

SOUTH AFRICA / JUDGMENT

Harker and Another v MGM Family Trust (Number: TM50521/1) and Others (2994/2022) [2023] ZAECQBHC 49 (5 September 2023) [2023] ZAECQBHC 49

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Ellis

CASE / FILE NUMBER

2994/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GQEBERHA)

CASE NO.: 2994/2022

Matter heard on: 3 August 2023

Judgment

delivered on: 5 September 2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: YES

REVISED

In the matter between: - JOSEPH ROSS HARKER Applicant In his capacity as Executor in the Estate of the Late Gladys Ruth O' Connor Estate Number 570[...] and Executor in the Estate of the Late Connell Stuart O' Connor Estate Number 968[...] (Appointed as Executor by Letters of Authority of the Master dd 02/12/2021) and MGM FAMILY TRUST (NUMBER: TM50521/1) Respondent Represented by Mr Phillip Christopher du Preez and/or PHILLIP CHRISTOPHER DU PREEZ and ALTERNATIVE MR CHRISTOPHER GRANT DU PREEZ DEFENDANTS

JUDGMENT

ELLIS AJ:

- [1] The executor in a deceased estate occupies a fiduciary position and must therefore not engage in a transaction by which he will personally acquire an interest adverse to his duty. [1]
- [2] On 4 July 2023 I issued an order that Mr Joseph Ross Harker is to deliver an affidavit setting out why an order should not issue that he be liable for the payment of the costs of the application, which was the subject of my earlier judgment handed down, on the scale as between attorney and client, *de bonis propriis*. This judgment deals with the argument on costs of 3 August 2023, where Mr Harker appeared personally.
- [3] Mr Harker is the duly appointed executor in the deceased estate of late Gladys Ruth O' Connor and Cornell Steward O' Connor (the applicant) and he is also acting as the attorney of record on behalf of the applicant.
- [4] It is unnecessary to traverse the facts of the application which gave rise to the order dismissing the application with attorney and client costs, suffice to state that the applicant pursued inappropriate and untenable relief in circumstances where the Uniform Rules clearly provide for the correct procedure.
- [5] The affidavit filed by Mr Harker was of no assistance to determine whether he acted in appreciation of his fiduciary duty and with due regard to the interest of the estate or whether he was incorrectly advised in pursuing the application. Instead, the affidavit sought to rehash the merits of the application with one exculpatory explanation proffered: that due to a typographical error the application was heard as one in terms of Rule 30 instead of Rule 28 read with Rule 30. I find this explanation to be irreconcilable with the founding affidavit in the Rule 30 application but in any event it matters not as I had already decided the merits of the application. Mr Harker's affidavit ought to have focused on the reasons why he should not pay the costs *de bonis propriis*. This was his obligation as executor, but *moreso* as an officer of this Court, which he has a duty to assist in arriving at a just decision.
- [6] Making an order for costs *de bonis propriis* is somewhat unusual but such orders are not of recent origin in our law. The general rule was already formulated in *In re Potgieter's Estate* 1908 TS 982, to the effect that a personal order for costs against a litigant occupying a fiduciary position is justified where his conduct in connection with the litigation in question has been *mala fide*, negligent or unreasonable.
- [7] I considered the following cases helpful. *SA Liquor Traders Association v Gauteng Liquor Board*[2] where a cost order *de bonis propriis* followed as a result of the negligence of the attorney who filed correspondence with the Constitutional Court without first reading it.
- [8] In *Cooper N.O. v First National Bank of SA Limited*[3] the court held that a trustee cannot be ordered to pay *bonis propriis* costs unless he is guilty of improper conduct. The trustee's conduct was found to be unacceptable, and although improper conduct is always unacceptable, unacceptable conduct is not necessarily improper. His conduct was found to

be ill-considered, as the application lacked detail without full disclosure being made but it was found not to be improper. There was no conscious attempt to mislead the court and it was found that de bonis propriis costs were thus not justified.

