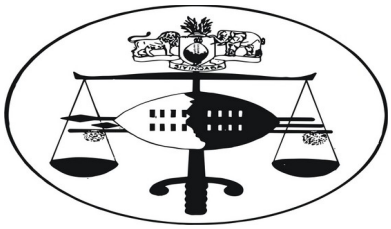

**IN THE INDUSTRIAL COURT OF SWAZILAND**

JUDGEMENT

Case NO. 301/13

In the matter between:

**MUNICIPAL COUNCIL OF MBABANE** **Applicant**

And

**SWAZILAND CITY COUNCIL STAFF ASSOCIATION** **1st Respondent**

**WORKERS UNION OF SWAZILAND TOWN COUNCILS** **2nd Respondent**

**Neutral citation:** *Municipal Council of Mbabane v Swaziland City Council Staff Association and Another (301/2013 [2013]* SZIC 40 (December 13 2013**)**

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

**Heard :** **20 November 2013**

**Judgment delivered:** **13 December 2013**

***Summary:***

***The present application was set down for hearing on 25th October 2013. On that day the Respondents were not ready because the Senior Counsel that was briefed by their Attorney was not available on that day. The Respondents applied for a postponement. The application was vigorously opposed by the Applicant. The matter was postponed until 20th November 2013 for arguments on the application for postponement and the merits. On that day however, the Applicant in this matter abandoned the main prayers. The only question left for the court to decide was that of costs of the postponement and also costs for the day.***

***Held—On the postponement—where an Applicant for a postponement has not been made timeously, or is otherwise to blame with respect to the procedure which has followed, but justice nevertheless justifies a postponement in the particular circumstances of the case, the court in its discretion may allow the postponement. The court found that the postponement was justified in the circumstances of the present case. The court makes no order as to costs.***

***Held—On the costs for the day—In the present case the court did not make a judgement based on the merits of the case. When the issues are left undecided, the court has a discretion to order that each party bears its own costs. The court accordingly makes an order that each party is to pay its own costs.***

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**JUDGMENT ON COSTS**
**13.12.13**

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[1] The Applicant in this matter is the Municipal Council of Mbabane, a statutory body duly established in accordance with the provisions of the Urban Government Act of 1969.

[2] The 1st Respondent is the Swaziland City Council Staff Association, a staff association duly established in accordance with its constitution, recognized by the Applicant as the collective bargaining agent for employees within the staff category.

[3] The 2nd Respondent is the Workers Union of Swaziland Town Councils, a trade union duly established in accordance with its constitution and recognized by the Applicant as the collective bargaining agent for unionisable employees at the Applicant's workplace.

[4] The Applicant instituted the present application for an order in the following terms;

*"1. Declaring that the collective agreement concluded between the Applicant and the Respondents on 17th July 2007, be and is hereby declared invalid and / or terminated.*

*2. Declaring that the 2012 Redundancy and Retrenchment Policy developed by the Applicant, is in force and operational.*

*3. Costs in the event of opposition.*

*4. Further and / or alternative relief."*

[5] The Respondents filed an Answering Affidavit in opposition, and the Applicant thereafter filed its Replying Affidavit.

[6] The matter was set down for hearing by the Applicant for 25th October 2013. The matter did not proceed on this day as the Respondents were not ready because the Senior Counsel that they had instructed was not ready for arguments. The Applicant accordingly applied for wasted costs occasioned by the postponement of the matter at the instance of the Respondents. The court reserved its judgment on the application for the wasted costs until 20th November 2013.

[7] When the matter appeared before the court on 20th November 2013, the Applicant indicated that it was abandoning prayer 2 of the Notice of Motion. By abandoning prayer 2, prayer 1 automatically became academic. The only issue that remained was that of costs for the day.

[8] The court is therefore presently called upon to determine the question of costs occasioned by the postponement on 25th October 2013 and the costs for 20th November 2013.

[9] **Postponement on 25th October 2013:**

It is not in dispute that the postponement on 25th October 2013 was occasioned by the non-appearance of the Respondents' Senior Counsel. The Respondents' Attorney told the court that he was able to brief Advocate V. Moleka SC from the Republic of South Africa. It turned out however that the date that had already been set in court, being 25th October 2013, was not suitable to the Learned Senior Counsel.

