FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1666/2010

In the case between:

CHAVONNES BADENHORST ST CLAIR COOPER	Applicant
and	
VASILIKI PATRINOS	1st Respondent
PANAGIOTIS PATRINOS	2nd Respondent
DR. PATRINOS INCORPORATED	3rd Respondent

IN RE:

In the matter between:

VASILIKI PATRINOS	Applicant
and	
CHAVONNES BADENHORST ST CLAIR COOPER	1st Respondent
PANAGIOTIS PATRINOS	2nd Respondent
DR. PATRINOS INCORPORATED	3rd Respondent

JUDGMENT: RAMPAI, J

HEARD ON: 20 MAY 2010

DELIVERED ON: 15 JULY 2010

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[1] These are motion proceedings. The 1st respondent brought an application in terms of rule 47 against the applicant in

which he demands an amount of R100 000,00 as security for the costs of the main application. The applicant in the main application opposes the application.

[2] I shall refer to the parties as in the main application where Advocate Patrinos is the applicant, Attorney Cooper the 1st respondent, Dr Patrinos the 2nd respondent and his incorporated dental practice the 3rd respondent.

[3] The applicant and the 2nd respondent were previously married out community of property with the inclusion of the accrual system. They lived together as husband and wife for a period of approximately two decades. Two children were born of the marriage. Both of them are now independent adults. The bonds of marriage which subsisted between the applicant and the 2nd respondent were dissolved by a final degree of divorce in Bloemfontein on the 18th November 2008. The divorce order (per Kruger J) incorporated a deed of settlement.

[4] The 1st respondent was appointed as a receiver in terms of clause 4 of the deed of settlement for the purposes of determining the accrual values in the respective estates of

the couple. The powers and the remuneration of the 1st respondent were spelled out in par 4.1 (sic) and 4.3. He was granted three months within which to make the required accrual determination. The couple agreed in terms of clause 4 of the deed of settlement that the decision of the 1st respondent would be final and binding on them.

[5] By the 18 February 2010 the 1st respondent's accrual determination was still outstanding. He finalised such determination fifteen and a half months later, on March 20 2010, to be precise – annexure vp1 founding affidavit, main application.

[6] The 1st respondent's accrual determination triggered off the main application. The applicant was dissatisfied with the determination apparently because it was not to her liking. She initiated urgent motion proceedings against the three respondents. As regards the 1st respondent she seeks an order whereby the receiver's accrual determination is set aside; the receiver is deprived of his remuneration relative to the services already rendered; the receiver is removed from office as such and the receiver is directed to pay the

costs of the main application jointly and severally together with the 2nd respondent on the punitive scale.

[7] The relief sought against the 1st respondent is fundamentally flawed in many respects. The 1st respondent was tasked to determine the accrual values of the respective estates of the parties. He accomplished that mandate on the 8th March 2010. Since he has already discharged his obligations, he no longer holds the office as a receiver. Therefore he cannot be removed from the office because he no longer occupies such office.

[8] The 1st respondent's determination is a final decision and it is binding upon the applicant in terms of clause 4 of the deed of settlement. The applicant does not wish to have the determination reviewed or corrected. All she wants is to have it finally rescinded and the 1st respondent barred from claiming from her the remuneration he has earned in making the determination. In addition to all these she demands that the 1st respondent must be penalised or saddled with an adverse punitive order of costs.

[9] The 1st respondent has no interest in the accrual dispute between the applicant and the 2nd respondent. He was sued for no good reason and unwisely dragged into this unnecessarily litigation. In the main application, he was cited in his personal capacity as if he was an interested party. By citing him in this fashion, in addition to seeking punitive costs, he was thus obliged to get involved. He had to engage the services of an attorney and an advocate at considerable expense. He was put out of pocket although the dispute(s) between the applicant and the 2nd respondent was really no concern of his.

[10] The rule provides that the party who desires to demand security for costs from another must set out the grounds upon which such security is claimed and the amount demanded – rule 47(1). The notice in terms of the rule must be delivered as soon as practicable after the commencement of the proceedings.

[11] The applicant's main application was served on the 1st respondent on the 13 April 2010. The very next day, the 1st respondent served the requisite notice in terms of rule 47(1) on the applicant demanding that the applicant put up

security for the costs in the amount of R100 000,00. The 1st respondent has complied with these formal requirements of the rule.

