



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

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

Case number: **A205/2017**

In the matter between:

THUSO ABRAM LEANYA

Applicant

and

**THE REGIONAL MAGISTRATE,
BLOEMFONTEIN**

1st Respondent

**NATIONAL PROSECUTING AUTHORITY:
FREE STATE**

2nd Respondent

CORAM: JORDAAN, J et DAFFUE, J

HEARD ON: 13 MAY 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 13 MAY 2019

I INTRODUCTION

- [1] This is an application for review of proceedings in the Regional Court, Bloemfontein. The application papers are in a chaotic condition and contrary to Uniform Rule of Court 62, read with this Division's Practice Direction 1/2015, incorrectly collated, secured and bound. We are confronted with two sets of heads of argument by applicant's counsel consisting of 210 pages, the last set filed as late as one court day before the hearing of this application. More will be said about the heads of argument later. Notwithstanding the condition of the application papers we decided to consider the merits of the application in the interest of justice.

II THE PARTIES

- [2] The applicant is Mr Thuso Abram Leanya, a former procurement officer of the Mohokare Local Municipality. He is the accused in the Regional Court, Bloemfontein, facing 186 counts of fraud and one count of money laundering. He is represented in the Regional Court by Adv Erwin Smit who also appeared on his behalf before us on the so-called "autonomous instructions" – whatever that means - of Tshepo Thusi Attorneys.
- [3] First respondent is the Regional Magistrate, Bloemfontein. She does not oppose the application and abides by the decision of this court.
- [4] Second respondent is the National Director of Public Prosecutions ("NDPP"). Adv JBK Swanepoel of the DPP, Free

State represented the NDPP before us. I shall refer to the NDPP as the respondent in this judgment as it is the only respondent who opposes the application, unlike what applicant's counsel pretended in his supplementary heads of arguments which I shall refer to later.

III THE RELIEF SOUGHT

[5] On 3 August 2018 applicant filed an amended notice of motion, signed by Mr Smit. This document, as is the case with the original notice of motion, refers extensively to case law, contains argument and several quotations. This is contrary to practice and more will be said about this later.

[6] Applicant seeks the following relief (if he is correctly understood notwithstanding the elaborate and even confusing manner in which the papers have been drawn):

- (1) That this court rule that respondent may not lead *viva voce* evidence at the trial of any witnesses whose statements are not contained in Part A of the docket, although these statements are captured on the CD presented to his legal representative months before he was called upon to plead;
- (2) That this court rule that the Justices of Peace and Commissioner of Oaths Act, 16 of 1963 and the 1972 Regulations issued in terms thereof are preemptory;
- (3) That the evidence of Ms T Swart and Ms A Barnard, who testified already in the main trial and were fully cross-examined, be declared inadmissible in that their witness statements were not contained in Part A of the docket,

although captured on the CD, and also insofar as the statements do not qualify as affidavits in that the oath was not administered properly (these females were referred to as “he” in the attestation clauses);

- (4) That the purported section 236¹ affidavits did not form part of Part A of the docket and furthermore, that these affidavits and the annexures thereto, *inter alia* bank statements of the complainant and applicant’s bank accounts, could not be used as documentary evidence in order to serve as *prima facie* proof and should be declared inadmissible; also that the commissioners of oath could not be called in the trial-within-a-trial to remedy defects to these documents.

IV THE OPPOSITION

- [7] The respondent *in limine* opposes the application on the basis that the trial court has not made any ruling on the admissibility of the witness statements and/or whether these affidavits may be used in accordance with the provisions of section 236.
- [8] The respondent also dealt with the merits in its opposition and insisted, based on section 35(5) of the Constitution, that evidence obtained in a manner that violates any right of the Bill of Rights shall be excluded if the admission thereof would render the trial unfair or otherwise be detrimental to the administration of justice. It is its case with reference to *Key v Attorney General, Cape Provincial Division & another*² that a “predilection for technical niceties and ingenious legal stratagems” should not be countenanced.

¹ Of the Criminal Procedure Act, 51 of 1977 (“the CPA”)

² 1996 (4) SA 187 (CC)

- [9] It also dealt with the pervasive feature of white collar crime cases where accused persons and their legal representatives embark on preliminary litigation in an effort to delay the start and/or conclusion of criminal cases.

