

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) NO. 14/2022  
CCA/0085/2021**

In the matter between:

**THE ORDER OF COSTS *DE BONIS PROPRIIS*: ADV. MUSI-MOSAE**

**IN RE:**

**FELLENG 'MAMAKEKA MAKEKA  
APPELLANT**

And

**AFRICA MEDIA HOLDINGS C/O  
LESOTHO TIMES  
RESPONDENT  
OFFICER COMMANDING  
THETSANE POLICE  
RESPONDENT  
COMMISSIONER OF POLICE  
RESPONDENT**

**1<sup>ST</sup>**

**2<sup>ND</sup>**

**3<sup>RD</sup>**

**CORAM:** DAMASEB AJA  
CHINHENGO AJA  
VAN DER WESTHUIZEN AJA

**HEARD:** 19 OCTOBER 2022  
**DELIVERED:** 11 NOVEMBER 2022

***SUMMARY***

*Counsel for applicant mulcted with costs de boniis propriis and appealing against such order of costs; Client's claim was for*

*over six hundred thousand Maluti alleging non-payment of rental by respondent tenant;*

*During course of filing pleadings, it is emerging that the rentals had been paid and a dispute between the parties was only in respect of an amount representing five per centum annual escalation of rent and not exceeding twenty-five thousand Maluti only;*

*Counsel pursuing main claim and adamantly contending respondent had admitted liability for amount of the escalation when clearly that was not the case;*

*Counsel submitting there had been miscommunication between her and client despite the contents of answering affidavit and her instructing attorney's letter restricting claim only to amount of the escalation, thereby showing counsel had not acquainted self with the documents and pleadings on record;*

*Counsel also becoming quarrelsome in response to issues raised by judge; Counsel given opportunity by court to file written submissions why costs de bonis propriis should not be ordered;*

*On appeal argument advanced that parties should have been required to file affidavits to deal with alleged contested facts relevant to decision on costs and that failure of court to take such course did not place it in position to decide the issue on properly; Court holding that evidence relevant to costs order was on record and decision also based on conduct of counsel in court - no need for affidavits;*

*Costs are in discretion of court of first instance and on facts there was no justification for interfering with first instance court's exercise of discretion; Legal principles on costs discussed;*

*Decision of High Court upheld and appeal dismissed with costs on attorney and client scale*

## JUDGMENT

### **CHINHENGO AJA:-**

[1] This appeal is against an order of costs only made in a judgment of the High Court (Mathaba J). The learned judge, in a well-reasoned judgment, as has now become a refreshing characteristic of judgments of the High Court, dismissed appellant's application for confirmation of a landlord's hypothec and attachment of the appellant's property at premises that it rented. I refer to the appellant as Mrs Makeka to distinguish her from her legal practitioner who is the real appellant in this appeal.

[2] The learned judge ordered costs *de bonis propriis* against Mrs Makeka's legal representative, Mrs Musi-Mosae, and costs on attorney and client's scale against Mrs Makeka herself. Before penning the judgment, the learned judge gave Mrs Musi-Mosae, an opportunity to make submissions why an order of costs *de bonis propriis* should not be made against her and costs on attorney and client scale should not be made against Mrs Makeka. The learned judge very conveniently produced one judgment dealing with both the merits of the application and costs.

[3] At paragraph [27], dealing with the merits of the application, the judge stated:

“In the result, I find that the applicant has not been able to establish on a balance of probabilities that the 1<sup>st</sup> respondent is in arrears [of rentals]. The applicant is therefore not entitled to an order for attachment and interdict restraining the 1<sup>st</sup> respondent from disposing of or removing the movables from the leased premises pending the determination of proceedings for the recovery of the rent.”

