

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/49/18

In the Matter Between:-

MOJELA SHALE

APPLICANT

AND

THE JUDICIAL SERVICE COMMISSION

1ST RESPONDENT

ATTORNEY GENERAL

2ND REPENDENT

PONT'SO PHAFOLI

3RD RESPONDENT

JUDGMENT

CORAM : **MOKHESI J**
DATE OF HEARING : **26th February 2020**
DATE OF JUDGMENT : **26th JUNE 2020**

Summary:

Civil Practice- *Applicant seeking costs despite the application being moot- application dismissed on account that costs order is consequential to determination of the merits, and therefore, in the absence of that, costs cannot be granted.*

Annotations :

CASES:

Cats v Cats 1959 (4) SA 375 (c)

***Simon NO v Air Operations of Europe AB and Others
1999 (1) SA 217***

MOKHESI J

[1] INTRODUCTION

It is common cause that this matter has been overtaken by events, and, therefore no longer present a live controversy which should be adjudicated by this court, except the issue of costs. The facts of this case are straight forward, and they are as follows: The incumbent of the office of the Registrar of the High Court and Court of Appeal had been placed on leave following complaints by the Judges of this Court and pending investigations into the allegations contained therein. As a result of this Mr. Mokeke was installed to act in that position until at the end of 2017 when he took a study leave to further his studies in South Africa. Due to the vacancy created by his pending absence, the acting incumbent had of necessity to be found as the Registrar had been on a prolonged leave of absence, and conclusion of the legal challenge to her being placed on leave and subsequent transfer to Molekane's hoek, far from being realized. As already said, there arose the need to appoint a person to act as the Registrar. The most senior person who could potentially act as the Registrar was the applicant, but things did not turn out the way he expected them to be as the Judicial Service Commission appointed the third (3rd) respondent to act instead, and this naturally aroused a deep sense of injustice within the applicant which propelled him to launch this application challenging the 3rd respondent's appointment and other relief. Crucially, the 1st respondent was requested to dispatch record of the Judicial

Service Commission proceedings that led to the resolution appointing the 3rd respondent.

[2] This application served before Monapathi J on the 16th February 2018 where he issued an order for the dispatch of the record. It should be noted that at this time the 3rd respondent was now the acting Registrar and the custodian of the resolutions of the JSC. There was a lull from this period until 02nd April 2019 when this matter was allocated to me. On this date the order of dispatch had not been complied with. On the 02nd April 2019 Miss Letsie for the applicant appeared alone, as Mr. Letsika for the respondent was not in attendance. The matter, by consent of parties was postponed to the 02nd May 2019 for mention, and on that date both Miss Letsie and Mr. Letsika appeared before me. Both counsel requested postponement of the matter to the 03rd June 2019 to explore the possibility of a settlement out-of-court.

[3] On the 03rd June 2019 Mr. Ndebele for the applicant appeared alone before me as Mr. Letsika was not in attendance, but instead of Mr. Ndebele updating the court on the progress of settlement negotiations he informed the court that he inquired from the Attorney General as to the existence of the record of proceedings of the Judicial Service Commission, and that he was reliably informed that it did not exist. So, armed with this information Mr. Ndebele moved the court to proceed with the hearing of the matter, a move which I outrightly rejected as the purpose of that day's

business was to provide an update on the settlement negotiations. I postponed the matter to the 01st August 2019 for mention given that the court was about to break for winter vacation. On that date Miss Letsie appearing at the instance of Mr. Ndebele and Mr. Fiee, at the instance of Mr. Letsika, appeared before me wherein Miss Letsie requested the postponement of the matter as “the 1st and 2nd respondents are in negotiations regarding the minutes of the JSC”. The matter was duly postponed to the 28th August 2019. Ms Letsie appeared again for the applicant wherein she said the following: “The meeting between the parties did not bear any fruit as the respondents were of the view that the applicant withdrew this application, however, we informed the respondents through a letter dated 12/05/19 that the applicant did not withdraw this matter, but CIV/APN/86/2018. The respondents have not responded to our letter. On this basis we apply that the application be granted in terms of the prayers sought in the notice of motion.”

[4] This approach, was rejected by the court as it amounted to ambush as the purpose for that day’s meeting was to provide an update on the so-called negotiations. I then directed the applicant’s counsel to issue notice of set down of the hearing of the matter. From this point there was an inaction on the part of the applicant until the 06th December 2019 when Notice in terms of rule 8(13) was issued. It should be emphasized that, by this time, the substantive incumbent of the office of the Registrar had won her legal challenge against the 1st respondent and had accordingly

reassumed her duties per the court order, and this effectively rendered the applicant's case academic.

[5] The above background is important because, faced with the supervening resumption of her duties by the Registrar and rendering of the applicant's case moot, Mr. Ndebele for the applicant argued that Ms. Phafoli (3rd respondent) should be mulcted with costs on attorney and client scale as she is the reason why the applicant's case could not be finalized on time. It needs mentioning that Ms Phafoli did not oppose the applicant's case. In his prayers, the applicant did not pray for punitive costs.

[6] Costs:

The issue for determination in this case is one of costs only as the main case has been rendered academic by the turn of events alluded to above. As a general rule, a claim for costs does not stand alone as it is consequential upon determination of the merits (***Cats v Cats 1959 (4) SA 375 (c) at 379 G – H: Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 at 231 C – D***). In the present matter the application has become moot. The question of costs does not, therefore, arise in the absence of a decision on the merits.

[7] In the result the application is dismissed.

M. MOKHESI J

FOR THE APPLICANT: MR. NDEBELE

FOR THE RESPONDENTS: NO APPEARANCE

