



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
2012.02.23	J. M. Joubert
DATE	SIGNATURE

CASE NUMBER: 46085/11
DATE: 24 February 2012

MARK SCALE JOUBERT	FIRST APPLICANT
JEAN MARTHA JOUBERT	SECOND APPLICANT
ADRIAAN LOUW SMITH N.O.	FIRST RESPONDENT
THE MASTER OF THE HIGH COURT	SECOND RESPONDENT
MARIA MAGDALENA JOUBERT	THIRD RESPONDENT
THE REGISTRAR OF DEEDS	FOURTH RESPONDENT
THE STANDARD BANK OF SOUTH AFRICA LIMITED	FIFTH RESPONDENT

JUDGMENT

MABUSE J:

1. The applicants, Mr. Mark Scale Joubert, the first applicant and Mrs. Jean Martha Joubert, the second applicant, seek a number of orders. Firstly, they seek an order in terms of which an agreement of sale of a property known as Erf. No. 110, Erasmusrand, Registration Division JR, the Province of Gauteng, measuring 1983 m² (“the property”) is set aside; secondly, that the first and final liquidation and distribution account of estate late Grant William Joubert 1938/2011, alternatively, such other liquidation and distribution account in the said estate as may have been filed with the second respondent, be set aside; thirdly, that the transfer of the said property from the Estate of the late Grant William Joubert (“Grant”) to the third respondent be set aside and that the said property be reinstated from the third respondent to the Estate of the late Grant William Joubert at the third respondent’s costs; fourthly, that the transfer of the property from the second applicant to the late Grant William Joubert be set aside and that the said property be retransferred from the estate of the late Grant William Joubert to the second applicant at the costs of the said estate against the restitution of such moneys as may be due to the estate of the said Grant William Joubert in respect of the purchase price; and fifthly, that Grant William Joubert’s estate and the third respondent be ordered to pay the costs of this application jointly and severally on a scale between attorney and client.

THE PARTIES

2. The first applicant is an adult businessman who lives at 35 Upper Kildare Crescent, Fishhoek in Capetown. He applies in this matter as an interested party in so far as he was an heir in his late father’s estate. The second applicant is a widow who stays on the property in question. She is the widow of one William Rous Joubert (“Rous”) who died on 4 July 2002 and the mother of the first applicant and the deceased Grant William Joubert (“Grant”). Grant passed away on 6 January 2011. By Letters of Executorship issued by the Master of the High Court (“the second respondent”) in Pretoria on 8 February 2011 under number 1938/2011, the first respondent, a major male employed by Stabilitas Board of Executors (Pty) Ltd, of Third Floor Stabilitas Chambers, 265 Kent Avenue, Fendale, Randburg, was appointed as the executor of the estate of late Grant. He is cited in this matter in his capacity as the executor. The second respondent is the Master of the High Court in Pretoria. The third respondent, Mrs. Maria Magdalena Joubert (“Magdalena”) is a major female who lives at 302 Schoongezicht Street, Erasmusrand, Pretoria, the other name by

which the property is known. She is the widow of Grant. The property which constitutes the subject matter of the sale agreement which the applicants seek to have rescinded is registered in her names. The applicants seek no relief against her. The fourth respondent, who is cited in his official capacity, is the Registrar of Deeds who has been appointed as such in terms of the provisions of s. 2 of the Deed Registries Act No. 47 of 1937 of Merino Building, corner Pretorius and Bosman Streets, Pretoria. Again no relief is sought against the fourth respondent. The fifth respondent is a registered commercial bank in accordance with the provisions of the Banks Act No. 94 of 1990 and has its registered office at Standard Bank Centre, 5 Simmonds Street, Johannesburg. The reason for citing the fifth respondent is that it has a vested interest in the property having granted a mortgage bond over the property under number B15556/2004. No relief is sought against the fifth respondent.

