IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Case No.15/2015

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

vs

THEMBA MACILONGO NDLOVU **1st Respondent**

JUSTICE MANGOSUTHU MZIZI **2nd Respondent**

Neutral citation: *The Director of Public Prosecutions v Themba Macilongo Ndlovu & Ano (15/2015) [2015] SZSC 21 (29 July 2015)*

Coram: **M.C.B. MAPHALALA ACJ, J.P. ANNANDALE and M.D. MAMBA AJA**

Heard: 15 July 2015

Delivered: 29 July 2015

[1] Civil Procedure – no appeal lies against the findings of a court unless such findings constitute the order of the court. Only orders made by the court are appealable.

[2] Civil law and Procedure – appeals by the Director of Public Prosecutions in terms of sections 6 and 7 of the Court of Appeal Act 74 of 1954. Where the appeal is disallowed or unsuccessful the Director of Public Prosecutions may be ordered by the Court to pay the costs of the appeal and such costs would be payable by the Government.

JUDGEMENT

MAMBA AJA

[1] The Respondents who are both attorneys of the High Court of Swaziland and practising as such under the style Masina Ndlovu Mzizi Attorneys, were arrested by members of the Police acting in concert with officers from the Anti Corruption Commission. Their arrest and detention was sometime in March 2015 and they were charged under the Prevention of Corruption Act 3 of 2006.

[2] Following their arrest and detention, the respondents filed an application for bail before the High Court. Although the application was opposed by the appellant, it was granted by the High Court in an ex-tempore judgment granted by Hlophe J on 24 March 2015. The written judgment and reasons thereof were subsequently handed down on 19 June 2015.

[3] By notice dated 25 May 2015, the appellant filed a notice of Appeal against the judgment of the High Court. The sole ground of appeal stated in that notice reads as follows:

> '1. The Court *a quo* erred in law in issuing an order that the matter be commenced by way of summons when in actual fact the matter had come to court on a strength of a warrant of arrest.'

[4] As can be seen from the tenor of the ground of appeal stated in the preceding paragraph, the appellant is not appealing against the actual order allowing or permitting the respondent to be freed on bail. The appeal is really based on an issue or reason that is incidental or secondary to the actual order made by the court *a quo*. It is really a peripheral or ancillary issue which does not constitute the order of the lower court and has no definitive effect thereon. During the very brief argument on this issue before us, Counsel for the appellant readily conceded this point. He further candidly conceded before this court that the appellant is not challenging the order by Hlophe J granting bail to the respondents. He conceded further that whether the ground of appeal was successful or not, the result would have absolutely no bearing or impact on the order granted by Hlophe J.

[5] This issue was settled by this Court in *Swaziland Royal Insurance and Another v George Edward Green, Civil Appeal 26/2012* (unreported, judgment granted on 30 November 2012. There the Court stated as follows;

> "IV. During the hearing of the appellants' appeal this court raised the issue whether or not a finding made by a court in course of making an order is appealable. Counsel for the respondent submitted that the findings made by the court *a quo* were only incidental to the main dispute and did not have any definitive effect on the order made. Consequently, they are not appealable. Counsel for the appellant, however, argued that (1) the court a quo had no jurisdiction to entertain the application for the Anton Piller order. Further, the insured … was wrongly joined in that application.
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> … Counsel submitted therefore, that these were errors of law relating to those findings which could only be remedied by an appeal. …
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> (V) In my opinion, the submissions of Counsel for the first appellant are erroneous. The matter was succinctly put by this court in the case of Gugu Prudence Hlatshwayo (Appellant) and the Attorney General – (Respondent) (2006) SZSC 8 (2/2006). See also Administrator, Cape and Another v Ntshwangela and Others

> 1990 (1) SA 714 (A) at 715C-D where the Court held that an appeal does not lie against the findings or reasons for judgment but only against the substantive order made by a court."

[6] Counsel argued that the issue was, however, going to be of legal guidance to the appellant in the future. In a word, the appellant was merely seeking legal advice from this court on how to go about bringing suspects to court who are under similar circumstances as the respondents were before being granted bail. It is not the role or function of this Court to give the service sought by the appellant in this Appeal. As stated by Innes CJ in Geldenhuys and Neethling v Beuthin 1918 AD 426 at 441;

> 'Courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'

(See also *Legal Aid South Africa v Magidiwana and Others [2014] 4 All SA 570 (SCA)* and the cases there cited). The appeal is entirely misconceived.