V THE REVIEW OF UNCOMPLETED CRIMINAL PROCEEDINGS

- [10] Hancke and Pickering JJ considered the applicable principles pertaining to reviews of uncompleted criminal proceedings in *Motata v Nair NO*³ and for the sake of convenience I quote extensively from paragraphs [9] – [12]:

“[9] It is trite that, as a general rule, a High Court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a lower court. As stated in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* [1959 \(3\) SA 113 \(A\)](#) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point decided against the accused by a magistrate is fundamental to the accused's guilt. At 119H - 120A Ogilvie Thompson JA (as he then was) stated as follows:

‘It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or *mandamus* - against the decision of a magistrate's court given before conviction. (See *Ellis v. Visser and Another*, 1956 (2) S.A. 117 (W), and *R. v. Marais*, 1959 (1) S.A. 98 (T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (6th ed., vol. I p. 750) state: ‘While a superior court having

³ 2009 (2) SA 575 (TPD)

jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts.

At 120D, the learned judge continued: '(T)he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps a fundamental, contention raised by the accused, does not *per se* necessarily justify the Supreme Court in granting relief before conviction (see too the observation of MURRAY, J., at pp. 123-4 of *Ellis'* case, *supra*). As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal.'

[10] In *Ismail and Others v Additional Magistrate, Wynberg and Another* [1963 \(1\) SA 1 \(A\)](#), the following was stated at 5H - 6A:

'I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others v. Additional Magistrate, Johannesburg and Another*, 1959 (3) S.A. 113 (A.D.) at p. 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the

other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in uninterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained' (*Wahlhaus's case*, *supra* at p. 120).'

- [11] These principles have been applied in a number of later cases including *Sita and Another v Olivier NO and Another* [1967 \(2\) SA 442 \(A\)](#) at 447E - F; *Lombard en 'n Ander v Esterhuizen en 'n Ander* 1993 (2) SACR 566 (W) at 569e - f; *S v Western Areas Ltd and Others* [2005 \(5\) SA 214 \(SCA\)](#) (2005 (1) SACR 441) in para 20.
- [12] It has been stressed that underlying the reluctance of the courts to interfere in uninterminated proceedings in a lower court is the undesirability of hearing appeals or reviews piecemeal. See *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999 (2) SACR 13 (C) at 22e - f; *Nourse v Van Heerden NO and Others* 1999 (2) SACR 198 (W) at 207d - e; and *S v Western Areas Ltd and Others* (*supra*) where, in para 25, Howie P stated:
- 'Long experience has taught that in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course.'"

- [11] No decision and/or ruling has been made by the trial court and/or no action or inaction by the trial court requires any review and possible setting aside by this court. This observation does not mean that we entirely agree with the approach followed, but that is not the test.

[12] Applicant's counsel indicated on 23 May 2017⁴ that he wanted to take issues on review to the Constitutional Court or this court, but then decided against that. I quote the final discussion that took place between the trial court and counsel on 19 June 2017 when the matter was postponed to 26, 27 and 28 March 2018 in order to proceed with the trial-within-a-trial *verbatim*⁵:

"COURT: Right, so we do not, I am not expected to give a ruling at this stage with any interlocutory matter, because it has not been concluded. I will then suspend the trial-within-a-trial that we dealt with relating to the 236 statements at this stage, pending the addition of all these other issues the three objections raised by the defence. And you will then, I will the State to reopen its case in the trial-within-a-trial, to include evidence on these issues. And then we will proceed within the trial-within-a-trial on these issues up until you close your case on again. So your case can be reopened at this stage. I do not believe there will be an objection from the defence.

MR SMIT: It is in order, Your Worship; **that is actually what I wanted from the start;** as the Court pleases.

COURT: So Mr de Bruyn, your case is reopened.

PROSECUTOR: Thank you, Ma'am.

COURT: And the defence case is also reopened at this stage, because they did not provide any evidence, so it goes without saying that their case is also reopened for them to proceed at will to call any witnesses they consider relevant." (my emphasis).

[13] I am satisfied that, bearing in mind what has been stated herein, no exceptional circumstances have been shown why this court should interfere with the criminal proceedings pending in the trial court. This is not a rare case which may result in a grave

⁴ Transcribed record, pp 766 – 769.

