IN THE SUPREME COURT OF ESWATINI

JUDGMENT

CASE NO. 37/2023

HELD AT MBABANE

In the matter between:

Ioannis Calivitis	1st Applicant
Willem Joseph Delport	2nd Applicant
And	
Jacques Van Der Heever	1st Respondent
Q's Swaziland	2nd Respondent
The Registrar of Companies	3rd Respondent
The Attorney General	4th Respondent

Neutral Citation: Ioannis Calivitis, Willem Joseph Delport vs Jacques Van Der Heever & Three Others (37/2023.)[2023]SZSC 52(30th November 2023)

Coram : MJ Dlamini JA

Heard : 20 September 2023

Delivered : 30 November 2023

Summary: Civil Practice – Punitive costs order – Leave to appeal – Need to show reasonable prospect of success on appeal – Applicant's conduct taint of bad faith and Absence of sufficient cause – No reason to interfere with costs order.

JUDGMENT

M.J. Dlamini JA

Introduction

[1] In this application for leave to appeal, the Applicants pray for an order granting them leave to appeal the costs order of the 14th April 2023 issued by Justice S. Masuku, 'stay of execution of the costs order pending the finalization of these proceedings' and costs of suit. The impugned order reads as follows: *"3. Costs are ordered in favour of the [1st Respondent in counter application and 1st Respondents in counter application at a scale of attorney and client"* in High Court Case No. 773/22.

[2] In their notice of motion, the Applicants attack the payment of the court a quo for failing -

(a) To consider that the Applicants were acting in their official capacities as directors when passing the impugned resolution… The costs of suit should be borne by the 2nd Respondent and not the Applicants in their personal capacities.

(b) To consider that there was no *mala fide* conduct on the part of the Applicants during the litigation process to warrant costs at attorney and client scale.

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(a) To consider that the Applicants were acting in their official capacities as directors when passing the impugned resolution… The costs of suit should be borne by the 2nd Respondent and not the Applicants in their personal capacities.

(b) To consider that there was no *mala fide* conduct on the part of the Applicants during the litigation process to warrant costs at attorney and client scale.

(c) To consider that the parties are all directors and shareholders of the 2nd Respondent and costs at attorney and client scale would further exacerbate the already volatile relationship between the parties.

(d) To take into consideration the circumstances of the matter carefully weighing various issues in the case, in particular the recklessness conduct of the 1st Respondent on the business affairs of the 2nd Respondent.

(e) To take into consideration that the 1st Respondent's prayers were defective and the court *mero motu* amended the 1st Respondent's prayers in furtherance of the 1st Respondent's case.

[3] This is an application in terms of Rule 9 (1) of the Rules of this Court. The application should in fact have been in terms of Section 14 (1) of the Court of Appeal Act 74 of 1954 read with the said rule 9(1), which reads:

> "An application for leave to appeal shall be filed within six weeks of the date of the judgment which is sought to appeal against and shall be made by way of petition in criminal matters or motion in civil matters to the Court of Appeal stating shortly the reasons upon which the application is based, and where facts are alleged they shall be verified by affidavit".

[4] The Applicants also filed an affidavit in which they alleged *inter alia* that the Court *a quo* misdirected itself when making the impugned order against the Applicants in their personal capacities yet the Applicants were acting in their official capacities when they passed the impugned company resolution for the benefit of the company. The Applicants added:

"14. Furthermore, the Court *a quo* misdirected itself when it held that there was vexatious conduct on the part of the Applicants during the litigation process to warrant costs at attorney and client scale.

"15. I wish to mention that there was no vexatious conduct on the part of the Applicants during litigation. The counter-application was moved by the Applicants per the Companies Act, 2009.

"16. [The counter-application] was filed by the Applicants in order to demonstrate the 1st Respondent's reckless conduct on the business affairs of the company as contemplated by the abovementioned provision.

"18. The application for leave was heard and granted by the High Court. The Applicants were exercising their rights when they moved the counter-application and they ought not to be punished for that with a punitive order.

"20. . . . The punitive costs order against the Applicants will have a negative impact on the already volatile relationship in light of the impasse prevalent between the parties.

"26. As demonstrated in the preceding paragraphs, I wish to mention that the Applicants have prospects of success in this matter, and the leave to appeal should be allowed."

[5] The court *a quo* stated the position thus:

"[3] The Applicant [i.e. 1st Respondent] in the motion sought to review and set aside a decision and resolution taken by the 1st and 2nd Respondents [i.e. 1st and 2nd Applicants' herein) in the main motion that removed the Applicant a

as Director of the 3rd Respondent [Qs Swaziland (Pty) Ltd]. The Applicant's second prayer sought an order directing the 4th Respondent (Registrar of Companies) to expunge Form J that confirmed the Applicant's removal as a Director of 3rd Respondent. There is also a prayer for punitive legal costs against the 1st and 2nd Respondents in the main application.

