

SOUTH AFRICA / JUDGMENT

Sportscene Mthatha v Myataza (CA121/2024) [2025] ZAECMHC 38 (20 May 2025) [2025] ZAECMHC 38

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.J. Lowe, M.S. Jolwana, P. Zilwa

CASE / FILE NUMBER

CA121/2024

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FLYNOTES: COSTS – De bonis propriis – Inadequate appeal record – Page numbering not matching and copies of crucial photographs poorly prepared – Impossible for judges to properly prepare for argument on slip and trip claim – Full bench appeal – Matter postponed – Precious judicial time wasted – Counsel’s duty to court discussed – Appellant’s attorneys to pay costs wasted de bonis propriis including respondent’s wasted costs – Counsel’s fee partially disallowed.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MTHATHA

CASE NO: CA121/2024

In the matter between:

SPORTSCENE MTHATHA

Appellant

And

NONDUMISO MYATAZA

Respondent

JUDGMENT: COSTS DE BONIS PROPRIIS AND FEES FORFITURE

LOWE J:

Introduction

1. This matter came before me as a Full Bench Appeal on 29 April 2025 in the above-mentioned court.
2. Due to the events set out below, the matter was postponed, appellant tendering respondent's costs wasted in the appeal and it being so ordered. The scale of those costs and as to whether the costs should be de bonis propriis, and whether any legal practitioner should forfeit their fee, were reserved for

determination.

3. Appellant's counsel, Ms. Westerdale, indicated that in respect of the above she would wish to lead evidence relevant. This I declined, suggesting that if appellant so wished, affidavits could be filed dealing with the costs issues both de bonis propriis and whether or not any practitioner should forfeit their costs relevant to those wasted in the appeal, which suggestion Ms. Westerdale accepted.
4. In due course, and on 8 May 2025 appellant's attorneys, Joubert Galpin Searle, represented by N. Boshoff in this matter, filed an affidavit (under the hand of N. Boshoff), dealing with various issues to which I will refer to more fully hereafter. In respect of respondent, her counsel Mr. Hobbs, indicated that it was unlikely that affidavits would be filed for respondent, but was given the entitlement to do so, he indicating that he wished to make no further submissions relevant to the costs issues raised.
5. The reasons for the appeal being removed from the roll and postponed, were dealt with in a full ex tempore judgment. I will, nevertheless, shortly summarise the issues relevant thereto. It should immediately be said that this was most unfortunate, as three appeal Judges, in a Full Bench appeal, had hours of their time wasted in attempting to prepare for the argument, in the face of an inadequately prepared record, and further the appeal taking a place on the roll, forcing out other deserving matters in circumstances when it should not have been set down at all, the record being inadequate, alternatively when it should have been timeously removed or corrected.

The background to this judgment on costs

6. Generally, the practitioners representing appellant failed to apparently understand their duty to this court, and their client. The attorney has chosen to file a myopic affidavit attempting to justify her and counsel's position, instead of stepping back to see the wood for the trees. This constituted a vain attempt to save their fee entitlement, and to avoid costs de bonis propriis. This of itself is disturbing in a situation in which not one word is said in the affidavit, about their client's interests, as to costs, let alone the wasted, precious, judicial time of no less than three judges of as much as a full day each. This judgment is, regrettably, a further waste of judicial time and effort. The entire issue, and the attorney's self-serving affidavit is worthy of stricture in all the circumstances of this matter.

