REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 48102/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

22/05/2013
DATE

SIGNATURE

In the matter between:

INVESTEC BANK LIMITED	First Applicant / Seventh Respondent
PRIVATE RESIDENTIAL MORTGAGES (RF)	Second Applicant/ Fifty Sixth Respondent
PRIVATE RESIDENTIAL MORTGAGES SECURITY SPV SERIES 1 (PTY) LTD	Third Applicant/ Fifty Seventh Respondent
PRIVATE RESIDENTIAL MORTGAGES SECURITY SPV SERIES 2 (PTY) LTD	Fourth Applicant/ Fifty Eighth Respondent

and

THE NEW ECONOMIC RIGHTS ALLIANCE (NPC)

J U D G M E N T

BAQWA J

[1] This is a return day of a ***rule nisi*** issued by my brother Justice Spilg on 3 May 2013 calling upon the directors of the Respondent to appear and show cause why the wasted costs of two interlocutory applications should not be awarded against than ***de bonis propriis.***

[2] The Respondent has filed opposing documents in the form of affidavits deposed to by its directors to resist the confirmation of the order made by my brother Justice Spilg.

[3] The following is a brief chronology of the facts and events that have led to this hearing today.

[4] On 19 December 2012 the Respondent caused the main application to be issued out of this court as an urgent application which was set down for hearing on 21 December 2012.

[5] The three Applicants herein were part of a total 65 Respondents who were cited by the present Respondent in the main application. In the main, the 65 Respondents comprised the major banks in South Africa and their subsidiaries.

[6] The main application comprised three parts, namely

6.1. Part A seeking urgent interim relief against the Respondent to interdict and restrain them from collecting any debts from members of the Respondent or proceeding to execute in terms of judgements obtained against such members;

6.2. Part B : sought an order reviewing and setting aside judgements obtained against the members and a removal of negative credit listings from any credit bureau pursuant to such judgements;

6.3. Part C sought an order against these banking institutions to the effect that same surrender judgements against the members.

[7] The basis or thematic driver of the main application was that the Respondent banking institutions have engaged in *" securitisation "* which has involved the cession of their financial instruments to associated entities and thus deprived the banks in question of ***locus standi*** . Further relief is sought by the Respondent (in part B) in the form of disclosure of the securitisation transactions by the banking institutions in question.

[8] The Respondent is cited in the application as *" a voluntary association that was established for the purpose of opposing the banking and the auxillary financial service providers who apply economic strategies that are harmful to civil society "*.

[9] In its constitution the Respondent describes its primary objective as follows : " *We provide non-financial support to those suffering from the adverse effects of corporations who place profits ahead of natural human rights* ".

[10] Respondent states further that it is a voluntary association acting in the interests of its members in terms of ***section 38 (e)*** of the constitution of South Africa. The section empowers anyone to approach a competent court on the basis of infringement of a right enshrined in the Bill of Rights as " *an association acting in the interests of its members* ".

[11] Part A of the application came before my brother Spilg J on 21 December 2012 in urgent court whereupon it was ordered that the matter be struck off the roll with costs.

[12] Subsequently, interlocutory applications were brought on 13 February 2013. On 19 February 2013 the Respondent, represented by Ndekwe Attorneys, filed a notice of intention to oppose the interlocutory applications.

[13] Scot Colin Cundill, a director of the Respondent and who is one of the parties subject to the ***rule nisi***, filed an opposing affidavit in which he describes himself as the " managing executive " of the Respondent .

[14] The defence raised in Cundill's affidavit to both interlocutories is that the Respondent intends to appeal the order made by Spilg J in terms of which the main application was struck off the roll with costs. Respondent has requested written reasons from Spilg J with that purpose in mind. A submission is made that this has the effect of staying these proceedings.

[15] It bears mentioning at this stage that in these proceedings, Respondent has not been represented by an advocate of this court. This may be relevant to the fact of Respondent not seeming to be aware that an appeal to an order striking the matter of the roll for lack of urgency is not appealable.

[16] A further consideration is that part A of the notice of motion was struck of the roll and does not relieve the Applicants from dealing with their obligations to deal with the relief sought in the normal course, that is, parts B and C. Any purported appeal does therefore not serve to suspend the further prosecution of the relief sought in the application.

