

SOUTH AFRICA / JUDGMENT

Maclean v Lentz and Others (2647/2020) [2021] ZAECHGC 104 (25 November 2021)

[2021] ZAECHGC 104

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

2647/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 2647/2020

Date heard: 18 November 2021

Date delivered: 25 November 2021

In the matter between

NTOMBEKHAYA JOYCE MACLEAN Applicant

(Nee NGUQU)

Vs

ELWYN LENTZ N.O. First

Respondent

PUMEZA SIMAYILE Second

Respondent

TULISWA MACLEAN Third

Respondent

NOLUSINDISO MACLEAN Fourth

Respondent

NELITHA MCWABENI Fifth

Respondent

BUHLE HLOMBE NGWANE Sixth

Respondent

ASANDA MAGALELA Seventh

Respondent

THE MASTER OF THE HIGH COURT Eight

Respondent

THE REGISTRAR OF DEEDS Ninth

Respondent

JUDGMENT

LOWE J:

INTRODUCTION

1. This matter came before me effectively in respect of costs only.
2. Applicant had indicated in a letter to the Registrar on 8 November 2021 that she no longer wished to pursue the matter. Subsequently in Court before me on 18 November 2021, appearing personally, Applicant formally withdrew the application. She made no tender as to costs.
3. However she made no submissions that Respondents were not entitled to costs, but rather that her former attorneys, Mageza Mokoena Raffee Inc (“Magezas”) should pay such costs *de bonis propriis*.
4. Applicant was represented by Ms. Molony and Magezas by Ms. Sephton.
5. Magezas was represented at the hearing, Bloem J having on 29 July 2021, made the following order:

“The attorneys as MAGEZA MOKOENA RAFFEE INC and CLOETE ATTORNEYS who, on behalf of the applicant, dealt with the above application until the purported Notice of Withdrawal as Attorney of Record dated 27 July 2021 was filed of record, shall explain on affidavit, to be delivered on or before 5 August 2021, why he, she or they did not withdraw earlier and, if it is found that the explanation is unsatisfactory, why he, she or they may not be ordered to pay any wasted costs occasioned by the late withdrawal de bonis propriis.”

6. It will be noted that the above is limited to the period up to 27 July 2021 on which date Magezas withdrew as Applicant’s attorneys of record.

7. In due course Magezas filed an explanatory affidavit (and an Affidavit from their local attorney of record) as also a Supplementary

Affidavit on the day of the hearing.

8. The matter can be dealt with shortly.

THE APPLICATION

9. In terms of Rule 41(1)(a) an Applicant may, after set down and with the consent of the parties, or leave of the Court, withdraw the proceedings.
10. In this matter that withdrawal occurred on the day set down for hearing with the parties' consent.
11. As there was no costs tender Respondents argued for their costs.
12. Applicant did not, nor could she have on the facts, resist such a request for a costs order.
13. In my discretion and having heard argument and on a perusal of the papers, I can find no basis at all upon which to deprive Respondents

of their costs in the application.

14. The Applicant's argument however was simply that those costs should all be paid by Magezas, de bonis propriis.

COSTS DE BONIS PROPRIIS

15. In essence such an order attaches to a material departure from the responsibility of office such as to justify the representatives being ordered to pay such costs[1].
16. Such an award is unusual and not easily granted. Negligence in a serious degree is required[2]. Such costs have been said to be awarded only in "exceptional circumstances"[3]. This must be decided in the light of the prevailing circumstances in each particular case.
17. In *Multi-links Telecommunications Limited v Africa prepaid Services Nigeria Ltd*[4] the Court held:

"It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care. See, for instance, Cilliers et al Herbstein & Van Winsel: The Civil Practice of the High courts of South Africa 5 ed vol 2 at 984. See also Ward v Sulzer 1973 (3) SA 701 (A) at 706G – 707H.

18. This approach is of material applicability in this matter, the question being whether Magezas can be said to have acted in such manner[5].

