

SOUTH AFRICA / JUDGMENT

Ribbon Dancer Investments CC v Moosa (21019/2022) [2023] ZAWCHC 75 (17 April 2023) [2023] ZAWCHC 75

COURT

Western Cape High Court, Cape Town

BEFORE

Francis, J

CASE / FILE NUMBER

21019/2022

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FLYNOTES:

COSTS DE BONIS

PROPRIIS

PROFESSION

– Conduct – Costs de bonis propriis – Manner in
which attorney applied for adjournment –

Meritless joinder

application and fruitless opposition to main application –

Lack of respect for colleagues and court

– Hampered

administration of justice – Attorney to pay costs of other
parties de bonis propriis in respect of

wasted costs occasioned by

adjournment.

IN

THE HIGH OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: 21019/2022

In

the matter between:

RIBBON
DANCER INVESTMENTS CC
Applicant
and
MOHAMMED
SHAHAAN MOOSA
Respondent
In
re:-
MOHAMMED
SHAHAAN MOOSA
Applicant
JAN
MEYER
First Respondent
THOMAS
VAN ZYL N.O.
Second Respondent

JUDGMENT

17 APRIL 2023

FRANCIS, J

- [1] An application was lodged by Ribbon Dancer Investments CC (“the applicant”) in which it sought inter alia the execution of an order granted by the Wynberg Magistrates Court evicting Mohammed Shahaan Moosa (“Moosa”) from the immovable property situated at [...] L[...] R[...] Lane, Constantia, Western Cape (“the property”), notwithstanding an appeal against the eviction order lodged by Moosa. This application is referred to hereinafter as “the main application”.
- [2] This litigation has a long history. One of Moosa’s creditors obtained default judgement against him during April 2019. Moosa was unable to settle the judgment debt and the creditor initiated sequestration proceedings during June 2020. Following a failed settlement agreement, Moosa’s estate was placed under final sequestration on 17 March 2021.
- [3] On 14 June 2021, the applicant offered to purchase the property from the trustees of Moosa’s insolvent estate. Moosa attempted to interdict the transfer of this property but the interdict was eventually set aside and the property transferred into the applicant’s name on 6 December 2021.
- [4] Despite demand, Moosa refused to vacate the property and the applicant instituted eviction proceedings in the Wynberg Magistrates Court on 23 February 2022. After pleadings had closed, Mr Verton Moodley (“Moodley”) of Verton Moodley & Associates Inc placed himself on record as Moosa’s attorney. The eviction

order was granted on 25 August 2022.

- [5] Moodley sent a copy of the judgment to Moosa and heard nothing from him until 9 September 2022 when Moosa gave Moodley instructions to note an appeal against the eviction order.
- [6] Moodley noted the appeal and requested reasons for the judgment in November 2022. More than a month later, on 9 December 2022, the applicant lodged the main application for the immediate execution of the eviction order in terms of section 18(3) of the Superior Courts Act 10 of 2013 (“the Act”).
- [7] The main application was set down on the urgent roll on 15 December 2022. By agreement between the parties, the application was adjourned to 25 January 2023 for hearing before this court.
- [8] An application was made to amend the notice of motion in the main application for a declaration that the notice of appeal delivered by Moosa was a nullity. Given the subsequent turn of events in this matter – as explained further on in this judgment - this amendment was not opposed and, to the extent necessary, is granted.
- [9] On 25 January 2023, Moosa sought an adjournment of the main application. Moodley deposed to the affidavit in support of the application to postpone the main application, and a copy of an unsigned version of the joinder application was served by email on the parties at 16h48 on 24 January 2023
- [10] The application for the postponement was motivated on the basis that Moosa intended to launch an application to join Jan Meyer (“the first respondent”) and Thomas Van Zyl NO (“the second respondent”) to the proceedings in the main application (“the joinder application”). The first respondent acted as the attorney of a creditor who applied to sequestrate Moosa. The second respondent was appointed as trustee to Moosa’s insolvent estate

and sold and transferred the property to the applicant during the course of the administration of the insolvent estate. In

addition, as part of the postponement application, Moosa indicated that he intended to bring an application to set aside the sale of the property to the applicant. He tended costs on a party-party scale.

- [11] After hearing argument, the adjournment was granted and the parties agreed on a timetable for the further conduct of proceedings. I also made an order that Moodley should be given notice to show cause why a *de bonis propriis* costs order should not be granted in respect of the wasted costs occasioned by the adjournment.

[12] When this matter reconvened, Moosa was represented by Mr K Naidoo who conceded, quite correctly so, there was not much merit in the joinder application and this application was withdrawn. Similarly, it was conceded that the opposition to the main application was fruitless and no argument was proffered against the order sought by the applicant.

[13] The only issue that remains to be dealt with is the issue of costs. This court has to determine whether Moodley should be ordered to pay the costs of the adjournment on 25 January 2023 de bonis propriis or whether an award of costs on a punitive scale should be made against Moosa in respect of all the costs of, and incidental to, this matter.

