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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal Case Number: A65/2022
Court a quo case number: 3668/2021

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between: -

CORNELIUS JOHANNES DE BRUYN N.O.	First Appellant
CORNELIUS JOHANNES DE BRUYN N.O.	Second Appellant
and	
KOOT OOSTHUIZEN ATTORNEYS	First Respondent
MASTER OF THE HIGH COURT, BLOEMFONTEIN	Second Respondent

CORAM: MBHELE, DJP, VAN ZYL, J, BOONZAAIER, AJ

HEARD ON: 02 DECEMBER 2022

DELIVERED ON: 24 MARCH 2023

[1] This is an appeal against the cost order in the judgment of a single Judge of this division delivered on 25 November 2021 wherein the court a quo ordered that each party shall pay their own costs after the parties entered into a settlement agreement on the date of the hearing.

[2] The appellants, aggrieved by the decision of the court a quo not to award costs in their favour, approached this court on appeal. The appellants submitted that the court a quo failed to exercise its discretion judicially when it did not find that the first respondent conceded all of the relief prayed for by the appellants, save for costs and that they were substantially successful and were entitled to a cost order in their favour. They further contended that the court a quo erred in finding that the first respondent was justified in opposing the application based on its apprehension that its fees would not be paid.

[3] The germane facts are the following. The appellants approached the court a quo and moved an application in which they sought files of the estates of the late Magdalena Pienaar De Bruyn and the late Hendrick Petrus De Bruyn (deceased estates) from the first respondent. The parties reached a settlement on the date of the hearing but could not agree on the issue of costs. The following are the terms of the settlement which became an order of court:

1. 'The First Respondent shall, within fourteen days of date of this order, release all such documents contained in its file(s) pertaining to the estates set out in paragraphs 1.1 and 1.2 below into the possession of the Applicant.

1.1 Estate Late Magdalena Pienaar De Bruyn, Estate number [...];

1.2 Estate Late Hendrik Petrus De Bruyn, Estate number [...];

2. The First Respondent shall within fourteen (14) days of date of this order, draft a bill of costs on an attorney and client scale in respect of the work done by the First Respondent in the administration of the estates set out in paragraphs 1.1 and 1.2 and submit such bill of costs together with copies of the file(s) and documents referred to in paragraph 1 (one above to

the Master of the High Court, alternatively the Legal Practice Council to be taxed in terms of Regulation 10.1 and 10.2 of the Regulations published under Government Gazette 42337 of 29 March 2019 for the purpose of determining what fee the First Respondent is entitled to for work done in respect of the administration of the estates set out in paragraphs 1.1 and 1.2 above;

3. The Applicant shall upon the determination of the First Respondent's reasonable fees(s) as contemplated in paragraph 2 above, furnish adequate security in the form of an office undertaking by the Applicant's attorneys for the payment of the amount so determined by the Master by the Legal Practice Council in the aforementioned taxation to be due to the First Respondent, which amount shall be payable upon finalisation of the administration of the two estates set out in paragraph 1.1 and 1.2 above.

4. The First Respondent shall make payment to the Applicants' legal representative trust account, PHH Badenhorst Incorporated, FNB, Account number: [...], of the funds under its control in favour of the estates listed in paragraph 1.1 and 1.2 above within fourteen (14) days of the date of this order.'

[4] The second appellant and his brother (erstwhile co-executor) were co-executors of the aforementioned deceased estates. The first respondent was appointed as the representative of the erstwhile co-executor of the two aforementioned estates. The erstwhile executor was finally sequestrated on 10 September 2020 leading to his automatic disqualification as the executor in the estates.

[5] The erstwhile co- executor resigned on 8 March 2021 leaving the second applicant as the sole executor of the estate. His resignation terminated the mandate of the first respondent as the erstwhile co-executor's agent. The first respondent, in his capacity as the representative of the erstwhile co-executor, had administration files, bank details as well as important documents relating to the estate in its possession.

[6] The second appellant demanded all documentation and bank account details of the estates from the first respondent after the erstwhile co-executor resigned. The first respondent refused to hand over the requested documents within 14 days as demanded, it asserted that it held a lien on the requested documents. The first respondent informed the appellants that in view of the fact that the first respondent had already drafted the liquidation and distribution accounts on both estates, it sought an opinion from the second appellant regarding the administration of the estates and the amount of administration costs payable to the first respondent for the administration services rendered until the date of resignation of the erstwhile co-executor.

[7] The first respondent submitted that it was awaiting guidance from the second respondent. It submitted, further, that there was an issue with security to be provided by the appellants and that the parties were not in agreement as to the tariff the respondent may levy for the services rendered. This dispute was only settled on the date of the hearing.