THIS MATTER

19. At issue are the costs of the application to date hereof including the costs of the postponement on 12 August 2021. The order in respect of which is as follows:
- “1. The matter be and is hereby postponed to 18 November 2021 for hearing;*
2. The Applicants previous attorneys of record (MAGEZA MOKOENA RAFFEE INC. and CLOETE ATTORNEYS) are to file a notice of withdrawal which properly complies with practice rule 7 of the Joint Rules of Practice for the Eastern Cape, within 5 days of the date of this order;
3. The attorneys of record for the second to seventh Respondents are to serve notice of the above-mentioned date of hearing (of 18 November
- 2021) on the Applicant by way of email, or any other method of service in terms of the Uniform Rules of Court.
4. The issue of costs, including whether or not MAGEZA MOKOENA RAFFEE INC. and/or CLOETE ATTORNEYS should pay the wasted costs of this postponement (due to their late withdrawal as attorneys of record) de bonis propriis, are reserved for determination at the hearing of this matter on 18 November 2021.”
20. The earlier Notice of Withdrawal by Magezas dated 28 July 2021 was in point of fact not effective, not being addressed to Applicant, but Respondents’ attorneys would, on receipt thereof, nevertheless have been alerted hereto on that date.
21. Pursuant to the order and on 17 August 2021, Cloete Attorney and Magezas withdrew in terms of the Rules, putting the matter beyond doubt.
22. In due course a Notice of Set down for 18 November 2021 (attaching my order of 12 August 2021), was directed to Applicant by email, insofar as I understand the papers before me.
23. Pursuant to the order of Bloem J (and as later supplemented), Magezas explained their position on affidavit, as appears more fully below.
24. In short Applicant engaged Magezas on 11 October 2020 – she was destitute it is said but the firm agreed to assist despite her impecunious circumstances – she could not afford to even pay courier expenses in the application.
25. After issue and service of the Application, Magezas’ mandate was terminated by Applicant on 26 January 2021 – this being common cause.
26. Magezas called Respondents’ attorney immediately (Mr. Mthotywa) informing him of this termination.
27. Magezas however failed to file a Notice of Withdrawal in terms of the Rules at that stage.

28. Magezas allege that Applicant was indeed well aware of her withdrawal and was not prejudiced hereby.
29. The local attorneys for Applicant, Cloete and Co, filed an affidavit explaining that they were instructed by Magezas on 10 November 2020, saw to the settling of the application with the assistance of Ms. Sephton which was issued on 1 December 2020.
30. On 10 February 2021, on enquiry, Magezas informed Cloete and Co of the termination of their mandate by Applicant in January 2021.
31. On 29 April 2021 Cloete and Co enquired of Magezas whether they could file a Notice of Withdrawal. No instructions were received however in this regard.
32. On 12 May 2021 the matter was set down for hearing on 12 August 2021 and this was forwarded by Cloete and Co to Magezas.
33. Magezas, it appears from an annexure in the papers, emailed Applicant informing her that the matter was set down as follows:

“Please be informed that this matter is now set down for a hearing in Grahamstown by the respondents on the date made available by the Registrar.

The implications hereof will be a judgment and order undefended by yourself. It is important for us to advise you of this development

and the potential consequence that any such order will have. In effect, they will, in the absence of legal representatives to argue

the matter be entitled to an order which will be effective against your interest.”[6]

34. There is no reason to doubt that this was an email duly sent.
35. In a supplementary affidavit Magezas deals with Applicant’s statement from the bar that she had told Magezas in January 2021 that she “did not wish to proceed with this matter.”[7] Magezas states under oath that at no time were they instructed by Applicant to withdraw the application but rather that she terminated their mandate to represent her.
36. As Ms. Molony argued, it seems at best for Applicant, that as a lay person she may perhaps have regarded a termination of mandate as being a termination of the application, which is however clearly not the case and an unjustified confusion, which cannot adhere to Magezas.
37. There is nothing before me to indicate that an instruction was in fact given to Magezas to withdraw the application – something an attorney would clearly understand and which would have cost implications for Applicant, and which would surely have been a matter carefully explained to the client in those circumstances.
38. Indeed the subsequent correspondence and emails between Magezas and Applicant support Magezas’ version in this regard, in my view.

