IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 56/2013

In the matter between

NICHOLAS MANANA	**1ST APPELLANT**
JOSIAH YENDE	**2ND APPELLANT**
DAN MANGO	**3RD APPELLANT**

And

ACTING PRESIDENT OF THE INDUSTRIAL COURT	**1ST RESPONDENT**
SWAZILAND GOVERNMENT	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

Neutral citation: *Nicholas Manana and 2 Others vs Acting President of The Industrial Court and 2 Others (56/2013)[2013] SZSCA 48 (30 October2013)*

Coram: **E.A. OTA JA**

Heard **24 OCTOBER 2013**

Delivered: **30 OCTOBER 2013**

Summary: **Civil procedure; application for leave to enroll appeal on urgent basis: application withdrawn three days before date of hearing; application completely devoid of any factors in justification of the urgency procedure; attorney and client costs awarded against the appellants as a mark of the Court's displeasure; costs de bonis propriis against appellants' attorneys considered; but not given principles thereof.**

JUDGMENT

OTA JA

[1] This is an application to enroll an appeal against the judgment of the High Court per Dlamini J, dismissing the Appellants application with costs. The application is brought before a single Judge of this Court.

[2] The antecedents of this case are that the three Appellants were all nominated members of the Industrial Court of Swaziland. They were appointed as such on diverse dates in 1991, 1995 and 1997 respectively. They were each given a three year contract renewable. In their last contract, however, they were given two years for the purposes of completing part-heard matters.

[3] In 2010, the 2nd Respondent published a gazette spelling out Appellants' terms and conditions of employment. The Appellants were dissatisfied with the said terms and conditions of their contract, and whilst still negotiating for better terms and conditions, they were informed that their contract would not be renewed upon termination. Consequently, the Appellants moved an application before the High Court challenging the 2nd Respondent for

terminating their contract of employment prematurely and also claiming gratuity on a higher scale than that suggested by the Respondents.

[4] The said application served before M Dlamini J, who on the 11th September 2013, dismissed it with costs.

[5] Aggrieved, the Appellants noted an appeal against the said decision, upon grounds articulated within the Notice of appeal as follows:-

"1. The learned judge erred in law by dismissing the Application and admitting affidavits dated 6th November 2012 and 2nd April 2013 filed out of time without a substantive application for condonation nor with leave of Court.

2. The learned judge erred in law and in fact by not considering the Amended Notice of application in so far as it dealt with the allowances amounting to E8,612-00 and basing her decision solely on the sitting allowance of E9.000-00 and the initial prayers.

3. The learned judge erred by holding that the Appellants are barred from pursuing the issue of payment of the gratuity on the strength of the Court order dated 29th July 2011. The compromise related only to prayers 2.1, 2.2 and 2.4

4. The learned judge erred by not considering the Court order dated 28th June 2012 which in essence kept the prayer for payment of gratuity alive.

5. Notwithstanding the absence of any legal basis (not contained in legal Notice No. 146/2010) for calculating the gratuity in the manner employed by Mr Sukati, the learned judge erred in holding that the computation in annexure "LB1" were correct.

6. **The learned judge erred and misdirected herself in holding that there were no basis to include the sum of E9.900-00 (sitting allowance) when in actual fact the appellants earned that amount as part of their remuneration.**

7. **The learned judge erred by not holding that the Appellants' claim for gratuity fell to be determined in terms of the provision of legal Notice No. 146/2010 for the duration of their service."**

[6] The appeal was filed on the 25th of September 2013. On the 7th of October 2013 the Appellants commenced an application under a certificate of urgency filed by their counsel Mr Muzi Simelane of M.P Simelane Attorneys, contending for the following reliefs:-

"1. Dispensing with the procedure and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the Appeal be heard on urgent basis.

2. That the Appeal in this matter be and is hereby enrolled for hearing as an urgent Appeal.

3. Costs only in the event of opposition.

4. Such further and or alternative relief."

[7] The application is founded on the affidavit of 3rd Appellant, Dan Mango.

