**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No.3720/09

In the matter between

**VILAKATI KHUMALO DESIGN AND QUALITY SURVEYORS (PTY) LTD** — **PLAINTIFF**

and

**COVENANT OF CHRIST MINISTRIES** — **DEFENDANT**

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| **Neutral citation:** | ***Vilakati Khumalo Design and Quantity Surveyors (Pty) Ltd v Covenant of Christ Ministries* (3720/09) [2012] SZHC** |
| **Coram:** | **OTA J.** |
| **Heard:** | **28th February 2012** |
| **Delivered:** | **13th March 2012** |
| **Summary:** | **The issue was whether summary judgment application an abuse of the process of court. Held: Summary judgment application an abuse of the process of court. Costs awarded De Bonis Propiis against Plaintiff's counsel on the scale as between attorney and own client.** |

**OTA J.**

[1] This is a summary judgment application in terms of which the Plaintiff contends for the following reliefs against the Defendant:-

1. Payment of the sum of E563,298.82 (Five Hundred and Sixty Three Thousand Two Hundred and Ninety Eight Emalangeni and Eighty Two Cents)
2. Interest on the aforesaid sum of E563,298.82
3. Costs of suit
4. Further and / or alternative relief

[2] The Plaintiffs case is that the parties herein entered into an oral contract of provision of professional services at the instance and request of the Defendant, on or about January 2009. That the terms of the agreement were that the Plaintiff will draw up architectural working drawings and quantity surveyor services for and on behalf of the Defendant, for a church building at Matsapha. The total of the contract value of the project would be E29,971,952.73. The total sum of the architectural working drawings would

be the sum of E1,450,000=00, and the total sum of the quantity surveying would be the sum of E1,160,000=00. That the sum due for the architectural working drawings and quantity surveying would be payable in stages, namely every 30% and 25% respectively, achieved.

[3] The Plaintiff alleged, that in fulfillment of its contractual obligations, it drew up the architectural working drawings which were approved by the Defendant. That Plaintiff also provided the quantity surveying services. Thereafter, in view of having completed the 30% and 25% work in these areas as agreed, the Plaintiff on the 4th of March 2009, filed its invoices for the sums of E449,579,29 and E299,719.53 respectively, totaling the sum of E749,298.82, as is evidenced by annexures “VK1” and “VK2” respectively. That the Defendant in complete breach of the agreement between the parties made payments of E160,000=00 as evidenced by annexure “VK3”. That the Defendant subsequently made a further payment, leaving the outstanding balance of E563,298.82 claimed in this summary judgment application, which the Defendant has refused to pay despite several demands.

[4] Now, the summary judgment procedure is designed to afford expeditious relief to the Plaintiff, where his case is clearly unanswerable and unimpeachable, and the appearance to defend has been entered by the Defendant as a dilatory stratagem, geared at depriving the Plaintiff of an early enjoyment of victory. Because of its stringent and extraordinary characteristics of completely closing the door of justice in the face of a Defendant in a defended action, the courts have often sounded the warning, that this remedy be treated with caution to prevent it from turning into a weapon of injustice. See **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Company Ltd v Process Automated Traffic Management (Pty) Ltd Civil Case no. 4468/08/ Sikhwa Semaswati Ltd t/a Mister Bread Bakery and Confectionary v P.S.B. Enterprises (Pty) Ltd case no. 3839/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal case no. 31/1999, Mater Dolorosa High School v RJM Stationery (Pty) Ltd Appeal case no 3/2005, Maharaj v Barclays Bank Ltd 1976 (1) SA 418.**

[5] I apprehend that it is in the bid to prevent this procedure from becoming a weapon of injustice, that Rule 32 (5) requires a Defendant who is opposed to

summary judgment to file an affidavit resisting same. And by Rule 32 (4) (a), the court is mandated to scrutinize such an affidavit resisting summary judgment to ascertain for itself that ”----- *there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof*”

[6] It is now settled law that once the opposing affidavit discloses a bonafide defence or raises triable issues, that the court should refuse summary judgment and allow the Defendant proceed to trial.

[7] However, for the Defendant to be said to have raised triable issues, he must demonstrate material facts in his affidavit, to enable the court reach the conclusion that a defence may emerge at the trial. The defence raised has to be bonafide not whimsical. The Defendant need not deal exhaustively with the merits of the case, or set out its defence with precision and exactitude. It is sufficient if material facts tending to a valid defence are disclosed.

