

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

NOT REPORTABLE

Case No: 2136/2017

Date heard: 26 February 2020

Date delivered: 3 March 2020

In the matter between:

MOGAMAT RIFAAD MOOSA

Applicant

AND

HIMAT RAMSUGIT

First Respondent

CLAUDETTE DOROTHY LOUISA VAN DER MESCHT (N.O.)

Second Respondent

WANDA ALFONSO (N.O)

Third Respondent

JUDGMENT

Goosen J:

[1] The applicant seeks leave to appeal against the costs order made by this court in dismissing the applicant's application. The application is premised upon the fact that this court, in its main judgment, found that the respondent had acted outside the law in depriving the applicant of the possession of property; that such unlawful dispossession violates the rule of law, and that the mandament van spolie provides for the protection of the rule of law.

[2] It was, therefore, argued that this court ought to have deprived the successful respondent of his costs because of his conduct. The appropriate order, it was submitted, given the adverse factual findings made against the respondent would have been to award costs to the unsuccessful applicant alternatively make no order as to costs.

[3] Mr Dyke SC, for the applicant, submitted that the law recognises that both the ethical and moral considerations are relevant to the exercise of a court's discretion regarding costs. That being so, it was submitted, there is a reasonable prospect that another court would come to a different conclusion regarding the award of costs. He further argued that in any event, there are compelling reasons to allow the matter to

be ventilated on appeal so that guidance might be obtained as to the exercise of a court's discretion regarding costs in matters such as the present.

[4] Mr Friedman, on behalf of the respondent, argued that there is no merit in the application since it is apparent from the judgment that the court indeed exercised its discretion. There being no suggestion that the court's approach to the question of costs amounted to the failure to exercise a discretion there is no prospect that an appeal court would interfere. On this basis the application ought to be dismissed. Mr Friedman argued that in any event, the argument regarding the conduct of the respondent obscures the fact that the application was, as a mandament van spolie, stillborn from the outset. In the light of the respondent's tender, the litigation ought never to have commenced. At the hearing relief was sought upon an alternative basis, for this very reason. In these circumstances the order is not likely to be assailed on appeal. He further argued that the court had decided the matter upon a particular basis while noting that two other defences raised by the respondent had merit. A court of appeal would, if leave were to be granted, consider the costs order also in the light of those defences. In such circumstances, there is no prospect of success on appeal.

[5] Mr Dyke argued that the principle is well-established that a successful litigant who is guilty of certain kinds of misconduct may be deprived of his costs. He referred to **Ritter v Godfrey**¹ where Atkin LJ said:

"In the case of a wholly successful defendant, in my opinion, the judge must give the defendant his costs when there is evidence that the

¹ 1920 2 KB 47 (CA) at 60

defendant (1) brought about the litigation or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.”

[6] In ***Merber v Merber***² the Appellate Division referred to the passage with approval. The court noted, however, that in ***Ritter v Godfrey*** the court was dealing with a case where the successful defendant had been deprived of his costs. The court held that:

“What I have quoted does not therefore mean that in the instances mentioned, the successful party must necessarily be deprived of his costs but that it is only in these instances, which are commented upon at p. 61 of the report, that the Court is entitled to deprive him of his costs.”

[7] The reference to page 61 of the ***Ritter*** report is instructive. There Atkin LJ explains each of the instances with necessary qualification, as follows:

“By (1.) is meant – has so conducted himself as to lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, and so induce him to bring the action. The authority for this proposition is *Bostock v. Ramsey*. It is wide, for in terms it is not limited to unreasonable or improper conduct, or conduct other than that which constitutes the alleged cause of action. Inasmuch as the bringing of many actions of contract and most actions of tort is due to the effect

² 1948 (1) SA 446 (A) at 453

upon the plaintiff's mind of defendant's conduct, and the effect is at any rate to induce a belief that the plaintiff has a good cause of action, it would appear to follow that provided the belief was reasonable the judge in all such cases has grounds for depriving a successful defendant of costs. I presume converso there would be grounds for dealing with a successful plaintiff's costs when his conduct had induced the defendant reasonably to believe that he has a good defence.

I am inclined to think therefore that the propositions in *Bostock v. Ramsey* should be read subject to the first, if not also the second, of the limitations suggested above – i.e. subject to the conduct being unreasonable or improper, and being conduct other than that which constituted the alleged cause of action. For the purposes of this case, however, I shall assume that they are to be read without the qualification suggested. (2.) and (3.) may possibly overlap. (2.), I think would include improper conduct in or connected with the litigation calculated to defeat or delay justice. Such conduct would also be included in (3.), which, I think, further extends to cases where the facts complained of, though they do not give the plaintiff a cause of action, disclose a wrong to the public: King v. Gillard, by which I understand some criminal or quasi-criminal misconduct, e.g., a fraud or crime or preparation for a fraud or crime, or possibly some act of serious oppression. Such conduct must, however, be in the course of the transaction complained of.” (emphasis supplied)

[8] Mr Dyke argued that ethical and moral considerations which are relevant to the conduct of the successful party may be taken into account in the exercise of a

court's discretion to award costs.³ He submitted that in this instance the respondent had taken the law into his own hands by depriving the applicant of his lawful possession of the property. Since the courts deprecate such resort to self-help the respondent ought to be deprived of his costs.

