IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN) **CASE NO: 4236/2014**

Heard on: 17 November 2016
Delivered on: 1 February 2017

"Reportable"

In the matter between:

GAVIN NEIL GOWER	**First Plaintiff**
ELLALEEN INGRID GOWER	**Second Plaintiff**

and

CAROL ANNE TOL	**First Defendant**
CAROL ANNE TOL N.O.	**Second Defendant**
LEONARD DOUGLAS ROBERT GOWER	**Third Defendant**
NEIL BYRON GOWER	**Fourth Defendant**
PATRICIA OLIVE GOWER-KOTZE	**Fifth Defendant**
FELICITY JUNE GOWER	**Sixth Defendant**
LYLE BRETT-ANDREW TOL	**Seventh Defendant**
CRYSTALLE-LEIGH TOL	**Eighth Defendant**
NONGANCINGI SIKOTI	**Ninth Defendant**

MASTER OF THE HIGH COURT OF SOUTH AFRICA,

EASTERN CAPE DIVISION GRAHAMSTOWN **Tenth Defendant**

JUDGMENT

MAKAULA J:

[1] The *lis* between the parties was settled in terms of an amended written agreement between the plaintiffs and the first and seventh defendants which they have asked should be made an order of court. The dispute which stands to be resolved is in respect of costs of the action.

[2] By way of background, the plaintiffs issued summons seeking an order *(a)* declaring the Last Will and Testament of the deceased to be null and void and *(b)* for payment as compensation for improvements to the farm of the deceased together with ancillary claims in the amount of R860 648.03.

[3] The action was defended by the first and seventh defendants.

[4] Pursuant to the issue of summons, the plaintiffs have since agreed to withdraw the claim to declare the Will null and void.

[5] The first defendant has on certain conditions agreed that the plaintiffs be compensated by an amount of R600 000.00 for improvements effected to the farm.

[6] The contention by *Ms Beard,* on behalf of the plaintiffs, is that the plaintiffs have been substantially successful in that, albeit that the parties have agreed that the plaintiffs shall withdraw their claim for an order declaring the Will to be null and void, the plaintiffs have been awarded a substantial amount of R600 000.00 out of the R860 648.03 that was initially claimed for the improvements made to the farm property. On that basis, the plaintiffs seek an order that the deceased's estate pay 75% of their taxed or agreed costs save for the costs of both counsel in respect of the appearance on 17 November 2016 and the qualifying expenses of Ms Lindstroom, a professional evaluator.

[7] In support of the order she sought, *Ms Beard* relied on *Spilg v Walker*[1] where Lewis JA held the following:

> "Every consideration of practical convenience induces me to the conclusion that it would be just and equitable to both parties that I should, instead of attempting to sever the costs on the different issues, make an award of a definite aliquot portion of the costs in favour of the applicant, and, bearing in mind that the greater portion of the costs was incurred in respect of the issues on which the applicant has failed, I consider that it would be a fair exercise of my discretion in the circumstances to award the applicant one quarter (¼) of the taxed costs of the application. The only order, therefore, that I make as to costs is that the respondent pay the applicant one quarter (¼) of the applicant's taxed costs of the application as of an opposed application, subject to the direction to the Taxing Officer that in respect of the

[1] 1947 (3) SA 495 (EDLD) at 504-505.

> amount allowed by him to the applicant for counsel's fees, such amount shall not be less than the minimum fee allowed to counsel for appearance on an opposed application."

[8] The rationale behind the order sought by the plaintiffs is that the majority of the costs have been generated in that portion of the claim *(the improvements)* on which the plaintiffs have been successful. *Ms Beard* submitted that a 75% award of costs would be appropriate, based on the volume of documentation produced by the plaintiffs in respect of the compensation claim which was the focus of the litigation between the parties.