[8] It is on record that in the wake of aforegoing application and on the 10th of October 2013, the parties with their respective Counsel namely: M.P. Simelane for the Appellants, M.M. Dlamini for the 1st Respondent and V. Kunene for the 2nd and 3rd Respondents, appeared before the learned Chief Justice for the

setting down of the application. The product of this exercise were the following directives issued by the Chief Justice:-

> **"1. The Respondents must file answering affidavits on or before 16 October 2013.**
>
> **2. The Appellants/applicants must file replying affidavits on or before 18 October 2013.**
>
> **3. The Appellants/applicants must file heads of argument on or before 21 October 2013.**
>
> **4. The Respondents must file heads of argument on or before 23 October 2013.**
>
> **5. The application will be heard on 24 October 2013 at 9am."**

[9] The Respondents duly filed an answering affidavit as ordered on 16th October 2013, which was sworn to by Lorraine Hlophe, described in that process as the Registrar of the Supreme Court of Swaziland and controlling officer of the judiciary, responsible amongst other things for the expenditure in the judiciary including payment of public officers' retainer fees in the judiciary.

[10] Appellants followed suit by filing a Replying affidavit on 18th of October 2013 in accord which the Chief Justice's directives.

[11] Thereafter, instead of filing their heads of argument on 21st October 2013 as directed, the Appellants on an even date, filed a notice withdrawing the application for enrollment of their appeal on urgent basis. In paragraph 3 of the said Notice, the Appellants requested both 1st and 2nd Respondents' attorneys to

consent to the costs being costs in the cause. This, they say is because the Appellants are advanced in age and at present have no source of income. The notice further informed the parties, that the Deputy Registrar of the Supreme Court has indicated that parties must still attend Court on 24th October 2013 for a formal withdrawal and costs.

[12] Attorneys for the 1st Respondent Messrs Robinson Bertram, reacted to the Notice of withdrawal with dispatch via a letter dated 22nd October 2013, wherein in para 2 thereof, they conveyed their client's strict instructions that the Appellants tender wasted costs for the withdrawal failing which they will apply for same in Court.

[13] It is on record that on the same date, 22nd October 2013,a letter sued out from the Supreme Court under the hand of its Registrar, which informed all the parties that His Lordship the Chief Justice had directed that at the hearing of the matter on 24th October 2013, the parties will be expected to argue the question why the Appellants shall not be ordered to pay costs on attorney and client scale or why the Appellants' attorneys shall not pay costs *de bonis propriis* in the matter.

[14] The question of costs on this punitive scale was thus motivated by the parties when this matter served before me for argument. During argument, Mr Simelane took the restricted view that since the Respondents did not seek for punitive costs in their papers, they were prevented from raising it in the way and manner it has been raised in this appeal.

[15] I find myself unable to subscribe to this proposition. It does not accord with the entrenched principle of law on the question of punitive costs. The learning is that punitive costs (1) can be sought specifically in the papers, or (2) an application for an order for the payment of punitive costs can be made at the hearing, however, (3) the Court still has the discretion to entertain a subsequent application if made within a reasonable period. See **The Civil Practice of the Supreme Court of South Africa (4th ed) page 729-730, Herbstein and Van Winsen.** Furthermore, the Court has inherent jurisdiction to raise the matter *mero motu.*

[16] *In casu*, and as I have already abundantly demonstrated, the parties were notified on the 22nd of October 2013 by the Supreme Court, that at the hearing on the 24th of October 2013, the issue of punitive costs will be argued. This directive falls within the purview of the powers of the Supreme Court to regulate its own proceedings and ensure strict adherence to its rules. There is no prejudice which has therefore occasioned to the Appellants in these circumstances.

[17] Now, the question of costs is a discretion which lies in the bossom of the Court. All the law requires is that this discretion should be exercised judicially and judiciously with the view to doing substantial justice between the parties. To achieve this, the Court must weigh all the circumstances of the case relating to the issue of costs on a delicate balance, to ensure that it reaches a conclusion which a reasonable man faced with the same facts and circumstances could have come to. As such, it is not an arbitrary discretion.

