

LESOTHO / JUDGMENT

Beleme Lebajoa V COMPOL (CIV/APN/0178/2022) [2023] LSHC 126 (3 August 2023)

[2023] LSHC 126

COURT

High Court

CASE / FILE NUMBER

CIV/APN/0178/2022

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IN THE HIGH COURT OF LESOTHO

Held at Maseru

In the matter between

CIV/APN/0178/2022

BELEME LBAJOA

APPLICANT

AND

THE COMMISSIONER OF POLICE

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

Neutral Citation: Beleme Lebajoa vs Commissioner of Police & Another [2023]

LSHC 126 CIV (3rd August 2023).

CORAM :

HEARD :

T. J. MOKOKO J

3RD APRIL 2023

DELIVERED :

3RD AUGUST 2023

SUMMARY

Wasted Costs on Attorney Client scale- on the date of hearing when the matter was ready for hearing- the other party made an application for recusal of the judge- not giving notice to the other side about his intentions- the other party made to incur unwarranted expenses-abuse of court process- wasted costs to be paid on attorney client scale in the circumstances.

CASES

ANNOTATIONS

1. Ben Radiopelo Maphathe v I Kuper Lesotho C OF A (CIV) NO. 55/2013
2. Bond Equipment (Pretoria) (PTY) Ltd v ABSA Bank 1992 (2) SA 63 (WLD)
3. Bote's v Potchefstroom Municipality 1940 TPD 113 at Page 117
4. Ferreira v Levin N. O and Other s1996 (2) SA 984 (CC) Page 1012
5. John Dhokotera v Zimra (301 of 2021) [2021] ZWHHC 301 (23 June 2021)
6. Katjaimo v Katjaimo and Others 2015 (2) NR 340 (SC) at 350-351-H
7. Lakofski v O' Reilly
8. Maduma v Municipality of Chinhoyi and Samuriwo 1986 (1) ZLR 12 (HC)
9. Mutunhu v Crest Poultry Group (Pvt) Ltd HH 399/17 at Page 22
10. Myburgh Transport v Botha t/a S. A Truck Bodies 1991 S. A 310
11. National Executive Committee of the LCD and others v. Mabusetso Makharilele CIV/APN/296/05 [2010] LSHC 25 (16 March 2010)
12. Nel v Waterbuung Landbouwers Ko-operative Vereeniging 1946 AD 54
13. Pitso Makhoza Malunga v Lesotho Brewing Company (PTY) Ltd CIV/APN/45/95
14. Poll v de Marillac 1941 WLD 35
15. R v Zackey 1945 A. D 505
16. Thabo Makenete v Major General Metsing Lekhanya and Others 1991-1992 LLR&LB 126
17. Van Dyk v Conradie and Another 1963 (2) SA 413

Introduction

JUDGMENT

- [1] I must state from the outset that the judgment in this matter was supposed to have been delivered on the 8th June 2023. However, owing to the family bereavement about six days before the judgment day, I took compassionate and annual leave to prepare for my mother's funeral and attend to other family matters that needed my attention. It is for these reasons that the judgment was not delivered on the scheduled date.
- [2] On or around the 2nd March 2023, applicant approached this Court on urgent basis, calling upon the respondents to show cause if any why;
1. (a) The Rules as to form and notice shall not be dispensed with on account of urgency.
 - (b) The 1st respondent's decision and consequences thereon in terms of which the Applicant has been verbally informed to vacate his office, shall not be stayed pending finalisation of the main application.

