CIV/T/190/1999
IN THE HIGH COURT OF LESOTHO

In the matter between:

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| DANMOR (PTY) LTD | PLAINTIFF |
| and | |
| ERMOLINO AIRLINES | 1ST DEFENDANT |
| KEY-AVIA AIRLINE | 2ND DEFENDANT |
| VICTORIA AIR AVIATION COMPANY (PTY) LTD | 3RD DEFENDANT |

RULING

Delivered by the Honourable Mr. Justice G.N. Mofolo on the 30th day of March. 2000.

After both counsel had addressed court on the proprietary or otherwise of proceeding with applications instead of the trial, the court has decided to make a ruling on an issue which had occupied counsel on either side for the entire period between March 14-16, 2000.

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Although from the very beginning this court made it clear it was seized with CIV/T/190/99 being the trial, by devious means and particularly Mr. Strydom for the 1st and 3rd defendants did not seem to fall in line and despite a clear directive from the Court an application under CIV/APN/133/99 had been launched by Mr Strydom instructing attorneys whose relief has amongst other tilings:

a) — to discharge the attachment.'

In reaction to the application the court had made a ruling on 17 March, 2000 holding that:

> 'Since only the trial was set down before this court and applications were not set down would be outside the ambit of this court for if it was desired to challenge the writ of attachment granted by the Chief Justice, this is a matter that must be set down before the Chief Justice for determination as this court can neither review or sit in judgment over what appears to be orders for other judges.'

- see p.3 of the Ruling annexed. Having made the ruling the court had indicated that 'costs will be costs in trial. Mr. Woker had attached the ruling saying much precious time was spent by Mr. Strydom in an effort to have the court address itself on a matter that was not before it and that the court has to show its displeasure by

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ordering costs on an attorney-and-client scale. Mr. Strydom has said negotiations
were in bad faith and on this score the plaintiff was not entitled to costs. What more although the court has made a ruling, defendants were not to be punished for exercising options that rules allow them to do. The court had reserved judgment.

The application CIV/APN/133/99 when originally launched was for striking out an application which, in the opinion of the court being part and parcel of the trial is normally moved before going into trial. As it is part and parcel of the trial, it is doubtful whether it is the sort that must be specifically set down in view of the fact that it goes with the trial. If this is the application Mr. Strydom moved to have heard, I doubt the court would have reason not to hear it. Unfortunately, an application which Mr. Strydom or his instructing attorneys launched and which Mr. Strydom spent quite some time musing whether it be heard or not was an application to set aside the writ of attachment, an application which effectively challenged an order of the Chief Justice. According to Mr. Strydom, there was nothing barring this court from hearing the application in view of the fact that, as he said, 'the question of jurisdiction is related to the question of attachment.' With respect, this court does not understand how the two are related in that:

1) jurisdiction of the court was not raised before the Chief

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Justice the court having ordered a writ of attachment on whether this was necessary in the circumstances.

2) jurisdiction not having been raised before the Chief Justice and not decided by him, it is a question which can properly be raised before this court.

3) Since attachment was the subject-matter before the Chief Justice decided the issue, it is doubtful whether this court can go into a subject decided by another court.

Mr. Strydom was aware or should have been aware that the decision as to writ of attachment by the Chief Justice was in the nature of a final order precluding this court to investigate circumstances under which the writ of attachment was granted. By pressing this court to go into an area outside its scope Mr. Strydom took a gamble he knew would not pay. The question of course is whether in taking his chosen course Mr. Strydom was activated by malice or bad faith of simply to waste everybody's time. In this regard he has said defendants are not to be punished for exercising options within the rules. This court agrees that the application is within the rules except that Mr. Strydom was ill-advised to bring it before this court. In this case defendant's attorney and advocate introduced a substantial issue on which they were put in the wrong, a factor which had legitimately put the other party to considerable inconvenience and expense resulting in procedural confusion. Be this as it may, it would seem a court will not order

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attorney-and-client costs in these circumstances unless there are special considerations. These 'special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party', the court may consider it just if a particular case be means of an order of attorney-and-client costs than put to party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation (see Nel v. Waterberg Landbouwers Ko-operatieve Vereeniging, 1946 A.D. 597 at 607). Mr. Woker has said he was paid to prosecute the trial and instead a matter that was not on the roll occupied him for the most part.

The order for attorney-and-client costs does not come easily for even where a litigant's conduct was described as reprehensible the court refused to award attorney-and-client costs (see Edengcorge Ltd. v. Chamomn Property Investments, 1981 (3) S.A. 460 (I) at 472 E-F. Indeed where an applicant had brought the application hastily to court when by making inquiries these might have put a different complexion upon the proceedings and the applicant (as in the instant application) had failed to do so, the court refusing an award of attorney-and-client costs had found it cannot be said on the probabilities 'that the applicant brought the application in bad faith nor can 1 find that it intended or attempted to mislead the



court.' (see Southern Pride Foods (Pty) Ltd. v. Mohidien, 1982 (3) S.A. 1068 at 1074 G).

While it may be said that Mr. Strydom was over zealous, this is understandable because he does seem to have endeavoured (albeit hastily sometimes) to apply his energies for the benefit of his clients. This court is not able to say that Mr. Strydom's conduct of the case was reprehensible nor can I say that the application was brought in bad faith or intended or attempted to mislead the court.

Mindful of the fact that when the court made an order for costs the court had not been addressed on this aspect, the court's order for costs is to read: costs to the applicant will be on an ordinary scale.

G.N. MOFOLO
JUDGE
23rd March, 2000.

For the Plaintiff: Mr. Woker
For the 1st & 3rd Defendants: Mr. Strydom