



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 668/18

In the matter between:

LUMBELA GENERAL TRADING CC

APPLICANT

AND

SWAZI INDUSTRIES AGENCIES (PTY) LTD

1ST RESPONDENT

MCINISELI ZWANE N.O.

2ND RESPONDENT

In re:

SWAZI INDUSTRIES AGENCIES (PTY) LTD

PLAINTIFF

AND

KENNETH LUMBELA

DEFENDANT

Neutral citation: *Lumbela General Trading CC vs Swaziland Industries Agencies*

*(Pty) Ltd & Others [668/18] [2020] SZHC 207 (14 October
2020)*

Coram: FAKUDZE, J

Heard: 22/09/2020

Delivered: 14/10/2020

Summary: *Civil Procedure – issue of costs – Applicant claim for costs at Attorney – Own client scale – the substance of the fact that Respondent continued to pursue the matter notwithstanding that the Applicant had established ownership of the motor vehicle in the Replying Affidavit – Respondent resists the Application for punitive costs on the basis that it was asserting client’s rights when it pursued the matter – Further that when matter brought to Supreme Court following the court-a-quo’s Ruling upholding the point of law raised by the Respondent, the Supreme Court ended up dealing with the substance of the Application in the court-a-quo by pronouncing that the Applicant was the owner of the vehicle. Supreme Court ordered that matter be referred back to court-a-quo for determination of the merits – both parties agreed that matter had been pronounced upon by the Supreme Court – Supreme Court also ordered that the Respondent should pay costs of the Appeal – principles of costs discussed particularly that costs follow the event – also that court’s grant punitive costs in rare circumstances – Court’s view that Applicant not entitled to costs because it was not the successful party – Respondent conceded that the Supreme Court had concluded matter – Each party to bear its own costs.*

JUDGMENT

BACKGROUND

- [1] The First Respondent obtained an order against Kenneth Lumbela (the Defendant in the main matter) in the sum of E107,973.45 (One Hundred and Seven Thousand Nine Hundred and Seventy Three Emalangeni Forty Five Cents) being for goods sold and delivered by the First Respondent to Kenneth Lumbela.
- [2] A writ of execution was eventually obtained and issued in favour of the First Respondent against Kenneth Lumbela and same was executed by the Second Respondent as the Deputy Sheriff. A motor vehicle was attached. Thereafter, the Applicant approached the High Court alleging that the motor vehicle that was attached belongs to it and does not belong to the said Kenneth Lumbela. The Respondent opposed the Application and the matter was dismissed by the court *a quo* on a technical point. The Applicant appealed the judgment and the Supreme Court found in favour of the Applicant. It also referred the matter back to the High Court for the determination of the main matter.

THE PARTIES' CONTENTION

The Applicant

- [3] The Applicant contended that it succeeded in the main but the Respondent opposed the costs. The Respondent conceded to the Application after the pronouncement by in Supreme Court on the ownership of the motor vehicle. It cannot therefore be said that the Applicant is the winner.
- [4] The Applicant further contended that on the 18th December, 2018 it launched an Application in this court and annexed to the Application several documents which sought to prove ownership of the motor vehicle, directorship of Applicant, physical address and the registration documents of the Applicant including the director's Identity Card. Notwithstanding the delivery, the Respondent continued to oppose the release of the motor vehicle. The Respondent's continued opposition of the Applicant's Application notwithstanding what was furnished to the Respondent is the basis upon which the Applicant is seeking costs at attorney-client scale.
- [5] The Respondent stated that it obtained an Order of the Court against the Applicant in the main matter in the sum of E107,973.45 (One Hundred and Seven Thousand Nine Hundred and Seventy Three Emalangeni Forty Five Cents) for goods sold and delivered by the Respondent to Kenneth Lumbela. A writ was obtained in favour of the 1st Respondent and was executed by the Deputy Sheriff. A motor vehicle was attached. The Applicant approached the High Court claiming that the motor vehicle belongs to it. The matter was heard by the High Court and it upheld the point of law raised by the Respondent pertaining to the Applicant's legal standing. An Appeal was noted by the Applicant and the Supreme Court ruled in favour of the Applicant. The matter was remitted back to the High Court for it to be determined on its merits.

