

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3970/05

In the matter between:-

MINISTER OF SAFETY AND SECURITY

Applicant

and

JAN FREDERICK JANSEN VAN VUUREN

1st Respondent

JOHAN JAGGA

2nd Respondent

HEARD ON:

16 SEPTEMBER 2011

JUDGMENT BY:

MATHEBULA, AJ

DELIVERED ON:

1 DECEMBER 2011

[1] This is an application for leave to appeal against an order made on the 16th August 2011. In particular, the applicant is seeking leave to appeal against paragraph 2 of the order. The grounds for leave to appeal are as follows:-

- i) The Honourable Acting Justice Mathebula erred in not making the agreement reached by the parties that the Respondents should pay the wasted costs occasioned by the postponement an order of court and ordering, instead, that there shall be no order as to costs.

- (ii) The Honourable Acting Justice Mathebula erred in not taking into consideration that the postponement was made at the instance of the Respondents and that the Applicant was ready to proceed with the trial.

- ii) In the circumstances where:

(a) the parties had agreed that the Respondents should pay the costs occasioned by the postponement;

(b) the postponement was at the instance of the Respondents; and

(c) the Applicant was ready to proceed with the trial and not at all to blame for the postponement, the Honourable Acting Justice Mathebula failed to exercise his discretion

judiciously or exercised it improperly, in that in the circumstances a proper and judicious exercise of discretion dictated an award of costs in the Applicant's favour.

[2] Both counsels approached me in chambers having agreed to postpone the matter. It has earlier come to my attention that the instructing attorney for the respondents (plaintiff in the main case) had suffered stroke a week or two before the trial date. This was the main reason for the postponement.

[3] I informed them that I was aware of the prevailing circumstances and that I consider the matter to be beyond the control of all of us. On that basis I indicated to them that despite their agreement, as to costs, I will exercise my discretion to make no costs order. Almost like a thunderbolt Mr Mene fiercely protested in an unruly manner that I have no grounds to rule in that manner. Mr Greyling left it in my discretion to make a ruling. I indicated to Mr Mene that we should then deal with this matter in open court of which he

angrily refused citing that a ruling had been made. I shall not deal with other insinuations that Mr Mene levelled against me which at times bordered on contempt.

[4] In his submission, Mr Mene did not advance any argument more than what is contained in the papers. Mr Greyling submitted that the decision to award costs lies in the discretion of the court.

[5] The question to award costs or not lies in the discretion of the court. In **UNION GOVERNMENT v HEIBERG** 1919 AD 477 at p. 484 Solomon AJ said the following:-

“The ordinary practice is, of course, that costs follow the event, but that is subject to the general rule of our law that costs - unless expressly otherwise enacted - are in the discretion of the Judge

See also **MOFOKENG v GENERAL VERSEKERING BPK** 1990 (2) SA 712.

[6] The relevant principles in regard to costs were summarised as follows in **WARD v SULZER** 1973 (3) SA 701 (A) at p.

- “1. In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides. See Gelb v. Hawkins, 1960 (3) S.A. 687 (A.D.) at p. 694A; and Graham v. Odendaal, 1972 (2) S.A. 611 (A.D.) at p. 616. Ethical considerations may also enter into the exercise of the discretion; see Mahomed v. Nagdee, 1952 (1) S.A. 410 (A.D.) at p. 420 in fin.
2. The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs; see Nel v. Waterberg Landbouers Ko-operatiewe Vereniging, 1946 A.D. 597 at p. 607, second paragraph. Moreover, in such cases the Court’s hand is not shortened in the visitation of its displeasure; see Jewish Colonial Trust, Ltd. v Estate Nathan, 1940 A.D. 163 at p. 184, lines 1-3.
3. In appeals against cost the question is whether there was

an improper exercise of judicial discretion, i.e., whether the award is vitiated by irregularity or misdirection or is disquietingly inappropriate. The Court will not interfere merely because it might have taken a different view.

4. An unsuccessful appeal against an order involving costs on the basis of attorney and client does not necessarily entitle the respondent to the costs of appeal on the same basis. A Court of appeal must guard against inhibiting a legitimate right of appeal, and it requires the existence of very special circumstances before awarding costs of appeal on an attorney and client basis; see Herold v. Sinclair and Others, 1954 (2) S.A. 531 (A.D.) at p. 537. The decision also indicated the undesirability, in that case, of elaborating on the generality of the expression “very special circumstances”. Without seeking to limit it, I think it safe to say that relevant considerations could include, amongst others, the degree of reprehensibility of the appellant’s conduct, the amount at stake, and his prospects of success in noting an appeal, whether against the main order or against the special award of costs with its censorious implications”.

[7] The main reason that the matter had to be postponed was the indisposition of the attorney for the respondents. The court is there to do simple justice between parties. That is

the discretion bestowed upon it which must be exercised judicially in manner that is just and equitable. In doing so one must consider all facts. It is beyond the control of the respondents that their attorney suffered stroke. In this matter, the main trial has not begun despite the matter being on the roll for sometime. There is no prejudice to the parties and in particular the applicant. I can only conclude that another court will not come to any different order than the one I gave on the **16th August 2011**. Instead the applicant is only delaying this matter and I can find no basis for this application. This application is not brought as a matter of principle but only a flex of muscles by a well resourced litigant. There are simply no prospects of success in this matter.

[8] As the general rule is that the costs follows the event. I will depart from this rule in order to allow the parties to enrol the matter so that it can proceed to finality. The issue of costs can still be argued at a later stage.

[9] Accordingly I make the following order:-

9.1 The application for leave to appeal is dismissed.

**9.2 Costs stand over to be argued at the conclusion of
the matter.**

M.A. MATHEBULA, AJ

On behalf of appellant:

Adv. B.S. Mene

Instructed by:

State Attorney

BLOEMFONTEIN

On behalf of respondents:

Adv. P. Greyling

Instructed by:

Goodrick & Franklin Attorneys

BLOEMFONTEIN

MAM/sp