IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1301/2015

In the matter between:

MOSES MOTSA	**1st**	**Applicant**
MOTSA INVESTMENTS (PTY) LTD	**2nd**	**Applicant**

And

LIONEL OSWALD REID	**1st**	**Respondent**
BEVERELY ANN OSWIN REID	**2nd**	**Respondent**

Neutral citation: ***Stanley Mchepa Banda & Another v Swaziland Development and Savings Bank & Another (1611/2011) [2016] SZHC 53 (14th March 2016)***

Coram: **M. Dlamini J**

Heard: **18th February, 2016**

Delivered: **14th March, 2016**

- *it is startling to note that an attorney who does not turn up in court upon receiving a notice of set down, would demand that the court adjudicate a matter in its favour. The wise words of* ***Ebrahim JA***[1] *are apposite, "****The court, in my respective view, cannot be an avant-guarde for the***

[1] Swaziland Development and Savings Bank v Bhokile Shiba, Civil Appeal No.55/12 at paragraph 24

Respondent....” *- The dictum that, “**Rules of court are not sacrosanct but meant to be observed”**, extends with equal force to rules of practice as well by reason that they like written rules intended to dispense justice expeditiously.*

Summary: On motion proceedings, the applicant seeks for payment of the sum of E1,824,000-00 together with interest of 9% following a sale of shares agreement, payment for the sum of E2,423,975-70 as balance outstanding on loan, failing which the sale of Portion 150 of Portion 102 of Farm 50 Ezulwini, Hhohho District measuring 2,9465 hectares and further ejectment from the said property together with costs of suit at attorney own client scale.

Chronicles

[1] It appears from the face of the court’s file that on 2nd October 2015 applicants applied that respondents file an affidavit on or before 7th October and the matter be postponed to 9th October 2015. On 16th December 2015 applicants’ Counsel applied for a hearing date and the matter was enrolled for the 18th December 2015. It appears that the matter ought to have been enrolled in the contested roll of 4th December 2015. It is not clear as to what happened on this date.

[2] A notice of set down was duly served upon respondents’ Counsel (as evident by it). On the hearing date, Counsel on behalf of respondents failed to appear. The court waited for him from 9:30 a.m. until 11:45 a.m. This was despite that respondents’ Counsel had not communicated with the Registrar. The court did order the Registrar to call Counsel for the respondents but his mobile was switched off. It is then that the court re-convened and granted applicant the prayers in the notice of motion.

[3] On 22nd December 2015, during court sitting on other matters, Mr. Nkomonde stood up to call the matter. The court indicated to him that the matter was dealt with on 18th December 2015. Mr. Nkomonde from the bar, without any written application, and in the absence of applicants' Counsel, moved that I stay the prayers granted under the application and issue reasons for granting the prayers. He boldly submitted that I, as a judicial officer, ought to have disregarded that he was absent from court on the 18th December 2015. I ought to have dismissed the applicants' application. The reason I granted applicants the prayers sought in the Notice of Motion, is because I failed, as a judicial officer, to exercise my duties of reading the full set of papers which were before me. Had I done so, I would not have granted the prayers.

[4] The court was astounded by the submissions from the bar by Counsel. I, however, ordered that applicants' Counsel should be present and the matter was postponed to the 23rd December 2015.

[5] On 23rd December 2015 when the matter was called, Mr. Nkomonde submitted from the bar an application which had no Registrar's stamp and filing notice. The prayers were as follows:

> *"1. Dispensing with the procedures in relation to time limits and manner of service prescribed by the Rules of Court and hearing this matter as one of urgency;*
>
> *2. Condoning the Applicant for non compliance with the Rules of this Honourable Court;*
>
> *3. Ordering that the Order issued by this Honourable Court in the main application on the 18th December be suspended pending handing down a written judgment; the instituting of an appeal in relation thereto; and further pending the finalization of the appeal in the Supreme Court of Appeal.*

4. Costs of this application in the event of unsuccessful opposition."

[6] The founding affidavit attested:

"4. On the 18th December 2015, this Honourable Court granted the Orders prayed for in the main application.[2]"

[7] Having heard both parties on this application, the court ordered applicants to file heads on 25th January 2016 on why they should not be mulcted with costs *de bonis propiis*. I also granted a stay of the orders pending appeal or the lapse of time of the appeal. The matter was adjourned to 2nd February 2016.

[8] On 2nd February 2016 Mr. Nkomode submitted that the order on filing of heads was confusing to him. I then ordered him to file an affidavit together with heads and the matter was once again postponed to 18th February 2016.