[9] *Mr de la Harpe*, on behalf of the first and seventh defendants, submitted otherwise, arguing that the plaintiffs brought two separate distinct claims. The costs of the first claim *(about the Will)* could be easily determined and quantified and much the same with the claim for improvements without determining the costs globally *(i.e. determining the amount of costs in respect of each claim)* and subsequently taking 75% of the total costs and award it to the plaintiffs. In amplification, *Mr de la Harpe* submitted that in respect of declaring the Will to be null and void, the plaintiffs have failed and should pay the first and seventh defendants' costs and similarly, in respect of the claim for improvements, the first and seventh defendants have been unsuccessful and should pay the plaintiffs' costs. In a nutshell, *Mr de la Harpe* submitted that the costs should follow the results. In support of his argument, *Mr de la Harpe* referred to LAWSA; Severability of Issues.[2] He further referred to *Golding v Torch Printing & Publishing Co (Pty) Ltd & Others.*[3]

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[2]Vol 3 Part 2 at p 211 paragraph 295 and the authorities cited therein.
[3]1949 (4) SA 180 (CPD) at 181.

[10] The facts in *Golding* are similar to the present matter in that the plaintiff was successful in two of the actions brought and the defendants successfully defended three of the actions brought by the plaintiff. The plaintiff, in that case, argued that he should be awarded the general costs of the action and the defendants be awarded costs of the actions/claims where they succeeded. The plaintiff asked for three-fourths of the total costs and the defendants the remaining one-fourth of the total costs. The defendants, on the other hand, argued that the plaintiff should be awarded two-fifths of the total costs and the defendants three-fifths of the total costs.

[11] Herbstein J, disagreed with both proposals and reasoned as follows:

> "It seems to me to be quite wrong to award costs on a basis of counting claims on which plaintiff succeeded and those on which defendants succeeded, for to do so is to have no regard to the particular nature of the claims or the time taken up on those claims. What the Court must do is to try and make a fair and just estimate of the liabilities of the parties for the costs of the action, having regard to their success or failure, and to the conduct of the case generally."

[12] In principle there is nothing wrong with both approaches[4]. However, I am of the view that the approach adopted by Herbstein J should be followed in this matter. I say so because the apportionment of costs after the totality of costs has been taken into account, as decided in *Spilg,* has some difficulties. If I were to follow the proposal in *Spilg*, I would have to justify why I prefer to award the plaintiffs 75% and not, for example, 60% of the totality of the costs. I raised this issue with *Ms Beard* and her response was that in doing so I would be exercising my discretion. It is correct that I would be exercising my

[4]As enunciated in *Golding* and *Spilg* cases.

discretion. That discretion would have to be exercised judicially and not arbitrarily. To follow the approach suggested by Ms Beard would mean that I would have to have a reason why an award of 75% and not, for example, 60% is allowed. In my view I would not have a reasonable explanation for such an allowance especially because it would be mathematically based. I am of the view that whatever percentage I would allow would be arbitrary because of a lack of a basis therefor. But if costs follow the results, the taxing master shall be in a position to accurately calculate the costs of the defence of an order declaring the Will to be null and void and similarly the compensation claim. In that fashion, no party would be adversely affected by the award of costs.

[13] Consequently, I make the following order:

1. The amended agreement concluded between the plaintiffs and the first and seventh defendant is made an order of court;

2. The plaintiffs are to pay the taxed or agreed costs of the first and seventh defendants in respect of the withdrawn claim to declare the Will to be null and void, jointly and severally, one paying the other to be absolved; and

3. The first and seventh defendants are to pay the taxed or agreed costs of the plaintiffs in respect of the claim for compensation for improvements made jointly and severally, one paying the other to be absolved.

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M MAKAULA

JUDGE OF THE HIGH COURT

Counsel for the Plaintiffs:	Adv Beard *instructed by* Messrs Huxtable Attorneys 22 Somerset Street **GRAHAMSTOWN**
Counsel for the 1st and 7th Defendants:	Adv de la Harpe *instructed by* Netteltons 118A High Street **GRAHAMSTOWN**