[4] At paragraph [50], dealing with costs, the judge stated:

“It is for the reasons above that I discharged and dismissed the application on the 14<sup>th</sup> December 2021 and I hereby order as follows:

50.1 That Mrs Musi-Mosae pays 15% of costs in this application *de bonis propriis* on an attorney and client scale; and

50.2 That the applicant pays the remaining costs pertaining to this application on an attorney and client scale.”

### **Appeal grounds**

[5] Mrs Musi-Mosae’s grounds of appeal against the costs order read:

“1. The learned judge *a quo* erred [and] misdirected [herself] in awarding costs *de bonis propriis* on attorney and client scale against the appellant’s counsel.

2. There is no basis for an order of costs on a scale as between attorney and client and worse still *de bonis propriis*.”

[6] The impression created by the grounds of appeal, as framed, is that the appeal is not only against the order of costs *de bonis propriis* but also against the costs on the attorney and client scale, and further that Mrs Makeka is appealing against the costs order adverse to her.

[7] We sought clarification from *Adv.Setlojoane*, legal representative of Mrs Musi-Mosae in the appeal. He stated that whilst the appeal was against costs *de bonis propriis* on attorney and client scale, that appeal was by Mrs Musi-Mosae only. Mrs Makeka, was not appealing the order against her. He also clarified that there was no appeal against the proportion of costs of 15% to be borne by Mrs Musi-Mosae. The clarification provided did not quite resolve the question in the court’s mind whether Mr Musi-Mosae was content to be mulched with costs at the higher scale if she failed to convince the court that costs *de bonis propriis* are not warranted.

[8] The impression created by the grounds of appeal, in particular the second ground, caused the 1<sup>st</sup> respondent to enter into the fray. It understood that there was a challenge by Mrs Makeka against the order of costs on the attorney and client scale.

### **Background facts**

[9] The 1<sup>st</sup> respondent, hereinafter referred to as Africa Media, leased Mrs Makeka's property, House No. 220 in the district of Maseru, for 3 years from 1 August 2014 with an option to renew the lease at its expiration. The monthly rent was M22 000.00 with an annual escalation of 5%. When the first period of lease expired, the agreement was tacitly renewed on the same terms. That much is common cause. From the commencement of the lease agreement, Mrs Makeka ceded her right to receive the monthly rentals to Standard Lesotho Bank and agreed with Africa Media that it would pay the monthly rentals into her bank account at the Bank.

[10] In urgent and *ex parte* motion proceedings commenced in October 2021, Mrs Makeka sued Africa Media for enforcement of a landlord's hypothec and attachment and removal of Africa Media's property as security for the due payment of arrear rentals of M629 452.72 for the period from January 2020 to August 2021. She stated that she intended to sue Africa Media because it had failed or neglected to pay that amount. She alluded to several prejudices and hardships that she suffered as a result of Africa Media's alleged failure to meet its obligation.

[11] The necessary pleadings were duly filed. It turned out that Africa Media paid the monthly rent to Standard Lesotho Bank as agreed with Mrs Mareka. The evidence also showed that Mrs Mareka knew, or at the very least ought to have known, that rent had been paid monthly and there were no arrears. The only issue that was in dispute between her and Africa Media was in relation to amounts payable arising from giving effect to the escalation clause in the lease agreement. Africa Media admitted that such dispute existed but contended that Mrs Mareka had to establish her entitlement to the increased rental considering the exchanges that had taken place between them.

[12] The High Court granted interim relief on the urgent and *ex parte* application in favour of Mrs Mareka by way of a *rule nisi* returnable on 2 November 2021. The *rule nisi* was discharged on 14 December 2021 with the judge making the order dismissing the application. The reasons therefor were delivered on 9 February 2022 after Mrs Musi-Mosae was given an opportunity to make submissions on the costs order that the court intended to make. We are not, as earlier stated, concerned in this appeal with the High Court decision on the merits of the application for the enforcement of the hypothec, but only with the costs order against Mrs Musi-Mosae.