[12] The grounds on which the 1st respondent demanded security from the applicants were stated as follows in the relevant notice:

> "2.1 That the Applicant does not have the financial means with which to pay or contribute towards any order of costs that might be granted in favour of the First Respondent;
>
> 2.2 That the Applicant's liabilities exceed their assets;
>
> 2.3 That at present, the monthly expenses of the Applicant exceed her monthly income; and
>
> 2.4 That the Applicant already made various agreements with certain creditors to make payment of her debts by way of monthly instalments."

[13] The applicant ignored the 1st respondent's demand for security. She refused to do so although she intimated in her answering affidavit that she had made arrangements to

have an amount of R100 000,00 paid into the attorneys trust account apparently for this very purpose. Implicit in her averment as contained in paragraph [25] was an acknowledgement by the applicant that the 1st respondent was at least entitled to insist on her furnishing security in the first place. Mr Johnson, counsel for the 2nd and 3rd respondents, like Mr Steyn, counsel for the 1st respondent, submitted that by making the particular averment the applicant had in fact tendered to put up security for costs in the amount as demanded by the 1st respondent. I am persuaded that by so doing the applicant exonerated the 1st respondent from justifying the amount of the security.

[14] As a result of the applicant's refusal to provide security the 1st respondent delivered a formal application to compel the applicant to furnish security for costs which application I was called upon to adjudicate. The application has become a full-blown contest.

[15] The 1st respondent seeks the following relief according to the notice of motion dated the 22nd April 2010:

15.1 That the applicant be directed to provide security for the costs in accordance with the 1st respondent's notice in terms of rules 47(1) dated the 14th April 2010;

15.2 That the amount of the security to be provided be determined by the registrar of this court;

15.3 That the proceedings under the above case number be suspended until such time as the applicant has complied with the order of this court by providing security for costs as contemplated in rule 47;

15.4 That the 1st respondent be granted leave to apply, on these papers, duly supplemented, for an order dismissing the applicant's application with costs, in the event of the applicant's failing, within a reasonable time, to provide security as contemplated in paragraphs 1 and 2 of the notice of motion;

15.5 That the applicant be directed to pay the costs of this application.

[16] The general rule applicable to an individual litigant is that no natural person, who resides in this country as an incola and who sues as the plaintiff, can be compelled to give security for costs except in certain exceptional circumstances – **VAZLADELIS v CASTLE BRIDGE PRIMARY SCHOOL CC AND ANOTHER** (2006) JOL 17288 (O) per Hattingh J.

[17] The rationale of the rule is that no hurdle should be permitted to stand in the way of a person's access to court and that no court should shut its doors by requiring an impecunious litigant to provide security for the costs of her opponent - **CREST ENTERPRISES (PTY) LTD AND ANOTHER v BARNETT AND SCHLOSBERG NNO** 1986 (4) SA 19 (C) at 20 B – D per Berman J.

[18] Mavundla J held that a court has a discretion to order or not to order the principal litigant to furnish security for the costs of the opponent and that, in exercising such discretionary power, the court has to be mindful of the principal litigant's right of access to court services – **MONKAM v MONKAM** (2007) JOL 20825 (T). Of course the court derives such power from its inherent jurisdiction.

[19] The party seeking security in intermediate proceedings bears the onus of proving that it is necessary for a party who initiated the main proceedings to provide security for costs – **MONKAM**, *supra* and **VAZLADELIS**, *supra*.

[20] The mere inability of an incola, such as the applicant, to satisfy a potentially adverse order of costs, in itself, is not

sufficient to justify ordering her to furnish security for costs of an adversary such as the 1st respondent in these proceeding. Something more is required. Over and above the inability the court must also be satisfied that the main case is vexatious or reckless or amounts to an abuse of court process. **RAMSAMY NO & OTHERS v MAARMAN NO & ANOTHER** 2002 (6) SA 159 (C) at 172 I.

[21] The onus rests on a party who applies for the provision of security to satisfy the court that, apart from financial inability and other factors, exceptional circumstances exist to justify the conclusion that the principal action was actuated by vexatious or reckless or abusive considerations - **RAMSAMY NO AND OTHERS v MAARMAN NO AND ANOTHER** 2002 (6) SA 159 (C) at 173 per Thring J.

