

**IN THE HIGH COURT OF LESOTHO- COMMERCIAL
COURT DIVISION**

-

HELD AT MASERU

CCT/0039/2017

In the matter between:

STANDARD LESOTHO BANK LIMITED

PLAINTIFF

And

KOPANO HOLDINGS (PTY) LTD

DEFENDANT

Neutral Citation: Standard Lesotho Bank Limited v Kopano Holdings
CCT/0039/2017) [2021] LSHC 120 COM (8th November, 2021)

JUDGMENT

CORAM: MATHABA J

HEARD ON: 27th October 2021

DELIVERED ON: 8th November 2021

SUMMARY:

Costs – Attorney and client costs – Agreement by party to pay attorney and client costs – Plaintiff entitled to make such a claim – Onus on defendant to raise grounds and circumstances in support of an objection to making an order in terms of the agreement - Principles discussed.

ANNOTATIONS:

BOOKS:

Cilliers AD ET AL: 2013. Herbstein & Van Winsen *The Civil Practice of the High Court of South Africa*, 5th ed. Cape Town: Juta & Co, Ltd.

LEGISLATION:

Lesotho High Court (Mediation) Rules, 2011

DECIDED CASE:

LESOTHO

Abel Moupou Mathaba and others v Enoch Matlaselo Lehema and others 1993-1994 LLR & LB 402

ENGLAND AND WALES

Halsey v Milton Keynes General NHS Trust; Steel v Joy and another [2004] EWCA civ 576, [2004] 1 WLR 3002

SOUTH AFRICA:

Claude Neon Lights (S.A) Ltd v Schlemmer 1974 (1) SA 143 (N)

Claude Neon Lights (S.A) Ltd v Peroglou 1977 (1) SA 575

Delfante v Delta Electrical Industries LTD 1992 (2) SA 221

Ferreira v Levin NO and Others 1996 (2) SA 621 (CC)

Helen Suzman Foundation v President of the Republic of South Africa [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC)

Neuhoff v New York Timbers Ltd 1981 (4) SA 684

Public Protector v South African Reserve Bank (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019(6) SA (22 July 2019)

S.A. Savings & Credit Bank Ltd v Bradbury and Others 1975 (1) SA 936 F-H;

SA Permanent Building Society v Powell and others 1986 (1) SA 722

Sapirstein v Anglo African Shipping Co (SA) Ltd 1978(4) SA 1

Western Bank v Carmichael 1974 (2) SA 232

Western Bank Ltd v Honeywill and Another 1974 (4) SA 148

Western Bank Ltd v Meyer, 1973 (4) SA 697

INTRODUCTION

[1] On the 14th February 2017 plaintiff sued out summons against defendant claiming payment of an amount of M1,005,592.82 plus interest thereon to be calculated at the rate of 17.75% per annum from the 1st November 2016 to date of full and final payment. Plaintiff also claimed costs on attorney and client scale inclusive of collection commission as part thereof. While the matter was hotly contested and had already been set down for hearing, both Mr. *Mpaka* for the plaintiff and Mr. *Mokhathali* for the defendant, appeared in Court before the late Chaka – Makhooane, J on the 12th February 2020 to report that the matter had been settled, with costs being the only issue outstanding.

[2] Arguments on costs were heard on the 4th March 2020 and judgment was reserved to the 4th June 2020. Unfortunately the late Judge passed on the following month before she delivered her judgment. When the matter was called on the 25th October 2021 the parties confirmed that the only thing pending was judgment on costs. They then agreed that the Court should consider and decide the issue of costs based on the Heads of Argument which they had already filed. The matter was subsequently allocated to me on the 27th October 2021.

BACKGROUND

[3] The genesis of the dispute was a Suretyship Agreement which the defendant had entered into with the plaintiff for Mountain Farms (Pty) Ltd

which defaulted on payment. Action was instituted against the latter as a principal debtor in **CCT/0448/2016**.

