [9] supra.

20 Supra par [8].

[28] In the matter of *Waar v Louw*[21] Steyn R (as he then was) described the circumstances under which a Court will order an attorney to pay for his or her mistakes *de bonis propriis*, as follows:

> "Die bevel dat die koste *de bonis propriis* deur appellant se prokureur betaal moet word, is na my mening ook verkeerd. Die neiging in die afgelope tyd is weliswaar om prokureurs deur middel van so 'n kostebevel vir hul foute te laat boet . . . En die rede vir so 'n bevel teen 'n prokureur is heel duidelik. Die prokureursamp is 'n hoë en verantwoordelike amp. Die prokureursberoep is 'n geleerde beroep wat groot vaardigheid van sy lede verg. Foute wat 'n prokureur in gedingvoering begaan en wat onnodige koste tot gevolg het, moet derhalwe nie ligtelik oorsien word nie. En 'n gedingvoerder behoort nie altyd verplig te word om self die koste te betaal wat deur die nalatigheid van sy prokureur versoorsaak is nie.
> Maar daar moet ook nie te streng teen 'n fouterende prokureur opgetree word nie. Die regspleging is soms 'n tergende dissipline, en selfs die mees behendige praktisyns kan foute begaan wat onnodige koste meebring.
> Die prokureursberoep moet nie deur 'n te toeskietlike houding beweeg word om die leisels slap te laat lê nie, maar moet ook nie met te veel sweepklappery demoraliseer word nie. Soos gewoonlik in menslike sake is die middeweg die beste."

In the case of *Machumela v Santam Insurance Co Ltd*,[22] an attorney was ordered by the Appellate Division to pay the costs of an unnecessary condonation application *de bonis propriis*. In the case of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*,[23] the Appellate Division went so far as to order an attorney to pay the costs arising out of unnecessary documents being annexed to an appeal record, *de bonis propriis*. In the case of *Webb and Others v Botha*,[24] the Natal Provincial Division awarded costs *de bonis propriis* against an attorney for embarking upon legal proceedings without any real prospect of success, relying on technical points only.

[29] There can be no doubt that, in this case, Mr Weideman acted in good faith. He was, however, guilty of a considerable amount of muddled thinking[25] and slovenly drafting. The futile attempts which he initiated to have the warrants of eviction suspended, not only caused the first respondent unnecessary expense, but also the Legal Aid Board, which is financed by the public

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21 1977 (3) SA 297 (O) at 304D-F.

22 1977 (1) SA 660 (A) at 664A-B.

23 1996 (2) SA 225 (A) at 236 B and F.

24 1980 (3) SA 666 (N) at 672C-673H.

25 Muddled thinking, on it own, will usually not justify a cost order *de bonis propriis.* See, for example, *Nkosi v Caledonian Insurance Co* 1961 (4) SA 649 (N) at 663G-H.

purse. In mitigation, Mr Weideman explained (during argument) that he had to act very quickly without sufficient time for proper reflection, that the applicants are unsophisticated people, that it is difficult to reach them to set up consultations, that his firm is the only firm in Vryheid prepared to accept legal aid instructions in eviction matters and that his firm handles more land reform work than it can efficiently cope with. It is indeed so that the firm is involved in a substantial number of land reform cases brought before this Court. Unfortunately, and I say this after discussions with my fellow judges, in many cases the firm's work is not up to standard. The slipshod work in this case is, unfortunately, not a once-off occurence.

[30] By not taking full instructions from the applicants, Mr Weideman was unable to present their case properly. He did not present the necessary factual evidence (as opposed to submissions) and he did not properly establish his authority to act on behalf of all the applicants.[26] He should have realised that, on the papers as they stand, the applicants could not succeed at all. This, together with the appallingly slipshod and inept manner in which the papers were prepared, constitute serious negligence.[27] Because of the haste in which the papers had to be prepared and because Mr Weideman acted in good faith, I decided that, in this instance, I will not award costs *de bonis propriis*. In future, the Court will be less lenient.

[31] In the matter of *Webb and Others v Botha*,[28] the Natal Provincial Division had to consider a cost order *de bonis propriis* against an attorney who had the propensity of embarking on legal proceedings without prospect of success, mostly relying on technical points. The attorney was warned a number of times that in future he might be held liable *de bonis propriis* for the costs of such proceedings. He did not heed the warnings, and eventually a costs order *de bonis propriis* was made against him. I have decided to follow that approach, and to warn the firm representing the applicants that the time is fast approaching when it would be held liable *de bonis propriis* for the costs of proceedings where the papers are patently deficient and the prospect of success

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26 See also infra par [33].

