THE HIGH COURT OF SWAZILAND

Civil Case No.2775/03

In the matter between:

MA VIE ZULU And **Plaintiff**

MBABANE CITY COUNCIL **Defendant**

CORAM **: MASUKU J.**

For the Applicant For the Respondent **: Mr J.N. Hlophe : Mr E.M. Simelane**

JUDGEMENT
15th June 2004

The Court is, in this matter, called upon to determine the issue of costs. For such a determination to be made, it is necessary that a brief history of the material facts and events is undertaken, for purposes of putting the matter in its proper perspective.

It suffices to mention that this is a matter which is accompanied by a degree of acrimony and as a result of which reason, in some of the events which unfolded, played second fiddle or was totally excluded. The acrimony is evident in the correspondence and papers, particularly those of the Respondent. This is a poor example that does not need to be emulated for it goes against all the best held and respected values and traditions which are expected to be observed by legal practitioners even in cases where divergent and irreconcilable views of a matter are strongly held. Attorneys should be above the emotions of their clients as they are

expected to act professionally, exhibiting an element of detachedness which will augment the performance of their duty to the Court.

In a nutshell, the Respondent issued a Summons against the Applicant for the delivery of certain property that was confiscated by the Applicant's law enforcers, alternatively, the payment of an amount of E35, 000.00 and costs. No claim for interest was made. It would tappear that the Combined Summons was served on the Acting Town Clerk, who states that on receipt of the Summons, he requested the Director of Finance to liase with Applicant's insurers for purposes of defending the matter.

The long and short of it is that the matter was never defended, culminating in a judgement by default, granted on the 2nd December, 2004. The execution procedure ensued and this resulted in the Applicant becoming aware that judgement had been entered against it as aforesaid. An application for rescission of the judgement was granted by consent on the 14th May, 2004. In terms of that Order, the parties agreed that the matter be referred for trial. Two issues relating to costs were reserved for future determination i.e. the costs of the default judgement and the Deputy Sheriffs fees relating to an attachment of a motor vehicle. I shall deal with both aspects of the matter, which were argued before me *ad seriatim,* beginning with the costs ofthe application for judgement by default.

(a) Costs in respect of application for judgement by default.

The ordinary and fundamental principle regarding costs was stated as follows by Herbstein & Van Winsen *et al,* "The Practice of the Supreme Court of South Africa", Juta, 4th Edition, 1997 at page 705: -

> *". ...as a general rule, the party who succeeds should be awarded his costs, and this ride should not be departed from except on good grounds. "*

It should also be borne in mind that the question of the award of costs is a matter wholly within the discretion of the court and it is done in exercise of a judicial discretion. In this case, it is clear that the rescission was granted by consent and the issue of the successful party does not arise.

In THERON VS ROSE-INNES & CO. 1927 CPD 123 at 124, Lourens J. stated the position regarding costs in matters such as the present one in the following terms: -

> *"If there are any wasted costs then the person who is responsible for such costs should be made to pay them, and the innocent person should riot be made to pay them, and the innocent person should not be made to suffer. In this matter, it is not disputed that the applicant would have to'pay the wasted costs, that is to say all the costs necessarily incurred by reason of his having been in default. "*

This in general is the principle that should apply, unless the Applicant states cogent reasons why this principle should be departed from *in casu.* The Applicant's contention in this regard is that: -

1) there was no compliance by the Respondent with the provisions of Section 116 of the Urban Government Act, 1969, regarding limitation of actions.

2) the proceedings overlooked the Applicant's power and duty to maintain order and good governance as conferred by Section 5 and 55 of the Urban Government Act;

I do not share the view that the above contentions should tilt the scales in the Applicant's favour, thus causing a shift from the applicable general principle enunciated above. Regarding the alleged non-compliance with the provisions of Section 116, the Respondent furnished the Court with the copy of a letter of demand, dated 4th October, 2003, which in my view provides a flail answer to the Applicant's contention as this letter appears to be in compliance with the requirements of the aforesaid provisions.

Regarding the balance of the contentions, I am of the view that the Summons was served on the Applicant and it is the Applicant that neglected to deal properly therewith by not filing the notice to defend. It would be presumptuous for the Court, at this juncture and on the papers, to venture an opinion on the propriety or otherwise of the Respondent launching the action proceedings or on the sustainability of the action or hopelessness thereof. As the matter has been referred to trial, an appropriate application can be made by the Applicant to

the trial Court at the appropriate time if the Applicant's present complaint is confirmed and shared by the trial Court.

