

36526/2015-lb
2022-06-15

JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 36526/2015

DATE: 2022-06-15

<p>DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: NO. (2) OF INTEREST TO OTHER JUDGES: NO. (3) REVISED. DATE 1 August 2022 SIGNATURE</p>
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10 In the matter between

MASOUD NEZAMPARAT

Applicant

and

THE MAGISTRATE EDENVALE NO

1ST Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

2ND Respondent

FANUEL TSHWENYEGO CHILWANE

3RD Respondent

J U D G M E N T

20 **VICTOR J:** In this matter on 10 August 2016 I granted an order in the following terms.

1. The applicant's submission of guilt in terms of section 57A of the Criminal Procedure Act 51/1977 made on 5 November 2009 is removed and set aside.
2. The result and entry in the criminal record book of the

particulars contemplated in section 57(vi) by the clerk of the court below is set aside and such particulars shall be expunged from the criminal record.

3. The clerk of the court below shall procure that the fine of R500 paid on behalf of the applicant on 5 November 2009 is refunded to him within three months of date of this order.

Now the contentious aspect in terms of prayer 4, I made the draft order which is not signed by myself but it seems to be
10 signed by the registrar. It states the following and I quote:

"The third respondent is to pay the applicant's cost on a scale as between attorney and client."

And then there is another prayer 5 and I quote

"The cost order is reserved and to be heard by Victor J during this term."

Quite clearly orders 4 and 5 are contradictory and certainly prayer 4 was not made by me on that date. The whole idea was that the third respondent should come and make submissions as to why the cost order should not be made against him on the
20 attorney and client scale.

Insofar as that court order reflects prayers 4 and 5 that cannot be correct. There has not been an opportunity to call for a transcript of that hearing and in any event, there has been a change of transcribers and it is uncertain at this stage whether a transcription of 2016 would be readily available.

However, Adv Ferrar G.H. on behalf of the applicant submits that his recollection is that the cost order was to be reserved and then properly argued before me. Obviously this did not take place during the term in which I made the order as envisaged by prayer 5. But be that as it may the applicant has now sought to deal with the question of costs.

An application was brought in this regard and the supplementary affidavit of Miss Swart explains that she is the correspondent's attorney. She was instructed by Attorneys Van
10 der Walt; the applicant's local attorney and she states that she bears no personal knowledge of the facts as was not involved. She states the main purpose of today's hearing is to deal with the question of costs.

She also goes on to explain that she collated the court file. She set forth a chronology to clarify the reasons for the matter having taken so long and thirdly to set for the basis as to why it is incumbent on whichever judge is seized with the matter to hear and adjudicate same in the absence of Victor J. However, I am able to hear this matter. She explains that when
20 she approached the registrar's office on 17 May 2019 to try and obtain the court file, the contents of the court file were in a state of disarray. She then sent the collated bundle to her counsel who then advised that the file should be put in order and that is what she did and this was uploaded on CaseLines.

But in order to determine the cost order against the third

respondent it is necessary to deal with various aspects. I have already read into the record that the third respondent has been properly notified of the hearing today. The third respondent who is an advocate, Adv Chilwane does not seem to have chambers and Ms Hannelie Swart struggled, in fact went to his office and found it to be empty. That is why she then communicated with him on WhatsApp and he then agreed to an e-mail address and she has since then been sending all the correspondence and the relevant notices of set down for today, to him.

10 This matter has an unfortunate history. In brief, the applicant is a doctor and he went abroad with his family. He returned and the one child was ill and vomiting so they had to go to a shopping centre to buy fresh clothes. In the shopping process an allegation was made that he had stolen a T-shirt from Stuttafords. The child was vomiting and the applicant of course was dealing with that when this unfortunate situation arose about the stealing of the T-shirt. He was taken to the magistrate's court and at court there was an exchange between the prosecutor and Adv Chilwane. The applicant paid money to
20 Mr Chilwane, the approximate amount was between R2 000 and R3 000. He did not receive a receipt. The applicant's home language is Urdu. There was no Urdu interpreter present at the time when this exchange took place between them. At some stage the third respondent came out to tell him that the matter had been discharged.

