

**IN THE INDUSTRIAL  
COURT OF**



**APPEAL OF ESWATINI**

**JUDGMENT**

Appeal Case No. 3/2019

Held at Mbabane

In the matter between:

**ESWATINI NATIONAL TRUST COMMISSION**

**APPELLANT**

**AND**

**NOTHANDO HLOPHE**

**RESPONDENT**

**Neutral citation:** *Eswatini National Trust Commission V Nothando Hlophe*  
*[3/2019] [2019] SZIC 10 (16<sup>th</sup> October, 2019)*

**Coram:** **FAKUDZE AJA**

**DLAMINI AJA**

**LANGWENYA AJA**

**Heard:** 17<sup>th</sup> September, 2019

**Delivered:** 16<sup>th</sup> October, 2019

**Summary:** *Labour Law – Appellant appeals against order of court a quo with respect to costs being on the punitive scale – avers that Respondent contributed to the delay in payment of what was due to it – Court considers that basis for Respondent to institute proceedings was because Appellant had not paid her May 2018 and June 2018 salary notwithstanding that Respondent was still Appellant’s Employee – Court concludes that court a quo was justified in ordering that costs be levied at punitive scale – Appeal dismissed with costs.*

## **JUDGMENT**

**JUSTICE M.R. FAKUDZE**

### **BACKGROUND**

[1] The Respondent resigned from employment on the 8<sup>th</sup> June, 2018 on allegations of constructive dismissal. At the time of termination of employment (8<sup>th</sup> June, 2018), the Respondent was owed by the Applicant salaries for May, 2018 and for days worked from the 1<sup>st</sup> to the 8<sup>th</sup> June, 2018.

[2] The salaries and other benefits due to the Respondent were finally paid in court after the Respondent had instituted proceedings in the court *a quo*. The payment was consensual between the parties and the only issue that remained after the settlement was the issue of costs. This issue is also the subject of the present appeal.

[3] The court *a quo* heard the parties' arguments on the issue of costs and at the end issued an order in favour of the Respondent that it should be entitled to costs at punitive scale. Being dissatisfied by this decision, the Appellant filed a Notice of Appeal.

### **Appeal**

[4] The Appellant filed the Notice of Appeal on 12<sup>th</sup> March, 2019 basing the Appeal on the following grounds:

1. *The court a quo erred in fact and in law in ordering that the Appellant should pay costs of the Respondent in Case No. 308/2018.*
2. *The court a quo erred in fact and in law in ordering that punitive costs must be paid by the Appellant, when the circumstances did not warrant such an order for costs.*
3. *The court a quo erred in fact and in law in ordering that costs are payable in this matter it being an Industrial Court matter.*

4. *The court a quo did not properly exercise the powers that it has in term of Section 4 of the Industrial Relations Act, 2000 (as amended).*

5. *The court a quo failed to consider and take into account Appellant's grounds for the opposition of the granting of the costs order.*

[5] During argument, the Appellant's counsel stated that ground 3 of the Notice of Appeal is abandoned.

### **The Parties' Contention**

#### **The Appellant**

[6] After the Appellant had received the resignation letter it responded to it on the 15<sup>th</sup> June, 2018, accepting the resignation and agreeing to pay the Respondent all its dues on condition that it effected a handover. Payment of the alleged compensation for constructive dismissal was put in issue. Thereafter a long drawn out communication between the parties ensued.

[7] The Appellant's main contention is that the Respondent's money was processed timeously and deposited into the Respondent's account. Unfortunately, the account was no longer operational. The Appellant took further steps by issuing out a cheque in favour of the Respondent and no one collected it until it became stale. Another cheque was issued in October, 2018 which was then collected by the Respondent.

[8] The Appellant argues that the Respondent contributed to the delay in ensuring that its dues are paid on time. Costs at a punitive scale should not have been ordered against the Appellant. The Appellant's reasonable explanation should be accepted by this court because after all the court *a quo* acknowledged it, but only misdirected itself when it issued a judgment against the Appellant.

### **The Respondent**

[9] The Respondent contends that it resigned on the 8<sup>th</sup> June, 2018. As at the end of May, 2018, it was still a member of staff of the Appellant. The same applies to the early days in June. The Appellant did not pay her the May, 2018 and June, 2018 salary. It was only paid in October, 2018.

[10] The Appellant made an attempt to furnish a reasonable excuse for failing to pay the Respondent. The excuse was that the Respondent's bank account had been closed. This means that the Appellant made payment into the Respondent's account only to find that it was no longer operational. The Respondent contends that this excuse is unreasonable in the sense that the Respondent could not close the account in the month of May whilst she was still Appellant's employee.