7. It must be said that one might have expected appellant's attorneys, guided by counsel, to have reflected on the matter, and having explained the position in the affidavit, to have appreciated that their client was, whatever else may be said, certainly not to blame for the deficiencies in the record, and that at the very least an undertaking given that no fee would be charged in the matter relevant to the hearing, nor would the client be asked to pay respondent's costs as tendered.
8. In summary, this appeal came before us with a considerable record, five volumes in length, the fifth volume being a thin volume containing a number of important documents relevant to the appeal.
9. The cause of action in the matter arose in respect of respondent's claim that she had slipped and fallen on a wet matt situated within the unit occupied by appellant, which matt was at the entrance of the unit relevant, with no warning signs, plaintiff slipping and falling and sustaining severe bodily injuries to her left leg, back and neck area arising from appellant's negligence.
10. The court a quo found for respondent in the matter ordering that appellant pay such damages as respondent was found to have sustained in due course, there having been an inadequate separation order moved prior to the trial commencing.
11. A number of witnesses were lead, several of whom referred to at least seven images of the place where the slip and fall occurred taken from different angles. This required various sets of the photographs to be utilized needing to be separately marked by a number of the witnesses as set out above. The inclusion of the marked images was crucial to a proper reading and understanding of the evidence.
12. On receiving the appeal record, it became plain that the photocopies of the photographs included in the record were entirely inadequate and could not be usefully used. One set of better quality photographs was included in volume 5, but were entirely unmarked, and accordingly were completely useless relevant to an understanding of the extensive evidence (and lengthy cross-examination) of the relevant witnesses. This fact must have been readily apparent to all attorneys and counsel involved in the matter, but up until the morning of the appeal this remained the position.
13. Put simply, despite every effort made to understand the evidence, in preparing for the appeal, the absence of marked images made it difficult, and certainly unreliable, to gain a proper understanding of the evidence, both in chief and in cross-examination.
14. The thrust of appellant's heads of argument, 16 pages and in 31 paragraphs in length, was that the judge a quo had erred in his assessment of the evidence, the probabilities and credibility of respondent and her witnesses, also those of appellant, and in finding for respondent, on the basis of respondent's witnesses which he preferred to appellant's witnesses.

This made a full understanding and analysis of the record entirely crucial to a proper and just hearing of the appeal.

15. A summary of the difficulties with the record, goes beyond the images, and is as follows:

16.1 Only one set of images, which were properly discernible but unmarked, was filed when there should have been several sets of images, duly marked by the respective witnesses, paginated and referred to in the record and heads of argument;

16.2 The record itself, incorporated irrelevant pages and photocopies of, for example, various x-ray images irrelevant to the appeal;

16.3 The appeal record referred, in cross-examination, to the pleadings in various respects, the page numbering in the record not matching the page numbering in the appeal record which had not been renumbered, and the numbers should have been corrected in this regard;

16.4 There were crucial references to the appellant's witness Ms. Gonzalves, who completed an incident and injury report which was contained in volume 5, pages 395 – 396, but which was referred to in the record by the original numbering in the bundles,

making the assessment and reading of the evidence more difficult than it should have been.

16. All in all the above constituted an entirely inadequate record for the purposes of the appeal and made it impossible for the appeal judges to fully and properly prepare for argument in what was a hotly contested matter and which was not without its difficulties. This required a most careful assessment of the mutually destructive versions, moreover in the light of a short and in some respects, unhelpful judgment a quo.

17. How this was not rectified before the appeal record was filed escapes me entirely. This has at no time been satisfactorily explained.

18. Appellant's counsel, and the attorney were both involved at the trial stage. It must have been immediately more than clear to appellant's legal team, well before the heads of argument were filed, let alone the practice note, that the record had not been adequately prepared. It ought to have been immediately corrected, before being lodged, or immediately when this

was discovered, and not left to the morning of the trial when appellant's counsel attempted to hand in a set of marked images, way too little too late.

19. Appellant's counsel in fact had a set of the photographs with her, when being introduced to the judges at the commencement of the morning, and whilst she mentioned same, I suggested she deal with this in open court. When the matter was called, appellant's counsel attempted to hand the marked images to the court, which I declined to accept seeking an explanation as to why this had been left to this late stage, and pointing out to both counsel that the inadequate preparation of the record didn't

end there and extended to other issues, making it impossible to prepare such as to ensure just and equitable determination of the

issues on appeal. I raised the question of costs, and as to whether these should be de bonis propriis and as to whether any practitioner should forfeit their fee.

20. Appellant's counsel was unable to take the matter any further in this regard, seeking that the matter stand down so that she could take an instruction.
21. On the matter being recalled, appellant's counsel indicated that agreement had been reached that appellant would tender the costs wasted having regard to the fact that the appeal must clearly be struck from the roll or postponed. I pointed out that I had directed that the court must be addressed as to why the costs should not be ordered on a de bonis propriis scale, and as to why the practitioners should not, to one extent or another, be prevented from raising a fee in the matter. Appellant's counsel indicated that she would wish to lead evidence relevant to costs, upon which, as I have said, I indicated that this would not be appropriate viva voce but that they could file affidavits if they so wished, which invitation counsel readily accepted.
22. In due course and on 8 May 2025, appellant's attorney filed an affidavit. This affidavit dealt with the issue of costs de bonis propriis and as to whether any practitioner should be deprived of their cost in the matter relating to both attorney and counsel. Respondent's attorneys (unsurprisingly) have elected not to file any affidavits.

