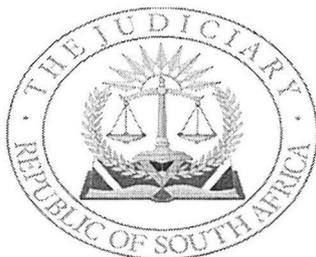


REPUBLIC OF SOUTH AFRICA



IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC22/2007

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	29 September 2023
..... SIGNATURE DATE

In the matter between:

GCUMISA LAND CLAIMS COMMITTEE

Claimants

Concerning farms in New Hanover District

This Judgment was handed down electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be at 16h00 on the 29th day of September 2023.

JUDGMENT: *Costs De Bonis Propriis*

NCUBE J

Introduction

[1] This judgment concerns the possible *de bonis propriis* cost order, against an attorney Mr Siphon L Mkhize “Mr Mkhize”, in favour of the landowners represented by Cox and Partners Attorneys. The other participating parties like Mondi, the Minister of Rural development and Land Affairs and the Regional Land Claims Commissioner, filed Notice to Abide in these proceedings. Adv T Katangure appeared on behalf of Mr Mkhize, instructed by Siphon Mkhize Attorneys, Westville. Mr MG Roberts appeared with Ms E Roberts-Sherwood appeared on behalf of the landowners instructed by Cox and Partners. Although a Notice to Abide had filed, Adv Chaudree SC with Adv Naidoo appeared on behalf of the Minister and the Commission.

Factual Background

[2] This matter has a long history. On the 7th of September 1998, Nkosiyezwe Prince Gcumisa, the Inkosi of the Gcumisa Tribe in the New Hanover District, lodged a land claim on behalf of the Gcumisa Community. The claim was investigated by the Regional Land Claims Commissioner (“RLCC”) and subsequently published in the Government Gazette. On 31 September 2006 the RLCC referred the claim to court for adjudication. On 5 September 2007, the attorney Mr Mkhize filed a Notice to Participate on behalf of the Gcumisa Community. From 5 September 2007 till 20 July 2023 Mr Mkhize was on record as the attorney for the Claimants and he participated in all proceedings including pre-trial conferences at which trial dates were arranged.

[3] At a pre-trial conference held on 19 March 2013, the trial dates of 28 October 2013 to 01 November 2013 were allocated. There was another pre-trial conference on 26 August 2013. At that conference Mr Mkhize reported that the Claimants were not

ready for the trial as they still needed to file expert report and to file a response to the referral. Another pre-trial conference was held on 07 October 2013. At that conference, Mr Mkhize reported that the Claimants required more time to finalise the expert report and to appoint a surveyor. The trial dates were adjourned for that purpose. On 26 January 2022 the landowners instituted an application to have the Claimants' claim struck off, since no response to the referral had been filed in respect of the Claimants. On 10 February 2022, Mr Mkhize filed the Claimants' response to the referral.

[4] On 03 March 2022, Mr Mkhize addressed a letter to Cox & Partners advising that he was working towards the trial and was in the process of obtaining an expert report. On 4 March 2022, Cox & Partners wrote to the State Attorney and Mr Mkhize lamenting about the delay in the matter and recording that whoever caused further delays will be liable to pay the costs.

[5] The most important event for purpose of this judgment is the withdrawal by Mr Mkhize on 20 July 2023 as the attorney for the Claimants. In that withdrawal letter, Mr Mkhize did not provide reasons for the withdrawal. At a pre-trial conference held on 25 July 2023, I issued a directive to Mr Mkhize to provide a written explanation on or before 2 August 2023 and appear in person on 7 August at Camperdown Magistrate's court on 7 August 2023 to explain why he withdrew as attorney of record after the matter had been set down for hearing and without giving reasons.

[6] On 2 August 2023, Mr Mkhize filed a short statement indicating that his legal representative was not available and that he was sick and not able to provide full statement which he in any event needed to prepare with his Counsel. Mr Maake of

RLCC'S office filed a report on 3 August 2023 recording that Mr Mkhize appeared at Mr Maake's office on 26,28 and 31 July 2023 and he even accompanied the Claimants' representatives to Port Shepstone Legal Aid office to apply for Legal Aid. On 4 August 2023, landowners represented by Cox & Partners filed submissions in respect of costs *de bonis propriis* to be paid by Mr Mkhize.

