

SOUTH AFRICA / JUDGMENT

Van der Walt v Murray and Another (2554/2019) [2019] ZAFSHC 169 (10 September 2019) [2019] ZAFSHC 169

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

2554/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 2554/2019

In

the matter between:

SAREL
JACOBUS VAN DER
WALT Applicant
and
CLOETE
MURRAY First
Respondent
RUWAYNE
SMITH Second
Respondent

JUDGMENT

CORAM: NAIDOO J

HEARD ON: 22 August 2019

DELIVERED ON: 10 September 2019

INTRODUCTION

[1] The applicant withdrew the “main” application and an application for a postponement and tendered the respondents’

costs on a party and party scale. The respondents refused to accept this and indicated that they seek costs against Mr FJ Senekal, the attorney of the applicant, on the scale as between attorney/own client. Arguments on costs ensued, and this is the ruling on the costs relating to this matter. Adv Coetzer represented the applicant and Adv Smith represented the respondents.

BACKGROUND

[2] I set out a brief summary of the history of this matter, in order to contextualise the submissions made by counsel in respect of costs. The applicant is an un-rehabilitated insolvent, whose estate was finally sequestrated by an order of this court. The first and second respondents are the duly appointed trustees of the insolvent estate. There is also a long and acrimonious history between the parties. On Thursday 6 June 2019, the applicant issued an urgent application out of this court for hearing on Tuesday 11 June 2019 before the duty judge of this Division, seeking an order, inter alia, in the following terms:

“1. That the Uniform Rules of Court relating to service and process be dispensed with in order that this application be heard as one of urgency in terms of Rule 6(12).

2. That a rule nisi issued (sic) calling on the Respondents on 25 July 2019 at 9h30 or so soon thereafter as the matter may be heard to show cause why the following order should not be made final:

2.1 That the Respondents be interdicted and restrained from proceeding with the administration of the Applicant’s insolvent estate (“the estate”) and the Second Meeting of Creditors be postponed for a period of 3 months:

2.1.1 pending the decision of the Master of the High Court in respect of the request to remove the Respondents as trustees of the estate;

2.1.2 alternatively, should the Master of the High Court decide against such removal, pending the finalisation of the Applicant’s intended application to Court for the removal of the Respondents as trustees of the estate.

2.2 That the Respondents pay the costs on a scale as between attorney and own client in their personal capacities.

3. That paragraphs 2.1 to 2.1.2 above serve as an interim interdict with immediate effect pending the final determination of the application.”

[3] The application was served on the respondents’ attorneys via email at 17h00 on 6 June 2019. The respondents opposed the

application and delivered their opposing affidavit by 10 June 2019, pointing out a number of defects in the application and specifically

in the Notice of Motion, such defects being inter alia, the non-joinder of material parties and the absence of dates by which the

respondents should indicate their intention to oppose the application and file their Answering Affidavit. In the late evening of 10 June 2019, the applicant’s attorney agreed that the order sought in the application could be varied. A draft order was presented to court on 11 June 2019 and the following order was granted:

“1. The application is postponed to 22 August 2019.

2. The application (sic) does not persist with the relief sought in paragraph 2.1 insofar as it relates to the second meeting of creditors of 12 June 2019.

3. The relief sought in paragraph 2.1, insofar as it relates to the administration of the insolvent estate, will proceed in the ordinary course.

4. The applicant will deliver his replying affidavit in accordance with the Rules of Court.

5. The respondents reserve the right to supplement its (sic) answering affidavit of 10 June 2019”

[4] The applicant did not file his Relying Affidavit in accordance with the Rules of Court, as directed by the court order, or at all. If the court order were adhered to, the applicant ought to have filed his Replying Affidavit by 25 June 2019, being 10 days (as prescribed in the Rules of Court) from the date of the court order. There was a large amount of correspondence that passed between the parties in the interim. The applicant’s attorney advised the respondents’ attorney that he was awaiting further information from the applicant in order to finalise the Replying Affidavit. It later transpired that the applicant wished to interrogate the respondents, amongst others, in terms of the Insolvency Act 24 of 1936 (the Insolvency Act). > [5] The applicant’s attorney, via a letter requested the respondents’ attorney to consent to a postponement of the application pending the finalisation of the insolvency enquiry. The latter declined to do so and requested the applicant to file a formal application for postponement by 12 August 2019, so that they could respond by 15 August 2019. In the interim, the respondents filed an opposing affidavit on 16 August 2019, in anticipation of the application for postponement, which in essence set out the history of the matter and especially the correspondence that passed between the parties.

