

SOUTH AFRICA / JUDGMENT

Fourie v Botha and Others (500/2024)

[2025] ZANCHC 70 (1 August 2025)

[2025] ZANCHC 70**COURT**

Northern Cape High Court, Kimberley

BEFORE

Olivier AJ

CASE / FILE NUMBER

500/2024

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(NORTHERN CAPE****DIVISION, KIMBERLEY)****Case Number: 500/2024****Reportable: YES / NO****Circulate to Judges: YES****/ NO****Circulate to Magistrates:**

YES / NO

Circulate

to Regional Magistrates: YES / NO

In the matter between:

DANIEL

JACOBUS FOURIE

APPLICANT

and

JOHAN

BOTHA

1ST

RESPONDENT

GREEFSPAN

II OM (PTY) LTD

2ND

RESPONDENT

BOIKANYO

SOLAR (RF) (PTY) LTD

3RD

RESPONDENT

JOHANNES

ANDREAS WIID N.O.

(In
his capacity as Trustee of the JA Wiid
Family
Trust, IT526/1999)

4TH

RESPONDENT

CHRISTIAAN

JACOBUS KIRSTEIN N.O.

(In
his capacity as Trustee of the JA Wiid
Family
Trust, IT526/1999)

5TH

RESPONDENT

PIETER

LODEWIKUS VAN NIEKERK N.O.

(In
his capacity as Trustee of the Pieter van Niekerk
Familietrust,
IT41/2000)

6TH

RESPONDENT

ANJA

VAN DER MERWE N.O.

(In
her capacity as Trustee of the Pieter van Niekerk
Familietrust,
IT41/2000)

7TH

RESPONDENT

MAR-ELIZE

DE JONGH N.O.

(In
her capacity as Trustee of the Pieter van Niekerk
Familietrust,
IT41/2000)

8TH

RESPONDENT

PETER

JOHN TRUTER N.O.

(In
his capacity as Trustee of the Pieter van Niekerk
Familietrust,
IT41/2000)

9TH

RESPONDENT

Heard on
: 25 July 2025

Delivered on : 1 August 2025
Coram
:
Olivier AJ
Summary
: Civil
Procedure – Costs – Applicant moves for costs on Attorney
and Client scale –
Applicant substantially successful in application and entitled to
costs – Case for punitive costs
order not made out in founding
papers – Applicant not entitled to punitive costs order.
ORDER
In the result, the

following order is made: 1.
The 1st
Respondent is ordered to pay the costs of the application lodged
under case number 500/2024 on 27 February 2024 on a scale as between
party and party, the costs to be determined according to scale “B”
as referred to on Rule 69(7) read with Rule 67A(3)
of the Uniform
Rules of Court.

JUDGMENT

OLIVIER AJ

1. The Applicant lodged an urgent application on 27 February 2024 in terms whereof a rule nisi was sought, returnable on 19 April 2024, for the following relief:

1.1 That the 1st to 5th Respondents be prohibited from in any manner whatsoever denying the Applicant access to the property known as Greefs Pan Farm, Farm No. 58, Extent 4239.7164 ha, Deeds No. HTQ-13/1885, Hopetown Regional District, Northern Cape Province (“herein after referred to as “Greefs Pan”) and to the sheep on Greefs Pan and from causing the Applicant to be such access for purposes of the relief set out in paragraphs 1.4 and 1.5 herein under;

1.2 That, subject to paragraph 1.5 below, the 1st Respondent be prohibited from selling or disposing of any of the said sheep on Greefs Pan;

1.3 That the Sheriff is authorised and ordered to attach all sheep present on Greefs Pan;

1.4 That the Applicant and the 1st Respondent shall be jointly responsible for the upkeep and care of the sheep and that proper record shall be kept of any expenses in this regard;

1.5 That the attached sheep may only be sold or disposed of in any manner whatsoever by agreement between the Applicant and the 1st Respondent and that, in such event:

1.5.1 proper record shall be kept by both parties of such sales and/or disposals;

1.5.2 the proceeds of such sales and/or disposals shall, pending the finalisation of part B of the application, alternatively pending the finalisation of the action to be instituted by the Applicant, be held in trust by the Attorneys for the Applicant; and

1.6 That the relief set out in paragraphs 1.1 to 1.5 above shall have interim effect.

2. The Applicant further moved for an order to the effect that the 1st Respondent be ordered to pay the costs of the application on an attorney and client scale.
3. Suffice it to simply say, since it is not relevant for purposes hereof, that in terms of part B of the application the Court was asked to dissolve and liquidate the partnership between the Applicant and the 1st Respondent and to grant relief ancillary thereto.
4. I was informed by Mr. Harmse who appeared for the Applicant, that the relief sought in terms of part B of the application has in any event become moot since the Applicant and the 1st Respondent have managed to resolve the issues between them and dissolve the partnership amicably and that all that remained for me to determine, was the issue of the costs of the application that stood over for later determination.
5. It appears from the papers that served before me that the initial urgent application was opposed by only the 1st Respondent.

The application was withdrawn against the 4th and 5th Respondents and the 2nd, 3rd and 6th to 9th Respondents filed notices to abide by the decision of the Court.

6. The initial application consequently proceeded on an opposed basis with the Applicant and the 1st Respondent being the only parties actively litigating the matter.
7. The application served before the learned Tyuthuza AJ on 15 March 2024 who, by agreement between the Applicant and the 1st Respondent, granted a rule nisi, returnable on 19 April 2024, in essentially the terms set out herein above with the following amendments to the relief as set out in the Notice of Motion:

7.1 The description of the property was changed from Greefs Pan to the Farm Kwartelspan, Farm nr 25, Portion 1 (Remaining Extent), Extent 1980,9130 ha, Hopetown Regional District, Emthanjeni Municipality, Northern Cape Province, held under Deed nr T1326/1890;

7.2 No order was granted authorizing the Sheriff to attach any sheep;

7.3 The responsibility for the upkeep and care of the sheep was afforded to the 1st Respondent alone;

7.4 The proceeds of the sale of any sheep pending the finalisation of part B of the application was to be shared equally between the Applicant and the 1st Respondent and was not to be paid into the trust account of the Applicant's Attorney; and

7.5 The costs of the application, as mentioned above, stood over for later adjudication.

8. No Heads of Argument were filed on behalf of the 1st Respondent and the Court was also not graced with any appearance on behalf of the 1st Respondent with no explanation for the failure to file Heads of Argument and/or for the lack of appearance on behalf of the 1st Respondent and I will proceed to determining the issue of costs based on the papers before me as well as on the Heads of Argument and argument on behalf of the Applicant.
9. Mr. Harmse implored me to consider granting a punitive costs order based thereon that the Applicant was compelled to lodge the urgent application of 27 February 2024 as a result of the recalcitrant behaviour of the 1st Respondent and he referred me to correspondence attached to the founding papers in support of his argument.
10. Mr. Harmse argued that the behaviour of the 1st Respondent in bluntly refusing the Applicant access to the property in question should be frowned upon and that the Court should show its dissatisfaction with the 1st Respondent's conduct by ordering the 1st Respondent to pay the costs of the application on a punitive scale.
11. It appears from the correspondence that I was referred to by Mr. Harmse, that the 1st Respondent did in fact make it difficult for the Applicant to enter upon property at the time, but given the contents of the 1st Respondent's answering papers, it appears that the 1st Respondent, at the very least, believed that he had proper grounds to do so.
12. I am fortified in the above by the fact that, despite the Applicant initially moving for an order to the effect that the 1st Respondent and himself be jointly responsible for the upkeep and care of the sheep pending the finalisation of part B of the application,
the parties eventually agreed that these tasks would be performed by the 1st Respondent alone.
13. It is common cause that the awarding of costs is in the discretion of the Court which discretion is wide and unfettered[1] and it is also common cause that this discretion should be exercised judicially upon a consideration of all of the facts of the case in order to be fair towards both parties.[2]
14. The general rule in respect of the awarding of costs is that the costs would normally follow the event and that the successful party would be granted his/her costs[3] and it is trite that "success" also means substantial success.[4]
15. I had little trouble in finding that, given the relief initially sought by the Applicant and given the eventual order granted by the Court, the Applicant has had substantial success with his application and that he should be entitled to a favourable order as to costs.
16. In respect of the question whether the 1st Respondent in this matter should be ordered to pay the costs of the Applicant on a scale as between attorney and client, it is apposite to refer to the dictum of Tindall JA in the matter of *Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging*[5] where it is held as follows[6]:

“In some cases it has been said that the court makes the order to mark its disapproval of the losing party’s conduct...But the treatment of such an award simply as punishment does not supply a complete explanation of the grounds on which the practice rests; something more underlies it than the mere punishment of the losing party...The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising from either the circumstances which gave rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”(My omissions).

17. In the end it is again a matter of fairness towards both parties.[7]
18. It is trite that an applicant needs to make out a case for the relief sought by way of application, in such applicant’s founding papers.[8]
19. In his Founding Affidavit, the Applicant went to great lengths to deal with the background of the matter as well as with the issues pertaining to the question of urgency, the requirements for obtaining interim relief and the reasons as to why he (the Applicant) should be afforded the interim relief that he sought on an urgent basis.
20. The Applicant however failed to deal with the issue of costs in his Founding Affidavit and did not provide any reason as to why he should be awarded the costs of the application on a punitive scale.

The above was also not dealt with by the Applicant in his Replying Affidavit.

21. I am consequently not convinced that the Applicant has set out circumstances that would prompt me from deviating from the “normal” party and party costs order and I am therefore not prepared to do so.

Mr. Harmse, to his credit, conceded that a proper case for a punitive costs order was not made out in the founding papers.

22. I have also not been addressed on whether costs should be determined on a scale other than scale “B” as referred to in Rule 69(7) read with Rule 67A(3) of the Uniform Rules of Court and I could also not find such reason.

ORDER:

23. On the above premises, the following order is made:

The 1st Respondent is ordered to pay the costs of the application lodged under case number 500/2024 on 27 February 2024 on a scale as between

party and party, the costs to be determined according to scale “B” as referred to on Rule 69(7) read with Rule 67A(3) of the Uniform Rules of Court.

A.D. OLIVIER

ACTING JUDGE

NORTHERN CAPE DIVISION

REPRESENTATIVES OF PARTIES:

For APPLICANT

: Adv J. Harmse

o.i.o Van Heerden Fourie Attorneys

DOUGLAS

c/o PGMO Attorneys Inc.

KIMBERLEY

For RESPONDENTS

: No Appearance

[1] See inter alia Intercontinental Exports (Pty) Ltd v Fowles [1999] 2 All SA 304 (A), par 25

[2] Gelb v Hawkins [1960] 3 All SA 371 (A) at 376.

[3] Union Government v Gass [1959] 4 All SA 392 (A) at 399.

[4] Golden Lions Rugby Union and Another v First National Bank of Southern Africa Ltd [1999] 2 All SA 294 (A) at 303.

[4] Golden Lions Rugby Union and Another v First National Bank of Southern Africa Ltd [1999] 2 All

SA 294 (A) at 303.

[5] Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging 1946 AD 597.

[6] Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging, supra at 607.

[7] Buthelezi v Poorter and Others [1975] 4 All SA 518 (W) at 529.

[8] Director of Hospital Services v Mistry 1979

(1) SA 626 (A) at 635-636.

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Prepared on 9 October 2026 · Esheria