



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 1488/2022

In the matter between:

MONIA BESTER

Applicant

And

SATARA (PTY) LTD

1st Respondent

WILLIAM KELLY N.O.

2nd Respondent

In re:

SATARA (PTY) LTD

Plaintiff

And

MONIA BESTER

Defendant

Neutral Citation: *Satara (Pty) Ltd vs Monia Bester* (1488/2022) [2023] SZHC
29 (13/03/2023)

Coram: **K. MANZINI J**

Date Heard: 24 October, 2022.

Date Delivered: 13, March, 2023.

SUMMARY: *Civil procedure – Application for costs to be granted at Attorney-client scale – Circumstances under which a Court will grant costs at a punitive scale-Instances where the general rule that costs follow the event applies.*

Held: Application for costs at a punitive scale is dismissed. Costs however granted on an ordinary scale.

JUDGMENT ON COSTS

K. MANZINI – J:

[1] The Applicant herein is one Monia Bester (the Defendant in the main matter), an adult female adult of the Mhlosheni area, within the Shiselweni District.

[2] The Respondents are Satara (Pty) Ltd, a company incorporated in terms of the Company Laws of Eswatini, and having its principal place of business at Sidvokodvo in the Manzini District (1st Respondent), whilst the 2nd Respondent is William Kelly N.O., a Sheriff of the Court, cited herein in his official capacity, and carrying on business at his principal place of business, being 222 Sobhuza Avenue, Matsapha Industrial Site in the Manzini District.

BACKGROUND

[3] The Applicant herein instituted rescission proceedings on an urgent basis, of an order of this Court which was obtained in default on the 15th of September, 2022. The same application sought at the 2nd Respondent be interdicted from selling and/or disposing of the assets attached under the Court Order so issued. This application also sought that the Court should order the 1st and 2nd Respondent to be ordered to return the assets of the Applicant which had been attached, and removed under the order issued on the 15th of September, 2022 to the Applicant's premises at the cost of the 1st and 2nd Respondents.

[4] Although the Respondent had initially entered an appearance to oppose these proceedings, the Attorney for the Respondent at that time, being Ms. M.J. Hillary, from M.J. Hillary Attorneys later conceded that the order had been obtained in error. Ms. Hillary informed the Court on the 14th of October, 2022 that the Respondent had decided to abandon the Judgment because, the Correspondent Attorneys of the Respondent had failed to inform them of the Notice of intention to Defend that was served on them in relation to the main matter.

[5] Subsequently, the Respondent's Attorneys withdrew as Attorneys of record, and the office of Maseko, Tsambokhulu was later appointed by the Respondent herein. The key issue that remained to be determined herein is that of costs. The Applicant herein claimed that it ought to be awarded costs at a punitive scale, which application was vigorously opposed by Attorneys for the Respondent.

[6] It was strenuously argued by Counsel for Applicant herein that the general rule in our jurisdiction is that costs follow the successful litigant, and therefore the Respondent herein ought to be held liable for costs at a punitive scale.

THE APPLICANT'S CASE

[7] The case of the Applicant is that the Respondent is liable for costs at a punitive scale for an array of reasons, all premised on the absence of *bona fides* in their actions. The narrative of the events that led to the Applicant's view point on this issue can be summarized in the following manner:

7.1 It is common cause, as stated in the Applicant's founding affidavit that the Respondents' Attorneys instructed the Sheriff to withdraw from the Applicant's premises on the Thursday afternoon without attaching or removing assets. This was after the Applicant's Attorney became aware that the matter had been defended, hence the Default Judgment was obtained irregularly, and should therefore be abandoned. According to the submissions of the Applicant's Counsel it was agreed between Counsel for Respondent, and himself that the Respondents' Counsel would reply to a written communication sent to the Respondents' Attorney on this matter.

7.2 Despite the foregoing, according to Applicant's Counsel, the Respondents through its attorney failed/refused to reply to the letter. According to Counsel herein the Respondents Attorney later instructed the Sheriff to go back to Applicant's premises, to attach and to remove assets of the Applicant on the very next day, which was a Friday afternoon for that matter.

7.3 The Applicant's Attorneys again contacted the Respondents' Attorney who refused to recall the Sheriff, and further refused to discuss the matter any further. The Applicant's Attorney warned the Respondents' Attorney in writing that their actions were irregular, and yet the Respondent and its Attorneys proceeded to attach and remove the Applicant's assets. In doing so, the Respondent and its Attorneys intentionally tried to force the Applicant to pay monies claimed in the main application, failing which the Applicant's assets would be sold at auction.