[4] As it has already been indicated, the matter was eventually settled with one of the sureties alongside the defendant making full payment inclusive of interest in the amount claimed in the summons. The view I hold is that the plaintiff was thus a successful party as its claim was met and settlement was reached within the context of litigation. The remaining issue for determination concerns the prayer for costs on a punitive scale of attorney and client. The plaintiff contends that it is entitled to costs on attorney and client scale notwithstanding the fact that the matter was settled.

ISSUE FOR DETERMINATION

[5] The issue for determination before this Court is whether the plaintiff is entitled to costs on attorney and client scale with the matter having been settled out of court.

PLAINTIFF 'S ARGUMENTS FOR COSTS ON ATTORNEY AND CLIENT SCALE

[6] The plaintiff basis its claim on the Suretyship Agreement entered into between the parties and argues that 'the obligation to pay costs arises *ex contractu* and the court has no option but to grant them'.

[7] The plaintiff asserts that the defendant launched a frivolous defence designed simply to prolong the conclusion of the litigation and resorted to

dilatory tactics in order to achieve the postponement of the first pre-trial conference as well as the trial itself. In support of its proposition, the plaintiff relies on the decision of Gauntlett, AJ, as he then was, in **Delfante v Delta Electrical Industries LTD**¹ where a prayer for costs on attorney and client scale was granted considering reprehensible conduct of the respondent as well as its defences in the main matter which bordered on the trifling.

DEFENDANT 'S COUNTER – ARGUMENTS RE: COSTS

[8] The defendant sets reasons why plaintiff should not be granted costs on attorney and client scale. It contends that it pleaded that the matter be referred to mediation as it had prospects of being settled amicably but that its proposal was met with resistance from the plaintiff.

[9] Relying on the decision in **Helen Suzman Foundation v President of the Republic of South Africa**² the defendant argues further that costs on attorney and client scale are granted against a litigant whose claim is frivolous, vexatious or manifestly inappropriate. According to the defendant, the requirements for punitive costs have not been met in the instant case. The defendant has extensively quoted the dissenting judgment of Mogoeng CJ, as he then was, in **Public Protector v South African Reserve Bank**³ which equated the grant of ordinary personal costs against a representative litigant with costs on an attorney and client scale. The judgment indicated that it must take

¹ 1992 (2) SA 221 at 233 D - F

² [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at para 36

³ (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA (22 July 2019)

extraordinary circumstances to award costs on an attorney and client scale against a representative litigant in her personal capacity. In that case the majority judgment maintained the decision of Court *a quo* ordering the Public Protector, in her personal capacity to pay 15% of the costs of the South African Reserve Bank on an attorney and client scale including costs of three counsel, *de bonis propriis*.

[10] The defendant submits further that since the matter was eventually settled, each party should bear its own costs.

EVALUATION AND THE LAW

[11] Before the issues that arise for consideration in the matter are discussed, it will be apposite to set out the legal principles relevant to costs on attorney and client scale.

[12] The basic principles governing the awarding of costs are that: (a) unless expressly otherwise stated, it is in the discretion of the presiding judicial officer to award costs, (b) costs follow the results, meaning that costs are generally awarded to a successful party. In exceptional cases, the Court may depart from the application of the rule that costs follow the results and deprive a successful party his or her costs⁴. Again, the learned authors of Herbstein and Van Winsen, the **Civil Practice of the High Court of South Africa**⁵ have, based on judicial decisions, summarised circumstances under which a Court

⁴ Ferreira v Levin NO and Others 1996 (2) SA 621 at 624, para (3) (CC)

⁵ CILLIES, Loots and Nel, The Civil Practice of the High Court of South Africa, (5th edition) at 970.

would deviate from the latter principle. It is not necessary to discuss these circumstances for present purposes.

