

SOUTH AFRICA / JUDGMENT

Silinga and Others v Nelson Mandela Metropolitan Municipality (CA266/2017) [2018] ZAECHGHC 50 (26 June 2018) [2018] ZAECHGHC 50

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G G Goosen, F Dawood

CASE / FILE NUMBER

CA266/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA 266/2017

Date heard: 1 June 2018

Date delivered: 26 June 2018

In the matter between

HLUMILE ABONGILE SILINGA First

Appellant

MIHLALI MNCI Second

Appellant

SAKHILE MNCI Third

Appellant

And

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

GOOSEN, J.

[1] This is an appeal against a magistrate's court order for costs de bonis propriis ordered against the legal representatives of the appellants. The order was made pursuant to the postponement of the trial of the

matter before the magistrate's court.

[2] The appeal was prosecuted in terms of s 83 (b) of the Magistrate's Court Act, 32 of 1944 (as amended). The right to appeal against a costs order is accordingly unqualified (cf. *Du Plessis v Nienaber* 1948

(4) SA 293 (T) at 297) and, so it was submitted, encompasses an appeal such as the present where the affected party is the legal representative of the appellant. I shall, for present purposes assume that this is so, since there exist good reasons, which will be set out hereunder, for this court to interfere with the order made.

[3] Summons was issued by the respondent on 12 April 2012 in which it claimed payment of R34 402.10 in respect of municipal rates due and payable by the appellants. Mrs Ndlovu of the firm D N Ndlovu & associates is the attorney of record of the appellants. The case was eventually set down for trial for the first time on 1 December 2015, some 3 ½ years after summons was issued. It is not known what occasioned this delay.

[4] On 1 December 2015 the matter came before magistrate Bono. The respondent was represented by Adv Bands. Mrs Ndlovu did not appear

apparently due to the fact that she was engaged in a matter in the High Court. In her stead a candidate attorney employed by the firm of attorneys appeared on behalf of the appellants. The candidate attorney moved for a postponement of the trial. This was opposed. Following a short adjournment to enable the candidate attorney to prepare and after hearing argument, the magistrate granted the postponement sought but ordered the attorneys, D N Ndlovu & associates, to pay the costs occasioned thereby de bonis propriis and on the scale between attorney and client.

[5] The appellants thereafter requested reasons for the judgment, pursuant to Rule 51 (1) of the Magistrate's Court Rules. No reasons were furnished. It appears that several requests were directed to the magistrate to no avail.[1] On 22 February 2017 the appellants' attorney wrote to the Senior Control Magistrate to request assistance in obtaining reasons

for judgment. The reasons were eventually delivered on 28 March 2017, whereafter the appeal could be prosecuted.

[6] Regrettably the delays did not end there. What followed was a further delay, albeit relatively minor, in the filing of the notice of appeal and the filing of the record of appeal. In respect of these delays the appellants sought condonation. This was not opposed. Condonation was accordingly granted at the hearing.

- [7] A court of appeal will be slow to interfere with a costs order made by a lower court. This is so because the question of costs is a matter for the exercise of the trial court's discretion. An appeal court will, however, interfere where the court a quo has not exercised its discretion judicially or has materially misdirected itself in the application of its discretion.
- [8] An award of costs *de bonis propriis* is generally reserved for matters in which a litigant litigates in a representative capacity. Such an award will be made as measure of the court's disapproval of the representatives conduct (see *Moller v Erasmus* 1959 (2) SA 465 (T) at 467 B-C). The conduct of the fiduciary or representative must evidence a lack of bona fides; negligence or recklessness in the conduct of the litigation; or improper conduct which deviates from the standards of conduct to be expected of the fiduciary or representative (cf. *Vermaak's Estate v Vermaak's Heirs* 1909 TS 679 at 691; *Blou v Lampert and Chipkin NNO and Others* 1973 (1) SA 1 (A) at 14).
- [9] Our courts have also made orders for costs *de bonis propriis* against the legal representatives of parties to litigation. Such orders are generally only made in exceptional circumstances (see

Thunder Cats Investments 49 (Pty Ltd v Fenton 2009 (4) SA 138 (C) at 151A-B). In *Multi-Links Telecommunications v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and Another v Blue Label Telecoms Limited ad others*

[2013] 4 All SA 346 (GNP) at para [34] and [35] Fabricius J said,

Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially

exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and Counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal

convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, the court. Legal practitioners

must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner. See *Kekana v Society of Advocates of South Africa*

[1998] ZASCA 54; 1998 (4) SA 649 (SCA) at 655-656 [also reported at [1998] ZASCA 54; [1998] 3 All SA 577 (SCA) – Ed].

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 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 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 the attorney in any particular context. Examples are, dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care.

