

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 1519/2004
Date heard: 19 May 2011
Date delivered: 07 June 2011

In the matter between:

BRIGID MARY CARSTENS (born O'Reilly) Applicant

and

CHRISTIAAN LOUIS CARSTENS First Respondent

CHRISTIAAN LOUIS CARSTENS N.O. Second Respondent

ANDRIES JOHANNES DANIEL BESTER N.O. Third Respondent

ARNO STRYDOM N.O. Fourth Respondent

VINCENT CYRIL TEE N.O. Fifth Respondent

BRIGID MARY CARSTENS N.O. Sixth Respondent

NEIL ANTHONY THOMAS N.O. Second Respondent in
Reconvention

JUDGMENT ON APPLICATION OF COSTS ORDER

DAMBUZA, J:

1]In this application the applicant seeks an order that the judgment and order that I granted on the respondents' point in *limine* be varied in that the costs awarded to her be directed to include the costs of employment of two counsel. The application is opposed by the first respondent.

2]It is common cause that when the point in *limine* was heard before me the

applicant was represented by two counsel, *Mr Buchanan SC* and *Ms Mey*, whilst the first respondent on one hand and the second to sixth respondents on the other were represented by one counsel each. In my judgment and order I made no reference or order consequent upon the employment of two counsel.

3]Indeed a specific submission was made in the applicant's Heads of Argument on the point *in limine*, that the applicant be awarded costs of two counsel. No written submissions were made on behalf of the respondents in this regard and I do not recall any submissions being made on their behalf during argument. In error I omitted to consider this issue in the judgment.

4]The basis for the opposition to the application by the first respondent is the delay by the applicant in bringing the application. The Judgment was delivered on 11 January 2011; an application for leave to appeal on behalf of the second to sixth respondents was filed on 4 February 2011 and the application for variation of the judgment was filed on 17 May 2011. I can only assume that the applicant became aware of the judgment on the day that it was handed down. There is no explanation in the application as to the cause of the delay in bringing the application.

5]Rule 42(1)(b) of the Rules of practice in this court, in terms of which the application is brought provides that:

“The court may, in addition to any powers it may have, *mero motu* or upon application of any party affected, rescind or vary:

- (a)
- (b) an order or judgment in which there is an ambiguity, or a patent error, or omission, but only to the extent of such ambiguity, error or omission;
- (c)

6]Although it is generally expected and in certain cases mandatory that the cause for a delay in approaching court for relief be explained, in this case the Rule does not stipulate a specific period within which the application should be brought. It would therefore not be proper to deprive the applicant of the relief sought for failure of explaining the delay alone; particularly as it is not the contention of the first respondent that there is valid reason, apart from the delay, for refusing the relief sought.

7]The general rule is that where the question of costs has not been argued, the court will either make a provisional order giving an opportunity to the parties to make representations for variation of such order, failing which the court will frame its order on the facts before it.¹

8]In view of the importance of the matter to the parties, the substantial amount of the applicant's potential claim in the divorce proceedings and the difficulty and novelty of the issue raised in *limine* it was, in my view proper and reasonable for the applicant to employ two counsel.

9]Regarding the costs of this application it is significant that the omission was through no fault of the parties. Further, although the first respondent opposes

¹ Lawsa Vol 3 at paragraph 299.

the application there was no separate hearing in respect thereof. Subsequent to the filing of the application I granted the first respondent opportunity to respond to the application. My decision is based on the papers filed. My view therefore is that the appropriate order would be for each party pay its own costs in respect of this application.

10]I am persuaded that the order in the judgment should be varied accordingly.

11]The following order shall therefore issue:

[11.1] The judgment and order handed down on 11 January 2011 is hereby varied to read as follows:

“The point of law raised together with the application to strike out certain paragraphs in the particulars of claim are dismissed with costs, such costs shall include the costs consequent upon the employment of two counsel and shall be paid by the defendants jointly and severally, the one paying the others to be absolved.”

[11.2] In this application each party shall pay its own costs.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv R.G. Buchanan SC instructed by
Greyvensteins Nortier of Port Elizabeth

For the 1st respondent: Adv J.D. Huisamen instructed by Kaplan Blumbert
of Port Elizabeth

For 2nd to 5th respondents: Adv P.A. Van Niekerk SC instructed by Van
Vollenhoven & Associates of Port Elizabeth