[7] On 7 August 2023, Mr Mkhize appeared in court and indicated that he needed more time to file his statement in respect of costs. Claimants through Legal Aid SA, were able to get another attorney Mr Oswald Mkhize ("Oswald") who is now their attorney on record. Inspection *in loco* set down for 7, 8, 10 and 11 August 2023 could not proceed as Mr Mkhize had withdrawn and another attorney had taken over. However, Oswald was able to take up the case. The inspection carried on until 06 September 2023, when it was adjourned due the non-availability of other witnesses who were required to do the pointing out.

[8] As a result of further directives by this court, Mr Mkhize filed a comprehensive written affidavit on the 8th of September 2023 in preparation for the costs argument on 20 September 2023. Land owners represented by Cox and Partners filed their response to Mr Mkhize's affidavit on the 18th of September 2023.

Issues

[9] The main issue for determination by this court, is whether Mr Mkhize should be held personally responsible for all the delays and consequently be ordered to pay costs *de bonis propriis*.

Law

[10] A well recognised principle is that costs *de bonis propriis* orders can be made against attorneys, only in reasonably serious cases like cases involving dishonesty, willfulness or negligence in a serious degree¹. In *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others*² O Regan J in this regard, expressed herself in the following terms:-

“An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court’s displeasure.”

[11] It is clear that an order of costs *de bonis propriis*, is not an order which is lightly resorted to. Before such an order can be made against an attorney, who is an officer of the court, there must be strong evidence of neglect of his duties as an officer of the court, his negligence must be of a serious or of a gross nature.

[12] In *Adendorffs Boerderye v Shabalala and Others*³ Mathopo J said: -

“It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of the court or in other ways related to the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or

¹ *Immelman v Loubser en'n Ander* 1974 ALL SA 89 (A), *Mahlangu v De Jager* 2000 (3) SA 145 (LCC) at 163 E-F.

² 2009 (1) SA 565 (CC) at para 54.

³ (1997/15) [2017] ZASCA 37 (27 March 2017) at para 35.

because the court feels compelled to make its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court and gross incompetent (*sic*) and a lack of care.”

Discussion

[13] Mr Mkhize’s conduct which is the gravamen of the landowners, must be viewed in light of the principles discussed above. The court will only make an order of costs *de bonis propriis*, if the court finds that Mr Mkhize’s conduct amounts to gross negligence or that he was dishonest in his dealings with the court, or his conduct amounted to an obstruction of the interests of justice.

[14] It seems to me that most of the delays were caused by lack of funding. There was a delay in obtaining an expert report not because of Mr Mkhize but because of lack of funding. There were instances where Mr Mkhize remained on record even when he had not been paid. On 20 March 2009, Mr Mkhize wrote to the parties saying:-

*“In the background, we have been placed on an untenable position in that the Commission has advised us that there are no funds available to pay for legal fees in this matter.....
We must point out that at the initial stages of this matter our client approached the Legal Aid for legal assistance and were turned down.”*

[15] Mr Mkhize wrote another letter to the Registrar and other parties dated 8 November 2010 complaining about lack of funding from the Commission and said:-

“Presently, unless your client confirms funding, we will not be able to take the matter forward even at the proposed pre-trial. You will recall that we remained on record in this matter only

because of our respect to the court and our colleagues and to avoid the possible unnecessary disruption our withdrawal may cause to all concern (sic)."

[16] Problems caused by lack of funding were highlighted at almost every pre-trial conference held since 2009. At a pre-trial conference held on 30 January 2012, Adv Roberts, counsel for the landowners, put the blame for the delay squarely at the door of the Commission, not on Mr Mkhize. Paragraph 12 of the minutes records the following: -

"Adv Roberts argued that the landowners have incurred costs since 2007 and that the delays were caused entirely by the lack of co-operation by the Commission. The property owners cannot be expected to carry the costs and were present at the conference."

