



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 2133/16

In the matter between:

**NOKUTHULA MTHEMBU AND**

**4 OTHERS**

**Applicants**

**VS**

**THE MINISTRY OF HOUSING &**

**URBAN DEVELOPMENT AND**

**ANOTHER**

**Respondents**

**Neutral citation:** *Nokuthula Mthembu & 4 Others Vs The Ministry of Housing & Urban Development & Another [2133/16] [2017] SZHC 210 (17<sup>th</sup> October, 2017)*

**Coram:** FAKUDZE, J

**Heard:** 10<sup>th</sup> October, 2017

**Delivered:** 17<sup>th</sup> October, 2017

**Summary:** *Civil Procedure - issue of costs – Applicants claim for costs at Attorney – own client scale – Respondents resist same on basis that none of the parties won because Respondents admitted in the Answering Affidavit that Applicants have not been suspended – principles governing award of costs discussed particularly that costs follow the event – successful party entitled to costs – granting of costs discretion of court – such discretion to be exercised judiciously – Applicants not entitled to costs by virtue of the fact that correspondence from Respondent clearly indicated that committees’ activities and its normal business meetings are put in abeyance..... In the court’s opinion putting in abeyance the council activities and the committees normal business does not amount to*

*suspension of the Applicants. Application dismissed. Each party to bear costs.*

## **JUDGEMENT**

### **BACKGROUND**

- [1] The Applicants sought an order for the review and setting aside of the 1<sup>st</sup> Respondent's decision to suspend the Applicants from exercising their duties as councillors and to declare the decision unlawful and unconstitutional.
- [2] The Applicants are elected councillors of Ezulwini Town Council. The basis of the Applicants' dissatisfaction is that they were not given the hearing as envisaged in terms of Section 33 of the Constitution.
- [3] As Councillors the Applicants perform their duties and functions through meetings. The purported suspension of the Councillors will negatively impact on their ability to carry out these functions and duties.
- [4] At the end of the matter, the court observed that the Respondent admits in its Answering Affidavit that "the Councillors have not been suspended as

Councillors from exercising their duties. Only Council meetings are suspended as per annexure NM 1.” The court then reserved the issue of costs for later determination. This Application seeks to determine this aspect.

## **THE PRESENT APPLICATION**

### **The Parties’ Contention**

#### **The Applicants’ case**

[5] The Applicants contend that the purpose of an award for costs to a successful litigant is to indemnify him for the expenses incurred having been compelled to institute proceedings.

[6] The Applicants allege that by virtue of the correspondence dated 16<sup>th</sup> November, 2016 which was authored by the 1<sup>st</sup> Respondent putting in abeyance the committees’ normal business meetings till the conclusion of the Commission attached to the Founding Affidavit and marked “NM1”, the 1<sup>st</sup> Respondent suspended the Applicants from office without affording them a hearing.

[7] The Applicants further allege that it was this suspension that led to them approaching the court for redress. They were put out of pocket and that is the basis upon which they are now making a claim for costs. The costs they are claiming are based on the punitive scale of attorney and own client scale.

[8] The Applicants aver that the court, in determining the issue of costs, considers the party in whose favour the judgment has been granted, meaning that the party who has been substantially successful in bringing or defending a claim, is entitled to costs. In this particular case, the Applicants were substantially successful in that the court observed that the 1<sup>st</sup> Respondent had alleged that he did not suspend the Councillors but only suspended the meetings. Therefore the Applicants are entitled to costs, so argues counsel for the Applicants.

### **The Respondents' case**

[9] The Respondents' case is that the law of costs is that costs follow the event. The Respondents' case is that on the 21<sup>st</sup> December, 2016, the court observed that "in the words of the 1<sup>st</sup> Respondent as represented by Learned Counsel N.G. Dlamini in essence the Applicants are not suspended." This admission is contained in the Respondents' Answering Affidavit which is at

page 75 of the Book of Pleadings. In paragraph 8, the Respondents state that “Applicants have not been suspended. Only the powers to convene council and committee meetings have been suspended.”

[10] The Respondents argue that since there was no suspension of the Applicants which position formed the basis for the Court’s Ruling, it cannot be said that the Applicants won the case. They are therefore not entitled to costs since paragraph 8 of the Answering Affidavit confirms the contents of the letter of the Minister dated 16<sup>th</sup> November, 2016 and addressed to the Chairman of the Council. Paragraph 3 states that “In the intervening period, as is the norm, council and its committees’ normal business meetings are put in abeyance till after the conclusion of the Commission whereat I will give further direction.”

