

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSE

CIVIL APPEAL NO. 43/95

In the matter between:

A.P.F. CHICOLE - Appellant

and

SUN PUBLISHING (PTY) LTD - 1st Respondent

RAHIM KHAN & COMPANY - 2nd Respondent

Mr. A.P.F. Chicole In Person

Mr. B.D. Radipati for the Respondents

J U D G M E N T

CORAM: Aguda, J.A.
Lord Cowie, J.A.
Lord Allanbridge, J.A.

AGUDA, J.A.:

The dispute between the appellant and the respondents in the Courts has spanned over a period of nearly six years beginning with a writ of summons issued by the appellant against the first respondent in the High Court, Francistown on April 15, 1991 claiming damages in respect of an alleged defamation of the appellant by the first respondent. No useful purpose will be served by recounting all the legal battles that have been fought by the parties in that Court and in this Court in that period of nearly six years. For the purpose of this appeal it is sufficient to commence with the orders which were made at the final conclusion of the suit in respect of which the appellant issued the writ in 1991. Judgment in the suit was given in favour of the appellant on December 7, 1994 as follows:

- (i) damages in the sum of P7,000, and
- (ii) costs to be assessed.

Upon the first respondent failing to make payment to the appellant in satisfaction of the judgment, he then made an application in terms of Order 54, rule 1, against the first respondent together with the second respondent who had stood surety for the first respondent. In respect of that application Gyeke-Dako, J., made the Order Nisi as prayed on June 16, 1995; with June 30, 1995 as the return date. On that day the matter came before Cotran, J., who refused the order sought. However when the matter came before the same Judge again on July 28, 1995, the second respondent told the Court that he accepted responsibility and that he had issued three post-dated cheques - dated August 31, September 30, and October 31 respectively - in satisfaction of the judgment debt. The appellant told the court that he was accepting the cheques in satisfaction provided that they were honoured whenever they were presented for payment. The learned Judge then made certain orders which he thought would finally bring the matter to an end.

However, on August 7, 1995, that is before the first cheque had matured, the appellant filed yet another application seeking an order of rescission of the Order made by Gyeke-Dako J., on July 28, 1995. That application was heard on August 18, 1995. However on the same date that the appellant filed his application, viz August 7, 1995, the second respondent sent a letter to the Registrar of the High Court signed by Mr. Khan

requesting him to bring to the attention of the Judge seized of this matter his application to review the order of July 28, 1995, and to amend the same accordingly. The Respondent did not send a copy of that letter to the appellant, but the Registrar sent a photocopy of it with the minute of Cotran J. on it to him. In a reserved ruling on the appellant's application, Cotran, J., on September 7, 1995, held that it was misconceived and was for that reason dismissed. He made no mention of the second respondent's letter of August 7, 1995. He then made an order for costs on "attorney and client scale." It is against that Order that the appellant has filed this appeal.

After the matter had been thoroughly argued before this court on January 23, 1997, we ordered that the appeal be allowed, and that the order of costs be made one as between party and party; we also held that the appellant was entitled to the costs of this appeal. We indicated that we would give our reasons later, and that is what we now do.

To begin with I would like to register my displeasure at the conduct of Mr. Rahim Khan in writing to the Registrar and asking him to bring to the attention of the Judge his wish that the Judge should "review his order and amend it accordingly." Mr. Khan knew or should have known that that was not the proper procedure for the achievement of what he was seeking to achieve. What made the conduct more annoying to me was the failure of Mr. Khan to send a copy of his letter under reference to the other party to the suit. It is, in my view, an elementary principle

of the administration of justice that no party to a dispute in court may be allowed to have an undue advantage over the other. How Mr. Khan expected the learned Judge to accede to his request, even if it was one that could have been granted, behind the back of the other party, baffled my imagination. I do hope that neither Mr. Khan nor any other legal practitioner in this country will tread the path he has trodden in this case and hope that nothing adverse will happen to him.

Having disposed of that preliminary matter I will now go on to consider whether or not the Court a quo was right when it ordered costs on attorney and client scale. The question of the scale of costs to be ordered is always at the discretion of the Court, but that discretion must be judicially exercised. Once so exercised an appeal Court would have no right to review or overrule the exercise. But the exercise must be based upon facts which are by themselves clear on the record or which are set down clearly by the court a quo.

In this case there is nothing on the facts and circumstances upon which the order made could be said to have been properly made. And the learned Judge said merely that "this application is misconceived and it is dismissed with costs on attorney and client scale as prayed by the respondents." He has not stated any facts and circumstances which would justify the order which he has made.

Two basic principles must always be remembered. The first is

that as a general rule, a party who has successfully prosecuted or defended a court suit is entitled to an award of costs, unless there are very strong circumstances which will make such an order unjust. The second is that the successful party is, as a rule, only awarded costs as between party and party. A corrolary to this second rule is that the court will not lightly award attorney and client costs and will make such an award only on rare occasions. As Searle, A.J., said in Van Wyk v. Millington 1948 (1) SA 1205, at 1215 -

"The Court is always loath to award attorney and client costs against a party, unless for very strong reasons, because every man has a right to bring his complaints or his alleged wrongs before the Court to get a decision, and he should not be penalised if he is misguided in bringing a hopeless case before the Court."

In addition I would also like to recall what the court said in Pohl v. de Marillac 1941 WLD 35, at 37 thus:

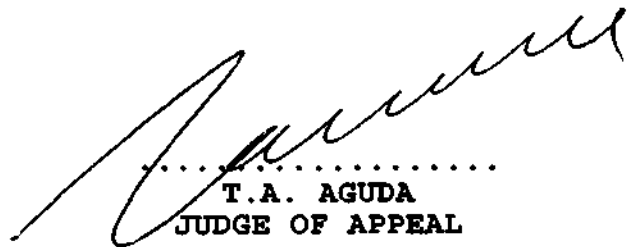
"To make an order condemning the party to pay the costs as between attorney and client is an unusual order; it is usually granted when the Court has come to the conclusion that the party has been dishonest or fraudulent; or where the Court has come to the conclusion that the party was actuated by malice, or there may be such grave misconduct that the Court, in order to mark its disapproval, orders the party to pay attorney and client costs, instead of the usual costs."

In my experience the principles stated in these cases have been guiding this Court for decades in the award of costs and they

appear to me quite sound. It is quite clear that the award that was made by the Court a quo in this case, cannot have support under these principles, and it was for that reason that we set it aside.

In the result as stated earlier the appeal succeeds and an order of costs as between party and party is made in respect of the proceedings in the Court below. The appellant shall have the costs of the proceedings in this Court.

Delivered in open court this 28th... day of January 1997.



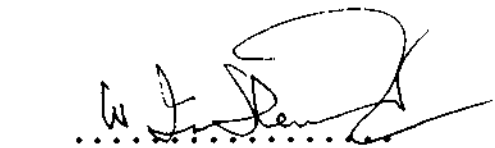
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T.A. AGUDA
JUDGE OF APPEAL

I agree.



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LORD W.L.K. COWIE
JUDGE OF APPEAL

I agree.



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LORD W.I.S. ALLANBRIDGE
JUDGE OF APPEAL