7.4 All this was done with the full knowledge of both the Respondents' Attorneys, that the matter was in fact defended, and the fact that Default Judgment was irregularly and erroneously obtained .

7.5 The Applicant's Attorneys warned the Respondents, and its Attorneys again on Friday afternoon, whilst the Sheriff was in the process of attaching, that their actions are irregular and that should they fail to restrain or recall the Sheriff, and abandon their irregularly obtained Court Order, an urgent application would be launched which included a prayer for punitive costs.

7.6 The Respondent and its Attorneys chose to ignore the Applicant's Attorneys warning, seeing it as a risk worth taking, in an attempt to force the Applicant to pay monies allegedly owed.

7.7 These actions described above are *mala fide*, malicious, and of ill intent. It is further extremely questionable that an Attorney who is an Officer of this Court, would participate in, and condone such actions, just to further their client's case.

7.8 Such actions cannot be condoned by this Court. A legal practitioner in the position of the Respondents' Attorneys, is bound to uphold the ethical and moral standards of the legal professions. The failure to observe, and promote the Rule of Law leads to its denigration in society.

[8] It was also the submission of the Applicant's Attorney that the Respondent is liable at a punitive scale because costs follow a successful litigant and, were it not for the Respondent's malicious acts, it would not have been necessary for the Applicant to go to the lengths of making an

application on an urgent basis for the rescission of the irregularly obtained Default Judgment. Despite being warned of the irregularity of their actions, the Respondent's Attorney proceeded nevertheless, in their actions, thus exposing their client to having to pay for costs at a punitive scale. There is no justification, according to Counsel for the Applicant, to expect the Applicant to bear the legal costs of reversing the malicious actions of the Respondent's Attorneys herein

- [9] Citing the case of **Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)**, Counsel proceeded to submit on behalf of the Applicant that this case stands as authority that costs at attorney and client scale may be warranted in situations that would be deemed unfair to a party to bear the costs that were brought about by litigation. It was the assertion of Counsel that in terms of the findings of the Court in this case, that considerations of when a party should bear the brunt of costs at attorney and own client scale must be guided by what is just and equitable in the circumstances of that particular case. The Court must further be moved to mark its disapproval of the conduct displayed by a litigant, in order for it to arrive at a conclusion that costs at this punitive scale are warranted.

[10] Counsel herein further cited the case of **Mkhatshwa and Others v Mkhatshwa and Others [2021] ZACC 15** which according to Counsel for the Applicant herein is highly persuasive to this Court since it emanates from the South African Constitutional Court. The holding of this Court in summary is that a party who acts in a manner that can be found to be a lowering of ethical and professional standards, naturally “*must*” attract punitive costs. According to Counsel the use of the word “*must*” in paragraph 27 of the said Judgment clearly indicates, and amounts to a “*directive*” to the Court herein that punitive costs must follow. The Counsel for Applicant herein argued that the Attorney for Respondent *in casu* did lower their ethical and professional standards, and all this was done in pursuit of executing a Judgment that they knew very well was irregularly and/or erroneously obtained.

THE RESPONDENT’S CASE

[11] In the main, the case of the Respondent is that the application by the Applicant for costs is without merit. It was argued by Counsel herein that the application is devoid of merit for the following reasons:-

11.1 Rescission applications are by their very nature an indulgence that is extended by the Court; and extended towards the party who seeks rescission of the Court's decision/Judgment. To this end, the Respondent's Attorney cited the case of **Mutsi v Santam Versekeringsmpy Bpk 1963 (3) SA 11** to buttress his assertion that it is settled law that in the ordinary course of events, the Applicant ought to bear the costs of the application, as the general rule that costs follow the event is not applicable in successful applications for the grant of a rescission because this is an indulgence extended to the Applicant in such proceedings.

11.2 The application for rescission was not opposed, and the order for rescission was obtained by consent of both parties.

11.3 The default Judgment was in itself granted pursuant to a genuine error that was common to all parties. The Respondent's Attorneys were genuinely not aware that the Notice to Defend had been served on its Correspondent Attorneys, and the said Notice, though filed at the Court's Civil Registry, failed to make its way into the Court file. The Court therefore had no grounds to find that the

matter was defended, since the Notice of Intention to Defend was not in the Court file.

[12] The Respondents' Counsel argued that in view of the above, therefore it would not be just for an order of costs, let alone costs at a punitive scale to be granted to the Applicant. It was the submission of the Respondents' Counsel that the application for costs of the rescission application ought to be dismissed. The Respondent's Counsel did however concede that the Court, if at all it should order costs, these should "*at the very least be costs in the cause.*"

[13] It was submitted by Counsel for Respondents that the general rule that costs follow the event, is overridden by the prevailing principle that the issue of costs falls solely within the discretion of the Court. He cited the **Laws of South Africa, Joubert, 3rd Edition 2022 at page 186 at paragraph 252**, this end. He further contended that in terms of the case of **Deviling v Central White Lime Works 1912 WLD 23 26**, a Judgment for costs cannot stand alone, and must accompany a decision on the merits of the case.