- [9] As against a member of a municipal council, the matter of Swartbooi and Others v Brink and Others[4] the Constitutional Court held that in terms of the common law rules and generally speaking, an order for costs de bonis propriis against a person acting in a representative capacity is rendered appropriate if their actions are motivated by malice or amounted to improper conduct.
- [10] In Darries v Sheriff Magistrate's Court Wynberg and Another[5] there was a flagrant disregard for the court rules which the court found cannot be countenanced, and gross neglect of his duties by the attorney, which warranted an order for costs de bonis propriis against him.
- [11] In the matter of Napier v Tsaperas[6] where the attorney accepted full responsibility for the failure to apply for condonation and a failure to file a record, he was found guilty of "nalatige en gebrekkige optrede" and the court therefore found justification for an award of costs de bonis propriis.
- [12] The matter of Machumela v Santam Insurance Co Limited[7] where the attorney should have sought consent before launching an application for condonation and the costs of the application were found to be unnecessarily incurred and without heeding established principles. Costs de bonis propriis was granted against the attorney.
- [13] Lastly, the matter of Immelman v Laubscher and Another[8] wherein there were defects in the application and many mistakes. The court was unable to establish which attorney exactly was to blame but stated that if they were able to do so, it would have been appropriate circumstances to grant such an order.
- [14] With regard being had to the cases cited above, it is apparent that orders for costs de bonis propriis are not made lightly and only after the judicial exercise of a discretion. The matters referred to above have the following in common: improper conduct; a lack of bona fides or unreasonable behaviour by a litigant.
- [15] An executor must act reasonable, meaning his conduct in connection with the litigation must be reasonable and with due regard to the resources in the estate. An attorney must act diligently, with due regard to the court rules and established principles, and never in a manner which can be considered to be improper.

- [16] In this current matter not only is Mr Harker as the executor the litigant in a fiduciary position, but he is also giving instructions in that capacity to himself as the attorney of record. The affidavit filed by Mr Harker does not clarify which hat he wore when embarking on this application, which application I have already found to be convoluted and without reasonable prospects of success. The costs of the application were therefore unnecessarily incurred and without heeding established principles.
- [17] A further aspect bears mentioning. The answering affidavit filed by the respondent in terms of my order of 4 July 2023 raised an issue that no record can be found of a Fidelity Fund Certificate currently issued to Mr Harker entitling him to practice. Further enquiries by the legal practitioners established that a court order dated 26 July 2016 by the then Law Society of the Cape of Good Hope as applicant was obtained against Mr Joseph Ross Harker as first respondent, being an interdict preventing Mr Harker from practising pending the obtaining a Fidelity Fund Certificate. Mr Jooste, at the hearing of the matter, requested me to direct that whatever order flows from this current judgment must be brought to the attention of the disciplinary committee of the Legal Practice Council as well as for the Master of the High Court to investigate whether the appointment and conduct of Mr Harker should be the subject of ethical scrutiny in the circumstances. At the hearing of the matter Mr Harker acknowledged that he is currently in trouble with the Legal Practice Council and accepted that he must bear the consequences flowing therefrom.
- [18] Without an explanation by Mr Harker as to how he considered the interest of the estate before embarking on unmeritorious litigation, obviously not in the best interest of the estate the administration of which was entrusted to him and considering his own concession that he is in trouble with the Legal Practice Council, I am of the view that his conduct amounts to improper conduct.
- [19] In the circumstances, there are no compelling reasons advanced as to why Mr Harker should not be liable for the costs *de bonis propriis*. I am further of the view that his improper conduct ought to be brought to the attention of the Legal Practice Council as well the Master of the High Court.

In the result the following order will issue:

1. The cost order made in terms of my judgment of 4 July 2023 shall be paid by Mr Joseph Ross Harker in his personal capacity.
2. The Registrar is directed to bring this judgment to the attention of the Legal Practice Council as well as the Master of the High Court by furnishing them with a copy thereof. The Registrar shall confirm his compliance with this order by advising the parties in writing of such compliance and placing written confirmation of his compliance in the court file.

L ELLIS

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Applicant: Mr Joseph Ross Harker in person Counsel for the Respondent: Adv. Jooste Instructed by: Pagdens Attorneys 18 Castle Hill Central Port Elizabeth (Ref.: M Kemp/me)

- [1] Horns Executor v The Master 1919 CPD 48; and Die Meester v Meyer 1975 (2) SA pg 1 (T).
- [2] 2009 (1) SA 565 CC at 582 E – G.
- [3] 2001 (3) SA 705 SCA at 717 D – F.
- [4] 2006 (1) SA 203 CC at 207.
- [5] 1998 (3) SA 34 SCA at 44.
- [6] 1995 (2) SA 665 AD.
- [7] 1977 (1) SA 660 (A) at 664 B – C.
- [8] 1974 (3) SA 816 AD.

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