



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Appeal no: A98/2024

In the appeal between:

PHEELLO MAHAMO

APPELLANT

and

MARYNA VENTER

FIRST RESPONDENT

JAPIE VENTER

SECOND RESPONDENT

AUTO & GENERAL COMMERCIAL FLEET SOLUTIONS

THIRD RESPONDENT

Neutral citation: Mahamo v Venter & Others (A98/2024) [2024] ZAFSHC (19 November 2024)

Coram: Chesiwe J et Greyling-Coetzer AJ

Heard: 28 October 2024

Delivered: 19 November 2024

Summary: Appeal – Costs only.

ORDER

1. The appeal is dismissed.
 2. No order as to costs.
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JUDGMENT

GREYLING-COETZER AJ et CHESIWE J

[1] The appellant approached this court on appeal, challenging only the cost order granted against him in the Bloemfontein Magistrate's Court on 22 March 2024.

[2] The appellant sought condonation for the late noting of the appeal. The application for condonation was not opposed. Good cause has been shown for the late noting and condonation is therefore granted.

[3] The appellant obtained default judgment against the respondents on 7 August 2023 in the amount of R35 000.00. Armed with the default judgment, the appellant proceeded to take execution steps against all three respondents. On 8 November 2023 the respondents launched a rescission application. The rescission application was successful and the appellant was ordered to pay the respondents' costs on an attorney-and-client scale.

[4] The appellant contends that the court *a quo* erred in finding that the appellant ought not to have opposed the rescission application; that it erroneously applied *Re Alluvial Creek 1929 CPD 532*, and therefore erred in awarding costs to be paid by the appellant to the respondents on an attorney-and-client scale.

[5] According to the appellant the appropriate cost order would have been to grant cost in his favour, as the respondents sought an indulgence from the court, alternatively that each party should have been ordered to paid their own costs.

[6] Although a notice of opposition in respect of the appeal was filed, the matter proceeded unopposed on the date of hearing. The first and second respondents appeared in person, informed the court that their legal representative withdrew and that the main action as instituted by the appellant in the Magistrate's Court has equally been withdrawn by the appellant. They indicated that they do not wish to proceed with

any opposition and intend abiding by the courts decision.

[7] A court of appeal will generally be reluctant to interfere with a cost order. A court of appeal cannot interfere merely on the ground that it would in itself have made a different order.¹ In *Public Protector v South African Reserve Bank*² the Constitutional Court stated as follows:

"An important principle in this appeal is that the courts exercise a true discretion in relation to cost orders. A true discretion exists where the lower court has a number of equal permissible options available to it. An appeal court will not likely interfere with the exercise of a true discretion. Ordinarily, it would be inappropriate for an appeal court to interfere in the exercise of a true discretion, unless it is satisfied that the discretion was not exercised judicially, the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant factors and principles. There must have been a material misdirection on the part of the lower court in order for an appeal court to interfere. It is not sufficient, on appeal against a cost order, simply to show that the lower court's order was wrong." (Own underlining)

[8] It was submitted by the appellant that it had to prove exceptional circumstances in order to justify interference by the appeal court. Relying on *Naylor and Another v Jansen*³ it was argued that that the failure to exercise a judicial discretion would usually constitute an exceptional circumstance.

[9] It was further contended that attorney-client costs are punitive in nature and ought only to be granted to penalise dishonesty, impropriety, fraud, reprehensive or blameworthy conduct, none of which are apparent from the record and the judgment by the court *a quo*.

[10] It is so that normally a court will not order a litigant to pay the costs of another litigant on the basis of attorney-and-client costs unless some special grounds are present.⁴ An award of attorney-and-client costs is granted by reason of some special consideration arising either from the circumstances of the particular case, or from the conduct of the losing party. The list of circumstances to find application is not exhaustive.⁵

[11] The court *a quo* was confronted with the appellant obtaining default judgment

¹ *Zuma v Office of the Public Protector* (unreported, SCA case number 1447/2018, dated 20 October 2020) at par [21]

² 2019 (6) SA 253 (CC)

³ (508/05) [2006] ZASCA 94; [2006] SCA 92 (RSA); 2007 (1) SA 16 (SCA) at par [10]

⁴ *Van Dyk v Conradie and Another* [1963] 2 All SA 312 (C); 1963 (2) SA 413 (C) at 418

⁵ *Nkume v Trans Union Credit Bureaux (Pty) Ltd and Another* 2014 (1) SA 134 (ECM) at 140 at par [12]

against all three respondents on the basis that he concluded a verbal agreement with all three respondents whilst contending in the court *a quo* that the first- and second respondents were cited as they are directors of the third respondent and for no other reason. Aligned with the former the first- and second respondents contended that they are directors and employees of the third respondent, and therefore were misjoinder. In obtaining the default judgment, it was on a jointly and severally basis, the one to pay the other to be absolved. When the appellant proceeded with execution steps, such steps were again directed to all three of the respondents on the jointly and severally basis.

[12] The misjoinder was reluctantly conceded by the appellant in the court *a quo*. The court *a quo* held that the appellant should not have opposed the rescission application in the circumstances. In this court it was argued that the allegations in the rescission application warranted the opposition and that opposition was required to proverbial 'clear the appellant's name'.

[13] Considering the merits of the rescission application in determining whether the court *a quo* exercised its discretion in respect of costs judicially, the finding is unavoidable that the first- and second respondents should not have been parties to the action. It further appears from the record that the appellant was procedurally not even entitled to the default judgment, as the request for default judgment was made before the expiry of the dies.

[14] In *Nel v Waterberg Landbouwers Kooperatiewe Vereeniging*⁶ it was held that: *"[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations and arising either from the circumstances which give rise to the action, or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for the party-and-party cost that the successful party will not be out of pocket⁷ in respect of the expenses caused to him by the litigation."* It is therefore in essence a matter of fairness to both parties.⁸

[15] One stands to be reminded that it is an order which is appeal against and not the reasoning of the court *a quo*. Although an order of costs differentiating between the first and second respondents and third respondent before the court *a quo* may have been justified, or more accurate a costs allocation it may have had little practical consequence. Nor is same in itself sufficient to demonstrate that the court *a quo* failed

⁶ 1946 AD 597, referred to as such in *Swartbooi v Brink* 2006 (1) SA 203 (CC) 213

⁷ *Ward v Sulzer* 1973 (3) SA 701 (A) 706

⁸ *Epstein & Payne v Fraay* 1948 (1) SA 1272 (W) at 1276

to exercised its discretion judicially. Even where a misdirection had occurred, which is not the case here, if regard is had to the amount involved, an interference won't be justified.⁹

[16] Considering that set out herein above and the applicable circumstances, the appellant has failed to demonstrate that circumstances exist for this court to justifiably interfere with the order as granted by the court *a quo*.

[17] Regards the costs in this appeal we are of the view that considering the circumstances that presented itself and that the main action has since been withdrawn a deviation from the general principle that costs should follow the event is appropriate.

[18] In the result the following order is made:

1. The appeal is dismissed.
2. No order as to costs.

I concur and it is so ordered


D. GREYLING-COETZER, AJ


CHESIWE J

Appearances:

For the Appellant:

ADV. KP MOHONO

Instructed by:

Tsuinyane Law Inc

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Bowley v Tuckers Land and Development Corporation (Pty) Ltd 1978 (2) SA 488 (T); *Woerman v Teubner* 1936 SWA 22