[18] The questions looming large for determination are: whether on the facts and circumstances of this case, the Respondents are entitled to costs on attorney and clients scale and whether the said costs should be borne by Appellants' attorneys *de bonis propriis*.?

[19] Let us first address the question of costs on attorney and clients scale, which I should mention here is contemplated by law where there are compelling factors warranting same. This is to avoid a party who has lawfully exercised his right to obtain judicial redress in his complaint from being unnecessarily mulcted with this scale of costs. What will qualify as such compelling factors will invariably be extrapolated from the peculiar facts and circumstances of each case. Happily, local case law authority has espoused some of the requisite factors which include, but are not limited to the following:-

- Abuse of process of Court;
- vexatious or unscrupulous conduct on the part of the unsuccessful litigants;
- absence of *bona fides* in conducting litigation;
- unworthy, reprehensive and blameworthy conduct;
- an attitude towards the Court that is deplorable and highly contemptuous of the Court;
- conduct that smarks of petulance;
- the existing of a great defect relating to proceedings;
- as a mark of the Courts disapproval of some conduct that should be frowned on;

- where the conduct of the attorney acting for a party is open to censure. See for example **Jomas Construction (Pty) Ltd v Kukhanya (Pty) Ltd Civil Appeal No. 48/2011, Philani Clinic Services (Pty) Ltd V Swaziland Revenue Authority and Another, Civil Appeal No. 36/2012, Silence Gamedze and Others v Thabiso Fakudze Civil Appeal No 14/2012**.

[20] Testing the antecedents of this case against the rigours of the aforegoing factors, I am inclined to agree with the Respondents that the conduct of the Appellants is one deserving award of this punitive scale of costs. This is because the Appellants failed to urge any factors whatsoever that would justify enrollment of their appeal on the premises of urgency. To warrant such a specialized procedure, the factors urged must be real and weighty, not self contrived or whimsical. This is not such a case.

[21] I say this because all that the Appellants allege in their papers is that the matter is quite old and has been delayed through no fault of any particular person, having been commenced in 2011, and the next session of the Supreme Court could be in May 2013. Further, they contend that the matter is of substantial importance to them for a variety of reasons, mainly being that without income, their gratuity does not earn interest whilst in the hands of the 2nd Respondent. Therefore, the need for them to have finality in the litigation, since they have been frustrated long enough, with no help and finances whatsoever to tackle the injustice they have allegedly endured.

[22] Speaking for myself, the aforegoing allegations do not pass muster as such compelling factors that would sustain the urgency procedure. The acrimony between the parties, as admitted by the Appellants themselves, has been on-going for a long time, since 2011. It is common cause that the application before the High Court was not under a certificate of urgency. It beats reason why the matter suddenly became urgent in the wake of the judgment of the High Court rendered in September 2013, to warrant this Court to relax its normal rules and admit the Appellants through the backdoor.

[23] The delay occasioned *a quo* by the fact that Hlophe J, and correctly so in my respectful view, recused himself from this matter in consideration of the relationship between him and the deponent of the Respondents' answering affidavit, Mrs Lorraine Hlophe, cannot justify such urgency.

[24] Whilst still on the issue of the delay, it is common cause that the Appellants through their legal representative at that time, Mr Mkhwanazi, and the first Respondent's representative, entered a consent agreement settling the matter. This was in August 2011, shortly after the matter was commenced *a quo* on the 20th of July 2011. Thereafter, the Appellants sought to abandon the consent agreement after making their calculations based on their own formula regarding the gratuity. To this end, they filed an application to amend in February 2012 which was not acceptable to the Respondents.

[25] Consequently, and in June 2012, Mkhwanazi attorneys and learned Crown Counsel Mr Kunene who appeared for the 2nd and 3rd Respondents, entered a consent order to the effect that the Appellants should be paid gratuity using the

Government formula and the difference in calculation of the gratuity should be referred for argument. It was the difference in calculating the gratuity that was the subject of the litigation *a quo*, wherein the Court held that there was nothing wrong with the Government's calculation of the gratuity premised on the relevant Legal Notices.

