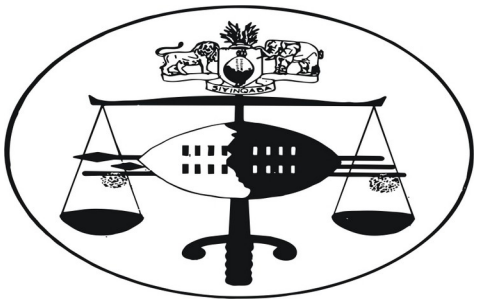

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 48//2011

In the matter between

JOMAS CONSTRUCTION (PROPRIETARY) LIMITED **Applicant**

and

KUKHANYA (PROPRIETARY) LIMITED **Respondent**

In re:

KUKHANYA (PROPRIETARY) LIMITED **Appellant**

and

JOMAS CONSTRUCTION (PROPRIETARY) LIMITED **Respondent**

Neutral citation:	Jomas Construction (Proprietary) Limited *v Kukhanya (Proprietary Limited* (48/2011) [2012] SZSC 2 (21 March 2012)
Coram:	RAMODIBEDI CJ, MAPHALALA JA, and HLOPHE AJA

Heard: **15 MARCH 2012**

Delivered: **21 MARCH 2012**

Summary: **Notice of application for early allocation of appeal court hearing – Application opposed and a point of law raised in limine that no grounds or special circumstances shown to exist to justify the hearing of the appeal urgently and out of term - The applicant subsequently filing a notice of withdrawal of the application and tendering costs on party and party scale – The Court putting the parties on notice to make submissions on whether the matter merits costs on a punitive scale including costs *de bonis propriis.***

THE COURT

[1] The crisp question for determination in this matter is whether, having withdrawn its application for an early allocation of appeal court hearing, the applicant should pay costs on the party and party scale as duly tendered or whether the costs should be on a punitive scale including costs *de bonis propriis.*

[2] The chronology of the relevant events giving rise to this matter is the following. On 9 August 2011, the Applicant issued summons against the respondent for payment of an amount of E 391, 975.29, being in respect of

building services allegedly rendered and supply of building materials allegedly delivered as agreed.

[3] On 30 August 2011, the respondent filed a notice of intention to defend the matter.

[4] On 10 October 2011, the applicant filed its declaration together with its application for summary judgment.

[5] On 26 October 2011, the High Court (Ota J) granted summary judgment in favour of the applicant.

[6] On 28 October 2011, the respondent filed an application for rescission of the High Court's judgment dated 26 October 2011 plus stay of execution.

[7] On 11 November 2011, the High Court (Sey J) heard the matter. On 8 December 2011, the learned Judge dismissed the respondent's application for rescission. She made the following order:-

> *"1. The application to rescind and set aside the Order of the Honourable Court granted on the 26th day of October 2011 be and is hereby dismissed.*

2. *The Order dated the 28th day of October 2011, staying the writ of execution levied against the Applicant's property be and is hereby discharged.*

3. *The Applicant is ordered to pay costs of this application on the scale between attorney and client."*

[8[On 8 December 2011, the respondent filed a notice of appeal to this Court against the whole of the High Court judgment as fully set out in the preceding paragraph.

[9] On 20 January 2012, the applicant launched the present application seeking the allocation of an early date of the Supreme Court hearing plus costs in the event of opposition.

[10] On 22 February 2012, the present application was set down for hearing on 15 March 2012.

[11] On 5 March 2012, the respondent's attorneys filed a "NOTICE TO RAISE PRELIMINARY OBJECTION" in the following terms:-

> *"TAKE NOTICE THAT the respondent in the present application intends to raise the following point of law:*

No grounds or special circumstances are set out or exist that justify the hearing of the appeal urgently during the recess of the Supreme Court."

The respondent accordingly prayed that the application be dismissed with costs.

[12] Two days later, on 7 March 2012, the applicant filed a notice of withdrawal of the application, tendering wasted costs on the party and party scale in the process.

[13] Pursuant to the applicant's notice of withdrawal of the application, the Court put the parties on written notice to make submissions on whether the matter merits costs on a punitive scale, including costs *de bonis propriis*. The letter in question reads as follows:-

"Boxshall Smith Attorneys
Shop No.11 Agora Shopping Complex
King Mswati III Avenue,
P.O. Box 176 Manzini
M200

Dear Attorneys

RE: JOMAS CONSTRUCTION (PTY) LTD V KUKHANYA (PTY) LTD – APPEAL CASE NO. 48/2011

Your notice of withdrawal of the application in the above mentioned matter was received by our office on 6 March 2012. I am instructed by His Lordship the Chief Justice to inform you that in keeping with the practice in

the Supreme Court the withdrawal will have to be formally made in open court on the date allocated for the hearing of the matter, namely on 15 March 2012. Both parties must attend Court on that day.

