

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2015/08456

<p><u>DELETE WHICHEVER IS NOT APPLICABLE</u></p> <p>(1)REPORTABLE: YES (2)OF INTEREST TO OTHER JUDGES: YES (3)NOT REVISED.</p> <p>11APRIL 2023 </p> <p>SIGNATURE DATE</p>
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In the matter between:

KADER HEIDI JOY

Applicant

and

SWARTZ MERVYN ISRAEL

First Respondent

KADER STUART WAYNE

Second Respondent

LANG KEITH HENRY

Third Respondent

Coram: FISHER J

Heard: 08 February 2023

Delivered: 11 April 2023

SUMMARY

Subsections 7(7) and (8) of Divorce Act- Powers of receiver/liquidator in relation to pension funds in divorce.

contempt of court - Without specific authorising powers as to pension fund benefits in order receiver /liquidator having no locus standi to liquidate pension fund assets on behalf of the joint estate.

Held - The receiver/liquidator having no general power to liquidate pension fund benefit of member spouse.

Held - order of court against liquidator /receiver implicating liquidation of pension fund interest impossible to comply with. As such, no contempt of court proven.

ORDER

1. The application is dismissed with costs in favour of the first and third respondents which costs are to be borne by the joint estate on the scale as between attorney and client.

JUDGMENT

Fisher J

Introduction:

- [1] This application is, at its heart, an application by one divorced spouse, the applicant against the other spouse, the second respondent (Mr Kader) for payment of monies which she contends are due to her in terms of the divorce.
- [2] There is a dispute about payment of this amount between the spouses. This, in itself, is not unusual. What is unusual is the manner in which the applicant has set about seeking payment of the amount which she contends

is due. This is where the first respondent, Mr Swartz and his attorney, Mr Keith Lang who is joined as third respondent enter the picture.

- [3] Mr Swartz is the court appointed receiver and liquidator of the joint estate. The applicant has looked to Mr Swartz for payment which she alleges she has been due to her since the final L&D account was produced by him on 11 October 2017. She does so now on pain of seeking an order declaring him to be in contempt of court and seeking related relief against him and his attorney.

Relief sought

- [4] The applicant seeks the imposition of a penalty for this alleged contempt by way of a fine of R500 000.00 and that Mr Swartz be committed to prison for 90 days if he continues in such alleged contempt.
- [5] Mr Swartz has been subjected to constant attacks by the applicant as to his carrying out of his functions as receiver. It is here sought that he be removed as receiver and that he forfeits the fees earned by him and the disbursements made by him in carrying out his duties as receiver.
- [6] He has already been paid these amounts by Mr Kader on behalf of the joint estate.
- [7] Mr Lang, who merely holds these amounts in trust for Mr Swartz as his attorney, is sought also to be subject to an order that he pays 'all monies

belonging to the joint estate that were paid unlawfully into his trust account by Mr Swartz into the trust account of Ms Richardson [the applicant's attorney]’.

- [8] He is also sought to be subject to an order that he provide a statement of account to the applicant in respect of the trust monies.
- [9] To add further injury to the insults against Mr Swartz, the applicant also seeks an order that she be allowed to set off these fees held against monies payable to her by the second respondent.
- [10] The effect of the order on Mr Swartz would be a personal loss of in excess of R1 million and loss of liberty.
- [11] There was furthermore an order sought relating to the providing of security for costs for R100 000 in respect of security for the Full Bench appeal in which Mr Swartz was cited in his personal capacity. This appeal is dealt with later. The applicant sought payment of this amount in that she alleged that Messrs Lang and Swartz had behaved improperly in that the security was provided by Mr Lang on the basis of the funds held in trust which were those of the joint estate and not those held for Mr Swartz. This relief is patently without merit and has fortunately now been withdrawn.
- [12] Punitive costs are sought against Messrs Swartz and Lang.
- [13] Messrs Swartz and Lang oppose the application. They have no choice considering the attacks made on them personally and professionally and the extensive reach of the relief.