[22] In **BOOYSEN & ANOTHER v EKSTEEN** (2007) JOL 20796 (O) at par. 8 Milton AJ quoted with approval the aforegoing view of Thring J at par. 172B **RAMSAMY**, *supra*, as regards the plaintiff's lack of financial means to satisfy a potentially adverse costs order. That view cannot be seriously criticised. However, I prefer the view expressed

by Olivier J in **FITCHET v FITCHET** 1987 (1) SA 450 (E) to the effect that the financial ability of the plaintiff to comply with an adverse costs order to pay the defendant's costs of the action, should such action be unsuccessful, is an obvious factor which should be taken into account in considering an intermediate application of this type. The financial means of the plaintiff is but one of the important factors to be taken into account.

[23] There may well be other considerations relevant to the exercise of the discretion to grant or not to grant the application, for instance, the substantive merits of the main proceedings – **DAVIDSON'S BAKERY (PTY) LTD v BURGER** 1961 (1) SA 589 (O) at 593 E per Klopper J. The relief for the provision of security may be granted even if the court merely finds that the main action has doubtful chances to succeed at the trial without making a firm finding that the main action has virtually no prospects of success.

[24] The rule was not designed and enacted to shut out the halls of justice in the face of deserving litigants with genuine and sustainable cases simply on account of their poor financial

means, but rather to protect apparently blameless defendants whose financial means are seemingly threatened by impecunious plaintiffs with unsustainable or dubious claims and from whom such defendants are unlikely to recover the costs awarded in their favour in the likely event of such plaintiffs failing in their seemingly hopeless actions.

[25] It is important to appreciate two possible scenarios when dealing with intermediate proceedings for the provision of security. The first stage concerns the adjudication of the defendants' demand for provisional security. If the court decides against the defendant, the main proceedings normally proceed without any security or any other hindrance. However, if the court decides in favour of the defendant, the plaintiff is obliged or directed to furnish security. In such an event, the plaintiff's action does not normally proceed. Instead, it becomes suspended pending the plaintiff's compliance. This is the initial stage of this kind of intermediate proceedings.

[26] Where the plaintiff complies, the suspension falls away and the main action resumes. However, should the plaintiff fail to furnish security in terms of the court order made at an

initial stage, then the defendant can again approach the court for an appropriate relief. The second stage concerns the adjudication of the defendant's demands for the final dismissal of the plaintiff's case. This then is the final stage of this type of intermediate proceedings. This subsidiary stage flows from the previous one. It is brought about by the plaintiff's failure to pay or furnish security.

[27] Although the two stages are substantially connected, the relief sought is an elementary distinction between the initial and the final stages. On the one hand, the effect of the initial stage is merely to temporarily slow down the main action by making it unusually cumbersome. On the other hand, the final stage seeks to completely derail or finally stop the main action. The remedial distinction is of vital importance.

[28] As regards the final stage for the dismissal of the main action without hearing tested oral evidence on the merits, the court requires moral certainty alone that the main action is unsustainable and therefore vexatious. This is where the stringent merit test applies. As regards the initial stage for the furnishing of security, the court requires no such high

moral ground of certainty. Here the court must adjudicate the matter on the basis that the main action is dubious, although not altogether improbable, and that it has very slim chances of success. The less stringent merit test therefore, applies to the initial stage. This was the stage I had to grapple with in these current proceedings. It was precisely this stage of the adjudication process Olivier J had in mind when he correctly ventured to say:

> "It may well be that, in applications for security for costs, the test should be somewhat different."

FITCHET, *supra*, at 454 E.

[29] The word vexatiousness seems to have two distinct dimensions at common law. Its one dimension outside the legislative parameters is that a vexatious action, for the purpose of finally dismissing an action, has been equated to an action standing outside the region of probability altogether and which is incapable of succeeding, because it is certainly impossible. Here the onus is a very stringent and a very exceptional one. Nothing but certainty is

required to satisfy the court that the main action has virtually no prospects of success at all.