- (c) The 1st respondent shall not be compelled, directed and ordered to restore the security guards that were unilaterally and without a hearing withdrawn from the applicant pending finalisation of the main application.
 - (d) The 1st respondent and his subordinates shall not be restrained and interdicted from interfering with the Applicant in the performance of his duties in any manner whatsoever pending the finalisation of the main case.
 - (e) The 1st respondent's decision in terms of which the Applicant has been verbally informed to vacate his office, while the matter is sub judice shall not be declared null and void ab initio and of no legal force and effect.
 - (f) The 1st respondent's decision to withdraw Applicant's security guards, while the matter is sub judice shall not be declared null and void ab initio and of no legal force and effect.
 - (g) The respondents shall not be ordered to pay costs on a scale as between Attorney and client and 50% of which to be paid by 1st respondent de bonis propriis.
 - (h) Applicant shall not be granted such further and or alternative relief.
2. Prayers 1 (a), (b), (c), and (d) were granted as Interim Court Order. Factual Matric
- [3] On the 6th March 2023 the first respondent was amongst others ordered to restore the bodyguards of the applicant, that had been unilaterally withdrawn from the applicant. This order was duly served on the office of the first respondent on the 7th March 2023 at 14:15 hours. The rule in the matter was returnable on the 13th March 2023 at 9:00 a.m.
- [4] On the 13th March 2023, applicant instituted contempt proceedings against the first respondent, on the ground that the first respondent had not complied with the Order of this Court of the 6th March 2023. On the 13th March 2023 Adv. Setlojoane, counsel for the applicant and Adv. Mohloki, counsel for the first respondent appeared before court. Adv. Setlojoane informed the Court that still the first respondent had not complied with the Court Order granted on the 6th March 2023. Adv. Mohloki asked for the Court's indulgence to consult further with the first respondent. Consequently, this Court granted him the indulgence and the matter was postponed to 20th March 2023 at 9:00 a.m.
- [5] On the 20th March 2023 both counsel appeared before Court, and Adv. Setlojoane informed the Court that, still the first respondent had not complied with the Court Order of the 6th March 2023. Adv. Mohloki's reaction was to the effect that there was a misunderstanding with his client regarding the Order, therefore he was intending to withdraw as the first respondent's counsel from the matter. This turn of events then necessitated this court to direct the first respondent to personally appear before this court on the 27th March 2023 at 8: 30 am, to show cause why he could not be committed to prison for contempt of court.
- [6] On the 27th March 2023, Adv. Phafane KC, assisted by his junior Adv. Setlojoane for applicant and Adv. Moshoeshoe for the first respondent appeared before Court. Adv. Moshoeshoe informed the court that the Office of the Attorney General had authorised the

first respondent to seek the services of the private legal practitioner in the matter, therefore prayed that the first respondent be given an indulgence to consult with his new lawyers. The applicant opposed the application for postponement and asked for the wasted costs for that day. After careful consideration of the first respondent's application, this court reluctantly granted the first respondent the postponement. The first respondent was given an opportunity from the 27th March 2023 to the 31st March 2023, to have consulted with his new lawyers. The matter was therefore postponed to the 03 April 2023 at 8:30 am for hearing. It is worth mentioning that upon the postponement of the matter, the first respondent was informed by this Court that on the 03 April 2023, the matter shall proceed with or without the first respondent's lawyers. Consequently, the first respondent was ordered to pay the wasted costs of that day.

- [7] On the 3rd April 2023, Adv. Setlojoane for applicant and Adv. Maqakachane, for the first respondent appeared before court. Adv. Maqakachane informed the court that on the 31st March 2023, he received instructions from his client and that he consulted with his client that morning- 03/04/2023, as he had just arrived that morning from the Republic of South Africa, where he had attended to his post- graduate studies business. Adv. Maqakachane then moved an application for the recusal of the Judge in this matter. It is worth repeating that on the 27th March 2023, the matter was postponed to the 3rd April 2023, at the instance of the first respondent, to enable him to seek services of a private legal practitioner.
- [8] On the 3rd April 2023, Counsel for the applicant came to court prepared to argue the matter and so was the court ready to hear the matter. Adv. Maqakachane did not give notice to the applicant's counsel that he would be moving an application for the recusal of the Judge in the matter. The matter was supposed to be heard at 8:30 am and Adv. Maqakachane advised the other side of his intentions at 8:35 am. Applicant's counsel was taken by surprise at the turn of events, as a result of which the applicant's counsel sought that the respondent should pay the wasted costs for that day on the punitive scale, on the ground that applicant was not notified of the first respondent's application for recusal, therefore had made all the necessary preparations and arrangements to argue the matter, as a result of which they had been made to incur the unnecessary expenses, which could have been avoided had they been given notice of the first respondent's intentions. It was the applicant's take that in the circumstances, postponement was unavoidable, therefore the first respondent should pay costs on a higher scale of attorney client scale, due to the conduct of the first respondent.
- [9] Applicant further prayed that such costs are to be paid by the first respondent before the first respondent is allowed to prosecute the application for recusal. On the other hand, the first respondent was opposed to the wasted costs on an attorney client scale, hence this judgment. Legal Principles Applicable