The application for postponement by the applicant was filed on 19 August

2019. On 21 August 2019, the applicant filed a supplementary

affidavit to the Founding Affidavit in the postponement application. [6] I pause to mention that the application for postponement was not filed in the court file, nor was the court file indexed and

paginated, as required by the relevant Practice Directive of this Division. The deponent to the supplementary affidavit in the

postponement application was the applicant's attorney, Mr Senekal, and the affidavit was, furthermore, filed without leave of the court. I pointed out to both counsel in Chambers that the founding papers were not in the court file, and in spite of my

Registrar searching for same, it was not found. Mr Coetzer requested an opportunity to investigate the matter, and when the matter was called for hearing, Mr Coetzer advised that his instructions were to withdraw both the main application and the application for postponement with a tender for the respondents' costs on a party and party scale.

[7] The arguments on costs that I have alluded to then followed and court adjourned at 11h30. At approximately 12h35, a clerk of court approached me in Chambers, with the application for postponement in hand. She advised that it was not apparent from the papers that the application for postponement was scheduled for hearing on 22 August 2019 and was therefore placed in a box for general filing. I requested my Registrar to contact both counsel immediately and advise them of the turn of events and enquire if they wished to make further submissions before the court makes a ruling. Both declined to make any further submissions.

ISSUES

[8] The issue that this court is tasked with determining are

8.1 Whether the applicant should pay the costs of the matter on a party and party scale or whether the applicant's attorney should be ordered to pay such costs on the scale as between attorney and own client.

THE LAW [9] In the unreported case of *IE Van Reenen v Dr PG Lewis +1* Case number 2302/2014, delivered on 14 May 2019, I dealt extensively with the legal position regarding costs, especially a punitive order for costs. I repeat, in part, what was

said in that matter. It is well established in our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. The determination of an appropriate costs order is in the discretion of the court, which discretion is usually informed by a number of factors in order that such discretion be exercised judiciously.

Erasmus in Superior Court Practice, D5-6, states it succinctly as follows: “In leaving the court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully

weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties”. This is particularly so if the court intends to depart from the general rule. There is a duty on a litigant to avoid conducting litigation in such a manner that it unduly protracts a case or unduly causes an escalation in costs. [10] It is also well established that vexatious conduct, even if it was not intended to be vexatious but has the effect of being vexatious, may well be the basis for an order awarding costs on an attorney and client scale. Where a litigant was able to, but fails to take steps to curtail proceedings and thus causes an escalation in costs, he may similarly face the prospect of paying costs on the attorney and client scale, on the basis that his conduct was unreasonable. (See LAWSA, Volume 10, Third Edition, 284). In this regard, the dictum of the court in Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another 1997(1) SA 157 (A), is apposite. The court, citing with approval the remarks of the courts in the matters, amongst others, of In re Alluvial Creek Ltd 1929 CPD 532 at 535 said:

“It was not disputed that in appropriate circumstances the conduct of a litigant may be adjudged ‘vexatious’ within the extended meaning that has been placed upon this term in a number of decisions, that is, when such conduct has resulted in ‘unnecessary trouble and expense which the other side ought not to bear’. Naturally one must guard against censuring a party by way of a special costs order when with the benefit of hindsight a course of action taken by a litigant turns out to have been a lost cause”. [11] In the in the Alluvial Creek case Gardiner JP remarked as follows at p535:

“An order is asked for that he pays the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious although the intent may not have been that they should be vexatious”. [12] The purpose of an award of costs on the attorney and own client scale was the subject of the court’s remarks in Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A), The court said that an award of costs on an attorney and own client scale against the unsuccessful party must be seen as an attempt by the court to go a step further than the usual order of costs between attorney and client, in order to ensure that the successful party is relieved of the burden of paying all the reasonable costs of litigation. The court cited with approval the matter of Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597 at 607, where Tindall JA said:

