

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 19/2016

In the matter between:

‘MASELLO TŠILOANE

APPELLANT

and

TONY MTHOMBENI

1ST RESPONDENT

O/C THETSANE POLICE STATION

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

CORAM : FARLAM, A.P.
LOUW, A.J.A.
CHINHENGO, A.J.A.

HEARD : 8 MAY, 2017

DELIVERED: 12 MAY, 2017

SUMMARY

Attorney and client costs order – whether justified.

JUDGMENT

FARLAM A.P

[1] Appellant in this matter appeals against a spoliation order granted against her in favour of the first respondent on 9 May 2016 by **Sakoane AJ** sitting in the High Court.

[2] When the appeal was argued in this Court counsel for the first respondent submitted that the case was now moot as there were no longer points in issue between the appellant and his client. When his attention was drawn to the fact that the question of the costs in the court below was still an issue between the parties he abandoned the costs order made in his client's favour and tendered the appellant's costs in the court *a quo* and on appeal, in both cases on the ordinary scale.

[3] Counsel for the appellant submitted that the order in her client's favour in respect of the costs in the proceedings in the court *a quo* should provide for those costs to be taxed on the attorney and own client scale.

[4] Accordingly, the only issue that has to decide in this case relates to the scale on which the appellant's costs in the court *a quo* should be taxed.

[5] Apart from the question as to whether there is a scale of costs as between attorney and own client as opposed to costs on the attorney and client scale simpliciter (a point left open by the South African Supreme Court of Appeal in **Thoroughbred Breeders' Association v Price Waterhouse** 2001 (4) SA 551 (SCA) and which it is unnecessary to consider in this case), I do not think that a case for an attorney and client costs order has been made out.

[6] Counsel for the appellant relied on three factors in support of her submission. The first was that the first respondent had brought his application in the wrong court: he should have sued in a subordinate court.

The second was that he belatedly brought contempt proceedings against the appellant for not complying with the order.

The third was that he sought to lead evidence at the hearing of the application on issues which had not been agreed on when the case had at an earlier stage come before the Chief Justice, who had referred the matter for oral evidence on certain issues.

[7] As regards the first point section 6 of the High Court Act 5 of 1978 provides that a High Court judge may of his own motion

permit an application which could have been instituted in a subordinate court to be heard in the High Court, which is what **Sakoane AJ** in effect did.

[8] As regards the second point: if the belated institution of contempt proceedings merited an attorney and client costs order that order would appropriately have been made in that application and not in the spoliation application itself.

[9] As regards the third point: I do not think that an attempt to lead evidence on an issue not covered by the Chief Justice's order was of such a nature as to justify an attorney and client costs order.

[10] The following order s made:

1. It is recorded that the first respondent has abandoned the costs order he obtained in the Court *a quo* and has tendered to pay the appellant's costs in the court *a quo* and on appeal, in both cases to be taxed on the ordinary scale.
2. The first respondent is ordered to pay the appellant's costs in the Court *a quo* and on appeal on the ordinary scale.

**I.G. FARLAM
ACTING PRESIDENT**

I agree:

**W.J. LOUW
ACTING JUSTICE OF APPEAL**

I agree:

**M.H. CHINHENGO
ACTING JUSTICE OF APPEAL**

For Appellant : Adv M.S. Molapo

For 1st Respondents : Adv R.D. Setlojoane