THE FACTS

3. During the year 1979, Rous, who at the time was married out of community of property to the second applicant, purchased the property. After his death in 2002, the second applicant inherited the said property by virtue of the provisions of a joint will made by her and Rous on 26 June 1997. The salient details of the said will are set out hereunder:

“3

We bequeath the entire estate of the first dying of us to the survivor of us ...

4

Should we die simultaneously or within 30 (thirty) days of each other or in such circumstances in which the survivor is unable to make a further will, we direct that our entire separate estates are to be consolidated and we bequeath the following assets in our estates as follows ...

4.2

We further direct that the balance of our entire separate estates which have been consolidated are bequeath in equal shares to our two sons the first applicant Scale Joubert, Identity number 610518 5194 082 and Grant William Joubert; Identity number 641202 5082 000. “

4. The second applicant contends that by drawing their joint will in the manner in which they did, she and Rous had wanted to make sure that the property would remain with both her sons jointly after their passing away. Shortly before Rous died Grant constructed, with the full knowledge and consent of, and, agreement with Rous, a garden flat on the property. This garden flat was constructed on certain conditions, inter alia, that Grant himself would construct the garden flat on the property and she and Rous agreed; that ownership of the property on which the garden flat had been built would pass to the surviving spouse of the two of them and that in the event of the survivor of them dying, ownership of the property would pass to the joint ownership of the first applicant and Grant, share-a-share alike. In determining the value of each such shares, the first applicant undertook to compensate Grant in an amount equal to the amount Grant spent in constructing the garden flat in addition to a proportionate amount based on the property valuations to adjust for the increase or decrease in the pertaining value of the property.
5. In order to fund the constructions of the garden flat, Rous undertook, on Grant ceding his rights, title and interests in sufficient insurance policies in his favour, to register a further mortgage bond in the sum of R200 000.00 over the property. She would then inherit the proceeds of the aforesaid ceded insurance policies in the event of Rous dying.
6. After Rous had passed away on 4 July 2002, the second respondent inherited the property in accordance with clause 3 of their joint will. Following such inheritance, the property was registered in the second respondent's names and deed of transfer T12175/2003 was accordingly issued to her. During 2003 Grant approached her and proposed that he should secure "*an early inheritance*" and in doing so he would buy the property from her. She agreed to Grant's proposal on conditions firstly that Grant compensated the first applicant in the sum equal to one half of the value of the property as at the time he purchased it and, secondly, that Grant should obtain the first applicant's approval to purchase the property from her as the property would have constituted the biggest asset in their individual estates.
7. She contends furthermore that she would never have sold the property to Grant if the first applicant did not approve and, secondly, if Grant was not prepared to secure The first applicant's share in the said property.

8. During late 2003, she fell very ill. As a result of her illness, she was admitted to No. 1 Military Hospital on a regular basis as a result of which she was unable to remember that she signed a deed of sale, the power of attorney to pass transfer and some supporting documents. She was indeed concerned about the first applicant's interests in the property to an extent that after the sale of the property she kept on asking Grant if the first applicant had approved of it. Grant repeatedly reassured her that everything was in order. Up to the year 2010 the second applicant was under an impression that Grant had obtained the first applicant's approval before he could purchase the property and furthermore that he had compensated him in the amount equal to one half of the value at the time of the purchase.
9. The third respondent, as indicated earlier, is now the registered owner of the property by virtue of the will that Grant had drawn. Her major concern is that as a consequence of the deceptive actions of Grant, the first applicant has been deprived of the bulk of his inheritance and that his inheritance has benefited Grant's estate.
10. The first applicant's interests in the property was that he had been told or given to understand by Rous and the second applicant that his inheritance would comprise of one-half share of the consolidated estates of the survivor of his parents or that in the event of the parents dying at the same time one half share in the balance of such consolidated estates of both parents.
11. He confirmed that Grant did not obtain his approval when he purchased the property and furthermore that even after he had purchased it he did not compensate him at all. Grant purchased the property from the second applicant for R450 000,00 and later attempted to sell it for R2.2 million. He contends furthermore that Grant deprived him of his inheritance from his parents.
12. Gerrik Hendrik Nel could only say that he drew the joint will and last testament after he received instructions from Rous. His specific instructions were to draw the will in the manner in which he did.