See **National Motor Company Ltd v Moses Dlamini 1985 – 1987 (4) SLR 124, Maharaj v Barclays Bank Ltd, 1976 (1) SA 418 Sinkhwa Semaswati**

[8] Now, in compliance with Rule 32 (5), the Defendant herein filed an 8 paragraph affidavit resisting this summary judgment application. The Defendant in it's heads of argument sought to defeat this application in *limine*, as an abused of the process of this court. It is however imperative that I first view this application in context, before reach the decision as to whether or not it's an abuse of the process of court, in the way and manner alleged.

[9] The poser here on these premises is; Does the Defendants affidavit disclosed any triable issues? The Defendant alleges that it has a valid and bonafide defence to the Plaintiffs claim as set out in paragraphs 3 to 8 of its affidavit in the following terms:-

" *3*

*3.1 I deny that defendant does not have a bona fide defence to plaintiffs claim.*

*3.2 I deny further that defendant is liable to pay plaintiff the sum claimed in its summons.*

*3.4 On the 21 October 2009 I was handed High Court Summons under the above case number by my son Sibusiso Maseko. He informed me that they had been served by the Deputy Sherrif for the Manzini region Mr. Martin Akker at the New Covenant of Jesus Christ Church at Matsapha in the district of Manzini*

*3.5 The Simple Summons stated amongst other things that the defendant was indebted to the 1st Respondent in the sum of E 589,298.82 (Five hundred and eighty nine thousand two hundred and ninety eight Emalangeni eight two cents) being in respect of professional services rendered on or around March 2009.*

*4*

*4.1 On receipt of the Summons I arranged a meeting with Mr. Sabelo Vilakati the purported Director of the 1st Respondent.*

*4.2 The meeting was held on the 31st October 2009 at the Covenant of Jesus Christ Church at Matsapha in the district of Manzini. Present during the meeting were myself, Steven Kaiwa, Pastor Wonderboy Mkhatjwa, 1st*

*Respondent's Attorney Mphumelelo Mabuza, Sabelo Vilakati (Director of 1st Respondent) and Thando Tsabedze.*

*4.3 During the meeting the issue of the legal proceedings that had been instituted by the plaintiff against the defendant was discussed. I informed Sabelo Vilakati and his Attorney Mr. Mphumelelo Mabuza that defendant had no contract with the plaintiff for services rendered. I further reminded them that the defendant entered into a written agreement with* ***Roots Civils (Pty) Ltd.***

*4.4 I further informed them that I was informed by the director of Roots Civils (Pty) Ltd that he had acquired the professional services of plaintiff for the provision of architectural services at Applicants premises. I was also given a copy of the written contract entered between plaintiff and Roots Civils (Pty) Ltd.*

*4.5 In the light of the above circumstances it was agreed by the parties that defendant is not liable to pay plaintiff the amount claimed in the Simple Summons. There is no privity of contract between plaintiff and defendant.*

*4.6 Mr Sabelo Vilakati further instructed his Attorney Mr. Mphumelelo Mabuza to withdraw the action proceedings instituted against defendant, with the view of settling and curbing further costs in the matter. We were further*

*assured by Mr. Sabelo Vikati that they would claim payment from Roots Civils (Pty) Ltd.*

*4.7 I and the other representatives of the defendant were very pleased with the outcome of the meeting as we were of the view that the matter had been settled.*

*5*

*5.1 On about December 2009 a meeting was held at Nokwane in the District of Manzini with the Director of Roots Civils (Pty) Ltd Mr. Rueben Msibi, the Director of the 1st Respondent Sabelo Vilakati, Mr Azaria Ndzimandze and Pastor Wonderboy.*

*5.2 During the meeting we informed Mr. Rueben Msibi about the action proceedings that had been instituted against us. Mr Msibi was surprised to learn that plaintiff had instituted legal proceedings against us for payment of fees for professional services rendered.*

*5.3 Mr Msibi further informed 1st Respondent that they should have contacted him for payment not the Applicant as per their contract executed on the 10th March 2009.*

*5.4 Mr. Sabelo Vilakati apologized for his actions and further assured us that he had instructed his Attorney to withdraw the action proceedings from this honourable Court.*

*5.5 We accepted Mr. Vilakati's apology and were of the view that the matter had been settled.*

