

IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 98/2010

In the matter between:-

EUNICE THANDAZILE KHUMALO

Applicant

AND

**PRINCIPAL SECRETARY – MINISTRY OF
PUBLIC WORKS AND TRANSPORT**

1st Respondent

THE ATTORNEY – GENERAL

2nd Respondent

Neutral citation: *Eunice Thandazile Khumalo vs Principal Secretary & Another (8/2010) [2018] SZIC 98 (24 September, 2018)*

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

Heard submissions: 17/08/18

Judgement delivered: 24/09/18

SUMMARY---Labour Law---Application for costs of suit---Legal principles applicable---Merits of the case left undecided---Discretion of the Court---

Respondents conceding to paying the costs at a lower scale than that asked by Applicant.

Held---The general principle is that the successful party is entitled to his costs.

Held further---In casu, the respondents having conceded to paying of costs on the lower scale, order for costs accordingly granted in favour of the Applicant based on the lower scale.

JUDGEMENT ON COSTS

1. The Applicant is an adult female and former employee of the Government of Eswatini. She instituted the present application on 24th March 2010 for an order in the following terms;

- “1. *Enjoining the Respondent to reinstate Applicant’s housing benefit;*
2. *Directing the Respondents to refund monies deducted as housing allowance from August, 2006 to date;*
3. *Any other order that the Honourable Court deems meet in the circumstances;*

2. The Applicant's application was opposed by the 1st Respondent on whose behalf an answering affidavit was filed deposed thereto by the former Principal Secretary, Paul Nkambule. The Applicant thereafter filed her replying affidavit to the 1st Respondent's answering affidavit and the pleadings were closed.
3. The brief facts of the Applicant's application revealed that the Applicant, during her time as a Civil Servant, was allocated accommodation at a house in Sterkstroom in Manzini. The Applicant was stationed at Manzini Central High School. The house developed numerous structural defects and became unfit for human habitation.
4. The Applicant reported the issue to the 1st Respondent who thereafter offered the Applicant two alternative places of abode, which the Applicant declined to occupy because of certain reasons.
5. Despite the Applicant not being housed by the employer, the employer was deducting certain amounts for rent from the Applicant's salary. The Applicant was not getting any housing allowance. The Applicant therefore reported the matter to the Conciliation Mediation and Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved by conciliation and the Applicant instituted the present legal proceedings.

6. When the matter appeared before the Court on 30 October 2014, the Court was informed that there were certain aspects of the order sought that have already been complied with by the 1st Respondent. The Court was told that the Applicant's housing benefit had been re-instated by the employer.
7. Numerous postponements followed thereafter as the parties were trying to have the matter settled by negotiations. When the matter appeared before the Court on 05 May 2017, the parties informed the Court that they have agreed that a consent order be made by the Court in terms of prayer 2 of the Notice of Motion less any amount that may already have been paid by the employer. The parties informed the Court that they did not agree on the question of the costs and that the matter would be set down at a later date to argue the question of costs.
8. The employer failed to comply with the Court order issued by consent on 05 May 2017. The Applicant filed an urgent application for contempt of Court on 21st August 2017. The employer opposed the contempt of Court proceedings. In its explanation for the failure to comply with the Court order, the employer stated that it had problems securing the funds because the office of the Accountant General was not cited in the

proceedings. The employer also stated that the Applicant and her attorney failed to co-operate in the computation of the actual amount due to the Applicant.

9. The parties again engaged in negotiations in order to determine the exact amount to be paid to the Applicant. The parties eventually came to an agreement. When the matter appeared before the Court on 03 May 2018, the parties told the Court that the Applicant had been paid. The matter was postponed until 14th June 2018 to argue the question of costs. On 14th June 2018 the matter was postponed pending negotiations on the issue of costs. The matter was finally argued on 17th August 2018.

10. On behalf of the Applicant it was argued that;

10.1 The Respondents' conduct had put the Applicant out of pocket.

10.2 The Applicant has had to incur unnecessary costs by having to bring the matter to the Court for its intervention.

10.3 An award of costs to the successful party is to indemnify that party for the expenses to which he/she was put through having been unjustly compelled to initiate or defend the litigation.

10.4 *It will be just and fair for the Applicant to be compensated for having been compelled to initiate the present proceedings against the Respondent.*

11. On behalf of the Respondents it was argued that;

11.1 *On the date of hearing the parties agreed that the dispute be settled by negotiations to maintain the smooth employment relationship between the parties.*

11.2 *The order of the Court granted on 05 May 2017 was granted with the consent of the parties.*

11.3 *The Court should take into account that it was the Applicant that refused to accept the accommodation allocated to her.*

11.4 *The Applicant had the obligation to quickly notify the employer about the anomaly of the deductions from her salary.*

11.5 *The Respondents abandoned the points raised in limine.*

11.6 *The delay in the payment was also caused by Government bureaucracy.*

11.7 *The costs may be granted based on the ordinary scale so as not to tarnish the relationship between the parties.*

12. The evidence before the Court revealed that after the order that was granted by the Court with the consent of the parties on 05 May 2017, the employer did not immediately comply with the Court order. That conduct by the employer caused the Applicant file an urgent application for contempt of Court. In that application the Applicant applied for costs on the punitive scale.

