

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 7581/2011

In the matter between:

NORBETH GRAM

Applicant

and

THE SHERIFF OF CAMPERDOWN

First Respondent

JOHNNY SINGARAM

Second Respondent

JUDGMENT

Delivered: 20 November 2012

MBATHA J

[1] The Applicant consented to the *rule nisi* being discharged in this matter. The Second Respondent is therefore applying for an order for costs on an attorney and client scale.

[2] It has been submitted that the application was brought on an urgent basis because a sale in execution was to take place the following day. Applicant had also brought an urgent application to the Labour Court, which he believed would be successful. However, it was not successful.

[3] The matter was set down on the opposed roll, at the directions of the Second Respondent's attorneys and not at the instance of the Applicant. The Applicant has not filed further replying affidavits and has subsequently

consented to the discharge of the rule nisi upon losing its case in the Labour Court.

[4] The Applicant has no instructions regarding the wasted costs occasioned by the sale in execution, but concedes that the Applicant is often ordered to pay such on a party and party scale. It has been submitted by the Applicant that the costs for the day be paid by the Second Respondent who enrolled the matter on the opposed roll without consultation with the Applicant.

[5] It is submitted that the applicant was *bona fide* in its actions as there was uncertainty regarding the order made by the Labour Court. All these factors should therefore persuade the Court in not granting costs on a punitive scale.

[6] The Respondent's submissions are as follows:

(a) That the *rule nisi* had to be discharged as it prevented the Second Respondent from proceeding with the sale in execution.

(b) In the consideration for an order for costs, the Court was requested to take into account the nature of the proceedings in the Labour Court. The Second Respondent was unfairly dismissed by the Applicant six (6) years ago and an arbitration award was granted in favour of the Second Respondent. The Applicant had to pay the Second Respondent compensation and re-instate him to his employment. The Applicant refused to comply with the order by refusing to re-instate him or pay him compensation. Applicant has unsuccessfully tried to have the award set aside, not only once but a number of times. The Applicant has the resources to pay but has deliberately ignored the Court order.

(c) His application to stay the sale in execution was dilatory and not *bona fide* in good cause. The Applicant had also disregarded the time frames set out by

the Labour Court Judge, until the Second Respondent indicated that it would anticipate the date of the rule nisi.

(d) The Applicant also filed the papers out of time and failed to file heads of argument in this matter. The only person who suffers prejudice is the Second Respondent indicated who had to re-advertise and has incurred more costs in this matter.

(e) The Second Respondent has also incurred costs in respect of this application.

[7] Mr Oliver conceded that the applicant was liable for wasted costs occasioned by the stay of the sale in execution. His submission is that the costs for the day should be borne by the Second Responded as this matter could have remained on the unopposed roll. He stated that there was no prejudice to the Second Respondent as his award has escalated to about R400 000.00, instead of the original award of R80 00.00.

[8] No costs order was made by the Labour Court in the dismissal of the application to rescind the judgment by the Labour Court.

APPLICATION OF THE LAW

[9] It is trite law that failure to limit or curtail the proceedings in any matter prejudices all the parties in the proceedings. The following was stated in **Texas Co (SA) LTD v Cape Town Municipality** 1926 AD 467-488.

“Generally costs are awarded to a successful party in order to indemnify him of the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity, but that does not affect the principle on which it is based”

[10] It is also important that an award for costs against a unsuccessful litigation should not be excessive, as this is only a refund for the actual costs occasioned by the litigation and not a protection against a risk of litigation.

[11] In respect of this case, it has been conceded by the Applicant that costs of execution should be paid. These should include all costs from the institution of the action to judgment costs, expenses of execution including all incidental cost.

[12] Though the successful party is awarded costs, the attorney and client costs award is in the discretion of the Court. Such discretion is exercised judicially upon consideration of the relevant facts of the case. The Court must be satisfied that such an order will not be unjust.

[13] Such an order cannot be decided in isolation from the merits of the case. I refer to **Du Plessis v Nienaber** 1949 (4) SA 293 (T) 295, in this case the history of the litigation between the parties is not in dispute; the various applications and orders made by the various Courts are not in dispute as well as the delays occasioned by the last applications to this Court and the Labour Court.

[14] The Applicant's defence is that they were *bona fide* in making the application in the Labour Court and that this matter should not have been on the opposed roll, without the Second Respondent informing them of their intention to do so.

[15] The Second Respondent, however has been prejudice as the order could not be enforced. When we look at the nature of the order granted in favour of the Applicant the prejudice to the Second Respondent is evident. The Applicant ought to have known that he had reached the end of the road and accepted the Court's ruling in favour of the Second Respondent.

[16] The Court accepts that the enrolment of the matter in the opposed roll by the Applicant was reasonable in the circumstances and the only way to enforce his rights.

[17] The submission that in the end he is getting more than he initially expected is unreasonable. A litigant who has proved a substantial right will not be deprived of his costs, merely because he has recovered damages.

[18] I find that the Applicant failed to curtail costs. In the leading case of **Scheepers and Nolte v Pate** 1909 TS 353 and 356 Innes CJ held that it was a duty of a litigant to avoid any course which unduly protracts a lawsuit or unduly increases its expense.

[19] A party has to pay wasted costs where he has utilised an incorrect or inappropriate procedure, in this case a case where there was no prospect of success in the Labour Court.

[20] The case of the Second Respondent must be viewed in the light of the circumstances of this case. The Applicant conceded to the discharge of the application, after failing again in the Labour Court. It would have been a different case, had his last bid for success succeeded in the Labour Court. Furthermore, there was no order for costs that was made in the Labour Court.

[21] I therefore make the following order:

- (a) The Applicant is ordered to pay costs on an attorney and client scale in being the cost of the application and wasted costs of the day; and
- (b) The Applicant is also ordered to pay wasted costs occasioned by stay of the sale in execution on a party and party scale.

MBATHA J

Date of Hearing : 31 August 2011
Date of Judgment : 20 November 2012
For the Applicant : Ms Oliver
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For the 2nd Respondent : Mr D Jafta
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