"[5] Notably, there has also been a litany of bitter litigation between the directors dating back to the year 2019. They have not found each other till these applications before this Court. The 3rd Respondent, its business, creditors, and employees have also carried the brunt of the litigation. Some of its business branches have since shut down. That is an outcome likely to prevail where there is animosity and in-fighting between shareholders and directors of a company…

"[6] The Applicant contended that the 1st and 2nd Respondents removed him as the 3rd Respondent unlawfully because they did not comply with section 200 of the Companies Act, 2009.

"[7] The Applicant alleged in the founding papers that the 1st and 2nd Respondent circulated a notice of extra-ordinary general meeting that did not comply with section 200 of the Act in that it did not have an agenda item for his removal…. It did not invite him to give reasons or show cause why his directorship should not be terminated with the company".

[6] Overall, the learned Judge *a quo* came to the conclusion that the notice for 1st Respondent's removal from being a director had 'glaring shortcomings'. Among other things, the notice did not give Respondent opportunity to be heard by way of written representation. This is set out in paras [18] and [19] of the judgment *a quo*. The learned Judge observed that the notice for the meeting was not dated and was for an extra-ordinary meeting when it should have been a special notice for an ordinary meeting. There were other shortcomings to the notice and the agenda of the meeting not indicating that there

would be a motion for removal of the 1st Respondent. Thus proper procedure was not followed at the meeting, as the learned Judge *a quo* observed:

> "[23] It is my considered view that the purported notices, procedures and style adopted by the 1st and 2nd Respondents to remove the Applicant, following the provisions of the article 75 of the articles of the company instead of the Act is wrong and therefore void".[1]

[7] In my opinion, the learned Judge adequately considered the merits of the matter, in particular the apparent shortcomings perpetuated by the Applicants who were respondents *a quo*. On the issue of costs, the 1st Respondent had applied for costs at punitive scale of attorney and client, which the Court *a quo* granted, again on sufficient consideration in my view, taking into account the relationship of the parties in particular the past conduct of the Applicants. The learned Judge also considered the need to foster peace between the parties by means of costs that could help *"deter some of the litigation the parties have embarked on including the one in casu. In this regard the Respondents in the main application could have saved costs by simply following section 200 on the removal of applicant as director. Worse still, they have attempted to defeat any outcome that they would have encountered when found to have acted unlawfully in the first application*". However, I do not consider that fostering good future conduct is the business of a punitive order as the learned Judge seemed to think. But there is enough evidence on record to support the punitive order.

[8] Unfortunately the Applicants have not indicated or attached their grounds of appeal for this Court to consider how they stand on the prospects of success. In their founding affidavit all that the deponent states is that the Applicants have prospects of success in this matter and leave to appeal should be granted because the punitive order was not warranted and the Court *a quo* failed to consider pertinent issues surrounding the matter: "The costs order by the Court *a quo* creates bad precedent and offends our jurisprudence in as far as costs orders at attorney and client scale are concerned". The Applicants also allege that

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[1] Ref. Yasmin Banu Suleman (nee Khan) vs Cassim Suleman and Another [2019] SZHC 152 (14 August 2019).

they have good prospects of success on appeal "because the Court *a quo's* failure to consider pertinent issues is glaring and it amounts to a miscarriage of justice." In my view this is not enough in the circumstances of this case to support a case of reasonable prospects of success.

[9] As the Applicants aver above, the Court *a quo* found that the Applicants had, in the past, been vexatious in dealings with the Respondents as shown by the several unsuccessful court actions. The term 'vexatious' was explained in **Fisheries Development Corporation**[2] by Nicholas J. as follows:-

> "In its legal sense; vexatious' means 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant' (Shorter Oxford English Dictionary). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant, 'abuse' connotes a misuse, an improper use, a use *mala fide,* a use for an ulterior motive".

[10] Considering the multiplicity of court proceedings shown in 1st Respondent's answering affidavit mostly implicating the Applicants. I cannot deny that the Applicants have been vexatious as alleged by the Respondents. As described by Nicholas J, this means Applicants have instituted proceedings without sufficient cause motivated by bad faith to annoy and harass the Respondents. Herbstein and Van Winsen[3] observe that: "When vexatious litigation is instituted or threatened, the court may thus, depending on the circumstances, summarily dismiss the action…"

[11] In **S v Smith**[4] Plashet AJA explained the meaning of "a reasonable prospect of success" in these terms:

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[22] **Fisheries Development Corporation v Jorgensen**, 1979 (3) SA 1331 (W) at 1339.
[33] The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed vol 2, at 1520.
[4] 2012 (1) SACR 567 (SCA) at para 7

"What the test of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of a trial court. In order to succeed, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal".

[12] It should be noted that Applicants are aggrieved only by the punitive aspect of the costs order. It is on this aspect of the order that the Applicants should direct their argument. This aspect covers a small but important area of the proceedings *a quo*. In all the circumstances, I am not concerned that Applicants sufficiently addressed this core aspect giving rise to the punitive order. This revolves around the question of how the Applicants have behaved themselves in correction with the proceedings.

[13] In the result, I can find no reason to interfere with the order of the Court *a quo*. I would dismiss the application as I do not see any reasonable prospects of success on appeal. It is so ordered with costs at ordinary scale.

M. J. Dlamini JA

For Applicants S. Mabuza

For Respondents. M. Khumalo