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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case No.: 20/2021

In the matter between:

L[....] M[....] H[....]

APPELLANT

and

W[....] A[....] H[....]

RESPONDENT

Coram: Molitsoane, J Daniso, J

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 1 August 2022. The application was disposed of without hearing oral argument but on the Heads of Argument later filed on record on behalf of the parties.

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 07 November 2022. The date and time for hand-down is deemed to be 07 November 2022 at 14: 00.

JUDGMENT

[1] This matter concerns the point of law raised with the parties during the hearing as to whether the appellant's attorneys should be ordered to pay the costs of the postponement of 18 July 2022 *de bonis propriis*, and if so, on what scale. We set the timelines for the submission of the Heads of Argument in order to dispose of this application on papers.

[2] The matter came before us as an appeal accompanied by an application for condonation for the late filing of the appellant's Heads of Argument. At the hearing of this application we raised with the parties the issue of the record which was not only incomplete but was also not paginated and indexed. The Counsel for the respondent also contended that the appeal was not ripe for hearing as no security had been paid in terms of section 51(4) of the Magistrate Court Act 32 of 1944 and the non-filing of the special power of attorney. On the basis of the incomplete record only, the hearing could not proceed. We chose not to deal with the issue of security and the special power of attorney. Because the appeal could not proceed, the only issue remaining was the costs occasioned by the removal from the roll. Counsel for the appellant tendered the wasted costs on behalf of the appellant, but we held a *prima facie* view, based on the record before us, that it was essentially as a result of the legal representatives of the appellant that the appeal could not proceed and as a result we gave the said legal representatives leave to file Heads of Argument setting out reasons why they should not be mulcted with the wasted costs of that day.

[3] The purpose of an award of costs is to indemnify the successful party for expenses incurred in litigation. This general rule is subject to the rule that the award of costs lies in the discretion of the court. Some costs are strictly outcome specific while others depend on the character of the case being prosecuted or the specific issues, like in the case before us, to be determined.¹

¹ Public Protector v South African Reserve Bank [2019] ZACC 19 para [34].

[4] The principles with regard to costs were set out as follows in *Ferreira v Levin NO and Others: Vryenhoek and Others v Powell NO and Others*:²:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation.”

[5] That the respondent must be indemnified of his costs is not in dispute. The respondent submits that whether such costs are paid by the appellant or the attorneys, same must be granted on the scale as between attorney and client ‘*as the respondent has been the victim in the conduct of the appellant and /or her attorney of record.*’

[6] Tlaetsi, DJP in *Plastic Converters Association v National Union of Metalworkers*³ said the following with regard to attorney and client costs:

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

² 1996(2) SA 621 (CC) para [3] (footnotes not included).

³ (2016) 37 ILJ 2815(LAC) para [40] delivered on 6 July 2016.

In *Madyibi v Minister of Safety and Security*⁴ the court held as follows:

“ ..the principle that I have been able to extract from other decisions of our courts that I have had recourse to... is that our courts have awarded costs on the punitive scale in order to penalise dishonest, improper, fraudulent, reprehensible or blameworthy conduct or where the party sought to be mulcted with punitive costs was actuated by malice or is otherwise guilty of grave misconduct so as to raise the ire of the court in which event a punitive costs order would be imperatively called for.”

[7] The correspondent attorney and her candidate, acting for the appellant, deposed to affidavits and set out in detail what they did in preparation of this appeal. What can be distilled from the affidavits filed of record is that the condonation application was enrolled for hearing on 17 February 2022. It appears that on the same day the court was of the view that the condonation application as well as the appeal should be heard together. The matter was apparently removed from the roll. The candidate attorney confirmed that she uplifted the court file and indexed it.

[8] Her undisputed evidence is that on 11 April 2022 she attended court to return both the original bundle and a set of copies totalling eight bundles, being four bundles for each Judge. It is unclear as to what later transpired that led to some documents missing during the hearing of the appeal. We are unable to impute any blame on the attorneys of the appellant. Seeing that the respondent is seeking an indulgence she must bear the costs. The respondent has not made out a case for punitive costs. We accordingly find that no case has been made for costs *de bonis propriis* also.

[9] **ORDER**

It is ordered that the appellant is liable for the wasted costs of 18 July 2022.

⁴ 2008 JDR 0505 (Tk) at para [31].

P.E. MOLITSOANE, J

I concur

N.S. DANISO, J

APPEARANCES

On behalf of the Appellant:

Adv. Nortje

Instructed by :

Webbers Attorneys

BLOEMFONTEIN

On behalf of the respondent:

Adv. Van der Sandt

Instructed by :

Kramer Weimann Attorneys

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