IN THE HIGH COURT OF SWAZILAND

Civil case No: 144/2010

In the matter between:

NEDBANK SWAZILAND LTD **PLAINTIFF**

AND

SANDILE DLAMINI NO **DEFENDANT**

Neutral citation: *Nedbank Swaziland Ltd v Sandile Dlamini NO (144/2010) [2013] SZHC30 (2013)*

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

For Applicant Attorney D. Jele

For Respondent Advocate L. Maziya
Instructed by Attorney T.L. Dlamini

Summary

Civil Procedure – costs of suit including costs of counsel as certified in terms of Rule 68 (2) – Plaintiff files a Notice of Withdrawal of Action a day before hearing – Notice to Raise Special Plea and Notice of Set Down filed long before date of hearing – Defendant files heads of argument on the day before hearing – plaintiff's attorney arguing that the attendance of defendant's counsel during the hearing unnecessary in light of the withdrawal of action and simplicity of the matter – section 11 of the Sheriff's Act of 1902, Rules 41 and 68 (2), sections 20 (1) and 21 (1) of the Constitution discussed – Court held that the defendant was substantially successful in the proceedings and entitled to costs of suit including costs of counsel as duly taxed in terms of Rule 68 (2).

JUDGMENT
28 FEBRUARY 2013

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[1] The plaintiff instituted an action against the defendant for the sum of E269 176.11 (two hundred and sixty nine thousand one hundred and seventy six emalangeni eleven cents), interest at the rate of 9% per annum as well as costs of suit at Attorney and own client scale including collection commission.

[2] The plaintiff alleged that on the 14th June 2007 the defendant purporting to act in terms of a writ of execution issued by the Registrar of the above honourable court in favour of Eltech (PTY) Ltd attached and sold equipment valued at E269 176.11 (two hundred and sixty nine thousand one hundred and seventy six emalangeni eleven cents) on the basis that the Judgment Debtor was the lawful owner of the equipment. The purchaser brought the equipment in good faith not knowing that it belonged to the plaintiff. The defendant was acting in his capacity as the Deputy Sheriff for the Manzini Region.

[3] The plaintiff argued that by virtue of the loss of its property by the defendant's wrongful conduct he is liable to pay the plaintiff's damages. The defendant defended the action and filed a Notice to Defend as well as a Special Plea, arguing, *inter alia*, that the action has prescribed in terms of the Sheriff's Act No. 17 of 1902. However, on the date allocated for hearing, counsel for the parties advised the court that the matter between

the parties has since been settled; and, that only the issue of costs was outstanding.

[4] The special plea was set down for argument on the 30th August 2012; however, on the 28th August 2012 the plaintiff filed a Notice of Withdrawal of Action which; embodied a tender to pay defendant's wasted costs. Later on the same day, the defendant's attorney filed and served its heads of argument upon the plaintiff's attorneys.

[5] During the hearing, plaintiff's counsel argued that the matter had been finalised in terms of Rule 41 (1) (b) in light of the Notice of withdrawal and tendering of a wasted costs; and, that there was no need for Advocate Lucas Maziya to have appeared in court during the hearing because he was escalating costs already incurred.

[6] During the hearing Advocate Maziya demanded that the plaintiff pays costs of the withdrawal as well as costs of counsel in terms of Rule 68 (2); this was opposed by counsel for the plaintiff who argued that costs granted in terms of Rule 68 (2) are of a higher scale since the Taxing Master allows them as if they are taxed under an Attorney and own client scale.

[7] The Plaintiff's Counsel argued that the nature of the case is not one in which costs should be granted at a higher scale for the following reasons: first, that the plaintiff's claim is neither fraudulent nor dishonest. Secondly, that the matter is not complex for the involvement of Senior Counsel, and, that the instructing attorney could have handled the matter since he was on the side-bar for more than twenty years; and, that the only issue before court was whether the defendant was right in law to sell the plaintiff's property when he knew full well that it did not belong to the Wheel Centre. Thirdly, that the plaintiff withdrew the matter a day before hearing and tendered wasted costs; hence, there was no need for Advocate Maziya to appear in Court. Fourthly, that if the matter had been argued, the Special Plea could not have succeeded because the provisions of section 11 of the Sheriff's Act No. 17 of 1902 is inconsistent with sections 20 (1) and 21 (1) of the Constitution; and, that this court could have declared it invalid.