- [10] In order to warrant such an order the court should be satisfied that there has been negligence in a serious degree or that the practitioner has acted inappropriately in 'a reasonably egregious manner' (see *Stainbank v SA Apartheid Museum at Freedom Park and Another* 2011 (10) BCLR 1058 (CC) at par 52; see also *SA Liquor Traders Association v Gauteng Liquor Board* 2009 (1) SA 565 (CC) at par [34]).
- [11] An order that a legal practitioner (or for that matter a representative litigant) should pay the costs personally carries with it obviously serious consequences that necessarily impinge upon the rights and interest of that representative. It is for this reason that, in dealing with such costs orders, a practice has been developed by the courts to afford the affected party notice of the intention to impose such order and an opportunity to make representations or submissions prior to such order being made. This practice usually involves the issuing of a rule nisi calling upon the affected person to show cause why such order is not made and is based upon constitutionally protected fundamental rights to a fair hearing (see *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC) at par [18] – [21]; cf also *Tasima (Pty) Ltd v Department of Transport and Others* 2013 (4) SA 134 (GNP); *Black sash Trust and others v Minister of Social Development* 2017 (9) BCLR 1089 (CC)).
- [12] In the present matter the magistrate did not follow a procedure which allowed the party against whom she intended to make an order to show cause why it should not be made. The absence of such procedure was justified on the basis that the candidate attorney, to whom the magistrate's intention was communicated, agreed to such order being made against the firm. A reading of the record indicates that the candidate attorney who was dispatched to attend to the postponement of the matter was hopelessly out of his depth. It appears that he sought to move for a postponement without having had regard to the relevant rules of court and that he was poorly prepared to deal with the issues raised on the day. Whilst it is certainly so that more could have been expected of him, as a young professional in training, his ineptitude was apparent to the magistrate and can hardly serve as justification for not affording the firm of attorneys a proper opportunity to be heard. Nor can the 'concession' or 'agreement' by the candidate attorney that such order be made be properly considered to be binding upon his principal given the circumstances in which it was made.

- [13] There is therefore, on the record of the proceedings before the magistrate, a material breach of the rights of the affected party and, accordingly a material misdirection which serves to vitiate the exercise of the magistrate's discretion.
- [14] In the light of this finding, it is necessary only to outline the basis for the magistrate's decision in the briefest terms since it bears also upon the scale of the costs order.
- [15] The application for a postponement was founded upon Mrs Ndlovu's unavailability to conduct the trial due to the enrollment of a High Court matter in which she had ongoing involvement. Mrs Ndlovu had corresponded with the representatives of the respondent in an email dated 18 November 2015. In that email she advised that a part-heard matter in which she was involved in the High Court had been enrolled and that she was therefore not available for the trial in the magistrate's court. She requested that it be removed from the roll.
- [16] Even if it is accepted that the basis upon which the postponement was sought reflects adversely upon the attorney and that such explanation may not, ordinarily, serve to persuade a court to grant a postponement, there is nothing to suggest that Mrs Ndlovu's

conduct was such as to justify an order for costs which is only made in exceptional circumstances. In my view, on this basis also, it cannot be said that the court a quo exercised its discretion judicially.

- [17] The order made was punitive in both form (a personal costs order) and its content (the scale of costs awarded). In both respects the order cannot be sustained. It follows that the appeal must succeed. The question which arises is what order should replace that made by the magistrate since the costs were occasioned by a postponement sought by the appellants.
- [18] Where a postponement is sought as an indulgence the costs occasioned thereby are ordinarily borne by the party seeking the postponement.

There is no reason why such an order should not be made. I understood counsel for the appellants to concede that this would be an appropriate order. There was some debate about the scale of costs. However, on the record there is no reason why the appellants, who, as parties to the litigation, are liable for the costs should be mulcted by a punitive costs order.

- [19] Finally there is the question of the costs of appeal. The respondent vigorously opposed the appeal, notwithstanding that it could have adopted a stance premised upon an understanding that its wasted costs should be paid by the party who sought the postponement. The appellants persisted, up the hearing of the appeal, that the costs occasioned by the postponement ought to be reserved. In these circumstances and considering that the adverse costs order appealed against was made *mero motu* by the magistrate, it seems to me that fairness dictates that each party bear their own costs on appeal.

- [20] I therefore make the following order:

1. The appellants' appeal succeeds.
2. The order made by the magistrate is set aside and replaced with the following order:
"The trial is postponed sine die and the defendants are ordered to pay the plaintiff's wasted costs occasioned by the postponement."
3. Each party shall pay their own costs of the appeal.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

DAWOOD, J.

I agree.

F. DAWOOD

Appearances: For the Appellants

Adv. B. J. Pienaar SC

Instructed by D. N. Ndlovu & Associates

C/o Mili Attorneys

For the Respondent

Adv. I. Bands

Instructed by McWilliams & Elliot Incorporated

C/o Whitesides Attorneys

- [1] The first request was delivered on 14 December 2015. A further request was delivered on 22 September 2016.

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