THE REPUBLIC OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no:A937/2014

19/8/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

19/08/16 .....

DATE SIGNATURE

In the matter between:

LUKAS PUTUKU MASUKU

AND

ANDRIAN SYDOW N.N

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This appeal, which concerns the narrow issue of costs, comes before this court with leave to appeal from Lazarus J. The appeal arises from the finding of the learned Judge that the applicant's application was ill conceived, unnecessary and accordingly there was no reason not to allow the cost to follow the results. In other words the court found that the respondent successfully opposed the rescission application which had been launched by the applicant. The court awarded cost on the party and party scale.

[2] The appellant has also filed an application for the late filing of the record which is unopposed. Having regard to the explanation proffered by the applicant, I am of the view that the interests of justice supports the granting of the condonation of the late filing of record of appeal.

[3] The applicant in his papers provides lengthy details about the sequestration order which the respondent obtained against him on 3 May 2011. For the purpose of this judgment the relevant issues are those related to the costs order granted consequent to the dismissal of the rescission application which was opposed by the respondent.

[4] The present application is opposed.

Background facts

[5] It is common cause that during December 2013, the appellant launched the application to rescind and set aside the provisional sequestration order which had been granted against him on 28 February 2011, including the sequestration order granted against him on 3 May 2010. The appellant also sought an order as to costs on the of attorney and client scale.

[6] This rescission application was opposed by the respondent who also sought an order on attorney and client scale. However, before filing the answering affidavit the respondent, informed the appellant's attorneys that the first order which was made on 3 May 2011, had been recalled following the application which was made by his erstwhile attorneys.

[7] The appellant says he discovered that he was sequestrated when he approached his bank during June 2013, for a credit facility. He was informed that there was a rehabilitation order against him and thus his credit application was for that reason unsuccessful. It was in that regard that the respondent contended and advised the appellant that his application for rescission was without foundation and that he should withdraw it. The appellant disregarded the advice and proceeded with the application for the rescission and setting aside the sequestration order.

Grounds for appeal.

[8] The appellant contends that the court a quo in awarding costs against him overlooked certain common cause facts and legal principles. The common cause facts, it would appear, related to the recalling of the sequestration order and the manner in which the respondent conducted itself in the institution of and prosecuted the appellant's sequestration. He contends further that, based on the principle of finality he had no option but to apply to have the provisional and the final sequestration orders set aside. It is further contended in this regard that the sequestration orders remained valid until they were set aside. The sequestration order could not, according to him, be set aside by agreement between the parties.

[9] The court is said to have ignored the principle of finality when it ignored the fact that the order of final sequestration orders was recalled after it was issued by the Registrar. In argument counsel for the appellant conceded that these proceedings concern the normal principles governing an appeal against a cost order. He however, argued that it was necessary to institute the rescission proceedings because there were three conflicting orders from the court relating to the issue of the sequestration of the appellant. The orders, are public documents and therefore third parties may hold them against the appellant.

The decision of the court

[10] In determining the appellant's rescission application the court a quo held that:

> "9. Consequently the applicant cannot obtain the rescission of the provisional or final sequestration orders as sought in the notice of motion as these orders are not presently in operation nor were they in operation at the time this application was launched."

[11] The court then in noting the problem faced by the appellant, concerning the listing on the credit bureau, adopted a practical solution to the problem by declaring that:

> "11. Notwithstanding the legal position, however, the applicant continues to suffer prejudice as a result of having been listed with credit bureau. As a result practical solution to the applicant's plight, I granted the declaratory relief set out above."

[12] It is apparent from the reading of the judgment that the court *a quo* in ordering the appellant to pay the costs reasoned as follows:

> "10. This being the case, the application was ill conceived and unnecessary. In the circumstances I see no reason for deviation from the general principle that the costs must follow the result."

The evaluation / analysis

[13] The key issue for determination in this matter relates to the exercise of the discretion of the court *a quo* in awarding costs in favour of the respondent. The main contention of the appellant is that there are "exceptional circumstances" that supports his appeal. This is governed by the provisions of s 16 of the Superior Courts Act of 2013, which provides:

> (2) *(a)* (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
>
> (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

[14] As indicated above this matter has to do with the appeal against the decision of the court *a quo* awarding costs in favour of the respondent. Having read the papers in this matter I do not find the provisions of s 16 of the Superior Court Act of 2013, to apply to the facts of this matter. This much counsel for the appellant conceded.

[15] I now proceed to deal with what I see as the key issue for determination in this matter. It is trite that the general rule of our law is that costs follow the results, which means the costs are awarded to the successful party. It is also trite that in considering whether to grant or refuse costs, the court has a judicial discretion

to exercise. It is for this reason that while the appeal court has the power to overturn decisions of a lower court on the issue of costs, it will, as a matter of principle, only do so if it is shown that the discretion was not properly exercised or that the court materially misdirected itself in determining the issue.

[16] In the present matter the proper reading of the judgment of the court *a quo* is that the respondent was the successful party, in that the rescission application was refused. This finding is supported by the record. There was no sequestration order that could be rescinded, the respondent having withdrawn its application..

[17] The fact that the court adopted a practical solution to what appeared to be an untenable situation for the appellant in having been listed in the credit bureau, does not detract from the finding that the appellant was unsuccessful in his rescission application. I do not agree with the appellant's counsel that this made the appellant partially successful.

[18] It seems to me from the reading of the appellant's papers that he conflates the merits of the sequestration proceedings and those of the rescission application. In this respect in the heads of argument the appellant complains that the court *a quo* ignored the chronology of events dating back to 2008 including that the respondent sought his sequestration in order to enforce a disputed debt. The disputed amount was according to him settled on 23 September 2010, but the respondent proceeded to obtain the sequestration order on 3 May 2013. The appellant further contended that the respondent sought a final sequestration

order in terms of the Insolvency Act without showing that he had committed an act of insolvency.

[19] The key finding by Lazarus J is that the *rule nisi* relating to the sequestration of the appellant was discharged in November 2011, after the respondent's application was withdrawn and the matter did not proceed on the return day. It is important to note that it has not been disputed that the the respondent tendered costs for the withdrawal of the sequestration application which was accepted by the appellant. It is also important to note that subsequent to the withdrawal of the application by the respondent appellant taxed the bill of costs tendered by the respondent.

[20] Having regard to the above I find no basis for faulting the court *a quo* in the approach it adopted in dealing with the issue of costs. In this respect the court *exercised* its discretion properly after considering and taking into account the facts and the circumstances of the case.

[21] The argument about the issue of the principle of finality bears no merits. In fact the issue is irrelevant in as far as the costs order arising from the reserving application is concerned. In any case counsel for the appellant conceded that even the authority he relied on did not support his proposition in this regard. The respondent has asked for cost on attorney and client scale. The appellant's counsel argued that for but for the launching of the sequestration process this matter would not have reached this point. To the contrary, in my view, but for the conduct of the appellant this matter would not have reached this stage. The

appellant was warned very early on that there was no basis, in the first instance for instituting the rescission application and thereafter pursuing these proceedings. This application was also unnecessary and the conduct of the appellant in instituting these proceedings was unreasonable.

Order

[22] In the premises the following order is made:

1. The findings of the Court a quo cannot be disturbed.
2. The appellant's application for appeal against the judgment of the Court a quo is dismissed with costs on attorney and client scale.

Molahlehi E

Acting Judge of the Gauteng Division.

I agree

Fabricius H J

Judge of the Gauteng Division

I agree

Moosa T

Acting Judge of The Gauteng Division