

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A117/08

In the matter between

WILLEM MATHEE and 7 Others

APPLICANTS

And

KHOTSO SESELE and 5 Others

RESPONDENTS

CORAM:

C J MUSI, J et VAN ZYL, J

DELIVERED ON:

25 May 2009

[1] On 9th March 2009 I made the following order:

- “1. The application is dismissed
2. The applicants’ attorney, Mr Samuels, is ordered to pay
the first respondents’ costs de *bonis propriis*.

Mr Samuels is granted leave to file written representation if he
so wish, on or before 23 March 2009 at 16H00 as to why he
should not pay the costs referred to above .

3. The applicants' attorney, Mr Samuels, shall not be entitled to recover any costs in respect of this application from the applicants".

[2] Mr Samuels submitted his representations on 23 March 2009. In the representations Mr Samuels makes two submissions as to why he should not pay the costs de *bonis propriis*. Firstly, because the papers were drafted by counsel, and secondly that paragraph 3 of the order is sufficient punishment.

[3] In his affidavit he states that he briefed counsel, Ms S. Mohamed, to draft the papers. He sent all the annexures to counsel, at her request. The annexures were attached to the papers by counsel.

[4] He also approached another counsel, Mr Bodasing, for advice on whether he should amend the application.

[5] He noticed that the first respondent raised the issue of non-joinder in his answering affidavit. He alerted counsel to this. She however advised him that she had read the papers,

conducted research and was of the view that it was not necessary to join other parties.

[6] He submitted that he acted *bona fide* and reasonably as he was guided by counsel. He also submitted that paragraph 3 of the order is sufficient punishment.

[7] He submitted that it was because of counsel's muddled thinking that irrelevant and unnecessary information was placed before us. He endeavoured to get Ms Mohamed's comment to no avail. She undertook to assist him with the drafting of the representations but he could subsequently not get hold of her. She did not respond to his letters. It is clear from Mr Samuels' submissions that he relied heavily on counsel's guidance in this matter. It must however be stated that there is a limit to the extent to which an attorney can hide behind counsel for work that is patently below the required standard.

[8] An attorney who briefs counsel may not abdicate his/her responsibility towards his/her clients. It remains the task of the attorney to ensure that the interest of the client are

sufficiently protected and advanced in the prosecution of the client's case. If the attorney for whatever reason doubts counsel's skill or judgment it is incumbent on that attorney to take the necessary steps in order to protect the interest of the client and to avoid mistakes, which may unduly escalate costs.

[9] Although Mr Samuels' conduct, in this matter, falls short of that which is expected of an attorney - where the papers drafted by counsel are glaringly in disarray - I am of the opinion that his explanation is, under the circumstances, acceptable. He acted *bona fide*. His conduct is not what one could classify as negligence of a serious degree. See **Waar v Louw** 1977(3) SA 297(0) at 304 E to H.

[10] Another factor which counts in his favour is the fact that he is already punished by virtue of paragraph 3 of the order.

[11] Mr Samuels requested us to order that counsel should not recover any fees from him and that the fees already paid to her in connection with this matter should be refunded. Ms Mohamed did not appear before us. We did not give her an

opportunity to be heard or to make representations. All that we have in relation to her conduct is what is contained in Mr Samuels' affidavit. It would be unfair to make an order against her.

[12] Paragraph two of the order mentioned in paragraph one of this judgment should therefore be deleted. It follows that the applicants as the unsuccessful litigants should be ordered to pay the first respondent's costs jointly and severally.

[13] The order in paragraph one above is varied as follows:

- (a) The application is dismissed.
- (b) The applicants are ordered to pay the first respondent's costs, jointly and severally the one paying the other to be absolved.
- (c) The applicants' attorney, Mr Samuels, shall not be entitled to recover any fees in respect of this application from the applicants. It follows that any fees paid to him in relation to this matter must be refunded.

C J MUSI, J

I concur

C VAN ZYL, J

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