

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE: MTHATHA

CASE NO: 2058/11

Heard on: 22/11/12

Delivered on: 17/01/13

NOT REPORTABLE

In the matter between:

CETYISWA QAKATHAYO

Applicant

and

THE SOUTH AFRICAN SOCIAL

SECURITY AGENCY

Respondent

JUDGMENT ON COSTS

NHLANGULELA J:

[1] In this matter the issue for decision is whether the attorneys of record for the applicant, Manitshana Tshozi Attorneys, are liable to pay costs *de*

bonis propriis which were incurred due to a postponement of the interlocutory application on 22 November 2012.

[2] I must say something about how the interlocutory application was brought. Before it came up there was an application brought on 26 August 2011 in which the applicant is seeking the following relief against the respondent, namely:

- “1. That the applicant be and is hereby granted leave to exhaust the internal remedies as provided for in the Social Assistance Act 13 of 2004 by lodging an appeal with the Minister of Social Development.
2. That the Applicant’s application launched on 26th August 2011 under case number 2058/1022 be and is hereby stayed pending the finalisation of the internal remedies aforesaid or pending the expiry of the period the Minister will be given to consider and decide Applicant’s Appeal.
3. That the applicant be and is hereby granted leave to file a supplementary founding affidavit after the

exhaustion of internal remedies or after the expiration of the period set out in paragraph 2 above dealing with the issue of exhaustion of internal remedies should it be necessary.

4. That there be no order as to costs except if the Respondent opposes this application in which event she should be directed to pay costs thereof.”

[3] It is common cause that the application brought on 26 August 2012 is referred to as the main application.

[4] The respondent opposed the relief sought by delivering an answering affidavit in which a defence in *limine* was raised that s 7(2)(a) of PAJA prohibits judicial reviewing of the application since an internal administrative review remedy for impugning the decision of the respondent as provided in terms of s 18 of the Social Assistance Act 13 of 2004, substituted by s 3 of Act 5 of 2010, has not yet been invoked.

[5] The provisions of s 18 of Act 13 of 2004 make it peremptory for a person aggrieved by a decision of the respondent to lodge an appeal to the Agency/Minister against such a decision.

[6] Then, instead of pursuing the main application by setting it down for hearing on the point of law as raised in the notice, the applicant brought the interlocutory application. Pursuant thereto, the applicant secured a date for arguments, set down the matter for hearing on 22 November 2012 and appeared before me with the opponent to present arguments. To appreciate the nature of the interlocutory application I must set out hereunder the terms of the relief sought as they appear in the notice of motion. They read:

“1. That the Respondent’s administrative action of awarding applicant a disability grant (hereinafter referred to as the pension or grant) attached with an unfair condition of temporariness as at 16th September 2008 without a proper notice to the Applicant and without observing the rules of natural justice be and is hereby declared unlawful, unconstitutional and invalid and is hereby reviewed, corrected and set aside.

2. That the respondent be and is hereby ordered to re-instate the applicant's disability grant within a period of three weeks from the grant of this order, such re-instatement to be with effect from the date of the termination of payment of the applicant's disability grant, that is August 2009 and be further directed to pay applicant's pension continuously until properly terminated in terms of the law.
3. That the Respondent be and is hereby directed to pay the applicant all unpaid moneys owed to her as a result of the unlawful pension stoppage or termination as from August 2009 until the date of the grant hereof together with interest thereon at the legal rate.
4. That the respondent be directed to advise Applicant's Attorneys when she has complied with the orders set out above and to do so within twenty days of having complied."

[7] During arguments both *Mr Mtshabe* and *Mr Zilwa*, counsel for the applicant and respondent respectively, conceded that a decision on the relief sought in the interlocutory application will automatically dispose of the

relief sought in the main application. Yet the main application did not serve before me. In the event I did not have authority to deal with it. And *Mr Mtshabe* declined an invitation made by me that the parties may just as well permit the adjudication of both applications. In the light of the stalemate I was driven to the decision that the interlocutory application serving before should be postponed to a future date for hearing together with the main application. What then remains is a question of wasted costs of hearing incurred on 22 November 2012.

[8] *Mr Mtshabe* tendered the payment of costs by the applicant. However, *Mr Zilwa* argued strenuously that punitive costs *de bonis propriis* against the attorneys for the applicant would be an appropriate and effective award of costs since the applicant was indigent and, being uneducated and ignorant of the law, her attorneys had a duty to dissuade her from piloting the unmeritorious interlocutory application. The respondent has had to defend the unmeritorious litigation by utilizing public funds simply because of a failure on the part of the attorneys to desist from piloting the unmeritorious application; so the argument went.

[9] Mr Mthokozisi Morris Tshozi filed an affidavit in which he stated that there are no reasons for mulcting his firm with wasted costs. He alleged that the fact that the applicant is indigent is not adequate basis for costs to be paid by her attorneys; a decision on the defences raised by the respondent towards the interlocutory application would not result in a dismissal of the main application; the decision that the interlocutory application be postponed was made by the Court *mero motu*; and the attorneys have in any event not been shown to be negligent or unreasonable in not setting down the main application for hearing on 22 November 2012. He stated further that, in any event, an attorney has no legal obligation to pay for a client's case.