[14] As indicated, Moodley deposed to an affidavit requesting this court to adjourn the main application on 25 January 2023. In his affidavit, Moodley states the following:

“By agreement between the parties, the main application was postponed inter alia for hearing on even date. My office was re-opened on the 10th January 2023, after having delivered the answering affidavit, even whilst I was on holiday, the time periods were complied with. Upon re-opening office, and in preparation for the hearing of this matter, I was instructed that a joinder application and a set aside application be launched, subsequent to telephonic instructions received from client. It was made clear to my client that the same could only be prepared and launched after having been placed in funds. My client has been through extreme financial difficulty and has depended on third parties for assistance, and in this instance, his assistance had only come through at the very last minute, he only managed to obtain this assistance, because he is at risk of losing his home”.

[15] Moosa did not file a confirmatory affidavit in support of the application for postponement.

[16] On the issue of costs, the applicant submitted that costs should be awarded against Moodley in his personal capacity. Ms Bosch, who appeared for the applicant, argued that Moodley assisted Moosa in breaching orders of the court, in manufacturing delays, and in instituting frivolous proceedings with no merit and which were aimed solely at preventing Moosa from having to vacate the property. It was further argued that the dilatory conduct of Moodley that is worthy of sanction included the fact that a request for the Magistrate’s reasons for judgment was not filed timeously, that the appeal was not

noted or filed timeously, that Moodley failed to timeously provide security for costs, and that no applications were filed to condone

Moosa’s non-compliance with the rules of court.

[17] Counsel for the first respondent argued that costs should be awarded against Moodley in his personal capacity due to his conduct and the manner in which he had brought the joinder application. The following uncontested facts were relied on by the first respondent:

[17.1] Moodley represented Moosa throughout the proceedings relating to the main application. He was aware on 15 December 2022 that the main application was postponed to 25 January 2023 for further hearing.

[17.2] Moosas's answering affidavit in the main application was served on 23 December 2023 in which he stated under oath that he had already given Moodley instructions to bring the joinder application.

[17.3] Moodley caused an unissued version of the joinder application, supported by an unsigned (draft) affidavit to be served via e-mail on the first respondent's office at 16h48 on 24 January 2023.

[17.4] The notice of motion for the joinder application indicated that the application would be heard on 25 January 2022 at 10h00, and called upon the first and second respondents to notify Moodley's firm within three hours of the service of the notice if they intended opposing the joinder application and to file answering affidavits within 10 hours after giving their notice of intention to oppose.

[17.5] Moodley did not inform any of the parties prior to sending the e-mail purporting to effect service of the joinder application to expect the application or alert them that this application was forthcoming.

[17.6] Moodley did not alert the first respondent by any other means that the e-mail in question had been sent, and the first respondent was thus unaware until the morning of 25 January 2023 that relief would be sought on an urgent basis against him at 10h00 that morning.

[17.7] Moodley did not answer the first respondent's telephone calls on the morning of 25 January 2023, and nor did he return those telephone calls or respond to the first respondent's e-mail sent at 09h20 on 25 January 2023.

[17.8] Moodley did not attend court on 25 January 2023, and nor did he arrange for a correspondent attorney to attend in his stead.

[17.9] Moodley did not brief counsel in anticipation of the hearing on both the joinder application and main application on 25 January 2023, and nor did he inform this court that he had attempted to ascertain the availability of counsel for the envisaged hearing.

[17.10] Moodley did not brief counsel in good time to appear on Moosa's behalf at 10h00 on 25 January 2023, i.e. the time the parties were informed in the notice of motion that the application for joinder would be brought.

[17.11] Moodley did not inform the respondents that this Court was seized with the main application and that the joinder application would also be brought before this Court as well.

[18] The factual matrix outlined by the first respondent applies equally to the second respondent. Counsel for the second respondent aligned himself with the submissions proffered by counsel for the first respondent. He, further, emphasised the meritless nature of the joinder application and the lack of urgency in launching the said application.

[19] Save for informing this court that he had consulted with Moosa on the morning of 24 January 2023, Moodley has provided almost no detail concerning the procedural and time-related events relevant to the hearing of 25 January 2023. He seeks to rely on the timing of

the receipt of instructions from Moosa. In this regard, Moosa filed a replying affidavit to the joinder application in which he purports to exonerate Moodley from any wrongdoing and takes the blame for the timing of the joinder application. Whilst Moosa is no doubt responsible for having given instructions to launch an ill-conceived

application that was clearly vexatious and aimed at delaying his eviction, Moodley, a legal practitioner and officer of this

court, cannot escape responsibility for his role in this matter.

[20] Moodley was not merely a creature of instruction, as he sought to argue. Indeed, many of the problematic issues identified in the procedural time-line outlined by the first respondent's counsel cannot in fairness be attributed to Moosa. Moodley was responsible for stipulating the times in the notice of motion relating to the joinder application and for the service of this application. He failed to inform the first and second respondents during office hours to expect the application. He failed to advise them that the matter would be heard before this Court simultaneously with the main application. He failed to instruct counsel timeously. He failed to appear in court or to instruct another attorney to do so on his behalf, and he failed to respond to the many telephonic and e-mail inquiries from his colleagues on the morning of 25 January 2023.

