IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A341/2015

Date:28/7/16

In the matter between:

R. P.: S. C. **APPELLANT**

And

CITY OF MATLOSANA **RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The appellant instituted an action for damages against the respondent after she was raped and assaulted at her place of employment with the respondent.

[2] She in due course withdrew her claim but did not tender costs. The respondent then launched an application in terms of Rule 41(1)(c) of the Uniform Rules of Court to compel the appellant to pay the respondent's costs. This application was opposed but on 5 September 2014 the respondent's application was granted and appellant was ordered to pay the respondent's costs.

[3] The appellant's application for leave to appeal was dismissed but on 29 April 2015 the

Supreme Court of Appeal granted leave to appeal to the full Court of this division.

[4] The appellant contends that the facts of this matter give rise to exceptional circumstances that warrant that the appellant should not be liable for the costs of the action which was withdrawn.

BACKGROUND

[5] The appellant was employed as an assistant librarian prior to 2002 which library was operated by the respondent.

[6] It seems to be common cause that since the beginning of January 2002 the Appellant reported incidents of crime at the Manzil library. She reported that she was threatened with violence, mugged, assaulted, robbed and her tires were slashed. She also reported numerous burglaries at the premises of the Respondent. On 9 September 2002 the Appellant suffered an attempted rape at the library. Various requests over the subsequent years for additional protection or security measures fell on deaf ears. The fact is that no additional security measures were ever implemented by the Respondent. On 14 July 2008 at approximately 09:00 the Appellant was brutally raped and assaulted in the library.

[7] After the rape Appellant instituted action against the Respondent. She alleged that the rape and assault were caused exclusively by the gross negligence of the Respondent, who ignored notices of the safety risks at the premises and who did not address the issue. She alleged that the Respondent failed to take the necessary safety measures to ensure the safety of its personnel at the Manzil Park Library.

[8] Prior to the institution of the action the Appellant gave proper notice to the Respondent in terms of Section 2 of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2002.

[9] In its plea delivered on 9 February 2009 the Respondent denied the rape and that it failed to take the necessary safety measures.

[10] In addition to the Respondent's aforesaid denial, it pleaded as follows:

> "5.*2 Without derogating from the generality of the aforesaid denial and in the event of this Honourable Court finding that the Plaintiff was assaulted and raped at her place of work, whilst she was in the employ of the Defendant, acting within the course and scope of her employment, which is still denied, Defendant specifically denies that the Defendant was negligent as alleged or in any other way whatsoever or that the Defendant, in the circumstances could have foreseen and/or reasonably take steps to prevent the assault and rape of an employee at the library at 09:00 in the morning.*
>
> 5.3 In the alternative and in the event of this Honourable Court finding that the Plaintiff was assaulted and raped at her place of work, whilst she was in the employment of the Defendant, acting within the course and scope of her employment and that the Defendant was negligent as averred, which is denied as set out in this plea, then and in that instance the Defendant pleads that the Plaintiff was also negligent in failing to take reasonable steps in the prevailing circumstances to safeguard her person against any form of attack."

[11] The Respondent persisted with the aforementioned denial almost up to trial. It also seems to be common cause that the Appellant discovered various letters to the Municipal Manager preceding the attack, as well as the contents of the police docket. Particulars of the medical examination and the photographs of the library were discovered as well as particulars of the criminal trial and various expert notices and summaries delineating the Appellant's trauma and damages suffered. All these irrevocably pointed to the incident having in fact taken place.

[12] The matter was initially enrolled on the trial roll of 17 May 2010. At a preceding pre-trial conference the Respondent indicated that it intended amending its plea. Subsequently, the Respondent delivered an amended plea 7 days before the aforesaid trial date wherein, for the first time, both the rape and assault and the Appellant's employment with the Respondent were admitted.

[13] In addition to the aforesaid admissions however, the Respondent at this stage inserted a special plea to the effect that, due to the Appellant's employment, the assault and rape was an *"occupational injury* . .." and thus a personal injury sustained as a result of an *"accident'* as defined in terms of the provisions of Section 1 of the Compensation Act, 130 of 1993 (the Compensation Act). Accordingly, the Respondent still denied liability.