13. The third respondent has expressed satisfaction in the expertise exhibited by Nel in drawing the first and final liquidation and distribution account ("the account") in the estate of the late Rous. Over and above her satisfaction, she has praised Nel to the skies for her expertise. She contends that at the time the said account was drawn and a draft copy thereof was sent to the second respondent for her perusal by Nel under cover of a letter dated 7 February 2003, the second respondent had been a house wife most of her life.
14. A copy of the said draft account showed quite clearly that there was a substantial cash shortfall. Even the final account showed a shortfall of R298 828.99. This shortfall was supposed to be made good by the second respondent paying an equal amount into the estate in order to prevent the estate assets, in particular the property, from being sold in order to defray the estate liabilities. Due to the fact that there was a cash shortfall and that the second applicant was impecunious, she was faced with two very difficult situations to resolve. Firstly, she had to pay the cash shortfall of R298 828.99 but had no financial resources whatsoever to do so. She had to take over the bond registered over the property. She could not do so because she was unemployed and had no money or source of income to maintain the bond.
15. It was Grant who came to her rescue by purchasing the property following a valid memorandum of sale entered into on 8 October 2003. Grant purchased the property from the second respondent for R450,000.00. The property was then registered in his names. In addition he took over the responsibility of paying the monthly instalments in respect of the property.
16. She disputed the applicant's contention that, after Grant had bought the property, he was obliged to compensate the first applicant. This she did on the ground that Grant had paid the full purchase price to the second applicant. According to her if the first applicant was satisfied that, under these circumstances he was entitled to be compensated by Grant and that Grant did not oblige, he was free to sue for damages.
17. When this matter came before court on Monday 6 February 2012, I indicated to the parties at the outset that I was reluctant to hear the matter if there was no prayer in which the approval by the second respondent of the first and final liquidation and distribution account

in the estate of Grant was not set aside. The matter was adjourned to a later date in order to enable the applicants to effect the necessary amendment of the notice of motion by the addition of a prayer to that effect. The notice of intention to amend the notice of motion was served on the second respondent who then indicated that he would not oppose the application and furthermore that he would abide the decision of the court.

18. It would have been otiose to proceed hearing the matter when there was no prayer in which, as I indicated earlier, the second respondent's approval of the said account had been challenged. The anchor of the prayers that the applicants sought was the said account. The property in question had been registered in the names of the third respondent in terms of a devolution set out in the account of Grant. The approval by the second respondent of a liquidation and distribution account amounts to a decision which occupies the same level as an order of the High Court. Accordingly the matter could not be heard while the decision of the second respondent remained intact.
19. The dispute between the parties is whether, in agreeing to sell the property to Grant on 8 October 2003, the second applicant was induced by fraudulent misrepresentations made to her by the said Grant. It is the applicant's case that the second applicant's agreement to sell the property to Grant was unduly and fraudulently influenced by certain misrepresentations made by Grant. Those misrepresentations were firstly, that she had agreed to sell the property to Grant only if Grant were, as he had undertaken, to compensate the first applicant in the amount equal to one half of the value of the property as at the time he purchased it from her and, secondly, only if he had obtained the first applicant's approval to purchase the property. It is common cause between the parties that Grant did not compensate the first applicant in any amount whatsoever and furthermore that he purchased the property from his mother without having obtained his approval. It is also common cause that the parties themselves had fixed the value of the property at R450,000.00. Accordingly, it is the applicant's case that Grant should have paid the first applicant one half of the said amount.
20. It will be recalled that, according to the third respondent, Grant had no obligation to pay the first applicant one half of the value of the R450,000.00 because the second applicant received all the money and thereby the complete value of the property. Grant could

therefore not pay one half of the said amount to the first applicant. It is common cause that the estate of Rous had estate liabilities amounting to R293,032.76. In order to defray these liabilities the second applicant would have had to pay an equal amount into the estate or sufficient assets of the estate would have had to be realised in order to cover the cash shortfall. The second applicant could not afford to pay any amount into the estate as she did not have it. She also did not have any source of income. Seemingly as the surviving spouse of someone who was in the navy she received some stipend which was basically meant to sustain her and not to pay Rous' estate debts.