⁵ Transcribed record, pp 794/5.

injustice. As Harms DP said in *NDPP v King*,⁶ potential prejudice may be rectified during the course of the trial and preliminary rulings may be revoked or amended, the effect hereof being that “(l)rrregularities do not lead necessarily to a failure of justice”. We do not live in a perfect world and there “is no such thing as perfect justice.” In paragraph [5] the learned judge relied on *Key*⁷ and *Thint (Pty) Ltd v NDPP & others; Zuma v NDPP & others*⁸ while commenting in strong language about the tendency of accused persons accused of white collar crimes to rely on technicalities and to embark on preliminary litigation with no intention to co-operate in a process that may lead to the finalisation of the criminal trial. In these case it is often the order of the day to attack the prosecution. This is exactly what has been happening in this case. Applicant went further and even attacked the trial magistrate as will be demonstrated.⁹ This should really be the end of the matter, but in fairness to the parties I considered it appropriate to briefly deal with the two pertinent issues raised by applicant.

VI THE BLANKET DOCKET PRIVILEGE RULE

- [14] The Constitutional Court changed the law relating to “blanket docket privilege” expressed in *R v Steyn*¹⁰ in the seminal judgment of *Shabalala & others v Attorney General of Transvaal & another*¹¹, finding the rule to be inconsistent with the Constitution.

⁶ 2010 (2) SACR 146 (SCA) at paras [4] & [5].

⁷ Footnote 2 *supra*.

⁸ 2008 (2) SACR 421 (CC) paras [65] & [66].

⁹ Par [23] (3) *infra*.

¹⁰ 1954 (1) SA 324 (A).

¹¹ 1996 (1) SA 725 (CC) at par [72].

- [15] The rule is easy to understand in our new democratic order and has generally been complied with to the best of my knowledge by prosecutors and State advocates ever since *Shabalala*. This case makes it clear that those documents contained in Part A of the Police docket, *i.e.* the witness statements, expert reports and documentary exhibits, may not be withheld from an accused based on a so-called blanket privilege. The information and documentation contained in Parts B and C of the docket, being internal reports and memoranda as well as the investigation diary, are privileged and the accused is not entitled thereto as a general rule.
- [16] In this matter applicant does not complain that access to the documents in Part A of the docket has been denied. His case is that he was provided with a CD containing much more evidence and evidential material than what is in essence contained in hard copy in Part A. Apparently, the report of the forensic auditors, PriceWaterhouseCoopers (“PWC”), including statements obtained by them from witnesses and documentary evidence such as bank statements of the complainant and applicant’s bank accounts do not form part of Part A of the docket or to use respondent’s terminology, “have not formally been married to the docket”. However, on 16 November 2015 the CD containing all these documents was made available to Mr Smit when he substituted applicant’s previous Legal Aid attorney. This was several months before applicant was called upon to plead to the charges which only occurred on 29 June 2016.¹²
- [17] It is not for this court to direct the trial court how to deal with the applicant’s insistence that *Shabalala* should be followed. I wish to

¹² Transcribed record, p 73.

make general comments only. *Shabalala* is not applicable. The applicant received the documents contained in Part A of the docket and as conceded, several further documents that the State intends to use which documents were timeously made available to the defence. The State has played open cards with the applicant and presented him with a forensic report with accompanying documents consisting of apparently seven lever arch files. Bearing in mind the number of lever arch files presented to the registrar of this court and the fact that the transcribed record is contained in the first two files only, voluminous documents have been provided to the defence. There is no complaint that they did not have sufficient time to peruse these documents. Mr Smit's reliance on *S v Molimi*¹³ is misplaced and without merit. In that case hearsay in the form of an extra-curial confession by a co-accused against the appellant which was not repeated during the trial, was allowed. The CC held that it was irregular for the trial court to make a ruling at the end of the case (that is after both parties have closed their cases). Such practice has the effect that "the accused will be left in a state of uncertainty as to the case he is expected to meet and may be placed in a precarious situation of having to choose whether to adduce or challenge evidence." The CC's finding is with respect correct, but the facts differ from those in this matter.

