HIGH COURT OF SWAZILAND

Held at Mbabane

Emmanuel Kodwo Erzah
Applicant

vs

Mavung'vung Holdings Family Trust
1st Respondent
Simanga P. Mamba
2nd Respondent
Registrar of Deeds
3rd Respondent **Attorney General**
4th Respondent **Nozipho Motsa** 5th
Respondent **The Ezrah and Sons**
Trust 6th Respondent

Civil CaseNo.3556/2009

Coram	MAPHALALA PJ
For Applicant	MR. B. NGCAMPHALALA
For 1st Respondent 2nd	MR. T. NDLOVU
Respondent 3rd	MR. M. DLAMINI
Respondent 4th	MR. V. KUNENE
Respondent 5th	MR. M. MABILA
Respondent	NO APPEARANCE

JUDGMENT 27th
October 2009

[1] The only issue for decision by the court is the scale of costs to be levied against the Applicant after he has filed a Notice of Withdrawal of an Urgent Application against the Respondents. The Applicant has tendered to pay costs at the ordinary scale but all the Respondents are in tandem that costs should be levied at a punitive scale.

[2] It is trite law that the award of costs is a matter wholly within the discretion of the court. But this is a judicial discretion and must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at.

[3] In leaving the Court a discretion;

> "the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the
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> case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he does this, and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a Court of Appeal to interfere with the honest exercise of his discretion."

(See *Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed* page 703 *in fin 704* and the cases cited thereat).

The leading case on the award of costs on an attorney-and-client basis is that of *Nel vs Waterberg Land Bouwers Ko-operatieve Vereeniging 1946 A.D. 597* (interpreted in *Mudzimu vs Chinhoyi Municipality & Another 1986(3) S.A. 140 (ZH)* at 143 D-l, 141.)

The grounds upon which the court may order a party to pay his opponent's attorney-and-own client costs include the following: That he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless, malicious or frivolous, or that he has misconducted himself gravely either in the transaction under inquiry or in the conduct of the case (see *Herbstein (supra)* at page 718). It has been held that attorney-and-client costs may be awarded on the grounds of dilatory or mendacious conduct on the part of an unsuccessful litigant (see *Ward vs Slizer 1973(3) S.A. 701 (A) 706 in fin).*

Caney J in *Moosa vs Lalloo and Another 1957(4) S.A. 207* at page 225 stated that:

> "The Courts lean against awarding attorney and client's costs and I do not think a litigant should be discouraged from exercising his rights of resort to the Courts in order to present his case, even though it may not appear at first sight to be a strong one!"

[8] It appears to me that the present case should be decided within the legal framework in *Herbstein (supra)* as outlined above in paragraph [6] of this judgement. That the grounds upon which the court may order a party to pay his opponent's attorney and own client costs include the following: That he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless, malicious or frivolous, or that he has misconducted himself gravely either in the transaction under inquiry or in the conduct of the case.

[9] The inquiry in the present case is whether the above grounds exist in the conduct of the Applicant. In order to decipher this state of affairs one has to look at the facts of the case leading to the withdrawal by the Applicant.

[10] The Applicant had moved an application for orders as follows:

"1. Dispensing with the usual forms and procedures relating to the institution on proceedings and allowing this matter to be heard as a matter of urgency.

2. Condoning the Applicant's non-compliance with the said Rules and hearing this matter as an urgent one.

3. Restraining and interdicting the 3rd Respondent from registering the property fully described at prayer 4 hereunder.

4. Declaring the purported sale of certain property to wit:

Certain: Lot 131 Fig Tree, Crescent and Mahogen Streets, Tubungu Estate, Matsapa in the District of Manzini." null and void.

5. Restraining and interdicting the 5th Respondent from disposing the said property to any other person without the participation of the applicant.

6. That pending the final determination of this matter, prayers 3 and 4 operate with interim effect.

7. Directing the 5th Respondent to make available all relevant documentation signed or passed by her in relation to the sale and/transfer of the said property.

8. Costs of the application.

9. Granting further and/or alternative relief.

[11] The Respondents have filed their Notices of intention to oppose. The Applicant has since withdrawn the application and tendered wasted costs. The Respondents have challenged the scale of costs tendered. The Applicant has responded by a letter dated 13th October 2009 that Applicant tenders costs party and party scale. This has caused all the Respondents to seek an order for costs at a punitive scale.

[12] It is important to traverse the facts of the matter leading to the withdrawal by the Applicant to understand the issues before the parties as stated in paragraph [9] *supra*. This aspect of the matter was outlined at length by Mr. Mabila for the 5th Respondent showing that

Applicant proceeded with this application when there have been negotiations between the parties as to the amount in the question.

[13] The facts of this aspect of this matter are that on the 2nd February 2009 the Applicant without authorization from the 6th Respondent decided to change the postal address through which 6th Respondent was receiving monthly statements from the Swaziland Building Society being P.O. Box A48, Swazi Plaza, Mbabane (an address in which he had had exclusive access.

[14] As a result of the aforegoing the Respondents contend that Applicant knew as early as the 31st July 2009 that the property had been sold and an amount of E190 345.50 had been paid into the 6th Respondent's account on the 30th July, 2009. In this regard annexures marked "NM2" and "NM3" respectively being copies of correspondence by the Swaziland Building Society to the 6 Respondent issued through the postal address, being P.O. Box 935, Manzini to which Applicant had exclusive access were communicated to the Applicant.

[15] At paragraph 20 of his founding affidavit the Applicant does acknowledge that the said sum of E190 345.30 has been paid into the 6th Respondent's account and he only raised issues about the balance of E60 000.00.