[13] Coming directly to the issue of costs on attorney and client scale, it is imperative to commence by considering the purpose for which they are awarded. In **Abel Moupo Mathaba & Others v Enoch Matlaselo Lehema & Others**⁶ Cullinan C.J, as he then was, quoted **Nel v Waterberg Landbouwers Ko-operative Vereeniging** (1949) A.D 597 at p. 607, where Tindall, J.A said the following:

“In some cases it had been said that the court makes the order to mark its disapproval of the losing party’s conduct. This terminology suggests that an award of the attorney and client costs is a form of punishment. But the treatment of such an award simply as punishment does not supply a complete explanation of the ground on which the practice rests; something more underlies it than the mere punishment of the losing party. On the other hand, the order cannot be justified merely as a form of compensation for damages suffered...the true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation”.

⁶ 1993-1994 LLR & LB 402 at 452

[14] As explained in **Mathaba**, *supra*, instances where costs on attorney and client scale are granted are for example, proceedings which are an abuse of court process, absence of *bonafides* in conducting the litigation or litigant's objectionable behaviour.

[15] Apart from inherent discretion of the Court to award attorney and client costs, the Court is generally bound to give effect to an agreement between the parties to pay attorney and client costs in the absence of a misconduct on the side of a successful party. In **Claude Neon Lights (S.A) Ltd v Schlemmer**⁷ the Natal Provincial Division had the occasion to consider if a magistrate was wrong in refusing to award costs on attorney and client scale despite an express agreement between the parties to that effect. The ground upon which the magistrate had declined an order for costs on attorney and client scale was that no evidence was presented to suggest that the defence was frivolous or vexatious. The Court held that the magistrate had misconstrued the fact that plaintiff had claimed such costs in terms of an express agreement and not by virtue of any alleged frivolous or vexations conduct on the part of the defendant. The Court assumed (without deciding that) the Court had a discretion to decline to make such an order, for instance in the case of a plaintiff's misconduct, but it held that there were no circumstances in that case that would justify the refusal of such an order. However, in **Western Bank v Carmichael**⁸ Eksteen, J was not

⁷ 1974 (1) SA 143 at 150 (N)

⁸ 1974 [2] SA 232 at 234

prepared to enforce agreement for defendant to pay attorney and client costs in the absence of specific grounds for which the court wished to penalise a defendant by ordering him to pay attorney and client costs. There followed **Western Bank Ltd v Honeywill and Another**⁹ a few months later where Leon, J clarified that the award of costs on attorney and client scale was not limited to situations where a Court wanted to penalise a defendant as it was commonplace for a Court to award such costs against a defendant where he has agreed to pay them. Citing **Western Bank Ltd v Meyer, 1973 (4) SA 697 (T)**, the Court held that where there has been an agreement to pay costs on attorney and client scale, the Court's power was limited. In **Meyer, supra**, the Full Bench of the Transvaal Provincial Division said the following regarding Court's power where parties had agreed on costs on attorney and client scale:

“...The agreements before us all contain clauses to the effect that if due to any breach of contract by the lessee the lessor has to institute action the lessee will be liable for costs on the attorney and client scale. It has been suggested that, inasmuch as the award of costs is a matter in the discretion of the Court, this provision in the contract cannot deprive the Court of such discretion. In this regard it must be remembered that this discretion must be exercised judicially. Hence it follows that, unless the lessor has been guilty of some conduct which in the opinion of the Court entitles the Court to deprive the lessor of its costs, the Court is bound to award costs to the lessor. Moreover, for the same reason it is bound to award such costs on the agreed basis. Only if the Court finds that there

⁹ 1974 [4] SA 148 at 151 (D. & C.L.D)

is conduct which justifies it in depriving the lessor of its costs can it disallow such costs. Failing such conduct, it is clear that the Court must award costs on the agreed basis. Clauses of this type are frequently found in contracts, and if the parties have seen fit to bind themselves to pay such costs, the Court must give effect to the contract. It has not been suggested that such clause is a penalty falling within the ambit of sec. 1 (1) of the Conventional Penalties Act. However, even if it did, the Court would have to bear in mind that the lessor is liable for such costs to his own attorney and, hence, sec. 3 of the Act would apply.”