[11] The Respondent finally contends that the court *a quo* was justified in coming to the conclusion that the withholding of the Respondent's salary was because the Appellant wanted the Respondent to do a handover before leaving the Appellant's employ. The order by the court *a quo* that the Appellant should pay costs at attorney-client basis is also justified. The Appeal should therefore be dismissed with costs at an ordinary scale.

### **The Applicable law**

[12] In **Mduduzi Zulu V Principal Secretary, Ministry of Natural Resources and Another Industrial Court Case Number 193/2008**, His Lordship Dunseith J. observed as follows:

*“The implications of being deprived of one’s pay are obvious: rentals and accounts cannot be paid: the necessities of daily life cannot be purchased, financial commitments cannot be honoured: educational expenses of one’s children cannot be paid.”*

[13] In **Sikhumbuzo Thwala V Philile Thwala (nee Dlamini) Case No. 101/13 SZHC 13 (11 February 2013)**, the court dealt with the issue of punitive costs. It stated as follows:

*“The award of costs of and incidental to any proceedings is at the discretion of the court. This is a discretion which, like any 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*

*be effected by questions  
its discretion, the court  
as the conduct of the  
anyway involved the other  
The court looks at all the*

*of benevolence and sympathy. In exercising  
looks at the result of the action itself as well  
parties to see whether either of them had in  
unnecessarily in the expense of litigation.  
facts of the case.....”*

### **Court’s Analysis and Conclusion**

[14] The well known principle in awarding costs is that “costs follow the event.” This means that the party who succeeds should be awarded costs. The other consideration is that the awarding of costs is discretionary. An appeal court can interfere with that discretion in instances where it was not exercised judicially in the sense that there has been a miscarriage of justice.

[15] When taking into account all the principles alluded to above, this court is inclined to conclude that there was no misdirection by the court *a quo* in awarding punitive costs against the Appellant. This is based on the fact that the Appellant alleges that the Respondent’s bank account had been closed when the May and June deposits were made. The question to ask is how could the Respondent’s bank account be closed, (particularly with respect to the May salary) whilst the Respondent was still the Appellant’s employee? Rules of reason and justice lead to the conclusion that the excuse advanced by the Appellant is lame and does not hold water. No proof from the bank to establish the Appellant’s version that the account had been closed has been attached by the Appellant.

[16] What is also worth mentioning is that the Judge in the court *aquo* analysed the excuse that was advanced by Counsel for Appellant for the non-payment and then concluded as follows:

“12.1 *In casu the court is of the considered view that the explanation given by the Respondent and highlighted in paragraph ten (10) of the judgment does not exonerate it from an award against it, of costs and more particularly of costs on a punitive scale;*

12.2. *It is a criminal offence in terms of Section 64 (a) of the Employment Act, 1980 not to pay the wages of an employee when those wages of an employee are due or payable. In the present case Applicant’s wages or salary for May, was due in May, 2018, whilst the wage for June was due and payable in June 2018;*

12.3. *On the papers before court, there is no indication or allegation made by the Respondent that there was a dispute on the amount due, as Applicant’s salary, for May and June 2018 or of any dispute on its due date. Payment was made three (3) months late, in October, 2018, after litigation in the matter had commenced;*

12.4. *The Court finds that the Respondents conduct in failing to pay Applicant her salary when same fell due and payable was not only unlawful but also callous, in the extreme;*



12.5. *The Applicant has had to run to court to protect her rights because of the Respondent's unlawful conduct which was clearly malicious and reckless;*

12.6. *Taking together all the factors detailed above, the court is of the view that the justice of the matter demands that costs be awarded on the punitive scale sought by the Respondent as a mark of the Court's displeasure."*

[17] This court is in full agreement with the conclusion and observations made by the Judge in the court *aquo* and there was no misdirection in the granting of costs at punitive scale. The court looked at the results of the action itself as well as the conduct of the parties and rightly concluded that the Appellant had put or involved the Respondent unnecessarily in the expense of litigation. See **Skhumbuzo Thwala V Philile Thwala (supra)**. Its Findings cannot be faulted.

[18] The appeal is therefore dismissed with costs at an ordinary scale.

M.R. FAKUDZE  
ACTING JUSTICE OF APPEAL

I agree

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T.L. DLAMINI  
ACTING JUSTICE OF APPEAL

I agree

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M. LANGWENYA  
ACTING JUSTICE OF APPEAL

APPELLANT: H. NHLEKO  
RESPONDENT: S.M. SIMELANE