21. There is no evidence that the first applicant himself had any money that he could contribute towards the estate liabilities. In fact nowhere in the evidence is there any mention that the first applicant contributed towards the estate liabilities or volunteered to do so. The third respondent had testified that Rous' estate was insolvent. This was denied by the first applicant who correctly pointed out that the said estate was not insolvent. He conceded however that it had a cash shortfall of R 293,032.76 but added that the said shortfall was covered by the sale of Rous' shares. There is no evidence that the proceeds of the sale of the shares were sufficient to cover the cash shortfall.
22. There is also no evidence as to whether or not the value of the shares was assessed and whether or not the amount that they fetched when they were sold was sufficient. In fact there is no evidence but only a bare assertion by the first applicant that the said shares were sold. If indeed that was so this could have been reflected in a supplementary account. There is therefore no proof that any person other than Grant contributed financially towards the liquidation of the estate liabilities. I accept the evidence of the third respondent that in order to save the estate assets and to defray the estate liabilities Grant bought the property in 2003. It is the manner in which the property was bought more than anything that constitutes the battlefield of the parties.
23. Referring to the written agreement of sale, Mr Uys, counsel for the third respondent, argued that the said property was not sold subject to any conditions or terms other than such conditions and terms as were contained in the agreement itself. Relying on the authority of *Johnston v Leil 1980(3) SA 978 (A) at 943 B*, he argued that where parties have decided to record their contract in writing, their decision will be respected and the resulting

document or documents will be accepted as the sole evidence of the terms of the agreement.

24. Clause 3.1 of the parties' written agreement of sale provided that the second applicant sold the property to Grant on the terms and conditions which had been "fully set out" in the agreement. The word "fully" suggested that the complete conditions and terms of the agreement had been fully set out in the written agreement and that no terms or conditions which were relevant to the agreement had been left out. It provided as follows:

"The Seller hereby sells to the Purchasers who hereby purchases the Property on the terms and conditions as more fully set out in this Agreement."

Clause 2.4.4 of the agreement stated it unambiguously and convincingly that the parties' written agreement contained all the terms and conditions in terms of which the second applicant sold the property to Grant. The said clause 2.4.4 had the following to state:

"... this agreement set out the terms and condition in terms of which the Seller sells the Property to the Purchaser."

25. In terms of the provisions of clause 11.1.2 of the said agreement the second applicant and Grant made it known to each other at the conclusion of the said agreement that neither of them was aware of any facts or circumstances which would materially influence the other of them from entering into the agreement and which was not contained in the said agreement. The two grounds on which the applicants challenge the validity of the agreement of sale in particular were not part of the terms and conditions on which the second applicant and Grant were prepared to conclude their agreement. The duty rested on each one of them to ensure that all the terms and conditions on which either of them intended to contract with the other of them were contained in the said agreement. The obvious purpose of this clause was to ensure that the agreement expressed the full conditions and terms upon which the parties contracted with each other; that the sanctity of the contract would not be challenged later by either of the parties on the basis that the agreement did not contain all

the terms and conditions and that neither of them should find it necessary to resort to extrinsic evidence in order to prove the terms and conditions of the agreement.

26. The terms or conditions on which the applicants rely to challenge the validity of agreement are not contained in the parties' written agreement. The second applicant signed the agreement well knowing that such terms or conditions had not been recorded in the agreement. In the absence of any special circumstances, which I must add, it was the duty of the second applicant to show to the court, a party that signs the agreement, whether or not such a party knew the contents of such an agreement, is treated as having assented to it. About such a party, Innes CJ had this to say in **Burger v SCAR 1903 TS 571 at 578**:

"It is a sound principle of the law that a man, when he signs a contract is taken to be bound by the ordinary meaning of the words which appear over his signature."

