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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION
T APPLICABLE

CASE NO: 498/ 2005
DATE: 19/8/2006

UNREPORTABLE

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
19/08/2005
DATE SIGNATURE

In the matter between:

REGSPERSOON VAN PENDULA	**Applicant**
And	
ALBERT ARNOLD	**First Respondent**
LOUISE ARNOLD	**Second Respondent**

JUDGMENT

MAKHAFOLA, AJ

The applicant approaches this court for a declaratory order on a notice of motion on the following terms:

[1] Dat die Agbare Hof 'n verklarende bevel uitreik in terme waarvan daar spesifiek bepaal word dat die kostebevel wat op 14 November 2003 deur hierdie Agbare Hof uitgereik is, op In

prokureur-en-klient skaal sal wees, soos bepaal deur regulasie 31 (5) uitgevaardig kragtens die Wet op Deeltitels 95 van 1986;

[2] Dat die Respondente gelas word om die koste van hierdie aansoek te betaal op In prokeur-en-klient skaal;

[3] Verder en/of alternatiewe regshulp.

The applicant's case is based on the fact that the court which confirmed the ***rule nisi*** with costs on 14 November 2003 should have ordered those costs to be on an Attorney and Client scale as stipulated by regulation 31 (5) issued pursuant to the Sectional Titles Act 95 of 1986.

The applicant further avers that there is uncertainty as to whether the cost order issued on 14 November 2003 is only party and party costs which has been taxed. According to the applicant the court intended to grant the prayer as contained in the notice of motion that the applicant is entitled to Attorney and Client costs and that this matter is neither a review nor an appeal but a declaratory application.

On behalf of the applicant it was contended that the matter is not ***res judicata*** that the applicant is in the correct forum; that the taxed bill on party

and party costs scale is not in full and final settlement of the respondent's debt; the applicant contends further that it is not its case that the presiding judge erred in his judgment.

The respondents in opposition of the application contend through three points ***in limine:*** that the matter between the applicant and themselves was finalized by an order issued on 14 November 2003 marked Annexure "C"; that the matter is ***res iudicata*** as it was finalized in a competent court; that the bill was taxed and the respondents have paid the taxed bill on party and party scale in full and final settlement of the debt due, owing and payable to the applicant in terms of the court order; that the applicant has failed to indicate in terms of which rule this application is launched; that the applicant is attempting apparently to correct the fault of the presiding judge in terms of rule 42; that at no stage did the applicant, during the case on merits, argue and request the court to grant it attorney and client costs. It was argued on behalf of the respondents that the applicant does not address this last point in its replication, despite it having been raised by the respondents in their opposing affidavit.

It can be gleaned from the applicant's replying affidavit paragraph 4.2 lines 35 on page 31 of the papers what the ***crux*** of the applicant's case is all about. The said lines read as follows;

> "Die Applikant is bloot onseker oor die skaal van die kostebevel wat verleen is en ander gevolglik die Agbare Hof vir duidelikheid oor hierdie kwessie."

From the point of view of the quoted paragraph 4.2 of the applicant's replying affidavit it is clear that the applicant seeks clarity on the costs order. My understanding of this contention is that the court order on costs is not clear and/or it has omitted to specify that the costs are on Attorney and client scale.

It was submitted on behalf of the applicant that it has a right to bring the application as a declaratory one. Whereas, on the other hand it was submitted on behalf of the respondents that rule 42 route should have been followed by the applicant arguing that the applicant was in a wrong forum raising several legal issues and defences which I now turn to address.

The legal issues that have arisen are the following:

[1] **Functus officio**

The general rule is that a judgment once given is final and not subject to amendment or supplementation by the court that has delivered it, and the court or judge is ***functus officio.*** This rule is subject to certain exceptions like matters which are accessory to the judgment such as costs, interest or appropriate tariff costs where courts have the discretion to supplement the judgment.

Vide: **West Rand Estates v New Zealand Insurance Co Ltd 1926 AD at 173**

Firestone SA (pty) Ltd v Gentiruco AG 1977(4) SA 298 (A)

[21 **Res iudicata**

This principle is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. Vide: African Farms and townships Ltd v Cape Town Municipality 1963(2) SA 555 (A) at 564

In essence the principle of ***exceptio rei iudicatae*** applies where: the parties are the same, the causes of action in both cases are the same, the same relief must have been claimed in both cases.