[16] Besides **Carmichael**, *supra*, it would appear the trend even in subsequent decisions, has been to award costs on attorney and client scale on the understanding that the Court is bound to enforce an agreement between the parties regarding payment of costs on attorney and client scale unless the Court finds that there is conduct justifying it to deprive a successful party of part or all its costs¹⁰. In reversing an order of the Witwatersrand Local Division refusing to order costs on attorney and client scale, the Appellate Division in **SA Permanent Building Society v Powell and Others**¹¹ said the following:

“...If the defendants considers that there are grounds upon which the Court should exercise its discretionary power to refuse to order the agreed costs to be paid, it is surely for him to raise the matter and to place the Court in possession of the facts and circumstances which he contends support his objection to the making of an order in the terms of the agreement.

¹⁰ S.A Savings & Credit Bank Ltd v Bradbury and Others 1975 (1) SA 936 F - H; Claude Neon Lights (S.A) Ltd v Peroglou 1977 (1) SA 575 at 578 (C.P.D); Sapirstein v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 at 14 AD and Neuhoff v New York Timbers Ltd 1981 (4) 668 at page 684 E - G;

¹¹ 1986(1) SA 722 at page 728 - 729 AD

A Court having before it only the lawful and enforceable agreement of the parties cannot properly exercise a discretionary power to disregard the agreement on the strength of sheer speculation as to the sort of oppressive conduct of which a person in the position of the creditor could conceivably be guilty nor on the strength of its own disapproval or the sense of unease in respect of an agreement such as the parties entered into.”

[17] I now turn to consider the factual matrix considering the principles set out above. In determining the appropriate costs order, the exercise involves, of necessity, traversing the history of the matter to the extent necessary, the conduct of the parties and the merits of the matter.

[18] The matter was settled before evidence was tendered as a result of which the allegations by the parties in their pleadings remain untested. Even the circumstances under which the matter was settled are not clear. As a result, it will not be wise to comment or conclude that the defendant opted to settle the matter because all the grounds upon which it resisted the plaintiff ‘s claim were frivolous and therefore award costs on an attorney and client scale against it. However, it is common cause that the defendant was a surety to the plaintiff ‘s principal debtor, Mountain Farms (Pty) Ltd¹². The Suretyship Agreement between the parties signed on the 30th September 2017 is annexed to the plaintiff ‘s Replication. Clause 3 thereof has a revealing effect. It reads as follows:

¹² Defendant’s Heads of Argument (unpaginated) at para 3 and Plaintiff’s Heads of Argument at page 3 paras 4.2 to 4.4

“ 3 Suretyship

The Surety binds and interpose himself as surety and co – principal debtor in solidum for the Debtor’s indebtedness generally to the Bank *howsoever arising* including:

3.1....

3.5 indebtedness in respect of interest, discount, commission, legal and collection costs (*on the attorney and client scale*) stamps and all other necessary or usual charges and expenses.” (my emphasis)

[19] Though Mr. *Mpaka* did not fortify his submission with reference to authorities, he did submit that the obligation to pay costs arises *ex contractu* and the Court has no option but to grant them. I have also gathered from the notes of the late Chaka – Makhoane, J, that Mr. *Mpaka* made reference to Clause 3 of the Suretyship Agreement, page 22 of the record, during arguments on the 4th March 2020. Based on the plethora of authorities cited above, it is my considered view that the defendant bound itself to pay legal costs on attorney and client scale *howsoever* arising. While it is accepted that where there is an agreement to pay costs on attorney and client scale the court’s power to disallow such costs is limited¹³, I disagree with the suggestion by Mr. *Mpaka* in his Heads of Argument that the Court has no option but to grant the costs. That

¹³ Western Bank Ltd v Honeywill and Another, *supra*.

assertion is not entirely correct. The correct position is that the Court still retains its discretion which must be judicially exercised as a result of which unless plaintiff is guilty of some conduct which in the opinion of the Court entitles it to deprive plaintiff of its costs, the Court is bound to award the costs to plaintiff on the agreed basis¹⁴.