*5.6 I wish to aver further that defendant never made payment of E 35 000.00 (Thirty five thousand Emalangeni) to liquidate the amount claimed by plaintiff. I aver further that on the 4th November 2009 at defendants premises at Matsapha, I was approached by Steven Kaiwa, Sabelo Vilakati and Attorney MphumeleloMabuza. Sabelo Vilakati requested that I give him E35 000.00 (Thirty five thousand Emalangeni). He explained that he was in trouble since his motor vehicle had been attached by the deputy sheriff of this Honourable Court and he had to pay the above amount to have his motor vehicle released. He promised that he would deduct the above amount from the invoice he would send to Roots Civils (Pty) Ltd. I believed to be true what he was telling me because his Attorney Mphumelelo Mabuza was present and he confirmed what he was saying.*

*Despite the above apology I have referred to Plaintiff's Attorney proceeded to apply for default judgment and further issued a writ against the defendant. Defendant's monies held under Account No. 0140063183901 were attached. Defendant then moved a rescission application which was granted by this Honorable Court on the 18th November 2010 by his Lordship Mamba J.*

*7*

*I have a bona fide defence to plaintiffs claim in as much as;*

*7.1 Defendant has never entered into a contract for professional services to be rendered at its premises with the Plaintiff.*

*7.2 Plaintiff has a written contract with Roots Civils (Pty) Ltd for the provision of professional services rendered to Defendant.*

*7.3 It is Roots Civils (Pty) Ltd that is liable to pay plaintiff for the professional services rendered to applicant.*

*7.4 The plaintiff is not in the roll of companies registered in terms of the company laws of Swaziland and therefore had no locus standi to institute the action proceedings against defendant.*

*8*

*It was found that the defendant had a bona fide defence in the above matter by this Honourable Court on the 18th day of November 2010 and that was the reason defendant was granted leave to defend this matter. I therefore pray that this Honourable Court dismiss this application with costs at attorney and own client scale since defendant has been put out of pocket to defend this application which plaintiff has moved notwithstanding the fact that this Honourable Court having ruled on the same issue.*

*WHEREFORE I PRAY FOR THE DISMISSAL OF THE SUMMARY JUDGMENT APPLICATION WITH COSTS AT ATTORNEY AND OWN CLIENT SCALE".*

[10] It seems to me that from the foregoing depositions, the Defendant has indeed disclosed triable issues constituting a defence that entitles it to proceed to trial. I say this because certain disputes emerge from the opposing affidavit which are best resolved at a trial of this matter. These disputes are as follows:-

1. Whether or not the Defendant has ever entered into a contract of professional services, to be rendered at its premises with the Plaintiff.
2. Whether or not the Plaintiff has a written contract with Roots Civil (Pty) Ltd on the provision of professional services rendered to Defendant.
3. Whether or not it is Roots Civil (Pty) Ltd that is liable to pay the Plaintiff for the services rendered.
4. Whether or not the sums paid by the Defendant to the Plaintiff were in respect of these professional services, as alleged.
5. Whether or not the Plaintiff is registered in the roll of Companies in terms of the Company Laws of Swaziland.

[11] The foregoing issues constitute a bonafide defence which is sufficient to defeat this summary judgment application. It is apposite for me to add here, that the foregoing triable issues were also acknowledged by my learned brother **Mamba J**, in his rescission judgment of the 18th of November 2010, against the default judgment obtained by the Plaintiff herein against the Defendant. (See pages 105 to 114 of the book). The rescission application it is on record, was fought upon the same facts and exigencies as the summary judgment application instant. In granting the rescission, **Mamba J**

identified the foregoing issues identified in casu, as constituting a bonafide defence warranting said rescission.

[12] It is by reason of this indisputable fact that Mr Ndlovu contends, that in view of the findings of **Mamba J**, that a bonafide defence enured in the rescission process, thus entitling the Defendant to defend the action, that the application for summary judgment instant, which is based on the same facts as the rescission process, and in which an inquiry as to whether the Defendants Affidavit discloses a bonafide defence is paramount, constitutes an abuse of the process of this court. His take is that since **Mamba J** found upon the same facts and circumstances, that a bonafide defence exists, to commence the summary judgment application for the court to embark upon the same enquiry upon the same facts and circumstances, is frivolous, vexatious and an abuse of the process of the court. It is in consequence of this fact that Defendant claims punitive costs on the scale as between attorney and own client, and *De Bonis Propiis* against Plaintiff's counsel, in the following terms as depicted in paragraph 12 of defendant's heads of argument:-