27. The applicants' situation is exacerbated by the fact that the parties' contract contained a non-variation provision in clause 11.2. This clause stipulated that no alteration, cancellation, variation or addition to the parties' agreement would be of force and effect unless such alteration or cancellation or variation or addition was contained in a document signed by the parties. Finally clause 11.3 contains an agreement between the parties that the document contained the entire agreement between them and that neither of them would be bound by any unrecorded undertaking or representations or warranties. Mr Uys argued that any reference by the applicants to the grounds on which they challenged the validity of the agreement is an attempt to employ extrinsic evidence in order to prove the terms of the agreement. He opined that such an attempt should not be allowed. On this basis he urged this court to dismiss the application.
28. The second applicant contended that during 2003 she fell ill and was resultantly regularly admitted to No. 1 Military Hospital. During or about that time she signed a deed of sale, a power of attorney to pass transfer and other documentation necessary to transfer ownership of the property to Grant. It is common cause between the parties that the second applicant signed the aforementioned documents. It is not the second applicant's case that she did not know that she was signing the said documents because she was admitted at the hospital. On the principle set out in **Burger v SCAR supra** the second

applicant must therefore be regarded, for all intents and purposes, as having assented to what was contained in such documents. She is accordingly bound by what she signed. She contended furthermore that after Grant had purchased the property from her and up to and including December 2010, she believed that Grant had purchased the property or had secured the first applicant's approval before he purchased the property from her. According to her testimony, the second defendant only became aware when the first applicant instructed an attorney to peruse the relevant records at the offices of the fourth respondent that Grant had purchased the property without paying the first applicant. It was only at this stage that the first applicant became aware that Grant had purchased the property from the second applicant.

29. There is a dearth of essential details around the two grounds upon which the applicants challenged the validity of the agreement. In the first place on 7 February 2003, the executor sent a copy of the account in estate of the late Rous to the second applicant under cover of a letter of the same date. In the said letter the executor made it known to the second applicant that the original account had been forwarded to the office of the second respondent. At this stage the second applicant was aware or should have become aware about the cash shortfall and that such a shortfall could be reduced by the realisation of the shares. Of utmost importance is her attitude towards the shortfall and what could be done about it. One would have expected that she would discuss the condition of her late husband's estate with her two sons and invite them to fashion out a solution. There is no evidence that she did and no explanation has been proffered why she did not. The first applicant has not testified about it either. There is also no indication whatsoever that she took steps to discuss the estate problems with the two sons, notably the first applicant, to find a last resolution to the issue of the shortfall. In my view, the allegation that the second applicant only became aware in December 2010 that Grant had purchased the property without having paid the first applicant and without having obtained his approval coupled with her failure to explain why she did not discuss the problems pertaining to Rous's estate carries very little weight.
30. There is no evidence whatsoever as to when Grant was supposed to compensate the first applicant and the manner in which such compensation would have taken place. No

evidence has been adduced as to how the bond on the house would have been dealt with and who would have taken over payment of the instalments of the bond.

31. With regard to the second ground, that Grant could only purchase the property if he obtained the first applicant's approval, again there is a paucity of details in this regard. No evidence has been placed before the court, firstly, that Grant agreed to the condition and secondly no evidence as to when and how such approval by the first applicants could be obtained. In her affidavit the second applicant stated that:

"I do however recall being concerned about The first applicant's interest and repeatedly asking Grant, before and after the sale of the immovable property, if he had in fact obtained the first applicant's approval and reimbursed the first applicant. In answer to the same Grant repeatedly reassured me that everything was fine and taken care of. I naturally trusted my son and at the time had no reason not to believe wholeheartedly in what he said to me."

32. What is certain about the second applicant's conduct is that firstly she herself never took any steps to discuss the terms or conditions of the agreement with the first applicant. No explanation has been given in the affidavit as to why the second applicant never discussed the agreement with the first applicant or enquire from the first applicant himself whether he knew that Grant wanted to purchase the property and that he had agreed to Grant's offer on certain terms or conditions. This flies across her declared wishes that she was interested in the first applicant getting what in her view was due to him.