[7] In fairness to Counsel for the appellant, he immediately realised the enormity of the error and the futility of the appellant's argument and he

promptly withdrew the appeal. I think this was the best option to take in the circumstances as the appeal was certainly destined for failure. The appeal is accordingly struck off the roll. Counsel for the appellant was, however, opposed to the grant of any order for costs against the appellant. I now examine this issue in the next segment of this judgment.

[8] Before I leave the issue of this ill-fated appeal, I should note that it is common cause that the noting of the appeal itself was out of time and the appellant subsequently filed an application for condonation thereof. This application was again opposed by the respondents. Ultimately, this application was not argued before us in view of the withdrawal of the appeal itself by the appellant.

[9] Appeals by the prosecution to this Court are governed by sections 6 and 7 of The Court of Appeal Act 74 of 1954 (hereinafter referred to as the Act). I set these sections out in full below:

> '6. (1) The Attorney-General or, in the case of a private prosecution, the prosecutor, may appeal to the Court of Appeal, against any judgment of the High Court made in its criminal original or appellate jurisdiction, with leave of the Court of Appeal or upon a certificate of the Judge who gave the judgment appealed

against, on any ground of appeal which involves a question of law but not a question of fact, nor against severity of sentence.

(2) For the purposes of this section, the question is to whether there was any evidence upon which the court could have come to the conclusion to which it did come shall deemed to be a question of fact and not one of law.

7. (1) On an appeal brought by the Attorney General or other Prosecutor the Court of Appeal may, if it decides the matter in issue in favour of the appellant –

(a) give such decision or take such action as the High Court ought, in the opinion of the Court of Appeal, to have given or taken; or

(b) give such directions as the Court of Appeal may think just.

(2) If an appeal brought by the Attorney General or other Prosecutor is disallowed, the Court of Appeal may order that the appellant pay to the respondent costs, if any, to which the respondent was put in opposing the appeal and such costs may be taxed according to the scale of civil appeals to the Court of Appeal.

(3) If the Attorney General is the appellant the costs which he is so ordered to pay shall be paid by the Government."

Plainly, from a reading of the provisions of section 6 (1) quoted above, the appeal also fell foul of those provisions inasmuch as the appellant did not either seek and or obtain the leave of this Court nor the certificate of Hlophe J to note this appeal. It is common cause further that as the bail application involves a prosecution by the Director of Public Prosecutions (at the public instance), any reference to the Attorney-General in the aforequoted sections should be read as a reference to the Appellant. This is in terms of the Director of Public Prosecutions Order No 17 of 1973.

[10] At first glance it would appear that section 7 (2) of the Act empowers this Court to order costs against the appellant only where the appeal has been *disallowed* and does not govern the case where the appeal has been withdrawn as in the present case. However, I do not think that this simplistic interpretation is warranted. *Disallowed* in this case means unsuccessful. The general tenor and scheme of these provisions is to permit this court, in the exercise of its judicial discretion to award costs against the appellant where the appeal has been unsuccessful. But even so, this court has, in my judgment, a general discretion on the issue of costs pertaining to matters heard by it.

[11] Referring to a similar provision of **The Criminal Procedure Act 56 of 1955 of South Africa, Du Toit etal, Commentary on the Criminal Procedure Act, revision service 15, 1995** at 30-44 states as follows:

> 'section 2 refers to orders of costs after the dismissal of an abortive appeal by the Attorney-General to either a Provisional division or the Appellate Division. Although the subsection leaves the granting of costs to the discretion of the particular Court of Appeal *(R v Lusu 1953 (2) Sa 484 (A) 492H)*, the courts abide by the principle that costs follow the result of the appeal where the Attorney-General's appeal is dismissed. This principle is not valid when reversed, however, with the result that the respondent does not have to pay the costs of a successful appeal by the Attorney-*General (S v Mckenzie 1967 (1) SA 62 (E) 69F-G; S v Davidson 1964 (1) SA 192 (T) 1978; Attorney-General, Transvaal v Lutchman and Another 1959 (2) SA 583 (A) 588; R v Skorpen and Another 1950 (2) SA 383 (N) 397).* A successful party will be denied its costs only in exceptional circumstances *(R v Lusu (supra) 492G-H; R v Skorpen (supra) 397).* If the question of law is decided in favour of the Attorney-General; but the appeal is nonetheless dismissed on the grounds of an argument which was not raised by the respondent, the Attorney-General will not be