The notice of withdrawal has come at the eleventh hour after His Lordship had already empanelled a Bench that will deal with the matter. The inconvenience must be obvious. Quite clearly, the Court will need an explanation for being treated in this manner. Accordingly, the parties must be prepared to argue on whether or not this is a matter which merits costs on a punitive scale including costs de bonis propriis.

By copy hereof attorneys L.R. Mamba and Associates are duly informed and invited to make submissions if any.

Yours faithfully

(signed)

_____

LORRAINE L. HLOPHE
REGISTRAR OF THE SUPREME COURT

cc: L.R. Mamba and Associates."

[14] As can be seen, that letter amply sets the tone for the enquiry in the present matter. For completeness, the record will show that by the time the application was withdrawn the presiding judges had already read the record of proceedings comprising 140 pages.

[15] We should like to record at this stage that the Court has had the benefit of full submissions from both parties. We are grateful to them.

[16] Now, the law on attorney and client costs as well as costs *de bonis propriis* is well settled in this jurisdiction. In the first place an award of costs lies within the inherent discretion of the Court. Such a discretion must not, however, be exercised arbitrarily, capriciously, *mala fide* or upon a consideration of irrelevant factors or upon any wrong principle. It is a judicial discretion. Generally speaking, an award of costs on attorney and client scale will not be granted lightly. The authors Cilliers, Loots and Nel: Costs 5th Edition state the principle succinctly at p971 in the following apposite terms:-

> *"An award of attorney – and – client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have."*

We agree with this statement. We wish to caution, however, that everything has its own limits. It is not inconceivable that even a person who exercises his right to obtain a judicial decision may abuse such right. In such a situation the Court would be entitled within its discretion to award costs on attorney and client costs against such person in order, for example, to mark the Court's displeasure.

[17] There are several grounds upon which the Court may grant an award of costs on attorney and client scale. The list is certainly not exhaustive. It includes

dishonestly, fraud, conduct which is vexatious, reckless and malicious, abuse of court process, trifling with the court, dilatory conduct, grave misconduct, such as conduct which is insulting to the court or to counsel and the other parties. As to authorities see the leading case of Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597 at 607.

[18] So, too, an award of costs *de bonis propriis* (out of his/her pocket) is a matter which lies within the court's discretion. Here the punishment is directed at the representative and not the litigant. As a general rule, the court will not grant an award of costs *de bonis propriis* unless the representative acted maliciously, negligently or unreasonably. See, for example, in Re Estate Potgieter (1908 T.S. 982 at p1002). Once again, the list is not exhaustive. Thus, for example, flagrant disregard of the Rules of Court may attract costs *de bonis propriis* against the representative within the inherent discretion of the court. In this regard we wish merely to draw attention to the following apposite remarks of Ramodibedi CJ in The Minister of Housing and Urban Development v Sikhatsi Dlamini and 10 Others, Case No. 31/08; The Chairman of the Commission of Enquiry into the Operations of the Municipal Council of Mbabane and 10 Others, Case No. 32/08; Sikhatsi Dlamini and 10 Others v Walter Bennett and Others, Case No. 38/08 SZSC 7) (Consolidated) (reported on line under Media Neutral Citation: [2008] at para [35], namely:-

"[35] Before closing this judgment it is necessary to make one further comment. The tortuous manner in which the parties were allowed to conduct litigation in this matter is cause for concern. There has been a minefield of applications of all sorts as the above chronology of events shows. This has resulted in unsatisfactory and costly piece-meal litigation. The Rules of Court were bent and sacrificed along the way. While the lawyers obviously stand to benefit financially from such a scenario, it is the poor litigants who are hit in their pockets. In the end, such a practice will obviously bring the whole justice system in this country into disrepute, something that must be avoided at all costs. It is not inappropriate in these circumstances, therefore, to sound a strong warning that in future legal practitioners who do not observe the Rules of Court might find themselves having to pay costs de bonis propriis."

See also such cases as Siboniso Dlamini v Winnie Muir, appeal Case No. 31/06 (Supreme Court); Andile Zikalala v Teaching Service Commission, Case No. 05/09 (Industrial Court of Appeal).

[19] So much for the law. We turn then to a consideration of additional facts which have a bearing in the determination of the matter.

