IN THE HIGH COURT OF SWAZILAND

RULING

Reportable

Civil Case No. 708/11

HELD AT MBABANE

In the matter between:

MARIO MASUKU	**1st Applicant**
W.E. MASUKU INVESTMENTS LIMITED	**2nd Applicant**

And

EXECUTOR- ESTATE LATE BANI MASUKU	**1st Respondent**
ESTATE LATE BANI EARNEST MASUKU	**2nd Respondent**
THE MASTER OF THE HIGH COURT	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**

In re:

BANI ERNEST MASUKU	**Plaintiff**

And

MARIO MASUKU	**1st Defendant**
MAQBUL AND BROTHERS INVESTMENTS	**2nd Defendant**

SAFA INVESTMENTS (PTY) LTD **3rd Defendant**

W.E. MASUKU INVESTMENTS (PTY) LTD **4th Defendant**

REGISTRAR OF DEEDS **5th Defendant**

THE ATTORNEY GENERAL **6th Defendant**

MASTER OF THE HIGH COURT **7th Defendant**

Neutral citation: Mario Masuku, W. E. Masuku and Estate late Bani Ernest Masuku (1708/11) [2017] SZHC 53 (07th March, 2017)

CORAM: C. MAPHANGA, JUDGE OF THE HIGH COURT

HEARD: 07th March, 2017

DELIVERED: 1st June, 2017

Summary

Background:

[1] This matter has had a long and circuitous past but the focus of the present proceedings is an application brought by the 1st & 4th Defendants for a stay of an action proceeding wherein the respondents (Plaintiff) has sought certain declaratory orders brought against the applicants. The application was launched by way of a Notice of Application on the 29th November 2016. In the Applicants seek the following orders *(ad verbatim):*

a) ***"That the action proceedings herein be and are hereby stayed pending payment of costs by the Respondents granted in favour of the Applicants under High Court Case No. 1753/09.***

b) ***That the action proceedings herein be and are hereby stayed pending the taxation of the Bills of costs under the following cases which were granted in favour of the Applicants;***

1. ***High Court Case No. 1709/11;***
2. ***High Court Case No. 274/11***
3. ***Appeal Case No. 55/10***
4. ***High Court Case No. 1484/12***
5. ***High Court Case No. 830/2010(B)***
6. ***High Court Case No. 1708/2011***

c) ***And/or alternatively the Respondents be directed to furnish the office of the Registrar with security for costs in the amount of E70,000 (Seventy Thousand Emalangeni) on the grounds for failure to comply with***

costs orders granted by this Honourable Court in the matters cited in (a) and (b) above."

The application is opposed by the 1st and 2nd Respondents and the former, being the executor of the 2nd Respondent (The estate late Bani Masuku) has filed an answering affidavit to that end.

[2] For the sake of clarity and utmost avoidance of any confusion I shall refer to the main protagonists at hand as the Applicants and Respondent.

[3] It is necessary to briefly sketch the history of the matter to locate the present application in its context. In essence the underlying dispute between the parties involved contesting claims to the control and interests in the equity of a company (the 2nd Applicant being; a property holding company registered for the purpose). May I hasten to add that the ultimate object of the acrimonious disputes are certain pieces of land registered in name of the company; these properties being central to the whole saga – have nonetheless long been sold and transferred to certain third parties.

[4] It is a fact in common cause that the Plaintiff to the main action (in regard to which the present application for a stay is sought) was the late Bani Ernest Masuku. He is now deceased having passed away in 2015 whilst the action was still pending. He was represented at all material times by his Attorneys, Messrs S C Dlamini & Company. The principal in that firm has, by letters of Administration, been appointed as an Executor in the late Mr. Masuku's estate and as it happens is now both acting as the Attorney of record and the nominal litigant herein.

[5] It is also common cause that the 1st Respondent prior to his death and the institution of the action went on a spirited campaign to stop the sale of the immovable properties. Over the years (during the period 2009 to 2012) he launched a series of applications, the primary object of which was to prevent the disposition of the contested land being a farm, Portion 6 of Farm 271, situated in Manzini.

[6] Reference has been made in the present application to the various proceedings as articulated in the 1st Applicant's affidavit. I shall return to this aspect as it is germane to this application.

[7] Central to this application for a stay are various costs awards allegedly made and issued by this court in the outcome of the various applications.

In part, it is allegedly the failure by the Respondents (in particular the Plaintiff) to make good and pay these allegedly outstanding costs awards that gives rise to this application for a stay of the action. I say in part because, as shall be apparent further herein from the facts and by implicit admission, a claim for unpaid costs only lies in respect of only one bill of costs as taxed and presented by the Applicants for payment to the Respondents.