### **Mrs Musi-Mosae's contention**

[13] The argument of Mrs Musi-Mosae’s counsel was basically twofold. This is captured in his written heads of argument where he states:

“[2] The costs *de bonis propriis* had not been asked for and were granted by the court on its own accord. The court asked, during hearing of the application that counsel should make submissions why an order would not be granted against her. This was done through the filing of heads of argument in which counsel then explained reasons why such an order could not be made.

[3] The problem then comes where, during this stage which can be named a show cause stage, the reasons for which an order was opposed are not part of the pleadings. The contents of the heads of argument which have been quoted by the court, are clearly evidence which as a result [is] tendered from the bar by counsel without filing an affidavit.

[4] In recognition of the principle of *audi alteram partem*, the Court had adopted a fair procedure but failed in the execution. The appeal therefore raises one ground, that the court erred in granting costs *de bonis propriis* against counsel.

...



[9] The court a quo's judgment cannot be questioned in the analysis of the principles applicable where costs are granted *de bonis propriis*. The principles therein stated are reflective of the correct statement of the law. However, the application of the principles to the facts of the present case does not seem to have been correct, coupled also with the manner in which counsel against who such costs were ordered was heard.

[10] In the first place, the matter is purely the Appellant [Makeka]'s case. It cannot be denied that notwithstanding, counsel has to advise correctly and act honestly and diligently in the handling of the matter. From a reading of the papers, it appears that this is one of the cases in which client has not been candid with counsel."

[14] It seems to me that, in summary form, the first of the two the issues raised by counsel is that the issue of costs *de bonis propriis* should have been heard following upon filing affidavits thereon by Mrs Musi-Mosae, and impliedly by counsel for Africa Media also, a point that *Adv. Setlojoane* seeks to make without reference to supporting authority, at paragraphs [16] and [17] of his heads of argument:

"[16] In our submission, the concept of hearing should mean a hearing which accords itself with the record and

pleadings. Once whatever reason counsel has to rely on is not part of the record and pleadings, then such material should be introduced into the record by way of affidavit. Otherwise all counsel will be submitting amounts to testifying from the bar, which practice is by no measure allowed.

[17] From the record<sup>1</sup>, it will emerge that all the facts which counsel sought to rely on are so substantial and are facts which are not covered by the pleadings. The pleadings do not disclose why the application was filed as it is, save that we can deduce that client had given information which was not correct from the outset. Counsel was therefore faced with a situation that required of her to give evidence from the bar in argument in a quest to try and satisfy the court that she could not be mulct[ed] with costs.”

[15] The only authority to which counsel referred is a decision of the Limpopo High Court Division, South Africa, in *Maboho & Others v Minister of Home Affairs*<sup>2</sup> where the court said:

“Argument is not evidence and it is not given under oath. It is merely a persuasive comment made by parties or legal representatives with regard to questions of law or fact. Argument does not constitute evidence and cannot replace evidence.”

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<sup>1</sup> Page 176

<sup>2</sup> Case No. 833-1128/2007, para 13

[16] The statement expresses what is trite in law but is not on the question whether or not affidavits of evidence should be filed. It however raises the issue whether submissions on costs are on an issue of law or fact.

[17] A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising it: rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise, it is a question of fact.

[18] The facts underlying a decision whether to impose costs *de bonis propriis* are on record and if there was an error on the part of the court, it was an error of application of the law to the facts, what *Adv. Setlojoane* describes as a failure “in the execution.” The question before the High Court was a question of law in relation to costs and not a question of fact.

[19] The High Court has inherent power to make costs orders against legal practitioners, derived from its supervisory jurisdiction. The kind of conduct that may attract an order of costs *de bonis propriis* includes any of the following - commencing or conducting proceedings that are an abuse of process; raising untenable defences for purposes of delay; repeatedly putting untenable submissions; acting in ignorance of the rules and prosecuting an appeal which has no prospects of success.