[9] However, Mr. Nkomode on 18th February 2016 submitted that he was unable to comply with the court's orders and applied that the court decides the matter of his costs *de bonis propiis* on its own.

Adjudication

[10] It is a rule of practice in this jurisdiction that an appeal automatically stays execution of court orders as pointed out by **Krieger J**, ***"The common law rule of judicial practice relating to automatic suspension of execution by the noting of an appeal…."***[3] Learned Counsel Mr. Nkomonde submitted that the rule of practice is not provided for by the Rules. The Rules are clear that the *dies* starts to run upon the court issuing the order. He could

[2] See unregistered affidavit
[3] Metcash Trading Limited v Commissioner for South African Revenue Services & Another CCT 3/2000 [2000] ZACC 21; 2002 (4) SA 317

not file an appeal because in its appeal, it ought to state the grounds. The grounds could only be ascertained from the written judgment. When asked as to why he did not file a Notice of Appeal and indicate that grounds would follow. Again Mr. Nkomonde submitted that such was not provided by the Rules.

[11] The court further enquired from Mr. Nkomonde as to why he did not contact the Registrar's office and request that this court issue a written judgment instead of putting applicant out of pocket by making the present application? Mr. Nkomonde advanced that such would not have suspended the order and the *dies*.

[12] It is my considered view that Counsel on behalf of respondents is creating a storm out of a tea cup. The rules of practice are part and parcel of this court and have been recognized by the Supreme Court.

[13] Mr. Nkomonde could have written a correspondence and copied it to the Registrar indicating that the respondents intended to appeal and that this court should issue a written judgment with the view that the *dies* was running from the date of the orders. It was completely unnecessary for respondents to cause applicant to be out of pocket. What is worse is that on 22nd December 2015, Counsel for respondents stood up from the bar to make such an application without anything reduced into writing.

[14] Again on the following day (23rd December 2015) Counsel for respondents failed to serve its application to applicants but did so in court. All this indicates respondents' Counsel's laxity and disregard of the rules of practice which are so embedded in this court as part of the machinery for discharging justice. The *dictum* that, "***Rules of court are not sacroscant***

but meant to be observed[4], extends with equal force to rules of practice as well by reason that they like written rules intended to dispense justice expeditiously.

[15] For the above, I am inclined to order respondents' Counsel to pay costs *de bonis propiis* at punitive scale for the three days *viz*. 22nd and 23rd December 2015 and 2nd February 2016. I say this very much guided by the *ratio* outlined by **Ota JA**[5] as follows:

> *"…**attorney-and-client costs may however be levied on grounds of the following compelling factors:- an abuse of process of Court, vexatious, unscrupulous conduct, on the part of the unsuccessful litigant, absence of bona fide in conducting litigation, unworthy, reprehensive 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. Attorneys and client costs have also been awarded where, inter alia proceedings were brought over-hastily on ill advised grounds…"(**my emphasis)*

Accusations for failure to consider the application

[16] This court noted that respondents' Counsel did not enquire as to whether the matter was dismissed after the answering affidavit was considered. Learned Counsel merely pointed fingers to the court. Further, it is startling to note that an attorney who does not turn up in court upon receiving a notice of set down, would demand that the court adjudicate a matter in its

[4] Silence Gamedze and 2 Others v Thabiso Fakudze (14/2012)[2012] SZSC 52 (30th November 2012) para 17
[5] *n4* para 31

favour. The wise words of **Ebrahim JA**[6] are apposite, "***The court, in my respective view, cannot be an avant-guarde for the Respondent****....*"

[17] Mr. Nkomonde did not provide the court with authorities supporting that the court ought to have considered the papers filed by him and dismissed applicants' application.

[18] **Corbett JA**[7] had this to say on *audi alteram partem*:

> "*Audi rule comprise not only the right to place one's version before the authority has to make the decision****, but also the opportunity to persuade that authority to exercise its discretion in a particular manner.***" (my emphasis)

[19] *In casu*, this *audi alteram partem* rule was extended to the respondents. They decided not to exercise the right afforded to them. They decided to absent themselves when the right to "***persuade***" in the words of **Corbett JA**[8] was presented to them. They are the authors of their own calamity. They cannot lay the blame at the doorstep of the court, I am afraid.