[10] By letter dated 18th October 2013, the Respondents' Attorney caused correspondence to be written to the other side advising that they were not ready to proceed on 25th October 2013. This letter was received by the Applicant's Attorneys on Monday 21st October 2013. The Applicant's Attorneys adopted a rigid position, and told the Respondents' Attorneys that the matter would proceed on 25th October 2013 as they had already briefed their Senior Counsel in Johannesburg, Advocate D. Smith SC, who had already booked a return air flight ticket. The Applicant replied to the Respondents' correspondence in part appears as follows:-

*"1. Notice of set down of the above opposed motion was served on your office as far back as 5 September 2013.*

*2. You were present in court when the date of 25th October 2013 was allocated for the hearing of the above motion.*

*3. We have already briefed Counsel who has already booked his return air flight ticket to and from Johannesburg and has reserved himself for Friday, 25 October 2013.*

*4. Heads of Argument have also been prepared by him in the above matter.*

*5. Our client is already committed to his day fee for Friday, 25 October 2013.*

*6. Your only reason for wanting to postpone the matter is the unavailability of Counsel which as you know, is not a ground for a postponement of any matter and even less so, under circumstances referred to above.*

*7. …..”*

[11] To this correspondence, the Respondents’ Attorneys replied by letter dated 22nd October 2013 where they stated, inter alia, in paragraphs 6 and 7 thereof that;

*"Again in your letter dated 10th October 2013 you had undertaken to serve us with your heads of argument no later than the 15th instant which you failed to do but only managed to serve us on the 22nd instant. Surely even if our Counsel was available for the 25th instant, he would still be incapacitated by the late filing of the heads to prepare and file his heads of arguments and still argue the matter as intended. You have surely placed us in a precarious position and it would not be fair to bully us into proceeding with the arguments of the matter on the 25th instant.*

*Flight bookings are never rigid and still can be cancelled even today to enable our respective Senior Counsels to liaise and agree on a date suitable to both of them to argue the matter."*

[12] It was clear from the evidence before the court therefore that the Applicant's Attorneys were made aware in advance that the matter would not proceed on 25th October 2013. Further, the Applicant's Attorneys were aware that the Respondents intended to brief Senior Counsel to represent them in the matter.

[13] It was argued on behalf of the Applicant that it is trite law that the non-availability of a particular advocate is not a ground for postponement. The court was referred to the following authorities.

**Herbstein & Van Winsen – The Civil Practice of the High Courts of South Africa – 5th ed, Vol 1, Cilliers, Loots, Net page 753**

**Duncan V. Roets 1949 (1) S.A. 226 (T) Pretorius V. Die Drankraad 1987 (2) S.A. 261 (NC) at 262 I-J.**

[14] These authorities indeed do lay down the above stated position of the law. Each case however must be decided based on its own peculiar facts and circumstances. In the present application the Respondents' Attorneys did inform the Applicant's Attorneys in advance that the date that was set for argument was no longer suitable. In the view of the court, the notice given was sufficient to enable the Applicant's Senior Counsel to cancel the flight bookings and not to fly into Swaziland. Secondly; there was an understanding between the parties in this matter that the Respondents' Senior Counsel would arrange with the Applicant's Senior Counsel for any other day suitable to both parties. It transpired that the Respondents' Senior Counsel did not do that. This was clearly beyond the control of the Respondents, the court cannot justifiably put the blame on the doorsteps of the Respondents.

[15] It was further argued on behalf of the Applicant that the application for the postponement should have been brought timeously. For this argument the Applicant's Senior Counsel relied on the case of **Van Dyk V. Conradie 1963 (2) S.A. 413 (C)** where it was stated at page 418 that;

*"Where the Applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the Applicant in a suitable case to pay the wasted costs of the Respondent occasioned to such a Respondent on the scale of attorney and client…."*

[16] In the present application, the evidence revealed that the Applicant's Attorneys were informed in advance that the matter was not going to proceed on 25th October 2013. The Applicant however insisted that the matter would proceed on that day. The Respondents' Attorney told the court that he decided to file a formal application for the postponement on Friday 25th October 2013 only because of the rigid posture adopted by the Applicant's Attorneys.