The affidavit

23. The appellant's attorney's affidavit is seven pages in length with 21 paragraphs.
24. The crux of the affidavit is as follows:
 - 24.1 Plaintiff's attorneys, Joubert Galpin Searle of Gqeberha were represented in the matter by attorney Boshoff;
 - 24.2 The affidavit was filed to address the issue of de bonis propriis costs and "further why any legal practitioner should not be deprived of their costs";
 - 24.3 The appeal was set down for hearing on 29 April 2025
 - 24.4 Appellant's heads of argument were due by no later than 4 April 2025 (I note however that those heads in fact being prepared on 31 March 2025, under counsel's name as per the heads of argument and filed of record on 3 April 2025);
 - 24.5 Appellant's attorneys filed a practice note (presumably prepared by counsel) on the same date;

24.6 On 2 April 2025 “and during the preparation of the appellant’s heads of argument” appellant’s counsel had alerted the attorney to the fact that the photographic exhibits, contained in volume 5, were incorrect and were unmarked and “... the court would require photographs marked by the respective witnesses.”;

24.7 At the same time appellant’s attorney was advised (surprisingly), to contact respondent’s attorneys as to the best way forward to have the correct exhibits placed before the court (this is difficult to understand as surely the appellant’s attorneys and counsel were best placed to decide this for themselves);

24.8 “The heads of argument and practice note were prepared on the basis that the correct exhibits would be supplemented timeously.” – something about which I will say more in due course;

24.9 The attorney had, on 3 April 2025, advised appellant’s counsel that “... I would attend to have the correct exhibits placed in the record”;

24.10 On Saturday 5 April 2025, unexpectedly, the attorney concerned had received a message that her mother was gravely ill and admitted to hospital in Cape Town with pancreatic cancer of which the attorney had been unaware;

24.11 A harrowing series of events had occurred thereafter, the attorney being away from her offices from 5 April 2025 to, presumably, the week commencing 15 April 2025;

24.12 On the 15 April 2025 the attorney concerned received further bad news concerning her mother’s condition who subsequently passed away on 3 May 2025;

24.13 On 15 April 2025 appellant’s counsel had messaged appellant’s attorney asking whether the photographs had been attended to, which she did not reply;

24.14 On 23 April 2025 appellant’s attorney had phoned respondent’s attorney, relevant to the photographs, who was not available, and had tried again on 24 April 2025, they connecting later, respondent’s attorney saying that the photographs would be in the court file (whatever this may mean);

24.15 On 28 April 2025, and at the airport on the way to Mthatha, appellant’s counsel had enquired as to whether the record had been “fixed” by correct marked photographs having been presented, appellant’s attorney saying she had packed marked photographic exhibits and requested that they attempt to hand them in at the hearing;

24.16 The attorney accepts that the preparation of the record was her responsibility “However any failure on my part to remedy this situation was not a result of any intended negligence[1] or wrongdoing on my part.”;

24.17 She confirmed that appellant’s counsel had, on more than one occasion, advised her that the record needed to be corrected;

24.18 This was not a matter of such a nature that warranted a costs order de bonis propriis, she accepting however that it was her error but that she had every intention of rectifying the record timeously but had been diverted due her mother's illness and her "... mental state at the time."

25. It must immediately be said that appellant's attorney's unfortunate and sad loss and what she went through at this time, is deserving of the most sympathetic consideration and there can be no doubt that this was shocking and immensely challenging.