*"12 The above Honourable Court has therefore ruled on the presence of a Bonafide Defence by the Defendant and the present application merely seeks to re-open arguments on an issue the court has already decided on. This creates an unwarranted duplication of process and is an unnecessary divergence of time and the scarce commodity of judicial intervention. Notwithstanding numerous correspondence to Plaintiff bringing these anomalies to their attention, the Plaintiff has since failed to withdraw the application and has instead chosen to further subject the Defendant to further unwarranted legal costs. The Defendant will therefore pray that the court visits such reckless litigation with an order for costs and de bonis propiis against the Plaintiff's attorneys. It would in this light therefore seem to be in order, that an order do issue calling upon him to state before court why he should not pay the costs at the scale sought and De Bonis Proiis "*

It is worth mentioning that the Defendant also claimed costs on the scale as between attorney and own client in its affidavit.

[13] It was argued replicando by Mr. M Mabuza on this issue, that cost De Bonis Propiis should be specifically asked for and this is not the position in casu. That the court will not order costs on the punitive scale lightly and that none of the elements requisite for such an order enures in these proceedings. That there is nothing in the rules precluding a summary judgment application just because a rescission application had been heard upon the same facts and circumstances.

[14] Now on the question of costs as between attorney and client, Mr. Ndlovu has rightly referred me to the case **of Nelson Shodi Zikalala v The Principal Secretary Ministry of Agriculture and others, civil case no 2419/1003, per SB Maphalala PJ,** where his Lordship declared as follows:-

> *"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.*
>
> 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 case, the conduct of the parties and any other circumstances 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 interfer with the honest exercise of this discreation"*

See **Emmanuel Kodwo Ezrah v mavung'vung Holdings Family Trust and other civil case no 3556/2009.**

[15] It is also the position of the law as demonstrated by **Herbstein et al, in the text The civil Practice of the supreme court of South Africa, 4th Edition at page 717,** that an award of attorney – and – client costs will not be granted lightly, as the court looks upon such orders with disfavor and is loathe to penalize a person who has exercised his rights to obtain a judicial decision in any complaint he may have. This notwithstanding, **Herbstein et al (supra) page 719**, advocates that attorney and client costs may be levied on the grounds of an abuse of the process of court, vexatious, unscrupulous,

dilatory, or mendacious conduct on the part of the unsuccessful litigant, absence of bona fides in conducting litigation, unworthy, reprehensible and blameworthy conduct, an attitude towards the court that is deplorable, and highly contemptuous of the court, conduct that smarks of petulance, the existing of a great defect relating to proceedings, as a mark of the courts disapproval of some conduct that should be frowned upon, and where the conduct of the attorney acting for a party is open to censure. Attorney and client costs have also been awarded where, *inter alia* proceedings were brought over-hastily on ill-advised ground. See **Billy Groening v Sabelo J. Bhembe civil case 1751/2011 per Maphalala PJ**. The list is not exhaustive, each case must be treated accordingly to its own peculiar facts and circumstances

[16] In casu, I am inclined to agree with Mr Ndlovu, that the summary judgment application instant is vexatious, frivolous and an abuse of the process of this court. This is because the summary judgment application was wholly and completely unnecessary, in view of the decision of Mamba J, in the rescission application, (which was fought upon the same facts and circumstances) to the effect that the Defendants has a bonafide defence entitling it to be allowed to defend the action. In coming to this conclusion,

I am mindful of the fact, and as rightly contended by Mr Ndlovu with reference to the case of **The African Echo (Pty) Limited t/a Times of Swaziland and another v Thulani Mau Mau Dlamini civil case no 3526/00**, that the requirement that Defendant raises a Bonafide Defence in a rescission application, embraces the same test required of a defendant who seeks to oppose the grant of a summary judgment against him.

