

THE HIGH COURT OF SWAZILAND

AN DRIES STEPHANUS VAN WYK

Plaintiff

And

ABSA BANK

1st Defendant

MASWAZI NSIBANDZE

2nd Defendant

Civil Case No. 1073/2005

Coram: S.B. MAPHALALA - J

For the Plaintiff: MR. J. RODRIQUES

For the Defendants: MR. M. MABILA

JUDGMENT

(On costs) (12th August 2005)

[1] Presently what is before the court is the issue of costs. The Plaintiff contends that Applicant/1st Defendant is not entitled to costs prayed because Defendant has failed to set out how he was unjustly compelled to institute the proceedings and further that he failed to set out grounds of urgency in the application for cancellation of the sale in execution in terms of Rule 6 (25) (a). The Applicant/Defendant on the other hand has taken the position that he is entitled to costs.

[2] The brief factual background of this matter is that in pursuant to a judgement of this court on the 4th February 2004, in the amount of E1, 278, 710-00 against the Defendants jointly; the Plaintiff caused to be issued a writ of execution against the Defendants whereupon certain movable goods were attached on the 10th February 2005. Unbeknown to Plaintiffs attorney 1st Defendant instituted an urgent application for the cancellation of the sale on the 23rd March 2005. The application was served on the Plaintiff's correspondent attorneys in Mbabane the previous day, being the 22nd March 2005. The 1st Defendant obtained an interim order for cancellation of the sale in execution of the movables, which was duly cancelled. Subsequent thereto the Plaintiff entered an intention to oppose the application for the return date and on perusal of the application conceded to the cancellation of the sale purely to avoid the issue of unnecessary costs. The Applicant/Defendant now insists that it is entitled to costs.

[3] Mr. Mabila who appeared for the Defendant argued that since the application before court was an interlocutory application in terms of the provisions of Rule 6 (24) there was no need to file a Notice of Intention to Oppose as the Plaintiff did. He further contended that in the instant case they were unjustly compelled to initiate the proceedings. Furthermore, he submitted that the question of urgency has been overtaken by events. The court was further referred to the textbook by Herbstein and Von Winsen, The Civil Practice of the Superior Courts in South Africa 4th Edition at page 703 to 709 on the discretion exercised by the courts on costs.

[4] On the other hand, Mr. Rodriques for the Plaintiff advanced arguments au contraire that Defendant is not entitled to costs as the Plaintiff has demonstrated that it would be entitled to costs on the application to cancel the sale in execution for the following reasons:

- The Defendant has not stated in its papers that it had locus standi in judicio to institute proceedings on behalf of third parties as is required in terms of Rule 58. It is a trite principle of law that a party may not act on behalf of third parties without a mandate and notwithstanding the aforesaid the 1st Defendant believes he is now entitled to costs on behalf of third parties.
- The Applicant failed to set out grounds of urgency in its application in terms of Rule 6 (25) (b) of the High Court Rules (as amended) as the Applicant had approximately six (6) weeks to challenge the attachment of the third party movables by the Deputy Sheriff.

[5] Notwithstanding the material defects in 1st Defendant's application Plaintiff conceded to cancellation of the sale in execution to avoid unnecessary costs. Therefore, so the argument goes, the 1st Defendant is not entitled to costs of the application as the attachment of the movables was in pursuant to a writ of execution property executed by the court and accordingly executed in accordance with the law.

[6] The final submission by the Plaintiff is that the circumstances of the application do not warrant an order for costs against the Plaintiff herein. Wherefore Plaintiff prays for a dismissal of the application for costs and that costs herein be awarded in favour of Plaintiff.

[7] Innes CJ in the Appellate Division case of Texas Co. (SA) Ltd vs Cape Town Municipality 1926 A.D. 467 expressed the following on the purpose of the award of costs:

"Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be".

[8] Holmes JA in the case of Ward vs Sulzer 1973 (3) S.A. 701 (A) said: and I quote:

"In awarding costs the court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides".

[9] See also the following cases: Fripp vs Gibbon & Co. 1913 AD 354 at 363, Bester vs Van Niekerk 1960 (2) S.A. 363 (e) at 366 E - G. 368 B - C.

[10] In the instant case the crux of the matter is whether the 1st Defendant has set out how it was unjustly compelled to institute the proceedings. It would appear to me on the facts of the matter that the position adopted by the Plaintiff is the correct one. I say so for the simple reason that the attachment of the movables were in pursuant to a writ of execution properly executed by the court and was accordingly executed in accordance with the law. It cannot be by any stretch of the imagination be said therefore that Defendant was unjustly compelled to institute the proceedings. For this reasons the application for costs is refused. The 1st Defendant is further ordered to pay the wasted costs of such application.

S.B. MAPHALALA

JUDGE