[8] In his Heads of Argument Defendant's Counsel argued that the plaintiff's claim has prescribed and no longer enforceable in law. He cited section 11 of the Sheriff's Act No. 17 of 1902 which provides the following:

> **"No action shall be brought against the sheriff, or any deputy sheriff, for anything done or omitted to be done in the execution of his office, unless commenced within six calendar months after the said act."**

[9] Section 20 (1) of the Constitution provides the following:

> **"20. All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."**

[10] Section 21 (1) provides the following:

> **"21. In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law."**

[11] It is common cause that the plaintiff filed a Notice of Withdrawal of Action on the 28th August 2012 with a tender of wasted costs; hence, it is not necessary for this court to decide the substantive issues involved in this case. However, it is inconceivable how section 11 of the Sheriff's Act is inconsistent with sections 20 (1) and 21 (1) of the Constitution.

[12] The issue for decision of this court is whether the plaintiff should pay the defendant costs of suit including costs of counsel as certified in terms of Rule 68 (2). The plaintiff has advanced four reasons why the costs sought by the defendant should not be allowed. I will now deal with these grounds: first, the plaintiff argued that the claim is neither fraudulent nor dishonest.

However, I may point out that these are not the only common law grounds for awarding attorney and client costs. The list is not exhaustive and includes vexatious and frivolous proceedings, reckless and malicious proceedings, a litigant's deplorable attitude towards the court, other great defects in the conduct of the proceedings as well as circumstances governed by Statutory Provisions. See The Law of Costs by A.C. Cilliers, published by Butterworth in 1972 at pages 66-70

[13] The second ground advanced by plaintiff's counsel is that the matter was not complex for the involvement of Senior Counsel and that the instructing attorney could have handled the matter. It is implicit in the Right to Fair Hearing as well as the Right to Administrative Justice both enshrined in the Bill of Rights that legal representation by counsel of one's choice is a fundamental right. To that extent Section 21 (1) of the Constitution provides as follows:

> "**21. (1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.**
>
> **(2) A person who is charged with a criminal offence shall be - ....**
> **(e) permitted to present a defence before the court either**

directly or through a legal representative chosen by that person."

[14] Section 33 of the Constitution provides the following:

> **"33. (1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.**
>
> **(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of the authority**."

[15] The third ground advanced by the plaintiff is that it withdrew the matter a day before hearing and tendered wasted costs, hence there was no need for counsel to appear before court. The Special Plea was lodged on the 6th April 2010 and received by plaintiff's attorneys on the same day. The Notice of Set Down for the hearing of the Special Plea was received by plaintiff's attorneys on the 16th August 2012 for the hearing on the 29th August 2012. The Notice of Withdrawal of Action as well as Defendant's Heads of Argument were received by the parties on the 28th August 2012. This means that Counsel for the defendant had been working on the heads

of argument up to the date of lodging and serving; it could be argued, and, rightly so, that defendant's counsel appeared in court on the day of hearing to argue for his costs as it turned out to be the case.

[16] The last ground advanced by the plaintiff is that if the merits of the matter had been argued, the Special Plea could have failed because section 11 of the Sheriff's Act is inconsistent with sections 20 (1) and 21 (1) of the Constitution. I do not agree. Section 11 of the Sheriff's Act is mandatory in nature and clearly shows that the action instituted by the plaintiff had prescribed; it was open to the plaintiff to have applied for condonation or extension of time but this was not done. Section 20 of the Constitution relates to "the equality clause", and it has no relevance to this matter. Similarly, section 21 deals with the right to a fair hearing; and, it has no relevance to this matter.

[17] Rule 41 provides the following:

> **"41. (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and, the Taxing Master shall tax such costs on the request of the other party."**

[18] It is apparent from Rule 41 that a plaintiff is at liberty to withdraw proceedings at any time before the matter has been set down; thereafter, the withdrawal should be done with the leave of court or by consent of the parties. In this matter the withdrawal was done after the matter had been set down; and in doing so the plaintiff did not obtain the consent of the other party or the leave of court. It is further apparent from Rule 41 that the other party is entitled to demand that the Taxing Master should tax a consent to pay costs.

