

THE HIGH COURT OF SWAZILAND

NELSON SHODI ZIKALALA

Applicant

v

And

THE PRINCIPAL SECRETARY - MINISTRY OF AGRICULTURE

1st Respondent

THE ACCOUNTANT GENERAL

2nd Respondent

THE ATTORNEY GENERAL

3 rd Respondent

Civil Case No. 2419/2003

Coram

S.B. MAPHALALA - J

For the Applicant

MR. HOWE

For the Respondents

MR. MDLULI (Attached to the
Attorney General's Chambers)

RULING

(On costs)

(13/11/2003)

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On the 7th November 2003, I granted an order by consent in terms of prayers 1 and 2 of the notice of setdown of even date. The orders were directing that the 1st and 2nd Respondent uplift the interdict of Applicant's salary and reinstate him to full pay forthwith and further directing that the 1st and 2nd Respondents pay the Applicant his arrear salary from 1st August 1997 to date of reinstatement of his salary for full pay. Such arrear salary to include all salary increments that were granted between 1st August 1997, to date of reinstatement of Applicant's salary to full pay.

According to prayer 3 the Applicant sought costs of this application on the attorney and own client scale. The Respondents opposed the said order. I heard arguments from both sides and then reserved my ruling on this aspect of the matter. This ruling relates this question.

The Applicant was tried by the Piggs Peak Magistrate's Court for Stock Theft on the 23rd November 1998 and was convicted and sentenced to two (2) years imprisonment half of which was suspended on condition that he is not to be convicted of a crime under the Stock Theft Act during the period of suspension. He appealed against the conviction to the High Court of Swaziland. His appeal was heard by the High Court and was eventually concluded on the 15th April 2003, when the court upheld the appeal.

Following the High Court's decision the Applicant immediately advised his supervisor Dr. M.A. Sukati who then informed the 1st Respondent of the position and asked that his full salary be reinstated in the circumstances. This was in April 2003. To date the 1st Respondent have not responded to the numerous letters between his attorneys and the 1st Respondent. The Applicant then launched this application to compel the 1st Respondent to discharge its obligations in terms of the Public Service Act. The Applicant, therefore contends that 1st Respondent ought to be ordered to pay costs at a punitive scale. He further contends that he has been put out of pocket having to pay attorney costs when 1st Respondent has no just cause for refusing to reimburse him and reinstate him to full pay. He together with his family continue to suffer hardships due to this interdiction which lawfully should have been removed in April 2003.

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The Respondents as represented by Mr. Mdluli do not oppose the granting of costs per se but are against costs at attorney and own client scale. It is contended on the main that the Respondents are now in the process of paying out the Applicant his dues and that the delay in doing so was caused by the slowness of Government's bureaucracy.

It is trite law that the award of costs is a matter wholly within 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 the Court 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 circumstance 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".

(See Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed at page 703 in fin 704 and the cases cited thereat).

The leading case on the award of costs on an attorney-and-client basis is *Nel vs Waterberg Land Bouwers Ko-operatiewe Vereeniging* 1946 A.D. 597 (interpreted in *Mudzimu vs Chinhoyi Municipality & another* 1986 (3) S.A. 140 (ZH) at 143 D -1, 144).

The grounds upon which the court may order a party to pay his opponent's attorney-and-own client costs include the following: That he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless, malicious or frivolous, or that he has misconducted himself gravely either in the transaction under inquiry or in the conduct of the case (see Herbstein (supra) at page 718). It has been held that attorney-and-client costs may be awarded on the grounds of dilatory or mendacious conduct on the part of an unsuccessful litigant (see *Ward vs Slizer* 1973 (3) S.A. 701 (A) 706 H in fin).

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In casu from the facts advanced before me it appears that the 1st Respondent was dilatory in processing the Applicant's claim. This occurred from the time the appeal judgement was issued by the High Court on the 15th April 2003 to date. This conduct is evidenced by the numerous letters from the Applicant to the 1st Respondent which in most cases were not attended to by the latter. The explanation on behalf of the 1st Respondent that the delay was in view of Government's bureaucracy rings hollow when one looks at what has transpired from the date of the appeal judgment. The Applicant had to launch these proceedings to compel the 1st Respondent to act.

In the circumstances of the case I am of the considered view that the Applicant is entitled to costs at this

scale.

In the result, the 1st Respondent is directed to pay the costs of this application on the attorney and own client scale.

S.B MAPHALALA

JUDGE