IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA5/2023

In the matter between:

HEROLD GIE AND BROADHEAD INCORPORATED **Appellant**

and

SUN CHEMICAL SOUTH AFRICA (PTY) LIMITED **Respondent**

Heard: **12 September 2024**
Delivered: **11 November 2024**
Coram: **Savage ADJP, Mlambo AJA and Davis AJA**

JUDGMENT

DAVIS, AJA

Introduction

[1] This is an appeal against an order of cost *de bonis propriis* which was granted against the appellant by the court *a quo* in a judgment of 19 January 2023.

[2] The appellant represented a group of individuals, mostly retired, who claimed that they were contractually entitled to certain post-retirement medical aid benefits. In 2017, their employer, Sun Chemical South Africa (Pty) Ltd, being the respondent, sought to reduce these benefits in a unilateral fashion.

[3] Aggrieved by this decision, the appellant was instructed by its clients (the applicants) to seek a legal remedy in order to hold the respondent to its full obligations and hence restore the benefits which the applicants considered were owed to them.

[4] Accordingly, the appellant instituted an action *pendente lite* aimed at preserving the payment of the full benefits pending the outcome of an action for final relief to be subsequently instituted.

[5] It appears to be common cause that the changes which triggered the application were brought about on 1 June 2017. On 28 June 2017, the appellant, on behalf of the applicants, launched a semi-urgent application aimed at securing an interdict to prevent the respondent from, *inter alia*, reducing the monthly medical aid contributions made on behalf of the applicants to the Discovery Health Scheme. This application was brought on an interim basis pending the outcome of an action to be launched to determine the lawfulness of the respondent's alleged unilateral reduction of the employer's contributions.

[6] In answer to this application, the respondent delivered papers which exceeded 600 pages and raised various challenges of an interlocutory nature. The applicant deposed to a series of confirmatory affidavits which were duly served. A day later a further six confirmatory affidavits were served. It appears that, as a result thereof, the

respondent delivered a notice in respect of an irregular step with respect to these confirmatory affidavits.

[7] Further notices were generated by the appellant on behalf of the applicants in respect of its opposition to the irregular step applications as well as a replying affidavit by applicants regarding a condonation application. Thereafter, the appellant served a notice of set down of the two irregular step applications and the condonation application for hearing on 27 October 2017.

[8] This elicited a response from the respondent's attorneys who wrote to the registrar as follows:

> 'The notice of set down is not clear as to what is to be heard. If it is only the Rule 30 application and condonation application, this would be inadvisable and it would be faster and more costs effective for both parties and the Court for the Registrar to enrol the main application and all interlocutory applications (including the Rule 30 applications and the condonation applications) for a single hearing on one date. This earing might take an entire day for argument on all matters relating thereto.
>
> Kindly revert to our offices and that of Herold Gie to inform us of whether or not this matter will proceed on 27 October 2017, as indicated or whether new dates will be allocated for the filing of heads of argument or whether a new hearing date will be allocated.
>
> We await your urgent response hereto.'

[9] Further correspondence, revealing the acrimonious relationship between the respective attorneys, was generated which culminated in the matter being brought before Waglay JP on 27 October 2017. The Judge President adopted the approach that the merits of the semi-urgent application ought to be heard at the same time as the hearing of the interlocutory applications. In addition, the learned Judge President suggested to the appellant that the applicant's application was without merit.

[10] As noted by Rabkin-Naicker J, sitting in the court *a quo,* "*the applicants proceeded to disregard a Directive by the Judge President to file an affidavit setting out, inter alia, whether the conduct of the applicant's legal representatives amounted to unethical conduct and whether fees paid to them stood to be recovered*". A letter was filed in place of an affidavit. The content of this letter cannot be considered as an answer to the said Directive.

[11] In the light of the consequences of the semi-urgent application not having been prosecuted by the appellant for a period of over five years, the learned judge found as follows:

> '[3] The respondent relies on the prejudice occasioned by the fact that this application has never been withdrawn by the applicants in that the company has had to reflect it in a special entry in its audited financial statements, as pending litigation. This it submits is a matter of concern to its management and international investors. Before bringing the application to dismiss, the respondent requested the applicants to remove the semi-urgent application from the roll and tender costs. This was never done. It was submitted on behalf of the applicants that it is perplexing as to why the respondent has brought this application. I disagree. The respondent is entitled to have finality in this matter, and to seek an appropriate costs order.
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> [4] The costs order I shall make in respect of C375/2017 reflects that I am satisfied that there has been negligence to a serious degree by applicants' attorneys which warrants an order of costs *de bonis propriis* being made, as a mark of the court's displeasure. In exercising my discretion in this respect, I am of the view that this order should not be, in addition, on an attorney and own clients scale, as sought by the respondent company. It is trite that the scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct.'