To the applicant's dismay when he applied to renew his work visa as an anaesthetist, he had to renew his work visa. The fact of the criminal charge and his apparent plea of guilty came to the fore.

The applicant has made out a clear case that he did not plead guilty to the charge. He was not guilty of stealing the T-shirt and he was therefore severely prejudiced by this criminal record.

He approached this Court and I set aside that criminal
10 record but I reserved the question of costs because of what appeared to be the conduct of Adv Chilwane where it is alleged he misled the applicant as to what the true state of affairs was in his discussions with the prosecutor.

Importantly the applicant did not sign any court papers pleading guilty, agreeing to an admission of guilt and the applicant was still awaiting Mr Chilwane's version of the events. It is now six years later and there still is not a version on oath from him.

When this application to set down the costs was
20 presented, Mr Chilwane then filed a notice of objection because he stated that the correct affidavit had not been filed. His notice of objection is dated 1 June 2022 and it shows that he lives at Extension 3, Dobsonville and he states that Ms Swart's supplementary affidavit does not reflect the facts which are within the applicant's personal knowledge and belief. It was

deposed to by an attorney and it shows that according to him the applicant had failed and/or neglected and abandoned the filing of a founding affidavit to support his notice of motion. All this is confusing but it clear to me that what one can infer that Mr Chilwane does know about this application ore particularly,

- (a) That the matter is on the roll today.
- (b) That the matter is pending.
- (c) That the relief sought today is in relation to the costs order.

10 The matter was on the roll previously. It came before Keghtley J but was removed because the papers were not in order. In the result the only order that I make today is in relation of the costs order pertaining to the order that I made in 2016. This was the question of the costs order against Mr Chilwane that was to be argued within that term. I accept Ms Swart's explanation why this matter has taken so long and she has set it out very clearly and concisely. The applicant's previous attorneys of record could not continue with the matter because it was not financially viable and they had to withdraw.

20 There is still the question of today's costs that would have been incurred in any event for today's hearing if this matter had been argued in 2016. So in other words I am not going to make an additional cost order for today. Mr Chilwane did not appear but that is not the reason why I am making a cost order for today, the reason is that in any event the applicant would have

had to incur the costs of arguing the attorney client costs against Mr Chilwane.

The applicant has asked the costs on the attorney client scale which is based on the fact that it necessitated him to come to court to set aside the criminal conviction. The application at that stage was properly served on the magistrate who made the order as agreed to by Mr Chilwane as well as the DPP. They did not oppose the relief so no costs order ought to be made against them. It was anticipated in 2016 that hearing would only be in
10 relation to Mr Chilwane's liability for cost.

Mr Chilwane according to the applicant had falsely entered the plea of guilty and it is for that reason that an attorney who has not come to court to prove the contrary has misled not only the applicant but the magistrate, and the deputy public prosecutor must pay the costs. The applicant has alleged fraudulent conduct on the part of an attorney and it is reprehensible that Mr Chilwane has not attended Court to clear his name. The conduct deserves a punitive cost order against Mr Chilwane.

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The order that I make is the following:

1. The third respondent shall pay the applicant's costs on the attorney-client scale.
2. The apparent prayer 4 in the order of 2016 was not made by the Court and prayer 4 should be deleted.

VICTOR, J
JUDGE OF THE HIGH COURT
DATE: Signed 01 August 2022

Date Heard 15 June 2022
Date of Judgment: 15 June 2022

10 **Counsel for the Applicant: Adv Ferrar**
Instructed by Hannelie Swart Attorneys

Counsel for the 3rd Respondent: In Person (no appearance)

CASE NUMBER-initials
YEAR-MONTH-DAY

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JUDGMENT

Date: 2022-06-29