REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

Case Nos: 7784/97
7785/97

In the matter between:

INTERIM WARD S19 COUNCIL	Applicant
and	
THE PREMIER: WESTERN CAPE PROVINCE	First Respondent
THE MEC: DEPARTMENT OF HOUSING, LOCAL GOVERNMENT & PLANNING, WESTERN CAPE	Second Respondent
SOUTH PENINSULA MUNICIPALITY	Third Respondent
COMMUNICARE LIMITED	Fourth Respondent

JUDGMENT DELIVERED ON 7 JULY 2003

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SELIKOWITZ J:

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This matter has a long and unfortunate history. The saga began in 1997, when application proceedings were instituted in the name of Applicant against the four respondents. Applicant sought in two related applications to review certain decisions relating to the further development of phases 2 and 3 of a township known as "*Masiphumelele*" and to interdict any action pursuant to the decision pending the review. For all practical purposes the two applications became consolidated. ("the main application") The Respondents other than the Fourth Respondent conceded the review. The matter thereafter proceeded before King DJP. The learned Judge's decision in the main application was handed down on 10 December 1997 and is reported at 1998 (3) SA 1056 (C).

Fourth Respondent is a non-profit company incorporated in terms of section 21 of the Companies Act, No. 60 of 1973. It is also a registered welfare organisation.

The reason why Applicant lost appears at 1063A-B of the judgment:

> **"I accordingly conclude that applicant has not satisfied the *onus* of showing that it is a *universitas personarum* (see *Mars Inc v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575); it is not a *universitas personarum* and accordingly cannot sue in its own name. The preliminary point raised by fourth respondent of absence of *locus standi in judicio* on the part of applicant must succeed and**

the application must fail insofar as concerns fourth respondent."

That left the question of costs. This the Court dealt with as follows (at 1063B-E):

> **"Costs will in the first instance be awarded in fourth respondent's favour against applicant; it may well be that applicant will not be in a position to comply with the costs order, in which event it will be open to fourth respondent to apply to this Court, on notice duly given, for further directions as to costs.**
> **...**
>
> **The order of the Court is accordingly:**
>
> **1. The application is dismissed with costs, including where applicable the costs of two counsel.**
>
> **2. Fourth respondent is authorised to approach this Court, on notice duly given, for directions as to recovery of all or part of the aforesaid costs in the event that such costs are not recovered from the applicant."**

Fourth Respondent was indeed unable, subsequent to taxation, to recover any of the legal costs from Applicant. Applicant was, in fact, dissolved by virtue of a resolution taken on 12 May 1998.

On 3 September 1997 and before the main application came before King DJP, the matter had been struck from the roll by Chetty J, who also ordered Applicant "*to pay the costs of both applications*". Those costs, too, have not been recovered from Applicant.

Pursuant to the order of King DJP, Fourth Respondent now makes application to this Court seeking further directions as to who, other than Applicant, is liable for the costs payable to Fourth Respondent in terms of the two orders. ("the costs application")

The notice of motion in the costs application specifically seeks an order that Dieter

Oswald Ingo Hambach and John Stuart Cannan be ordered jointly and severally to pay the costs both of the main application and of the costs application itself.

Messrs Hambach and Cannan oppose the relief sought. They filed answering affidavits and Fourth Respondent filed a replying affidavit. Fourth Respondent also filed a number of notices pursuant to Rule 14.

The matter again came before King JP (as he by that time was), who on 18 April 2000 made an order -

postponing the costs application *sine die*;

directing that various costs incurred in respect of that application (including certain costs apparently not yet incurred) stand over for later determination;

requiring Hambach, Cannan, one J Mathers and one C Ward to provide certain further information to Fourth Respondent; and

granting Fourth Respondent to approach the Judge President for further directions as to how the costs application should proceed.

The further directions referred to above were sought and obtained, by agreement, from Hlophe JP (who had by that time replaced King JP) on 20 February 2001. The Court referred the costs application to the Fourth Division for hearing, and permitted the filing of certain further affidavits. Further affidavits were duly delivered. Fourth Respondent took steps the steps to join certain further members of Applicant without conceding that it needed to do so and at the direction of King JP.

The position now is that Fourth Respondent is seeking a costs order jointly and severally against Hambach, Cannan, Clinton Paul Ward, Kenneth Bradshaw, Richard William Foster and Hilary Cecil James Langley (referred to hereafter collectively as "*the exco members*").