[14] The special plea reads as follows:

> *"On or about 16 July 2008 and in terms of the relevant provisions of the Compensation Act,* a *written claim was instituted for and on behalf of the Plaintiff to recover the benefits to which the Plaintiff is entitled under the Compensation Act as* a *result of the occupational injury Plaintiff sustained as referred to in paragraph 1A. 1 above in the prescribed form against the Director-General which claim is, to the best of the Defendant's knowledge, not finalised as yet."*

[15] Subsequent to the special plea being filed the Appellant withdrew her claim against Respondent on the advice of her attorney The Respondent, not satisfied with the simple withdrawal of the action by the Appellant without a tender by her for its costs, launched the application in terms of rule 41(1)(c) for costs. The matter was set down for hearing on 13 November 2013. On that day however, the action did not feature on the trial roll but the Appellant alleged that unbeknown to the Appellant it had been set down by the Respondent on the unopposed motion court roll where the Respondent attempted to obtain the costs order

sought. When this was discovered by the Appellant's legal representatives, argument was presented regarding improper service of the set-down and the matter was postponed sine die with costs thereof being reserved resulting in the matter featuring on the opposed motion court roll before Prinsloo J.

APPLICABLE LEGAL PRINCIPLES

[16] The general rule is that an unsuccessful litigant should pay the costs of his/her opponent and generally, when a party institutes action but withdraws it, he/she should pay the costs of the Defendant unless good grounds exist[1] . It is however merely a general rule and our Courts have developed a flexible approach which allows for deviation from this rule under appropriate circumstances.

[17] The principles to legal costs were summarised as follows in **Goldfields Ltd and Others v Motley Rice LLC[2]** *:*

> " *The starting point for an analysis of the South African legal position for legal costs is the general rule that:*
>
> > *(a) In ordinary cases costs should follow the event - the successful party is ordinarily entitled to costs against the unsuccessful party;*
> >
> > *(b) Costs are awarded in the discretion of the court which may in appropriate cases not award costs to a successful part y or even award costs against such part y . .. The existence of a discretion of the court in all cases (constitutional and otherwise) ensures that the court is always in a position to balance the interest of the parties and to protect its own process, if necessary through costs orders. In this context there is no party which is a priori immune from the court's power to protect its own process through costs orders."* (my emphasis)

[18] The Constitutional Court has summarised the position pertaining to costs as follows in **Ferreira v Levin NO and Others:**[3] *The Supreme Court has, over the years, developed* a *flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted is in the discretion of the presiding judicial officer and the second that the successful party should, as* a *general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to* a *large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytic accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether* a *party achieves technical success only, the nature of the litigants and the nature of the proceedings."*

[19] It is with the aforesaid principles in mind that I proceed to consider the appeal before us.

[20] The Court *a quo* in its judgment carefully considered the general rule pertaining to costs and the circumstances of the case and concluded that there should not be a deviation from the general rule. It is trite that costs are awarded in the discretion of the Court and to interfere with that discretion requires that we will have to find that the discretion was not properly exercised or that the Court misdirected itself.

[21] Although the Court considered the circumstances of the case I am of the view that the Court did not give sufficient consideration to the background of the matter. The Appellant is a rape victim who was raped at her workplace after her employer was warned about safety concerns, but chose to do nothing about it. The Respondent is furthermore a public entity who is constitutionally obliged to provide a safe and healthy environment and who failed abysmally to do just that in relation to its employees and in particular the Respondent[4] . This failure resulted in the rape of the Appellant and the institution of the action against the Respondent.

[22] The further important aspect is the content of the respondent's plea. The rape was initially denied and the respondent even raised an alternative invoking the provisions of the Apportionment of Damages Act. This plea implicated that the Appellant was partially to blame for the rape on her. I find this plea offensive, even bizarre and deeply insensitive to the Appellant who must have suffered unimaginable trauma as a result of the rape.

