

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Division)**

In the matter between:

**TOTAL LESOTHO (PTY) LTD**

**PLAINTIFF**

AND

**THAPELO KHADI**  
**TOTAL LESOTHO PROPERTIES (PTY) LTD**

**1<sup>ST</sup> DEFENDANT**  
**2<sup>ND</sup> DEFENDANT**

**RULING**

**Coram** : L. Chaka-Makhooane J

**Date of Hearing** : 13<sup>th</sup> June, 2016

**Date of Ruling** : 8<sup>th</sup> September, 2016

**SUMMARY**

*Application for costs on attorney and client scale – Plaintiff withdrawing its claim against defendants and tendering costs on party to party scale – Costs on attorney and client scale only granted in exceptional circumstances – 1<sup>st</sup> Defendant seeking costs on attorney and client scale but failing to show justifiable reasons for awarding*

*costs on a punitive scale – Award of costs remains discretion of court seized with case – Costs awarded to 1<sup>st</sup> defendant on party to party scale.*

## **ANNOTATIONS**

### **CITED CASES**

1. Ashraf Abubaker v Commissioner of Lesotho Revenue Authority CCA/50/2007 (Unreported).
2. Commander of the Lesotho Defence Force and Another v Sekoati LAC (2007-2008).
3. Khaketla v Malahleha LAC (1994-99) 275.
4. Lesotho University Teacher's and Researchers Union (2009 – 2010).
5. Mahao Lesotho Electricity Corporation and Others LAC (2009 – 2010).  
Nel v Waterberg Landbouwers Ko-op Vereeniging 1946 AD 597.
6. Nkosi v ABSA Bank Ltd (2014) ZAGPPHC.
7. Phakiso Molise v Compol C of A (CIV) 4/98.
8. Sotho Development Corporation (Pty) Ltd v Nedbank Lesotho (Pty) Ltd C of A (CIV) 18/00.
9. Suzman v Pather & Son 1957 (4) SA (D).
10. Swissbrough Mines & Another v LHDA C of A (CIV) 9/99.
11. Total Lesotho (Pty) Ltd and Another v Thabang (Pty) Ltd LAC (2009 -2010).

### **STATUTES**

High Court Rules Act No. 9, 1981.

- [1] This is an application by 1<sup>st</sup> defendant for costs on attorney and client scale pursuant to the plaintiff's withdrawal of its action proceedings. The plaintiff instituted action proceedings against the defendants in the High Court as far back as the 8<sup>th</sup> July, 2010 seeking an order to direct the 1<sup>st</sup> defendant to relinquish his 51% shareholding in the 2<sup>nd</sup> defendant company.
- [2] It is the plaintiff's case that sometime in 2004 it entered into a verbal agreement with the 1<sup>st</sup> defendant wherein they formed the 2<sup>nd</sup> defendant. In terms of the agreement, the plaintiff would hold 49% of shares in the 2<sup>nd</sup> defendant while the 1<sup>st</sup> defendant would be entitled to 51% of the shares. It is common cause that the 1<sup>st</sup> defendant has since passed away, sometime in September, 2013 and he has been substituted by **Thapelo Khadi**.
- [3] The plaintiff claimed that it was an express term in its agreement with the 1<sup>st</sup> defendant that the latter would be employed by the 2<sup>nd</sup> defendant as its Managing Director. According to the plaintiff, it was further agreed that upon the 1<sup>st</sup> defendant's termination of his employment contract, he would relinquish his 51% of shares in the 2<sup>nd</sup> defendant and transfer those shares to the plaintiff. Despite the aforesaid undertaking, it is the plaintiff's case that the 1<sup>st</sup> defendant refused to surrender the shares to the plaintiff.

[4] On the other hand, the 1<sup>st</sup> defendant alleged in his plea that he held a 51% shareholding in the 2<sup>nd</sup> defendant in his own right and benefit. He denied that he held the shares in his capacity as Managing Director of the 2<sup>nd</sup> defendant. Therefore, he refused to relinquish his shareholding in the 2<sup>nd</sup> defendant after the termination of his employment and he further denied that there was a demand upon him to surrender the shares.

[5] Nonetheless, on the 19<sup>th</sup> April, 2016 the plaintiff filed its “Notice of Withdrawal of Action”. It is significant to note that the notice was couched in the following terms:

*“KINDLY TAKE NOTICE that the abovementioned Plaintiff hereby withdraws the abovementioned action and tenders the 1<sup>st</sup> Defendant’s costs”*

It is clear from the preceding passage that the plaintiff withdrew his claim against the defendants and tendered costs to the 1<sup>st</sup> defendant on an ordinary scale.