[17] In a letter dated 4 March 2022, Mr Van Der Merwe of Cox and Partners indicated on paragraph 2 that the delay was caused by the Commission and the claimants. Paragraph 2 of the said letter states: -

"The history of this matter is well known and is a typical example of how landowners are prejudiced as a result of delays caused by the conduct of the Commission and claimants. In this regard we must unfortunately refer to the claimants, as represented by Mr Mkhize. For years on end we had to hear about the problems that they have with the Commission. Now there is indication that they will once more delay this matter because they still not have obtained the services of an expert. They could have done so years ago."

To that extent, paragraph 15 of the Chronology is not correct where it says: -

*"Letter from Cox and Partners informing all the parties that **Mr Mkhize is once again delaying the matter....**"*

The letter referred to above did not record that Mr Mkhize was delaying the matter, but the Commission.

[18] The final episode in this non funding saga, was the letter written by Judge Gildenhuis dated 15 December 2010. I wish to refer to paragraphs 3 and 4 of that letter. Paragraph 3 states: -

"I am informed by Mr Mkhize, attorney acting for the claimants' community, that funding was approved during 2007 for them to represent the community in the restitution claim. The attorney and counsel proceeded working on the matter. Then on 27 February 2009, the attorney received a letter that no further funding will be forthcoming because of budget constraints. For understandable reasons, the attorney and counsel could not proceed with their work. The Commission advised the attorney to seek financial assistance from Legal Aid Board and from lawyers for Human Rights. None of these institutions were in the position to give financial assistance."

[19] In paragraph 4 of the above letter, Judge Gildenhuis recorded that since the letter of 27 February 2009 cancelling the previously approved funding, Mr Mkhize wrote fifteen (15) letters to the Chief Land Claims Commissioner, to the Legal Head and to the Regional Land Claims Commissioner asking that funding be reinstated and that no written reply was received to any of those fifteen (15) letters.

[20] In terms of the directive of 25 July 2023, Mr Mkhize was directed to provide a written explanation as to why he withdrew as the claimants' attorney of record on 20 July 2023 and why he should not be ordered to pay the costs of the trial *de bonis propriis*. Mr Mkhize has provided a written explanation in the form of an affidavit.

[21] In his affidavit, Mr Mkhize states that he withdrew as attorney of record for the Claimants because he is sick since his ancestors want him to get out of this case and take up the ancestral calling to become an Isangoma. He experienced this sickness in November 2022. He did not immediately withdraw because he was still pleading with his ancestors to allow him to proceed with his work as an attorney and he offered a cow for that purpose, but all was in vain, he was then forced to withdraw.

[22] In paragraph 8.3 of his affidavit, Mr Mkhize states that his life belief is rooted in Indigenous African tradition and custom and as a result, he sought advice about his sickness and was advised to fulfill the calling of becoming Isangoma. This explanation is given in the form of an affidavit and it constitutes evidence. In the absence of evidence gainsaying this explanation, I am bound to accept Mr Mkhize's explanation as being reasonable.

Finding

[23] I find that Mr Mkhize is not responsible for the delays caused in this case. I equally find that Mr Mkhize has provided a reasonable explanation as to why he withdrew as attorney of record for the Claimants on 20 July 2023.

Order

[24] In the result, it is declared that Mr Mkhize is not liable to pay cost *de bonis propriis* occasioned by the adjournment of the trial in this case.



NCUBE J

Judge: Land Claims Court

Randburg

Date of hearing: 20 September 2023

Date judgment delivered: 29 September 2023

Appearances

For Claimants: Adv Katangure, T

Instructed by: Siphon Mkhize Attorneys

Durban

For Landowner Defendant: Adv Roberts SC

Adv Roberts-Sherwood, E

Instructed by: Cox & Partners Attorneys

Vryheid

For Participating Parties: Adv Chaudree SC

Adv Naidoo

Instructed by: The State Attorney

KwaZulu-Natal