[20] Before an order of costs *de bonis propriis* is granted the legal practitioner must be given a reasonable opportunity to be heard. If given leave by the court to do so, the legal practitioner may file short written submissions addressing the law as to costs on relevant issues. And this is what precisely happened in this case. The learned judge invited Mrs Musi-Mosae to address her on the law relating to costs *de bonis propriis* and attorney and client costs. The facts of what transpired during the litigation were before the court on the record and not in dispute. The issue was the application of the law to those facts.

[21] There are several principles to take into account when considering to make an order of costs *de bonis propriis*. The jurisdiction must be exercised with 'care and discretion and only in clear cases'; a legal practitioner is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or defence which is plainly doomed to fail; the legal practitioner is

not the judge of the credibility of witnesses or the validity of arguments; in considering such order, arising from a legal practitioner's conduct of the proceedings, a court must make full allowance for exigencies of acting in that environment and only when a legal practitioner's conduct of proceedings is plainly unjustifiable can it be appropriate to make such order. The overriding consideration is always whether the legal practitioner has been given full and sufficient notice and full and sufficient opportunity of answering it. See *Lemoto v Able Technical (Pty) Ltd*<sup>3</sup>. This, the learned judge did. He invited Mrs Musi-Mosae to make written submissions on the issue and decided the issue on the submissions made. The facts being apparent on the record and deducible from the conduct of counsel in court, there was no reason to adopt the unusual procedure of requiring parties to file affidavits or adduce evidence on the facts, as contended by counsel.

[22] The second point, extensively addressed by the court below, is that arising from the allegation that "client has not been candid with counsel." All this amounts to laying the blame on Mrs Makeka without at all faulting Mrs Musi-Mosae for lack of due diligence. The learned judge ably considered this issue and I have no basis for finding an error or misdirection on his part.

[23] Africa Media, through its legal representative, *Mr Ploos Van Amstel*, submitted that it did not move the court for an order of costs *de bonis propriis* but abides by its decision. He

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<sup>3</sup> (2005) 63 NSW 300

referred to several persuasive authorities that support the decision of his Lordship and as he submitted, a similar decision in respect of the costs of appeal, namely, *David v Naggyah*<sup>4</sup> (court in appropriate circumstances awards costs *de boniis propriis*); *Jenkins v FJJ de Souza & Co (Pty) Ltd*<sup>5</sup> (where legal practitioner is guilty of professional negligence); *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*<sup>6</sup> (where legal practitioner is guilty of muddled thinking leading him into incorrect conduct); *Waar v Louw*<sup>7</sup> (error must be reasonably serious to warrant costs *de bonis propriis*); *Immelman v Loubser* (dishonesty, wilfulness or negligence in a serious degree warrant costs *de bonis propriis*); *Stainbank v SA Apartheid Museum at Freedom Park & Anor*<sup>8</sup> (costs *de bonis propriis* appropriate where legal practitioner has acted inappropriately in a reasonably egregious manner); and *Washaya v Washaya*<sup>9</sup> (instituting proceedings in a haphazard manner, wilfully ignoring court procedures and rules and presenting case in a misleading manner or forwarding an application plainly misconceived or frivolous).

[24] Having referred to the authorities mentioned above counsel for Africa Media prayed for costs *de bonis propriis* in respect of the costs of the appeal.

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<sup>4</sup> 1961 (3) SA 4 (N) at 7

<sup>5</sup> 1968 (4) SA 558 (R)

<sup>6</sup> 2013 All SA 346 (GNP)

<sup>7</sup> 1977 (3) SA 297 (O) at 304G-H

<sup>8</sup> 2011 BCLR 1058 (CC)

<sup>9</sup> 1990 (4) SA 41 (ZH) at 45G-46B

[25] The costs order of the High Court was made in exercise of the court's inherent power. The exercise of such power is discretionary. Herbstein and Van Winsen<sup>10</sup> state:

“The award of costs is a matter wholly in the discretion of the court. But this is a judicial discretion and must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at. In leaving a magistrate (or a judge) a discretion,

‘the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he does this and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion.’”

