Civil Appeal No: 10/99

In the matter between:

SABELO MDUDUZI N.O. APPELLANT

VS

MERIDIEN RECOVERIES (PTY) LTD 1st RESPONDENT

(formerly known as Bank of Credit & Commerce) International Swaziland Limited

MASTER OF THE HIGH COURT 2nd RESPONDENT

CORAM : SCHREINER A J.P.

: LEON J A

: BECK A J A

FOR THE APPELLANT : S. MASUKU

FOR THE 1st RESPONDENT : P. FLYNN

JUDGMENT BECK A J .A.

In 1996 one Frederick Tyrer died in South Africa. At the time of his death he was a shareholder in a company known as Syntech Limited that was incorporated under the Swaziland Companies Act in March 1990. A death notice and an inventory were completed in Swaziland in February 1996 and they reflect that the deceased left movable property only, consisting of shares in Syntech Limited, the

value of which shares was stated in the inventory to be E650 000. In May 1996 the Master of the High Court Swaziland appointed the appellant, Mr. S.M. Masuku, executor dative to the deceased's estate.

In September 1998 the appellant, suing in a representative capacity as the executor dative, issued a summons against the first and second respondents against whom the appellant seeks an order setting aside two final liquidation orders that were obtained as long ago as June 1981 at the instance of the first respondent as the petitioning creditor in each instance. The deceased was a shareholder in each of the two companies concerned. The appellant contends that those liquidation orders were obtained fraudulently by the first respondent who did not reveal to the court information which would allegedly have been fatal to the applications for liquidation.

After entering an appearance to defend, but before filing a plea, the first respondent served on the appellant's attorneys a notice in terms of Rule 47 of the High Court Rules calling upon the appellant (as plaintiff) to furnish, security for costs in the sum of El20 000 "on the grounds that the plaintiff is a peregrinus of this Honourable Court in that:

1. Sabelo Mduduzi Masuku is executor dative in the estate of the late Frederick Tyrer, who died in South Africa, being a South African who would have been a peregrinus of this Honourable Court.;
2. The said estate of the late Frederick Tyrer has no assets in Swaziland save for the

alleged interest as share holder in a company called Syntech

Limited;

3. The said company no longer exists as it was struck off the companies roll on 25th October 1996; and

4. The first respondent would have no right of recourse in the event that legal costs are awarded in its favour in these proceedings."

The wording of this Rule 47 notice conveys the meaning that security for costs is claimed only because the appellant is a peregrinus that has no assets in Swaziland against which the first respondent could have recourse to recover costs that may be awarded to it.

The appellant replied that liability to give security for costs was contested and that the request for such security was refused. Consequently, the first respondent applied to court for an order on the appellant to furnish security for costs, for the proceedings instituted by the appellant to be stayed pending the furnishing of such security, and for costs of the application in the event of it being opposed.

In its founding affidavit the first respondent alleged firstly that the appellant, in his nominal capacity as the executor dative, is not the real plaintiff, and that the real plaintiff is the estate of a deceased who was a South African national ordinarily resident in South Africa, so that his estate is a South African estate and can only have peregrinus status in Swaziland.

Secondly, the first respondent averred that the deceased estate has no assets in

Swaziland since its only asset, as shown by the inventory filed, namely its Syntech shareholding, is valueless because Syntech has never traded, has never filed any statutory returns, has never been issued with a company licence since its incorporation, has been dormant throughout the entire period since its incorporation, owns no immovable property and has been struck off the register of companies, and dissolved, by the Registrar of Companies because it was not carrying on business and was not in operation.

These twin attacks, firstly as regards the foreign status of the deceased estate as being the real plaintiff, and secondly on the total lack of any assets owned by the deceased estate, were separately challenged and canvassed in the appellant's answering affidavits.

The appellant denied "in the first instance" that the deceased estate of which he has been appointed executor dative is a peregrine estate and he contended that, since he has been appointed executor dative by the Master of the Swaziland High Court, the deceased estate that he administers must be a Swaziland estate. He also denied that the deceased was ordinarily resident in South Africa, despite having himself stated in the death notice that the deceased was a South African national by birth, and that South Africa, where the deceased died, was the country where the deceased was ordinarily resident.

The appellant then went on, in his answering affidavit, to deal with what he referred to as the first respondent's "second averment" that the deceased estate has no assets in Swaziland. The appellant denied that averment, and in support of his

denial he pointed to, and relied exclusively on the estate's shareholding in Syntech. He did

not indicate that the estate owned any other assets whatsoever in Swaziland, but confined himself entirely to the deceased estate's proprietary interest in Syntech and his averment that Syntech has an as yet unsatisfied claim against a South African company called Galfer (South Africa) (Pty) Limited for payment of R650 000 allegedly owed to it by Galfer as the purchase price for equipment sold to Galfer by Syntech in 1991. Whether or not this claim is recognised by Galfer, and whether Galfer, which the appellant says has not performed any of its obligations in terms of that eight year old agreement, is able to pay this sum, or even if Galfer still exists, is not stated by the appellant, thus making it impossible to assess to what extent, if any, this claim has a monetary value for Syntech, and perhaps also for deceased estate which owns 50% of the shares in Syntech.

