

SOUTH AFRICA / JUDGMENT

Malao v K Malao Inc and Others (60617/2020) [2021] ZAGPPHC 503 (12 August 2021) [2021] ZAGPPHC 503

COURT

North Gauteng High Court, Pretoria

BEFORE

A C Basson

CASE / FILE NUMBER

60617/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED: YES

Case number: 60617/2020

In the matter between:

KABELO PHILEMON LUCAS MALAO

APPLICANT

(Applicant in the second application for leave to appeal)

and

K MALAO INC

FIRST RESPONDENT

(Applicant in the first application for leave to appeal)

INVESTEC BANK LIMITED

SECOND RESPONDENT

(First respondent in the first application for leave to appeal)

THE ROAD ACCIDENT FUND

THIRD RESPONDENT

(Second respondent in the first application for leave to appeal)

THE SHERIFF FOR SANDTON SOUTH

FOURTH RESPONDENT

(Third respondent in the first application for leave to appeal)

CITY OF JOHANNESBURG

FIFTH RESPONDENT (Fourth respondent in the application for leave to appeal)

APPLICATION FOR LEAVE TO APPEAL: SECOND APPLICATION

BASSON J

Introduction

[1] This is a second application for leave to appeal against the order and judgment of this court made on 26 November

2020. This time the application is brought by an attorney (Mr Kabelo Malao) of the first respondent (the applicant in the first application for leave to appeal). The applicant also brought an application for condonation for the late filing of the second application for leave to appeal. The following order was made on 26 November 2020.

“1. In respect of the 1st and 2nd respondents:

The matter is held to be not urgent and is therefore struck from the roll with costs (in respect of each of the two respondents) de bonis propriis on the scale as between attorney and client against Mr Kabelo Malao of Messrs K Malao Inc. Such costs to include the costs consequent upon the employment of two counsel.

2. In respect of the 4th respondent the following order is made:

2.1 The application is dismissed with costs de bonis propriis on the scale as between attorney and client against Mr Kabelo Malao of Messrs K Malao Inc.

2.2 The attachment of the fourth respondent’s bank account, held at Investec Bank is irregular and is hereby set aside.

2.3 The Sheriff of the High Court, Sandton South, is ordered to immediately and without any delay repay all amounts attached and paid into its Trust Account held at Standard Bank, with account number 012802980 with branch code number 012345, under case number 35920/2017, to the 4th respondent’s Investec bank account.”

- [2] In this second application for leave to appeal the applicant frames the ground for appeal as follows:

“KINDLY TAKE NOTICE THAT the abovementioned Applicant [Kabelo Malao] intend to apply to the above Honourable Court on a date to be determined by the Registrar of this Honourable Court for leave to appeal only against the cost order against the Applicant de bonis propriis on the scale as between attorney and client in favour of the First Respondent (cost of two Counsel), Second Respondent (cost of two Counsel) and Fourth Respondent (one Counsel) granted by the Honourable Madam Justice A C Basson under the abovementioned case number on 26 November 2020.”

- [3] The only ground for leave to appeal is the de bonis propriis costs order that the court granted against the applicant in his personal capacity as an attorney of the first respondent.
- [4] The first respondent instituted an application for leave to appeal against the entirety of the order of 2020 including the order pertaining to costs de bonis propriis (the first application for leave to appeal). That application was opposed by Investec, the RAF and the City of Johannesburg. I dismissed the first application for leave to appeal with costs. I have given written reasons for the order granted in November 2020 as well as in the first application for leave to appeal.

Condonation

- [5] In terms of rule 49(1)(b) an application for leave to appeal as well as the grounds thereof shall be furnished within 15 days after the order appealed against is delivered. I have already mentioned that the cost order de bonis propriis was handed down on 26 November 2020 and challenged by the first respondent in the first application for leave to appeal. The first application for leave to appeal was instituted timeously.
- [6] One of the grounds for leave to appeal in the first application for leave to appeal was the imposition of the cost order de bonis propriis against the applicant. In the first application for leave to appeal, this court dealt with the reasons for imposing such a cost order. An important fact for granting a special cost order against the applicant was the fact that the court held the view that the applicant in his personal capacity was the “driving force behind the urgent application”.
- [7] I do not intend to rehash the principles regarding de bonis propriis cost orders again. I have done so on two prior occasions: In the original judgment and in the first application for leave to appeal.

Should there still linger any doubt when a court will grant such an order, I can do no better than to quote from the following two judgments: In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*,^[1] the court held the following in respect of the rationale for an award of costs de bonis propriis and the instances that warrant that warrant such an order:

“[34] Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.

See *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA) at 655-656.”

In *Webb v Botha*[2] the court explained the high standards to which legal representatives are rightfully held by the courts to, inter alia, conduct litigation responsibly, cost-effectively and free from frivolity:

“That Mr Van Wyk has the propensity I have just mentioned has become apparent to various Judges of this Division over the past few months. In an unreported judgment delivered on 24 September 1979, in the matter of Car Sales Inc v P J D Walker, FRIEDMAN J said:

‘This Court has, in the past month at any rate, been faced with a number of appeals brought by the firm of attorneys acting for the present plaintiff. All of these appeals have related purely and simply to procedural matters occurring in the magistrate's court. There are enough matters of true substance available to engage the time of both this and other courts for one not to be concerned with matters which are of totally insubstantial value or interest. The time may well come, if appeals of this kind are persisted in, for special orders for costs to be made in dismissing the appeals, and those special orders for costs may not necessarily and always be confined to costs against the appellant himself.’ 16 At 672C-673D.