[30] The other dimension of the word vexatiousness outside the legislative framework is that a vexatious action, for the purpose of seeking security, has to be equated to one standing within the domain of probability and is therefore well capable of succeeding, though its chances appear doubtfully slim, because although it is not certainly impossible, it is obviously unlikely to survive the trial. In this scenario the onus is not as stringent and exceptional as in the previous category of vexatiousness. The court needs only be satisfied that the main action is unlikely to succeed and not that it will most definitely fail.

[31] The provisions of Vexatious Proceedings Act No. 3 of 1956 authorise courts to prohibit further legal proceedings by a person who has persistently and without any reasonable cause instituted legal proceedings against another. Therefore, the element of persistence legal steps against a particular person distinguishes statutory vexatiousness from common law vexatiousness – **FITCHET**, *supra*. At common law the very first civil action against another may,

depending on the circumstances, be classified as vexatious or reckless or an abuse of the court process. A classical example of statutory vexatiousness is the unreported matter of **PAPANE v VAN TONDER & OTHERS** (FS 6066/08) delivered on 9 April 2009 where over a period of more than ten years the plaintiff persistently instituted hopeless proceedings against the defendants, who include the SABC in almost every court.

[32] On behalf of the 1st respondent, it was forcefully contended that the applicant's main application was characteristically vexatious, reckless and abusive. I shall revert to this contention later.

[33] In her founding affidavit in support of the main application the applicant states that she has no reliable income; that the main source of her income originates from legal aid briefs she receives from the Legal Aid Board which briefs are unreliable and provide inadequate income for her survival; that she does not have any insurance policies of note; that she belongs to no pensioen scheme; that she does not have a reliable motor vehicle; that she cannot afford to buy a vehicle and that she has not been on

holiday for a period of four consecutive years and that she cannot afford to go on holiday.

[34] In her answering affidavit in opposition to the security application the applicant surprisingly and in fact distressingly somersaults. She seeks to deny that which she stated in her founding affidavit in the main application. The following instances demonstrate the inconsistencies of her statements in the two affidavits. As regards an income; which she chiefly derives from legal aid briefs, she now blames the 1st respondent for her precarious financial situation.

[35] Her claim or suggestion that her income would have been different now had the 1st respondent done his work correctly and punctually fails to impress. I cannot see how the 1st respondent determination could have positively affected her income if it were punctually completed before the 19th February 2010. Put differently, it is unclear as to how the 1st respondent's belated determination could have negatively affected the frequency of the briefs she receives from the Legal Aid Board which briefs are the primary

source of her livelihood – par [36.2], main application read with para [19], security application.

[36] As regards a holiday, which she has not taken in four years, she now claims she decided to forego going on holiday in order to save money. This implies that all along she had the money which she could have spent to go on holiday but instead decided rather to save such money over the past four years. This is in sharp contrast to her earlier version that she could not afford going on holiday – par [37.3], main application read with para [18.2], security application.

[37] As regards a motor vehicle, which she needs not only to practise her vocation but also to go around, she now obscurely claims that she does have a motor vehicle but suggests that compared to that of the 1st respondent hers was worth far less. Obviously this is not the same thing as saying she has no reliable motor vehicle. It now seems that her motor vehicle is reliable and in a roadworthy condition. The problem seems to be that the 1st respondent apparently drives a comparatively better or more expensive vehicle – para [37.2], main application read with para [18.1], security application.

[38] When a subsequent statement of a witness contradicts the previous statement, a witness is held to the previous statement. As a general rule a witness is not allowed to somersault as the applicant does in this case. Applied to the instant case, the effect of the principle is that the applicant derives her income from the public defender system; that such briefs are infrequent; that the income so derived is not only unreliable but also inadequate for her basic needs of subsistence; that she belongs to no pension scheme; that she has no insurance policies of note and that her financial situation is so poor that she cannot afford to go on holiday; that her financial situation has been desperate for a long period of four years immediately preceding her main application.

[39] The question which now arises from the applicant's prevailing circumstances is whether she will be in a position to pay the costs of the respondent should her main application be unsuccessful. The answer is obvious. She alleges that she has the financial support of a certain Ms Brittain, apparently her neighbour and friend. This averment, far from supporting her case, fortifies the

contention of the 1st respondent that the applicant will not be able to satisfy any order of costs that might be granted in favour of the 1st respondent.