“The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special

considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say "as far as it can" because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay his own attorney and the amount of an attorney and client bill which has been taxed against the losing party" [See also *Friederich Kling GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C), where the court cited with approval the cases of *Alluvial Creek* and *Nel v Waterberg* above] [13] In view of the prayer for costs against the applicant's attorney, it is useful to cite the standard of conduct expected of an attorney. Although the learned author, JR Midgley, in his work "Lawyers' Professional Liability", First Edition 1992, p84, deals the duty of an attorney to his client, the standard of conduct expected of an attorney, in my view, extends to his conduct in respect of third parties as well, and he will be held to account, particularly in respect of those who are negatively impacted by such conduct. Midgley cites the dictum of De Villiers CJ in the case of *Van Der Spuy v Pillans* (1875) 5 Buch 133 where he said "every attorney is supposed to be reasonably proficient in his calling, and if he does not bestow sufficient care and attention, in the conduct of the business entrusted to him, he is liable." Midgley continues and refers to an extract from *Honey and Blanckenberg v Law* 1966(2) SA 43 (R) at 46 F-G where the court said

"In the performance of his duty or mandate, an attorney holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. If, therefore, he causes loss or damage to his client owing to a want of such knowledge as he ought to possess, or the want of such care he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client"

This appears to be the generally accepted guiding principles in an attorney-client relationship. The duty to exercise care, skill and diligence is the duty not to be negligent. In my view, it goes without saying that where a failure to act in accordance with this duty causes harm or loss to another, a court may well consider sanctioning such failure by an appropriate order for costs against the attorney. I will deal further with this later in the judgment.

[14] In support of his contention that the applicant's attorney should pay the costs in this matter, Mr Smith submitted that Mr Senekal had ample notice that the respondents intended to seek a costs order against him personally, and failed to react to the many instances when they directly indicated their intention to do so. He referred to the Answering Affidavit in the main application. In paragraph 52.2 thereof the respondents indicated that in view of Mr Senekal's conduct, they intended to rely on section 74 of the Insolvency Act 24 of 1936, which provides as follows:

“74 Improper advising or conduct of legal proceedings

If it appears to the court that any attorney or counsel has, with intent to benefit himself, improperly advised the institution, defence or conducting of legal proceedings by or against an insolvent estate or has incurred any unnecessary expense therein, the court may order the whole or part of the expense thereby incurred to be borne by that attorney or counsel personally”. [15] Mr Smith also referred to the history of this matter from the time the applicant launched the application on an urgent basis and the many instances when Mr Senekal was informed that the respondents would seek an order for costs against him personally. As indicated above, this was largely dealt with in the Answering Affidavit filed by the respondents in anticipation of the application for postponement of this matter by the applicant. Mr Coetzer was in the unenviable position of having been briefed to appear in this matter at the proverbial eleventh hour, leaving him no time even to prepare Heads of Argument. All he was able to do was advise the court that he was instructed to withdraw both applications and tender costs on a party and party scale. He thereafter attempted to justify the defect in the Notice of Motion by submitting that the return day of the Rule Nisi served as the date by which the respondents should oppose the matter.

In my view, this argument cannot be sustained to cure a fatal defect in the papers. The rest of his arguments centred around the merits and as valiant as his attempts were to rescue the situation for the applicant and his attorney, these arguments also cannot, in my view, be sustained.

EVALUATION [16] This court’s task is to determine a just and equitable costs order. Such an exercise must, of necessity, involve traversing the history of the matter as far as may be necessary, the conduct of the parties and, if necessary, the merits of the matter. As alluded to earlier, a great deal of correspondence flowed between the legal representatives of the parties in this matter, dealing largely with the application, the further conduct of proceedings and the issue of costs. [17] On 11 June 2019, the day the application was heard and an order granted by agreement between the parties, the respondents’

attorneys addressed a letter to Mr Senekal, the applicant’s attorney recording the sequence events leading up to the grant of the order. It emerged from the letter that, based on the agreement reached with Mr Senekal, the respondents their attorney and counsel would not travel to Bloemfontein. Although it was agreed that Mr Senekal was to draw the draft order to be presented in court, he did not do so. Several attempts were made by the respondents’ attorney between 8h30 and 14h00 on 11 June to obtain the draft order, without success, in spite of discussing it with an attorney from Mr Senekal’s office, who alleged that he had no instructions in this regard.

[18] The respondents’ attorneys eventually drew the draft order which was presented in court. The respondents were obliged to brief a local advocate to appear in court for the hearing at the scheduled time of 14h00.

