IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 3026/98

IN THE MATTER BETWEEN:

MORMOND ELECTRICAL Plaintiff

V

MARBEL CONSTRUCTION (Pty) LTD Defendant

CORAM : MASUKU - A. J.

FOR PLAINTIFF : MR. L.N. KHUMALO

FOR DEFENDANT : MR. P.R. DUNSEITH

JUDGEMENT

6/8/1999

On the 8th December, 1998, the Plaintiff commenced action against the Defendant by issuing a simple summons in which it claimed the payment of an amount of E45,313.34 and other ancillary relief. The Defendant filed a notice to defend, whereafter, the Plaintiff filed its declaration. The Plaintiff then filed an application for summary judgement, which was opposed by the Defendant. In its affidavit resisting summary judgement, the Defendant raised its defence which convinced the Plaintiff that the Defendant had a valid defence whereupon the Plaintiff withdrew, its application for summary judgement without tendering costs as required by the provisions of Rule 41 of the Rules of this Court.

The question for determination is whether summary judgement is to be regarded as a "proceeding" for the purposes of Rule 41. If it is a "proceeding", then the Plaintiff must tender costs occasioned by its withdrawal. On the other hand, if it is not a "proceeding", the Defendant is not entitled to any costs occasioned by the withdrawal of the summary judgement neither can the Court order the Plaintiff to pay such costs in terms of Rule 41 (1) (c). Rule 41 (1) (a) provides as follows:-

"A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the Court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the Taxing Master shall tax such costs on the request of the other party".

In my view, summary judgement does not fall to be regarded as proceeding when due regard is being had to the wording of the Rule in question. Of particular importance is the use of the word "instituting", in the first line of Rule 41 (1) (a), which means "establish or start" - see Oxford Advanced Learners' Dictionary, Fourth Edition, 1990.

In my view, the proceedings are "instituted" or "started" when the Summons or an application is issued from the office of the Registrar - see Van Winsen at al 'The Civil Practice of the Supreme Court of South Africa", Fourth Edition, Juta & Co., 1997 -see also SIMPROSS VINTNERS (PTY) LTD v VERMEULEN 1978 (1) SA 779 @ 781 to 782 G - A.

In the instant case, the proceedings were instituted by the issuance of the Simple Summons and all the other steps that ensued, including the summary judgement application were predicated upon the simple summons and were aimed at obtaining the relief set out in the simple summons.

In the work entitled "Civil Procedure in the Supreme Court", Harms L. T. C., 1992 states as follows at page 314 (2) at K7:

"Summary judgement procedure (my underlining) permits the grant of a final order in a defended action without trial. Its purpose is to prevent delay where the Defendant has no real defence and to prevent an abuse of the process of the Court".

From the aforegoing extract, it is worthy of note that summary judgement is referred to as a procedure and not proceedings. It is no coincidence that Von Winsen etal (supra), at page 434 also refers to summary judgement as a procedure.

In my view, the use of the word procedure by these authors is not as a result of terminological inexactitude but is a clear and accurate description of what summary judgement is — a procedure not proceedings.

I accordingly find that there was no need for the Plaintiff to embody a tender for costs nor can the Court order the Plaintiff to pay the costs occasioned by the withdrawal in the circumstances.

By way of observation, it is my considered view that withdrawals of actions or proceedings should be filed in appropriate circumstances in order not to lead to obfuscation of simple matters. When the Plaintiff realised from the Defendant's affidavit resisting summary judgement that a valid and bona fide or arguable defence had been borne out, it should have filed a notice addressed to the Registrar and the other side in which it would state that it consented to the Defendant being granted leave to defend the matter. This in my view is good practice which would be useful for practitioners to follow in such matters.

T.S. MASUKU

ACTING JUDGE