



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.32/2013

In the matter between:

ZANDILE MARY NSIMBINI

Appellant

vs

NOMPHUMELELO PRISCO THIELE

Respondent

Neutral citation: *Zandile Mary Nsimbini vs Nomphumelelo Prisca Thiele (32/2013) [2013] [SZSC 66] (29 November 2013)*

Coram: A.M. Ebrahim, J.A.
S.A. Moore, J.A.
M.C.B. Maphalala J.A.

Heard: 18 November 2013

Delivered: 29 November 2013

Summary: *Civil Appeal – Costs – High or Magistrate’s court scale – Factors to be shown justifying costs on High Court scale. Appellant’s application for leave to appeal against the costs order made by the court at first instance awarding costs on the Magistrate’s court scale is refused with costs.*

JUDGMENT

EBRAHIM JA:

[1] In this matter, the Appellant is applying for leave to appeal against the order of costs made by *Dlamini J* in the High Court on 11 June 2013. In that judgment, the learned judge had found for the Appellant (Plaintiff in the court *a quo*). The Appellant had claimed the sum of E9 750 from the Respondent (Defendant), being the balance due after the sum of E17 000 had been handed by the Appellant to the Respondent but not fully accounted for. The Respondent had disputed the amount outstanding but the learned judge found for the Appellant.

[2] In 2011, the legislature had increased the civil jurisdiction of the magistrates courts to claims of E30 000 and below. See (*Magistrate's Court (amendment) Act 2008* assented to on 26 February 2011). The amount claimed by the Appellant clearly fell within the jurisdiction of the magistrate's court. The agreement under which the money was handed to the Respondent was entered into on 15 March 2011. Summons was issued on 5 April 2011 and served on 12 April. The trial hearing was on 9 April 2013. The Appellant, in the Notice of Motion for leave to appeal, claims that the action was instituted "a few days" after the magistrates courts' civil jurisdiction had been increased. This is clearly not correct as the summons was issued almost six weeks later and in any event only came to be heard in the High Court on the 9th April 2013.

[3] In her judgment, the learned judge, having found for the Appellant, then went on to consider the matter of why the Appellant brought the case in the High Court, rather than the magistrate's court. She pointed out that the same counsel who appeared for the Appellant had brought another claim in the High Court where the sum involved was E9 607, again well within the jurisdiction limits of the magistrate's court.

[4] Counsel had argued before her that the High Court had jurisdiction and that the Appellant was entitled to choose which court to bring the action in. The learned judge did not say that the High Court did not have jurisdiction, but pointed out that injustice may be occasioned if a matter is unnecessarily brought in a forum where the costs are higher. The losing party would have incurred costs at the High Court scale, even though costs at the magistrate's court scale may be ordered.

[5] The learned judge noted that counsel had been warned on three previous occasions about bringing to the High Court matters which should have been dealt with by the magistrate's court and warned that, if he persisted, costs *de bonis propriis* might be awarded against him. She ordered that costs be awarded on the magistrate's court scale.

[6] There can be no doubt that the High Court, being a court of unlimited jurisdiction, had the jurisdiction to hear this matter, even though the case could also have been heard in the magistrate's court. It is well established, though, that this does not give litigants *carte blanche* to bring cases in the High Court where the magistrate's court has jurisdiction. Litigants can choose, but they run the risk that the court will grant costs on the High Court scale.

[7] The basic principle which a court should adopt in considering the question of costs was described by *Holmes AJA* (as he was then) in *Gelb v Hawkins 1960(3) SA 687 (A)* at 69A:

“In seeking a basic principle to apply, I do not think it is necessary or desirable to say more than that the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides.”

[8] In *Maranyika v Howe 1997(2) ZLR 88 (H)* at 100, *Malaba J* (as he then was) said:

“A judge has a discretion whether to award costs to a successful party on the lower court scale or not, in a matter over which the magistrates' court has jurisdiction. The discretion, which has to be judicially exercised, is dependent upon the circumstances of the case.”