- [6] The Respondent argues that it did not wilfully defend the Application thus causing the Applicant to suffer more legal expenses. The Respondent raised a point of law pertaining to the Applicant's legal standing, particularly that the directorship of the Application was raised in the Replying Affidavit. The court-*a-quo* ruled in favour of the Respondent and the Applicant appealed to the Supreme Court. The Supreme Court found in favour of the Applicant and remitted the matter back to the High Court for the determination of the merits.
- [7] The motor vehicle licence disk attached to the Application had expired at the time the proceedings were instituted. It expired on the 31st March 2018 and the proceedings were instituted around the 18th December, 2018. The Applicant had not given the Respondent a copy of the blue book. The blue book is *prima facie* proof of ownership and not conclusive proof of ownership. The Respondent was therefore bound to defend the Application.
- [8] The Respondent further argued that it should not bear costs for the Application because the Supreme Court did not only deal with the point of law appealed against but went further to determine the merits of the matter when it stated that the motor vehicle belonged to the Applicant. There was nothing left for the court-*a-quo* to decide when the matter was remitted back to it. When the matter was remitted back there was appreciation on the part of the parties that the pronouncement of Supreme Court had finalised the dispute. By virtue of this concession, the Applicant cannot claim to be the winner.

[9] The Respondent has a right to be heard and to be afforded a fair hearing. The ruling by the Supreme Court denied the Respondent an opportunity to ventilate its defence. The Respondent should not therefore bear costs for a matter that was dealt with. At the very least each party should bear its own costs for the High Court proceedings.

THE APPLICABLE LAW

[10] The basic rule pertaining the award of costs is that costs are awarded based on the discretion of the court. Such discretion should be exercised judiciously and judicially; otherwise it becomes no discretion at all. In the case of **Nedbank Swaziland v Sandile Dlamini N.O. Civil Case No. 144**, His Lordship Maphalala M.C.B. J (as He then was), cited with approval at page 10, the case of **Kruger Brothers and Wassciman v Ruskin 1918 A.D.** 63 to 69 where Innes C.J. 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 exercised judicially.”

[11] The Learned Authors **Herbstein and Van Winsen, The Civil Practice of the Superior Court in South Africa** at pages 477 to 478, deal with the fundamental rules relating to the award of costs. These Authors observe 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 upon grounds on which a reasonable man could have come to the conclusion arrived at”

[12] On the issue of costs being awarded on attorney and own client basis, the High Court case of **Sikhumbuzo Thwala v Pholile Thwala (nee Dlamini) Case No. 101/12**, adequately covers it. The Learned Justice Ota stated that:

“Now the award of costs and incidental to any proceedings is at the discretion of the court. This discretion 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 its 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 any way involved the other unnecessarily in the expense of litigation. The court looks at all the facts of the case. 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 penalise a party who has lawfully exercised his right to obtain a judicial decision in any complaint he might have.”

COURT’S ANALYSIS AND CONCLUSION

[13] It is a fundamental principle that the party who succeeds should be awarded costs. Courts also consider the conduct of the parties to see whether either of them had in anyway involved the other in the expense of litigation. In the case before court, it is the Applicant’s contention that it was a successful

party in the sense that the Respondent should not have proceeded with the Application because the documents attached to the Replying Affidavit proved the ownership of the attached vehicle. The Applicant further contends that after the matter had been referred back to the High Court by the Supreme Court, the Respondent conceded that the ownership of the motor vehicle belonged to the Applicant.

[14] The Respondent contends that it had every reason to defend the interests of its client. It should not therefore be punished for doing so in the form of costs. It genuinely believed that the attached motor vehicle belonged to Kenneth Lumbela. The other consideration is that the Applicant cannot be heard saying that it won the case on the merits, reason being that the Respondent conceded to the merits of the case based on the Supreme Court Judgment. The reason why it conceded is that the Supreme Court overstepped its bounds when it decided the matter on the merits when it had only been called upon to deal with a point of law. There was also no *prima facie* proof of ownership in the form of a blue book. The purported proof in the form of a licence disk had expired at the time of the launching of the Application.

[15] The court's view is that the Respondent is correct. None of the parties can claim to be successful on the merits. The Supreme Court Judgment made a finding on the merits when it said the following in paragraph of its judgment:-

“[7] *It is clear from the judgment that the learned Judge viewed paragraph 16 of the Founding Affidavit and not exactly established the legal standing of the Applicant company in the*

proceedings. In that respect, the learned Judge overlooked the undisputed allegation, in my opinion, if the two sentences of paragraph 11 are transported to the end of or read into paragraph 1 of the Founding Affidavit we get a full statement which establishes the relationship between the deponent and the Applicant in those proceedings. The deponent is the owner of the Applicant a closed corporation and the Applicant is the current owner of the property attached. The chain of events is logically linked. The deponent in the owner of the Applicant is also the owner of the motor vehicle.”

[16] The other consideration in agreeing with the Respondent is that the licence disk had already expired. There was no attempt by the Applicant to *prima facie* proof ownership of the motor vehicle.

[17] It follows that if none of the parties is a winner each party should bear its own costs. The Application is therefore dismissed.



FAKUDZE J.

JUDGE OF THE HIGH COURT

Applicant: M. Dlamini

Respondent: W. Maseko