- [18] The evidence of the two State witness, Swart and Barnard, who testified in the main trial, cannot be declared inadmissible for the reasons advanced by applicant. If Mr Smit was caught by surprise, he could have asked for an adjournment to consider the statements and obtain instructions on the merits of their versions,

¹³ 2008 (3) SA 608 (CC) at par [42].

instead of criticising the State for alleged technical deficiencies. It is the *viva voce* evidence that the trial court must consider eventually and not whether the witness statements complied with the aforesaid Regulations. Witness statements, unless the CPA provides otherwise, cannot be handed in to serve as the evidential material before the court. Witnesses must, as a general rule, present *viva voce* evidence in order to be cross-examined.

- [19] I said earlier that we do not live in a perfect world and although it is advisable that all documents to be relied upon by the State are provided to the accused before a trial date is arranged, we know from experience that ballistic reports, DNA reports and several other documentary evidence are often obtained late and after the contents of Part A of the docket had been made available to accused persons. Matters are usually rectified by either postponing the case if so required, or for the matter to stand down for a while, to obtain proper instructions. It is common cause that the South African Police Service does not have the capacity to investigate white collar crime and in most of these cases forensic auditors are briefed to assist with the investigation. These reports and the documentary evidence relied upon in order to prove a proper paper trail are voluminous and it is not uncommon that these documents are captured in electronic format and not in hard copy. The mere fact that these documents are not included in Part A of the docket at the stage when the contents thereof are made available to the accused, or at all, cannot result in a situation where the State is prohibited from relying on those evidence as Mr Smit submits. It is always a matter of fairness and whether the accused is prejudiced to such an extent that he

did not receive a fair trial. I have not heard any word from the accused that he had been prejudiced or will be prejudiced if evidence is allowed. The fact that he might be convicted based on admissible evidence cannot be regarded as prejudice.

VII THE ALLEGED UNSWORN STATEMENTS

- [20] Statements that do not comply with the legislation and regulations may be found to be defective to the extent that no reliance can be placed on them for purposes of section 236. Mr Smit referred to several judgments, some which are in favour of his argument and some against him. The trial court must still rule on this issue and it would be premature to present this court's view on the matter. It needs to be clarified: I do not refer to witness statements in general, but to those statements and/or affidavits provided by the CPA to be handed in as *prima facie* proof, such as is the case with section 236.
- [21] The purpose of section 236 is clear. It obviates the necessity of calling bank officials to hand in documents which should in most cases not even be in dispute; therefore to shorten the proceedings. We do not know what the applicant's defence is, but it is a concern that a major issue is made of evidence relating to the bank statements of his former employer, the complainant in the criminal case, and his own bank statements. I say this, having noted from the charge sheet and annexure thereto that it is the State's case that in 186 instances specified amounts of money were transferred on specified dates over a number of years to accounts of the applicant. The total amount is approximately R900 000.00.

[22] Even if the trial court finds that the statements (affidavits) could not be handed in in terms of section 236, it will not be the end of the matter. Nothing would then prevent the respondent to call the particular witnesses, the bank officials, or if they are not available anymore, other bank officials in control of the bank statements or who can positively testify about the statements, to testify for the State. Mr Smit submitted to the trial court that such *viva voce* evidence would not be admissible in the following words:¹⁴

“It means that you cannot enter the court without disclosing the evidence to the defence, and if it is not affidavits, there is nothing we can work out, because they can come in and now tailor the evidence, because we do not have anything under oath to bind them upon, and that is the argument here.”

Mr Smit's submission appears to be that if there was no compliance pertaining to attestation of all the affidavits (statements) - not only the section 236 statements - but all other witness statements in the docket or contained on the CD, then the State would not be in a position to present any admissible evidence at all and his client would go free. This is absurd and the argument is rejected. Justice is not a one-way street: an accused is entitled to a fair trial, but the State, representing the public and acting in the interest of the public purse in this instance, is entitled to fairness as well. The irony of Mr Smit's argument is that he indicated initially that he would not have any objection if the witnesses who testified in the trial-within-a-trial were called to testify in the main trial, but when the trial magistrate indicated that he was confusing her, he changed tack and made it clear that on “face value of the State's case files, the State

¹⁴ Transcribed record, p 113/4.

is not in a position to lead any further evidence in this matter, because it is inadmissible So we say all the affidavits are inadmissible because of the presumption of irregularity.”¹⁵ I quote from the transcribed record as Mr Smit has *ad naseam* made the same submissions in this regard and on other aspects from the onset and continued to do so in this court. His argument is rejected.