[17] Thus, **Erasmus in his work entitled "Superior Court Practice juta 1995, at B1 201 – 202 ,** expounded one of the requirements for success in an application for rescission in terms of Rule 31 (3) (b) of the Rules of the High Court of South Africa, which is in pari materia with our own rules, as follows:-

> *"(c) He must show that he has a bonafide defence to Plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour"*

[18] Furthermore, on **page B1 203 – 4 Erasmus (Supra)** continued as follows:-

> *"The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he must show a probability of success: it suffices if he shows a prima facie case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient details to enable the court to conclude that the application is not made merely for the purpose of harassing the respondent – if a Defendant establishes a bona fide defence against a portion of a Plaintiff's claim he is entitled to rescission of the whole judgment - the sub – rule does not allow setting aside of a part of a default judgment"*

[19] I have hereinbefore demonstrated the requisites of a summary judgment application and the duty cast upon an opposing Defendant. It cannot be gainsaid, that the question of bonafide defence in both rescission and summary judgment applications, is steeped in the same connotations . There is thus much force in Mr Ndlovu's contentions, that this question having been decided upon the same sets of facts and circumstances in the rescission

application, rendered its reopening in casu, otiose. It is clearly caught up by the principle of issue estoppel.

[20] Mr. Mabuza has argued that there is nothing in the rules of this court precluding a summary judgment application, just because a rescission has been granted in the same case. Whilst agreeing that there is no such expressed rule, I am however quick to add here, that each case must be treated accordingly to its own peculiar facts and circumstances. Therefore, the mere fact that the rules of court do not expressly preclude such an application, does not give any party the unbridled right to abuse the process of court. It is the duty of the court to prevent the abuse of its processes, irrespective of the rules of court, which I find a needed to emphasize, are not sacrosanct. It is the inherent duty of courts to regulate and adopt procedure including rules of court, to see that the rules of court serve their true purpose as a handmaid to an inexpensive and efficacious delivery of justice. The court will thus not turn a blind eye to any flagrant abuse of its process, just because the rules of court do not expressly preclude such. I find judicial backing on this issue in the case of **Khunou and others v M Fihrer and Sons (Pty) Ltd and others 1982 (3) SA 353 at page 354,** where the court held as follows:-

*"The proper function of a court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable courts to perform this duty with which, in turn, the orderly functioning and indeed the very existence, of society is inextricably interwoven. The Rules of court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.*

*Of course the Rules of court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate for specific cases. Accordingly, the superior courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if need be, the Rules of court, according to the circumstances -------.*

*It follows that the principles of adjectival law, whether expressed in the Rules of court or otherwise, are necessarily flexible.*

*Unfortunately, this concomitant brings in its train the opportunity for unscrupulous litigants and those who would wish to delay or deny justice to so manipulate the courts procedure that their true purpose is frustrated. Courts must be ever vigilant against this and other types of abuse. What is more important is that the court's officers, and especially attorneys, have an equally sacred duty. Whatever the temptation or provocation, they must not lend themselves to the propagation of this evil, and so allow the administration of justice to fall into disrepute. Nothing less is expected of them and, if they do not measure up, a court will mark its disapproval either by an appropriate order as to costs against the defaulting practitioner or in a proper case, by referring the matter to the Law Society for disciplinary action"*

[21] It remains for me to emphasize, that I took the pains of countenancing the summary judgment application , just to demonstrate the facts and circumstances, as well as the defence raised, which all conduce to the rescission application determined by **Mamba J.** In the circumstance ,this summary judgment application was completely unnecessary. It is mendacious. Time and money wasting. It is a dilatory stratagem geared at

frustrating the due course of justice. It is frivolous and vexatious, thus an abuse of the process of this court. These state of affairs entitle the Defendant to the attorney and client costs claimed.

[22] What remains to be decided is whether the costs should be borne by the Plaintiff or by his counsel, Mr M Mabuza. Mr Mabuza has contended that for the Defendant to be availed of the claim of costs De Bonis Propiis, it should have specifically claimed for same. Mr Mabuza made this proposition with reference to **Herbstein et al (supra)**

**[23]** **N**ow, **Herbstein et al** (supra) at pages 729 – 730 state as follows:-

> *"Costs de bonis propiis, if sought should be specifically asked for , or an application for an order for the payment of costs de bonis propiis should be made at the hearing, but the court may entertain a subsequent application if made within a reasonable period"*

[24] I have hereinbefore demonstrated that the Defendant sought costs on this scale in paragraph 12 of its heads of argument. This was followed up by

oral submissions tendered by Mr. Ndlovu in these respects, at the hearing of this matter. I hold the view, that having done this, the Defendant has satisfied all that was required of it to be entitled to this relief, thus defeating Mr. Mabuza's posturing to the contrary.