As the stay application is two-fold, the second prayer in the application seeks such stay 'pending the taxation of bills of costs under the listed cases wherein ostensibly certain costs awards are yet to taxed and or allowed.

Stay application

1. ***It is necessary to set out in broad brushstrokes the applicable principles as to award stay of proceedings on account of non-payment of costs awarded in favour of a party.***

2. ***The cardinal rule as pertains a stay in proceedings on account of unpaid past costs is that a Plaintiff will not be***

permitted to harass a Defendant and prosecute a matter in the same cause of action until he has paid costs of unsuccessful past actions.

3. ***The aggrieved party in a stay application has to show that;***

   a) The parties to the previous action are substantially the same; and

   b) That the issues in the subject matter are substantially the same or closely connected that they can properly be regarded as concerning what is essentially the same cause as between the parties

[8] In this matter (baring the other parties who are essentially innocent third parties) there is no question that the parties are substantially the same and that as such the first requirement is met.

[9] What begs the question is the matter of the dispute or cause of action. In this regard the court is at sea because, other than what is contained in Paragraph 9 – 12 of the Applicants founding affidavit scanty facts have been placed before the court to enable the assessment as to the similarity

of the issues. Certainly there is insufficient information as pertains the full circumstances of the various cases that have been cited by the Applicant relied on for their claim for unpaid costs.

In any case it would seem the application itself is at best confused and at worst misconceived as it is in part predicated on a claim for unpaid costs accruing from previous litigation yet in the same papers the applicant seeks a stay in order to have the bulk of the costs awards relied on to be taxed.

[10] The applicant through the voice of the 1st Applicant deposes as follows:

> ***"9. On or between the years 2009 and 2012, the late Bani Ernest Masuku lodged various application and action proceedings before this honourable court against the Applicants in bid to stop the sale of Property, Portion 6 of Farm 271, Manzini. The Aforesaid applications and actions were under the Case Numbers set out hereunder:-***
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> 1. ***High Court Case No. 1709/11***
> 2. ***High Court Case No. 274/11***
> 3. ***Appeal Case No. 55/10***

4. ***High Court Case No. 1484/12 e***
5. ***High Court Case No. 830/2010 (B)***
6. ***High Court Case No. 1708/2011***

[11] The difficulty I face herein is as the application bereft of sufficient detail as to the circumstances, the material facts and attendant issues involved in the list of cases that the Applicant cites in support of the allegation of mala fide litigation, how does the court make an assessment as to whether indeed the Plaintiff's conduct constitutes an abuse of the court?

[12] That would however not to be the end of the Applicants problems. In all, but one of the matters cited no past litigation in regard to which costs awards allegedly remain unpaid it is apparent from the Applicants own papers that no bills of costs have been taxed before the taxing master.

[13] The only exception is the case cited as Case No.1753/09 in which the Applicant avers that he was awarded costs and duly drew and taxed a bill of costs. I return to this one instance of costs.

[14] Suffice it to say barring this item, it is inconceivable how the Applicant can rely on the barest costs award and assert the Respondent has failed or is refusing to pay costs where such costs have not been taxed and allowed.

[15] As a general rule a party cannot recover his costs without a prior agreement as to the measure of such costs or taxation. And no claim for such costs or process for the recovery thereof can issue unless taxed or agreed in a determinate sum.

(s***ee A. C. Cilliers, "costs" 2008 Lexis Nexis at Para 13:39; see also Incorporated Law Society v Lokofski 1939 TPD 209/29.).***

[16] As to the reason why the claimed costs have not been taxed this is what the Applicants had to say,

"I wish to state that Bills of costs were duly prepared by my Legal Representatives and duly served to the Respondents Attorneys. See copies attached hereto marked A – F. The Respondent's Representative only attended one taxation that of High Court Case No. 1753/09 and a writ of execution were issued and the Applicant (Mr Bani Ernest Masuku) failed to pay the costs. (See Annexure G)".

[17] I am not convinced of the diligence the Applicants in prosecuting their alleged claims for costs awards. It is clear from the history of the matter that the various interlocutory matters concerned in these sought costs go back a number of years. There is no cogent explanation as to why those claims have languished. It cannot be that the reasons uttered to as the evasion by the Respondents to taxation of the bills can be taken as compelling.

[18] In any case until such costs are taxed and allowed the allegation that the Respondents are refusing to pay past costs awards are untenable. Except the singular taxed bill in Case No. 1753/09, none of the alleged costs awards are due and payable.

[19] Readily I now turn to the unpaid bill. Although there is in this regard some merit to the claim that the Applicants have failed to pay this item of costs in the absence of any substantive facts to support the allegation that the relative proceedings are connected to the present action and the particulars from which any similarity of the issues or causes can be drawn, I am unable to find that the Respondents conduct has been

vexatious or mala fides in any way as to warrant an order to stay the present action.