[17] In the case of **Erasmus V. Grunow 1980 (2) S.A. 793(O) at 797** the court dealing with the question of costs held that;

*"The law contemplates that the court should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which have a bearing upon the question of costs and then make such an order as to costs as would be fair and just between the parties"*

The circumstances of the present case are that the Applicant's attorneys were made aware earlier than 25th October 2013 that the matter would not proceed as the Respondents were not ready owing to the unavailability of Senior Counsel.

[18] It was further argued on behalf of the Applicant that even if no party may be blameworthy with regard to the necessity of a postponement, the party seeking such postponement is generally ordered to pay the costs as it is the one that is seeking an indulgence from the court. In the case of **Van Rooyen V. Naude 1927 OPD 122 at 122 – 123** the court pointed out that;

*"The practice which has generally been adopted in South African Courts is to throw the burden of the wasted costs on the party applying for the postponement. That seems to be a sound practice, for, though it may not be any fault of the party applying for the postponement that his witness is absent,*

*yet he has at any rate more responsibility in the matter than the other party to the case."*

[19] As already pointed out herein, the golden rule is that each case must be judged depending on its own peculiar facts and circumstances. In the present case the Respondents' Attorney told the Applicant's Attorney in advance that the Senior Counsel that he had briefed would not be able to be in court on 25th October 2013. Furthermore, the facts of the present application revealed that the nature of the dispute is one that would involve negotiations between the parties. An order for costs in the circumstances of this case would create tensions and dampens the spirit of good faith which should prevail during negotiations.

[20] The court taking into account all the peculiar facts and circumstances of this case, and also taking into account the interests of justice and fairness will come to the conclusion that no order for costs should be made as regards the postponement of the matter on 25th October 2013.

[21] **COSTS FOR 20TH NOVEMBER 2013**

When the matter appeared before the court on 20th November 2013 for arguments on the merits, the Applicant made some concessions which made the whole application to fall away. There only remained the question of costs. On behalf of the Applicant it was argued that the question of costs is one wholly

within the discretion of the court. On behalf of the Respondents it was argued that there should be no order for costs against the Respondents as the Applicant only made the concessions on that day in court. On behalf of the Applicant it was argued that the Respondents should have foreseen from the heads of argument that the Applicant would be abandoning the main prayers.

[22] In court it transpired that the page of the Applicant's heads of arguments wherein it was clear that the Applicant was abandoning the main prayers was missing. This was what made the Respondents' Senior Counsel to argue that the concession was only made on that day in court. The court adjourned and on return, the Applicant's Senior Counsel had recovered the missing page.

[23] The Respondents' argument that as they were brought to court by the Applicant, the Applicant should bear the costs for the day as they had abandoned the main prayers was persuasive. The general principle is that the party who succeeds should be awarded his costs. This general rule however could be departed from if there are good grounds for doing so. The question that follows is; who is the successful party in the present application. In the present application the court did not make any order based on the merits of the matter. When issues are left undecided the court possesses discretion either to direct each party to bear his own costs. A claim for costs cannot stand alone, and a judgment for costs involves a decision on the merits.

(See:- **Herbstein and Van Winsen:<u>The Civil Practice of the Supreme Court of South Africa, 4th edition page 708.)</u>**

[24] In the present application there was no decision of the court on the merits. The Applicant's Senior Counsel must be credited for being insightful and making the concessions in the matter and thereby saving the court's time. It will therefore not be fair to burden the Applicants with costs for having done the right thing. On the other hand, the Respondents Senior Counsel had not yet filed his heads of argument in court. The circumstances of this case are such that it will be fair to both sides if the court makes an order that each party is to pay its own costs.

[25] Taking into account all the submissions made before the court, the circumstances of the case, and also the interests of justice, fairness and equity, the court will make the following order:

1. **Each party is to pay its own costs.**

[21] The members agree.

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

**FOR APPLICANT:** **ADV. D. SMITH SC**
**(Instructed by Robinson Bertram Attorneys)**

**FOR RESPONDENTS:** **ADV. P. FLYNN SC**
**(Instructed by Mkhwanazi Attorneys)**