

SWAZILAND HIGH COURT

ZWANE Frances

Plaintiff

v

CENTRAL BANK OF SWAZILAND

Defendant

Civ. Case No. 1905/2000

Coram Sapiro, CJ

For Plaintiff Mr. Thwala

For Respondent Mr Flynn

JUDGMENT

(30/04/2002)

This is an action in which the plaintiff sued the Central Bank as First Defendant, Robinson Bertram a firm of attorneys, as Second Defendant, the Sheriff of Swaziland as third Defendant, Nomachule Maphalala as fourth Defendant, Registrar of Deeds as Fifth Defendant and the Attorney General as sixth Defendant.

I have read the summons and other pleadings in this matter and would query why many of these defendants are before the court at all. At this stage after aborted hearings, only one of three days allocated to this matter was taken up in the conduct of proceedings.

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Very little progress was made, mainly because the difficulty which I pointed out at the very commencement. The Particulars of Claim do not appear disclose a cause of action.

In the analysis of Mr. Flynn who appeared for some of the Defendants, all allegations in the paragraphs preceding, paragraph 18 of the particulars of claim is of historical interest only. The basis of the claim is that His Majesty King Mswati III in a traditional process known as "Kwembula ingubo" meaning "seeking refuge under the King's blanket" or seeking the King's protection made an order that the Defendant should restore to the plaintiff certain property which had been sold in execution and that pension monies claimed by the Plaintiff was to be paid to him including all arrears from June 1994 to date of payment. It does not appear from the papers who had to pay this pension. There is no indication at this stage why this claim is made against for instance Robinson, Bertram, Sheriff of Swaziland, Fourth and Fifth and Sixth Defendants. Indeed there is nothing in the summons to show why this pension should be paid other than an Order of His Majesty.

Now an Order of His Majesty is not the law of this Court. If His Majesty has made such an Order then his subjects who respect him will obey such Order but it is not for this Court to endorse that sort of procedure. This being so, the summons does not in fact disclose a cause of action. This was known or should have been known to all the Defendants and appreciated by them from the very outset. This matter could have been cut short if an exception had been taken. The exception, I consider, would have probably succeeded. Because it was not taken a burden of costs not only to the Defendants but also to the plaintiff himself has to be born.

As the Defendant has not taken advantage of the exception procedure, it cannot be expected to be paid for the wasted costs, which have resulted from such failure. The action has now been withdrawn because the Plaintiff's counsel has come to the realisation that the action was baseless and misconceived, at least in its present form. I consider it to be a proper exercise in my discretion to award the plaintiff the costs which have been incurred but on the basis that an exception would have been taken timeously to the particulars of claim and that such exception would have been successful. In such costs would be included Counsel's fee, which is certified as necessary in terms of Rule 68. I wish to make it clear that I am making no order as to costs beyond the exception stage.

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The plaintiff is to pay the defendant's costs as if the matter had been decided on a successful exception taken by the plaintiff and that such costs are to include Counsel's fee in regard thereto.

SAPIRE, CJ