[9] There can, in my view, be no doubt that a resort to self-help by a party is indeed a factor which may be weighed in the exercise of a discretion regarding the award of costs. There are instances where this factor has pertinently been considered.

[10] In *Engling and Another v Bosielo and Others*⁴, a matter involving a mandament van spolie in respect of a business, Comrie J, despite refusal of the spoliatory relief, disallowed the respondents' costs on the basis that the respondents had taken the law into their own hands.

[11] In *Abbott v Von Theleman*⁵, which concerned an application to interdict respondent from damaging property (by cutting a fence and lock on a gate), Van Reenen J granted an interdict but deprived the applicant of his costs. The learned judge said the following:

"As regards the application for an interdict, I in the exercise of my discretion, do not make an order of costs. The reason why I deviate from the usual rule that normally the successful party is entitled to his costs (see Cilliers The Law of Costs 2nd ed para 2.08 and the cases cited in footnotes 1 and 2) is that the applicant, in the face of the

³ See *Mohomed v Nagdee* 1952 (1) SA 410 (A) 420; [1952] 1 AU SA 121 (A)

⁴ 1994 (2) SA 388 (BG) at 398D-E

⁵ 1997 (2) SA 848 (C)

respondent's objections and despite the existence of at least two decided cases of this Division on the subject (see *Stuttaford v Kruger* 1967 (2) SA 166 (C); *Penny and Another v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C)) saw fit to take the law into his own hands by having locked the said gate. Although the applicant's conduct is clearly less so than that of the respondent, I consider the applicant's aforementioned conduct sufficiently reprehensible to deprive him of an order of costs in his favour (see *John Sisk & Son (SA) (Pty) Ltd v Urban Foundation* 1987 (3) SA 190 (N) at 196D)."

[12] The question in the present application however, is not whether the respondent ought to have been deprived of his costs on the ground of him having resorted to self-help. It is whether a court of appeal is likely to interfere with the costs order.

[13] As stated in ***Merber*** (*supra*)⁶,

"It seems therefore that, when a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule and if there are no such grounds, then ordinarily it will interfere. But when, as in the present case, the general rule has been followed, then the appellant must first show that there were grounds for departing from the rule and, if there are such grounds, that the trial Judge, in refusing to depart from the rule, has either failed to take such grounds into consideration or has acted arbitrarily in not giving effect to them by depriving the successful party of his costs. In either of these events the appeal court would be free to exercise its own discretion." (emphasis added)

⁶ Ibid at 453

[14] The mere fact that the appeal court would have given more weight to the grounds does not mean that the judge has acted arbitrarily, i.e. not with judicial discretion.

[15] In this instance, the award of costs to the respondent in accordance with the ordinary rule occurred on the basis of consideration of all relevant factors. As the main judgment indicates this court was alive to the nature and effect of the respondent's conduct. It equally indicates that the respondent had sought to avoid litigation. In this regard restoration of an equivalent form of storage to that which was lost was offered. When the application was launched the relief sought was opposed on three grounds. The judgment deals with one such ground finding in effect that the application was ill-founded. It indicates that the other grounds are not without merit but says no more in that regard.

[16] All of these relevant factors were considered in determining the costs order. The question of an adverse order was considered but discounted because of the conduct of the respondent prior to the litigation commencing.

[17] An appeal court will not interfere with a trial court's exercise of a discretion merely on the basis that it might have exercised the discretion differently. There is, in my view, no reasonable possibility that a court of appeal will find that this court did not exercise the discretion vested in properly or at all. There is accordingly no reasonable prospect of success on appeal.

[18] I am equally not persuaded that there are compelling reasons to grant leave to appeal in this matter. There is no significant matter of law or principle at issue. It is

clear that a court may, on the grounds set out earlier, deprive a successful litigant of his or her costs. It may also, in the context of the mandament van spolie, indicate its disapproval of the conduct of the unlawful dispossessor where the relief is not granted, by depriving that party of his or her costs. Whether that occurs is a matter for the court exercising its discretion judicially.

[19] In all of the circumstances the application for leave to appeal cannot succeed.

[20] I make the following order:

The application for leave to appeal is dismissed with costs.

G.G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicant:	Adv B.C Dyke SC
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