



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No: 55/2012

In the matter between:

**MUSA SIKHINDI NHLENGETHWA**

**Applicant**

VS

**WILLIAM MABUZA**

**Respondent**

**Neutral citation:** *Musa Sikhindi Nhlengethwa vs William Mabuza 55/2012 SZHC 201 [2012] (21<sup>ST</sup> August 2012)*

**Coram:** **MAPHALALA PJ**

**Heard:** **8 AUGUST 2012**

**Delivered:** **21 AUGUST 2012**

**Summary:** *The only issue for decision by the court is whether this Court will grant costs where the parties have recorded a consent agreement. The court finds that the conduct of the Applicant in making the Application placed the other side at a loss. The court finds that the Applicant pays wasted costs.*

[1] The only issue for decision by the court is who should pay wasted costs where the parties have entered a consent agreement which was made an order of court. The attorney for the Respondent took the position that Respondent ought to be granted costs in this matter in view of the behaviour of the Applicant in filling this application where there was no need to do so on the facts of the case. On the other hand the attorney for the Applicant opposes the order for costs sought by the Respondent.

[2] The award of costs is a matter within the discretion of the court. But this is a judicial discretion and must be exercised on grounds upon which a reasonable man could come to the conclusion arrived at. In leaving the 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 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.”

[3] See *Herbstein et, al, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition* at page 704 on the above statement of

the law. Further on in the same page the learned authors *Herbstein supra* state briefly, the principles that should guide the court are as follows:

1. As a general rule, the successful party is entitled to his costs;
  2. To determine who the successful party is, the court should look to the substance of the judgment and not merely its form;
  3. The court can, for good reason, deprive a successful party of his costs, in whole or in part;
  4. The court can, for good reason, order a successful party to pay the whole or portion of the costs of the other party, and
  5. The court can, in special cases, make an order that the unsuccessful party must pay the costs of the successful party on an attorney-and-client basis.
- 
4. According to the same legal authority of *Herbstein (supra)* it is a fundamental principle that as a general rule, the party who succeeds should be awarded its costs, and this rule should not be departed from except on good grounds.
  5. The learned authors as cited above in the same page ask the important question as “who is the successful party” and they answer the question by stating that the party in whose favour judgment is given is not necessarily the successful party; the

other party may, nevertheless, have succeeded on the issues in dispute.

6. In the present case although the parties entered into a consent agreement the Applicant should have approached the Respondent for what he was seeking. There was no need for the matter to come to court in the first place. The Applicant to pay wasted costs.

**STANLEY B. MAPHALALA**  
**PRINCIPAL SECRETARY**

**For the Applicant : Mr. Xaba**

**For the Respondent : Mr. L. Mzizi**