- [14] Mr Swartz claims that he is not in contempt because the order as to realization of assets and payment are impossible to comply with. Furthermore, he argues that it is impossible for him to assuage the alleged contempt of this court.
- [15] Mr Kader has come late to this case and was absent from the proceedings which resulted in the order which is the subject of the alleged contempt. He was absent also from the appeal proceedings relating to that order before the Full Bench, save that he deigned to provide a confirmatory affidavit for Mr Swartz.
- [16] Essentially, Mr Kader has left it up to Mr Swartz to fight this battle – which is, in reality, not that of Mr Swartz but that of the divorced spouses.
- [17] For the first time since the divorce, an order for payment is also sought against Mr Kader personally.
- [18] Mr Kader abides the relief against Messrs Swartz and Lang, agrees that Mr Swartz should be removed (although not on the basis of misconduct) and opposes the claim for payment by him.
- [19] I turn to deal with the material facts.

Material facts:

- [20] The applicant and Mr Kader were married to each other in community of property. They divorced on 26 February 2016. The agreed terms of the divorce included that Mr Swartz would act as receiver and liquidator of the joint estate with agreed powers which were set out in annexure A to the order of divorce.

- [21] Mr Swartz was given the power under the divorce order to sell and transfer the assets of the joint estate and recover the proceeds thereof so as to split them between the spouses.
- [22] It is central to this case that Mr Swartz does not have the power to litigate on behalf of the joint estate, save ‘to obtain delivery of assets alleged to be vested in the joint estate’, to collect debts due to the joint estate and to defend proceedings brought against the joint estate.
- [23] Pursuant to the divorce order, Mr Swartz set about the task of liquidating the joint estate.
- [24] There were pension fund interests held in the name of Mr Kader which, in terms of section 7(8) of the Divorce Act¹ read with section 37D(1)(d) of the Pension Funds Act², were deemed to be part of Mr Kader’s assets and thus the joint estate.
- [25] In terms of section 7(8) an order could have been granted by the court handing down the divorce order to the effect that any part of the pension interest which was due or assigned to the other party in the divorce action shall be paid by the fund to the other party when pension benefits accrue in respect of that member party. This relief was not sought as at the date of divorce. It could, however, be sought subsequently.³
- [26] After first producing an initial report including a Liquidation and Distribution (L&D) account, Mr Swartz received certain representations

¹ Act 70 of 1979

² Act 24 of 1956

³ *GN v JN 2017 (1) SA 342 (SCA)* at paragraphs [25] and [28].

from the applicant as to the report. After having taken these representations into account he produced his final report – which has been termed a ‘supplementary report’ but which all accept is the final report pertaining to the liquidation and distribution of the joint estate. The final report incorporated the final L&D account relating to the estate.

[27] It is important that this is the report which was accepted by the court a quo and the full court as the basis for the order in issue.

[28] The following were pertinent aspects of the final L&D account produced by Mr Swartz on 11 October 2017:

- The report registered a net surplus R 14 167 677,18;
- Valuation fees, the fees of Mr Swartz and other sundry disbursement including the conveyancer’s fees pertaining to cancellation of the bond over the erstwhile matrimonial property which all totalled R 514 016.51 were deducted from the net surplus leaving a net amount for distribution of R13 653 660.67.
- This net amount was allocated equally between the spouses.
- On this allocation the applicant was due R2 421 081.05 and Mr Kader was due R 1 216 945.44.
- The distribution of the amount was determined on the basis that the applicant would receive a cash payment of R 1 432 316.75 and a transfer of an amount of R988 764.30 to a pension fund to be nominated by her.

[29] By everyone’s account, the parties accepted the report in relation to the calculations of the respective amounts owing to the parties. In fact, the report reveals that the payment method was as per the applicant’s request. The movable and immovable assets had, by that stage, been liquidated essentially on the basis that the applicant purchased the immovable property

which was the erstwhile matrimonial home at an agreed price and the defendant purchased certain movables.

[30] The divorce was acrimonious and the process of liquidation and distribution was subject to constant dispute – primarily by the applicant.

[31] It is common cause and emerges from its express terms that the final L&D account and the accompanying report were drawn on the basis that the R988 764 was to be paid to a pension fund nominated by the applicant from Mr Kader's *iSelect* Preservation pension fund held with Investec Bank.

[32] The fact that the L&D account was drawn and the amounts due calculated on the basis of this premise is central to this case and the processes which have come before it.

[33] On 11 October 2017 the final L&D report was published and initially accepted by the applicant. The applicant, subsequent to this acceptance, did a volte-face.

[34] Focussing on a part of the report which indicated a preference of Mr Kader not to liquidate his pension fund benefits but to source the money to pay her elsewhere, the applicant stated, through her attorney, that she 'had now decided that she wanted the outstanding amount to be paid to her bank account and not to a pension fund'.