[26] The aforegoing factors do not support the unnecessary delays now being canvassed by the Appellants in aid of this application. If the truth be told, having relinquished the initial consent agreement, which step naturally occasioned delays, and having chosen to litigate, the Appellants are in my view estopped from raising delays as a factor in justification of the urgency they now advance.

[27] Similarly, the fact that the Appellants are currently unemployed and facing financial straits cannot sustain the urgency propounded. The Appellants cannot be allowed to take advantage of having their case heard before other litigants who are facing similar financial woes in view of the present economic mood of the society. These litigants who approached the Court earlier than the Appellants, are queued up in the front porch of the Supreme Court waiting patiently to be admitted into its exalted presence. If every member of the public with financial troubles were to be allowed to jump the queue, then this Court's diary will be greatly upset and disarrayed, creating chaos. This will not only defeat the very essence of the urgency procedure, but will also spell ill for the administration of justice. Therefore, unless the Appellants can demonstrate real prejudice, which they have failed to do, they cannot be accorded such an advantage.

[28] For the sake of completeness, let me briefly observe that Mr Simelane's passionate pleas to the effect that the Appellants should not be visited with punitive costs on grounds that they have served the Industrial Court for a long time, that is 16, 20 and 14 years respectively, is hardly a factor envisaged in these proceedings and is thus untenable.

[29] Thenceforward, it appears that the Appellants' papers are completely bereft of any justification whatsoever for taking the step they took in the direction of urgency.

[30] This is moreso as it is common cause, that a pertinent portion of the proceedings a quo, relating to the *viva voce* evidence tendered by Mr Sukati principal accountant of the judiciary, which is of paramountey to the prosecution of this appeal, does not form part of the record before Court. This in itself makes nonsense of the urgency proposed.

[31] It seems to me that the totality of the aforegoing state of affairs lends impetous to Mr Kunene's contention, that the Appellants only sought to withdraw the urgency application in the face of the Respondents' answering affidavit which showed up the urgency they advanced as self contrived and whimisical. They are therefore on a fishing expedition. Unfortunately, the Respondents had already been put to considerable time and energy (especially in view of the advent of the Supreme Court session on 1st November 2013), as well as expenses, in the race to conform with the time limits set by the learned Chief Justice on the 10th of October 2013, as I have hereinbefore detailed in para [8] above.

[32] The withdrawal of the application in these circumstances on the 21st of October 2013, just 3 days before it was set to be argued on the 24th of October 2013, and after putting the Court and the Respondents to all the troubles concomitant thereto, is one deserving of this Court's show of disapprobation. This is in appreciation of the fact, as I have already exhaustively demonstrated ante, that there was no reason whatsoever that warranted commencement of same in the first place. The Appellants were simply on a fishing expedition.

[33] This is in accord with the mood of this Court as expressed in a plethora of its decisions, the most recent being the case of **Siphamandla Ginindza v Mangaliso Clinton Msibi Civil Case No. 29/2013 para [22],** wherein the Court made the following apposite remarks:-

> **"-----we must warn, as we hereby do, that in future litigants who pursue frivolous and scandalous applications such as the present matter shows may expect to pay punitive costs. Similarly, legal practitioners involved in such cases may themselves expect to pay costs *de bonis propriis*. We point out for completeness that the applicant and his attorney escaped punitive costs in this matter primarily because they had not, in all fairness to them, been given prior warning to argue the point. Others following in their footsepts may not be so lucky."**

[34] The only question that remains for me to answer is whether the costs should be borne by the Appellants or their counsel Mr Muzi Simelane. This brings us directly to the question of costs *de bonis propriis*.

