IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.227/15

In the matter between:

NORAH STOCKS **Applicant**

VS

JOHAN DUPLESSIS **Respondent**

Neutral citation: *Norah Stocks and Johan Duplessis (227/2015)[2015] SZHC179 (19 October 2015)*

Coram: **FAKUDZE J**

Heard: **08 October, 2015**

Delivered: **19 October, 2015**

SUMMARY: – ***granting of costs on attorney- client scale by a Magistrate – basis for the Appeal that Magistrate erred in fact and in law in granting costs against the Appellant and at attorney and own client scale in Civil Case 1964/2015 because Appellant's hypothec was not perfected reason being that Respondent had paid the rent prior to the launching of the application - held that the court aquo's discretion with respect to the granting of costs should not be lightly interfered with - held further that Appellant's***

conduct in proceeding to argue the points of law raised by Respondent was a clear indication that the matter had not been overtaken by events as alleged by Appellant. Appeal is dismissed and Appellant to pay costs of this appeal on the ordinary scale.

JUDGEMENT

BACKGROUND

[1] Appellant, who was Applicant in the court aquo, instituted proceedings against **Respondent at Manzini Magistrate's court under Civil Case No. 1964/2015.**

[2] The Application centred around non payment of rent by Respondent. Appellant sought an order to perfect the Landlord's hypothec, payment of arrear rentals in the amount of E2, 500. 00, cancellation of the lease agreement and the ejectment of Respondent from Appellant's property. The Application was launched on the 18th May, 2015 on a certificate of urgency. A *rule nisi* returnable on the 25th May, 2015 was issued by the court a quo and served on Respondent on the 19th May, 2015.

[3] **OPPOSITION BY RESPONDENT AND NOTICE TO RAISE POINTS OF LAW**

On the 22nd May, 2015, Respondent filed a Notice of Intention to Oppose the Application and also filed a Notice to raise the following points of law -

(a) That the Applicant's cause of action is supposedly based on rental arrears for April, 2015. The Application was moved on the 18th May, 2015. The Respondent had, on the 16th May 2015, already made payment of the Rental for the month of April2015. At the time the Applicant moved the Application , her cause of action had totally been extinguished and the same was an unnecessary abuse of the court;

(b) That the Applicant, as an extension of point one, above has approached the court on an exparte basis and has made material misrepresentations and non disclosures and has intentionally misled the above court into granting an Order (though interim) against the Respondent. Applicant has failed to disclose that the Respondent had made full payment of the Rentals sought for April, 2015 on the 16th May as stated and Applicant had been fully aware of that.

[4] In the court a quo, the matter was postponed two or three times and according to Appellant's attorney, The postponements were occasioned by the office of the clerk of court. It was finally argued and on the day it was argued the Parties had filed their Heads of argument. The points of law were first dealt with and the Ruling on them was delivered on the 20th August 2015. The court a quo upheld all the points raised by Respondent's Counsel, dismissed Applicant's application and discharged the *rule nisi* with costs at attorney and own client scale.

[5] **APPEAL**

Following the dismissal of the Application, the discharge of the *rule nisi* and the order on costs, Appellant filed an appeal and the grounds of appeal are that -

(a) The court a quo erred in law by not considering that the Application was not only for perfecting a landlord's hypothec but also for cancellation of the oral lease agreement and ejectment of the Respondent in the Appellant's premises.

(b) The court a quo erred in fact and in law in granting costs against the Appellant and at an attorney and own client scale.

[6] When the appeal was first set down in the contested roll of the 2nd October, 2015, I enquired from Appellant's Counsel if the Respondent is still in

occupation of the leased property because we might called upon to deal with a matter that had been overtaken by events. Counsel informed me that Respondent had vacated the property and the first ground of appeal must fall away. Counsel indicated that the focus would be on the issue of the awarding of costs by the court a quo.

[7] The matter was set down for argument on the 8th October, 2015. The scope of the enquiry was ably defined by Appellant's Counsel when She said that this Court must focus on whether this Court should interfere with the jurisdiction of the court a quo in granting costs on attorney – client basis and whether or not there was proper exercise of discretion by the Magistrate in the court a quo. Counsel further submitted that the Court should consider whether Counsel for Appellant's conduct during the litigation warranted punitive costs. Respondent's Counsel added one more consideration and that is whether there was exercise of the discretion by the Magistrate on the wrong principle when awarding the costs on attorney - client basis.