33. Although Grant bought the property in 2003, it took her a little over seven years to find out that Grant had not, according to her own version, paid the first applicant. The second applicant has furnished no valid reason why she did not discover earlier that the property was registered in Grant's names without him having paid the first applicant anything and without him having obtained the first applicant's approval. It was argued by Mr. Wesley that the second applicant's version that she only became aware in 2010 that the property had been registered in Grant's names without him fulfilling the terms and conditions was not contradicted by the third respondent. That is not correct because the third applicant herself testified that:

“I do not recall the precise date but during 2006 at Pretoria in the cottage in my presence Grant discussed the purchase price of the property with the first and second applicants.”

Although the third respondent has not furnished the full contents of the said conversation her evidence clearly contradicts the second applicant's version.

34. The first applicant denied that at the meeting of November 2006 Grant discussed the purchase price with him and the second applicant. On the contrary he contended that Grant had hinted on both of them purchasing the property from their mother but he rejected such a proposal. It is, in my view, strange that Grant could make such a proposition when he already had bought the property from the second applicant; after he had taken over the responsibility to maintain the bond and the first applicant had contributed nothing towards not only the instalments of the bond but also the cash shortfall in their late fathers' estate. It is clear from the first applicant's evidence that he and Grant never even discussed the bond instalments and the cash shortfall.
35. According to the third respondent the first applicant became upset after Grant had made it clear that he would not pay him anything. Even after they had discovered in 2010 that according to them Grant had neither compensated the first applicant nor obtained his approval, they did not, while they had the opportunity during Grant's lifetime, take any steps to invalidate the agreement or to claim payment of the compensation. On her own version I am not satisfied that Grant had made any misrepresentations.
36. Even if this court were to accept that indeed there was a misrepresentation made by Grant which induced the second applicant to conclude the agreement such a misrepresentation was, in my view, not material and could therefore not justify the cancellation of the contract. Stratford AJA has this to say in **Pathescope (Union) of South Africa Limited v Mallinick 1927 AD 202 at 207:**

“To entitle her to succeed on the issue now being examined is it necessary that the misrepresentation must be of a material fact, that is to say, that the misrepresentation must be of a nature as would be likely – regarding the question from a commonsense point of view – to induce a person of intelligence and in the position of the plaintiff to enter into the contract.”

37. That the alleged misrepresentation was not material can be inferred from the following circumstances: the fact that, after she and Grant had agreed and Grant had, in her own words, undertaken to pay the first applicant one half of the value of the property, the second applicant proceeded to accept without any reservations the entire amount of R450 000.00 as the value of the property; the fact that, having accepted the said amount she did not insist on Grant paying a further R275 000.00 to the first applicant; the fact that she was bent on safeguarding the first applicant's interests to a point where, on her own version, she created what in my view was a *ius quaesitum tertior* or a contract for the benefit of a third party; that she was only concerned with safeguarding that the first applicant received what rightfully was his share and, finally; the fact that the first applicant now seems to be desirous of getting something out of the said contract which signifies his acceptance of the contract.

38. The third respondent raised an objection to the applicant's application to include the following prayer in their notice of motion:

"that the first and final liquidation and distribution account of estate late Grant William Joubert 1938/2001, alternatively, such other liquidation and distribution account in the said estate as may have been filed with the second respondent be set aside."

The basis of the objection was that after the second respondent had approved the account in late Grant's estate, such an account was duly advertised as enjoined by the provisions of **s. 35(5)(a) of the Administration of Estates Act 66 of 1965** and that no objection was raised against it. Mr Uys argued that the applicants have not supported the above prayer with any facts. What is clear though from the papers is that if the application to set aside the agreement of sale succeeds, there will be no basis for the second respondent's approval of the said account.