Fourth Respondent seeks a costs order against the exco members on the basis firstly that they were members of Applicant and secondly that they were members of its executive committee. In respect of Hambach and Cannan, the further allegations are that they "*initiated and took an active part in authorising, sanctioning and instituting the [main application]*", and that Cannan was the executive committee's chairman.

Three defences to Fourth Respondent's claim have been raised in the affidavits filed on behalf of the exco members. The first is that they were not in fact members of Applicant. The members were other ratepayer associations. The second is that, even if they were members, it is not competent to order them to pay the legal costs incurred by Fourth Respondent in the main application. The third is that, even if it is competent to order them to pay such costs, no individual member's liability can exceed a *pro rata* share of the total costs, calculated on the basis of the total membership of Applicant.

Mr Fagan, who appeared for Fourth Respondent, argued that where Applicant had utilised the provisions of Uniform Rule 14 to its benefit, Fourth Respondent should be entitled to use it against the exco members after giving them adequate notice as provided for in rule 14(5)(d) read with rules 14(6) and 14(10(b). Conceding that the provisions of rule 14 are procedural and that the rule affords no substantive rights, *Mr Fagan* submitted that the consequence of the rule is that the citation of an

association is deemed to be a citation of every member of that association. That citing the association is simply a convenient, shorthand way of citing every member of the association as a party. Consequently, the only way that individual members can escape liability is to establish that the proceeding were instituted by individual members or officers of the association who thereby exceeded their authority.

In the alternative it was submitted that there was a basis in common law for the relief sought.

Mr Oosthuizen SC who appeared on a *pro amico* basis for the six persons against whom the costs order is sought, submitted that the members of an association are not, in law, liable for its debts. Rule 14 is simply procedural and does not create any liability. At common law, members of an association such as Applicant are not liable for its debts.

Both Counsel cited authority, both local and English which dealt with the liability of members and, indeed committee members, of voluntary associations and similar clubs for the contractual debts of the associations. No authority was, however, proffered which dealt with costs in a situation analogous to the current one.

I do not consider that Rule 14 assists in the determination of this matter. Nor do the authorities which deal with contractual liability. In my opinion, this matter must be approached and decided as a matter of costs and the well trodden path of the court seeking a result that is fair and just to all parties is the route I intend to take.

It is clear, in my view, that somebody has to be liable for the legal costs incurred by a respondent as a result of a failed application. I leave aside special circumstances which indicate a special costs order. It cannot be so that an entity with no legal

standing at common law can bring a person to court and then simply disappear like mist before the sun, leaving the respondent with the burden of paying the legal costs incurred in the process. The non-existence, in law, of the entity does not change the fact that there is a real person behind that entity, giving instructions to attorneys and signing the papers necessary to pursue the litigation. When the entity fails, that person must take responsibility.

There is a considerable amount of evidence and extensive documentation before the Court from which the protagonists have sought to investigate the how's and why's and, more importantly, the who's of the decision to pursue the main application. Considerable time and effort - and, I should add, expense - has been invested in identifying the five constituent ratepayer associations which were the "members" of Applicant and, indeed, to analyse their constitutions and even to attempt to identify their individual members.

The view I take of this matter is that Fourth Respondent is entitled to a costs order in its favour from the person or persons who instituted the main application. The identity of that person or those persons should, in the first place be sought *ex facie* the record in the main application.

I do not consider it the duty of the Court in this application to seek to go behind the identity of the person or persons who instituted and conducted the litigation in the name of Applicant. Nor do I consider it necessary to investigate the circumstances that led to the institution of the main application in the name of Applicant.

Whether or not the person or persons who instituted the main application did so in the *bona fide* belief that they were acting for a *universitas personarum;* whether they were actively misled or allowed themselves to be misled is not in issue here. Those

questions will only arise when the person or persons who are ordered to pay the costs seek to recover a share from others or seek to claim reimbursement from a party or parties who may be liable for misleading them.

Fourth Respondent is entitled to look to the person or persons who are the immediate cause of the costs they incurred in defending themselves against the claims made in the main application. The person or persons liable are those who announced that he, she or they represent the Applicant and are standing up to act on its behalf. If such person is found to have been incorrect then that fact should not prejudice the innocent opponent. The representative who was prepared to act without adequate authority must stand in for his or her error. All the relevant facts in this case were available before the main application was launched and the person or persons who accepted the mandate to institute the main application can not look away when the costs are at issue. No-one compelled the person or persons to represent the Applicant. The nomination was voluntarily accepted and could have been declined.

