IN THE HIGH COURT OF SWAZILAND

Civil case No: 4627/10

In the matter between:

MAXINE LANGWENYA	**FIRST APPLICANT**
ROBINSON SIMELANE	**SECOND APPLICANT**
AND	
VUSI MATSEBULA (N.O.)	**FIRST RESPONDENT**
EZULWINI TOWN BOARD	
ZAMANI THABEDE	**SECOND RESPONDENT**
WENDY THABEDE	**THIRD RESPONDENT**
MUKELA RESIDENTS' ASSOCIATION,	
DRUCE DE JESUS	**FOURTH RESPONDENT**

Neutral citation: *Maxine Langwenya & Another v. Vusi Matsebula (NO) and 3 Others (4627/10) [2012] SZHC135 (28 June 2012)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Civil Procedure – payment of costs of suit – matter settled amicably - issues before court undecided and no judgment granted – neither party is substantially successful – costs within court's discretion in the circumstances and the general rule inapplicable- each party to pay his own costs.

JUDGMENT
9th JULY 2012

---

[1] The applicants instituted an urgent application seeking the following orders: firstly, directing the first, second and third respondents to desist from unlawfully interfering with the enjoyment of their property; secondly, that the second and third respondents desist from throwing waste material on plot 38, Mukela Township at Ezulwini; thirdly, directing the first respondent to restore three garden forks, two spades, one hose pipe, three 25 litre buckets, two water containers, compost manure and other garden implements which he removed on the 17th December 2010 from the property; and fourthly, directing members of the Royal Swaziland Police Service to serve the Order herein upon the second and third respondents.

[2] The Court issued a Rule Nisi on the 23rd December 2011 and it was duly served upon the respondents. All the respondents opposed the application and subsequently filed Answering Affidavits. On the 30th March 2012, the parties informed the Court that they have since settled the matter amicably; and, that the only outstanding issue was the payment of costs of suit.

[3] It is trite law that the purpose of an award of costs to a successful litigant is to indemnify him for the expenses he has incurred in defending or being compelled to initiate litigation; these costs are referred to as party and party costs. It is settled that such costs do not include all the costs that the litigant has incurred but only those expenses which appear to the Taxing Master to

have been necessary in defending or initiating the legal proceedings. See *Herbstein & Van Winsen, The Practice of the Supreme Court of South African, 4th edition by Louis De Villiers, Van Winsen et al, Juta & Co. 1997* at *pages 701-702*.

[4] The award of costs is a matter within the discretion of the Court; this discretion should be exercised judiciously. In exercising that discretion, the Court should have regard to the general rule that the party who succeeds should be awarded his costs and that the rule should not be departed from except on good grounds. See *Herbstein & Van Winsen* (supra) at pages 704-705.

[5] *Lewis A.J.P*. in the case of *Dickson v. Minister of Water Development 1971* (3) SA 71 (RAD) at 72A stated the law as follows:

> **"It is trite law that in the exercise of a Court's undoubted discretion in regard to costs, the normal principle applied is that where a party has been substantially successful, costs follow the event, and it seems clear from the case of *Van der Merwe v. Mcgregor 1913 C.P.D. 497* that the same normal principle is applicable to Water Court proceedings. That case laid down what is also a trite proposition, that an appeal court will be slow to interfere with the exercise of the discretion in the Court *a quo*, but will interfere if the discretion has been exercised on a wrong principle or where, although there has**

been substantial success on the part of the appellant, he has been deprived of his costs on unreasonable grounds."

[6] *Holmes JA* in the case of *Blou v. Lampert & Chipkin, NNO and others* 1973 (1) SA 1 at 15 E-G stated the following:

"Now a Court making an Order as to costs has a discretion to be exercised judicially on a consideration of all the facts; and in essence it is a matter of fairness to both sides …. Thus it is that the power of interference on appeal is limited. The extent of the limitation was very crisply stated by *Trollip, J* in *Pretorious v. Herbert,* 1966 (3) SA 298 (T) at p. 302 A, as follows:

'The limits to which this court on appeal can interfere with an order made by the magistrate as to costs is, I think, clear from *Merber v. Merber*, 1948 (1) SA 446 (AD) at page 452, 453. The effect of the passages there is that the discretion as to costs must be judicially exercised by the trial Court, that is, there must be some grounds on which a Court, acting reasonably, could have come to the particular conclusion; if there are such grounds, then their sufficiency to warrant that conclusion is a matter entirely for the trial Court's discretion, and the Court on appeal cannot interfere, even if it would itself have made a different order."

[7] *Holmes JA* in the case of *Ward v. Sulzer* 1973 (3) SA 701 at 706 -707 stated the following.

"In general the basic relevant principles in regards to costs may be summarised as follows:

1. **In awarding costs the court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties in essence it is a matter of fairness to both sides ….**

2. **The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs…. Moreover, in such cases the Court's hand is not shortened in the visitation of its displeasure….**

3. **In appeals against the costs the question is whether there was an improper exercise of judicial discretion i.e. whether the award is vitiated by irregularity or misdirection or is disquietingly inappropriate. The Court will not interfere merely because it might have taken a different view.**

4. **An unsuccessful appeal against an order involving costs on the basis of attorney and client does not necessarily entitle the respondent to the costs of appeal on the same basis. A Court of appeal must guard against inhibiting a legitimate right of appeal and it requires the existence of very special circumstances before awarding costs of appeal on an attorney and client basis…. Without seeking to limit it, I think it safe to say that relevant considerations could include amongst others, the degree of reprehensibility of the appellant's conduct, the amount at stake, and his prospects of success in noting an appeal, whether against**

the main order or against the special award of costs with its censorious implications."

[8] *Botha JA* in the case of *Kathrada v. Arbitration Tribunal and Another* 1975 (2) SA 673 (A) at 679A and 680 G –H said the following:

"This allegation was, no doubt, made in the light of the general rule applicable in ordinary trial actions as well as arbitration proceedings that in the absence of special circumstances, a successful litigant is entitled to his costs….

The discretion as to costs conferred upon the arbitrators by sec 45 (3) (b) of Act 3 of 1966 is, as I have already indicated, a discretion which must be exercised judicially upon a consideration of all the relevant facts and in accordance with recognised principles. As between the parties, it is in essence a matter of fairness to both sides. Where there has therefore been an improper exercise of that discretion, i.e., where the award as to costs is vitiated by irregularity or misdirection, or is disquietingly inappropriate, a court of law will on review set aside the order…. Failure to act in accordance with the settled practice and principles, upon which costs are generally awarded, is such vitiating irregularity or misdirection."

[9] It is common cause that the issues raised in the proceedings were never argued and decided by this Court. The parties merely advised the Court that the matter has since been settled amicably between them and that the only outstanding issue relates to party and party costs. The agreement

between the parties was not made an order of Court. In the circumstances where the issues are undecided and consequently no judgment granted, neither party could be said to be substantially successful. This is a proper case in which the court should exercise its discretion with regard to the general rule relating to the award of costs. See *Herbstein & Van Winsen* (supra) at page 704.

[10] Accordingly each party will pay his own costs of suit.

_____

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For first and second Applicants	Attorney M. Langwenya
For first Respondent	Attorney S. Mdladla
For second and third Respondents	Attorney L. Howe