[6] Moreover, on the 19<sup>th</sup> April, 2016 **Mr Malebanye KC**, counsel for the plaintiff, appeared before this Court and expressed that the plaintiff had withdrawn its claim and had tendered costs to the 1<sup>st</sup> defendant on an ordinary scale. **Mr Sekatle**, counsel for the 1<sup>st</sup> defendant, stated that in as much as he accepts the withdrawal of the proceedings, he however seeks costs on an

attorney and client scale. The matter was then postponed to the 13<sup>th</sup> June, 2016 for full arguments on the issue of an appropriate costs order.

[7] On the date of hearing, **Mr Sekatle** submitted that costs should be awarded against the plaintiff on a punitive scale because the plaintiff took an inordinately long time without pursuing the matter, and that was to the 1<sup>st</sup> defendant's prejudice. Conversely, **Mr Malebanye KC** argued that the justification does not warrant punitive costs because where a case is not prosecuted, the **High Court Rules**<sup>1</sup> allow any party to the proceedings to set the matter down for hearing.

[8] Nonetheless, it is important to note that both counsel agreed that costs on an attorney and client scale should be awarded only in exceptional circumstances, in particular, but not limited to, matters which are frivolous, vexatious, malicious, improper, fraudulent or misleading to the court.<sup>2</sup> The general rule is that costs follow the event, and the successful party will normally be awarded his or her costs.<sup>3</sup> Furthermore, it is well established that punitive costs ought not to be awarded merely for punishing the losing party.<sup>4</sup>

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<sup>1</sup> Act No. 9 of 1980.

<sup>2</sup> See *In Re Alluvial Greek* 1922 CPD 532; *Phakiso Molise v Compol C of A* (CIV) 4/98; *Swissbrough Mines & Another v LHDA C of A* (CIV) 9/99; *Sotho Development Corporation (Pty) Ltd v Nedbank Lesotho (Pty) Ltd C of A* (CIV) 18/00; *Ashraf Abubaker v Commissioner of Lesotho Revenue Authority CCA/50/2007* (Unreported); *Commander of the Lesotho Defence Force and Another v Sekoati LAC* (2007-2008) 303.

<sup>3</sup> *Khaketla v Malahleha LAC* (1994-99) 275.

<sup>4</sup> See *Nel v Waterberg Landbouwers Ko-op Vereeniging* 1946 AD 597.

- [9] In **Total Lesotho (Pty) Ltd and Another v Thabang (Pty) Ltd**<sup>5</sup> the trial court's order of attorney and client costs against the appellants was set aside for the reason that a litigant could not be penalized simply because the case it advanced was found to be wrong. However, in **Lesotho University Teachers' and Researchers Union v National University of Lesotho**<sup>6</sup> the Appeal Court held that in exceptional circumstances, the trial court has inherent powers to award costs on attorney and client scale even *ex mero metu*.
- [10] In the **Lesotho University Teachers' and Researchers Union**<sup>7</sup> case, the appellant had abused the court process, used scandalous language in his affidavits and launched contempt proceedings in order to harass the respondent. The court found that the cumulative effect of the applicant's conduct justified the court *mero metu* to award costs on an attorney and client scale against the appellant.
- [11] Similarly, in **Mahao v Lesotho Electricity Corporation and Others**<sup>8</sup> the Appeal Court held that an order for costs on an attorney and client scale was fully justified after the appellant had approached the trial court on an urgent basis and without notice to the other party, with the full knowledge that the pursued matter had been overtaken by events.

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<sup>5</sup> LAC (2009-2010) 555.

<sup>6</sup> (2009-2010) 220.

<sup>7</sup> *Ibid.*

<sup>8</sup> LAC (2009-2010) 220.

[12] Besides arguing that the plaintiff has taken an inordinately long time without prosecuting its case, **Mr Sekatle** has not presented any other evidence to the effect that the plaintiff has committed any of the abovementioned acts which would otherwise justify an award of punitive costs. In any event, authorities agree that the issue of costs squarely lies within the discretion of the court seized with the case.<sup>9</sup>

[13] Therefore, the Court is not satisfied that the circumstances of the present case warrant a punitive costs order.

[14] It is for the foregoing reasons that the application is dismissed and the costs awarded to the 1<sup>st</sup> defendant are party to party costs.

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**L. CHAKA-MAKHOOANE**  
**JUDGE**

For Plaintiff : **Mr Malebanye KC**

For Respondent : **Mr Sekatle**

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<sup>9</sup> Khaketla v Malahleha (Supra).