[8] Basically, Appellant's contention is that instructions to take the matter to court were given to her on the 15th May 2015 and she accordingly filed the urgent application on the 18th May 2015 and the *rule nisi* was issued. Service of the *rule nisi* was effected by the Deputy Sheriff on the 19th May 2015. When the Deputy Sheriff arrived at Respondent's place of residence, he discovered that payment of the arrears had been effected on the 16th May 2015. Applicant's Counsel further argues that based on this revelation, she instructed the Deputy Sheriff not to attach the movables of Respondent. The other reason Appellant's Counsel instructed the Deputy Sheriff not to attach the movables was that Respondent had started removing his belongings from the residence following the cancellation of the oral lease agreement by the Respondent which cancellation letter was served on the Respondent on the 2nd April 2015.

[9] Appellant's Counsel further contends that on the 22nd May 2015,

Respondent filed a Notice of Intention to Oppose the Application and also filed a Notice to raise points of law. Appellant's submission is that since the

movables were not attached by the Deputy Sheriff following the issuance of the *rule nisi*, there was no need for Respondent to file the Notice to raise points of law. The whole exercise now became academic. In short, Respondent suffered no prejudice. Appellant's Counsel submits that the she tried to get hold of Respondent's Counsel to update him on the latest development, but Respondent's Counsel was unco-operative. Respondent's Counsel denied this allegation.

[10] Appellant holds the view that attorney – client costs should not have been awarded by the court a quo because Respondent's Counsel is equally to blame. Respondent's response to the issues raised by Appellant is that notwithstanding that Appellant came to know about the payment of the 16th May, 2015, she went ahead with the Application on the 18th May 2015. Respondent further contends that after it came to Appellant's attention that payment had been made, Appellant's Counsel should have filed a notice of withdrawal and tendered payment of wasted costs. Appellant had plenty of time given that the matter arose in May and was finally dealt with by the court a quo in August. Respondent contends that the fact that Appellant's Counsel went ahead and prepared Heads of argument and argued the matter on the 18th August, 2015 is a clear indication that the matter was not at all academic and therefore Respondent should not share the blame. Respondent's Counsel holds the view that the Magistrate in the court a quo was perfectly right in discharging the *rule nisi* and awarding costs on attorney - client basis.

THE LAW ON COSTS ON ATTORNEY CLIENT BASIS

[11] The Superior Courts in our jurisdiction have provided guidelines on the issue of costs on attorney - client basis. Two Superior Courts judgments suffice to demonstrate this point. In the High Court case of **Skhumbuzo Thwala v Pholile Thwala (nee Dlamini) Civil Case No. 101/12** the learned Judge, Justice Ota, as she then was, said,

> "***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 the discretion must not be affected by questions of benevolence and sympathy. In exercising this discretion the court 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."

The above consideration by the learned Judge pertains to the issue of costs in general. The Judge went further to address the issue of awarding costs on attorney and client basis when she said-

*"**It is imperative for me to observe here that the attorney and client 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. The 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.**"*

[12] The Supreme Court judgement in **Jomas Construction (Proprietary)Limited v Kukhanya (Pty) Ltd Civil Appeal No. 48/2011** also clarifies the issue as to when costs at attorney and client basis and costs *debonispropriis* are granted. The learned Judges observed that:-

*"**Now the law on attorney and client costs as well as costs debonispropriis is well settled in this jurisdiction. In the first place an award of costs lies within the inherent discretion of the court. Such discretion must not, however, be exercised arbitrarily, capriciously, mala fide or upon consideration of irrelevant factors or upon any wrong principle. It is a judicial discretion. Generally speaking an award for costs on attorney and client scale will not be granted lightly."***

[13] The Judges went on to observe that -

*"**We wish to caution, however, that everything has its own limits. 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***

client costs against such person in order for example, to mark the court's displeasure. There are several grounds upon which the court may grant an award of costs on attorney and client scale. The list is not exhaustive. It includes dishonesty, fraud, conduct which is vexatious, reckless and malicious abuse of court process, trifling with the court, dilatory conduct, grave misconduct such as conduct which is insulting to the court or to counsel and the other parties. So, too, an award of costs debonispropriis (put out of his or her pocket) is a matter which lies within the court's discretion. Here the punishment is directed at the representative and not the litigant. As a general rule the court will not grant an award of costs debonispropriis unless the representative acted maliciously, negligently or unreasonably."

APPLICATION OFTHE LAW TO THE FACTS

[14] Counsel for Appellant and Respondent have provided this Court with comprehensive Heads of argument. This Court shall forever remain grateful to both Counsels for this. When the matter was argued before me, forceful and convincing arguments were advanced by both Counsels.

