



**IN THE HIGH COURT OF SOUTH AFRICA**

**MPUMALANGA DIVISION (MAIN SEAT)**

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED.

5 /09 /2019

DATE

SIGNATURE

**CASE NUMBER 1530/2017**

**CASE NUMBER: 2362/2017**

**In the matter between:**

**ERICK HLULIMPI MAGAGULA**

**PLAINTIFF**

**LEVY MANZINI**

**PLAINTIFF**

**And**

**MINISTER OF POLICE**

**DEFENDANT**

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**JUDGMENT**

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## LEGODI JP

[1] The Constitutional Court has endorsed the principle that a personal costs order may also be granted on a punitive scale. The punitive costs mechanisms exist to counteract reprehensive behaviour on the part of a litigant. The usual costs order on a scale as between party and party scale is theoretically meant to ensure that the successful party is not “out of pocket” in respect of expenses incurred in litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any costs occasioned by litigation<sup>1</sup>.

[2] The award of costs is a matter in respect of which courts exercise a true discretion<sup>2</sup>. The Constitutional Court has previously granted *de bonis propriis* costs, (costs which a party is ordered to pay out of her own pocket as a penalty for improper conduct) against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibility and where they acted inappropriately and in an egregious manner. The assessment of the gravity of the conduct is objective and lies within the discretion of the court<sup>3</sup>.

[3] On 5 August 2019 I made an order of costs against the attorneys and counsel on a punitive scale in the following two cases:

Erick H Magagula vs Minister of Police                      Case no: 1530/2017

Levy Manzini vs Minister of Police                              Case no: 2362/2017

[4] I did not give reasons for the order. I now do so. On 19 October 2018 and 21 September 2018 the two matters respectively were laid before a judge during case management proceedings. Date of trial for 5 August 2019 was determined by the parties’ legal representatives. Mr Labe appeared for Mr Magagula (the plaintiff) during case management proceedings of 19 October 2018 and Adv M N Kgare

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<sup>1</sup> Public Protector v South African Reserve Bank (CCT 107/18 [2019] 2ACC 29 (22 JULY 2019) para 221

<sup>2</sup> See Public Protector *supra* at para 227

<sup>3</sup> See Public Protector *supra* also at para 227

appeared for the police (the defendant) in the matter of Mr Manzini during the case management proceedings of 21 September 2018.

[5] In paragraph 2.1 of the case management form it was recorded that the court on 5 August 2019 will commence at 8h45 for roll call. On the latter date, Mr Labe who appeared on behalf of Mr Magagula only pitched up in court long after 8h45. He thought that the court was scheduled for 10h00, so was his explanation. This was despite the fact that he personally attended case management proceedings on 19 October 2018 and made himself part of the recordings that the court will start at 8h45 for the roll call.

[6] The reason for the roll call to start at 8h45 must be obvious. Allocation of matters to Judges on the trial roll, is to ensure that cases are proceeded with in time and not later than 10h00. Mr Labe had no acceptable explanation for not being at court when this matter was called for allocation by his opponent. As there was no appearance on behalf of the plaintiff when the matter was called, it was stood down to be dealt with by the roll call court and not by the trial court as a request for absolution or dismissal. Witnesses on behalf of the defendant were in attendance for this purpose.

[7] It is a well-known practice in this Division that the roll call is conducted in three stages: First, allocation of matters to Judges on the trial roll. Second, settlements on the date of trial. And last, requests for postponement on the date of trial. Summary enquiry as to costs occasioned by settlements and postponements on the date of trial contrary to paragraphs 6 and 7.1 of the pre-trial form, is always conducted as contemplated in paragraphs 7. and 7.2 of the case management document quoted in paragraph [25] hereunder.

[8] Despite this practice in regard to three stages of roll call starting at 8h45 which has now been reinforced in paragraph 9 of the Practice Directive issued on 24 July 2019, Mr Labe did not seem to have been worried to be at court in time on 5 August 2019. Instead, he pitched up at about 10h00 and explained that the matter should be allocated and be proceeded with despite allocation for trial having closed.

[9] He was also asked about his knowledge of the Practice Directive which took effect from 24 July 2019. He acknowledged that he has a copy of the Practice Directive, but did not read it. Paragraph 9.1 of the Practice Directive reads: '*The Judge President or a senior judge designated by the Judge President and or Deputy Judge President shall conduct trial roll call on every Monday of a trial week\_which shall start exactly at 08h45*'. The time is specifically underlined and bolted in the Practice Directive to attract an eye of the reader and to show emphasis and importance thereof.