- [10] When dealing with costs on attorney and client scale, the court in the case of John Dhokotera v Zimra¹, at page 3 stated that the court's approach to determining the issue of costs is guided by the trite principle that the award of costs is in the discretion of the court. 1 (301 of 2021) [2021] ZWHHC 301 (23 June 2021)
- [11] In the case of Ferreira v Levin N. O and Others², the court referred to the Supreme Court that it has over the years developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted is in the discretion of the court and the second that a successful party should as a general rule, have his or her costs. Even the second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy depriving successful parties of their costs, can depend on circumstances such as for example, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigation and the nature of the proceedings.
- [12] On the subject of costs on attorney client scale, the court in the case of Mutunhu v Crest Poultry Group (Pvt) Ltd³, held that it is settled law that the award of costs on attorney/client scale is likely to be granted if the conduct of the litigant from which such an award is sought amount to an abuse of the court process and that his actions thereby brought additional and unwarranted expense to the other party. The leading case on the issue is Nel v Waterbuung Landbouwers Ko-operative Vereeniging⁴, where the court found that the party ought not to be put out of pocket for unnecessary proceedings. Also see Maduma v Municipality of Chinhoyi and Samuriwo⁵ where Reynolds J found that one party was put through considerable inconvenience by virtue of the respondent's unreasonable objections and behaviour. 2 1996 (2) SA 984 (CC) Page 1012 3 HH 399/17 at Page 22. 4 1946 AD 54 5 1986 (1) ZLR 12 (HC)
- [13] In Van Dyk v Conradie and Another⁶, it was said that before a court could postpone a trial and impose a condition that wasted costs be paid before a plaintiff proceeds with his case, there must be negligence, blameworthiness or utter indifference of a high degree, for normally a court does not order a litigant to pay wasted costs of a postponement incurred by another litigant on the basis of attorney client scale unless some special grounds are present such as that the party has dishonest or fraudulent, or actuated by malice or has been guilty of gross misconduct either in the transaction under inquiry or in the conduct of the case.
- [14] In the Van Dyk case (supra) a passage was quoted from Bote's v Potchefstroom Municipality, in which Millin J said: "It seems to me that the decisive factor which influenced the Learned Judge's discretion was the failure to give notice of the intention to apply for a postponement on the day of the trial. That, I think, as shown by his observation that if the plaintiff had taken care some of the wasted costs of the defendant appearing with his witnesses might have been saved⁷".

- [15] In *Poll v de Marillac*⁸, the court found the plaintiff was unable to proceed with the trial because of his ill-health and the court found he was blameworthy in delaying notification to defendant on his ability to proceed and thus putting the defendant to unnecessary expense. The court had been asked expenses incurred by defendant be paid on attorney and client scale basis and dealing with the question the court stated: 6 1963 (2) SA 413 7 1940 TPD 113 at Page 117 8 1941 WLD 35 “I would have had no difficulty on the question of costs, but for the case of *Lakofski v O’ Reilly* (supra). In that case the court granted postponement to the defendant who through his own mistake was not in a position to proceed with trial, but was ordered to pay wasted costs, including attorney and client costs. To make an order condemning the party to pay costs as between attorney and client is an unusual order, it is usually granted when the court has come to the conclusion that the party was actuated by malice or there may be such grave misconduct that the court, in order to make its disapproval, orders the party to pay attorney and client costs, instead of the usual costs⁹”.
- [16] In *Bond Equipment (Pretoria) (PTY) Ltd v ABSA Bank*¹⁰, it was a case of forcing postponement by last minute attempts to amend proceedings, a practice deprecated as interfering with smooth flow of litigation and a remark consonant with Practice Directive. The court ordered wasted costs on an attorney and client scale.
- [17] In the case of *Ben Radiopelo Maphathe v I Kuper Lesotho*¹¹, on the issue of attorney-client costs, the Court of Appeal referred to the Namibian Supreme Court where it stated the applicable approach in *Katjaimo v Katjaimo and Others*¹². Attorney and own client costs are awarded sparingly and only if party and party costs will not adequately indemnify the innocent party in respect of the costs incurred as a result of the opponent’s nonfeasance or malfeasance.
- [18] In the case of *National Executive Committee of the LCD and others v. Mabusetsa Makharilele*¹³, the court in its judgment stated that parties were put 9 1941 WLD 35 at Page 37 10 1992 (2) SA 63 (WLD) 11 C OF A (CIV) NO. 55/2013 12 2015 (2) NR 340 (SC) at 350-351 – H 13 CIV/APN/296/05 [2010] LSHC 25 (16 March 2010) to terms by the court and the matter was formally set down for hearing on arguments on the 19th August 2005. However, and contrary to the plethora of authorities and the pronouncements of both this court and Court of Appeal of Lesotho, the respondent and without notice to the other parties and only a day preceding the date of hearing of the matter, filed a notice of withdrawal of application. It is a matter of common cause that as a result of not only the respondent’s conduct complained about, the applicants who prepared the necessary papers in preparation for prosecution of this application, also incurred unwarranted expenses in the process. There is indeed no other way in which a court of law marks its displeasure with regard to such conduct, except by awarding costs against an offending party. Of course, such judicial discretion is always exercised judicially depending on the circumstances of each case. There is no doubt in the mind of this court that in the circumstances of this case, the respondent’s actions constitute the worst abuse of court process- vide- *Strong Thabo Makenete v Major General Metsing Lekhanya and Others*¹⁴.