> burdened with the respondent's costs *(Prokureur-General (kaap) v Barenblatt NO en'n ander 1960 (2) SA 534 (A) 543 F-H)*. It is certain that at present the power to order an unsuccessful Attorney-General to pay the respondent's costs is not limited to those cases where the appeal was frivolous or vexatious (S *v Ranta 1969 (4) SA 142 (T) 148G-H; S v Davidson (supra)).'*

With due respect, I align myself with these views as also representing the law in this jurisdiction.

[12] As already stated, the issue of costs is a matter within the discretion of this Court. The Court exercises a judicial discretion. Such discretion must be based on justice, fairness and equity. The aim is not to punish an unsuccessful litigant, unless the court decides that a punitive costs order is necessary or merited. The aim is to compensate the successful party by putting him or her as near or close as possible, in monetary terms, to his or her condition prior to the litigation.

[13] Ordinary costs are compensatory and not punitive. The respondents have applied for costs to be awarded at Attorney and own client scale. That is a punitive order for costs. The justification for this, the respondents argue, is that the appellant first, failed to follow the rules of court by failing to either seek leave of this court or obtain a certificate from the

Honourable trial judge in order to file this appeal and secondly, filed the appeal well out of time. The third reason or ground is that the appeal itself was on an issue that was not appealable and was therefore without any merit or justification.

[14] In *Swazi MTN Limited and 3 Others v Swaziland Posts and Telecommunications Corporation and Another app. Case (58/2013)* dated 29 November 2013, this Court stated as follows:

> 'Now, the law on attorney and client costs as well as costs de bonis propriis is well settled in this jurisdiction. In the first place an award of costs lies within the inherent discretion of the court. Such a discretion must not, however, be exercised arbitrarily, capriciously, mala fide or upon a consideration of irrelevant factors or upon any wrong principle. It is a judicial discretion. Generally speaking, an award of costs on attorney and client scale will not be granted lightly. The authors Cilliers, Loots and Nel: Costs 5th edition state the principle succinctly and page 971 in following apposite terms:-
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> "An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalize a person who has exercised a right to obtain a judicial decision on any complaint such party may have."

We agree with this statement. We wish to caution, however, that everything has its own limits. It is not inconceivable that even a person who exercises his right to obtain a judicial decision may abuse such right. In such a situation the court would be entitled within its discretion to award costs on attorney and client scale against such person in order, for example, to mark the court's displeasure.

There are several grounds on which the court may grant an award of costs on attorney and client scale. The list is certainly not exhaustive. It includes dishonesty, fraud, conduct which is vexatious, reckless and malicious, abuse of court process, trifling with the court, dilatory conduct, grave misconduct, such as conduct which is insulting to the court or to counsel and the other parties. As to authorities see the leading case of *Nel v Waterberg Landbouwers Kooperatiewe 1946 AD 597 at 607.'*

[15] In *Intercontinental Sports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA*) at para 25 Smalberger JA explained the nature of this discretion in the following terms:

> 'The Court's discretion is a wide, unfettered and equitable one. It is a facet of the Court's control over the proceedings

> before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation.'

This rule applies across the board whether the order for costs is at the ordinary scale or on the scale as between attorney and own client or even where the costs are to be borne by one or more of the parties or their legal representatives *de bonis propriis*. In this case I deal with the issue of costs on a punitive scale; ie on attorney and client scale. See *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging, 1946 AD 597 at 607* and *Ward v Sulzer, 1973(3) SA 701 (AD at 706-707*). See also Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa, 3rd ed (1979)* at 487 where the learned authors state the rule or position as follows:

> "Tindall JA [in *Nel supra*] stated that by reason of special considerations 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 may consider it just, by means of such an order, to ensure more effectively than it can do by means of a judgment for a party and party costs that a successful party will not be out of pocket in respect of the expense caused to him by the litigation.
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> An award of attorney and client costs will not be lightly granted, as the court looks upon such orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have.
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> The grounds upon which the court may order a party to pay his opponent's attorney and client costs include the following: that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous, or that he has misconducted himself gravely either in the transaction under inquiry or in the conduct of the case.'
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> (I have omitted all foot notes and would also add that such costs may also be awarded against a party who has been mendacious).