[10] For Mr Labe practising in this Division (Mbomela), to have failed to heed to paragraph 2.1 of the case management directive made in his presence and participation on 19 October 2018. Furthermore, he failed to read the Practice Directive. This leaves much to be desired. If he had read the practice directive, his eyes would have been drawn to the bolted and underlined time under paragraph 9.1 of the Practice Directive. It is a reprehensive conduct of sufficient gravity to deserve the displeasure of this court.

[11] This court like any other high court has in terms of section 173 of the Constitution inherent powers to protect and regulate its own process taking into account the interest of justice. Paragraph 9.1 of the Practice Directive is one such process and it has to be complied with. To come to court and seek for allocation at 10h00 or thereafter when allocation for trial had closed, is unacceptable. It was on the basis of all of this that costs order on punitive scale out of own pocket, was made. It was necessary to do so to ensure that the defendant who was there in time and ready to proceed was not put out of pocket.

[12] Rule 37 (9)(a)(ii) provides that 'at the hearing of the matter, the court shall consider whether or not it is appropriate to make special order as to costs against a party or his attorney because he or his attorney failed to a material degree to promote the effective disposal of the litigation'. To come for a roll call at 10h00 or thereafter in the face of what is recorded in paragraph 2.1 of the case management directive and what is stated in paragraph 9.1 of the Practice Directive, amounted to failure to a material degree to dispose of the case effectively and efficiently.

[13] I now turn to deal with the reasons for the costs order made in the matter of Manzini against Adv M M Kgare and her instructing and correspondent attorneys. Legal principle, case law and directives referred to earlier in this judgment are also applicable herein. Adv Kgare and her attorneys elected to arrive late at court, long after the matter was called and allocation closed. Because of their absence, the case was to proceed as a request for default judgment. The plaintiff was ready with witnesses for this purpose.

[14] The explanation for being late was that they knew courts to start at 10h00. Adv Kgare has no basis to make this assertion. On 1 September 2018 she appeared during case management proceedings as instructed by the attorneys for the defendant. She participated in the case management proceedings and made herself part of the recordings in paragraph 2.1 of the case management directive which reads: *“On the date in question the court will commence at 8h45 for the roll call”*.

[15] “On the date in question” was with reference to the date of trial being the 5th August 2019 which Adv Kgare and her opponent chose. For her to suggest that she was unaware that she had to come for the roll call at 08h45, was a display of not taking case management and directives thereto seriously. It gives the impression that all what she was interested in, was the date of trial and not everything that was recorded in the case management document. For example, just below paragraph 2.1 of the case management document, it was recorded in a long hand under paragraph 2.2 by her opponent as follows: *‘This is a case of unlawful arrest and detention’*.

[16] She did not seem to have laid her eyes on these recordings. If she did, she would have noticed that the court was to start at 08h45 for a roll call as recorded in paragraph 2.1 of the case management form. This was despite the fact that in the same document to which she made herself part of, it was recorded: *“Completion of the pre-trial minutes as provided above should not be used as a routine”*.

[17] Immediately above these recordings in the form as quoted in paragraph [16] above, Adv Kgare in her own handwriting provided her email address, cell phone number, landline number and her names indicating that she was appearing for the

defendant. If she had seriously considered the warning that '*completion of the pre-trial minute form—should not be used as a routine*', she would have ensured that every paragraph of the form was read and properly noted somewhere for her own record and reminder. She obviously did not. Otherwise, she would not have explained that she expected the court to start at 10h00. Her conduct is unacceptable.

[18] She too did not heed to paragraph 9.1 of the Practice Directive quoted in paragraph [9] of this judgment. It is expected of legal practitioners to acquaint themselves with the changing of Practice Directives in the respective Divisions where they litigate. That would ensure that nothing is left for chance until late on the date of trial.

[19] Paragraph 5.2.4 (viii) of the Norms and Standards published under Government Gazette No 37390 on 28 February 2014 makes it clear that directives and or rules of court need to be complied with. It provides that Judicial Officers must ensure that there is compliance with all applicable time limits. In my view, failure to do so will render inherent powers of courts to regulate their own process as contemplated in section 173 of the Constitution a routine with no consequences.

[20] For those who resist change and still regard case management as a man-made rule with no legal consequences, should heed to the fact that since 1 July 2019 case management has become part of our court process and Rules of Court contemplated in rules 30A and 37A as amended.

[21] Knowing that there are these new rules, it was expected of those whose matters are the subject of case management and on trial, to go back to their matters as they prepare for trial and ensure that they are compliant and ready. It amounts to a wanting conduct that despite the presence of Adv. Kgare during the case management proceedings of 1 September 2018 and her participation thereto, she was not aware of what she committed herself to, as she wanted the court to believe.