Vide: **National Sorghum Breweries (Pty) Ltd *t1a* Vivo African Breweries v** International liquor **Distributors (Pty) Ltd 2001 (2) SA 232 (SCA)**

The issue of estoppel is also relative in the sense that a party or litigant is prevented from disputing an issue decided by a previous court.

[3] Forum

It is the duty of any litigant to bring his/or her case before the correct court which is entitled to hear the matter.

[4] Rule 42 of the Uniform Rules

Rule 42 (1) provides for circumstances under which a court may act ***mero motu*** or upon application of any party affected to rescind or vary an order or judgment.

[5] Regulation 31(ID of the Sectional Titles Act 95 of 1986

Reads as follows:

> "Die Landmeter-general moet by ontvangs van die kennisgewing ingevolge subregulasie (4) die nodige wysegings en endossemente op die deelplan en die registrasie kantoorkopie daarvan aanbring."
>
> [Sub-r (5) vervang deur GKR2653 van 1991.J

Having read and checked the said regulation and its substitute I have found it relating to the surveyor-general.

I share the views of the learned judges in the different decided cases I have cited above regarding the legal issues herein raised. My view is that they express correctly the principles of our law in those various legal issues that have been raised.

All the above issues that had been raised are in some way relative to the issue of this application. But the *crux* of this application is and remains seeking clarity on the uncertainty of the costs order as alleged by the Applicant.

The above having been stated I make the following findings from the totality of the evidence in the application:

(a) there is no basis for "clarification" of the order because Annexure "C" is unambiguous;

(b) there cannot be any basis for rectification either because there is no evidence on affidavit that there exists any patent error;

(c) there is no basis that the court which issued Annexure "C" omitted to grant attorney and client costs if same were never argued or addressed in court which was in a position to hear and fully deliberate the issue at the time;

(d) the intention of the court then and now is directly expressed by the costs order in place as embodied in Annexure "C"; (e) the costs order as embodied in Annexure "C" is final, not subject to any supplement or revisit and it was issued by a competent court;

(f) the respondents have paid the applicant's taxed bill on party and party costs scale as intended by Annexure "C" in full and final settlement of the debt due, owing and payable to applicant at the time of the presentation of the taxed bill;

(g) the costs order embodied in Annexure "C" correctly expresses the intention of the court that the costs order, if not given any specific label, are and remain, by interpretation and practice, for all intents and purposes: party and party costs.

The respondents have requested and argued for costs on attorney and client scale should they succeed in this application. I am of the view that when applicant launched this application the application was not ***mala fide,*** an abuse of the court process or vexatious. Applicant, as it is apparent from its founding affidavit, believes that it could retrieve R 60 000-00

(sixty thousand rand) as it alleges it has lost which is the difference between party and party costs and attorney and client scale. The applicant needs not be punished.

Vide: **Giovagnoli v Di meo 1960 (3) SA 393 (D) at 400**

Mahomed & Son v Mahomed 1959 (2) SA 688 (T)

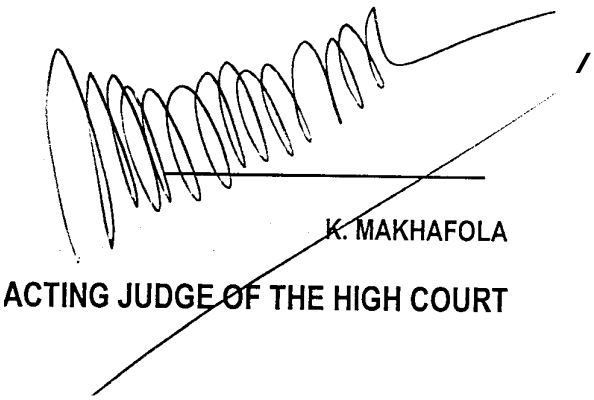
After all, a costs order falls within the ambit of the court's discretion which is to be exercised judicially with due regard to all relevant considerations. It is also the position where the parties to litigation have entered an agreement as to costs the court's wide, unfettered and equitable discretion is not oustered. Vide:

INTERCONTINENTAL EXPORTS (PTY) Ltd v

FOWLES 1999(2) SA 1045 (SCA) 1055 F-1.

It has to be remembered that by its nature the law pledges to redress any issues raised by any litigant that beckons correct forums designated for the purpose.

Consequently, the applicant has failed to make a case for the relief it seeks. The application is dismissed with costs.



K. MAKHAFOLA

ACTING JUDGE OF THE HIGH COURT