

IN THE HIGH COURT OF SOUTH AFRICA

[Not Reportable]

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 3508/20

Heard on: 21/01/21

Delivered on: 26/01/21

In the matter between:

CHIEF ZWELIVELILE MANDELA

Applicant

and

BHITO TOTI

First Respondent

MXOLISI NIKANI

Second Respondent

LUCKY NKUNDLENI

Third Respondent

MQAYI MQHAKAYI

Fourth Respondent

BAMBATHA TYHALAKHULU

Fifth Respondent

BRANCH COMMANDER, BITYI POLICE STATION
Respondent

Sixth

ANY UNKNOWN PERSONS

Seventh Respondent

JUDGMENT ON COSTS

NHLANGULELA DJP

[1] This matter served before me for the purposes of a determination of the issue of costs.

[2] On 02 October 2020 Jolwana J granted an *interim* order interdicting and restraining the respondents from burying the remains of one Khaya Nkundleni, the deceased, on a piece of land which is described as Mvezo Great Place; and as an

ancillary thereto, directing the respondents to refill the dug grave thereon; stop damaging the issue of the premises and to repair the damaged fence. The relief sought was opposed by the respondents. To that end, answering papers were delivered on 09 October 2020, the step which was followed by filing of a replying affidavit on 13 October 2020. It appears that the parties appeared before court on the return day, which was on the same day of their appearance in court on 13 October 2020, where the following order was granted:

- “1. *Rule Nisi* issued on 02 October 2020 is confirmed on paragraph (*sic*) 3/1 and 3.2.
2. The matter is postponed to opposed court (*sic*) to determine costs in the court order (*sic*).”

[3] The ancillary relief seems to have been omitted in the order dated 13 October. As is apparent from the developments of the matter since 02 October 2020, that omission is innocuous.

[4] It is common cause that the main relief stopping the burial of the deceased in the premises was confirmed by Jolwana J on 13 October 2020. However, the stance adapted by the respondents is that since the ancillary relief was omitted in the court order, it remained to be finally determined by the court. When the matter served before me, counsel for the applicant revealed the fact, not disputed by the respondents, that the ancillary relief had been abandoned by the applicant well before 13 October 2020 with the result that it became unnecessary for the court to make reference to it in the order.

[5] The significance of the final order dated 13 October 2020 is that the main interdict against the burial was decided finally. Mootness cannot arise from that order. As correctly submitted on behalf of the applicant, on the general rule that costs follow the result see: *Union Government v Gass* 1959 (4) SA 401 (A) at 413, I am not persuaded by counsel for the respondents that the applicant should be deprived of costs willy-nilly. In the absence of a valid reason for bending the

general rule, I cannot exercise discretion in favour of the respondents that each party should pay its own costs.

[6] The issue(s) for consideration regarding the costs flowing from the abandonment of the ancillary relief is, though a different one, not separate from that of the order dated 13 October 2020. The consequences of the decision to abandon a relief would ordinarily be followed by a tender of costs. In this case the abandoned relief is, I repeat, ancillary to the main relief in that it is so much interwoven into the main relief that an award of costs in favour of the applicant would be appropriate. In a play of open game, the applicant had immediately abandoned the ancillary relief the moment he discovered that the remains of the deceased had been interred in different premises. The abandonment happened to be the only route to be followed because of unreasonable resistance on the part of the respondents to allow the entire application be laid to rest on 13 October 2020. Further, I say that the resistance was unreasonable on the following considerations of undisputed facts emerging from the affidavits:

- (a) The applicant is the lawful custodian of Mvezo Great Place at the behest of Mvezo Traditional Council, of which he is a part.
- (b) A permission to inter the remains of the deceased had not been obtained by the respondents.
- (c) The respondents had no right to use Mvezo Great Place for burial purposes.
- (d) There was actual and imminent threat posed by the respondents to conduct unauthorized burial on the premises.
- (e) Attempts to force way into the premises through the fence surrounding Mvezo Great Place was made by the respondents. The averment that the respondents were not seen cutting the fence is a red-hearing; the main point of the matter being that it was necessary for the applicant to stop the respondent from gaining access into the premises. In my opinion, the dispute of fact, which is not genuine, that the respondents were not seen damaging the fence did not weaken the applicant's case. Nonetheless, for

the purposes of costs the court does not have to decide if any of the parties is the winner – see: *Fripp v Gibbon & Co* 1913 AD 354 at 363; *Intercontinental Exports (Pty) Ltd v Fairless* 19199 (2) SA 1045 (SCA) at 1055. Perhaps to be straight-forward, since the respondents have not been able to place before court a credible version that would deprive the applicant of an award of costs, an appropriate decision is the one that gives costs to the applicant. The fact of abandonment alone is of no moment. Likewise, a case for payment of costs on a punitive scale has not been made up.

[7] In the result the following order shall issue:

“The respondents to pay costs of the application, including appearance costs of 13 October 2020, jointly and severally; the one paying and the others to be absolved from liability.”

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the plaintiff : Adv. P.V. Msiwa

Instructed by : Mjulelwa Inc
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Counsel for the defendant : Mr Meyers

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