26. However, that is not the end of the matter by any means for appellant's attorney or counsel.

27. Most regrettably, the affidavit is, inexplicably silent as to the position of her client in this regard and subject to considerable criticism as appears below:

27.1 Appellant's counsel's heads are dated 31 March 2025, and appellant's attorney says that she was informed on 2 April 2025 during preparation of those heads, (which had in fact apparently already been finalised two days earlier), that the photographic exhibits were incorrect and unmarked, the crucial issue of dates being unexplained;

27.2 Appellant's attorney had on 3 April 2025 advised counsel that she would attend to having the correct exhibits placed in the record but is silent as to what she did, having made that decision on 2 April 2025, prior to Saturday 5 April 2025, at a time when she was unaware of her mother's illness;

27.3 It is further glaringly apparent from the affidavit, that appellant's attorney took no steps, whatsoever, to pass the file onto a colleague at a substantial firm of attorneys, or give instructions to her secretary to do so, or to have counsel briefed to guide appellant's attorneys in the proper preparation of the record, nor is there an explanation as to why this was not done;

27.4 There is further, entirely absent, a single word relevant to the fact that the debacle that ensued was by no means in any way connected with appellant itself, the client, and as to why the client should be responsible for bearing the wasted costs occasioned by the attorney's conduct;

27.5 There is no explanation as to why on 23 April 2025 when appellant's attorney was again dealing with the matter, on her own evidence, that she did not attend to the placing of the record in proper order, and why this was only attempted on 28 April 2025;

27.6 There is no explanation in any event, as to why the attorney concerned did not check the record appropriately before 2 April 2025, when it was originally prepared and filed, and see to it that it was in proper order in obvious respects relevant to the photographs and renumbering;

27.7 There is no explanation as to why the other issues, which I have pointed out above relevant to the inadequacy of the record, had not been attended to prior to this time;

27.8 There is no indication whatsoever as to why the practice note, filed on 3 April 2025, reflected only that "The record contains a complete copy of the proceedings as served before the court a quo." (which is in any event a misleading assertion);

27.9 There is no indication as to why appellant's counsel who was, or should have been, fully aware of the deficiencies referred to above, and had discussed the image difficulties with her attorney, had not included this issue in detail in her heads of argument, let alone the practice note, (which I assume was prepared by counsel), although signed by the attorneys concerned.

28. It is, to say the least, disturbing that the practice note, filed on 3 April 2025, did not refer to these deficiencies at a time when both counsel and the attorney were aware of the difficulties referred to and the fact that the record was most certainly not as it was before the magistrate, and was in other respects inadequately prepared as referred to above. Similarly, it was to be expected of appellant's counsel, when preparing her heads, to draw attention fully to the deficiencies in the record and the lack of marked images, with an undertaking that these would be placed in order forthwith, to enable a proper understanding of the matter, and that if necessary the heads would be supplemented in this regard, the record corrected, the images as marked provided, the irrelevant pages being removed and the numbering corrected.[2]
29. Not a word was said in the heads of argument or practice note of both appellant and respondent in this regard, and it is extremely difficult to understand on what basis this was so, having regard to the duty of attorney and counsel to the court in preparation of these most important documents, the fundamental basis of argument in the appeal. This remains entirely unexplained.
30. All of these above matters are relevant to the costs decision that needs to be made in this matter, and which is reflected in the order following.

Counsel's heads of argument

31. It would be as well to remind those seized with the drafting of heads of argument that these have been authoritatively said to be important for the administration of justice. They are not to be taken lightly in any circumstances, as was set out in *S v Ntuli*[3], a matter referred to with approval in *Feni v Gxothiwe*[4] and *Geza v Standard Trust Ltd*[5] where Marcus AJ stated that:

"Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard."

32. In this regard those drafting heads of argument would do well to frequently read the article by Harms, then Deputy president of the Supreme Court of Appeal "Heads of argument in courts of appeal", as published in "The Advocate"[6], where the view was expressed that before counsel sits down to dictate, type or write they should refresh their memory by reading

the rules of court and practice directives then take time to think about the case the point they wish to make and to ponder the value of their submissions.

33. The point was made that the value of heads of argument is not measured in kilograms or in reams, counsel to take time and more effort to be brief, concise and to the point. Heads of argument are quite different from written argument, something which is frequently overlooked.
34. To this should be added that the Eastern Cape Practice Directives, originally published on 12 September 1969, deal expressly in Rule 8(d) with heads of argument to be amongst other things, a concise and succinct statement of the main points which will be argued.
35. I add that the very purpose of heads of argument is to guide the court concisely both through the record and argument including quite clearly, issues raised relating to the contents of the record and if applicable, its deficiencies and make submissions in respect thereof, sadly lacking in this matter, from both counsel.