Ad merits

[20] That as it may, the applicants' application was not without merits. The applicants deposed:

> *"6. Sometime in July 2010, the parties hereto entered into a sale of shares agreement, wherein the Respondents sold to the Applicants the total shares in the company by the name of Landscape Turf and Irrigation Services (Pty) Limited."*

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[6] Swaziland Development and Savings Bank v Bhokile Shiba, Civil Appeal No.55/12 at paragraph 24

[7] Attorney General, Eastern Cape v Blom & Another 1988 (4) S.A. 645 AT 669

[8] n[5]

8.2 On conclusion of the agreement the Respondents resigned as directors of the company and 1st Applicant was appointed as a director and Form J application was filled and a share certificate was issued."

[21] They also stated:

"9. In terms of the agreement, Applicant was compelled to issue an undertaking that he will pay all the creditors owed by the Respondents. . (Annexed hereto and marked "MM4" and "MM3" is a copy of the Letter of Undertaking."

10. It is also important at this stage to mention that as per clauses 3 of the agreement, the purchase price was the sum of E6 000 000-00 (Six Million Emalangeni) which Applicant paid in full as per clause 4 of the said agreement."

[22] They further assert:

"11. At the time this agreement was entered into by the parties, the Respondents were in serious financial difficulties and were unable to get any assistance from any of the banks in Swaziland.

12. So the notion behind the agreement was to consolidate all debts faced by the Respondents and make them one, so much so that the respondent pay only one creditor who would have rescued them by paying all the debts. The banks were refusing to assist Respondents but Applicant came to their rescue and paid on their behalf.

13. It was therefore necessary to prepare an addendum to the agreement of sale of shares to cater for the repayment and securities. The Respondents did not want to lose the property owned by the company, Landscape Turf and Irrigation Services (Pty) Limited. : (Annexed hereto and marked "MM5" is a copy of the Addendum Agreement)."

[23] They point out

"14. In terms of clause 2.1.2. of the addendum agreement, the Respondents were required to pay me the sum of E48,000-00 (Forty Eight Thousand

Emalangeni) monthly and are in arrears in excess of E2,000,000-00 (Two Million Emalangeni) since June 2012.

16. It is my humble submission that I am on the other hand paying each and every month to Nedbank to service the loan in respect of this property. (Annexed hereto and marked "MM6" is a copy of the bank statement)."

[24] They conclude:

"17. In terms of clause 3 of the addendum agreement, I am entitled to cancel the agreement and sell the property in question, being Portion No.: 150 of Portion 102 of Farm No.: 50, Ezulwini, Swaziland."

[25] Respondents deposed to a long protracted answering affidavit failing to appreciate the crisp issue raised by applicants. At any rate respondents deposed that applicants did transfer the various sums which they needed as they were "*financially stretched."*

"9.7 I was financially stretched as I had used up much of my financial reserves in establishing the New Insurance Company RESURE and setting up the operational LIDWALA.

"9.8 The Subscription Agreement was drafted but never signed by Mr. Motsa. Nonetheless, on the 25th August 2009 Mr. Motsa deposited E10 Million into RESURE's bank account in fulfillment of the agreement aforesaid. I refer the court to "Annex MM5" hereto being a bank statement showing the said deposit."

[26] At their paragraphs 10.4 they aver:

"10.4. We therefore reached a verbal agreement with Mr. Motsa in terms of which he agreed to obtain an unsecured bank loan for E3.7 Million which was to be disbursed as follows:

10.4.3 E380,540-60 was to be paid to Standard Bank. This was to clear the Vehicle Finance Facility offered to Imphilo Yami Insurance Brokers."

[27] This averment at the mouth of respondents, establish that the sum of E3.7 million received by applicants all went to respondents and their companies. Again at paragraph 11 they point out clearly that applicants incurred a loan.

> *"11. We figured out with Mr. Motsa that the banks would not accede to granting him the finance of E3.7 Million unless there was some cogent explanation for him to source the finance personally."*

[28] At paragraph 9.8.1 the respondents had pointed out:

> *"…on the 25th August 2009, Mr. Motsa deposited E10 Million into RESURE's bank account in fulfilment of the agreement aforesaid. I refer the Court to Annexure M hereto being a bank statement showing the said deposit*."

[29] They then aver:

> *"It was then agreed between him and I that, we would enter into a defunct Sale of Shares Agreement in respect of Landscape Turf and Irrigation Services (Pty) Ltd, the company which was owned by myself and my wife and which owned the house in which I and my family currently reside at Ezulwini."*

[30] At paragraph 13 they agree on the obligation to repay applicants.