The same attorney, Mr Coetzee, who earlier indicated that he had no instructions appeared in court, without counsel on behalf of the applicant. The court stood the matter down for Mr Coetzee to find Mr Senekal and take instructions. He did so and eventually the court order was granted. The letter on 11 June 2019 ended by indicating that a personal costs order (against Mr Senekal) would be sought for the wasted costs of briefing counsel in Bloemfontein. [19] The applicant's Replying Affidavit was never filed, nor did he proceed with the application to remove the respondents as trustees of the insolvent estate as envisaged in paragraph 3 of the court order dated 11 June 2019. A further letter was addressed to Mr Senekal on 28 June 2019, pointing out that the applicant's Replying Affidavit was not filed and should he wish to do so, he was required to bring an application for condonation to do so. Mr Senekal was again notified in this letter that an order for costs *de bonis propriis* will be sought against him. Mr Senekal responded to this letter on 28 June 2018, and advised that he is still awaiting information from his "clients" to enable him to draft the Replying Affidavit. The tone of his letter was clearly discourteous and hostile, where he said of the respondents That they "cannot even deal with the elementary aspects of the administration of estates..." and "your clients manage to make another amateur mistake by not advertising the second meeting of creditors in the required newspaper." [20] Mr Senekal's response to the respondents' assertions that he had not complied with the Rules of Court, and that they would seek the punitive costs order I have mentioned, is perhaps indicative of his attitude to Rules of court.

He said "As to your thread (sic) for cost order *de boins* (sic) *propriis*, please don't embarrass yourself by making allegations which is (sic) frivolous, disingenuous and without merit". In my view, Mr Senekal, as an attorney of many years' experience, does not appear to see the necessity to comply with the Rules of Court and when his non-compliance is pointed out, he deems such complaints as lacking merit. Such an attitude can only stem from a disrespect for the Rules of Court and the convenience of the court and his opponents. [21] In a letter dated 3 July 2019, the respondents' attorneys again pointed out that the Rules of Court have not been complied with. Mr Senekal responded to this letter only on 16 July 2019, despite his indication that he was out of office and returned on 8 July 2019. Clearly he saw nothing wrong in waiting 8 days after his return to the office to respond to a letter addressed to him by a colleague in respect of a matter already scheduled for hearing in court. In his reply, he, instead, attacks the authority of the trustees to oppose the application. This type of correspondence, with similar responses continued right up to a few days before the hearing on 22 August 2019.

[22] No application was made to court for an extension of the period to file the applicant's Replying Affidavit, no explanation was given for why the affidavit was not filed and no explanation or indication was given for why the application to remove the

respondents as trustees was not prosecuted in the ordinary course, or at all. The perception that Mr Senekal conducted himself in this manner to cause as much offence and inconvenience to the respondents as possible, is hard to avoid. The respondents' attorneys refused to consent to a postponement of the matter on 22 August 2019 and advised in no uncertain terms that if the applicant persists with such an application, he should bring a timeous substantive application in

respect thereof. This was not done by the date stipulated by the respondents' attorney, which then caused them to serve a Notice of Set Down for enrolment of the matter for hearing on 22 August 2019.

[23] An application for postponement was filed on 19 August 2019, which initially did not reach the court file. On 21 August 2019, a day before the hearing of the matter, the applicant filed a Supplementary Affidavit in support of the application for postponement, which was merely delivered to my Registrar. The application for postponement was not indexed or paginated as required by the relevant Practice Directive of this Division, nor was the leave of the court sought to file the additional affidavit. If the Mr Senekal had taken the trouble to ensure that the Practice Directives were complied with, he would have discovered that the founding papers relevant to the postponement application were not in the court file. In any event, it was not clear why a postponement was being sought, as the reasons for bringing the application to court on 6 June 2019, on an urgent basis, had already fallen away,

There was no reason whatever for the application to remain on the court roll and no reason to keep alive an interim order which had no effect. The applicant did not file Heads of Argument, as required by the Practice Directives of this Division, and briefed counsel only on 19 August 2019.