Costs de bonis propriis and the deprivation of costs relevant to legal practitioners

36. Costs de bonis propriis, that is “straight from the pocket”, relate to those that litigate in a representative capacity, and are awarded by our courts in appropriate circumstances.
37. As I set out in *Kenton-on-Sea Ratepayers v Ndlambe Municipality*,^[7] there must be good reason for such an order, such as improper or unreasonable conduct or lack of bona fides, the rationale therefor being a material departure from the responsibility of office. This applies to unreasonable, reckless or dishonest conduct.
38. The issue of such a cost award against both advocate and attorney were raised in the then Transkei Supreme Court case of *Congress of Judicial Leaders of South Africa v Minister for Local Government, Eastern Cape and Others (Tk)*^[8] to which I shall return in a moment.
39. The general rule relevant to such costs orders was referred to as long ago as 1908 in *In Re: Potgiete’s Estate*^[9] setting out that a personal order for costs against a litigant occupying fiduciary capacity was justified where his conduct in

connection with the litigation in question had been male fide, negligent or unreasonable.

40. This was referred to with approval by Innes CJ in *Vermaak’s Executor v Vermaak’s heirs*^[10] relevant to an executor paying the costs de bonis propriis.
41. This has been raised many times since and, in summary, the court will in appropriate circumstances award costs de bonis propriis against attorneys, the office of the state attorney, counsel, trustees, guardians, company directors, liquidators and others as referred to in *Erasmus Superior Court Practice 2nd Ed Van Loggenberg Vol II*^[11].

42. As to costs orders against attorneys, this has been dealt with for more than a hundred years in our authorities, and most recently in various Constitutional court decisions one being *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board*[12].
43. As against attorneys, such a costs order has the effect that the attorney must pay out of his or her own pocket such costs as a penalty for improper, or negligent or unreasonable conduct in the litigation. Whether a person acted negligently or unreasonably must be decided in the light of all the particular circumstances of each and every case.[13]
44. In respect of counsel, costs *de bonis propriis* have been awarded in a number of circumstances.[14]
45. Thus, generally, against both attorneys and counsel, improper, negligent or unreasonable conduct may be visited with a costs order *de bonis propriis* in appropriate circumstances. [15]
46. Put differently, a court may award such costs to indicate its extreme displeasure at the conduct of a practitioner, both attorney and counsel, for improper, negligent or unreasonable conduct, as also addressing matter relevant to their client whose best interests appear to have been neglected and ignored in respect of the costs issues which I address herein.
47. This has been extended to what has been described as egregious conduct of a matter by a practitioner which need not go so far as wilful or male fide conduct but includes a "gross disregard for his professional responsibilities.[16]
48. In *Pheko (CC)* (supra)[17] the court said that at the very least an attorney had an obligation to notify the Registrar (in that matter) of the client's change of address and that the failure to notify the Registrar in this regard constituted gross negligence on his part.
49. The Constitutional Court in support hereof referred to *Machumela v Santam Insurance Company Ltd*[18] where an attorney "... cost the applicant money for not having obeyed the rules of court". The Constitutional Court added emphasis suggesting that this had been grossly negligent and expressed its displeasure at what was described as the gross negligence, particularly, of an officer of the court.
50. Further, it is not unprecedented that costs orders *de bonis propriis* may also be made on an attorney and client basis.[19]
51. It is also competent for a court, in appropriate circumstances, to simply disallow a practitioner charging a fee for a particular matter in the face of a gross disregard for professional responsibilities and obligations.