[8] The first respondent contended that a long family feud between the appellant, the erstwhile co-executor and their late father created a mistrust between the two brothers making it difficult for the first respondent to release the requested documents without a guarantee that its account would indeed be settled once the files have been released.

[9] The appellants, through their legal representative, and the first respondent exchanged correspondence wherein each party communicated their views on what the way forward should be in the matter. The first respondent informed the appellants in a letter dated 11 June 2021 that it was in the process of obtaining an opinion from the second respondent and that it was not at that stage in a position to provide a breakdown of the costs. It wrote a follow up letter on 14 June 2021 asserting its right of retention. The appellants responded to these letters on 04 August 2021 requesting the first respondent to draft its bill of costs and submit it to the second respondent for taxing. On 12 August the appellants filed the application in the court a quo.

[10] The general rule in litigation is that the successful party is entitled to an order for costs. See **Texas Co. (S.A.) Ltd. v Cape Town Municipality**¹. The court, however, retains the discretion to award costs which discretion must be exercised judicially based on legal principles. As the starting point the court must determine whether any costs are payable to any of the parties. Once the court has decided that costs are payable it has to decide who of the parties is entitled to costs. This exercise cannot be embarked on capriciously or by chance, there should be sound legal principles upon which the decision is based.

[11] In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another**² Khampepe J remarked as follows quoting with authority **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**³

‘[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised —

‘judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles’.

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

¹ Texas Co. (S.A.) Ltd. v Cape Town Municipality 1926 AD 467 at 488

‘Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation ‘.

² 2015(5) SA 245 CC at par. 88 &89

³ 2000 (2) SA 1 CC ZACC 17) para 11

[89] In *Florence* ⁴Moseneke DCJ stated:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'

[12] A court exercising a wide discretion may choose from all the options at its disposal and award a cost order that it considers just in the circumstances of the case at hand. The court of appeal can only interfere if it is of the view that such order is not within the confines of the law. The court has to, *inter alia*, consider the conduct of the parties during the actual litigation process, all other matters that lead up to and occasioned the litigation and whether there were attempts to settle the matter before and during the litigation. The extent to which a party raised, pursued or contested a particular issue and whether it was reasonable for that party to pursue that issue. The court must consider whether a successful party exaggerated its claim in the course of litigation and whether it was necessary for the opposing party to oppose the claim stated in that manner. See **Fripp v Gibbon & Co**⁵

[13] In **Fripp v Gibbon** the court further held:

'I agree that as a rule it is fair and just that the costs should follow the event, whether of claim or of counterclaim. But I cannot agree with the view that the unsuccessful party should bear the burden of all the costs simply on the ground that in the final result he is the unsuccessful party. To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, prove

⁴ *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) (2014 (10) BCLR 1137; [2014] ZACC 22) (*Florence*) para 111.

⁵ *Fripp v Gibbon & Co.* 1913 AD 354 at 363

to have been unnecessarily or ineffectively incurred should, as a rule, be borne by the party responsible for such costs.'

[14] In the current matter there was exchange of correspondence between the parties, the last letter from the appellants being 8 days before the application was instituted. The first respondent had communicated its fears of its fees not being paid without an agreement on the scale at which such fees are payable and assurance that they will indeed be paid if files were released to the appellants. It then sought guidance from the second respondent in dealing with this issue. The animosity between the second appellant and the erstwhile co-executor and the fact that the director of the first respondent, Mr. Oosthuizen was reported to the Free State Law Society in the process of that feud made it difficult for the first respondent to just release the requested documents without some form of security or guarantee which guarantee the second appellant was not in a position to offer.

[15] The second appellant was not willing to concede to the costs on attorney and client scale until the date of hearing when the matter was eventually settled. It is only after the Master responded to the enquiry from the first respondent that the parties could settle the matter and the second appellant agree to the first respondent's costs on an attorney and client scale. It was not unreasonable for the first respondent to pursue its opposition of the application owing to the prevailing circumstances. The court a quo considered all these factors when exercising its discretion. I am unable to find that the court a quo failed to exercise its discretion judicially. The appeal ought to fail.

[16] I make the following order:

[17] **ORDER:**

1. The appeal is dismissed with costs.
2. The order of the court a quo is upheld.
3. The appellants to pay costs of the first respondent.
4. Costs to include that of Counsel.

N.M. MBHELE, DJP

I concur.

C. VAN ZYL, J

I concur.

S. BOONZAAIER, AJ

Appearances:

For the Appellants:	Adv. R. Van Der Merwe
Instructed by	Badenhorst Attorneys Bloemfontein

For the Respondents:	Adv. J.C. Coetzer
Instructed by	Lovius Block Attorneys Bloemfontein