[35] I can only assume that the applicant had decided that if Mr Kader had a source of liquid cash from which he could pay her, this should benefit her.

- [36] I must emphasize that there is no evidence of any remaining liquid funds belonging to the joint estate or Mr Kader. He has been resolute that he requires the facility to pay the monies tax free and that he will not agree to an alternative payment method unless the applicant personally bears the costs of such alternative payment.
- [37] The transfer of monies from one pension fund to another would not attract income taxes, however, if the pension funds or part thereof had to be withdrawn by Mr Kader this would attract an income tax payable by the joint estate.
- [38] This was pertinently addressed by Mr Kader's attorney, Mr Yosef Shishler. He sent an email explaining that the L&D account had been prepared on the express agreement that the payment would be made to a pension fund. This state of affairs, he said, was designed to allow Mr Kader the facility to transfer the money to the applicant tax free as he could make this payment from his pension fund to that of the applicant should he wish to do this. He emphasized that the proposed change in payment method would mean that this facility was denied Mr Kader. Mr Kader was thus not prepared to allow for this amendment to the payment method save on the basis that the applicant bear the tax which would be occasioned by a withdrawal of the pension fund interest.
- [39] Thus, whilst the final L&D account had been drawn on the agreed position that the applicant would receive the payment in issue into a pension fund of her nomination, there was now an impasse between the spouses. Mr Kader's position was that if he had to make the payment in cash this would require a reformulation of the L&D.
- [40] Mr Swartz duly wrote to the applicant's attorney Ms Sian Richardson explaining patiently that there were implications to the applicant's change of

mind. He informed Ms Richardson in no uncertain terms, that if the monies were not distributed as per the initially accepted L&D account this would have a tax implication which would mean that the final L&D would have to be scrapped.

- [41] By 15 November 2017 and almost a month after the final L&D account had been accepted there was still vacillation on the part of the applicant as to how the monies due to her would be received.
- [42] At this stage, Mr Swartz was, despite his best endeavours, in the middle of the storm which had blown up as to the payment due to the applicant and the fact that there was no liquidity in the deceased estate.
- [43] There were some minor skirmishes as to the delivery of movables to Mr Kader and the taking into account of certain funds generated from these movables and other minor adjustments which had to be brought to bear on the L&D. This is relevant only in that it served to reduce the final disputed amount to be paid to the applicant from R988 764.30 to R940 498.31.
- [44] On 15 November 2017, Ms Richardson wrote an email to Mr Swartz advising him that it was his 'duty and responsibility' to obtain a court order so as to allow for the payment of monies from Mr Kader's pension fund to that of the applicant.
- [45] Ms Richardson's tone at this point is abrasive. She states that she had previously offered to assist with obtaining the necessary court order but that because of the lack of co-operation and dilatory conduct which she had experienced from Mr Shishler acting on behalf of Mr Kader she was no longer prepared to assist.

- [46] She informed Mr Kader as follows: ‘Obtaining the court order is your responsibility, Mr Swartz...’. She followed up with a threat that, if he did not take steps to obtain a court order, she had instructions to apply to court for relief.
- [47] On 21 November 2017, Mr Swartz wrote to Ms Richardson in an imploring tone. He said that he was not abdicating his responsibilities but that he sought a workable solution which would allow for the cost-effective division of the estate.
- [48] It is clear from the correspondence between Ms Richardson and Messrs Swartz and Sishler that it was understood by all that, as at November 2017, the last assets capable of realisation had been dealt with. The only outstanding amount was the amount of R940 498.31.
- [49] The cash amount payable to the applicant under the final L&D account had been paid by Mr Kader acting on behalf of the joint estate. This amount was received without demur. These funds came from a liquidated pension fund asset in the name of Mr Kader. The liquidation of this pension fund asset also served to pay the amount due in respect of the fees and disbursements of Mr Swartz in a total amount of R540 831.
- [50] The applicant did not dispute that these fees and disbursements were a first charge on the joint estate. She did however raise a dispute as to the manner of the calculation of the fees. By this stage, the applicant’s dissatisfaction at not obtaining the payment that she sought, was mainly directed at Mr Swartz. Instead of attempting to find a rational way through the impasse, she decided that she would litigate against Mr Swartz both personally and in his capacity as receiver.