[19] Rule 68 provides the following:

> "**68. (1) Subject to sub-rule (2) the scale of fees payable to attorneys and advocates shall as far as possible be in accordance with the tariff contained in the Fourth Schedule to these Rules (hereinafter referred to as the "tariff").**
>
> **(2) Where the court or the judge is satisfied on application being made, that having regard to the nature of the case or any exceptional circumstances the costs allowable under section H of the tariff (costs of counsel) may be inadequate, the court or judge may direct that the taxing master on taxation ... not be bound by the amounts set out in that section, and where such a directive given the taxing master may, if he thinks fit,**

allow on taxation such larger sums as he thinks reasonable."

[20] The basic rule of our law is that an award of costs is in the discretion of the court; the general rule of our law that costs follow the event, and, that the successful party is awarded his costs is subject to this basic Rule. See the Law of Costs (supra) at page 9.

[21] In the case of *Kruger Brothers & Wasserman v. Ruskin* 1918 AD 63 at 69 *Innes CJ* stated the basic rule as follows:

"…the rule of our law is that all costs unless expressly otherwise enacted are in the discretion of the judge. His discretion must be judicially exercised; but it cannot be challenged, taken alone and apart from the main order, without his permission."

[24] *Murray CJ* in the case of *Levben Products v. Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 stated the following:

"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial judge is given a discretion (*Fripp v. Gibbon & Co.*, 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. If there are such grounds,

then the appellate tribunal in its reluctance to interfere with the discretion of the trial judge would not set aside the order as to costs given by him merely on the ground that it might have taken a different view of the sufficiency of such grounds (per *Wessells, CJ., Penny v Walker* 1936 AD 241 at p. 260, where the learned Chief Justice refers to the case of *Ritter v. Godfrey*, 1920 (2) K.B. 47). In the second place there is the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for so doing."

[23] The discretion of the court must be exercised judicially upon a consideration of the facts of each case, and that in essence, it is a matter of fairness to both sides; the word judicial means "not arbitrarily". See the Law of Costs (supra at p. 11; Gelb v. Hawkins 1960 (3) SA 687 (AD) at 694; *Marber v. Merber* 1948 (1) SA 446 (AD) at 453.

[24] In the case of *Maxine Langwenya and Another v. Vusi Matsebula NO and three others* High Court Civil Trial No. 4627/10 (unreported), I dealt extensively with the issue of costs. I emphasised that the court in exercising its discretion should have regard to the general rule that the party who succeeds should be awarded his costs, and, that this rule should not be departed from except on good grounds.

[25] In the *Maxine Langwenya* case (supra), I further dealt with the issue of a party who has been substantially successful. At paragraphs 4 and 5 of the judgment, I quoted with approval the case of *Dickson v. Minister of Water Development* 1971 (3) SA 71 RAD at 72 A where *Lewis AJP* stated 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…."**

[26] It is apparent that the defendant has been substantially successful in defending these proceedings. The plaintiff filed a Notice of Withdrawal of Action only after the defendant had lodged the Notice to Raise Points of Law as well as the Notice of Set Down for hearing of the matter.

[27] The defendant's Attorney had instructed counsel to draw up and settle the pleadings including the Heads of Argument. The defendant's counsel was entitled to appear in court to argue the issue of costs in light of the Notice of Withdrawal in terms of Rule 41 which tendered only wasted costs; it would be unfair for the defendant to pay counsel's costs when he had been dragged into court by the plaintiff.

[28] On the 23rd May 1990 *His Lordship Chief Justice Hannah* amended the High Court Rules in order to ameliorate the financial hardship faced by Advocates. He introduced Rule 68 (2) which allowed for the taxation of costs above those allowed under section H in the Fourth Schedule. A perusal of the costs under section 11 indicates that the costs are very low in relation to the work done by the advocates; it does not take account of inflation and the current cost of living. A further amendment of the High Court Rules to review the tariff of fees allowed for Advocates and Attorneys under the Fourth Schedule is long overdue.

[29] In the circumstances the plaintiff is ordered to pay costs of suit including certified costs of Counsel in terms of Rule 68 (2).

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