Conclusion relevant to applicant's attorney and counsel

52. In this matter, the fact that the appeal could not proceed, having regard to the deficiencies in the record, was due to the inadequate attention to the detail of the photographs to be included in the record by the attorney concerned, for which there is no explanation whatsoever forthcoming relevant to the period prior to 5 April 2025, and thereafter as to why the matter was not passed on to another attorney, nor what happened, in this regard, between her return to office on 23 April 2025 to 28 April 2025 save for two misguided phone calls. It is unclear when the attorney concerned prepared the marked photographs which she had with her when travelling to Mthatha, the day prior to the appeal, and as to why these were not made available earlier, even on her own version.
53. There is further no explanation as to why that attorney did not, much earlier, but at least on 25 April 2025, alert the Full Bench Judges as to the difficulty in the matter.
54. There is also no indication as to why another attorney in the firm did not attend to the matter, or why counsel was not appropriately briefed to guide an attorney relevant to the correction of the record.
55. This all on its own, and despite my deep sympathy for the attorney's loss, does not provide any basis for escaping the consequences of this debacle.
56. There is absolutely no reason at all why appellant itself should bear those costs, due to the events described above, which were through no fault of its own in any way at all. The fact that this appears not to have been appreciated by the attorney concerned, guided by counsel, exacerbates the situation. It is in this regard that the affidavit is myopic, not a word being said apparently in complete disregard of the entitlement and rights of their own client.
57. Turning to counsel's responsibilities in this regard. Counsel's first duty is to the court. A Full Bench appeal is a matter of considerable consequence taking up three Judges' time and taking up a place on an already full roll and in the face of other appeals waiting their turn to be heard as soon as possible in the public interest. It was counsel's duty in preparing their heads of argument, knowing (or should have known) that the record was not in proper order, and in material respects to draw deficiencies to the Judges attention in their heads in detail, but about which not a word is said. The same is applicable to the practice notes which were misleading.
58. It is difficult to understand why this was not drawn to the court's attention, there being no explanation herefore in the affidavit beyond suggesting that the appellant's heads (and presumably practice note) were prepared on the basis that the correct exhibits would be included timeously. If that were the case, this should have been clearly set out in both the practice

note and the heads which remained silent and were misleading in this regard. On a reading of the practice note and the heads the Judges concerned were accordingly not alerted to this serious difficulty.

59. This all warrants a finding relevant to costs expressing the court's displeasure as to the conduct of both the appellant's attorney and counsel concerned, and their neglect as set out above.
60. This is more than sufficient to justify a costs order de bonis propriis, both to express this displeasure, to reflect the unfortunate consequences hereof, and in circumstances in which the appellant itself should not be mulcted with such costs.
61. In my assessment counsel's conduct (or lack thereof) was not so egregious as to justify a costs order de bonis propriis against her, but nevertheless, in the circumstances, her fees should be disallowed in the respects appearing in the order below, to express this court's displeasure set out in the criticisms made above. In my view appellant's counsel not only failed to raise this in the practice note and heads of argument which would have alerted all to the issue, including respondent's legal team, but then sought to defend appellant's legal team's entitlement to foist the costs upon their client, in their own interests, ignoring that of the client which was in no way complicit. The respondent's legal team adopted a different and thoroughly proper approach, making no attempt to avoid the fees consequence of their omissions. This must be, and is reflected in the order at the end of this

judgment.

62. As I understand costs orders de bonis propriis, this is such as to require the appellant's attorneys to pay those costs wasted in respect of the appeal, being respondent's costs, as also to disentitle her from raising a fee against her client insofar as wasted costs are concerned in respect of her own attendances, fee, and disbursements relevant to such things as travelling and accommodation.
63. As to counsel's fee being disallowed, in part as to two thirds thereof; this relates to those costs wasted, being predominantly counsel's fee to draft the practice note and to prepare for arguing the appeal as to half thereof as this is not entirely wasted and her day fee and disbursements thereto for travelling and accommodation, to the extent appearing in the order below.

Respondent's attorneys and counsel

64. Whilst it is suggested that there was some communication between appellant's attorneys and respondent's attorneys, the entire responsibility for preparation of the record falls upon the appellant, in respect of which respondent can bare no responsibility.