In the cases of THE AFRICAN ECHO (PTY) LTD t/a THE TIMES OF SWAZILAND VS THULANI MAU MAU DLAMINI H. COURT CASE NO.3562/00 and HANS C. WEINARD VS MICHELLE SHEILLA CASE NO. 3022/00, I expressed the view that a party who seeks rescission as a result of his default craves an indulgence and should pay the wasted costs of the Application for judgement by default. I reaffirm that view.

In the present case, I am of the considered opinion that diere is no reason why the Applicant should not pay the wasted costs of the judgement by default, which were in any event occasioned by its default. In this aspect, I find for the Respondent.

Sheriffs Costs

The Sheriffs costs, which are the bone of contention arose in the following manner. The Applicant, it will be seen, applied for the following relief in its urgent application dated 4th May, 2004: -

3) Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one.

4) Staying execution of the writ of execution in the above matter.

5) Releasing the motor vehicle of the Applicant (Defendant) attached and removed by the 2nd Respondent in view of the security covering the judgement debt paid by the Applicant to its attorneys.

6) Directing that such security be kept by the Applicant's attorneys in its Trust Account pending the outcome of legal proceedings relating to this application.

7) Rescinding, varying and or setting aside the Default Judgement granted by the above Honourable Court in favour of the 1st Respondent on the 5th day of December, ***(sic)*** 2004.

8) Directing that prayers 2,3,4 and 5 operate as a rule *nisi* with immediate and interim effect pending the outcome of this application.

9) Granting the Applicant the costs of this application.

It is common cause that on the 4th May, 2004, the matter served before Maphalala J., who ordered release of the vehicles in question against the Applicant forthwith depositing an amount of E35,000.00 with its attorneys of record. The said amount was ordered to be kept pending the outcome of the matter. The Respondents were ordered to file their papers, which they did and to which the Applicant replied. The vehicles were apparently released.

On the 14th May, 2004, the Consent Order was then granted and which is in the following terms: -

10) Respondents are to return the motor vehicle to wit, SD 590 HG to the Applicant upon payment of the sum of E2 400.00 to the Trust Account of attorneys Mbuso E. Simelane & Associates being the agreed value of the goods mentioned in paragraph 13.4 of Felix Matsebula's Founding Affidavit to the Rescission of Judgement application or alternatively upon return of the said goods by the Applicant to the Respondent. It is agreed that such payment or return goods is not an admission of liability by the Applicant but a settlement measure.

11) The Rescission of the Judgement granted by default on the 5th December 2004, be and is hereby granted and the matter is referred to trial to deal with all relevant issues concerning the items mentioned in paragraph 13.6 of Felix Matsebula's Founding Affidavit annexed to the Application for Rescission.

12) The determination of the question costs in respect of the Default Judgement which is hereby rescinded be reserved for determination on the 4th June 2004.

13) The Deputy Sheriffs fees regarding the attachment of the above mentioned motor vehicle are to be determined on the 4th June 2004.

14) The Applicant is to file and serve its Plea before 16h00 on the 4th June 2004.

15) The contempt proceedings against the 2nd and 3rd Respondents is hereby abandoned. ;

On the 10th May, 2004, the 2nd Respondent laid under attachment a further vehicle belonging to the Applicant bearing registration number SD 590 HG. This vehicle was subsequently released by virtue of the Consent Order of the 14th May, 2004.

The Respondent's contention is that it was entitled to cause further property of the Applicant to be laid under attachment because the Order granted by Mr Justice Maphalala on the 4th May, 2004, did not have the effect of staying the Writ of Execution which had already been issued.

This argument is clearly untenable and amounts to a flagrant abuse of the execution process in the sense that Mr Justice Maphalala ordered the Applicant, to deposit with its attorneys an amount sufficient to cover the Respondent's claim as security. These is a receipt which was issued by the Applicant's attorneys indicating that the said amount was indeed paid as per the Court Order and this was done on the same day the Order was granted.

There was in the circumstances no need or justifiable reason for further attachment in light of the security already furnished. In my view this further attachment amounted to no more than harassment of the Applicant. It would be anomalous, indeed unjust and wrong for this Court, in the circumstances, to order the Applicant to bear the Second Respondent's costs. In this case, the Applicant, on whose instructions the 2nd Respondent must have proceeded should bear these costs. If there was sufficient evidence that it was the Applicant's attorneys who issued the instruction for the Second attachment, then this would be an ideal case for issuing costs *de bonispropriis* against the Respondents' attorneys.

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