[40] In her confirmatory affidavit dated the 31st March 2010 in support of the applicant's main application, Ms Brittain herself confirms:

> "I am aware of the applicant's financial demise since her ex-husband left her and I am prepared to assist her wherever necessary especially to retain her home for herself and her children."

There you have it. She is literally a "woman" of straws. The entire case, we now know, is about her wish to retain the house owned by the 2nd respondent, a man to whom she was married out community of property. That this matter is about the applicant's desire to retain and exclusively own her former husband's house, is also evidenced by the very first statement in her heads of argument drawn up by her goodself. She kicks off on a very emotive note that there is a serious threat to evict her from her home of twenty two years. Certainly the particular house was her home for over two decades. Whether she has become the owner thereof by effluxion of time, is a different proposition altogether. It seems the law is not on her side. I have sympathy for this poor lady.

[41] Ms Brittain also evidences the fact that the applicant does not and will not have financial means to pay or contribute towards any order of costs which might be granted against her in favour the 1st respondent. She relies upon a loan from Ms Brittain in a bid to convince the court about the healthy state of her financial affairs. However, this only serves to prove the very opposite of what she intended to establish. A loan impoverishes because it increases one's liabilities. There can be no doubt about the unhealthy state of her financial affairs. Her banking on someone weakens her already weak case. The bottom-line of all this is that she is not financially self-reliant.

[42] At para 25 of her answering affidavit in connection with the security application the applicant stated that she had already made arrangements to have R100 000,00 deposited into her attorneys trust account as security for costs. Before this interlocutory application was heard, the

1st respondent's attorneys called upon the applicant to pay the said amount to her attorney for that purpose – annexure A. The applicant's response, through her attorneys, was an outright repudiation of that suggestion – annexure B. Her negative stance was amazing. Although she had intimated that the funds were available; that she was willing and able to afford the amount, when she was called upon to make provision for just that in accordance with her offer she reneged. This was not without significance. She probably did not have the money she claimed she had or she did not obtain a loan she expected she would obtain. Her unexplained refusal to pay the funds over to her attorneys as a provision for costs put her promised financial support from her neighbour in a very different light.

[43] It is also the 1st respondent's case that the applicant's liabilities exceed her assets. Although the applicant disputes this, she makes no effort to tabulate her liabilities. She only tabulates her assets. She now complains that the 1st respondent failed to investigated her material or proprietary affairs properly. However, she herself dismally fails to set the record straight. She gives details of her

assets only, withholds information relating to her liabilities but alleges her assets exceed her liabilities. In my view the omission to candidly disclose her liabilities was deliberate. The 1st respondent was involved in determining the accrual of the applicant's estate. Therefore he had intimate knowledge of her financial situation. There is no reason to doubt his averment in this regard. His averment that her liabilities exceed her assets is probably a correct reflection of the true state of affairs. It is significantly bolstered by her deliberate omission to disclose her liabilities which she claims to be far less than her assets.

[44] In the main application the applicant places absolutely no reliance on the accrual determination made by the 1st respondent. As a matter of fact the main application was precipitated by her absolute repudiation of such determination. She is determined to have it set aside. That being her stance, she cannot now, in an endeavour to defeat the 1st respondent's application for security, rely on an amount allocated to her in accordance with the same accrual determination she rejects – para 15.4. It will be noted that she lists as an asset in her exclusive estate, an amount of R469 490,88 – para 13 item 7. By so doing she

approbates and reprobates. The law does not countenance such a strategy.

[45] At para 15.5 of her answering affidavit in connection with the security application the applicant reacts as follows to the 1st respondent's allegation:

> "15.5 Applicant has no proof that my monthly expenses exceed my monthly income and my monthly expenses do not exceed my income in any form."

She does not deal with her income and expenses at all save to make this bold statement. She evasively shies away from the point. She makes no effort to meaningfully disprove the 1st respondent's allegation. Perhaps Mr Steyn is correct in saying that for some reason, she is shy to deal with her true financial position now that the shoe pinches.