<u>The reasoning of the court *a quo* in its award of costs *de bonis propriis*.</u>

[12] While it is difficult to divine the precise reasons for the award of punitive costs, it appears that two essential reasons were proffered by the court *a quo*, namely that the application sought to interdict an event which had already taken place and that the fact that the application had never been withdrawn meant that the respondent had to reflect it as a special entry in its audited financial statements which acted to its financial prejudice.

The law relating to an award of costs *de bonis propriis*

[13] In *Stainbank v South African Apartheid Museum at Freedom Park and another*[1], Khampepe J set out the indicated approach to an award of costs *de bonis propriis*:

> '[52] Although the courts have the power to award costs from a legal practitioner's own pocket, costs will only be awarded on this basis where a practitioner has acted inappropriately in a reasonably egregious manner. However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*.
>
> [53] Punitive costs have been granted when a practitioner instituted proceedings in a haphazard manner; wilfully ignored Court procedure or rules; presented a case in a misleading manner; and forwarded an application that was plainly misconceived and frivolous.
>
> [54] The basic rule relating to the Court's discretion is as relevant to the award of costs *de bonis propriis* as it is in other costs awards. Extending from this discretion, it appears the assessment of the gravity of the attorney's conduct is an objective assessment that lies within the discretion of a Court making the award.'

[1] [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) at paras 52 - 54.

[14] Turning to the fundamental reasons proffered by the court *a quo*, namely that it was inappropriate to seek an interim interdict after 1 June 2017 when the initial decision to reduce benefits had been taken, and that an interim interdict cannot be granted thereafter, it, unfortunately, appears that the basic principles of the law of interdict were not sufficiently considered either by the court *a quo* or by counsel for the respondent on appeal before this Court.

[15] In short, it is clear that a party may apply for an interim interdict if it can show that it would receive relief in the future from an action of another party which infringed upon, at the very least, a *prima facie* right of the applicant.[2]

[16] If a *prima facie* right has been established, then an apprehension of irreparable harm must be established. The test is whether there is a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the applicant.[3] Whatever the dispute as to whether, in this case, an interim interdict could and should have been granted by a court which would have heard the semi-urgent application, there can be no doubt that there was a clear legal basis, at the very least, for seeking some form of interim relief. In terms of an argument to establish irreparable harm, the latter would have been caused to the appellant's clients by the continued conduct of the respondent to reduce their contributions and hence the amount of their post-retirement medical aid benefits. In short, the alleged harm continued after 1 June 2017.

[17] On the strength of the law relating to a punitive cost order of the kind made by the court *a quo*, there is simply no basis to conclude that the steps taken by the appellant on behalf of the applicants to seek interim relief were of a kind which constituted a material departure from the responsibilities of an attorney acting in the best interests of his or her client. On the basis of the law in respect of interim interdicts, there was no basis to conclude that the appellant had exhibited conduct which could be

[2] See for example *Nabuvax (Pty) Ltd and others v City of Tshwane Metropolitan Municipality and others* [2013] 3 All SA 528 (GNP).
[3] See the authorities collected in LAWSA (3 ed.) vol 4 at para 57.

categorized as negligence of a sufficiently serious fashion to justify a punitive costs order.

[18] In respect of the question of prejudice, it is difficult to understand the reason why special entries in the financial statements constituted the kind of prejudice which could have justified such an order. In particular, a second order had been granted by the court *a quo* to the effect that "*the applicants in the main action are to ensure that a signed copy of the pre-trial minute is filed at court within ten days from the date of the receipt of this order failing which respondent may apply for the dismissal of the action on an unopposed basis on these papers duly supplemented*". In short, on the basis of this order, the dispute will now have to be resolved by way of an action which means that the respondent will be required to retain a special entry in its financial accounts pending the outcome of that action.

[19] For the reasons set out, the appeal must succeed. There was no argument by the respondent regarding a costs order against the individuals represented by the appellant and hence, it must follow that the portion of the order which reads "*the attorneys for the applicants Herold Gie Incorporated are to pay the cost of the application de bonis propriis"* is set aside. The respondents are ordered to pay the costs of this appeal.

Davis AJA

Savage ADJP and Mlambo AJA concur.

APPEARANCES:

For The Appellant:	Adv GA Leslie SC
Instructed by	Herold Gie Attorneys
For The First Respondent:	Adv A Bishop
Instructed by	MH Attorneys