[9] No definite lines may be circumscribed within which cases in which High Court costs will be awarded must fall. The Plaintiff must show the existence of special reasons, either at the time of the commencement of the action or during the hearing, satisfy the court that he acted reasonably in bringing the case to the High Court.

[10] In *White v Saker & Company* 1938 WLD 173, Schreiner J (as he then was) said that one such special reason is the fact that the case presented questions of law or fact of extreme 'difficulty and complexity'. In other words, it is not a special reason, that the case raised difficult questions of law or fact. The difficulties must be those out of the ordinary. In *Hunt & Ors v Campbell* 1945 WLD 1, Millin J referred to *Koch v Realty Corp South Africa* 1918 TPD 356 and said at page 4-5:

“An attempt was made during the course of the argument to classify all the previous cases where Supreme Court costs had been allowed in cases which were within the magistrate’s jurisdiction. The classification came to this: firstly, a plaintiff may be justified in coming to the Supreme Court to vindicate his personal or professional reputation for example, where a medical man is refused his fee on the ground of incompetence. In such a case, it may be considered reasonable to come to the Supreme Court even though the amount claimed is a trifling sum. Secondly, where the case presents extraordinary difficulties either in law or fact. Thirdly, where the costs are about the same in the two courts and the remedy in the Supreme Court is the speedier. I think later cases show that

where the speediness of the relief is of importance, the qualification that the costs in the two courts should be about the same is no longer insisted upon.”

See also *de Winter v Ajmeri Properties & Investments* 1957(2) SA 297 (D) at 299A-D; *Ramsuran v Yorkshire Insurance Company Ltd* 1965(2) 263 (D) at 264G-265A.

[12] An example of a professional man bringing a case in the High Court occurred in *Granger v Minister of State (Security)* 1985 (1) ZLR 153 (H), where a senior legal practitioner brought an action against the Minister following his arrest, on specious grounds, by security guards.

[13] It seems to me that, based on those criteria, there was no need whatever to have brought this matter to the High Court. The legal and factual issues were quite ordinary and not particularly complex. In my view, the learned judge was quite correct in so finding and in awarding costs on the magistrate’s court scale.

[14] The Appellant also complains about the remarks of the learned judge, to the effect that the Appellant’s attorneys had instituted the action in the High Court for purposes of financial gain for themselves at the expense of the litigants. It is not necessary to decide whether her remarks were justified, as they were clearly *obiter*. Certainly, it would be possible to conclude that such had been the appellant’s counsel’s motive, but other conclusions are also possible. She

was, though, quite entitled to point out that counsel had indulged in this practice more than once and to warn him about the possible consequences of persisting in such conduct.

[15] At this point I propose to highlight submissions made by the Appellant's counsel in support of the application on behalf of his client. He submitted –

- (a) **“The grounds upon which the Applicant seeks leave to appeal against the costs order relate to the manner in which the court *a quo* exercised its discretion as to costs and the factors it emphasized in concluding that the costs were to be costs on the Magistrate’s Court scale...”**
- (b) **“The question of whether the appropriate scale of costs would be the High Court or Magistrate’s Court scale was therefore not canvassed in this matter and counsel for the Plaintiff was not afforded the opportunity to address the issue in the circumstances of the case.”**
- (c) **“... the attorney did not have the opportunity to make submissions in respect of the reasons for proceeding in the High Court.”**
- (d) **“While the award of costs is within the discretion of the court it is a judicial discretion and must be exercised on the grounds upon which a reasonable man would exercise that discretion.”**

(e) **“It is submitted that none of the grounds for the exercise of the court *a quo*’s discretion are grounds upon which a reasonable man would decide the question of costs. The court *a quo* erred in its findings in relation to the Applicant’s attorney. It also erred by questioning the integrity of the Applicant’s attorney as a basis for its decision on costs and warning of costs *de bonis propriis* in future matters. It also determined the question of the scale of costs *mero motu* and without the benefit of argument in the case before it. In the circumstances it is submitted that this Honourable Court ought to interfere with the finding on costs in that the court *a quo* erred in the exercise of its discretion on the grounds set out in the judgment. It is submitted that there is no reason why the costs should not have been awarded on the High Court scale as claimed in the particulars of claim.”**

[16] Learned counsel drew our attention to the case of *Ramsuran and Anor v Yorkshire Insurance Company Ltd 1965(2) SA 263 D & CLD* at 264.