VIII THE CONDUCT OF APPLICANT’S COUNSEL

[23] Mr Smit was requested to address the court in view of the respondent’s stance that he should be ordered to pay the costs of the application *de bonis propriis*. His attempts in this regard were not at all meritorious. The following conduct requires censure:

- (1) He failed to accept the CD and insisted on hard copies of the documents captured on the CD. This reminds me of Mr King who wanted the prosecution to present him with copies of all relevant documentation free of charge. The SCA stated that “the application was cynical, and without any merit and was brought purely with a view to delay the criminal proceedings.”¹⁶
- (2) The change of attitude pertaining to the trial-within-a-trial cannot be overlooked. The real issue to be addressed was the admissibility of the documents pretending to be affidavits for purposes of section 236 of the CPA. During the proceedings and after the State has closed its case, Mr Smit decided to attack the authority of PWC, the forensic auditors, who had been mandated by the complainant to do a forensic audit. He even went so far to attack the validity

¹⁵ Transcribe record, pp 286 -288.

¹⁶ National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA) at par [8].

of the procedure undertaken by the State in terms of section 205 of the CPA to obtain evidence from bank officials. This caused the trial court to widen the scope of the trial-within-a-trial procedure, causing the court to rule that that process should be continued, and by agreement with the parties, their cases were reopened to allow them to lead evidence in respect of these issues as well.¹⁷

- (3) The manner in which the trial court was referred to in Mr Smit's heads of argument is atrocious. It is indicative of an arrogant, unprofessional and unethical approach by counsel which I have never come across. The trial magistrate is labelled in the initial heads of argument as the "main culprit" and when respondent's counsel pointed this out, Mr Smit tried to escape from being reprimanded by quoting a less damning meaning of "culprit" and relying on the fact that he is actually Afrikaans speaking. It is not necessary to become involved in semantics, but the New Oxford Dictionary defines "culprit" also as "a person accused of a criminal offence" and even "a person guilty of a criminal offence." Mr Smit, instead of tendering an excuse, carried on in his supplementary heads by stating that it "is highly irregular that the National Prosecuting Authority is representing the First Respondent" (the trial magistrate); (T)he independence of the Regional Court has been tarnished here as well as the National Prosecuting Authority is now the mouthpiece of the 'Regional Court'; and "(S)uffice to say that the custom of citing the 'Regional Magistrate' in litigationshould actually change in future as it is actually the 'Regional Court Bloemfontein as per the Honourable Magistrate Soomaroo' who is on

¹⁷ See footnote 5 and the particular quotation.

trial here. In other words the Criminal Regional Court Bloemfontein is on trial here.” To say the least, this is outrageous speech by a legal practitioner that should not be tolerated. He knows that the first respondent decided to abide the decision of this court, but apparently relied on a mistake in the covering sheet filed by the State Attorney referring to “respondents” heads of argument – the plural form - instead of to second respondent’s heads. Mr Smit’s unwitty approach is deplorable.

- (4) The manner in which this court was addressed in the heads of argument is also far from what is expected of a legal practitioner. I do not intend to refer to several examples of an arrogant attitude displayed towards the court.
- (5) The fact that Mr Smit took over the role of attorney is indicative of the subjective manner in which he approached the litigation from the onset and in this court as well. He not only signed the amended notice of motion and the notice of set down which is the obligation of the attorney and not counsel, but the applicant’s attorney was actually side-stepped and possibly ignored in the process. It is apparent from the documents that Mr Smit is not a member of any recognised society of advocates, but a private investigator and member of L.A.P.I., also known as Legal and Private Investigations.
- (6) Clearly, the application bundles have been prepared by Mr Smit and not his attorney. These do not comply with the court’s Practice Directive 1/2015. The documents, some of them being printed double-sided, are not bound in such a way that permit both sides to be fully legible without turning

one's head or neck 45 degrees clockwise or by turning the document the same degrees anti-clockwise. Furthermore, Mr Smit saw it fit to attach his various written submissions presented to the trial court to the founding affidavit, whilst both notices of motion are in essence consisting of legal argument – all and all, we have been presented with an application and heads of argument in excess of a thousand pages, excluding the two volumes in excess of 800 pages consisting of the charge sheet, evidence and repetitive oral and written submissions presented to the trial court;

