



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 142/12

In the matter between:

WIETS LOURENS BOTES

Applicant

And

**COMMERCIAL & INDUSTRY ENTERPRISES
(PTY) LTD t/a CIE MIDAS**

Respondent

Neutral citation: *Wiets Lourens Botes v Commercial & Industry
Enterprises (Pty) Ltd t/a CIE MIDAS (142[2012] SZIC 3
(FEBRUARY 26, 2013)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard : **FEBRUARY 15, 2013**

Judgment delivered: **FEBRUARY 26, 2013**

Summary:

The Applicant applied for costs against the Respondent on a punitive scale. The parties reached an out of court settlement, there was no judgment of the court on the merits of the case.

Held—Such costs may be granted by the court in exceptional circumstances.

Held—The Applicant failed to show that there exists exceptional circumstances in this case to warrant the court to make an order for costs on the punitive scale. Application dismissed accordingly and the court ordered each party to pay its own costs.

**JUDGMENT ON COSTS
26.02.13**

[1] The Applicant instituted motion proceedings against the Respondent for an order as follows;

“1. That judgment be entered against the Respondent for the payment of the terminal benefits of the Applicant in the amount of E363 407.47 (Three Hundred and Sixty Three Thousand Four Hundred and Seven Emalangeni Forty Seven Cents) as shown in annexure “A” which was sent by the Respondent’s accountant to the Applicant and his Attorney.

2. *Costs of this application to be paid by the Respondent on Attorney and own client scale and collection commission.*
 3. *Further and / or alternative relief.”*
- [2] The Applicant is a former employee of the Respondent. He was employed by the Respondent on 1st June 1986 as a Manager. He was in continuous employment until 31st January 2012.
- [3] The Applicant thereafter reported a dispute to the Conciliation, Mediation and Arbitration Commission (“CMAC”). The dispute could not be resolved and a certificate of unresolved dispute was issued and is annexed to the application marked “F”.
- [4] The present application is not for the determination of the unresolved dispute. The Applicant having been terminated at the instance of the Respondent is simply asking for the payment of terminal benefits due to him following the termination by the Respondent.

- [5] The application for the determination of the unresolved dispute is pending before the court.
- [6] The Respondent is resisting payment of the Applicant's terminal benefits. It was agreed between the parties that oral evidence be led to resolve two main questions, namely; the date of employment of the Applicant and the number of accumulated leave days due.
- [7] Whilst the matter was proceeding in court, the parties continued to engage each other in a bid to settle the matter amicably. Eventually, on 06.11.12 the parties informed the court that they have reached a settlement. The terms of the settlement were endorsed by the court and the parties agreed that the only issue outstanding was that of legal costs. The matter was on that day postponed until 03.12.12 for argument on the question of costs. The arguments did not proceed on that day and the matter was postponed until 10.12.12. The Respondent was on that day represented by Advocate Lucas Maziya. The court was also informed that the Respondent had failed to comply with the terms of the settlement.
- [8] On 10.12.12 the Applicant's attorney was not available to argue the matter because of medical reasons. The matter was postponed until 15.02.13 when

the matter was finally argued. On that day the Respondent was represented by Mr. M. Shongwe.

[9] Heads of argument were filed on behalf of the parties. On behalf of the Applicant it was argued that;

9.1 *The grounds upon which a court may order a party to pay an opponent's attorney and own client costs include the following;*

9.1.1 *that the party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives.*

9.1.2 *the other litigant made false claims based upon false evidence.*

9.1.3 *The Respondent clearly did not have a defence to the Applicant's claim, thus causing the Applicant unnecessary legal costs.*

9.2 *The Respondent's Director Mr. A.P. Zervos admitted during cross-examination that he had no problem paying the Applicant his terminal benefits. He said he just wanted to know how much to pay. He made this admissions seven months later.*

9.3 *The Respondent clearly did not have a defence to the Applicant's claim, thus causing the Applicant unnecessary legal costs.*

9.4 *The Respondent's defence was frivolous and was taken for the sole purpose of gaining time.*

[10] On behalf of the Respondent it was argued that;

10.1 *The question of costs is a matter that lies within the discretionary powers of the court. For this, the court must take into account the provisions of **Section 4 of the Industrial Relations Act, 2000** as amended. (The Act).*

10.2 *In terms of the Act, this court may make an order for costs according to the requirements of the law and fairness.*

- 10.3 *The court should be loath to penalize a party who has lawfully exercised his right to obtain a judicial decision in any complaint he or she might have had.*
- 10.4 *The court should first look at the result of the proceedings itself as well as the parties to see whether either of them had in any way involved the other unnecessarily.*
- 10.5 *The Respondent by opposing the present application had no motive to delay or stultify the process of execution.*
- 10.6 *Punitive costs order is not an award which the court makes lightly. There must be something which is reprehensible or morally indefensible in the conduct of the party before the court will make such an order*

[11] The Principle of Law Applicable:-

The award of costs is a matter in the discretion of the court. This is a discretion, which like any other discretion must be exercised judiciously according to rules of reason and justice, not according to private opinion.