[46] Her financial position appears to be so parlous that she now desperately but wrongly attempts to beef it up by resorting to the accrual determination she has already repudiated. When that amount, which represents approximately 64% of the value of her alleged assets is discounted or

disregarded, such value substantially drops to R265 469,65. It must be borne in mind that even this is not a favourable value. According to the 1st respondent, the value of her assets is eclipsed by that of her liabilities. According to the 1st respondent the value which the applicant places on her assets is highly questionable. It is important, however, that he is of the opinion that the value of her asset is overshadowed by the value of her liabilities.

[47] In many instances in her answering affidavit the applicant described the 1st respondent in serious derogatory terms. She claims that he is a dangerous fishing expeditionary, that he is an unprofessional practitioner – para 17.2, that he is a reckless litigant – para 17.7, and that he is a vexatious individual – para 17.9. She insinuates that he is an incompetent and dishonest attorney – para 18.2 and also insinuates that he deliberately ambushed her by bending the rules and resorting to dirty, abusive and sharp practices to sabotage or derail her good case – para 22.3 and that he is afraid of her strong case – para 20.3. She reckons that the 1st respondent either through incompetence or deception or collusion or some other unorthodox ways represents that the amount of the accrual

is R4,5m less than it is in truth and in reality – para 20.5 and 20.6.

[48] These negative characterisation of the 1st respondent was, in my view misguided and unwarranted. If the first respondent was an untrustworthy or unethical lawyer, as he is portrayed to be, he would probably have decided to make the accrual value much more than he actually found in order to inflate his remuneration which is proportionally linked to the accrual value. Mr Steyn contended that the aforegoing statements or insinuations by the applicant of the 1st respondent were scandalous and defamatory. Her behaviour, counsel argued, was disgraceful and unbefitting of an advocate.

[49] These allegations are serious, constituting as they do, an unwarranted vitriolic attack on the character of the 1st respondent, an attorney and an officer of the court, by the applicant, an advocate and herself an officer of the court. It must be remembered that the 1st respondent did not ask to be appointed a receiver in the estates of the feuding couple. Allegations of this sort are very serious to make of anybody. Their gravity is a matter of great concern in this

instance because they were made by one officer of the court against another. Of particular concern is that these unfortunate remarks relate to the integrity of a lawyer. In my view they appear to be lamentably devoid of substance. **SOCIETY OF ADVOCATES v EDELING** 1998 (2) SA 852 (W) at 898F – H.

[50] On the facts, I am of the firm view that a proper case has been made out for the grant of the application for the provision of security concerning the costs. Therefore I make the following findings: that the applicant does not have the financial means to pay or contribute towards any order of costs that might be awarded in favour of the 1st respondent in the main action; that her liabilities exceeds her assets; that her monthly expenses exceed her monthly income; that the main action was vexatious, reckless and constituted an abuse of the court process; and that the main action appears unlikely to succeed. I would therefore granted the application.

[51] There remains one more aspect to deal with. It concerns the issue of costs. The decision of the applicant to sue the 1st respondent was misguided. She sued him in his personal

name. The 1st respondent was appointed by the applicant and the 2nd respondent on the advice of or in collaboration with the lawyers. I have already pointed out that the applicant agreed to be bound by the 1st respondent's accrual determination as a final decision. The deed of settlement and the court order in which it was incorporated still stand and must be respected. This appears to be one of the many insurmountable obstacles she will have to circumvent before her main application can succeed.

[52] My *prima facie* view, which I express with great reluctance, is that the main application was recklessly, vexatiously and abusively instituted against the respondents – particularly the 1st respondent – **RAMSAMY**, *supra.* The applicant's unfounded, vicious and vitriolic attack on the 1st respondent's character was a strongly aggravating factor which cannot be left uncensured. This, in my view, is an appropriate case where the wroth of the court must be expressed through a punitive order of costs. I am, therefore, inclined to penalise the applicant by saddling her with a special costs order as between attorney and client. The comments I made in par. 9, *supra*, provide further justification for a punitive costs order.

[53] These then are my reasons for the order I made on the 20th May 2010. That order, which is annexed hereto, is hereby incorporated in this judgment by reference. I rest my judgment.

M. H. RAMPAI, J

On behalf of the applicant: Adv. V. Patrinos
Instructed by:
Cobus le Roux Inc.
BLOEMFONTEIN

On behalf of the 1st respondent
in main application: Adv. J. W. Steyn
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