[17] The case was set down for hearing by notice of motion delivered on 26 March 2013 for the week of 9 April 2013. At the roll call of 9 April 2013 the Respondent was purportedly represented by its *"legal adviser"* Mr Raymond Dicks who indicated that the Respondent required a postponement as it did not have counsel to appear on its behalf on that day. The application was postponed to 30 April to enable Respondent to obtain the services of counsel.

[18] On 29 April 2013 and after the placing of the interlocutory applications on the opposed roll of 30 April 2013, the Applicants were served with a notice of withdrawal of the main application.

[19] Despite a discussion with Applicants attorneys during which Respondent was advised that a tender for costs was required pursuant to the notice of withdrawal and that Respondent would have to appear in court to argue that point if no tender was made.

[20] Counsel for the Applicant appeared for the purposes of arguing the costs but there was no appearance for the Respondent.

[21] Due to the manner in which litigation had been conducted by the Respondent, Justice Spilg handed down the ***rule nisi*** in terms of which the directors of the Respondent are called upon to show cause why they should not be ordered to pay the costs ***de bonis propriis.***

[22] As stated earlier Respondent has filed affidavits purportedly resisting the order made by my brother Spilg J being made final. The Respondent today is once more represented by Mr Raymond Dicks who is not an admitted attorney or an advocate of this court.

[23] Ordinarily a company may not be represented at the high court in civil proceedings other than by a duly qualified legal practitioner. In ***casu*** Applicants have consented to Mr Dicks making submissions on behalf of the

Respondent and his fellow directors. Be that as it may the court still has the discretion whether or not to allow that to happen. I have given the matter due consideration. I have considered in particular the order which my brother Spilg made and I have deemed it appropriate for Mr Dicks to make the submissions on behalf of respondent and fellow directors.

[24] I have perused the documents filed by the Respondent and I have considered the submissions by Mr Dicks but I do not find any basis upon which they should not pay the costs. Litigation is not a game in which directors or officials of a company or a body corporate can engage at leisure and avoid the consequences thereof. They initiated extensive legal proceedings and considerable time and expense was incurred by the Applicants in defending that action. When the matter was about to be adjudicated, the proceedings were withdrawn. This happened after the matter had been postponed at Respondent's instance. This is a typical case of what is normally referred to in our law as vexatious proceedings.

24.1 If a party brings a case before the courts on documents that are not properly drafted with prayers that are not competent.

24.2 If that party then presents himself or itself in court without proper representation.

24.3 If that party then fails to attend court without offering an explanation for non attendance.

24.4 If that party then withdraws the action without tendering costs that constitutes vexatious proceedings.

[25] The Respondent's directors have conducted litigation in a vexatious and reckless manner. They have not paid even the costs awarded against them in the main application.

It is trite that actions which cause unnecessary litigation and costs that are unreasonable and reckless will justify a costs order ***de bonis propriis.***

In the words of Ponnan J : *" Yet a further consideration is that corporate officers can cause impecunious companies to litigate hopeless causes without any fear of personal risk "*

See Manong and associates (Pty) (Ltd) v Minister of Public Works and another 2010 (2) S A 167 (S C A) at P 171 (E – F)

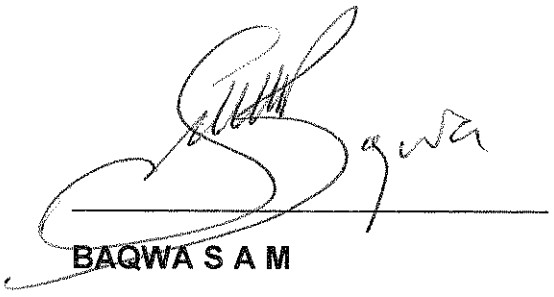
[26] Despite the filing of lengthy affidavits the Respondent has failed to explain the non appearance in the matter in the matter and why costs were not tendered when the matter was withdrawn. Respondent has failed to tender sufficient reasons why the rule nisi should not be confirmed.

[27] In the result, the following order is made :

27.1 The ***rule nisi*** granted by Spilg J on 3 May 2013 is hereby confirmed with costs.

27.2 The confirmation of the costs order in the ***rule nisi*** is against respondent jointly and severally with the directors mentioned in the ***rule nisi***, that is, excluding Mr Brendan Alexander Vermaak.

.27.3 The order for costs today is awarded jointly and severally against the Respondent and the three directors mentioned in rule nisi and Mr Raymond Dick who is now also a director of Respondent.



BAQWA S A M

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	D Fisher S C
Respondent:	Raymond Dick (in person)
Date of Judgment:	15 May 2013