[20] Whilst it trite that this court is clothed with inherent jurisdiction to prevent abuse of its process and stay proceedings before it in certain circumstances, it is also well established that in the interest of justice it will be loathe to exercise this power unless there are exceptional circumstances. That this is so is because **['the courts of law are open to all and only in (those) very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action'.]**[1] For this reason strong grounds must be put up to persuade the court to intervene in this manner. One such situation is where the proceedings are vexatious or frivolous or where the continuance of such proceedings will bring a serious embarrassment and an injustice to one or more of the other parties on account of the proceedings being prosecuted by a person without having paid the costs which have been incurred in previous proceedings in which the same subject matter was in dispute.

[21] In this application the Applicants are seeking an order for a stay in an action proceeding on similar grounds. The driving allegation on which the application is mounted however is not that the action is frivolous and

[1] *Western Assurance v Caldwell's Trustee* 1918 AD 262 at 273. Also Herbstein and Van Winsen, *The Civil Practice of the Superior Courts of South Africa,* Third Ed., JUTA 1979 at page 267.

vexatious but that the litigation is *mala fide* on the basis of the grounds set out in the founding affidavit.

[22] In exercising its discretion as to whether a stay in the proceedings is justified in such matters involving non-payment of prior costs, I consider the following passage by the learned authors Herbstein and Van Winsen to be insightful when they say'

> "***Vexatiousness is, however not the only ground for ordering a stay, the Appellate Division having laid down that there is no hard and fast rule as to when costs incurred in earlier interlocutory proceedings in a case must be paid before the litigant is allowed to to proceed further. If the non-payment of the costs is vexatious, oppressive or mala fide, the court will not allow the litigant to proceed without paying the earlier costs. If there is mere inability to pay the court may grant its indulgence to the applicant; but even where an inability to pay exists and where there is no mala fides or intention to act vexatiously, the court is still entitled to look at all the surrounding circumstances and then in its discretion to determine whether or not earlier costs ought to be paid"***[2]

[2] Herbstein and Van Winsen (supra) at page 279.

[23] What I understand the above passage to mean is that, firstly the failure by a party to pay previous costs awarded in favour of the applicant may be another basis for the stay in new proceedings pending settlement of the earlier costs, standing apart from the ground of Vexatiousness. Secondly, that even if there is no mala fides shown, the question of inability to pay may be viewed as open by the court to be determined by it having regard to the surrounding circumstances and ultimately also determine whether or not the costs should be paid.

[24] Illustrative of this consideration is the approach taken by the court in the Cape division in the case of ***Argus Printing and Publishing Co. Ltd v Rutland*** in taking a view that it would not exercise the discretion to order a stay pending payment of the costs in interlocutory proceedings, to bar a litigant from pursuing his remedy for the infringement of his rights unless he has done something either in the incurring of the costs or in evading the due payment thereof to warrant the courts disapproval.[3]

[25] According to the Argus decision the following factors were enumerated as key considerations the court will advert to in its discretion, namely whether:

[3] 1953 (3) SA 446 (C) at page 449

> "(t) he party who has been ordered to pay costs has incurred them by reason of some abuse of the process of the court;
>
> That party has either deliberately or through carelessness occasioned unnecessary costs; and
>
> That party has contumaciously refused to pay costs awarded against him or is vexatiously withholding payment.[4]"

(Added parenthesis)

[26] ***In De Jongh v Sliom 1930 TPD 570 the court relying on a much earlier decision of the Appellate division of the South African superior courts adumbrated that it would stay proceedings where the costs of previous litigation between the parties remain unpaid, if satisfied upon the facts of a particular case that the process of the court is being abused. (See also Western Assurance Company v Caldwell's Trustee 1918 AD 262).***

[27] Obversely in ***Potchefstroom Town Council v Botes 1939 TPD*** at 6 the court took the view that this is a general principle and not a rigid rule as

[4] Ibid at 449.

the court's jurisdiction or discretion is not only to be applied where the defaulting party is acting dishonestly, vexatiously or harassing the other party because even in the absence of such features the court may in appropriate cases stay the proceedings until the earlier costs are paid[5].

[28] Further it has been said that if the previous proceedings are interlocutory in nature the court may order a stay if the non-payment of the earlier costs is characterised by vexatious, oppressive or mala fide conduct, in such a case the court will not allow a litigant to proceed before paying the earlier costs. Such is the case in *casu* in consideration here is the defaulting party's conduct as relates to the payment of earlier costs awarded against it in such interlocutory proceedings[6].