[26] The learned authors refer to a Zimbabwean case, *Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd*<sup>11</sup>, in which

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<sup>10</sup> *The Civil Practice of the Supreme Court of South Africa* 4<sup>th</sup> ed, p 703-704

<sup>11</sup> 1957 (4) SA 225 (SR) at 227C-D

the appellate court refused to set aside an order of costs given by the trial judge merely on the ground that the appellate court might have taken a different view of the sufficiency of the grounds upon which the discretion was exercised. In my view it is also important that the court must always ensure that the administration of justice should not be impaired by too liberal an exercise of that power. The authors, with reference to several cases give, examples of instances when a court of appeal will interfere with the discretion of a trial judge - where the exercise of discretion has not been proper; or has been based upon a wrong principle or upon a wrong view of the facts; where the court has purported to exercise its discretion without sufficient legal grounds for doing so, or where the court has wrongly held it has no discretion at all, or where some well recognized principle or rule in regard to the awarding of costs has been violated.<sup>12</sup>

[27] Mathaba J's judgment is thorough on all the issues relating to the exercise of discretion. He observed that Makeka, with counsel's guidance instituted an urgent *ex parte* application claiming that she was owed M629 452.72 when she knew that the only issue in dispute between her and Africa Media was the amount represented by the application of the escalation clause in an amount of about M25 113.06; Africa Media provided a bond of security for the amount in dispute, in respect of which, in any event, it denied liability, which stance Mrs Musi-Mosae twice in her heads of argument contradicted, as found by the learned judge, twisting the facts to shore up her persistent

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<sup>12</sup> At p748-749



error that Africa Media admitted liability. In this regard the learned judge said –

“... Mrs Musi-Mosae twice in her heads of argument said that [Africa Media] admitted being liable in the amount of M25 113.06. In my view, counsel was deliberately twisting the facts and I gave her an opportunity at the beginning of proceedings to explain why she said that [Africa Media] admitted liability. The court spent a considerable amount of time on this aspect with counsel sticking to her guns even as she could not find anything from the record to support her assertion. Counsel was literally quarrelling with the court instead of just conceding that she was wrong in arguing that [Africa Media] admitted liability. I did not take kindly to counsel twisting the obvious facts and the quarrelling with the court when it was pointed out to her that her submission was not supported by the facts.”

[28] The learned judge dealt exhaustively with two issues that Mrs Musi-Mosae addressed in her heads of argument, the first that she described as a miscommunication between her and Mrs Makeka resulting in her indicating that Mrs Makeka would institute action to recover from Africa Media the rentals owed in the sum of M629 452.72, which she later realised to have been a ‘huge mistake’. In this connection the learned judge referred

to a letter of demand which belied the assertion of miscommunication and observed:

“Again, it is clear from the letter of demand issued by [Mrs Makeka]’s counsel of record to [Africa Media] dated the 24<sup>th</sup> September 2021 which is annexed to the founding affidavit that what was being demanded from [Africa Media] was rent escalations and not the M629 452.72. This letter must have clearly raised Mrs Musi-Mosae’s eyebrows even if she was not personally the author thereof. I assume that counsel read the letter before annexing it to the founding affidavit. Otherwise, she would still have committed negligence of a severe degree if she filed the letter in court without having first read it.”

[29] The second was her submission tendering an apology in relation to her persistent argument on Africa Media having admitted liability. She attributed her quarrelsomeness the fact that she “was admitted to practice as an advocate sometime in August 2017 and this has been quite a journey for me. I have had to learn a lot through several appearances, and this was definitely a lesson for me.” In reaching his decision the learned judge relied on relevant and persuasive authority, among them – *Nel v Waterberg Ko-operative Vereeniging*<sup>13</sup>, *Khan v Mzovuyo Investments (Pty) Ltd*<sup>14</sup>, and *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board &*

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<sup>13</sup> 1949 AD597 at 607