[35] I intend to make short work of this issue because it is a straight forward one. This is because this scale of costs has been judicially tested and settled by a litany of case law authorities across national borders, and what has emerged is that it is awarded against an attorney only in reasonably serious cases. Speaking about this position of the law in **The Civil Practice of the High Court and Supreme Court of South Africa (5th ed) (Vol 2) at pp 985-986, the learned editors Herbstein and Van Winsen** remarked as follows:-

> **"The Court will in appropriate circumstances award costs de bonis propriis against an attorney Webb v Botha is extreme case, in which the Attorney obstructed the interests of justice, occasioned unnecessary costs to be incurred by all the parties----- and delayed the final determination of the action to such an extent that prejudice to the parties might well result. The legal practitioner has been ordered to pay costs de bonis propriis where he had acted in an irresponsible and grossly negligent or reckless manner--- causing prejudice to the other party---- generally speaking, costs de bonis propriis will be ordered against Attorneys only in reasonably serious cases."**

[36] Then, there is the case of **Christopher Dlamini v Sebenzile Dlamini Civil Appeal No. 34/12 para [13],** where this Court per Ramodibedi CJ, in awarding costs *de bonis propriis* against an attorney for unethical conduct stated thus:

> **"As indicated earlier, the application for rescission of the default judgment in the matter was made in bad faith in the circumstances of this case. This factor alone is enough to attract punitive costs. What is reprehensive is that <u>Mr. S C Simelane</u> for the defendant played an active part in the matter without so much as an apology to the Court. In doing so, he broke one of the rules regulating proper ethics in the legal profession, namely, never to unduly attack a learned colleague behind his back as has happened here. As if that was not enough, he sought to mislead this Court in a number of respects, seeking to challenge the fact that the defendant accepted the default judgment in question. This was bad advocacy deserving of censure. It is regrettable to observe that professional**

> **standards have taken a nosedive amongst some legal practitioners in this jurisdiction. In these circumstances, therefore, this Court put to counsel why he should not be ordered to pay costs *de bonis propriis* as a mark of the court's displeasure. Predictably, he had no acceptable answer."**

[37] Furthermore, adumbrating on the acceptable conduct of an attorney in this regard in **The Theory of the Judicial Practice of South Africa (1921) at 42, C.H Van Zyl** propounded as follows:-

> **"This duty on the part of an attorney is not a servile thing, he is not bound to do whatever his client wishes him to do. However much an act or transaction may be to the advantage, profit or interest of a client, if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it ---- the law exacts from an attorney uberimma fides -----that is the highest possible degree of good faith. He must not act in a case which he knows from the beginning to be unjust or unfounded. He must abandon it at once if it appears to him to be such during its process."**

[38] It is inexorably apparent from the totality of the foregoing, that, it is unethical conduct by an attorney that would earn an award of costs *de bonis propriis* against him. In view of this, I do not think that the conduct of Mr Simelane *in casu,* warrants an order of costs *de bonis propriis.* In coming to this conclusion, I am mindful of the fact, as I have already abundantly determined, that there was absolutely no reason for launching this application and putting the Respondents out of time and pocket, which in itself should elicit punitive costs on an attorney and client scale. However, for said costs to be borne by Mr Simelane there must be evidence that he acted *mala fide*, recklessly, unreasonably or was reprehensible or intransigent or in anyway breached his duty to the Court as well as his client. The established facts are that Mr Simelane promptly withdrew the action upon his obvious realization of its futility. This should in my view account to his favour. It would have been

different if he had persisted in the bogus application to the end. In those circumstances, costs *de bonis propriis* would be properly ordered as a mark of this Court's censure. This is not such a case.

[39] ORDER

In the light of the totality of the aforegoing, I hereby order as follows:-

1. That the application for enrollment of this appeal on an urgent basis be and is hereby withdrawn at the appellants' instance.
2. That the Appellants be and are hereby ordered to pay costs of this application on attorney and client scale.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

……. DAY OF ……..……. 2013

OTA JA

JUDGE OF THE SUPREME COURT

For the Appellants:	Mr M. P. Simelane
For 1st Respondent:	Mr D. N. Jele
For 2nd & 3rd Respondents:	Mr V. Kunene (Senior Crown Counsel)