LEGAL PRINCIPLES APPLICABLE:

13. Dealing with the question of costs, the learned authors, *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa 4th edition at page 705* stated the legal principles applicable to the question of costs in the following manner;

“It is a fundamental principle that, as a general rule, the party who succeeds should be awarded his costs, and this rule should not be departed from except on good grounds.....”

14. In casu, the issues were left undecided as the parties reached an agreement and the Court issued a consent order. The question that arises therefore is;

was there a successful party in this matter. The learned authors (supra) at page 708 addressed this question as follows:-

“When issues are left undecided the Court possesses a discretion either to direct each party to bear his own costs in regard to those issues or to award those costs to the party who succeeded on the issue that the Court decided, but a claim for costs cannot stand alone, and a judgement for costs involves a decision on the merits.”

15. As already pointed out in paragraph 14 above, in casu, the Court did not decide any issue in the main application.
16. The Applicant however filed another application on an urgent basis for contempt of Court as the employer failed to comply with the Court order. It was in this application that the Applicant applied for costs on the scale as between an attorney and own client.
17. Even in the application for contempt of Court, the matter did not go to the merits. The Court did not make any finding on the issues raised. The Respondents counsel however appreciated that there was indeed delay in complying with the Court order which forced the Applicant to institute

the contempt of Court proceedings. However, in paragraph 10 of the heads of argument, the Respondents' counsel stated that;

“.....In this application the Respondents concede partly to the costs incurred by the Applicant in bringing this application but not at a punitive scale.”

Again, in paragraph 14 of the heads of argument, the Respondents counsel stated that;

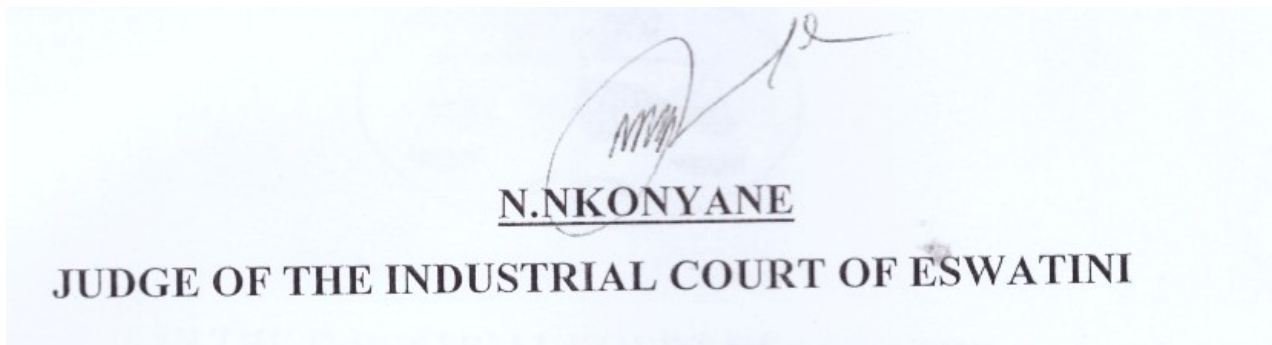
“...Respondents humbly submit that the Applicant be granted costs on the latter application at an ordinary scale so as not to tarnish the relationship between employer and employee....”

In paragraph 15 the Respondents' counsel submitted that;

“Wherefore Respondents pray that the Court should grant costs on the latter application at an ordinary scale and not the former.”

18. The evidence before the Court revealed that the Applicant is now no longer employed. She retired from the civil service in July 2017. The Applicant first instituted the legal proceedings on 24th March 2010. She was finally paid in March 2018, about eight years later.

19. The Court is alive to the fact that even in the contempt of Court proceedings, the merits were not argued. The issues were therefore left undecided. In case of **Erasmus V Grunow en 'n ander 1980 (2) SA 793 (0)** it was held, however, that a decision as to costs does not always imply a decision on the merits.
20. In casu, there was a concession by the Respondents that costs may be granted, but based on the ordinary scale. The opposition to the prayer for costs was therefore directed only to the punitive scale.
21. Taking into account all the facts and circumstances of this case, the interests of justice, fairness and equity, the Court will make the following order;
 - a) *The Respondents are to pay the Applicant's costs of suit based on the ordinary scale. The Respondents are jointly and severally liable, the one paying, the others to be absolved.*
22. The members agree.



For Applicant Ms. S. Dlamini
(Howe Masuku Nsibande Attorneys)

For Respondents Mr. N. Dlamini
(Attorney – General’s Chambers)