<sup>14</sup> 1991 (3) SA 47 (Tk)

*Others*<sup>15</sup>. The reasons for decision are summed up eloquently in the judgment. I adopt that summary in its entirety:

“[47] As the facts set out hereinabove indicate, the application was moved *ex parte* on facts that were known to [Mrs Makeka] to be false and was prosecuted in a very woeful manner. There was want of *bona fides* at the time the application was lodged and prosecuted. Assuming that the application was brought hastily and there was miscommunication as counsel alleged, she realised when the answering affidavit was filed that the application was premised on false facts and very likely to fail. She was warned by [Africa Media]’s attorneys that punitive costs would be requested against [Mrs Makeka]. She had time to advise her client to abandon the case or to prepare appropriately in respect of further documentation. I have no doubt she earned herself a chance to be mulcted with costs. She persisted with the meritless argument that [Mrs Makeka] was owed M629 452.72 even as she was aware of the falsity of [Mrs Makeka]’s allegations in this regard. She thus conducted herself in flagrant disregard of her duties as an officer of the court.

[48] Moreover, inasmuch as counsel was entitled to steadfastly argue her client’s case, it was unacceptable of counsel to waste the court’s time by

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<sup>15</sup> 2009(1) SA 565 (CC)

raising unarguable point that [Africa Media] admitted liability and insisted on this point even after she was given a chance to revisit the answering affidavit. In my opinion , it would be grossly unfair to order [Mrs Makeka] to bear the costs of this application alone.

[49] I have considered Mrs Musi-Mosae's apology and the degree of her culpability in pursuing this this application. Noteworthy is that an order of costs *de bonis propriis* is not intended to bankrupt a lawyer. As Mogoeng J, as he then was, said in *Matidi Paul Motshegoa*,<sup>16</sup> *supra*, like all other people, legal practitioners have varying degrees of capabilities and to err is human. Some legal practitioners are at a very early stage in their career. In my view, imposition of costs *de bonis propriis* on them must be done with caution unless their conduct is extremely opprobrious. I do not consider *Mrs Musi-Mosae* to be a senior legal practitioner considering that she only started practising in August 2017. On the other [hand] *Mrs Musi-Mosae* must be reminded that she has an obligation towards the court as well."

[30] From the way in which the learned judge addressed the issues before him, there is no basis for interfering with his exercise of discretion or with his decision. The appeal is not so much against the order of costs on attorney and client scale in

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<sup>16</sup> *Matidi Paul Mosthegoa v Pauline Moipone Mosthegoa and Another* (995/98) [2000] ZANWHC 6 (6 May 2000)at p 18

the order against Mrs Makeka. She has not challenged that order. It stands against her. The concern of Mrs Musi-Mosae that the order *de bonis propriis* is premised on an order of costs on attorney and client scale and if the former was set aside in respect of her, she would not be worried about it in relation to Mrs Makeka. Thus her appeal is really against the order *de bonis propriis*. That too cannot succeed. Her appeal stands to be dismissed.

### **Leave to appeal**

[31] During the course of preparing this judgment, I noticed that the Mrs Musi-Mosae and her counsel did not, so far as the record shows, seek leave of this Court to appeal the costs order against her. Section 16(1) of the Court of Appeal Act 1978 requires leave to be sought and granted:

“16(1) An appeal shall lie to the Court -

(a) from all final judgments of the High Court;

(b) by leave of the Court from an interlocutory order, an order made ex-parte or an order made as to costs only.”

[32] The reason for not seeking leave to appeal is that they cleverly formulated the notice of appeal grounds so as to

appear as if they were appealing against the whole judgment of her Ladyship Mathaba J. The notice reads: “

“KINDLY TAKE NOTICE THAT that the appellant intends to appeal and hereby appeals against the judgment of His Lordship AR Mathaba J handed down on the 9<sup>th</sup> day of February 2022.

