CIV/APN/479/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:-

CASTON MOTEAPHALA THAANYANE **APPLICANT**

V

SECURITY LESOTHO (PTY) LTD **1ST RESPONDENT**

THE REGISTRAR – NUL **2ND RESPONDENT**

THE VICE-CHANCELLOR **3RD RESPONDENT**

THE NATIONAL UNIVERSITY OF LESOTHO **4TH RESPONDENT**

JUDGMENT

Coram : Hon. Majara J.

Date of hearing : 10th November 2011

Date of judgment : 8th December 2011

Summary

Application for interdict - rule nisi granted - respondents complying with the order but opposing other prayers - whether prayer proper and supported with facts – existence of a bona fide dispute of fact - prayer properly challenged -whether applicant entitled to costs on attorney and client scale - costs on that scale not justified - prayers dismissed with costs.

ANNOTATIONS

CITED CASES

1. **Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155**
2. **Sello v Ramainoane CIV/T/19/97 (unreported)**
3. **LUTARU v NUL 1999-2000 LLR/LB 52**
4. **Khaketla v Malahleha & Others 1990-94 LAC 275**

BOOKS

1. **Herbstein & Van Winsen; The Civil Practice of the Supreme Court of South Africa 4th Edition, 1997.**

[1] The applicant sought an order against the respondents interdicting them from denying him access to the 4th respondent's premises for purposes of participating in the Local Government elections. He also asked for costs on attorney and client scale. The Court, per my brother Peete J, granted the interim order on the 29th September 2011 in terms of prayer 3 in the Notice of Motion and called upon the respondents to show cause on the 30th September 2011 why the Order should not be made final. This is the date that appears on the minutes in the Court's file and

on the typed Court Order. However, there is also a hand written amendment to the typed return date which was the 30th September to the 17th October 2011. The amendment bears the Judge's signature and is presumably authentic. The application is opposed.

[2] It is common cause that the applicant was denied access to the 4th respondent's premises. However, there is a dispute of fact with respect to the reasons for the said denial. In terms of the applicant's averments in his founding affidavit, he was denied access as a way of impeding him from touting voters residing within the 4th respondent's premises and to prepare for the elections. On the other hand, the respondents assert through the affidavit deposed to by the Registrar, Dr. S Tlali that the exclusion had nothing to do with the applicant's political activities outside the university but with his activities in relation to SRC elections and students activities while he is not a registered student.

[3] At any rate, after they were served with the rule nisi, the respondents filed their notice of intention to oppose the matter. It is also common cause that after they were served with the interim Court Order, the respondents allowed the applicant access on the campus and he was able to take part in the Local Government elections which were held on the 1st October 2011. Logically this should have brought this matter to an end.

[4] However on the 17th October, 2011, the parties appeared before me the matter having since been allocated to me for hearing. Counsel for the applicant sought a postponement to obtain instruction from his client with respect to the issue of costs of the application. By consent, the matter was set down for hearing on that issue to the 10th November 2011.

[5] At the hearing of the matter, it was submitted on behalf of the applicant that he was denied access into the center despite having informed the respondents of the purpose of his presence there and that this was with the intention to impede him from taking part in those elections and that this constituted a denial of his constitutional right which necessitates that he be awarded costs on a punitive scale.

[6] On the other hand, **Mr. Koto** who appeared on behalf of the respondents made the submission that his clients had no problem granting the applicant access as long as it was only for purposes of his participation in the Local Government elections. As I have so stated, this is common cause.

[7] He added that the respondents proceeded with their opposition of the application for the reason that firstly, they had a problem with prayer 2 (b) in the Notice of Motion because it is couched in general terms. The prayer is stated as follows:-

> *"declaring the actions of the respondents of denying applicant access into the campuses as improper and unlawful."*

[8] It was his submission that the prayer does not confine itself to denial of access for local government elections but is general and wide in its terms. He added that if it had been couched in more restrictive terms so that the application for access into campus would only be for purposes of the applicant participating in local government elections, the respondents would not have had any problem with it. Further that the prayer seeks to brand their denying the applicant such access as generally improper and unlawful for any reason aside from that of his participation in the said elections.

[9] Secondly, that the applicant prayed for costs at attorney and client scale so that if the rule were to be confirmed as it was, they would be liable to costs on that higher scale.

[10] With respect to the reason why the applicant was denied access, **Mr. Mabulu** submitted on behalf of the applicant that the respondents' version is surprising and a fabrication because there is no record proving same. I have already stated that there is a dispute of fact on this issue. This being the case, the question for consideration is whether this is a bona fide dispute of fact.