I have considerable understanding and, indeed, sympathy for the person or persons who, as members of a voluntary association which represents the community, stand up to be counted and undertake to put time and effort into the furthering of the aims of the association only to find that their good deeds are visited with a high financial cost. They must, however, seek support from their own constituents and not expect the victorious opponent to forego its costs because of sentiment.

From the record it appears that at a "special meeting" held on 23 April 1997, Applicant's members resolved to institute legal action against the respondents in the main application. Messrs Cannan and Hambach were "*to sign all legal documents on behalf of Applicant"*. In his answering affidavit in this application, Mr Hambach

states that after accepting the mandate to act for Applicant, he and Mr Cannan played an active roll in instructing the attorneys acting for Applicant.

The founding affidavit in the main application is made by Mr Hambach who states that he is "*duly authorised to depose to this affidavit, and to act in these proceedings on Applicant's behalf*." Supporting affidavits were filed by a number of persons purporting to represent various local ratepayers associations. Only one of them, however, stated that he represented Applicant. The others limited themselves to their own local associations. The person who stated that he was "*duly authorised to depose to this affidavit and act in these proceedings on Applicant's behalf*" is Mr Cannan. He also confirms the content of the affidavit of Mr Hambach in its entirety.

The main application was issued on 13 June 1997. During July the Respondents other than Fourth Respondent fell out of the case when the authorities conceded that the permission in issue had, indeed, to be set aside. Applicant's attorney wrote a letter to invite Fourth Respondent to withdraw its opposition and desist from all further development work at the site in question. The letter threatens that if Fourth Respondent does not withdraw then the matter will proceed and Fourth Respondent will be at risk for the costs. Applicant also invited Fourth Respondent to make it an offer in regard to the costs.

By early August Fourth Respondent had filed its answering affidavit. In the affidavit the issue of Applicant's *locus standi* is expressly raised and it is stated that it "*is not an incorporated association and cannot litigate*."

In Applicant's replying affidavit, deposed to by Mr Hambach. The deponent says that "*I take issue with this point of law and am advised by my attorney of record that the Applicant does have locus standi to bring this application*."

In a separate application brought by Applicant for reinstatement of the main application after it had been struck from the roll by Chetty J, Applicant was again represented by Mr Hambach who reconfirms his authority.

In that affidavit Mr Hambach explains how he and Mr Cannan "*spent two days, namely 7 and 8 August 1997, going through the answering papers and drawing up the draft, in layman's terms, ... I typed this draft on 9 and 10 August 2001 and delivered it to Applicant's attorney on Monday, 11 August 2001.*"

Later, this draft of the Applicant's replying affidavit, was settled by Applicant's attorney in consultation with Messrs Hambach and Cannan.

It is clear *ex facie* the record that it was Messrs Hambach and Cannan who accepted the mandate from Applicant to conduct the litigation on its behalf. They purported to carry out the mandate by instituting and pursuing the main application. The mandate was *pro non scripto* because Applicant lacked the capacity to litigate. In carrying out the mandate Messrs Hambach and Cannan have, in my view, made themselves liable to Fourth Respondent for the costs because they were, in law, not authorised to litigate against Fourth Respondent in Applicant's name. By so doing they caused Fourth Respondent to expend the costs of the main application.

I am satisfied that the liability of Messrs Hambach and Cannan for the costs should be a joint liability and not a joint and several liability.

I am fortified in the result I have reached by the approach approved by the Appellate Division in *Blou v Lampert and Chipkin, NNO, and Others*, 1973 (1) SA 1 (A).

The circumstances of that case are not on all fours with those here but the principle applied lends support to my decision. In that case the issue was an award of costs *de bonis propriis* against a trustee who had no *locus standi* to institute the proceedings. Holmes JA in discussing the costs order said (at p.14):