- (7) Applicant caused the trial court to arrange for the record to be transcribed and copies to be made of numerous exhibits which is a prescript of rule 53 – a total of eleven lever arch files have been filed with the registrar of this court – but then Mr Smit decided that the transcribed record is irrelevant, although extracts thereof have been made and attached to his papers as it pleased him.
- (8) The two lengthy heads of argument with unnecessary repetition and quotations from legislation, other documents and case law are inconsistent with vested practice. Mr Smit would be well-advised to study retired Deputy President Louis Harms' article with the title, *"Heads of argument in courts of appeal"* in *Advocate*, December 2009 edition. He has no idea of the meaning of "concise." Both Uniform Rules of Court 49(15) and 50(9), dealing with appeals, state that "concise and succinct" heads of argument shall be filed, dealing with the "main points (without elaboration)." Superfluous matter such as lengthy quotations should be eliminated or at least kept within reasonable bounds. Excessive prolixity

may be penalised.¹⁸ The first set of heads of argument comprises 239 pages. On Friday 10 May 2019, the last court day before the hearing, Mr Smit filed 68 pages of supplementary heads of argument. The Rules of this Division¹⁹ do not provide for what is in essence a written response to the respondent's heads of argument. In this instance Mr Smit responded to an extent to the submissions of the respondent, but again repeated what has been submitted in the first heads and also on more than one occasion in the criminal trial. Thirty years ago, Hefer, JA commented on this issue in *Van der Westhuizen NO v United Democratic Front*²⁰ in no uncertain terms and disallowed counsel's fees for drafting their heads of argument and ordered that their opponents' heads of argument shall be taxed on the basis that they comprise twenty pages only.

[24] Punitive costs orders against attorneys are granted from time to time. See *Machumela v Santam Insurance Co Ltd*²¹ and *SA Liquor Traders' Association v Gauteng Liquor Board*.²² In the last-mentioned case O'Regan, J held that an order of costs *de bonis propriis* is warranted where the negligence of the attorney is of a serious degree. The order is made "as a mark of the court's displeasure." The CC cited *Machumela supra* and *Waar v Louw* quoted in *Webb v Botha* hereunder with approval. Similar orders

¹⁸ Erasmus Superior Court Practice, D1- 661 to 693 and authorities relied upon.

¹⁹ Rule 13(4) in particular.

²⁰ 1989 (2) SA 242 (A) at 252 B – H. See also: *SA Post Office v De Lacy* (19/08) [2009] ZASCA 45 (13 May 2009) at paras [7] & [8].

²¹ 1977 (1) SA 660 (A) at 664B.

²² 2009 (1) SA 565 (CC) at par [54].

against counsel are rare especially insofar as advocates are not directly involved with the affairs of clients and do not drive the litigation. In this matter counsel was actively in charge of proceedings from the first day he took over in the criminal court. A perusal of the record serves as proof that he never requested an opportunity to obtain instructions from his attorney. In fact, he even allowed his client to sign heads of argument and other written submissions clearly drafted by him and presented to the trial court. In this court he acted as the attorney, signing the amended notice of motion and the notice of set down. His address in Pellissier, a residential area, was used as the address for delivery of documents. His attorney, if he is still to be regarded as such, has taken a back seat and was apparently not involved in the litigation in this court, save insofar as he has signed the original notice of motion which was obviously drafted by Mr Smit.

[25] In *Webb & others v Botha*²³ the court dealt with an attorney that was known for his propensity of taking highly technical and often ill-considered objections and I quote the following:

“In any event, Mr van Wyk ought to have advised his client to abandon the judgment when he received the magistrate’s written judgment and not to have waited until costs had been incurred by the preparation of copies of the record. Had he been unable to unearth any “defects” in the papers he would presumably have advised his client to concede the appeal, or he might, having regard to his propensity for taking highly technical, and more often than not ill-founded, objections, even have found some other point on which

²³ 1980 (3) SA 666 (N) at 672C – 673H

to resist the appeal, in either of which events his client would have become liable for costs.....

As was pointed out by MT STEYN J in *Waar v Louw* 1977 (3) SA 297 (O) the Courts have in the recent past tended to make attorneys pay for their mistakes. MT STEYN J stated the reason for this as follows:

“Die prokureursamp is ‘n hoë en verantwoordelike amp. Die prokureursberoep is ‘n geleerde beroep wat groot vaardigheid van sy lede verg. Foute wat ‘n prokureur in gedingvoering begaan en wat onnodige koste tot gevolg het, moet derhalwe nie ligtelik oorgesien word nie. En ‘n gedingvoerder behoort nie altyd verplig te word om self die koste te betaal wat deur die nalatigheid van sy Prokureur veroorsaak is nie.”