[11] In order to ably determine this I find it apposite to follow the approach that has been consistently adopted by the Courts in several decisions including that in **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd**[1] per Murray A.J.P.'s judgment at page 1160 *to wit*, as a general rule,

> *"…the normal method of procedure is by way of action, and under the procedure a defendant possesses certain procedural or tactical advantages of which the court would be slow to deprive him. Although the practice of permitting motion proceedings is recognized—and the learned judge emphasizes at p. 631 of the report that the only test to be applied is the existence or non-existence of a bona fide dispute on a material fact—the respondent with these procedural advantages is generally speaking entitled to a safeguard in that is* (sic) *should be open to him*
>
> *'to record a bare denial on material averments without evidence in support unless the petitioner is able to show that on the papers as a whole such denial is mala fide and unsupportable (Peterson v. Cuthbert & Co., Ltd., 1945 A.D. 420).'"*

[1] 1949 (3)SA 1155

[12] In other words, as the learned Judge went on to quote, *'a respondent ... may properly by a bare denial raise a bona fide dispute.'*

[13] In the present proceedings, not only have the respondents denied that the applicant was denied access on their premises for purposes of students affairs and the SRC elections, but they have gone on to aver per the answering affidavit, that he was called and informed of the decision much prior to the Local Government elections. Applying the above test, I am of the view that they have indeed raised a bona fide dispute on a material fact.

[14] In addition, their subsequent conduct after they were served with the interim court order which was to immediately grant the applicant access even as they continued to oppose the application for the reasons as I have already alluded to above, evinces that the applicant was indeed denied access not for purposes of the elections but for the reasons that they have stated.

[15] While I do agree with Counsel for the applicant that the University campus is open for everybody who is eligible as a voter, I do not agree with his contention that this is so at any time because it suggests that it is so even when there are no elections. This in turn leads me to deal with prayer 2 (b) in the Notice of Motion namely, '*declaring the actions of the respondents of denying applicant access into the campuses as improper and unlawful'*. In this regard, I accept the submission that was made on behalf of the respondents that this prayer is couched in general and wide terms and is as such problematic because if it is confirmed as it is, it compels them to allow the applicant access generally without any restrictions. In my opinion, they were thus justified in going ahead with their opposition of the application.

[16] This is further borne out by the fact that despite their discomfort with the way it is couched, the respondents nonetheless allowed the applicant access after they were served with the rule nisi which as I have already stated, supports them on their contention that they had no problem allowing the applicant access for purposes of taking part in the Local Government general elections.

[17] Coming to the prayer of costs on Attorney and Client scale, it is trite that this is a punitive scale that is usually granted against the party that is shown to have been guilty of certain, usually gross misconduct in the way it handled the proceedings. It is a scale that is not granted willy-nilly and at the behest of the party that seeks such costs without any sound basis but one that is ordered in '*very special and exceptional circumstances*'. See in this regard the case of **LUTARU v NUL**.[2]

[18] It is therefore not enough for the applicant to submit, through his Counsel, that the respondents should be ordered to pay the said costs for the reason that they were denying him his constitutional right especially because they did allow him access and he did participate in the elections. Indeed, the prayer especially as sought on that scale, was premature as indeed costs normally must follow the event unless there are valid grounds for depriving such the successful party of same as was correctly stated in the case of **Khaketla v Malahleha & Others** [3].

[19] Thus the case of **Sello v Ramainoane**[4], quoted to this Court, does not support the case of the applicant because I have not found that the respondents had any malicious intentions in their conduct. On the contrary, I have already found that they were justified in opposing this matter for the reasons that I have already

---

[2] 1999-200 LLR/LB 52 at 64-65
[3] 1999-94 LAC 275 AT S86
[4] CIV/T/19/97 (unreported)

stated. This being the case, I cannot make an order of costs against them. Indeed athorities[5] have this to say with respect to the court's determination of costs:-

> *"When issues are left undecided the court possesses a discretion either to direct each party to bear his own costs in regard to those issues or to award those costs to the party who succeeded on the issues that the court decided. But a claim for costs cannot stand alone, and a judgment for costs involves a decision on the merits."*

[20] The submission that the respondents bore the responsibility to approach the applicant to settle the matter out of Court while not intrinsically wrong is no basis for them to be mulcted with costs, let alone on that scale when indeed as I have stated, they were within their right to oppose the other prayers as they stood. I might add that there is no reason why the applicant being the *dominis litis,* did not do the same and approached the respondents to have the matter settled once and for all as soon as they complied with the Rule Nisi and allowed him access. It is my view that he proceeded with this application at his own peril.

[21] It is for all the foregoing reasons that I accordingly dismiss prayers 2(b) and (c) as they are stated in the Notice of Motion with costs.

N. MAJARA
JUDGE

For applicant : Mr. Mabulu

For respondents : Mr. Koto

[5] Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa, 4th Edition p708.