27 This alone could be a sufficient ground for an award of costs *de bonis propriis*. See *Mahlangu v De Jager*, LCC1/96, 9 February 1999 at par [69], as yet unreported, internet web site: http://www.law.wits.ac.za/lcc/1999/mahlangusum.html

28 Supra n 24.

obviously absent. It distresses me having to do this because the firm is fulfilling an important function in representing indigent litigants in land reform measures. The importance of the litigation is, however, no excuse for sub-standard performance.

[32] The first respondent asked for an award of costs against the applicants to be on the scale of attorney and own client. Because there was no dishonesty or wilfulness in Mr Weideman's conduct, I do not think this is justified. No authority was quoted to me which would support such an award on the facts of this case. I must , however, consider whether there is justification for an award of costs on the scale of attorney and client. In *Rautenbach v Symington*,[29] Lombard J held:

> "Hierdie hof se diskressie om prokureur en kliënt koste te beveel is nie tot gevalle van oneerlike, onbehoorlike of bedrieglike optrede beperk nie - daar bestaan geen uitputtende lys nie. Dit strek verder en sluit alle gevalle in waar spesiale omstandighede of oorwegings die toestaan van so 'n bevel regverdig."

Although I accept the *bona fides* of Mr Weideman, the fact that he acted without full instructions right up to and throughout the hearing of the matter, that the preparation of the papers demonstrates gross slovenry and ineptness and that Mr Weideman disregarded the warning contained in the letter from first respondent's attorney of 2 February 1999 and proceeded with an application which he should have known could not succeed, bring me to the conclusion that costs should be awarded on the scale of attorney and client.

[33] When I order costs against the applicants, it will impose a liability on them in respect of proceedings which they, or some of them, might not have authorised. Mr Weideman's instructions from the Legal Aid Board were to assist the applicants in opposing the pending eviction. Except possibly for the first applicant, he does not seem to have informed them of how he intended doing this. All of them may not have approved of the legal proceedings which he launched. At this stage, I have some doubt as to whether all of them authorised the proceedings or not. If any of them did not authorise the proceedings, they should not be held liable for costs under an adverse costs order. Apart from stating that he received instructions from the Legal Aid Board and bare allegations in each of the founding and replying affidavits that he "is duly

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[29] 1995 (4) SA 583 (O) at 588A-B.

authorised to depose of this affidavit", there is no proof of his authority.[30] Mr Weideman, on his own evidence, never consulted with any of the applicants except with the first applicant who, he said in argument, acted as spokesperson for the other applicants. There is no allegation or any evidence in the papers that first applicant had the necessary authority to act for or give instructions on behalf of the others.

[34] If any of the applicants did not authorise the application, those applicants are entitled to approach this Court to rescind the costs order against them. The power of the Court rescind a costs order is limited and must be sparingly exercised.[31] To ensure that the applicants do have the right to apply for a rescissim of the costs order against them, it is advisable to provide for such right in the order which I intend to make. Such an approach was followed in the case of *Washaya v Washaya*[32] in dealing with uncertainty relating to the authority of an attorney.

[35] Because the Legal Aid Board is paying the applicants' costs, the Board ought to be informed of this judgment. I will request the registrar to transmit a copy thereof to the Board. I also direct Mr Weideman to make the applicants aware of my order in this case and of their right to apply for a rescission of my the cost order. Should they be advised that they have good cause for doing so, I recommend to the Legal Aid Board to grant them the necessary assistance and to appoint a different attorney to represent them.

Order

[36] The Court orders as follows:

(a) the application is dismissed with costs, such costs to be taxed as between attorney and client; and

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30 It is trite law that the founding affidavits in application proceedings must contain evidence that it is the applicants which are litigating and not some unauthorised person on their behalf. See Erasmus, Breitenbach and Van Loggerenberg, *Superior Court Practice*, Service 8 (Juta & Co Ltd, Cape Town 1997) at Bl-37, B1-38 and the cases quoted in footnote 1 on Bl-38.

31 *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (AD) at 309A.

32 1990 (4) SA 41 (ZHC) at 46A and C.

(b) each of the applicants is hereby granted leave to apply for a rescission of the order of costs on notice to the first respondent and to the firm of attorneys who represented them in these proceedings.

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JUDGE A GILDENHUYS

Heard on: 19 February 1999 **Handed down:** 3 March 1999

For the applicants:
Mr A J Weideman, from *Christo Loots Inc*, Pietermaritzburg.

For the respondents:
Adv A de Wet, instructed by *Cox & Partners*, Vryheid.