



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No. 893/2018

MIRIAM KINGSLEY

Plaintiff

And

**THE PRINCIPAL SECRETARY IN THE MINISTRY
OF PUBLIC WORKS AND TRANSPORT (ROAD
DEPARTMENT)**

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation : ***Miriam Kingsley & The Principal Secretary in the
Ministry of Public Works and Transport (Road
Department) and Another (839/2018) [2019] SZHC 107
(21st June, 2019)***

Coram : **M. Dlamini J**

Heard : **10th April, 2019**

Delivered : **21st June, 2019**

- Costs order**
- ***Compromise creates new rights and obligations, brings about new contract, it is intended to end litigation or avoid or stop litigation***
 - ***Compromise justifies a deviation from general rule that costs follow the event.***

Summary: The plaintiff contends for an order of costs after obtaining a relief for the claim of E294, 000 and interest thereof by consent of the defendant. The defendant strongly opposes an order for costs by reason that the plaintiff was given his main claim on a silver platter.

The Parties

- [1] The plaintiff is an adult female Swazi of Portion 31 Farm 308 situate at Nkoyoyo, Mbabane, region of Hhohho.
- [2] The first defendant is the Principal Secretary, the heard of second defendant. Second defendant is responsible *inter alia* for major constructions of roads and Government buildings. The third defendant is the legal advisor and representative of all Government Ministries and entities.

Procedure

- [3] The plaintiff's cause of action is simple. It is that the first and second defendants expropriated a portion of his Portion 31, Farm 308 situate at Nkoyoyo region of Hhohho. Plaintiff therefore demanded by means of combined summons the sum of E294 000.00. Defendant filed its Notice to defend and a plea. Plaintiff lodged a summary judgement application.

On the hearing date of plaintiff's application for summary judgement, Counsel for both parties appeared in court. They entered a consent order in respect of the capital sum of E294, 000.00 and interest therefore. No order as to costs was entered. This was on 17th August, 2018.

[4] On 1st April, 2019, plaintiff served a Notice of Set Down for an order of costs. First defendant strenuously objects to such an application.

Adjudication

[5] My task is simple. Is the plaintiff entitled to costs in the circumstance of this matter? In her heads of arguments, the plaintiff submits that the defendant is obliged to pay costs as the whole basis for defending the matter was based on *mala fide*. Defendants caused the plaintiff to institute legal proceedings despite service upon them of a letter of demand. The defendants on the other hand contend that an agreement was reached between the parties. Its terms are evident in the orders entered by consent on 17th August, 2018. This agreement was conclusive and binding. It was final. It is disingenuous of plaintiff to seek to undo the agreement mutually concluded on 17th August, 2018.

[6] Defendant further points out that it was defendant who initiated the agreement concluded. It was agreed on this basis therefore that a costs order would be excluded. Defendants concluded by pointing out that the general rule that a successful party is entitled to costs cannot apply to the present case as the parties reached a compromise.

[7] It is common cause that neither the action proceedings (summons) nor the application (summary judgement) filed by plaintiff was prosecuted. The parties reached an agreement that the plaintiff would be paid by the first and second defendant the sum of E294, 000.00 as compensation and interest thereof. A costs order was not entered against the defendant on 17th August, 2018. I therefore agree that plaintiff in the circumstance cannot be held to be a successful party in the same term as envisaged by the general rule that a successful party is entitled to costs.

[8] Further, plaintiff does not state why she failed to secure a costs order of the 17th August, 2018. Why she waited for almost a year before she could claim costs. The defendant on the other hand submitted that plaintiff compromised his claim. By plaintiff's failure to advance reasons why it failed to claim costs on the day of hearing of her summary judgement, the court is left with the explanation advanced by defendant which is that the claim was compromised. **Potterill AJA**¹ eloquently stated:

“An agreement of compromise creates new rights and obligations as a substantive contract that exists independently from the original cause. The purpose of a compromise is twofold:

(a) to bring to an end to existing litigation and

(b) to prevent or avoid litigation.” (My emphasis)

¹ Slabbert v MEC for Health and Social Development, Gauteng (432/2016) [2016] ZASCA 157 (3 October, 2016) at para 7

[9] The Learned Justice of Appeal proceeded:

*“When a compromise is embodied in an order of court the order brings finality to the **lis** between the parties and it becomes res judicata.”*

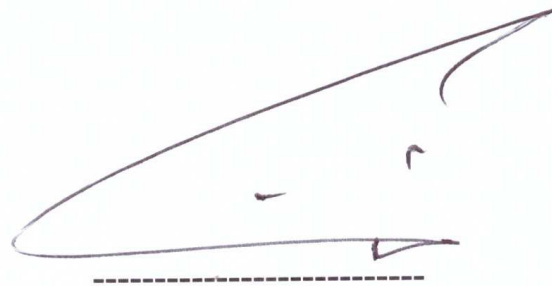
[10] On grounds for rescinding a compromise, the learned judge wisely propounded:

*“[8] This being said, a transactio (**compromise**) is made by consent between parties and like any contract or order of court made by consent, it may be set aside on the ground that it was fraudulently obtained. It may also be set aside on the grounds of **justus error**, ‘provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to ‘**compromise**’. [5] A ‘**compromise**’ agreement may also be set aside if the parties to the agreement laboured under a common mistake. [6] However, a unilateral mistake on the part of one party that does not flow from a misrepresentation by the other does not allow for the former party to resile from a consent agreement. [7] The question thus is whether one of these grounds exists for the MEC to resile from the ‘**compromise**’ agreement.”*

[11] None of the above clearly tabulated by the learned judge form the basis of plaintiff's application. In the result, the plaintiff's application for costs order is not justified in light of the compromise. The compromise justifies a deviation from the general rule that costs must follow the event.²

[12] In the final analysis, I enter the following orders:

1. Plaintiff's application is dismissed
2. No order as to costs.

A handwritten signature in dark ink, consisting of a large, sweeping loop on the left side and a series of smaller, connected strokes on the right side, ending in a sharp point.

**M. DLAMINI
JUDGE**

For the Plaintiff : J. Henwood of Henwood & Company

For the Defendant : M.M. Dlamini of the Attorney General's Chambers

² Maxine Langwenya and Another v Vusi Matsebula and Three Others High Court Civil Number 4627/10 unreported