



IN THE HIGH COURT OF SWAZILAND

RULING ON COSTS

Case No: 1751/2011

In the matter between:

BILLY GROENING

Applicant

and

SABELO J. BHEMBE

Respondent

Neutral citation: *Billy Groening vs Sabelo J. Bhembe 1751/2011 [2012] SZ HC 30 (24 February 2012)*

Coram: Maphalala PJ

Heard: 9 June 2011

Delivered: 24 February 2012

Summary: A ruling on the award for costs at attorney and own client scale and the circumstances leading thereto

- [1] Applicant filed an urgent Application for the return of household items listed in paragraph [8] of his Founding Affidavit as well as for an order for costs at the attorney and own client scale.
- [2] A rule *nisi* was granted in terms of prayers 1, 2, 3 and 4 of Applicant's Notice of Motion and the question of costs was left in abeyance for arguments of the parties.
- [3] The parties have filed Heads of Arguments on the scale of costs to be levied.
- [4] The Applicant contends that the Respondent's behaviour was malicious and that he misconducted himself gravely in the manner in which he dealt with the Applicant and as such conduct cannot in anyway be condoned. In this regard cited the case of *van Dyk vs Conrade & Another 1963 (2) SA 41(C)* at 418E-F.
- [5] The Applicant further contends that the court cannot allow any person to take the law into their own hands and therefore cannot condone such behaviour when it occurred. To show seriousness of the conduct of any person, the court has also issue out a judgment that shall act as a deterrent for further incidents. That "special circumstances or considerations" exist in this matter so as to justify an order for costs as prayed for. In this

regard the attorney for the Applicant cited the case of *Rautenbach vs Symington 1995(4) SA 583 (O)* at 588 A-B.

[6] That Applicant was induced to fear when Respondent dispossessed the Applicant of his property in that Respondent arrived with seven (7) men and they were armed with knobkerries, pangas and knives. This therefore made the Applicant fearful for his life and therefore did not resist the dispossession thereof.

[7] Further that Respondent exposed the Applicant to an unhealthy environment by exposing him to the cold weather moreso because the Applicant is a sickly person suffering from asthma.

[8] On the other hand the Respondent also advanced arguments against the order sought by the Applicant. These arguments are outlined in paragraph [3] to [24] Respondent's Heads of Arguments.

[9] In conclusion at paragraph [20] thereof the Respondent contends that the court should grant an order of costs and that Respondent would like to offer a sum of E3,000 and the rest of costs (if any) be borne by the Applicant.

[10] 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 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 an 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 et, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 704 and the cases cited thereto).

- [11] On the issue of awards of attorney-and-client costs the leading case on this aspect of the matter is the case of *Nel vs WaterbergLandbouwers Kooperative Vereening 1948 AD 597* where *Tindall JA (Schreiner JA and Feetham AJA* concurring) stated that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party-and-party costs that a successful party will not be out of pocket in respect of the expense caused to him by the litigation. An award of attorney-and-client costs cannot, however, be justified merely as a form of compensation for damage suffered.”

[12] The learned authors *Herbstein et al*, *The Civil Practice of the Supreme Court of South Africa*, 4th Edition at page 717 state that an award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loathe to penalize a person who has exercised his rights to obtain a judicial decision in any complaint he may have.

[13] According to *Herbstein (supra)* at page 19 attorney-and-client costs may be levied on the grounds of an abuse of the process of court, vexatious, unscrupulous, dilatory, or mendacious conduct on the part of the unsuccessful litigant, absence of *bona fide* in conducting litigation, unworthy, reprehensible and blameworthy conduct, an attitude towards the court that is deplorable and highly contemptuous of the court, conduct that smacks of petulance, and that is vexatious and an abuse of the process of the court, the existing of a grave defect relating to proceedings, as a mark of the court disapproval of some conduct that should be frowned upon, and where the conduct of the attorney acting for a party is open to censure. Attorney-and-client costs have also been awarded where, *inter alia* proceedings were brought over-hastily on ill-advised grounds.

[14] In my assessment of the legal authorities cited above and the arguments of the parties as gleaned from the parties' Heads of Arguments I have come to the considered view that "special circumstances or consideration" exist

in this matter so as to justify an order for costs as prayed for. In my assessment of the facts of this case the actions of the Respondent would fall in the rubric of “unworthy, reprehensible or blameworthy conduct” stated by the learned authors *Herbstein (supra)* at page 719. See also the South African case of *Hamza vs Bailen 1949 (1) SA 993 (C)* at 1003.

[15] In the result, for the foregoing reason Respondent is ordered to pay costs to the Applicant at attorney and own client scale.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE

For Applicant: Mr. S. Matse

For Respondent: Mr. S. Bhembe