[24] An attorney, and especially one of Mr Senekal's experience, is expected to be well acquainted with the Rules of Court and the requirements of the Practice Directives of a Division in which he chooses to litigate. The respondents are the duly appointed trustees of the applicant's insolvent estate, and as such, need to protect the interests of the creditors of the insolvent estate. Litigation of this nature and conduct such as I have described have the only consequence of incurring unnecessary costs, which the insolvent estate must bear, to the prejudice of the creditors. Mr Senekal is a seasoned insolvency practitioner of many years, with an intimate knowledge of the Insolvency Act and its requirements. It is clear that in matters of a procedural nature, involving the Rules of Court, a lay person who approaches an attorney for assistance (as in the case of the applicant), relies on the skill and expertise of such an attorney to guide him through the maze of litigation in the most expeditious and cost-effective way. Put differently, the attorney is required to conduct himself according to the standards mentioned in the *Van Der Spuy* and *Honey* cases cited by Midgley above. As I indicated, the same standard of care, diligence and professionalism is required when dealing with third parties, in order that loss or prejudice is not occasioned to them in the conduct of the attorney's business on behalf of his client. [25] Mr Senekal failed to conduct himself with the requisite degree of care and diligence expected of him. He brought an urgent application on behalf of his client, where there was no urgency, he then failed to act in accordance with a court order which he had agreed to, and failed to seek condonation for such failure. In addition, he ignored the cardinal Rules of Practice relevant to this Division, which in my view displays disrespect for this court. It is clear that he did not prepare the matter for meaningful argument, and instead withdrew both the main application and the postponement application at the start of proceedings on 22 August 2019.

[26] He indicated in a letter to the respondents' attorneys, dated 16 July 2019, that the insolvent (applicant) is not funding this litigation, without saying who is. Bearing in mind Mr Senekal's experience with such matters, and that the respondents did not give consent to the applicant to institute proceedings, as required by the Act, he must surely have been aware that the professional thing to have done was to give full details of who is funding the litigation. This would have been a clear indication that the applicant is not concealing monies which should rightfully be dealt with in the administration of the insolvent estate. [27] The tender of party and party costs will, in any event, not address the irrecoverable costs that would necessarily have been incurred by the respondents on behalf of the insolvent estate and creditors, in opposing this matter. I agree with Mr Smith that Mr Senekal was given fair and ample warning that the respondents would seek a punitive order for costs against him personally.

Not once did he respond by saying that he is acting under instructions and that application for such an order would be inappropriate and would be opposed. He also failed to deal with the provisions of section 74 of the Insolvency Act which was pertinently raised by the respondents in their Answering Affidavit to the main application, and in which they warned that they will seek a punitive order for costs against Mr Senekal. Instead, he high-handedly dismissed such warnings as frivolous, disingenuous and without merit.

[28] The tone of his correspondence and the pleadings in this matter speak of his lack of respect for his colleagues, a disregard for the Rules of Court and for the court itself. I see no reason for the respondents or the insolvent estate to be mulcted in costs they had to unnecessarily incur. Due to the conduct of Mr Senekal, they were not spared the trouble and expense of litigation, and I am of the view that he should bear those costs. [29] The case of *Pheko and Others v Ekurheleni City* 2015(5) SA 600 (CC) bears mention. The court held that the failure on the part of the attorney of the relevant municipality to notify his clients and the registrar of that court, of a change of address, amounted to gross negligence. The court also held that the attorney concerned was not only an attorney but an officer of the court. The evidence showed a gross disregard for his professional duties. The court held at paragraph [51] that

"Costs de bonis propriis are costs which a representative is ordered to pay out of his or her own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or unreasonably. Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case." [30] Similar sentiments were expressed by the Constitutional Court in the matter of *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009(1) SA 565 (CC). The court held at paragraph [54] that:

"An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy." In my view, the conduct of Mr Senekal, with regard to the manner in which these proceedings were dealt with, fell far short of the high standard expected of an attorney. His conduct can be described negligent, unreasonable and lacking in diligence. There is ample justification for him to be ordered to the costs, and he should be so ordered.

[31] In the circumstances, I make the following order: An order for costs de bonis propriis is made against the applicant's attorney, Mr FJ Senekal, who is directed to pay the respondents' costs of this matter,

including all reserved costs, on the scale as between attorney and own client.

S. NAIDOO, J

On behalf of Applicant: Adv. Coetzer Instructed by: FJ Senekal Inc 42 President Steyn Ave

Westdene Bloemfontein (Ref:WAS/MAT/1647) On behalf of the 1st

& 2nd Respondents: Adv. JE Smith Instructed by: Werksmans Inc Sandton, Johannesburg c/o Webbers Attorneys Webbers Building 96 Charles Street Bloemfontein (Ref: ADW/lvs/WER3/0008)

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