[20] Reverting now to the facts, what is of grave concern to this Court is the fact that the present application was launched and yet withdrawn within a very short space of time, this raises the question whether the application was

necessary in the first place? This is so especially because it was always known that the next session of this Court was just around the corner. The Court has been put to considerable inconvenience. And so, too, has the respondent. The record will show that before the application was withdrawn the Court had to sit no fewer than four times, albeit in Chambers, to deal with preliminary issues in the matter. In doing so we must record that Mrs. Boxshall - Smith for the applicant has now filed an affidavit in the matter. Paragraphs 6 to 12 merit quotation in full:-

> *"6 On the 5th March 2012 I was contacted by the Respondent's managing directors who informed me that they no longer wished to have the application heard and that I must please remove the application and let the appeal [take its] normal cause.*
>
> *7. I asked them their reason for the withdrawal of the application they informed me that the sitting of the Appeal Court was soon and that they did not want to incur costs should the above Honourable Court not grant in their favour given their financial constraint.*
>
> *8. I informed the Respondent's managing directors that I did not want to withdraw the application as I felt if we were successful in the application we could be heard before the end of March 2012.*
>
> *9. I advised the Respondent's managing directors to please continue and they said that they want me to [withdraw] the application with immediate effect.*

10. I informed them that they would still have to tender costs, I was further informed by the Respondent's managing directors that they were willing to tender costs as the costs at present would not have accumulated to such a substantial amount.

11. I had no other option but to follow the Respondent's instruction which went against my advice. If I had proceeded with the application against the Respondent's instruction and not been successful the Respondent could have brought proceedings against me and reported me to the law society for not complying with their request and acting without a mandate which in itself would constitute reckless and negligent behavior on my part.

12. I have also obtained Affidavits from the Respondent's managing directors Mr. Joe Glover and Marco De Sousa which stand in support of what is stated in my affidavit."

[21] For the sake of completeness, we wish to record that Joe Glover and Marco De Sousa referred to in the preceding paragraph have indeed filed affidavits confirming Mrs. Boxshall - Smith's averments.

[22] What stands out like a sore thump is that Mrs. Boxshall - Smith inexplicably allowed her better judgment to be overruled by that of her clients. That in itself is unacceptable conduct, to put it mildy. A legal practitioner's first duty is to the Court and not his/her client. We need hardly stress that where there is

a conflict between counsel's better advice and the client's "interest", counsel is obliged to withdraw from the matter. It cannot be otherwise in a proper conduct of litigation. Otherwise the whole justice system would soon be brought into disrepute. It is, therefore, the duty of this Court to nip such conduct in the bud.

[23] But, there is another consideration which has weighed heavily with this Court. It is that Mrs. Boxshall - Smith has apologised profusely for her conduct in the matter. She has done so both in her affidavit and in oral sub`issions before us. In paragraph 13 of her affidavit she said the following:-

> *" 13. I would just like to formally apologise for any inconvenience this may have caused the above Honourable Court and the Appellant's attorney as I was put in an unfortunate situation as it was never my intention to withdraw."*

[24] We interrogated Mrs. Boxshall - Smith extensively during submissions in the matter. It turned out, and we accept, that she is fairly new in the legal profession. She has been practising for about three years to date. We are satisfied that the whole fiasco can reasonably be put down to inexperience. It is thus the duty of the Court to guide her rather than destroy her overnight. She is a decent young lawyer who obviously did not mean any harm. Indeed

the record will show that as she tendered her apology to the Court she literally broke down into tears. We were deeply touched.

[25] There is yet another factor in favour of Mrs. Boxshall – Smith. It is this. Mr. Mamba for the respondent very fairly and properly left the matter in the court's hands, certainly in respect of costs *de bonis propriis*. It was for that reason that he made submissions, in his own words, as *amicus curiae*.

[26] We are satisfied that the foregoing circumstances call for mercy. We must stress, however, as Mr. Mamba correctly submitted, that this is the highest Court in the Kingdom. We expect the highest standards from legal practitioners. Again, as Mr. Mamba correctly put it, the dignity and respect which the members of the public has for the courts must be channeled through the legal practitioners who represent them. That is the fundamental duty of any self respecting legal profession anywhere in the world.

[27] In the result the following order is made:-

(a) The applicant's application for early allocation of Appeal Court hearing in Case No. 48/2011 is hereby withdrawn.

(b) The applicant shall pay the respondent's wasted costs on the party and party scale.

_____

M.M. RAMODIBEDI
CHIEF JUSTICE

_____

M.C.B. MAPHALALA
JUSTICE OF APPEAL

_____

N.J. HLOPHE
ACTING JUSTICE OF APPEAL

For Appellant : **Mrs. Boxshall - Smith**

For Respondent : **Mr. L.R. Mamba**