[25] Now, the editors **Herbstein and Van Winsen in the Text the Civil Practice of the High Court and Supreme Court of South Africa 5th Ed (2009) vol 2 at pages 985 – 986** state the following :-

> *"The court will in appropriate circumstances award costs de bonis propiis against an Attorney* ***Webb vs Botha*** *is an extreme case, in which the Attorney obstructed the interests of justice , occasioned unnecessary costs to be incurred by all the parties --- and delayed the final determination of the action to such an extent that prejudice to the parties might well result. The legal practitioner has been ordered to pay costs de bonis propiis where he had acted in an irresponsible and grossly negligent or reckless manner --- causing prejudice to the other party --- generally speaking, costs de bonis propiis will be ordered against Attorneys only in reasonably serious cases".*

[26] In casu, there is absolutely no reason for the summary judgment application, in view of the fact that the Defendant disclosed a bonafide defence in the rescission application sought upon the same facts. Mr. Mabuza was well aware of **Mamba J's** judgment on this issue which is valid and subsisting and thus binding upon the parties until set aside. To seek to reopen these issues in the way and manner it was done, was clearly unlawful. It was Mr. Mabuza's responsibility as Plaintiffs attorney to advise it accordingly. Mr. Mabuza failed to do so. Rather he recklessly persisted in proceeding with the summary judgment application, notwithstanding the fact that the Defendant caused a letter dated the 27th April 2011, to be written to him, in which the Defendant urged the judgment of **Mamba J** in the rescission application, and urged Mr. Mabuza to withdraw the summary judgment application within three days and tender costs (see page 140 of the book).

[27] This is the kind of conduct which is not tolerated by the court. As **Masuku J** stated in the case **of Muhle Oneway Services (Pty) Ltd v Phillip Khumalo civil case no 1580/99:-**

*"There is absolutely no defence to the Applicants case in my view and 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 notwithstanding advice to the contrary, the practitioner may properly withdraw. In this connection, I cite with approval the dictum of* ***MYBURLGH A.J.N in BARLOW RAND LTD V LEBOS AND ANOTHER 1985 (4) 34****. (See head note) where he cited* ***C.H. Van zyl "The Theory of the Judicial Practice of south Africa (1921) at 42,***

***"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. However much an act or transaction may be to the advantage, profit or interest of a client, if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it --- the law exacts from an attorney uberimma fides --- that is the highest possible degree of good faith. He must manifest in all his business matters an inflexible regard for***

***the truth---- 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 process"***

*It is my considered view that the Respondent should have been advised that there is no case in this matter from the onset"*

[28] In casu, it is only proper that Mr. Mabuza pays the costs. He was undoubtedly unreasonable and reckless in his approach to these proceedings. In his recklessness, he not only wasted the time of the court and that of the Defendant, and is still wasting it, but he also put the Defendant out of pocket in coming to defend these proceedings. He purely took a chance in these proceedings, thus derogating the notion of finality of disputes in court, expressed in the maxim *interest republicae ut sit finis litium*. As the court said in the case of **Khunou and others v M fihrer and Sons (Pty) Ltd and others supra at page 362, C-E**

*"If I am to order that the costs be paid, there can be no doubt that they must be met by respondents' attorney himself. There is no reason why his clients should bear the costs brought about by their attorneys*

*intransigence. As to the costs themselves, in my view the applicants are entitled to them. They were obliged to come to court for relief. They made numerous requests for the documents which were refused. Their threat of an application was spurned. More importantly, the respondent's attorney took up the attitude which he did, not in order to clarify any issue or to bring about the ventilation of the true dispute between the parties in a proper and efficacious manner, but merely by reason of his decision to give the applicant's attorney" "no quarter" and to put them to as much trouble as possible. In the circumstance*

*+he must pay the costs----"*

See **Washaya v Washaya (1990) (4) SA41 at page 45 G-J.**

[29] In the light of the totality of the foregoing, I make the following orders:-

1. That this summary judgment application be and is hereby dismissed.
2. That the Plaintiff's attorney is directed to pay the costs of this application de bonis propiis.

3. That such costs are to be taxed on the scale as between attorney and own client.

**For the Plaintiff:** **Mr. M. Mabuza**

**For the Defendant:** **Mr. T.M. Ndlovu**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE ……. DAY OF ……... 2011**

**OTA J.**

**JUDGE OF THE HIGH COURT**