[11] The Respondents finally contend that since they had raised the issue that the Applicants had not been suspended, there was no need for the Applicants to proceed by way of a Replying Affidavit and ultimately have the matter adjudicated and ruled upon by the court. The Application for costs should therefore be dismissed by this court.

## **The Applicable Law**

[12] The basic rule pertaining the award of costs is that costs are awarded based on the discretion of the court. Such discretion should be exercised judiciously and judicially; otherwise, it becomes no discretion at all. In the case of **Nedbank Swaziland V Sandile Dlamini N.O. Civil Case No. 144/2010**, His Lordship Maphalala M.C.B. J (as He then was), cited with approval at page 10, the case of **Kruger Brothers and Wasserman V Ruskin 1918 A.D. 63 to 69** where Innes C.J. stated the basic rule as follows “..... *the rule of our law is that all costs unless expressly otherwise enacted, are in the discretion of the judge. His discretion must be exercised judicially.*”

[13] In **Fripp V Gibbon & Co. 1913 AD**, the court pointed out the difficulty courts face in deciding the award of costs when De Villiers P said:

*“It is common cause that while, as rule there is no room for the discretion of a Magistrate or a Judge on the merits of a case as he is bound to decide the issues between the parties in accordance with their rights as established at the trial, on the matter of costs, the law allows him a discretion which of course is a judicial discretion. Questions of*

*costs are always important and sometimes complex and difficult to determine and on leaving the Magistrate a discretion the law contemplates that he should take into account or consideration the circumstances of each case carefully weighing the various issues including the conduct of the parties and any other circumstances which order as to costs as would be fair and just between the parties.....”*

[14] The Learned Authors **Herbstein and Van Winsen**, The Civil Practice of the Superior Court in South Africa at pages 477 to 478, deal with the fundamental rules relating to the award of costs. These Authors observe that:

*“The award of costs is a matter wholly within the discretion of the Court. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.....”*

[15] On the issue of costs being awarded on Attorney and own client basis, the High Court case of **Sikhumbuzo Thwala V Pholile Thwala (Nee Dlamini) Case No. 101/12**, adequately covers it. The learned Justice Ota stated that:



*“Now the award of costs and incidental to any proceedings is at the discretion of the court. This discretion like any other discretion must be exercised judicially on fixed principles that is according to rules reason and justice, not according to private opinion. Similarly, the exercise of the discretion must not be affected by questions of benevolence and sympathy. In exercising its discretion, the court looks at the result of the action itself as well as the conduct of the parties to see whether either of them had in any way involved the other unnecessarily in the expense of litigation. The court looks at all the facts of the case. It is imperative for me to observe here that the attorney and client costs sought by the Respondent is one that the court approaches with caution. The judicial accord is that this scale of costs is only awarded where there are compelling circumstances that would justify same. The cautious approach is underscored by the fact that the court is loath to penalise a party who has lawfully exercised his right to obtain a judicial decision in any complaint he might have.”*

### **Court’s analysis and conclusion**

[16] It is a fundamental principle that the party who succeeds should be awarded costs. In the case before court, it is the Applicants’ contention that they

were the successful party and are therefore entitled to costs. The Applicants further contend that if the 1<sup>st</sup> Respondent had not suspended the Applicants there would have been no need for them to approach the court so as to challenge the suspension. The Applicants further allege that the correspondence by the 1<sup>st</sup> Respondent dated 16<sup>th</sup> November, 2016, putting in abeyance the committees' normal business meetings till the conclusion of the Commission, had the effect of suspending the Applicants from office.

[17] The Respondents maintain that a proper construction of the correspondence dated 16<sup>th</sup> November, 2016, establishes that what was put in abeyance was the committee's business meetings till the conclusion of the Commission. The Respondents further argue that since there was no suspension of the Applicants as alleged by the Respondents this is what they raised as a defence in the Answering Affidavit. The court then made a Ruling based on this assertion. It cannot therefore be said that the Applicants won.

[18] This court is inclined to agree with the Respondents that none of the parties won or was substantially successful. The Respondents continuously maintained that there had been no suspension of the Councillors and

notwithstanding this assurance, the Applicants rushed to court to have a non-existent suspension to be set aside. The Court that dealt with the initial issue, observed that the Respondents are pointing out in their papers that there was no suspension and the Applicants, being satisfied by what the court observed, put the matter to rest.

[19] I am therefore inclined to exercise my discretion that the Applicants' Application is hereby dismissed and the Applicant is not entitled to the costs prayed for. Each party shall bear its costs of this Application

A handwritten signature in black ink, appearing to be 'F. Fakudze', written over a horizontal line.

**FAKUDZE J.**

**JUDGE OF THE HIGH COURT**

APPLICANT: V. KUNENE

RESPONDENT: N. DLAMINI