15] It is common cause that the issue of deciding the awarding of costs can be complex and difficult. This was observed by His Lordship De Villiers Pin Fripp V Gibbon & Company 1913 AD At 363. His Lord said,

"It is common cause that while, as a rule there is no room for the discretion of a Magistrate or a Judge on the merits of a case as he is bound to decide the issues between the parties in accordance with their rights as established at the trial, on the matter of costs, the law allows him a discretion, which of course is a judicial discretion. Questions of costs are always important and sometimes complex and difficult to determine and in leaving the Magistrate 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 judgement 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. The court of appeal assumes the Magistrate has exercised his discretion unless there are good reasons for holding that he has not done so....”

[16] In the case before me, Appellant raised the point that the court a quo should not have ordered Appellant to pay for costs at a punitive scale because there was no misconduct on the part of Appellant warranting such costs. Secondly, she genuinely and honestly represented the interests of the client throughout the proceedings. The fact that the landlord’s hypothec was not perfected should also be another consideration.

[17] Respondent argues that failure on the part of Appellant to disclose that payment had been effected prior to the launching of the Application in the court a quo justified the decision of the court a quo in discharging the *rule nisi* with costs at attorney and client scale. Furthermore, even if Applicant did not know that payment had been effected at the time the Application was launched, she did not take any steps to put the matter to rest because the cause of action had ceased to exist.

In light of the Fripp’s case referred to above, I find nothing in the court a quo’s ruling that suggests any bias, capriciousness and the exercise of the discretion upon the wrong principle. There is therefore no reason for this Court to interfere with the honest exercise of discretion by the court a quo. There also seems to be no good reasons to suggest that the discretion was exercised unreasonably in the circumstances.

[18] In fact, what prompted the Magistrate in the court a quo to make an order for punitive costs is clearly stated in the reasons for the Ruling when she says -

“***I find that the applicants should not have instituted the proceedings and alternatively it should have approached the court for the discharge of the Rule Nisi after they were in receipt of the Notice of Intention to oppose, Notice to raise points of law and proof of payment. However that was not the case. It is clear that the Respondent has been put out of pocket by having to oppose an non existing claim.”***

[19] We must also bear in mind that Appellant was the *dominus litis* in this case. After realising that payment had been effected, she should have simply withdrawn the Application and tendered payment of wasted costs. Her conduct in even preparing Head of arguments on the points of law and going ahead to argue them clearly shows that the case had not been overtaken by events as earlier suggested by Appellant's Counsel.

[20] In light of all that has been said above, I find nothing extra ordinary in the way the Magistrate in the court a quo exercised her discretion in awarding punitive costs. As a lower court, she was bound to follow decisions of higher courts on issues similar to the one she was called upon to deal with. I therefore dismiss this Appeal and confirm the Ruling of the court a quo.

[21] On the issue of costs of this Appeal, Respondent's Counsel argues that this appeal should also attract punitive costs in the same way as it did in the case of **Swaziland Housing Board v Thulani Abande Dlamini Civil Case No. 48/10**. Counsel for Respondent argues that it is apparent that the Respondent has been put out of pocket by defending a non existent case. Counsel for Appellant has argued in reply that Abande's case is not at all materially similar to the one before this Court. Counsel went further to state that the attorney client - costs that she will incur by virtue of the ruling of the court a quo far outweighs the arrear rental she was claiming on behalf of her client when she instituted the proceedings.

[22] The words of Justice M.D. Mamba, AJA in the matter between the **Director of Public Prosecution v Themba Macilongo Ndlovu and Justice Mangosuthu Mzizi, Criminal Appeal Case No. 15/ 2015** are words worth considering in exercising one's discretion on the issue of awarding costs on attorney – client basis. The Learned Judge said –

> ***"Notwithstanding all these negatives inherent in this appeal, a punitive costs order may have a negative effect of discouraging aggrieved parties from prosecuting or pursuing their legitimate grievances before this Court. This is of course not to suggest that litigants are free to pursue their grievances in any manner. The Rules of Court are there to guide them."***

I entirely agree with the observations by the Learned Judge. It is my humble observation that fairness to all the parties and reasonableness in this appeal compels me to order that Appellant pays costs to the Respondent on the ordinary scale.

M.R. FAKUDZE J

JUDGE OF THE HIGH COURT

For Appellant: **G Reid**

For Respondent: **T.M. Ndlovu**