39. It must be said, however, that Magezas clearly failed to timeously file a Notice of Withdrawal in January 2021, the first notice being dated 23 July 2021, but not being addressed to the Applicant.
40. The second withdrawal notice on 17 August 2021 was in good order.
41. The effect hereof would, at best for Applicant, relate to such costs as were incurred unnecessarily after the instruction to withdraw was given in January 2021 up to 17 August 2021.
42. Those costs effectively relate only to those wasted on 12 August 2021 when the matter was postponed as appears above, and would not impact on the remaining costs including the exchange of affidavits after issue.
43. However, it cannot be overlooked that on 12 May 2021 the Notice of Set down for 12 August 2021 was communicated to Applicant by email from Magezas (although she denies receipt hereof from the bar).[8]
44. The issue is whether those costs, for there are none others relevant before proper withdrawal and notice was given, should be paid de bonis propriis by Magezas
45. I emphasize that this conclusion is drawn on the basis that I cannot, on what is before me, conclude that Applicant instructed Magezas to withdraw the application, as she maintains.
46. This conclusion is reinforced by an email from Applicant to Magezas on 26 January 2021 which says clearly "...I therefore am terminating your legal services on my ANC case with immediate effect." There is no reference to an instruction to withdraw the application.
47. On 7 March 2021 Applicant emailed Magezas again referring to the termination of her mandate and stating that she would not be liable for further costs which may be incurred in the matter.
48. In my view having regard to the emails referred to above, and that of 12 May 2021, Magezas failure to withdraw, even if implicated in the wasted costs of 12 August 2021, which is far from clear, is not in the circumstances of this matter, conduct sufficiently egregious or grossly negligent as to warrant a costs order de bonis propriis therefore.
49. It must be remembered in this regard, that Applicant would have been fully aware from her instruction to Magezas to withdraw in January 2021 (that is to withdraw as her attorneys of record, she having terminated their mandate, as later confirmed), and would have been more than aware that she was on her own in the matter, alternatively must instruct other attorneys. If she was under a misunderstanding what a withdrawal of mandate meant, this can hardly be laid at the door of Magezas. That the matter was proceeding was clearly drawn to her attention by Magezas on 12 May 2021 and it would have been clear then to Applicant that the application had not been withdrawn and was proceeding.

50. I am not persuaded, that the late filing of a Notice of Withdrawal, would have materially affected the outcome hereof, or was conduct of the nature required.

ORDER

51. In the result:
1. That the application is withdrawn by agreement between the parties as at 18 November 2021, is noted.
 2. Applicant is to pay the Respondents costs of the application including the wasted costs of 12 August 2021.
 3. There is no order as to costs de bonis propriis in respect of the application in respect of Mageza Mokoena Raffee Inc.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: In person

Appearing on behalf of the Respondents: Adv. Molony

Instructed by: Netteltons Attorneys, Ms. Pienaar

Appearing on behalf of Attorneys Mageza and Cloete: Adv. Sephton

Instructed by: Mageza Mokoena Raffee Inc, and Cloete Attorneys

[1] Kenton on Sea Ratepayers Association v Ndlambe Local Municipality 2017 (2) SA 86 (ECG) 118F

[2] Lushaba v MEC for Health, Gauteng 2015 (3) SA 616 (C) at 634 D - E

[3] Kenton (supra) 118 F – G and President of the RSA v The Public Protector 2018 (2) SA 100 GP at 147 A – 148 I

[4] 2014

(3) SA 265 GP at 289 A - D

[5] In Pheko v Ekurhulini City 2015 (5) SA 600 (CC) at 625 D - E an attorney was ordered to pay the costs being found to have been grossly negligent.

[6] The affidavit of Mr. Jolobe of Cloete Attorneys says in terms that this email informed Applicant that the matter was set down for 12 August 2021, presumably attaching the Registrar's set down referred to in the subject line.

[7] In point of fact Applicant denies receipt of the Mageza email referred to above of 12 May 2021.

[8] See above at para 33

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Prepared on 11 October 2026 · Esheria