[51] On 27 May 2019 the applicant applied to court for a directive on the basis that she disputed the mechanism employed to calculate the Mr Swartz' fees – being a percentage charge in terms of the Insolvency Act.⁴ She furthermore asked for an order that he 'realise' assets of the joint estate from which to pay her R940 498.31 in cash.

[52] This application came before Foulkes-Jones AJ who handed down a judgment on 12 December 2019. In terms of this judgment, it was ordered that:

- Mr Swartz was not entitled to calculate his fees in accordance with the insolvency Act but that he was entitled to his reasonable fees for work performed;
- Mr Swartz render an account of this work done within 30 days such account to be supported by vouchers;
- The fees as calculated were to be a first charge against the joint estate;
- Mr Swartz was obliged, within one month, to realize so many assets of the joint estate necessary to effect payment of the amount calculated as being due in terms of the final report, which at that stage was R940 498.24.
- Such payment was to be adjusted on the basis that it reflected the applicant's 50% share of payment of Mr Swartz's fees as were then unpaid.

[53] Mr Swartz was, at this stage, called on to expend his personal funds on opposing litigation between the ex-spouses. He was being placed by them in

⁴ Act 24 of 1936.

an intractable position. Although Mr Swartz filed an affidavit, neither Mr Kader nor Mr Swartz appeared at the hearing and the matter was determined without the court having the benefit of their submissions. Mr Swartz understandably sought to keep his costs to a minimum.

[54] In fact, the applicant had misled the court. She did not disclose the following incontrovertible facts:

- The only asset in the joint estate was Mr Kader's remaining pension interest in the *iSelect* pension fund;
- There were formalities involved in the liquidation of this pension fund and Mr Swartz had expressed that he could not obtain the liquidation of these funds without the co-operation of Mr Kader as member of the pension fund;
- The amount claimed had been determined on the basis of a payment model that attracted no tax;
- The tax implication of the change of payment model was not immaterial and was likely to exceed R700 000.

[55] It is not clear what the applicant expected Mr Swartz to do given that he had, no money to fund litigation, no assets which could be realised by way of sale and no co-operation from the member of the pension fund which was the sole asset. And yet she forged ahead.

[56] Mr Swartz was thus faced with an order which gave him much difficulty.

[57] He thus sought leave to appeal the judgment and order on the basis, inter alia, that the further information relating to the tax implication of payment

was required to be taken into account. Mr Kader did not oppose the application but he did not enter the fray personally either. The application was heard on 23 July 2020 and judgment was handed down against Mr Swartz on 19 October 2020.

[58] Mr Swartz then sought leave to appeal from the Supreme Court of Appeal and leave was granted to the Full Court. It seems likely that this leave was granted due to the anomaly which exists between the order for payment and the acceptance of the terms of the final L&D report by the Court.

[59] The Full Court, whilst addressing the fact that there was a need for the tax implications and the Divorce Act to be considered, made the point that there would have to be the necessary engagement with these principles in that section 7(8) of the Divorce Act had not been invoked. The appeal was however dismissed.

[60] Thus, the order stands and it has led to this application.

Discussion

[61] The relief sought as set out above falls into the following four categories:

- First, the contempt relief against Mr Swartz;
- Second the removal and forfeiture relief against Mr Swartz;
- Second, the reporting and transfer of trust funds relief against Mr Lang;
and
- Third, the payment relief against Mr Kader.

[62] I will deal with each category in turn.

The contempt relief

- [63] the applicant has to prove the requisites of contempt (the order, service or notice, non-compliance and wilfulness and *mala fides*) beyond a reasonable doubt. The respondent then has an evidentiary burden in relation to wilfulness and *mala fides*.⁵
- [64] It stands to reason that Mr Swartz cannot be wilfully in contempt of an order that is impossible of compliance. I thus move to consider whether it is indeed impossible to comply with the order of Foulkes-Jones AJ as Mr Swartz alleges.
- [65] In terms of the order Mr Swartz was obliged, within one month, to realize so many assets of the joint estate to effect payment of the amount calculated as being due in terms of the final report, which at that stage was R940 498.24.
- [66] It is not seriously disputed that there are no assets in the estate capable of being realised by way of sale. In any event, according to *Plascon – Evans*⁶, Mr Swartz’ version in this regard must be accepted.
- [67] The applicant argues that the order, properly construed, enjoins Mr Swartz to take steps to achieve liquidity from the pension fund interest of Mr Kader so that she can be paid the cash amount due to her under the order from this pension withdrawal.
- [68] It seems to me that there are two bases on which such an order is not competent. The first is that Mr swartz’ powers as receiver under the divorce order do not allow him to bring proceedings on behalf of either of the divorced spouses or the estate save for the purposes of vindicating assets.