39. There is no doubt that the applicants did not object to Grant's account. What is of paramount importance though is that neither of the two applicants has furnished reasons why the second respondent's approval of Grant's account should be set aside. In the same manner as an applicant must do in an application for rescission of a default judgment, the

applicants must show good cause why the decision of the second respondent in approving the final account in the said estate must be set aside. They have not done so. In the same way as the applicant in an application for rescission of default judgment, the applicants in this matter must also explain their failure to object to the account. This has not been done either.

40. According to **Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 354 A**, it is not sufficient for the applicant in an application for rescission of a default judgment merely to allege that good cause exists in order to set aside the default judgment. Such an applicant must, in addition thereto, prove to the court that good cause indeed exists before the court can rescind the default judgment. The duty to do so rests on the applicants. The court stated in the said authority that the applicant in an application for rescission must, in demonstrating the existence of good cause, furnish at least an explanation of his default in order to place the Court in a better position to understand how the default took place and assess his conduct and motives. Schreiner JA, as he then was, put it in the following fashion at page 353A:

“It is enough for the present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives.”

41. Nowhere in the application do the applicants furnish any reasons why they seek an order to upset the second respondent's approval of Grant's account nor have they furnished any explanation why they did not object to the said account. This, in my view, is a quintessential matter in which to apply the principle set out in the authority of **Silber v Ozen Wholesalers (Pty) Ltd** *supra* and followed in many subsequent decisions. The application to set aside the first and final liquidation and distribution account of the estate late Grant William Joubert or such other liquidation and distribution account in the said estate cannot succeed.

42. **COSTS**

Counsel for the third respondent has asked that if the application is dismissed with costs, the applicants should, as a result of their conduct preceding this application, be ordered to pay such costs on attorney and client scale. The reasons furnished by the counsel for the third respondents were, firstly, that all the third respondent's attempts to have the matter

amicably settled in order to avoid incurring costs were shunned by the applicants; secondly, that despite the third respondent's undertaking that she would do nothing further that would have an adverse effect on the interests of any party in respect of the property and furthermore that she would not in anyway interfere with the second applicant's occupation of the garden flat located on the property, the applicants were not prepared to accept the said undertaking; thirdly, after the third respondent had informed the applicants that they could take an order in terms of prayers two of their notice of motion and the costs to be costs in the main application; the applicants informed the third respondent that they were not satisfied with an order in terms of prayer 2 of the notice of motion, despite the fact that it was in their notice of motion, and that they would then take new relief in the form of a *caveat*. As a result of the conduct of the applicants the respondents was unnecessarily forced to file an answering affidavit. The fourth reason was that after the matter had been formally set down for hearing and the third respondent had filed her answering affidavit the applicants had the matter removed from the roll contrary to the provisions of Rule 41 of the Uniform Rules of Court which clearly stipulates that a person instituting the proceedings may at any time before the matter has been set down and thereafter only with the consent of the parties or leave of the court withdraw such proceedings.

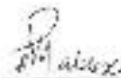
43. May a court order one litigant to pay the other litigant's costs on attorney and client scale? This is possible in order to mark disapproval of the conduct of a party. This is what the court stated in **Koetser v SA Council of Town and Regional Planners 1987(4) SA 735 (W) at 744 J – 745 A**. That a court can make such an order is clear from the authority of **Nel v Waterberg Landbouers Ko-operatiewe Vereeniging 1946 AD 597**. In this authority the court stated that such an order may be made only if special circumstances such as the conduct of the losing party or the circumstances which led to the institution of an action exists and the court considers it just to make such an award. I am of the view that in this application, such special circumstances as may justify the award of cost on an attorney and client scale have been established and that the court should not be too coy to make an appropriate order.
44. In the result I make the following order:
1. The application is dismissed.

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JUDGMENT

2. The applicants are hereby ordered to pay the costs on attorney and client scale, the one paying and the other to be absolved.



P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys: Gerhard Botha and Partners Inc.

Applicant's Counsel: Adv. CP Wesley

Respondent's Attorneys: Hartzenberg Incorporated

Respondent's Counsel: Adv. L Uys

Date Heard: 9 February 2012

Date of Judgment: 24 February 2012