

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 4575/2015

In the matter between:

MAPULE MERIAM HLATHI

Applicant

and

FREE STATE GAMBLING AND LIQUOR AUTHORITY

1st Respondent

**THE CHAIRMAN OF THE FREE STATE GAMBLING
AND LIQUOR AUTHORITY**

2nd Respondent

CORAM: **BOKWA, AJ**

HEARD ON: **10 DECEMBER 2015**

JUDGMENT BY: **BOKWA, AJ**

DELIVERED ON: **25 FEBRUARY 2016**

A. INTRODUCTION

[1] This court is called upon to decide the issue of the reserved costs occasioned by the postponement on 26th November 2015.

[2] The order of the Honorable JP Molemela dated 26th November 2015 reads as follows:

“That: (By agreement)

1.1 The main application and application for condonation are postponed to the opposed roll of the 10th of December 2015.

1.2 Costs to stand over for later adjudication”.

- [3] At the hearing of the application on the 10th December 2015 the Respondents conceded to the main relief and consented to an order in the following terms:

“1.3 Dat die Eerste en Tweede Respondente gelas word om die Applikant se aansoek om ‘n registrasiesertifikaat vir ,n taverne, ten opsigte van ,n perseel geleë te Erf 5239, Sone 6, Thumahole, Parys, Vrystaat Provinsie te oorweeg binne 21 (EEN - EN - TWINTIG) dae na verkryging van die bevel.

1.4 Dat die Eerste Respondent die koste van hierdie aansoek betaal op die skaal soos tussen prokureur en klient”.

- [4] The parties could not agree in respect of the costs occasioned by the postponement of the 26th November 2015. They proceeded to argue the matter only on costs. After hearing the counsels, I requested them to submit supplementary heads only in respect of the costs aspects. I am indebted to both Counsels for their heads of arguments.

B. BACKGROUND FACTS

- [5] The application was issued on 23rd September 2015 and served on Respondents on 25th September 2015. The Respondents had to file their notice of opposition by 20th October 2015. Respondents failed to file their notice of opposition within the prescribed time limits.
- [6] The Applicant enrolled the matter for hearing on 29th October 2015. The Respondents only filed their notice of opposition on 22nd October 2015, resulting in the matter being removed from the roll on 29th October 2015 and the first Respondent tendering to pay the wasted costs.

- [7] Subsequent thereto, the Respondents had to file their opposing affidavit by 11th November 2015. They failed to do so.
- [8] The Applicant proceeded to enroll the matter on 13th November 2015 for hearing on 26th November 2015. The Applicant heads of argument were filed on 18 November 2015.
- [9] On 18 November 2015, Respondents filed a notice of motion (for condonation) accompanied by an answering affidavit. The Applicant filed a notice of opposition to the condonation application on 24th November 2015.
- [10] On 24th November 2015 the Respondents filed their heads of argument.
- [11] On 26th November 2015 both the main application and the application for condonation were postponed to the 10th of December 2015, by order of the Honorable JP Molemela.

C. ISSUES FOR DETERMINATION

- [12] This Court must decide the issue of reserved costs of the 26th November 2015, which order stated amongst others that the “costs to stand over for later adjudication”.

D. APPLICABLE LEGAL PRINCIPLES

- [13] The fundamental principles governing the awards of costs have been dealt with by our courts. The basic rule is undoubtedly the one that, the award of costs is in the discretion of the court. The general rule of our law is that costs follow the

event, meaning that the successful party is awarded his costs. Innes CJ stated as follows in **Kruger Bros & Wasserman v Ruskin**:¹

“The rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.”

- [14] The SCA has on more than one occasion laid down the principle that the court’s discretion must be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides.² “Judicially” means not arbitrarily.³ The Courts’ discretion is wide, though not unfettered.⁴

E. ANALYSIS

- [15] The common cause facts are that:
At the hearing of the application on 10th December 2015 the Respondents conceded to the main relief and an order was obtained by agreement in favour of the Applicant, the only issue being the costs of 26th November 2015.
- [16] It was furthermore common cause, that the parties were of the view that the main application and the interlocutory application for condonation were not ripe to be proceeded on, and as a result that a postponement was necessary for the filing of further affidavits. In the circumstances the Respondents could not have been under the impression that the matter will be proceeded on.

¹1918 AD 63 - 69. See also *Graham v Odendaal* 1972 (2) SA 611 (A) 616; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A).

² *Marks v Estate Gluckman* 1946 AD 289 314 – 315; *Van der Ploeg v Vivier* 1966 (3) SA 218 (SWA) 222; *Jordan v New Zealand Insurance Co Ltd* 1968 (2) SA 238 (E) 245.

³ *Merber v Merber* 1948 (1) SA 446 (A) 453; *Bruwer v Smit* 1971 (4) SA 164 (C); *Barron v Cantor* 1912 CPD 295 – 297.

⁴ *Moller v Erasmus* 1959 (2) SA 465 (T) 467; See also par 2.06 n 1. Contra: *JW Jagger & Co Ltd v Van Graan* 1942 CPD 195 – 198.

[17] The Respondents had not filed their heads of argument, which had to be filed by Friday the 20th November 2015 before 11:00 am. It is common cause that the Respondent's heads were only filed on 24th November 2015.

[18] The Applicant counsel in his submissions, requested me to have regard to the decision in **Burger v Kotze and Another**⁵ where the Court held as follows:

"I do not think that it is correct to state as a general rule that the wasted costs are to be paid by the party who seeks a postponement. That may be the normal order if no one is to blame for the fact that the trial has to be postponed. But if a postponement has become necessary in consequence of the fault or default of one of the parties, or his representative, it is the normal rule, I think, that wasted costs are awarded against the party who was at fault or in default".

[19] The Respondent's Counsel, Mr. Choudree, conceded that their answering affidavits were not filed timeously. He was at pains to argue that Respondents were not in willful default or that the Applicant had suffered no prejudice by such late filing. He attributed further delays to the fact that the reports were in Afrikaans and had to be translated, to English.

[20] In the circumstances he implored the Court not to award a punitive costs order against the Respondents.

[21] I am not persuaded by the explanation for the delay submitted by the Respondent's Counsel. I must agree with Applicant's Counsel that it is not only unconvincing but also without merit.

[22] The conduct of the Respondents had been less than satisfactory. They failed in many respects to comply with the rules of the Court. They were late in terms of filing their Notice of Opposition, Answering Affidavits and the Heads of

⁵ 1970 (4) SA 302 (W).

Arguments. The Respondent's responsibilities and obligations are statutory in nature as envisaged in the Liquor Act and the Constitution. The Respondents conducts amounts to a blatant disregard for the rights of Applicants such as in this case. Their conduct in my view invites a punitive cost order.

F. RELIEF

[23] In the circumstances It is ordered that:

1. The costs occasioned by the postponement of the 26th of November 2015, is costs in the main application.
2. The first Respondent is ordered to pay Applicant's costs on a scale between Attorney and Client.

I.R.O. BOKWA, AJ

On behalf of the Applicant:

Adv. C. D. Pienaar
Instructed by:
Honey Attorneys
BLOEMFONTEIN
(Mr. JM Burger)

On behalf of 1st & 2nd Respondents:

Adv. A. B. G. Choudree
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