⁵ *Fakie NO v CCH Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) Paragraphs [42] and [63] - [65]

⁶ *Plascon -Evans Paints Ltd v Van Riebeeck Paints (PTY) LTD* 1984 (3) SA 623 (A)

The second is that Mr Swartz does not have the locus standi to obtain relief under sections 7(7) and 7(8) of the Divorce Act.

[69] I move to deal with each of these bars to realising the pension funds.

The powers of Mr Swartz as receiver

[70] The nature and scope of Mr Swartz' powers of receipt and liquidation in respect of corporeal and incorporeal assets of the joint estate poses no problem. He may realise these assets by selling them to the highest bidder. But how are pension fund interests to be realised in the liquidation?

[71] Pension fund benefits are a different matter. Such benefits are statutorily regulated. They may not be attached reduced or transferred. In terms of the section 37A of the Pension Fund Act read with section 7(7) of the Divorce Act the pension benefit of the spouse is not an actual asset but is 'deemed' to be a part of a party's assets.

[72] Thus, to my mind a pension benefit it is not, in fact, an asset and cannot be dealt with under Mr Swartz' general powers of receivership and liquidation as set out in the divorce order.

[73] In a divorce, the only manner in which one spouse can become a beneficiary under the pension fund of the other spouse is by means of the machinery in section 7(7) and (8) of the Divorce Act.

[74] A theme which has run through the demands and threats made against Mr Swartz is that it is his duty to approach the court for section 7(7) and (8) relief.

[75] As I have said, to my mind such an application is not covered by the express terms of the order appointing Mr Swartz. But even if I am wrong on this construction of his powers under the order, the question arises whether, as a matter of course under the legislative scheme created by sub sections 7(7) and (8) a receiver and liquidator in a divorce would have the locus standi to seek on his own behalf relief under the Divorce Act. I turn to deal with this issue

Locus standi in respect of pension funds

[76] Neither Foulkes-Jones AJ nor the Full Court was addressed on the locus standi and powers of Mr Swartz. In fact, it seems to me that these matters were studiously avoided.

[77] The applicant's argument in this application has proceeded on the assumption that Mr Swartz has the power arising out of his office as receiver and liquidator to approach a court on behalf of one or the other of the parties for relief relating to Mr Kader's pension fund.

[78] However, pension benefits are not reducible, transferable or executable save to the extent permitted by statute.⁷

[79] Sections 7(7) and 7(8) of the Divorce Act allow for spouses' pension funds interests to be taken into account in determining patrimonial benefits. This is achieved by way of a provision which notionally treats the benefit as an asset of the joint estate for the purposes of allowing the non-member party a

⁷ Section 37A(1) of the Pension Fund Act.

right to receive part of the benefit due to the member when it is paid out in the normal course of the policy.

- [80] Section 7(8) provides that court may make an order to the effect that ‘any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member’.
- [81] In my view, a third party such as a receiver and liquidator would not have the locus standi to bring an application under section 7 unless this was specifically catered for in the empowering order on the basis that he was given the power to act on behalf of the spouses or either of them. The legislation does not afford such him standing in his own right.
- [82] However, and in any event, the applicant does not seek an order in terms of section 7(8). She seeks an order that the amount due to her in terms of the order of Foulkes-Jones AJ be paid to her on the basis that such amount is withdrawn or liquidated from the pension fund.
- [83] On any construction of the Divorce Act, the Pension Fund Act or the order appointing Mr Swartz, he does not have the power to force a member of a pension fund to withdraw funds from his pension fund or to force the pension fund to release such funds against the wishes of its member.
- [84] There is no case made out for any basis on which this pension fund asset can be realised to pay the applicant the cash that she demands.
- [85] With the best will in the world, Mr Swartz is simply unable to comply with the order of Foulkes-Jones AJ.

