



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 2480 /08

In the matter between:

SIBONGILE FRUHWIRTH t/a
TATABB INVESTMENTS

APPLICANT

and

JAPAN STAR (PTY) LTD
SANDILE DLAMINI

1ST RESPONDENT
2ND RESPONDENT

In re:

JAPAN STAR (PTY) LTD
SANDILE DLAMINI

1ST APPLICANT
2ND APPLICANT

and

SIBONGILE FRUHWIRTH t/a
TATABB INVESTMENTS

CORAM
FOR THE APPLICANT

: Q.M. MABUZA -J
:
: MISS HLATHWAYO OF
MTHEMBU ATTORNEYS
:
: MR. N. FAKUDZE OF
ZONKE MAGAGULA & CO.

FOR THE RESPONDENTS

RULING 26/9/08

- [1] The Applicant wishes to set aside order 3.6 of the interim order granted on the 4/7/08 as well as the confirmation thereof in case 2480/08 featuring the same parties.
- [2] This is an unusual and peculiar application. The Applicant wants the court to set aside a judgment without rescinding it. The reasons given are that the
- Respondent instituted action in the High Court when the deed of sale clearly stipulates the Magistrates Court.
 - That in the deed of sale there was no provision for costs at attorney and client scale.
- [3] The facts are that the Applicant purchased a motor vehicle from the Respondent. At the time the application was moved on the 4/7/08 against her, the Applicant was owing E15000.00. The deed of sale states that action shall be instituted at the Magistrates Court. It is silent about costs at the attorney and client scale. The application was moved at the High Court notwithstanding the agreement. Costs on the attorney and client scale were sought. A rule nisi was issued on

the 4/7/08 returnable on the 18/7/08. She was served with the rule and went to pay on the 15/7/08. She did not file a notice to oppose the costs order even though she knew about it when she paid. She also knew that it was returnable on the 18/7/08. It is this order on the attorney and client scale that she now wishes to have this court set aside.

[4] At the time she paid the E15000.00 she knew about the punitive costs order. She states at paragraph 6.4 of her founding affidavit that she asked the first Respondent to tax his costs to enable her to ascertain the propriety thereof. I must admit that I have difficulty in understanding the latter statement. She asked the attorney to tax a bill and they did and when they gave her the taxed bill she had a problem with it. How could they have taxed a bill on the Magistrate scale in the High Court? Alternatively how could they have taxed a bill in the Magistrates Court when the action was instituted in the High Court?

[5] The court cannot set aside an order simply because the Applicant does not wish to pay a taxed bill that she ordered to be taxed. The fact that there is no punitive scale in the deed of sale is neither here nor there. An

Applicant may depending on the circumstances apply for the scale he or she desires. The court may not grant it or may grant it depending on the circumstances of the case as Miss Hlatshwayo has correctly pointed out. In this case the Applicant should have filed a notice to oppose the costs order when the order was served on her.

[6] In the event that the court has misconstrued the Applicants intention and that it is a rescission that she wants, the procedure therefore is set out in Rule 42. In addition there are the rules of the common law. She has followed neither and this court cannot assist her.

[7] The application is dismissed with costs on the ordinary scale.

Q.M. MABUZA -J