[20] Having determined that the defendant agreed to pay costs on attorney and client scale, the next stage of the enquiry is to establish whether there are any grounds upon which I should exercise my discretionary powers to refuse to order the agreed costs to be paid. In short, has any valid reason been advanced why I should not enforce the terms of the agreement between the parties? As the Court pointed out in **SA Permanent Building Society**, *supra*, it is for the defendant to raise such grounds and place them before court.

[21] The defendant asserts that it had wanted to reach amicable settlement to the dispute but that was met with resistance from the plaintiff. Save for the allegation in paragraph 2.7 of the defendant's Plea that "*The action is premature in the premises and it is obligatory that it be mediated as the dispute can be resolved had it not been but for the improper approach of the court by the plaintiff*", nothing evinces misconduct on the side of the plaintiff. The allegation from the defendant was in response to paragraph 4 of the plaintiff 's Particulars of Claim where the plaintiff indicated that it objected to

¹⁴ S.A Permanent Building Society v Powell and Others, *supra*.

mediation because “*the Defendant Company has, after exhaustive attempts, not been able to settle the outstanding debts notwithstanding written demands in terms of the agreement entered into.*”

[22] I have searched in vain, for an authority in our jurisdiction where a successful party was denied its costs on the basis that it elected not to refer its case for mediation. Be that as it may, the Supreme Court of Appeal of England and Wales in **Halsey v Milton Keynes General NHS Trust; Steel v Joy and another** [2004] EWCA Civ 576, [2004] 1 WLR 3002, held that since costs should follow the event, the burden is on the unsuccessful party to show why there should be a departure from the general rule as a result of which the burden is still on the unsuccessful party to show that the successful party acted unreasonably in refusing to agree to alternative dispute resolution. I cannot agree more.

[23] To the extent that the decision in **Halsey**, *supra*, places the burden on the unsuccessful party to demonstrate that the successful party acted unreasonably, it dovetails well with the decision in **SA Permanent Building Society**, *supra*, that it is for the defendant to raise and place before Court, grounds upon which the Court should refuse to order the agreed Costs.

[24] Besides the allegation that the plaintiff refused to refer the matter for mediation, nothing has been placed before me to demonstrate that such

refusal was unreasonable. Neither is the defendant alleging that the plaintiff's election to object to mediation was unreasonable. Importantly, no evidence of steps taken by the defendant to curtail the case and thus avoid escalation in costs was brought to my attention. In the absence of such evidence or evidence showing that the plaintiff acted unreasonably, there is no basis for me not to recognise the agreement between the parties and order the agreed costs.

[25] Again, I have carefully analysed the pleadings, paragraphs 4 and 9 of the Particulars of Claim and paragraphs 2 and 3 of the Plea. I realise that the defendant has not issuably denied that it did not settle the outstanding debt after *exhaustive attempts and notwithstanding written demand* in terms of the agreement. It is difficult to imagine what other steps the plaintiff was required to take besides suing out summons. Once plaintiff decided to institute Court action, it was procedurally required in terms of Rule 7 (2) of the **High Court (Mediation) Rules, 2011** to indicate in its pleadings whether it consented to or was opposed to referral of the matter to mediation. I am not persuaded that the plaintiff should be penalised for communicating its choice in the Particulars of Claim, particularly when it has not been alleged that such a choice was unreasonable. Moreover, regard being had to Rule 8 (1) of the **Mediation Rules, supra**, it is only 15 days after the filing of the first defence, that the parties are invited to mediation administrator where objection has been raised. Consequently, it is only subsequent to filing of the first plea that it can be

determined if plaintiff's objection to mediation is reasonable or not – by then some costs would have already been incurred. It does not appear that Rule 8(1) was applied in this matter as a result of which the parties did not appear before mediation administrator. I realise that I have belaboured the point more than it was necessary as the defendant blames the plaintiff 's election to object to mediation, without necessarily saying that such an election was unreasonable.