- [19] Applicant's counsel referred the court to the case of *Pitso Makhoza Malunga v Lesotho Brewing Company (PTY) Ltd*¹⁵. The facts in this case were briefly that, there were applications set for hearing. Counsel for applicant applied for postponement on the ground that his client wished to engage the services of another legal representative. Later on, the new legal representative for applicant appeared in court and made an application for postponement of the applications on the ground that his instructions were incomplete and that he was only approached by the applicant to represent him three days before the date of hearing, therefore he was not prepared to argue the matter. Counsel for the respondent initially opposed the application for postponement, he ultimately backed down in view of the applicant's counsel none-preparedness but insisted 14 1991-1992 LLR&LB 126 15 CIV/APN/45/95 that the applicant must be ordered to pay costs on attorney and client scale, in as much as the applicant was clearly abusing the court's process and indulgence. Counsel for respondent submitted that applicant knew fully well that the applications would proceed on the date set down for hearing, yet he did nothing until the very last day.
- [20] In the *Malunga* case (*supra*) the court was referred to the case of *Myburgh Transport v Botha t/a S. A Truck Bodies*¹⁶. The court quoted with approval what Mahomed AJA (as he then was) stated as the legal principles applicable in an application for postponement: "1. The trial judge has a discretion as to whether an application for a postponement should be granted or refused (*R v Zackey*)¹⁷.
2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons and
 3. Where the applicant for a postponement has not made his application timeously , or is otherwise to blame with respect to procedure which he has followed, by justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be¹⁸". 16 1991 S. A 310 17 1945 A. D 505 18 *Pitso Makhoza Malunga v Lesotho Brewing Company* CIV/APN/45/95 at page 7.
- [21] Applying the principles enunciated in the cases referred to above, I have concluded that once counsel for the first respondent moved an application for recusal of the judge on the day the matter was supposed to be heard, meant that the postponement was unavoidable, so that the recusal application could be heard first. I have considered the fact that as a result of the last move by the first respondent, the applicant incurred unwarranted expenses in the process. There is indeed no other way in which the court of law marks its displeasure with regard to such conduct, except by awarding costs against an offending party. However, such judicial discretion must always be exercised judicially depending on the circumstances of each case.

- [22] I have considered the fact that on the 27th March 2023, the matter could not be heard, as the first respondent asked the court for an indulgence, so that he could be given time to instruct private legal practitioner of his choice, as he had been so authorised by the Office of the Attorney General. Consequently, the first respondent was given an indulgence to instruct a private legal practitioner of his choice. The matter was then postponed to the 03/April/2023 for hearing. The application for the recusal of the judge was not timeously made, but inexcusably made at the eleventh hour, without prior warning to all the concerned, with the resultant inconvenience to the court and the applicant. The court was treated in a cavalier fashion and this fact alone is in my view a justification to award costs on attorney and client scale, in order to demonstrate to the first respondent, the court's displeasure or its disapproval of the conduct of the first respondent.
- [23] This court finds that the first respondent's conduct by failing to give prior notice to the other side of his intention to apply for the recusal of the judge, put the other party and the court, through a considerable amount of inconvenience, by virtue of the first respondent's last-minute application for the recusal.
- [24] The court has considered the fact that if the first respondent had taken steps to give notice to the other party about his intentions, which would automatically necessitate the postponement of the matter, some of the wasted costs of the applicant such as preparing and appearing in court might have been saved.
- [25] Mr. Maqakachane, counsel for the first respondent informed the court that he was given instructions to represent the first respondent in the matter on the 31st March 2023. He informed the court further that he had gone to the Republic of South Africa to attend to his private matters, and he arrived in Lesotho that morning- 03/04/2023, the day on which the application was supposed to be heard. Mr. Maqakachane did not find it courteous to notify the other side of his intended move on that day. It is a matter of common cause that the other party was in attendance and had prepared to argue the matter. The expenses that were incurred by the applicant on the 03 April 2023 were unwarranted.
- [26] I have considered the fact that at all material times, it was all about the convenience of the first respondent, to the prejudice of the other party. It is worth recalling that prior to the 03/April/2023, the first respondent asked for postponement without prior notice to the other side. The first respondent was reluctantly given the indulgence he asked for. On the second occasion the first respondent without prior notice to the other side, took a move that necessitated postponement of the matter. It is for this reason that this court finds that it was always about the convenience of the first respondent, to the prejudice of the other party.
- [27] There is no doubt in the mind of this court that in the circumstances of this case, the first respondent's actions constitute the abuse of court process. Vide- Strong Thabo Makenete case (supra). Order

1. The first respondent should pay the wasted costs of the 03 April 2023, on attorney and client scale.

T. J. MOKOKO JUDGE FOR THE APPLICANT: ADV. S. PHAFANE KC ASSISTED BY ADV. R. SETLOJOANE FOR THE 1ST RESPONDENT: ADV. MAQAKACHANE. 14

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