He went on to mention “oneerlikheid, moedswilligheid of nalatigheid van ‘n ernstige aard” as examples of the kind of conduct which will be visited with an order for the payment of costs *de bonis propriis*.

[26] In *Absa Bank Ltd v Public Protector*²⁴ the full court commented as follows:

“The issue as to what order of costs would be appropriate falls primarily within the discretion of a Court which must be exercised in a judicial manner. Generally speaking, a Court will not grant an order for costs to be paid personally where a litigant is acting in a representative capacity. Herbstein & Van Winsen give the following summary of the law in this regard:

“A representative litigant whose conduct is so unreasonable as to justify this special order can, despite acting in good faith, be ordered to pay the costs de bonis propriis. The Court will not, however, make such an order lightly, and mere errors of judgment will not be sufficient. It has been held that such an order should not be granted in the absence of some really improper conduct, and that the fairness or unfairness of proceedings honestly brought should not be scrutinised too closely. The criterion has been stated to be actual misconduct of any sort or recklessness, and the reasonableness of the conduct should be judged from the point of view of the person of ordinary

²⁴ [2018] 2 All SA 1 (GP) at par [125].

ability bringing an average intelligence to bear on the issue in question, not from that of the trained lawyer."

- [27] It is apposite to mention *Turnbull-Jackson v Hibiscus Coast Municipality*²⁵ as Mr Smit has made much noise about the trial magistrate, unnecessarily attacked her personally as indicated above and already paved the way to eventually launch an application for her to recuse herself. Madlanga, J said the following about an allegation of bias against a decision-maker: "This would be the easiest stratagem for the unscrupulous to get rid of unwanted decision-makers: if I insult you enough – whatever enough may be – you are out."
- [28] Mr Smit must take the brunt of the court's displeasure with his attitude and actions in light of the authorities quoted and upon this court exercising its discretion. He must be held liable in his personal capacity for a portion of the costs incurred herein. This matter should be referred to the Free State Society of Advocates to be dealt with in an appropriate manner.
- [29] The applicant should be ordered to pay some of the costs as well as he must have played a not too insignificant role in the tactics adopted herein. In my view it would be fair if applicant is ordered to pay 50% of the second respondent's costs of the application and his counsel, Adv Erwin Smit the balance of 50% *de bonis propriis*. They shall also pay the first respondent's costs of preparing and copying of the transcribed record and all documentation contained in the eleven lever arch files filed with registrar in equal portions.

²⁵ 2014 (6) SA 592 (CC) at par [32].

IX CONCLUSIONS

- [30] In conclusion it is confirmed that applicant has failed to show that any irregularities, not to speak of reviewable irregularities, have been committed by the trial court, and even if that was the case, that any exceptional circumstances exist why this court should intervene midstream in the part-heard proceedings in the Regional Court.
- [31] The costs should follow the event, but as mentioned earlier, applicant's counsel should be ordered to pay a portion of the second respondent's costs as well as the costs of preparing and copying of the record in order to show this court's disapproval of the manner in which he has conducted him thus far, not only in the trial court, but in this court as well.

X THE ORDERS

- [32] The following orders are issued:
- (1) The application is dismissed.
 - (2) Applicant and his counsel, Adv Erwin Smit, shall each pay 50% of the second respondent's costs in opposing the application as well as the first respondent's costs of preparing and copying the transcribed record, inclusive of all documentation such as the charge sheet and exhibits contained in the eleven lever arch files filed with the registrar of this court.
 - (3) The matter is referred to the Free State Society of Advocates to consider the approach of Adv Erwin Smit to the litigation and to take appropriated steps it may deem fit.

J P DAFFUE, J

I concur

JORDAAN, J

On behalf of Applicant : Adv E Smit
Instructed by : Tshepo Thusi Attorneys
Bloemfontein

On behalf of 2nd Respondent : Adv JBK Swanepoel
Instructed by : NDPP
c/o the DPP, Free State
BLOEMFONTEIN