> *"I and Mr. Motsa, however, agreed that we will then enter into an Addendum to the Sale of Shares Agreement though which we agreed in terms of repayment of the finance which he would have obtained from his bank to pay off our consolidated debts."*

[31] They state further:

> *"It was agreed in terms of the Addendum that upon full payment of the debt to Mr. Motsa, he would then transfer the shares of Landscape Turf and Irrigation Systems (Pty) Ltd back to me and my wife."*

[32] They further admit to complying with the terms of the agreement as follows:

> *"18. Upon execution of the Addendum, both myself (at first) and Impilo Yami (later) dutifully paid Mr. Motsa the instalment of E48,000-00 per month towards the repayment of the loan. I annex hereto cheques as proof of payment that I made in the form of cheques and payment made by Impilo Yami as confirmed in the Financial Statements, and these are Annexed and marked "M 9" and "M 10" respectively."*

[33] Immediately below however, they admit breaching the said agreement by stopping payment.

> *"19. The reason why Impilo Yami stopped payments to Mr. Motsa was because, in spite of the provisions of the Addendum and his undertaking as made in Annex "M 8" hereto, Mr. Motsa then refused to transfer shares equivalent to the amount which I and Impilo Yami had paid.*

[34] One wonders as to the cogency of the reason to refuse to continue paying in terms of the agreement for the reason that respondents stated earlier that it was upon "*full payment that applicants were expected to transfer shares equivalent ...*" It is not in dispute that applicants are still servicing the loan which was intended to rescue respondents from their financial woes.

Respondents' counterclaim

[35] I note that respondents raised a counterclaim. The basis of the first counterclaim is that first respondent discharged services of employment prior to the agreement which is the subject matter in this case. However, respondents did pay partly by installments of E48,000-00 as per the

agreement. It is not clear why respondents are suddenly demanding a set off and thereby resile from the contract. Clearly it was not the intention of the parties when they concluded the contract that the amount owed by applicants (if any) under the contract of employment (if there) was to be set off. What was intended as pointed out by respondents, was that respondents would pay E48,000-00 every month to service the loan. On the probabilities of the case, it is my considered view that the respondents' counter claim is nothing else but meant to frustrate the applicants in its claim.

[36] Advancing a further counterclaim, respondents aver:

> "*I have already outlined that my Agreement with Mr Motsa, at the inception of RESURE's operations through LIDWALA was that he would become a 50% shareholder of RESURE. In turn RESURE owns 35% of LIDWALA. Mr Motsa's end of the bargain was that he was to provide and deposit E2 million into RESURE's bank account as issued share capital of the company in fulfilment of the requirement of the Insurance Act, and as a pre-requisite for grant of the Insurance Licence."(my emphasis)*
>
> *Indeed on the 3rd March 2009, Mr. Motsa deposited the said amount into RESURE's bank account. The Insurance Licence to RESURE was granted by the RIRF on the strength of the amount deposited by Mr. Motsa as aforementioned. (my emphasis)*
>
> *It is also to be remembered that that on the 25th August 2009, Mr. Motsa also deposited an amount of E10 Million into RESURER's bank account in an attempt to satisfy the RIRF's advice to put up a E10 Million bank reserve before LIDWALA can be allowed to operate. (my emphasis)*
>
> *It later transpired that on the 1st April 2009 Mr. Motsa withdrew the amount of E2 Million from the bank account of RESURE. This he did without any requisite*

authority of the Company RESURE or the requisite signatures of the signatories to the bank account.

It also later transpired that the E10 Million was withdrawn by Mr. Motsa on the 13th October 2009.

The above developments as referred to in paragraphs 26 and 27 above were discovered in July 2010 upon financial audit carried out by RESURE's financial auditors.

Despite I having confronted Mr. Motsa on the missing monies, and him having denied same to have been withdrawn, the Auditors also got no explanation from the bank as to how these amounts disappeared from the company's bank account. I attach hereto correspondence and bank account statements in this regard and mark same (in bulk) (Annex "M 11").(my emphaisis)

When the funds were discovered to be missing, and that RESURE was without any paid up share capital, it became crucial that the Companies, both RESURE and LUDWALA attempt to resolve the issue. The Companies resolved to negotiate a Subscription Agreement with Mr. Motsa by virtue of which he would hold shares in LIDWALA in trust for an institutional investor (who had been identified as SNPF). In return Mr. Motsa was to provide an amount of E2 Million, to represent the Company's issued share capital. The Subscription Agreement was signed on the 2nd August 2010, I annex hereto a copy marked Annex "M 12".