[29] In a nutshell a more succinct statement of the principles from the emerging jurisprudence was set out in the case of ***White v Northern Insurance Company 1918 TPD 265*** thus:

> '***Where a plaintiff or applicant has put a claim before the court and has been unsuccessful and he then brings a second claim, the court will stay the second proceedings until the costs of the earlier proceedings are paid, unless there is some reason why***

[5] Also Herbstein and van Winsen *ibid*. at 277.
[6] Herbstein supra at 279

they should not be stayed; but in the case of upaid costs of interlocutory proceedings the court will not stay the action unless there is some reason why it should. Such a reason for example, is that the non-payment of costs is vexatious'

[30] Distilled it comes down to this; Vexatiousness and abuse of the court process may be inferable in instances where the issues in the litigation are substantially the same on the merits in the cause. In such cases the respondent has to show why such proceedings should not be stayed. In interlocutory proceedings or where the previous unpaid costs arise in relation to interlocutory proceedings leading to the main proceedings on the merits, the applicant would have to show why it should. So the court shall be loathe to grant a stay unless it can be shown that the defaulting party for instance has sought to evade or escape the payment of previous costs as should earn him the courts disapproval.

[31] In view of the lack of sufficient factual matter on which to determine that the facts are substantially the same or as to the substance of the previous proceedings on the papers, it is unclear whether the previous proceedings referred to in the applicant's founding papers were interlocutory or otherwise.

[32] It is clear however in this case that the Applicants has not alleged that the proceedings are vexatious but rather that the litigation on the part of the respondents has been mala fide in light of his failure to honour past costs.

[33] To this end they have deposed to the following averments in the founding affidavit:

> ***' I am verily advised and I believe that the failure by the Respondents to pay and/or comply with the cost orders in the cited matters above renders their continued litigation to be mala fide. I am advised that mala fide litigation is strictly prohibited by this Honourable Court hence a stay of these proceedings deems necessary" (sic).***[7]
>
> ***I am further advised and verily believe that the Respondents cannot approach this court for a remedy favourable to him <u>yet he has failed to comply with previous orders of this court and failed to pay previous costs as ordered by this court even by the Supreme Court</u>.'*** (added underline).

[34] In the same vein the applicants continue to state:

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[7] Paragraph 17 of the founding affidavit.

> ***"May I say that Applicants have been dragged to court by the Respondent's through various mala fide applications challenging the sale of the property in question which were duly dismissed by this court. This therefore guarantees good prospects of success by the Applicants even in this action. May I state therefore that it would be unfair and unjust if these proceedings could proceed without attending the previous costs orders, which the Applicants herein are still entitled to because the issues are still alive and Applicants will incur more costs in the current action proceedings to which Applicants are not guaranteed that it will be paid costs should they be awarede in favour of Applicants again***.

[35] Finally the Applicants entreat:

> ***'In the event Respondents fail to pay the monies emanating from the taxed <u>and /or to be taxed bill of costs</u>, I implore this honourable court to direct Respondents to pay security for costs prior to having any further proceedings heard and determined."*** *(Emphasis added).*

[36] It is interesting that the attribution of the litigation as *mala fide* is simply alleged to be on account of the respondents' failure to pay the said 'costs orders'. It is not suggested that it is the failure to pay itself that is actuated by mala fides nor has an attempt even to show that the applicant is able to pay the costs but is malevolent and simply refusing to do so.

[37] The respondent has in his answering affidavit resorted to the subterfuge that the estate is out of pocket and simply unable to pay. To be exact the words used to describe its pecuniary situation is that it is 'indigent'. That is not *mala fide per se.*

Conclusion

All in all and in considering the totality of the circumstances of this matter I am not persuaded given:-

a) The dilatory and rather lackadaisical conduct of the applicants in seeking to recover what costs awards claimed;

b) The fact that a major portion in the litany of previous costs awards have not been taxed or qualified; and

c) The relatively small amount standing to the credit of the applicants credit of costs allowed and accruing in respect of the singular taxed account that the applicant stands to suffer real prejudice in allowing this long outstanding and drawn out action to proceed to its final determination.

[38] In considering the matter I am also mindful of the fact that although this has been alleged glibly, no case has been made out in the papers for a finding that the respondents' conduct, either in the handling of the litigation proceedings and the alleged multiplicity of proceedings on the one hand or the respondents failure to pay past costs on the other, is vexatious, mala fide or abusive of the court process. Such circumstances have not been set out in these papers.

[40] For the foregoing reasons I therefore make the following orders:

The application is dismissed;

Costs shall be costs in the cause.

MAPHANGA J

For the Applicant : Mario Masuku

For 1st Respondent : Estate Late Bani Masuku