The exercise of this discretion must not be affected by questions of benevolence and sympathy.

(See: **Sikhumbuzo Thwala v. Philile Thwala (nee Dlamini)**)

Case No. 101/12 (H.C.)

[12] The general rule is that the party who succeeds should be awarded his costs. This general rule should not be departed from, except on good grounds.

(See:- **Herbstein and Van Winsen:**

The Civil Practice of the Supreme Court of South

Africa: 4th edition p. 705)

[13] The court is grateful to the parties' representatives for authorities submitted to the court in support of their arguments. The present proceedings however are distinguishable because there was no successful party in the sense that there was no judgment of the court on the merits.

[14] The court is not of the view that the Respondent wasted the court's time or abused the court process by opposing the application. There were two questions for the court to decide, namely; the date of employment of the Applicant and secondly, the number of accumulated leave days. The

evidence revealed that the owner of the Respondent, Mr. A.P. Zervos was not hands on, but spent most of the time outside the country. In his evidence he clearly stated that he was not refusing to pay, but that he wanted to be sure that he was paying for the correct number of years and for the correct number of accumulated leave days. We do not think that it was a waste of time for the court to make the enquiry into these two questions.

[15] The Applicant's attorney argued that there were numerous unnecessary postponements which delayed the proceedings and that the Respondent would make an undertaking in court but fail to carry it through thereafter.

[16] There is no doubt that there were too many postponements in this matter. In two of these postponements where the court was of the view that they were unnecessary, the court did grant an order for costs in favour of the Applicant. For example; on 20.06.12 the matter could not proceed because the Respondent had instructed new attorneys. The court granted the order for costs because the Respondent had ample time to instruct new attorneys and to be ready to proceed with the matter in court on that day.

[17] On 26.10.12 the court also granted an order for costs when the Respondent's attorney informed the Applicant's attorney in court that the proposed offer was not acceptable.

[18] On 29.06.12 the matter did not proceed because the Applicant's attorney was not in court because of medical reasons. Again on 10.12.12 the Applicant's attorney was not in court for medical reasons.

[19] The court record therefore shows that on two occasions the matter did not proceed on account of non-availability of the Applicant's attorney for medical reasons. On two other occasions when the matter was postponed at the instance of the Respondent, an order for costs was granted in favour of the Applicant.

[20] In this matter, it is uppermost in the mind of the court that the parties eventually reached a settlement on their own. This court, being a labour court and enjoined by **Section 4 of the Industrial Relations Act, 2000** as amended, to promote harmonious industrial relations, has a duty to encourage litigants to peacefully settle disputes among themselves. An order for costs on the punitive scale will undoubtedly have a negative effect and discourage parties from settling labour disputes through negotiations.

[21] In the present application we are unable to agree with the Applicant's attorney that this is a matter where the court must make an order for costs on the punitive scale because of the following reasons:-

21.1 *The court finds that the Respondent did not act vexatiously or frivolously in defending the application.*

21.2 *The conduct of the Respondent's owner Mr. A.P. Zervos was candid and fair to the court by stating that he was not against payment but wanted proof that the calculations were based on correct information.*

21.3 *There was no successful party as the matter was resolved by settlement by the parties. There was no judgement of the court on the merits of the case.*

21.4 *On other occasions when the matter was postponed because of the Respondent's conduct, the court did grant an order for costs in favour of the Applicant.*

21.5 *It has not been shown that in exercising its right to defend in this matter, the Respondent was abusing that right.*

[22] Taking into account all the evidence before the court and also all the circumstances of this case and the considerations of equity and fairness, the court will dismiss the application for costs on the punitive scale and order that each party is to pay its own costs.

[30] The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: M. BOXSHALL-SMITH
(CURRIE BOXSHALL-SMITH
ASSOCIATES)**

**FOR RESPONDENT: M. SHONGWE
(MADAU & SIMELANE ATTORNEYS)**