[10] Supplementary heads of argument were filed by both parties dealing with the question of cost.

[11] I have already found that the issues raised in both applications are the same, hence the order I made that both applications must be heard together. I have also found that the reason for a postponement of the interlocutory application was the failure on the part of the applicant to set down the main application for hearing. Arising from these findings is the question why it

was that the applicant did not see a need to cause both applications to be heard on 22 November 2012 when, as the *dominis litis*, she ought to have ensured that both applications are heard together. This question could not be answered by those who represent the applicant. It being obvious that the applicant would never be able to make such a complex decision, those instructed by her had to proffer a reasonable explanation for the Court to decide whether to mulct or exonerate them from paying the costs. To that end, the Court must assess the allegations of law and fact as they stand in the affidavit. It matters not that the respondent did not controvert those allegations. All that I have to do is to evaluate the allegations against the following factors: the cause of action and the nature of defence proffered, indigency of the applicant, the reason for the set down of the interlocutory application, the purpose of the postponement and whether or not the applicant acted negligently, recklessly, irresponsible or maliciously.

[12] In my judgment there was no good reason for the setting down of the interlocutory applications as the adjudication of it alone would be impossible. In both applications the cause of action is the reviewing of the decision of the respondent, the parties are the same and the relief sought is virtually the same. The defence based on the provisions of s 18 of Act 13 of

2004 does not only have merit, but it has also been conceded by the applicant. There was no reason for setting down the interlocutory application in the circumstances. I would not dismiss the interlocutory application because the issues therein, including the special defence of law, are pending in the main application. Instead of setting down the main application so that it is heard and finalized the applicant brought an application which is similar to the main application. I am acutely aware of a growing number of similar applications in this division that are being brought against the department merely to provoke a protracted litigation which is punctuated with numerous postponements deliberately, to cause a delay in the finalization of disputes and to squeeze the public purse of as much “legal fees” as long as it is possible. This case is quintessentially the same. I am not persuaded by the argument raised in the affidavit of Mr Tshozi in so far as it says that the attorney has a right to implement client’s instructions even where doing so is to repeat one and the same application. Surely, a line must be drawn between the execution of reasonable instructions and the doing of something else to frustrate and abuse the legal process as the attorneys for the applicant have done in this case. A comment by Davis J in *Brown v Papadatis And Another NNO* 2009 (3) SA 542 (C) at 545J-546D is apposite here. The learned Judge said:

“Mr Khan submits that he was given instructions to so pursue this course of action, but attorneys must surely apply a professional standard in deciding to do this. See the dictum of Innes CJ in *Vermaak’s Executor v Vermaak’s Heirs* 1909 TS 679 at 691. Applicants have rights, but the courts are not playthings, to be abused at the convenience of litigants who raise spurious, reckless arguments which jeopardize the integrity of the court, so as to postpone proceedings, when they, as in this case, have clear rights, which can protect any interest or rights which they may have.

In my view, this is a case where the court should say: Of course, litigants have rights; of course, courts must fastidiously respect these rights; of energetically as he or she may be able, to protect these rights. But when the boundary is overstepped so grossly in circumstances where there is no legal basis, no precedent, no serious evidential edifice on which to launch such an application (ie even on these vague affidavits could a recusal application ever be brought?), the court should say, you have overstepped the mark and have crossed a bridge in circumstances where an order of costs *de bonis propriis* must follow.”

[13] I am in full agreement with Davis J.

[14] It is not the case of Manithshana Tshozi Attorneys that the applicant instructed them to litigate in a manner that will over-burden the Court with a prolix of papers unnecessarily. In the circumstances they cannot fault their client for the decision they took which has resulted in unnecessary costs at the expense of the respondent. In the case of this division in *Khan v Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47 (Tk) Hancke J stated that the test applicable in measuring up the conduct of a representative of a party in litigation is one of unreasonableness/negligence. I quote the words of Hancke J at 48E-F:

“There must be good reasons to order a litigant in a representative capacity to pay the costs *de bonis propriis*. Cilliers *Law of Costs* 2nd ed at 162 and authorities cited there. The principle of awarding costs *de bonis propriis* is summed up by Innes CJ in *Vermaak’s Executor v Vermaak’s Heirs* 1909 TS 679 at 691 as follows:

‘The whole question was very carefully considered by this Court in *Potgieter’s* case (1908 TS 982), and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in

question must have been *mala fide*,
negligent or *unreasonable*.’

(My Italics) See also *Estate Orr v The Master* 1938 AD 336;
Gangat v Bejorseth NO 1954 (4) SA 145 (D) at 150;
Grobbelaar 1959 (4) SA 719 (A) at 725B-C; *Venter NO v*
Scott 1980 (3) SA 988 (O) at 993H.”

[15] It is my view that the attorneys for the applicant were grossly negligent in the circumstances of this case at the expense of the respondent and the court. They are liable to pay the costs incurred by reason of the postponement of the matter.

[17] In the result I make the following order:

**“Manitshana, Tshozi Attorneys to pay attorney and client
costs incurred on 22 November 2012 *de bonis propriis*.”**

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant : Adv. N Z Mtshabe
Instructed by : Manitshana Tshozi Attorneys
c/o L G Nogaga Attorneys
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Counsel for the respondent : Adv. P.H.S. Zilwa
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