



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Civil Case No: 101/12**

**In the matter between**

**SIKHUMBUZO THWALA**

**APPLICANT**

**And**

**PHILILE THWALA (NEE DLAMINI)**

**RESPONDENT**

Neutral citation: *Sikhumbuzo Thwala v Philile Thwala (born Dlamini) (101/13) 2013 [SZHC] 13*  
(11February 2013)

**Coram:** **OTA J**

**Heard:** **5 February 2013**

**Delivered:** **11 February 2013**

**Summary:** Costs: Punitive costs on attorney-and-clients scale:  
guiding principles in award thereof.

- [1] The issue of costs which I am called upon to determine has its roots in the tug of war between the parties, who are husband and wife married under Swazi Law and custom, though now separated. Their bone of contention was the only product of their union, a 15 year old girl named **Phindasandze Thwala** who was in the custody of the Respondent.
- [2] Dissatisfied with this state of affairs the Applicant launched an application on the 20<sup>th</sup> of January 2012 and on the premises of urgency seeking several reliefs which included custody of the minor child.
- [3] The Respondent reacted to the custody application with a counter application, wherein she claimed maintenance for both herself and the child. In the wake of the counter application for maintenance, the Applicant filed a notice of intention to oppose the counter claim, which he followed up with a Notice to raise points of law mainly on the jurisdiction of the court to entertain and determine the issue of maintenance as per the Respondents counter application.
- [4] I heard arguments on the point taken in *limine* on jurisdiction on the 31<sup>st</sup> of January 2012 and handed down the decision on the 8<sup>th</sup> of February, wherein I dismissed the application and assumed jurisdiction of the counter application.
- [5] After the socio economic report which I ordered to be filed was duly filed by the Department of Social Welfare, I set down the two

applications for argument on the 5<sup>th</sup> of February 2013, on which day the Applicant conceded the two applications both on custody and maintenance. This resulted in a consent order on these issues. What is left to be determined is the costs to be awarded if any.

- [6] **Mr Dlamini** who appeared for the Respondent seeks punitive costs on the scale of attorney- and-clients costs for the three applications which arose in this litigation. His stance is that the Respondent who is indigent has been put out of pocket by the fact of this litigation and that in any event, the Applicants conduct in the course of the litigation is one which is deserving of a mark of disapproval by the court.
- [7] On the other hand **Mr Shongwe** who represents the Applicant, holds a contrary view. His take is that the Applicant demonstrated great contrition by conceding the two applications and thus ought not to be punished with costs.
- [8] Let me straightaway observe here that Respondents contention for costs in respect of the application taken in limine on the jurisdiction of the court to entertain and determine the issue of maintenance cannot lie. This is because I had clearly indicated in paragraph 39 of my judgment rendered on the 8<sup>th</sup> of February 2012, that there shall be no order as to costs in relation to that application. Having stated as above I say no more on the issue.

- [9] The award of costs if any in the circumstances will embrace only the main application on custody and the counter application on maintenance.
- [10] Now, the award of costs of and incidental to any proceedings is at the discretion of the court. This is a discretion which like any other discretion must be exercised judicially, on fixed principles, that is according to rules of reason and justice, not according to private opinion. Similarly the exercise of this discretion must not be affected by questions of benevolence and sympathy.
- [11] In exercising this discretion, the court first looks at the result of the action itself as well as the conduct of the parties to see whether either of them had in anyway involved the other unnecessarily in the expense of litigation. The court looks at all the facts of the case.
- [12] Having stated the general position on award of costs as above, it is imperative for me to observe here that the attorney- and- clients costs sought by the Respondent is one that the court approaches with caution. The judicial accord is that this scale of costs is only awarded where there are compelling circumstances that would justify same. This cautious approach is underscored by the fact that the court is loath to penalize a party who has lawfully exercised his right to obtain a judicial decision in any complaint he might have.
- [13] What will qualify as a compelling factor warranting this award of costs will depend on the peculiar facts and circumstances of each case.

The following factors have however been approved by jurisprudence as such compelling factors:-

1. An abuse of process of court.
2. Vexatious, unscrupulous conduct on the part of the unsuccessful party.
3. Absence of *bona fides* in conducting litigation.
4. Unworthy, reprehensive and blameworthy conduct.
5. An attitude towards the court that is deplorable and highly contemptuous.
6. Conduct that smarks of petulance.
7. The existing of great defect relating to proceedings.
8. As a mark of the courts disapproval of some conduct that should be frowned upon.
9. Where the conduct of the attorney acting for a party is open to censure.