> "***Costs de bonis propriis against the trustees.***
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> **The Court a quo held that the trustees had no *locus standi* to institute the proceedings. There is no appeal or cross-appeal against that decision.**
> **There are several judicial decisions dealing with the circumstances n which a party litigating in a representative capacity will be condemned to pay costs *de bonis propriis*. (I rather think that there is something to be said for using the modern expressions of '*out of his own pocket*', or '*uit eie beurs*'). For example, it has been held that such an order will be made where he acted in bad faith, or negligently, or unreasonably. See, for example, *Re Estate Potgieter*, 1908 T.S. 982 at p. 1002, and the cases collected in a recent compilation, Cilliers on Costs (with its engaging foreword by Mr. Justice van Winsen) at pp. 203 et seq. I would think that these examples are all comprehended within the basic notion of material departure from the responsibility of office. Counsel for the trustees earnestly besought us to hold that, although they may have acted wrongly, their conduct did not fall within the limits of judicial censure. In my view the matter fells to be decided on a somewhat different basis. The trustees were held by the Court a quo to have instituted the proceedings without *locus standi* to do so. See the ratio of the judgment of the Court a quo reported in 1970 (2) SA 185 at pp. 200 (last line) to p. 214F. There is no appeal or cross-appeal against that decision. This means that they had no authority to represent the insolvent estate in the proceedings; and that, *de jure*, the insolvent estate was not before the Court, and did not litigate, and cannot be ordered to pay costs. The right persons to be mulcted in costs for the abortive application are the trustees who purported to bring it on behalf of the insolvent estate without right or authority to do so. This seems to me logically inescapable. It was also the approach of the Court in *Ashley v SA Prudential, Ltd.*, 1929 T.P.D. 283, to which counsel for Harlingen referred us. There the proceedings were brought in the name of Ashley by one Matthews claiming to be authorised to do so by a power of attorney. It was held that the document did not confer on him the power to bring the proceedings.**
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> > **'Matthews... should not be allowed to escape the consequences of having sought battle in the motion Court without having made certain that he was fully accoutred for the fray... I think there must be no order on the application, and R. T. Matthews is ordered to pay the costs personally.'**
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> **Similarly, in *Town Council of Brakpan v Cohen and Others*, 1938 W.L.D. 146, a petition in the name of the town council was signed by the acting town clerk by**

virtue of a resolution authorising him to apply for an interdict against the first respondent only. Schreiner J., held that the acting town clerk had no authority to bring proceedings against the other two respondents. The learned Judge added, at p. 149 in fin.,
'In regard to the costs of these two respondents the logical course would be to make the acting town clerk pay such costs (cf. Ashley v SA Prudential, 1973 (1) SA p15)

Only the gracious consent of counsel saved the unhappy official from that exacting fate. See also *Toubkin, N.O., v Dönges, N.O.*, 1951 (3) SA 72 (T) at p. 75B.

It seems to me therefore that the Court a quo was right in ordering the trustees to pay costs *de bonis propriis*."

I turn now to the costs of this application.

Fourth Respondent armed with the order of King DJP and a taxed bill of costs upon which it could not recover was entitled to take the steps that it did by launching and pursuing this costs application. In this application the costs should follow the result and be awarded to Fourth Respondent. There are, however, extra costs which were incurred by a variety of persons in complying with the directions given by King JP on 18 April 2000 and by Hlophe JP on 20 February 2001. The costs of and occasioned by these two orders were not incurred at the instigation of Messrs Hambach and Cannan and justice requires that those costs are not to be treated as part of the costs that the two gentlemen will have to pay. In respect of those costs and the costs of the *exco members* who were joined as a result of the said orders I intend to make no order so that those costs will fall where they are and not be recoverable by anyone. The *exco members* were not separately represented in this application and they cannot have caused nor incurred any real extra costs.

For the reasons stated I make the following order:

1Dieter Oswald Ingo Hambach and John Stuart Cannan are jointly liable for the costs which were awarded against Applicant by this Honourable Court on 3 September 1997 and on 10 December 1997.

2Fourth Respondent will be required to re-tax the bills of costs in respect of the costs referred to at the instance of either of Messrs Hambach or Cannan who shall inform Fourth Respondent's attorney in writing by not later than 31 July 2003 if they or either of them requires the bills of costs to be re-taxed.

3The taxing master is authorised and ordered to tax the bills of costs afresh, if re-taxing is demanded, at the applicable tariff which was applied when the bills of costs were originally taxed.

4Dieter Oswald Ingo Hambach and John Stuart Cannan are to be jointly liable for the costs of this application save that the costs will not include any costs of and incurred as a result of the orders granted on 18 April 2000 and on 20 February 2001.

5In respect of all other parties and all other costs there will be no order as to costs.

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SELIKOWITZ J