

SOUTH AFRICA / JUDGMENT

Mothupi and Another v Master of the High Court, Mahikeng and Others (Leave to Appeal) (UM99/2020) [2021] ZANWHC 43 (6 August 2021)

[2021] ZANWHC 43

COURT

North West High Court, Mafikeng

BEFORE

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CASE / FILE NUMBER

UM99/2020

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

CASE NO: UM992020

In the matter between:

MOROKE HERMAN MOTHUPI

1st Applicant

MOROKE HERMAN MOTHUPI N.O.

2nd Applicant

AND

THE MASTER OF THE HIGH COURT,

1st Respondent

MAHIKENG

MAJOKO CYNTHIA MOTHUPI

2nd Respondent

MAJOKO CYNTHIA MOTHUPI

3rd Respondent

SEBONTA SILAS MOTHUPI

4th Respondent

SEBONTA SILAS MOTHUPI N.O.

5th Respondent

LEAVE TO APPEAL JUDGMENT

DJAJE J

- [1] This application for leave to appeal is only against the cost order against the first applicant in the urgent review application. The main application was to review the appointment of the first applicant and the fourth applicants as executors. Both the first applicant and the fourth respondent were ordered to pay the costs of the application on a punitive scale including the costs of two counsel. This leave to appeal is opposed by the second and third respondents only. Reference to respondent hereunder is meant for the second and third respondents.
- [2] The first applicant argued that he was not before court in the main application and did not file any opposing papers. Therefore the punitive order against him was unjust and/or irrational. Further that, a litigant who is not before court cannot be ordered to pay costs let alone on a punitive scale.
- [3] In contention, the respondents submitted that the first applicant was cited in the main application in his personal capacity as a cost order was sought against him. Secondly, that the first applicant did not act in the interest of the estate or the heirs and therefore the estate could not be burdened with a cost order. In their heads the

respondents' counsel referred to the matter of Da Silva and another v Da Silva N.O. and others, case no. 2498/2007 CPD where the following was held:

"The general rule is that an executor who litigates on behalf of an estate is not mulcted in costs. However the executor can be ordered to pay the costs de bonis propriis where there was mala fides, unreasonable or negligent conduct on his part or where he acted against the interests of the estate."

- [4] In the main application the finding made was that, the first applicant together with the fourth respondent as executors of the estate did not act in the interest of the estate and the heirs thereto. They refused the second respondent access to the affairs of the estate whilst she was the wife of the deceased to whom she was married in community of property. Their conduct was clearly meant to frustrate the finalisation of the estate whilst the businesses were suffering.

[5] An order for costs falls within the discretion of the court and an appeal court will not readily interfere with the exercise of that discretion unless if such discretion was not exercised judicially. The grounds upon which the cost order was made in the main application were as a result of the findings mentioned above in paragraph [4] and cannot be considered to be based on a wrong principle. As stated in Da Silva, the executors were not acting in the interest of the estate or the heirs to the estate. There was no reason why the estate had to be mulct with a cost order. Their conduct was malicious and it was for that reason that a punitive cost order was made.

[6] The test to be applied in an application for leave to appeal is set out in section 17 (1)(a) of the Superior Courts Act 10 of 2013 which provides that:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;”

[7] Having considered the submissions on behalf of both the applicants and the respondents, I am of the view that there are no reasonable prospects of success in this matter. Consequently the application should fail and costs to follow the result.

Order

[8] Consequently, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicants are ordered to pay costs.

J T DJAJE

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING

: 30 JULY 2021

DATE OF JUDGMENT

: 06 AUGUST 2021

COUNSEL FOR THE APPLICANT : ADV TSHIVASE

COUNSEL FOR RESPONDENT : ADV SHEPSTONE

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Prepared on 9 October 2026 · Esheria