In my view this case, far from assisting his clients case, does the opposite.

I have particular regard to the passages cited at page 264 paragraphs E to H and paragraph A & B on page 265 of the judgment, where *Caney J* made the following observations:

“... Mr. Pistorius contended also, however, that the costs awarded to the first plaintiff should be taxed on the appropriate scale of the

magistrates' courts tariff of costs for the reason that the amount of the judgment was within the jurisdiction of the magistrate's court, namely R1,000. Mr. Allaway disputed this contention, maintaining that the first plaintiff's costs should be upon the Supreme Court scale. I should say at this point that nothing turns on the claim of the second plaintiff which, I was informed by counsel, had been settled prior to the case coming to trial.

Counsel were agreed that the decision of the question in dispute lay in the discretion of the court. In *Norwich Union Fire Insurance Society Ltd v Tutt*, 1960(4) SA 851 (A.D.) at page 854, Holmes AJA, delivering the judgment of the Court, said:

‘...The basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is a question of fairness to both sides’.

Generally where a plaintiff recovers a judgment within the jurisdiction of the magistrate's courts, he must be content to have costs on the magistrates' courts' scale; the *onus* is upon him, if he seeks costs on the Supreme Court scale, to justify his recourse to the more expensive tribunal; it is for him to show circumstances or reasons in support of that. *Rajah v Manning* 1959(1) SA 834 (N); *Palmer v Goldberg*, 1961 (4) SA 781 (N) at page 785. In this regard the Court may consider the matter in the light of the apparent situation at the time when the plaintiff issued the summons, although ‘it is fair to take as a starting point the position as it discloses itself at the hearing in the Supreme Court’. (my emphasis added)

The Plaintiff may show that it was reasonable for him, as he saw the case when he launched the proceedings, to take such a view of the case as justified his coming into the Supreme Court. *White v Saker & Co., 1938 WLD 173* page 174; *Hunt and Others v Compbell, 1945 WLD 1* at page 6.

In the instant case there were no questions of fact involving considerable difficulty, nor any questions of law of extreme difficulty and complexity, as envisaged in the former of the two cases in the Witwatersrand Local Division.” (my emphasis added)

[17] Counsel also drew our attention to pages 86 to 94 of the record which contains the Plaintiff’s Closing Submissions and Heads of Arguments and in particular to page 94 under the heading of:

COSTS

“[25] If the plaintiff is successful it asks this court to award costs against the defendant at an attorney and own client scale for *inter alia* the following reasons;

The defendant has put the plaintiff in an unnecessary expense of a long drawn trial on the basis of spurious defence raised in its plea to the Plaintiff’s claim. It is trite law that an unbecoming defendant who raises a spurious defence is to be burdened with costs of a punitive scale.”

[18] I find myself in respectful disagreement with the submissions made by the Appellant’s counsel. Not only is the authority of *Ramsuran (supra)* against

him but what was submitted in paragraph 25 of the Plaintiff's Heads of Argument raised the issue of "costs" and it is inconceivable that the learned *judge a quo* would not have considered the issue of costs and all the manifestations following from that issue.

[19] Whilst the learned *judge a quo* could have given the parties an opportunity in addressing in greater length on the issue of costs on whether she should order costs on the magistrate's court scale or the High Court scale, I remain satisfied that the conclusion she reached was eminently correct and just in the circumstances. My reasoning for so concluding flows from my reasoning and authorities referred to *supra*.

[20] Accordingly the application for leave to appeal is dismissed with costs.

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree:

S.A. MOORE
JUSTICE OF APPEAL

I agree:

M.C.B. MAPHALALA
JUSTICE OF APPEAL

For Appellant : **Advocate P. Flynn**

For Respondent : **Mr. M. Mthethwa**