[14] Counsel for the Respondent further contended that the law on the circumstances warranting the grant of costs at a punitive scale not only lies in the discretion of the Court, but this discretion ought to be exercised by the Court judicially, and not arbitrarily, capriciously, *mala fide* or upon a consideration of irrelevant factors or the wrong principle (per **Joma Construction (Pty) Ltd v Kukhanya (Pty) Lt Supreme Court Civil Case No. 48/2011**). It was further emphasized by Counsel for Respondent that over and above the desire of the Court to display its displeasure at a party's behaviour/conduct which may exhibit the following:

- *dishonesty*
- *vexatiousness*
- *recklessness*
- *abuse of court process*
- *grave misconduct*

It was argued by the Respondent's Counsel that the grant of costs *de bonis propis* most often is usually meant to show the Court's displeasure for a blatant disrespect of the Court's rules, or unbecoming conduct by one of the parties, or Counsel. (see: **Stealth Security (Pty) Ltd v**

Swaziland Procurement Agency High Court Case No. 1574/2018
SZHC 216 (10/10/22).

[15] The submission of the Attorney for Respondent herein is that it is common cause that *in casu*, the Respondent and/or its Counsel, did not act maliciously, nor did it seek to maliciously mislead the Court into granting the impugned default Judgment Court Order. It was submitted that when the Respondent's Attorney moved the application for default Judgment before Court, they were labouring under the genuine belief that the Applicant had defaulted in filing its Notice of Intention to Defend in a timeous manner. Furthermore, the Counsel for Respondent submitted that the Respondent upon realising the error that had occurred, did not waste the Court's time by opposing the rescission application one it was filed, but simply abandoned the Default Judgment, and consented, thereby to the rescission of said Judgment.

[16] Counsel for the Respondent further argued that the Court ought not to treat the conduct of the Respondent with any kind of censure, but must instead be viewed as a litigant that made a genuine error. The error, according to Counsel herein, cannot even be said to be one that the Respondent laboured under alone, or to put it differently, it cannot be said

to be the fault of the Respondent exclusively. Counsel herein contended that the mistake can be attributed firstly to the Correspondent Attorneys of the Respondent because they failed to alert the Respondent of the Notice of Intention to Defend that had been served upon them. The Respondent's Attorney further argued that in the second place, the error could be attributed to the Applicant itself, for failing to ensure that the Notice to defend found its way into the Court file.

[17] It was the submission of Counsel for the Respondent that his client ought not to be mulcted with costs on any scale, let alone those between attorney and own client. It was the Counsel's submission herein that all the Respondent did was to exercise its right in law, to recover monies for goods sold to the Applicant (in the main matter). The Respondent should not be held liable for the acts of its Counsel. The Applicant herein has not even attempted to attribute any vexatious behaviour to the Respondent itself, but it is the Attorneys of the Respondent against whom the allegations of misconduct, and unethical behaviour are being made by the Counsel for the Applicant herein. The error herein, is one that is genuine and falls squarely at the feet of the Respondent's Attorney, and not the Respondent itself. It was the Respondent's prayer that the

application for costs ought to be dismissed, and each party should pay its own costs, or alternatively that costs be costs in the cause.

ANALYSIS OF SUBMISSIONS AND THE LAW

[18] The premise upon which the Applicant herein seeks an order on a punitive scale is that as a general rule costs do follow the event. This means that the successful party should be awarded costs (see **Joubert, “The Law of South Africa”, 2 ed, part 2, paragraph 292**). It is common cause herein that the Order of Default Judgment was erroneously and/or irregularly obtained as the Correspondent Attorneys of the Respondent’s Attorneys failed to inform them that the main action was defended, and furthermore, the said Notice of Intention to Defend, somehow did not find its way into the Courts file. It is true that the Applicant’s Attorney argued that the Applicant was caused to expend funds, and thereby incur expenses due to the Respondent’s act of failing to heed warnings against executing the writ of execution obtained by Applicant on the basis of the irregularly obtained default Judgment.