[16] In arguments before me Counsel filed Heads of Arguments and I listened to lengthy and spirited arguments from all the attorneys. All the Respondents argued that costs should be levied on a punitive basis. I shall therefore summarize their individual arguments for purposes of the record.

It is argued for the 1st Respondent that the Applicant has recklessly embarked on a cause of action and should have realized from the onset it had not the slightest chance of succeeding in.

Furthermore, it is argued that the trustee in the 1st Respondent who is also the 2nd Respondent herein and Applicant's attorney are only separated by a single floor at

the Bhunu Mall. Most of the documents field in support of the application were actually documents given to the Applicant's attorney by the 2nd Respondent in good faith and on the strength of a professed negotiation by the Applicant's attorney. Instead, the 1st and 2nd Respondents were met with an urgent application giving them less than 24 hours to appear in court.

The 1st Respondent having urgently filed its opposing papers and Heads as per the demand by the Applicant, on the date of hearing the Applicant sought a postponement on the ground that their papers were not in order. What followed was a Notice of Withdrawal presented in court. Thus the Respondents have been put out of pocket in a manner that clearly cannot be compensated for by an order for costs on the normal scale.

In support of his arguments the attorney for the 1st Respondent cited the case of *Muhle One Way Services (Pty) Ltd vs Phillip Khumalo High Court Case No.1280/199* where *Masuku J* stated the following:

> "... in my view, practitioners have an ethical duty to properly advise their clients if they have no case. The courts must not be inundated with matters in which it is clear that there is no case or where it appears that the legal position has not been properly explained to a litigant. If a litigant insists on proceedings to court not withstanding advice to the contrary, the practitioner may properly withdraw.
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> This duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do... He must not act in a case which he knows from the beginning to be unjust or unfounded. He must abandon it at once if it appears to him to be such during its progress.
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> It is my considered view that the respondent should have been advised that there is no case in this matter from the onset.
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> In the result... I am of the view that the application is entitled to costs on the punitive scale as prayed for and it is so ordered."

The 2nd Respondent also took a similar approach as that of the 1st Respondent and so are the arguments of the other Respondents. Counsel for the 2nd Respondent

cited a number of decided cases on the subject including the cases of *Fripp vs Gibbon & Company 1973 AD 355 A 366, Smit vs Maqabe 1985(3) SA 974 T* at 977A-I, *van Dyk vs Cowradbie & Another 1963(2) S.A. 413C* at 418 and that of *Hawkins vs Gelb & Another 1959(1) S.A. 703.*

The Applicant on the other hand vigorously opposed the arguments advanced for the Respondents. The Applicant's arguments are presented in the Heads of Arguments of Counsel for the Applicant. The main question asked by the Applicant is "why were the contents of the correspondence dated 8th October 2009 not conveyed to the Applicant and/or his attorneys soon after the sale of the property."

[23] The Applicant further contends that had he known that the balance had been held by the conveyancer two (2) months after sale; Respondents would not have been exposed to litigation.

[24] The Applicant further has taken the point that the 1st and 6th Respondents are not juristic persons and cannot be sued or sue unless they act through their trustees. (See *Honore and Cameron South African Law of Trusts 4th Edition* page 6, 7 and 55 -57).

[25] Having considered the arguments of the parties in this matter I have come to the considered view that Applicant ought to have been aware of the contents of the correspondence dated 8th October 2009 which it has been shown in the papers have been conveyed to the Applicant soon after the sale of the property.

[26] In this regard annexures "NM2" and "NM3" respectively being copies of correspondence by the Swaziland Building Society to the 6th Respondent issued through the postal address, being P.O. Box 935, Manzini to which Applicant had exclusive access was sent to him.

[27] The Applicant should not have launched the application in view of the facts as stated above in paragraph [13] and I find what was stated by *Masuku J'm Muhle One Way Services (Pty) Ltd (supra)* apposite. The learned Judge stated the following:

> "... in my view, practitioners have an ethical duty to properly advise their clients if they have no case. The courts must not be inundated with matters in which it is clear that there is no case or where it appears that the legal position has not been properly explained to a litigant. If a litigant insists on proceedings to court not withstanding advice to the contrary, the practitioner may properly withdraw.
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> This duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do... He must not act in a case which he knows from the beginning to be unjust or unfounded. He must abandon it at once if it appears to him to be such during its progress.
>
> It is my considered view that the respondent should have been advised that there is no case in this matter from the onset.
>
> In the result... I am of the view that the application is entitled to costs on the punitive scale as prayed for and it is so ordered."

It is abundantly clear that on the facts as outlined above that the Applicant's motives were vexatious, reckless and frivolous.

However, one has to determine the Applicant's final argument that the 1st and 6th Respondents are not juristic persons and cannot therefore be sued or sue unless through their trustees. In this regard the court was referred to the legal authority of *Hanore and Cameron South African Law of Trust, 4th edition* at page 6, 7 and 55-57.

The argument is that it is not clear on whose behalf the offices of Masina & Mazibuko act for because the trustee of the 1st Respondent was cited and appointed the office of S.P. Mamba to act on his behalf. The wrong citation of an entity which does not exist as a person will not thereafter vest on it the necessary powers to make its existence as a juristic person.

Having considered the arguments of parties on this aspect of the matter, I agree *in toto* with the Applicant that on the legal authority of *Honore and Cameron (supra)* the 1st and 6th Respondents are not juristic persons and therefore no costs can be granted to them in the circumstances of the case. I further agree with the Applicant that the wrong citation of an entity which does not exist as a person will not thereafter vest on it the necessary powers to make its existence as a juristic person.

S.B. M. Judge

In the result, for the aforegoing reasons Applicant is ordered to pay costs to the 2nd, 3rd, 4th and 5th Respondents at the scale of attorney and client scale.