In an unreported judgment delivered on 22 October 1979 (*A J van den Bergh v Breezenheimer (Pty) Ltd*) DIDCOTT J ‘repeated and underlined’ the warning which had been sounded by FRIEDMAN J. In another unreported judgment (*Raydean Investments (Pty) Ltd v Shire Plant Hire (Pty) Ltd and Another*), delivered on 25 October 1979, DIDCOTT J said:

‘Earlier this week I had occasion to warn the applicant's attorney that the time was fast approaching when he would be held liable de bonis propriis for the costs of reckless interlocutory proceedings. In doing that I was merely repeating a warning given by my Brother FRIEDMAN last month, and the ground for the warning is that this Court has undergone, during the past two months, a veritable barrage of appeals and reviews all instigated by this attorney, in the overwhelming majority of which there has been no substance whatsoever and no purpose served, except to waste costs.

I have thought very carefully during the proceedings this afternoon whether that warning should now be put into effect. I have come to the conclusion that, in this particular case, it may very well be that the client itself rather than the attorney has been responsible for the determined ducking and diving that has been taking place. I am certainly not prepared to put the parties to further expense by adjourning the matter so that enough information can emerge truly to apportion the blame. The attorney concerned (and I make it quite plain that I am not talking about the Pietermaritzburg correspondents who appear on record here, but the attorney in Durban) must be under no misapprehension by now but that the Judges of this Division are watching him very carefully, and that if he carries on in this way he will rue his behaviour because our patience is very near an end with him.' Mr Van Wyk was the attorney concerned in all these cases, and, on 9 November 1979, the time predicted by DIDCOTT J arrived and he was ordered by SHEARER J (with HOWARD J concurring) to pay the costs of an appeal, in the matter of Car Sales Inc v Khoza, de bonis propriis on the scale as between attorney and client. His conduct in that case was described as 'exploitation of the Rules, unrelated to any practical advantage to the parties or either of them', and he was found in the process to have misled his opponent and to have concealed material facts from the Court. Mr Van den Berg urged us not to make a similar order in this case. He emphasised that such orders are made only in exceptional cases, and he submitted that Mr Van Wyk's conduct in this case was not so reprehensible as to justify such an order. As was pointed out by M T STEYN J in *Waar v Louw* 1977 (3) SA 297 (O) the Courts have in the recent past tended to make attorneys pay for their mistakes. M T STEYN J stated the reason for this as follows:

'Die prokureursamp is 'n hoë en verantwoordelike amp. Die prokureurs-beroep 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 oorgesien

word nie. En 'n gedingvoerder behoort nie altyd verplig te word om self die koste te betaal wat deur die nalatigheid van sy prokureur

veroorsoak is nie.' He went on to mention 'oneerlikheid, moedswilligheid of nalatigheid van 'n ernstige aard' as examples of the kind of conduct which will be visited with an order for the payment of costs de bonis propriis."

[8] I have in my two previous judgments dealt fully with the reasons as to why a special costs order against the applicant is warranted. I do not intend repeating what I have already stated. I stand by what I have said. The punitive costs order de bonis propriis was awarded against the applicant "in his personal capacity" and due to the standard required of him "as an officer of the Court" to conduct litigation responsibly. The punitive costs order awarded against the applicant personally, came as result of the unacceptable and obstinate manner in which he conducted litigation as an attorney: The applicant failed in his professional duties toward the Court and the administration of justice as an officer of Court.

- [9] The issues raised by the applicant in this second application for leave to appeal are now res judicata. In this regard, correspondence was dispatched to the applicant confirming that the issue of costs has already been dealt with in the judgment in respect of the first application for leave to appeal. Furthermore, the applicant and the first respondent have to date not filed a petition to the Supreme Court of Appeal in terms of section 17(2)(b) of the Superior Courts Act. Moreover, this application is also out of time. Although the applicant filed an application for condonation, no case has been made out for the granting of such condonation particularly light of the fact that the issue of the cost order de bonis propriis is now res judicata. Lastly, as indicated in my reasons for refusing the first application for leave to appeal, costs fall within the discretion of a court.
- [10] Lastly in respect of the costs in this application. Investec asked that the second application for leave to appeal and the accompanying condonation application be dismissed with costs on an attorney client scale. I am in agreement. This second application is ill conceived and warrants a special costs order.

[11] In the event the following order is made:

“1. The application for condonation as well as the application for leave to appeal are dismissed.

2. The applicant to pay the second and third respondents’ costs on an attorney and client scale”

AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 August 2021.

Case number

: 60617/2020

Appearances

For the Applicant

: Adv S Guldenpfennig SC

(In the application for leave to appeal)

Instructed by

: K Malao

For the 2nd Respondent : Adv SL Mohapi

Instructed by

: Werksmans Attorneys

For the 3rd Respondent : Adv R Schoeman

Instructed by

: Malatji & Co Attorneys

Date of Judgment

: 12 August 2021

[1] 2014 (3) SA 365 (GP).

[2] 1980 (3) SA 666 (N).

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