[19] To buttress his assertion that this Court ought to award costs on a punitive scale against the Respondents, by making reference to a number of

decided cases, and in particularly learning on the South African authority emanating from the Constitutional Court of that country. Applicant's Attorney, contended that since this decision was delivered by the South African Constitutional Court, this Court is therefore to be highly persuaded by the Constitutional Court's decision that a party who acts in a manner that is found to be a lowering of ethical and professional standards of the legal profession "*must*" attract punitive costs. (see **Mkhatshwa and Others v Mkhatshwa and Others [2021] ZACC 15**).

[20] It is common cause also that the application by Applicant in this regard was vigorously opposed by Respondent's Counsel herein. The Respondent's Counsel opined that the Court ought not to treat the conduct of the Respondent with any kind of censure because the entire debacle was as a result of a genuine mistake which was occasioned by the failure of the Correspondent Attorneys as well as the Applicant, because they themselves failed to ensure that the Notice to Defend was contained in the Court file. The Counsel for Respondent further insisted that in this case the general rule of costs following the event does not apply, because the Respondent had opted to abandon the Judgment obtained in default, and therefore it was not a case where the rescission was determined on the merits. In fact, according to Respondent's Counsel, the position of

the law is that rescission proceedings are considered to be an indulgence afforded to a party, and does not in and of itself, guarantee a successful party an award of costs as this remains within the discretion of the Judicial Officer who is seized with the rescission application, which discretion ought to be exercised judiciously.

[21] In analysing the case at hand, the Court finds that it is not bound by the decision of the South African Supreme Court in this regard. Indeed, the Court is persuaded instead by the position of the law that an order rescinding default Judgment is not considered in terms of our law to have the effects of final Judgment (see **Joubert, “The Law of South Africa, 2nd ed, 3rd edition, paragraph 262”**).

[22] If this Court is to be guided by the general rule that not only is the issue of costs are one that falls within the preview of the Court’s discretion, it follows therefore that, even when it comes to the general rule that costs follow the event, the Court should seek guidance from legal authority regarding when it should apply. According to **Joubert, “The Laws of South Africa (supra), paragraph 292**, the rule should only be departed from where good cause exists. In giving guidance on when a party is considered to be the successful, the following is stated:

“However, “success” means “substantial success”. Not only the form, but the substance of a Judgment must be considered in establishing who is the successful party.”

[23] Clearly therefore, since the rescission application instituted by the Applicant herein did not proceed to be heard even on its merits, because the Respondent abandoned the Judgment obtained in default, it cannot be said that the Applicant herein is a successful party. Furthermore, it is true that the Applicant may not necessarily be deemed to be the successful party herein, but it cannot be ignored that this party has been put out of pocket by having to institute the rescission proceedings by way of urgent application in the first place. Furthermore, the Default Judgment was clearly obtained on account of a genuine error, and no mischievous act can be attributed to the Respondent, nor its erstwhile Attorneys in this regard. It is trite that this Court does retain an inherent jurisdiction to exercise its discretion in this regard, and by the Respondents own concession, these costs may simply be costs in the cause.

[24] The Court herein being mindful that the Applicant herein has been caused to incur some expense by instituting the urgent applicant for the rescission of the default Judgment, it ought to be awarded costs. These costs are not awarded as of right, but ought to be an exercise of the Court's wide discretion, which if judiciously exercised, leads this Court to the decision that costs at an ordinary scale are due to be awarded to the Applicant herein.

[25] The Court herein is further guided by Rule 41 of The High Court Rules. In particular Rules 41 (1) (a), 41(2) and 41(3), the rules provide as follows:

“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.”

“ 41 (2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgement either in whole or in part by delivering notice thereof and such judgment either in whole or in part by delivering notice thereof and such judgment or decision abandon in part shall have effect subject to such abandonment.”

“ 41 (3) The provisions of sub-rule (1) relating to costs shall mutatis mutandis apply in the case of a notice delivered in terms of sub-rule (2) .”

[26] In *casu*, the respondent abandoned the irregularly obtained judgment, but did not tender any costs to the Applicant. By so doing, it is therefore left to this Court, in the exercise of its discretion, to come to the rescue of the Applicant herein. The Court has also taken cognisance of the fact that the wrongdoing that occurred after the impugned order was obtained, that was recounted by the Applicant’s Attorney, is not the Respondent’s fault, but rather that of the Respondent’s erstwhile Attorneys. Consequently, an order for costs *debonis propriis* would amount to an unfair mulcting of the Responded for the sins of the erstwhile attorneys.

[27] In these premises the application is dismissed. The Respondents are hereby ordered to pay costs levied on the ordinary scale.

K. MANZINI
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: A. DUPONT, (Dupont Attorneys)

For the Respondents: MR. M. TSAMBOKHULU (Maseko Tsambokhulu Attorneys)