Removal and forfeiture relief

- [86] On Mr Swartz' version, which I must accept, the final L&D account was drawn on the basis of an agreement between the ex-spouses that there would not be a cash payment but a benefit transfer. In fact, in terms of Mr Swartz' final report this was at the request of the applicant.
- [87] Quiet why the applicant has believed that she is entitled to renege on this agreement is difficult to understand. It seems to me that the only deficiency in Mr Swartz service in the divorce has been that he has indulged the applicant's whims and vacillations when he should not have.
- [88] To my mind it is clear that the R 940 498 should have been paid into a pension fund nominated by the applicant. She agreed to this method of payment and Mr Kader has insisted that if this method is not adhered to, he will resist the distribution under the L&D.
- [89] The alternative is a stalemate. Mr Swartz has no assets to realize and thus cannot be held to be in contempt of the order of Foulkes- Jones AJ.
- [90] In my view, Mr Swartz has complied with his duties as to the liquidation and distribution of the estate. His final L&D account provides for the only possible mechanism of distribution in all the circumstances. And it was agreed to in this context.

- [91] Thus, Mr Swartz has performed his function as best he could under trying circumstances and is *functus officio*. There is no basis on which to remove him.
- [92] There is certainly no basis to remove him for misconduct.
- [93] As to the forfeiture claimed, his fees and disbursements were paid by Mr Kader on behalf of the joint estate and he has accounted therefor on the basis ordered by Foulkes-Jones AJ. It seems that the applicant seeks to continue her opposition to these costs but she does not here make out any basis for such opposition. There is certainly no case whatsoever made out for any forfeiture of these fees. Indeed, such relief would be fundamentally unconstitutional.
- [94] Mr Kader does not dispute that he paid the fees on behalf of the joint estate and that they are reasonable.
- [95] The computation of the fees at a reasonable hourly rate has yielded an amount which exceeds of the calculation made on the basis of the percentage charge under the Insolvency Act.
- [96] The order makes provision for payment of the fees of Mr Swartz on the basis of the payment already made to him by Mr Kader on behalf of the joint estate. It provides for the applicant and Mr Kader to augment the amount paid on behalf of the joint estate on a 50/50 basis should this be necessary.

The reporting and trust monies relief

- [97] Mr Lang as Mr Swartz' attorney holds funds which Mr Swartz has deposited into his trust account. These are Mr Swartz' fees and disbursements. Whilst there has been a dispute raised by the applicant as to the computation of fees

the computation under the order has yielded an amount due in excess of that paid by Mr Kader on behalf of the joint estate. There is no basis for Mr Lang to release these funds to the applicant's attorney.

[98] A duty to render an account may arise from a fiduciary relationship, a contractual relationship or a statutory duty.⁸

[99] Mr Lang does not stand in a fiduciary or contractual relationship to the applicant and there is no statutory implication. In fact, Mr Lang's duties lie with his client.

[100] Thus, no case is made out for an account to be made by Mr Lang.

The payment by Mr Kader to the applicant

[101] Mr Kader's failure to join actively and sensibly in the misguided litigation which has been brought by the applicant has allowed this impasse to develop to this intractable point.

[102] This notwithstanding and because of the central difficulty pertaining to the pension fund distribution, the applicant has not made out a case for the judgment which she seeks against Mr Kader.

Costs

[103] The supine approach of Mr Kader in these proceedings is regrettable. It seems that he has attempted to gain advantage from the current stalemate. He has latterly made his defence clear in these proceedings.

⁸ *ABSA Bank Bpk v Van Rensburg* 2002 (3) SA701 (SCA)

[104] The order of Foulkes-Jones AJ proceeded from the false premise that there were assets that were capable of being liquidated to meet the applicant's demands. The applicant made the case and Mr Kader did not take the requisite responsibility for gainsaying it that he should have. Instead, Mr Swartz was called on to play a role that was beyond the description of his office and he has had to expend personal resources to this end.

[105] It seems to me that Messrs Swartz and Lang should not be left out of pocket. They have both been unjustifiably criticized and have been forced to oppose proceedings personally under circumstances where they have merely been doing their work.

Order

I thus order as follows:

The application is dismissed with costs in favour of the first and third respondents which costs are to borne by the joint estate on the scale as between attorney and client.

D FISHER
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

Adv V Davel

Instructed by:

Sian Richardson Attorneys

For the 1st and 3rd Respondent: Adv CJ Badenhorst SC

Instructed by: Keith H Lang Attorneys

For the 2nd Respondent: Adv T Ossin

Instructed by: Bosman and Mungul Inc.