

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH-AFRICA

Case no. 779/2011

In the matter between:

SENATLA TRADING ENTERPRISE 26 CC

Applicant

and

BLOEM WATER

1st Respondent

BEN MALAKOANE

2nd Respondent

HEARD ON: 21 AUGUSTS 2012

CORAM: DANZFUSS, AJ

JUDGMENT BY: DANZFUSS, AJ

DATE OF JUDGMENT: 20 DECEMBER 2012

- [1] The applicant applied for an order that the first respondent (Bloem Water) and the second respondent (its Chief Executive Officer) be found in contempt of an order of court directing the first respondent to pay certain amounts of money into the trust account of the applicant's attorneys **Peyper Sesele Inc.** It also applies for an order that the second respondent be sentenced for such contempt and for

an order of costs as between attorney and own client.

[2] By agreement between the parties the request for committal for contempt of court of the second respondent has been withdrawn because of compliance with the court order in the meantime. The court is requested to decide upon the costs of the application only.

[3] Before this application was issued, the first respondent represented by second respondent addressed a letter to **Madisebo Catering** being a party to the main application in which the order to make payment was made. In this letter the respondent records as follows:

“You are hereby informed by Bloem Water that it shall abide by the interim interdict and the ruling of the High Court pending finalisation of the application between you and Senatla Trading Enterprise at the High Court on or before **24th March 2011.**”

The **24th March 2011** was the return day of a rule nisi directing the respondents to make payment.

[4] In an opposing affidavit by the second respondent on behalf of both respondents the following is recorded:

- (i) Second respondent was not a party to the proceedings and although he is the Accounting Officer of the first respondent it is not his function or duty to effect payments on behalf of the first respondent.
- (ii) He contends that he neither defied nor ignored the court order.
- (iii) The payments have in fact in the meantime been made on **21 February 2011**.
- (iv) The first respondent was under the *bona fide* but mistaken impression that it had to show cause on or before Thursday, 24 March 2011 why it should not be ordered to pay the amounts in question. The respondents intended abiding by the court order pending finalisation of the application on or before **24 March 2011**.

- [5] It has been held that if an application is made for the sole purpose of punishing the respondent the applicant is no more than an informer who brings the contempt to the attention of the court and that the applicant under such circumstances is not entitled to an order of costs.

See: NAUDE EN 'N ANDER v SEARLE, 1970 (1) SA 388 (O) at 393 D.

It has also been held that there was no reason why the court should not make the contemnor to pay costs to which the informer may have been put in presenting the facts to the court.

See: CAPE TIMES LTD v UNION TRADES DIRECTORIES (PTY) LTD AND OTHERS, 1956 (1) SA 105 (N) at 124 G;

MAKIWAME v DIE SUID-AFRIKAANSE PERS BEPERK EN 'N ANDER, 1957 (2) SA 560 (W) at 564 H.

In **DU PLESSIS v DU PLESSIS**, 1972 (4) SA 216 (O) the court held that on the facts the purpose of the application was to enforce the order of the court and the fact that the enforcement of the order had not been expressly sought in the prayers, did not alter the nature and character of the application.

- [6] In the present matter the applicant in its opposing affidavit specifically contends that the application is aimed at reporting to the court that its order is being ignored and on the other hand, to seek compliance with the court order by the first and second respondents.
- [7] Although the application has been withdrawn after payment has been made the applicant was forced to approach court because of the respondent's failure.
- [8] The general rule that the costs follow the event implies that a defaulting respondent shall usually be ordered to pay the costs of the proceedings for committal.

SINGER'S ESTATE v KOTZE, 1960 (2) SA 304 (C) at 308

H.

The court will usually order the respondent to pay the applicant's costs as between attorney and client.

MARTIN v FRENCH HAIRDRESSING SALOONS LTD,

1950 (4) SA 325 (W) at 330 H;

HARDY VENTURES CC v TSHWANE METROPOLITAN

MUNICIPALITY, 2004 (1) SA 199 (T) at 204.

The court nevertheless retains a discretion.

[9] I am of the opinion that the respondents' failure to make payment timeously was not wilful. This is borne out by the abovementioned contentions in the answering affidavit and more in particular the letter to **Madisebo Catering**. The applicant nevertheless had to incur the costs of drawing the papers and approaching the court.

[10] The applicant did not file a replying affidavit wherefore the

respondents' contentions that it is not the second respondent's functions or duty to make payments on behalf of the first respondent and that the first respondent was under the *bona fide* although mistaken impression that it had to show cause on **24 March 2011** why it should not be ordered to pay the amount in question are not disputed.

ORDER:

[11] Wherefore I make the following order:

The first respondent is ordered to pay the costs of this application including the costs of **17 February 2011** and **24 March 2011** which costs have been ordered to stand over for later determination.

F. W. A. DANZFUSS, AJ

On behalf of the applicant:

Adv. S. Grobler
Instructed by:
Peyper Sesele Inc

On behalf of the first respondent:

Ms N.T. Ngubane
Moroka Attorneys

On behalf of the second respondent: Ms N. T. Ngubane
Moroka Attorneys