[23] The Court *a quo* stated in its judgment that Defendants are free to raise any defence that is good in law and that the wording of the aforesaid plea is standard in similar pleadings[5]. I agree with this view as a general assumption. However the mere fact that a defence is a generally acceptable defence does not mean that a Court should not take into account that the defence is palpably without merit and offensive and insensitive to the suffering of a party when considering an appropriate cost order.

[24] The Appellant went further and amended its pleadings and instituted a special plea in terms of sec 35 of the Compensation Act, and alleged that the incident falls within the ambit of that Act.

[25] A similar set of facts arose in **DN v MEC for Health, Free State[6] ,** a medical practitioner claimed damages from her employer for the injuries she sustained during an assault and rape while on duty at a State hospital. The employer filed a special plea alleging that the employee was precluded by sec 35 of the Compensation Act from instituting any action against the employer. This special plea accords with that of the Appellant in the present matter.

[26] The Court held that the incident was not an "accident" as contemplated in sec 35 of the Compensation Act and the provisions of the said section were accordingly not applicable. The plaintiff in that matter was not precluded from claiming damages from the employer and the

special plea was dismissed[7] .

[27] The Appellant's attorney was seemingly not aware of the aforementioned case and advised her, on strength of the special plea to withdraw her action. The Court a *quo' s* view was that the Appellant was legally represented and as such she must live with the advice of her representative or sue him. In my view this approach loses sight of the fact that it was Respondent who raised this defence which was bad in law and, but for the special plea, the action, which by now has prescribed, would not have been withdrawn.

[28] In my view one should also consider the litigants before Court. On the one hand we have a vulnerable member of society who was raped at her place of employment after her employer was warned of the safety risks and on the other hand we have a public entity that has a duty to provide a safe working environment.

[29] The learned judge should also have considered the huge financial disparity between Appellant and the Respondent. Respondent has the public purse available to finance litigation. The Appellant is a librarian whose financial resources must be limited.

[30] An order against the Appellant to pay the costs in view of all the circumstances constitutes a further violation of a vulnerable member of society who has already suffered the most unspeakable violation of her bodily integrity and who must also have suffered severe emotional trauma.

[31] The learned judge in the Court *a quo* for the reasons set out above misdirected himself and this Court should intervene. I therefore find that exceptional circumstances do exist which would allow for a deviation from the normal cost order. Consequently the appeal should be upheld.

[32] I make the following order:

32.1 The appeal is upheld;

32.2 The order of the Court *a quo* is set aside;

32.3 The respondent is ordered to pay the appellant's costs of the action up to and including the postponement of the trial on 17 May 2010;

32.4 It is ordered that each party shall after the aforesaid date be liable for its own costs of the action;

32.5 The respondent is to pay the appellant's costs of the application in terms of Rule 41(1)(c); and

32.6 The respondent is ordered to pay the costs of the appeal and the preceding applications for leave to appeal in the Court a *quo* and in the Supreme Court of Appeal

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R G TOLMAY

JUDGE OF THE HIGH COURT

I AGREE:

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N KOLLAPEN

JUDGE OF THE HIGH COURT

I AGREE:

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D MAKHOBA

JUDGE OF THE HIGH COURT

DATE OF HEARING: 8 JUNE 2016

DATE OF JUDGMENT: 28 JULY 2016

ATTORNEY FOR APPELLANT: THERON JORDAN & SMITH INC

ADVOCATE FOR APPELLANT: DAVIS (SC)

ATTORNEY FOR RESPONDENT: OOSTHUIZEN DU PLOOY

ADVOCATE FOR RESPONDENT: C RIP

[1] Germishuys v Douglas Besproeiingsraad 1973(3) SA 299 (NK)

[2] 2015(4) SA 299 (GJ) at paragraphs [29] and [32]

[3] 3 1996(2) SA 621 (CC) at [3]:

[4] See sec 152(1)d of the Constitution

[5] Judgment, p 4, par 10

[6] 2014(4) SA 49 (FB)

[7] At par [18] and [22]