**See The Civil Practice of The Supreme Court of South Africa, (4<sup>th</sup> ed) page 717 by Herbstein and Van Winsen, Jomas Construction**

**(Pty) Ltd v Kukhanya (Pty) Ltd Civil Appeal No. 48/2011 para 16,  
Silence Gamedze and Others v Thabiso Fakudze Civil Appeal  
Case No. 14/2012.**

[14] Having carefully considered the peculiar facts and circumstances of this case, I am inclined to agree with **Mr Dlamini** that the Respondent is entitled to the punitive costs sought on the scale of attorney- and clients- costs.

[15] I say this because the Applicants conduct in the whole proceedings left much to be desired.

[16] The Applicant instituted the main proceedings in January 2012 as I have abundantly demonstrated above. The Respondent launched a counter application for maintenance which elicited a Notice to raise points of law on jurisdiction from the Applicant. After I dismissed the point taken in limine on jurisdiction on the 8<sup>th</sup> of February 2012, the Applicant filed no further papers in opposition of the counter application notwithstanding that he had earlier on in the proceedings filed a notice of intention to oppose same. This remained the position until the 5<sup>th</sup> of February 2012 when this matter was set down for argument.

[17] Having filed no papers in opposition of the counter application, one would have expected that the Applicant had abandoned his intention to oppose same. But that was not to be. I say this because Applicant and his counsel appeared in court on the 5<sup>th</sup> February 2013 and but up

a spirited argument on why Applicant should be granted condonation to file his opposing affidavit at that late stage. When I refused the application for condonation, counsel then sought the courts indulgence for the Applicant to present oral evidence in proof of his means and still in opposition of the counter application. I granted this request in the interest of substantial justice. The Applicant however failed to tender any documentary evidence in proof of his means irrespective of the fact that he is a Director in his own company from which he draws monthly salaries.

[18] Since the duty of the court is to do substantial justice, I stood down the case to enable the Applicant produce his personal bank statement as well as that of his business.

[19] When the court reconvened at 2pm, the Applicants counsel informed the court that though the Applicant had secured his personal bank statement he was however unable to get that for his business. Thereafter in a dramatic move, Counsel then informed the court that his client was conceding the claim for maintenance to the tune of E4,500 which Respondents counsel had proposed right at the outset of the proceedings on the 5<sup>th</sup> February 2013 and which the Applicant had rejected.

[20] I should also mention here that during the course of these proceedings and prior to the 5<sup>th</sup> of February 2013, I made several interim orders for the Applicant to pay school fees for the minor child, E200 for transportation to and from school as well as E2,500-00 as contribution

towards her maintenance. These order which were made on 30/01/12, 7/09/12 and 10/09/12 were by the consent of the parties.

[21] It cannot be gainsaid that the Applicant arrogantly spurned these orders refusing to comply with them until a writ was issued against him.

[22] Similarly, with respect to the main application on custody, the Applicant initiated the proceedings as far back as January 2012. By so doing he dragged the Respondent, whom he acknowledged in his papers is unemployed and indigent, to court. Respondent was in that event compelled to engage the services of counsel which she has had to retain for over one year since the pendency of these proceedings. However, in yet another very dramatic move, the Applicant appeared in court on the 5<sup>th</sup> of February 2013, after the socio economic report had be filed and conceded custody of the minor child to the Respondent. This he did after putting her through the inconvenience, rigours and expense of litigation.

[23] More to the foregoing is the considerable inconvenience the court was put through . I have had to sit several times albeit in chambers to deal with preliminary issues in these proceedings.

[24] The Applicants conduct was highly contemptuous of the court and he also clearly demonstrated an unconscionable attitude towards the



Respondent throughout these proceedings. I fail to see any contrition on his part as advanced by his counsel.

[25] Taking together all the factors detailed above, I am of the firm view that the justice of the matter demands that costs be awarded on the punitive scale sought by the Respondent as a mark of the courts displeasure. **As Ramodibedi CJ stated in the case of Jomas Construction (Pty) Ltd (supra).**

“ It is not inconceivable that even a person who exercises his right to obtain a judicial decision may abuse such right. In such a situation the court would be entitled within its discretion to award costs on attorney-and-clients costs against such person in order, for example, to mark the court’s displeasure”

[26] In the light of the totality of the foregoing I order as follow:-

[27] Costs is awarded on the scale of attorney-and-clients costs in both the main application and counter application.

For the Applicant: M Shongwe

For the Respondent: M. S. Dlamini

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
11<sup>th</sup> DAY OF FEBRUARY 2013**

**OTA J  
JUDGE OF THE HIGH COURT**