[21] One must accept that an attorney is duty bound to advance the interest of his client, even where such a course could cause harm to the opposite party (see, *Road Accident Fund v Shabangu and Another* 2005 (1) SA 265 (SCA) at para [11]). In the *Road Accident Fund* case, the court cited with approval the judgment of Sir Robert Megarry V-C in *Ross v Caunter* [1980] 1 CH 297 at 322 B-C where it was stated that:

"In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb "properly", that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him."

[22] In addition, a *de bonis propriis* award of costs against a legal representative of a party to the litigation is made in exceptional circumstances and generally where there is a substantial deviation from the standard expected of legal practitioners. Dishonestly, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence, and a lack of care are all examples of conduct that would ordinarily merit a sanction of a personal costs order (see, *Multi-Links Telecommunications v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and others* [2013] 4 All SA 346 (GNP) at para [34] and [35]).

[23] However, as Mogoeng J (as he then was) stated in *Motshegoa v Motshegoa and Another* (995/98) [2000] ZANWHC 6 (11 May

2000) at p19:

“Practitioners must know that there is a line which divides the pursuit of a client’s genuine course and an abuse of process which they dare cross at the risk of personally attracting the wrath of the court.”

[24] The court’s discretion to grant a cost de bonis propriis award is not only confined to the type of egregious conduct mentioned in paragraph [22] above. The court’s discretion to make an award costs de bonis propriis includes cases where special circumstances or considerations justify such an order (see, *Rautenbach v Symington* 1995 (4) SA 583 (O)). Thus, for example, in *Khan v Mzovoyo Investments (Pty) Ltd* 1991

(3) SA 47 (TK) the court granted costs de bonis propriis against an attorney whose slack and apparent unconcerned handling of his client’s case was adjudged by the court to have been unreasonable.

[25] Moodley is a legal practitioner and an officer of this court. As such, he has a duty to respect his colleagues and is obliged to assist in the administration of justice or, at the very least, not in any way hinder it (see, *Grundler N.O. and Another v Zulu and Another* (D8029/2021) [2023] ZAKZDHC 7 (20 February 2023)). The fact that Moodley may have received funds late or that he was not instructed timeously does not detract from his obligations, as a legal practitioner, towards his colleagues and to this court. The manner in which Moodley processed the joinder application and applied for the adjournment illustrates his lack of respect for his colleagues, displayed a measure of disrespect for this court, and hampered the administration of justice. In the circumstances, I am of the view that a costs de bonis propriis order in respect of the adjournment is justified.

[26] In so far as the remainder of the costs are concerned, it is evident from the papers that the main application was nothing more than a ruse to delay the inevitable eviction of Moosa from the property. So, too, was the ill-conceived joinder application. Thus, it is difficult not to conclude that Moosa’s vexatious conduct warrants a punitive costs order.

ORDER

[27] In the result, the following order is made:

[27.1] The notice of appeal lodged by Mohammed Shahaan Moosa under case number 3086/22 in the Magistrates’ Court for the district of Wynberg and dated 1 November 2022, is declared to be a nullity.

[27.2] The application to join the first and second respondents is dismissed.

[27.3] Mohammed Shahaan Moosa is directed to pay the costs of the applicant and of the first and second respondents on an attorney and client scale, save for those costs mentioned in para 27.4 below.

[27.4] Mr Verton Moodley of Verton Moodley & Associates Inc is directed to pay the costs of the applicant and the first and second respondents de bonis propriis in respect of the wasted costs occasioned by the adjournment on 25 January 2023.

FRANCIS, J

In the High Court of South Africa

(Western Cape Division, Cape Town)

[REPORTABLE]

Case Number: 21019/2022

In the matter between:

RIBBON DANCER INVESTMENTS CC

Applicant

MOHAMMED SHAHAAN MOOSA

Respondent

In re:-

MOHAMMED SHAHAAN MOOSA

Applicant

JAN MEYER

First Respondent

THOMAS VAN ZYL N.O.

Second Respondent

Coram:

Francis, J

Date of Hearing: 1 March 2023 Date of Judgment: 17 April 2023 Counsel for the Applicant: Adv Sune Bosch sbosch@capebar.co.za Attorneys for the Applicant: L Truter & Associates Inc (Ms L Truter) lo-ammi@truterattorneys.co.za Attorneys for Respondent: Verton Moodley & Associates Inc (Mr Verton Moodley Counsel for Mr Verton Moodley: Adv Kuvashkir Naidoo knaidoo@advnaidoo.co.za Counsel for the First Respondent in the joinder application (Mr Meyer): Adv Bronwyn Wharton wharton@capebar.co.za Counsel for the Second Respondent in the joinder application (Mr Van Zyl): Adv Deneys van Reenen deneysvanreenen@gmail.com

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