65. Nevertheless, it is plain that respondent's attorneys were aware of the fact that the photographs were in the record unmarked. Insofar as counsel is concerned, as I understood his submission, he was not aware of this till a late stage, as he relied upon the photographs that he had retained from the trial which obviously were marked. He should of course have been so aware when preparing his heads.
66. The only question which arises is whether respondent's attorneys, and counsel, ought to have any portion of their fees disallowed in all the circumstances of the matter.
67. As I have already indicated counsel when asked whether any portion of his fee should be disallowed, sensibly, made no further submissions having indicated that his attention was given to the photographs which he had, but as I understood it he did not examine the record in this regard, (which he should have done). Further, respondent's practice note, being silent hereon was unhelpful being inaccurate as to the state of the record.
68. It is also so, that on a proper examination of the record, respondent's counsel ought, in his heads of argument, to have drawn attention to the deficiencies, notwithstanding this not having been raised in the appellant's practice note and heads.
69. In the circumstances, a portion of respondent's counsel's fee should be deducted, no fee to be charged in respect of the practice note, and one half of counsel's preparation and fee as also the day fees in respect of the argument of the appeal, being disallowed.
70. Respondent's attorney's fee for perusing the record, attendances upon or drafting of the practice note, and perusing counsel's heads must similarly be disallowed.
71. Respondent's counsel and attorney were both based in Mthatha and therefor did not incur traveling or accommodation expenses.

Order

72. It is accordingly ordered that:
 1. Appellant's attorneys are to pay the costs wasted in this matter, as reflected in the main order, on a *de bonis propriis* basis including respondent's wasted costs and such as to also include those costs referred to in paragraph 62 above;
 2. Appellant's counsel's fee is disallowed as follows, the fee charged in respect of the preparation of the practice note, two thirds of counsel's preparation fee relevant to the appeal hearing; two thirds of the appearance fee; and the costs and disbursements relevant to counsel's travelling and accommodation.
 3. Respondent's counsel's fee is disallowed as follows, the fee charged in respect of the preparation of the practice note, one half of counsel's preparation fee relevant to the appeal hearing, and one half of the appearance fee.

4. Respondent's attorney's fees are disallowed for perusing the record, attendances upon or drafting of the practice note, and perusing counsel's heads.

M.J. LOWE

JUDGE OF THE HIGH COURT

I agree,

M.S. JOLWANA

P. ZILWA

Appearing on behalf of the Defendant/Applicant: Adv. Westerdale, instructed by Ms. Boshoff from Joubert Galpin Searle, Gqeberha.

Appearing on behalf of the Plaintiff/Respondent: Adv. Hobbs, instructed by Mr. Le Roux from, Mthatha.

Date heard:

29 April 2025.

Date delivered:

20 May 2025.

- [1] Which of itself is a misnomer, as negligence is not an "intended" concept and requires no element of intention.
- [2] Had this been done, respondent's legal team would have been further alerted hereto, also factor in the preparation of heads and then would surely have dealt with this in the respondent's heads and practice note.
- [3] 2003
- (4) SA 258 (W)
- [4] 2014
- (1) SA 594 (ECG) at 596C – D.
- [5] Unreported ECG case number 3234/2021 dated 14 March 2023 paragraph [31]
- [6] December 2009 pages 20-22
- [7] 2017 (2) SA 86 (ECG) at 118 F – 119 B.
- [8] 23 November 1995 Case 1685 unreported heard in Umthatha November 1995.
- [9] 1908 TS 982
- [10] 1909 TS 679

- [11] D5–31/32
- [12] 2009 (1) SA 565 (CC) at 581F – 582G; Pheko v Ekurhuleni City 2015
- (5) SA 600 (CC) at 624 paragraph [51] to [55]; and see Commisioner: South Africa Revenue Services v Louis Pasteur Investments Pty Ltd (in provisional liquidation) 2022
- (5) SA 179 (GP) at paragraphs [49] – [56].
- [13] Grobbelaar v Grobbelaar 1959
- (4) SA 799 A at 725B-C.
- [14] Hopf v The Spar Group (Buil it division) [2007] 4 All SA 1249 (D) at 1258f – 1259f; Thundercats Investments 49 (Pty) ltd v Fenton 2009
- (4) SA 138 (C) at 147A – 150A and 150I – 152E; Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP) at 288G – 289D; Kunene v Minsiter of Plice (unreported SCA case number 260/2020 dated 10 June 2021) at paragraphs [48] – [49].
- [15] Pheko (supra) [51]; South African Legal Liquor Traders Association (supra) page 7, para [54].
- [16] Pheko (CC) (supra) [54].
- [17] At paragraph [54].
- [18] 1977 (1) SA 660 (A)
- [19] Public Protector v South African Reserve Bank 2019
- (6) SA 323 (CC) at 320B; Kunene (supra) paragraph [48] – [49].

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