



IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE / ~~NOT REPORTABLE~~

Appeal Case No: AR284/22

In the matter between:-

THE MINISTER OF POLICE

APPELLANT

and

MANQOBA NHLALENI NGUBANE

RESPONDENT

ORDER

1. The appeal is upheld.
2. The order directing the State Attorney, Ms N Nogwebela to pay the wasted costs occasioned by the postponement of the trial proceedings on 5 and 6 April 2022 is set aside.
3. Each party in this appeal is to pay their own costs.

JUDGMENT

Delivered on: 17 November

2023

R SINGH, AJ

INTRODUCTION

[1] This appeal lies against a costs order that was granted *de bonis propriis* against the State Attorney, Ms Nogwebela by the Magistrate in the court a quo. The respondent has filed a notice to abide the decision of this court and does not oppose the appeal.

THE FACTS

[2] The respondent had instituted an action against the appellant in the court a quo for damages arising out of an alleged unlawful arrest and detention. The trial was set down for 24 and 25 May 2021. During the course of the proceedings, the appellant's Counsel in the court a quo indicated that the appellant intended to launch an application for the recusal of the trial magistrate, Mr B.S. Gumede (***“the recusal application”***). On 25 May 2021, the Learned Magistrate granted an order directing the appellant leave to “bring any application they wish” by 31 July 2021.

[3] The recusal application was issued on 29 July 2021 and served on the respondent on 30 July 2021. This is evident from the date stamp of the Registrar of the Regional Court which appears on each page of the notice of motion.

[4] Prior to the finalisation of the recusal application, the respondent served a notice of set down on the appellant for 5 April 2022 and 6 April 2022 for “pre-trial” and for trial, respectively. On 01 April 2022, Ms Nogwebela wrote to the respondent’s attorneys and the Registrar of the Regional Court objecting to the matter being set down on the basis that the recusal application has not been finalised.

[5] On 05 April 2022, the appellant was represented by Counsel and a candidate attorney from the office of the State Attorney, Mr Bhagwandass. Ms Nogwebela was not present at court. The matter was stood down until the next day being 6 April 2022.

[6] The following day, the court a quo took the view that the recusal application had not been issued timeously in compliance with the order of 25 May 2021. Arising therefrom, Counsel representing the appellant sought condonation to the extent that the court a quo held the view that the recusal application had not been issued timeously. This was opposed by the respondent’s legal representative whose objection was that there was no substantive application for condonation before the court. It is clear from the record that the respondent’s legal representative had no basis to oppose the condonation application and his conduct in this regard is unbecoming of an officer of this Court. The Learned Magistrate indicated that the appellant would not be entitled to apply for condonation and granted an order, *inter alia*, that Ms Nogwebela and the candidate attorney furnish written reasons for why the costs of the 05 and 06 April 2022 ought not to be paid by them *de bonis propriis*.

[7] Ms Nogwebela and Mr Bhagwandass delivered their written representations. Notwithstanding the representations aforesaid, the Court a quo granted the costs order *de bonis propriis* against Ms Nogwebela on 19 May 2022.

THE ISSUES

[8] The crisp issue to be decided is whether the order for costs *de bonis propriis* granted by the court a quo was warranted.

THE COURT A QUO'S REASONS FOR THE ORDER

[9] Briefly the court a quo's reasons for making the order under consideration were, *inter alia*, as follows:-

- 9.1 the appellant had failed to follow the rules of court and had not explained why the recusal application was served to the Magistrate's Commission;
- 9.2 the presiding Magistrate inferred that the recusal application was brought at the behest of Ms Nogwebela;
- 9.3 on 6 April 2022, the appellant's Counsel brought an application for condonation of the recusal application which the court a quo contended was abandoned and that the appellant's legal representatives were reckless in so doing;
- 9.4 the appellant ought to pay the wasted costs of the 5th and 6th April 2022 as had the condonation application been made, the respondent would not have incurred the wasted costs of 5 and 6 April 2022 and that this amounted to reckless behaviour on the part of Ms Nogwebela.

THE APPLICABLE LEGAL PRINCIPLES

[10] It is trite that an order for costs *de bonis propriis* should only be made in exceptional circumstances and where the conduct of a party's legal representative has been egregious and materially and substantially deviates from the standard expected of legal practitioners in the conduct of the proceedings.¹²

¹ Grobbelaar vs Grobbelaar 1959 (4) SA 719 (A) at 725

² Kgoro Consortium (Pty) Ltd & Ano vs Cedar Park Properties 39 (Pty) Ltd & Ors [2022] ZASCA (65) (9 May 2022) at para 18

APPLICATION OF THE LAW TO THE FACTS

[11] The record clearly shows that the recusal application was launched by 31 July 2021. There was therefore timeous compliance with the order of court of 25 May 2021. The Learned Magistrate in the court a quo accordingly misdirected himself in finding that the recusal application was “sent to the Magistrate’s Commission” and not filed with the court in compliance with the order of court granted on 25 May 2021.

[12] There is no evidence of reckless, irresponsible and negligent conduct which can be imputed to Ms Nogwebela on fact. Accordingly, there were no exceptional circumstances to warrant the court a quo making a punitive order for costs against Ms Nogwebela personally.

CONCLUSION

[13] In the circumstances I propose the following order:

1. The appeal is upheld.
2. The order directing the State Attorney, Ms N Nogwebela to pay the wasted costs occasioned by the postponement of the trial proceedings on 5 and 6 April 2022 is set aside.
3. Each party in this appeal is to pay their own costs.

R SINGH, AJ

I agree, so it is ordered.

Date of hearing : 17 November 2023

Date of judgment : 17 November 2023

APPEARANCES

For Appellant: Mr A.K Kisoona Singh SC

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For Respondent: No appearance