[16] Again, In *MCpherson v Teuwen and Another (2009/27002) [2012] ZAGP JHC 18* (22 February 2012) KGOMO J stated as follows:

> '[55] Attorney and client costs are those costs which a litigant or attorney is entitled to recover on behalf of or from a client in respect of disbursements made on behalf of the client and for professional services rendered by him to and for his client. They are normally payable by the client whenever and whatever the outcome of the case. This is in contradistinction to or with party and party costs whose purpose of granting was clearly set out in *Die Voorsitter van die Dorpsraad van schweizer – Reneke v Van Zyl 1968 (1) SA 344 (T) at 345.*
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> …
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> [57] Attorney and client costs are mostly only awarded under extraordinary circumstances or where they are part of the parties' agreement. For a party to be saddled with an order of costs an attorney and client scale, such a party would most probably have acted or conducted itself *mala fide* and or misconducted itself in one way or another during the litigation process. Normally, such a party would have been capricious, brazen and or cowboyish in its approach to the litigious process and not have cared what the consequences of its acts or actions would be on the legal process and or the other side.'

The learned judge also noted that where a party has acted in good faith, although an element of fraud or recklessness could be inferred, the court

might still refuse to grant costs at attorney and client scale. I fully endorse these remarks as reflective of the practice in this court as well. (See also *De la Guerre, Juanna Elize v Ronald Bobroff and Partners INC and 2 others, case 2264/2011 (RSA HC).*

See also the judgment by this Court in Philani Clinic vs SRA.

[17] I have outlined above the obvious deficiencies or short-comings in this appeal. These were acknowledged by the appellant and consequently the appeal was withdrawn. The withdrawal, one might argue, was rather too late and the respondents had already been put out of pocket as a result of the noting of the appeal. Whilst, I fully share the respondents' concerns in this regard, I am not satisfied that this is a proper case for this court to penalise the unsuccessful appellant with a punitive order for costs. I say so fully mindful of the fact that the appellant essentially comprise a team of legally trained and experienced personnel who ought to have executed their task in a more professional, reasoned and measured manner than they did in this abortive appeal. Notwithstanding all these negatives inherent in this appeal, a punitive costs order in the special circumstances of this case, may have a negative effect of discouraging aggrieved parties from prosecuting or persuing their legitimate grievances before this court. This is of course not to suggest that litigants are free to pursue their grievances in any manner. The rules of Court are there to guide them.

[18] In *Alton Ngcamphalala and 3 Others v R, Civ. Appeal 20/2005*, this Court had occasion to deal with the issue of costs under almost similar circumstances. Unfortunately though, the issue was not argued before the court and therefore the court did not deal with it. The prayer for costs was abandoned, 'because of the provisions of rule 28 of the Court of Appeal Rules precluding the allowing of costs in criminal appeals and matters incidental thereto.' That rule provides as follows:

> 'Subject to section 4A of the Act, no costs shall be allowed to any party on the hearing and determination of a criminal appeal or any proceedings preliminary or incidental thereto.'

[19] This rule is problematic. First, it goes counter to the clear provisions of section 7 of the Act quoted earlier. Secondly, there is no section 4A in the Act. I have, regrettably not been able to trace the origin of this rule in the very limited time I have had to consider this matter. Nonetheless, it appears to me to be nothing but a stray bullet with no obvious target. It is an *obscurum per obscurius* (obscure by the still more obscure). It is lost in the total scheme of the Act governing this court. But more importantly, where there is a conflict between the Act and the rules, logic and legal reasoning dictates that I follow the provisions of the Act. Those

provisions empower this court to make an order for costs, in a criminal appeal, against the appellant where the latter is unsuccessful.

[20] In the result, I make the following order:

(a) The Appeal is struck off the roll and

(b) The Appellant is ordered to pay the costs of this appeal on the ordinary scale.

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M.D. MAMBA AJA

I agree.

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M.C.B. MAPHALALA ACJ

I also agree.

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J.P. ANNANDALE AJA

For the Appellant: **Mr. M. Nxumalo**

For the Respondents: **Mr. M. Dlamini**