[22] The conduct that she was not aware that she committed herself to 8h45, shows gross disregard of her professional responsibility together with her attorneys who are also expected to know how courts in this Division operate. Show of

displeasure in the form of costs on an attorney client scale against the defendant's counsel, instructing and correspondent attorneys jointly and severally the one paying out of own pocket, the other to be absolved, was justified in the circumstances.

[23] The plaintiff's attorney who was at court in time and called the matter during allocation stage, was entitled to do so for the matter to be dealt with in the absence of the defendant and or its legal representatives. The plaintiff should not be put out of pocket due to this kind of conduct.

[24] The court after allocation proceeded with those matters which were settled and postponed on the date of trial. It finished the roll at about 16h00 because it had to deal with defaulters as contemplated in paragraphs 7 and 7.2 of the form quoted in paragraph [25] hereunder. In paragraph 6 of the pre-trial form, parties' legal representatives themselves set the date by which if the matter is settled, must be removed from the trial roll, which date must not be less than seven clear court days before the date of trial also set by the parties' legal representatives. I mention all of this to emphasis the point that after allocation had closed, it was not like the roll call court had nothing to do.

[25] Paragraphs 7. and 7.2 of the case management form to which the parties' legal representatives in these cases bound themselves at the time, provided:

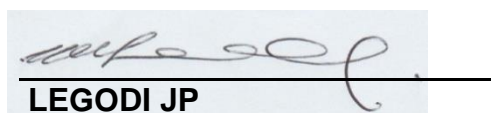
“7. *It is hereby recorded that should this matter be settled on the date of trial parties run the risk of punitive costs order and or forfeiture of a day's fee against any person responsible for late settlement of the matter and any such costs order may include payment out of own pocket by whoever is responsible for the late settlement including claim handlers and or attorneys for the parties.*

7.2 *It is hereby further recorded that should the matter be postponed on the date of trial, the party and or legal representative or any person responsible for the postponement runs the risk of punitive costs order, payment out of own including claim handlers and or legal representatives and forfeiture of a day fee occasioned by the postponement”.*

[26] It is clear from these recordings that during roll call, time is of essence to ensure that not only those who are ready for trial are given preference, but also to ensure that defaulters contrary to paragraphs 6, 7 and 7.2 of the case management form, are dealt with accordingly. I am hesitant to mention that in most cases, it is the public purse which takes care of the legal costs occasioned by sloppy handling of matters against state departments and other institutions like Road Accident Fund. In more than 50% of these matters, legal practitioners are at fault. This has to stop. As officers of court, legal practitioners are expected to assist our courts in accelerating the pace of litigation and not to distract it.

[27] A new division like this, still on its feet, deserves to be a model division and any distractive conduct in pursuit thereto, in appropriate circumstances, ought to be halted by resorting to consequences. Justice delayed justice denied. When time frames are set, the objective is to ensure that there is no time wasting. Courts must start in time and matters must be disposed of expeditiously.

[ 28] To conclude, what is stated in the preceding paragraphs are the reasons for costs order made on 5 August 2019 in respect of the two matters.



LEGODI JP

DATE OF HEARING: : 5 August 2019  
DATE REASONS HANDED DOWN: 13 August 2019

In the matter of: E H Magagula vs Minister of Police  
FOR THE PLAINTIFF : MM LABE ATTORNEYS  
: SUITE 606-608, BESTER BROWN CENTRE  
CNR. PAUL KRUGER & BESTER BRORWN  
MBOMBELA  
TEL: 013 752 3767  
REF: 2017-31/MA/mm/L-MP



FOR THE DEFENDANT : STATE ATTORNEY  
C/O MABUNDA ATTORNEYS  
: OFFICE NO 436, CLATEX BUILDING  
32 BELL STREET  
MBOMBELA  
TEL: 072 033 1425  
REF: NMM/049/MPL

In the matter of: L Manzini vs Minister of Police

FOR THE PLAINTIFF : FREY & SLABBERT INC  
: 21 BRANDER STREET  
MBOMBELA  
TEL: 013 752 37541967  
REF: MR GK Slabber/MP/SM 4253

FOR THE DEFENDANT : STATE ATTORNEY  
C/O MBOWENI ATTORNEYS  
: OFFICE NO 205, MEDCEN BUILDING  
14 HENSHALL STREET  
MBOMBELA  
TEL: 013 752 4830  
REF: 8677/2017/Z47/MC