

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/147/2019

In the matter between:

‘MAKHAUHELO MABUSE

APPLICANT

AND

**OFFICER RESPONSIBLE FOR MAFETENG
CRIMINAL INVESTIGATION DIVISION**

1st RESPONDENT

**POLICE DISTRICT COMMISSIONER
(Snr. Supt. Likhama)**

2nd RESPONDENT

COMMISSIONER OF POLICE

3rd RESPONDENT

ATTORNEY GENERAL

4th RESPONDENT

Neutral Citation: `Makhauhelo Mabuse vs Officer Responsible for Mafeteng Criminal Investigation Division and Others (CIV/APN/147/2019) [2021] LSHC 27 (25th MARCH 2021)

CORAM:

MOKHESI J

DATE OF HEARING:

17TH FEBRUARY 2021

DATE OF JUDGMENT:

25TH MARCH 2021

SUMMARY

CIVIL PRACTICE: *Application for determination of costs after matter disposed of- Whether the court functus officio- Held, the court is not functus officio based on the exceptions to the functus officio rule, and costs awarded accordingly.*

ANNOTATIONS

Cases:

Firestone South Africa (PTY) Ltd v Gentiruco AG 1977 (4) SA 298 (A)

Sopher v Sopher 1957 (1) SA 598 (W)

[1] This matter concerns the issue of costs which was not dealt with when final judgment was pronounced. On the 07th May 2019 an application for *habeas corpus* and other reliefs was brought against officer commanding Mafeteng Criminal Investigation Division and District Police Commissioner. In terms of this application the respondents were among other reliefs interdicted from assaulting the applicant's son Mahoete Mabuse who was in their custody.

[2] The said detainee was brought before court on the 08th May 2019. This court was able to establish that he was tortured because he had sustained injuries which were clearly visible, for which the police officers could not give a satisfactory explanation. As the conduct of the police was in conflict with my prior order interdicting them from assaulting him, I ordered that the detainee be released from custody forthwith. I did not make any pronouncement on the costs sought.

[3] **FUNCTUS OFFICIO**

Once a court has delivered its verdict in a matter, the general principle is that the same court cannot revisit it, because it is *functus officio*. This is a salutary principle of our law. However, this rule is not absolute as it is subject to at least four exceptions. The exceptions to this rule were stated in the decision of **Firestone South Africa (PTY) Ltd v Gentiruco AG 1977 (4) SA 298 (A)** at 306F – 307G, wherein the court said:

“The general principle now well established in our law is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio; Its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased...”

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement in one or more of the following cases:

(i) The principal judgment order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted the grant....”

[4] It is in terms of this exception that the issue of costs in the instant matter is being dealt with. In his founding papers, the applicant had sought costs on ordinary scale, but in her heads of argument, a higher scale was sought. From the record, it is clear that respondents were not put on notice that a higher scale would be sought. The basis of the applicant’s prayer for costs on a punitive scale owes its life to the conduct of the police torturing the applicant’s son even though they were specifically interdicted from doing so by this court. As a general rule the court is vested with a judicial discretion to award costs. The other general principle is that costs follow the event. An award of costs on an attorney and client scale being punitive in nature, is generally awarded when there was a prayer for it or where the other party had been put on notice that such an order will be sought (**Sopher v Sopher 1957 (1) SA 598 (W) at 600D – E**). However, there may be special circumstances justifying such an award of costs even though the other party had not been put on notice (**Sopher v Sopher** *ibid*).

[5] In the instant matter the applicant had specifically sought an order against the respondents not to assault her son, however, as it turned out when he was brought before court, he was badly tortured. The application was lodged on

the 07th May 2019, and on the 08th May 2019 the detainee was brought before the court. Although the applicant suggests that the police had disobeyed my order, I do not think that that conclusion could be so easily reached in the circumstances of this case: it is possible that when the order was served on the police the detainee had already been tortured, as it is equally possible that he could have been tortured after the police had been served with the order. In the absence of a convincing evidence that the respondents tortured the detainee in defiance of my orders, my considered view is that costs should be awarded on the ordinary scale.

[6] In the result:

(a) The applicant is awarded the costs of suit.

MOKHESI J

For the Applicant: Adv. B. Mokoatle
Instructed by T. Mahlakeng & Co. Attorneys

For the Respondents: No Appearance