[26] Again, the defendant 's proposal for mediation is irreconcilable with its subsequent actions. I am aware that the defendant delayed filing its discovery affidavit and witness statement as a result of which the pre-trial conference scheduled for the 5th March 2018 had to be postponed. The defendant had to be compelled through a Court Order obtained on the 5th March 2018 to file its discovery affidavit and witness statement. To mark its displeasure regarding the defendant 's misconduct which necessitated an interlocutory application to compel it to file witness statement and discovery affidavit, the Court ordered the defendant to pay costs on attorney and client scale for the application. Considering the defendant's conduct, the genuineness of its alleged desire to settle the matter through mediation is open to serious doubt. Be that as it may, this judgment would be incomplete if I were to close the discussions on this point without placing emphasis on the value and the importance of mediation. This judgment is therefore not a license for parties to

dodge mediation – there will be consequences in appropriate cases where parties are found to have unreasonably opposed mediation.

[27] The defendant has placed much reliance on **Public Protector v South African Reserve Bank**, *supra*, in particular the minority judgment of Mogoeng, C.J, as he then was. Even as he addressed the Court, Mr. *Mokhathali* referred to paragraph 12 of his Heads of Argument where the judgment is extensively quoted. While I do not question the correctness of the legal argument presented by Mr. *Mokhathali*, namely that the issue of costs is entirely within the discretion of the Court, I am not sure he fully comprehended the breadth of Mr. *Mpaka*'s argument. Mr. *Mpaka* 's argument was two pronged. He claimed costs on attorney and client scale based on the agreement between the parties as well as on the fact that, according to him, the defence was frivolous and designed to prolong the conclusion of the matter. Mr. *Mokhathali* did not address the first leg of Mr. *Mpaka*'s argument, either he misconceived the first basis on which the costs on attorney and client scale were claimed or he found the argument unassailable. While the sentiments of Mogoeng, C.J, as he then was, in **Public Protector v South African Reserve Bank**, *supra*, remain relevant and profound, the Court in that case was not dealing with a situation where a defendant had bound himself or herself by an agreement to pay costs on attorney and client scale.

[28] In addition, it has been argued on behalf of the defendant that since the matter was settled, each party should handle its own costs. The argument loses sight of the fact that settlement was reached in the context of litigation. Again, it does not take into account that the defendant is bound by Clause 3 of the Suretyship Agreement in terms of which it agreed to pay legal and collection costs on attorney and client scale *howsoever* arising. Worse still, pleadings had already been closed and the matter ready for trial when settlement was reached. Even in circumstances where there has been no appearance to defend, a Court must give effect to the parties' agreement regarding payment of costs on attorney and client scale¹⁵. While a party's attitude to settle should be viewed in a positive light when it comes to costs, plaintiff's claim in this matter was only met after it had toiled as reflected by the pleadings.

[29] As it has already been indicated, one of the grounds on which the plaintiff insists on costs on attorney and client scale is that the defence raised by the defendant was frivolous and intended to delay the conclusion of the case. Without passing any judgment on this issue, zeroing in on issues that were going to be tried as fully defined in the pre – trial minute, whether the defence was frivolous or not is open to disagreement.

¹⁵ S.A Savings & Credit Bank Ltd v Bradbury and Others, supra, at 937 C- F; SA Permanent Building Society v Powell and Others, supra, at 728 F – H;

[30] I do not consider it necessary to decide whether the defendant 's defence was frivolous or its conduct was aimed at delaying the conclusion of the case. In my view, whatever the situation may be, no grounds exist for depriving the plaintiff of attorney and client costs as agreed between the parties in the Suretyship Agreement. There are no facts or circumstances placed before me on the basis of which I can exercise my discretion to refuse to order the agreed costs between the parties.

ORDER

[31] In the circumstances, I make the following order:

1. the defendant is ordered to pay plaintiff's costs on attorney and client scale.

A.R. MATHABA J
Judge of the High Court

For the Plaintiff:
For the Defendant:

Adv. T.R Mpaka
Adv. M.E Mokhathali