KINDLY TAKE NOTICE THAT the grounds upon which the appeal is based are as outlined in the grounds of appeal.”

[33] If this was not some stratagem to avoid making an application for leave, then it is ignorance of the rules of Court in respect of which the court could mark its disapproval by an appropriate order of costs and order cost *de bonis propriis* against counsel appearing for Mrs Musi-Mosae. I have refrained from penalising him accordingly because I consider that the costs order against Mrs Musi-Mosae, who will pay the costs of the appeal anyway assuming counsel acting for her raises a fee, will have a salutary effect without burdening her again with another such order.

### **Costs of appeal**

[34] The last issue for decision is that of the costs on appeal. Counsel for Africa Media prayed for costs against *Adv. Setlojoane de bonis propriis* or in the alternative on the attorney and client scale. At the hearing we got the impression

that Mrs Musi-Mosae’s counsel was clutching at straws. His contention that Mrs Musi-Mosae should have been given the opportunity to file an affidavit to deal with issues of fact was without merit. It seemed to us that apart from what is contained in the heads of argument, counsel was asking this Court to be merciful because the only point of some substance he raised in oral submissions was that Mrs Musi-Mosae was relatively new in the practice of the law. There was no sufficient justification for prosecuting the appeal in light of the inherent serious weaknesses of Mrs Musi-Mosae’s case. I would have imposed another order of costs *de bonis propriis* but for what I have stated in the preceding paragraph.

[35] This Court is entitled to order costs of appeal to be paid on an attorney and client scale, but in special circumstances. However, it does not follow that “where costs on attorney-and-client scale have been properly granted at first instance, they should normally be granted again if the loser, advancing similar contentions, fails on appeal.”<sup>17</sup> The similar contention advanced by *Adv. Setlojoane* is with respect to the relative inexperience of his client. The other main submission that affidavits should have been filed has no merit. He did not even cite authority in support thereof. Herbstein and Van Winsen<sup>18</sup> opine that in appropriate circumstances a court should make a special order of costs in cases in which the issue arises from the exercise of a discretion by a lower court, and also in appropriate circumstances, award costs against an attorney *de bonis*

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<sup>17</sup> Herbstein and Van Winsen, op.cit. p 922.

<sup>18</sup> Ibid. p 922-923

*propriis* or even *de bonis propriis* on an attorney and client scale.

[36] In this case Africa Media was constrained to enter into the fray because of the inelegant framing of the grounds of appeal which gave the impression that Mrs Makeka was appealing against the order of costs on an attorney and client scale made against her, yet it was only Mrs Musi-Mosae who was appealing against the order *de bonis propriis*. Africa Media deserve indemnification against costs it has needlessly incurred, and the appropriate level of costs is the attorney and client scale. The question is who should be ordered to pay those costs? It obviously cannot be Mrs Makeka because she was not a party to the appeal. It is Mrs Musi- Mosae who should shoulder those costs. It seems to me that *Adv. Setlojoane* is unlikely to charge any costs or require Mrs Musi-Mosae to pay him any fees. His firm instructed Mrs Musi-Mosae. See the letter demanding payment of amount representing rental escalations dated 21 September 2021 and the notice of motion dated 21 October 2021. It also appears he is the principal mentioned by Mrs Musi-Mosae. In the circumstances it does not make sense to make an order of cost *de bonis propriis* against *Adv. Setlojoane*, even if that were otherwise merited.

### **The order**

[37] The order of this court on the merits and costs of appeal is that Mrs Musi-Mosae's appeal against the order of costs *de*



*bonis propriis* be and is hereby dismissed with costs on the attorney and client scale.

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**MH CHINHENGO  
ACTING JUSTICE OF APPEAL**

I agree

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**PT DAMASEB  
ACTING JUSTICE OF APPEAL**

I agree

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**J.VAN DER WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

**FOR APPELLANT:** R SETLOJOANE  
**FOR RESPONDENT:** PC PLOOS VAN AMSTEL