Indeed Mr. Motsa paid the said E2 Million to LIDWALA and acquired 137,195-12 shares. Ironically, this was the very amount he had initially paid to RESURE's account as paid up share capital in order that an insurance licence be obtained from the RIRF and the very amount which entitled him to the 50% share holding in RESURE.(my emphasis)

On the 17th November 2011 Mr. Motsa appointed myself to sell his 137,195-12 shares in LIDWALA and call up the Subscription Agreement. On the 2nd February 2012 Mr. Motsa was paid out on this transaction an amount of E2.4 Million.

The value of the shares which Mr. Motsa sold is currently the amount of E10,988,000-00 (Ten Million Nine Hundred and Eighty Eight Emalangeni). This

is in accordance with the latest valuation of LIDWALA INSURANCE COMPANY which I have annexed hereto and marked Annex "M 13".

Should Mr. Motsa had not withdrawn the E2 Million put up as share capital in RESURE, there would have been no need for LIDWALA to require the sale of shares of 137,195-12 in LIDWALA to secure the E2 Million paid up share capital. This interest would have remained with RESURE, thereby also benefiting me as shareholder in RESURE. There would have been no need for him to acquire shares from LIDWALA under the Subscription Agreement. Owing to his wrongful conduct of withdrawing the E2 Million in RESURE's bank account he therefore deprived me of equity and benefit in the value of E5,494,000-00 (Five Million Four Hundred and Ninety Four Emalangeni). This claim is still to be instituted through Court proceedings by way of action in this Honourable Court."

[37] Analysing the above averments it is clear that the total reading of this claim reflects that respondents are on a fishing expedition. They do not have evidence to demonstrate that applicant withdrew the sums alleged. They want to use the court under the pretext of a counter claim. For this reason, it would be a futile exercise to refer the matter to trial in this regard. There are a number of avenues opened to respondents to ascertain the person who withdrew the alleged sums and certainly not under a counter claim. A further reading of respondents' assertions as cited above show that at all material times, first applicant was pumping his money into the respondents. Nothing is demonstrated by respondents to have come from them. However, they then claim that interest ought to have been accrued in their favour. How, in the absence of any demonstration that they too contributed, it is not clear. Worse still respondents have not demonstrated that it was agreed between them and applicant that interest from the various monies deposited by applicant would accrue to them. In fact, respondents pleaded that the entire contract was for purposes of rescuing them from their financial distress. What further adds weight to the finding that respondents' claim is without merit is that respondents themselves have demonstrated that first applicant has put into the businesses various

significant sums and applicant as can be seen from its prayers does not claim the total amount vested in the businesses but only the sum of E1 824 000 and E2 423 975.70.

[38] Counter claim C is based on the averments under counter claim B, above. It must therefore be treated likewise.

Dispute of facts

[39] Respondents have also raised a point of law that there are dispute of facts in the matter. I do not think so in the light that it is not disputed that first applicant received a loan in order to serve respondents from their financial distress. It is not disputed that respondents were to pay every month the sum of E48,000-00 to applicants in order for applicants to service the loan. It is not contested that the respondents did pay but decided to default before the loan could be fully serviced. It is not in issue that the applicant even to date is still servicing the loan with the intention of assisting respondents. In view of the *Plascon Evans Rule*, referring the matter to trial will not tilt the scales of justice in favour of respondents as the material terms in this matter stands uncontested.

[40] On the above, the respondents' defence is without merit. It is for the above reasons that I granted the orders as prayed, *viz*,.

1. First and second respondents are hereby ordered to pay the applicants the sum of E1,824,000-00.

2. First and second respondents are hereby ordered to pay the applicants the sum of E2,423,975-00.

3. Alternatively, that the property in issue, to wit, Portion 150 of Portion 102 of Farm 50, Ezulwini, Hhohho District, Swaziland, measuring 2,9465 hectares is hereby ordered to be put on sale in terms of clause 3 of the Addendum Agreement to the sale of shares agreement.

4. Failing which compliance with prayers 1 and 2 above the first respondent and second respondent and/or anyone holding title under them or anyone in occupancy of the said property be and is hereby ejected forthwith.

5. First and second respondents are ordered to pay costs at attorney client scale one paying the other to be absolved.

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M. DLAMINI
JUDGE

For Applicant : **O. Nzima of Nzima and Associates**

For Respondents: **M. Nkomonde of Nkomonde Attorneys**