The appellant did not challenge the evidence that Syntech has been dormant and was de-registered and dissolved because it was not carrying on business. He has merely said that he was unaware that Syntech had been de-registered and he submitted that it would be just for registration of the company to be restored in view of its claim against Galfer. There is no suggestion that this has happened, nor is there any indication that steps have been, or soon will be, taken to enforce payment of the alleged claim against Galfer.

Significantly the appellant went on in his answering affidavit to say that "even if the first defendant would otherwise be entitled to require security for costs" the court should exercise its discretion against making such an order by reason of the nature of the appellant's case in the action he has instituted, in which, as I have

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already indicated, the appellant alleges fraudulent conduct by the first respondent in 1981 when it obtained the two liquidation orders which the appellant now seeks to have rescinded.

The appellant concluded his answering affidavit by saying;-"To sum up:-

1. I deny that the plaintiff is a peregrinus of this Honourable Court.
2. I deny that the estate has insufficient funds to satisfy any adverse order for costs.
3. I aver, in any event, that special circumstances exist for the exercise of discretion by this Honourable Court in favour of the plaintiff."

Despite the denial that the deceased estate has insufficient funds to satisfy any adverse order for costs the appellant submitted in argument that an order compelling the estate to furnish security for costs would have the effect of putting an end to the action that has been instituted.

The issues of the status of the deceased estate in Swaziland and of the estate's ability to meet an adverse order of costs were both fully canvassed in the affidavits, as well as in the arguments that were presented in the court a quo, as is apparent from the transcript which is contained in the record of the proceedings when the application was moved. There could therefore be no prejudice to the appellant in deciding the application on the basis of the exercise of a discretion to order security for costs even if the deceased estate be an incola of Swaziland, not a peregrinus.

This is what the court a quo did. The learned Chief Justice assumed, without

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deciding, that the deceased estate is not a peregrinus but an incola of Swaziland. During the course of argument by the appellant's counsel in the court a quo the learned Chief Justice said to him, "I will deal with this matter on the basis that this is a local estate", to which the appellant's counsel replied, "Yes My Lord. And it being a local estate we are saying that we don't have to furnish security for costs and the whole issue becomes discretionary My Lord." Appellant's counsel then went on to request the court to take into account, in the exercise of

its discretion, the nature of the action that the appellant had instituted in which fraudulent conduct was alleged.

Even assuming, as the court a quo did, that the deceased estate is not a peregrinus, it nevertheless seems to me that it cannot be said that the learned Chief Justice exercised his discretion wrongly in deciding that security must be furnished. It is a factor of considerable importance that no relief is claimed in the action that has been instituted other than rescission of the liquidation orders. No claim for damages against the first respondent is yet being made, and there is no certainty that any such claim will ever be made, even if rescission of the liquidation orders were to be granted. The obvious difficulties of now being able to prove any claim for damages would seem to be formidable, and there is good reason to doubt whether the deceased estate has any real interest in the action that has been instituted. In Mears v Brooks and Mears Trustee 1906 T.S. 546 at 550 Bristowe J. said "I am very much inclined to think, that where the plaintiff is suing and has no real interest of his own in the subject matter of the action, that really is a very good ground for ordering him to give security for costs." That was said of an incola plaintiff, and, with respect, I am in agreement with this observation.

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The action that the appellant has instituted borders on the vexatious. If no subsequent action for damages is ever instituted (and in argument before us counsel for the appellant said no more than that such a future action "may" be instituted) then the present action for rescission is purposeless. Moreover, the present action is also unnecessary. If the appellant can prove that the liquidation orders were indeed fraudulently obtained, and that the deceased suffered damages in consequence, there would seem to be no reason why the appellant should not have instituted an action for damages now, rather a separate action for rescission only while contemplating that a further action might thereafter be brought for damages.

If, together with this consideration, one takes into account the factor that the deceased estate is totally impecunious at the present time, and that it is speculative as to whether or not the shareholding of 50% that it has in the de-registered company Syntech Limited will ever have any value (the court a quo aptly described this "asset" as "nebulous, to say the least") then I consider that it cannot be said that the learned Chief Justice exercised his discretion unjudicially in ruling that security for costs must be furnished by the appellant.

Having ruled that security must be furnished, the learned Chief Justice then asked counsel what the position was with regard to fixing the amount. Counsel for the appellant wished to go before the Registrar and to canvass before him the amount that would be appropriate, but the learned Chief Justice decided to fix the amount himself, and he did so without further ado.

In so doing I am of the view that the court a quo erred. The first respondent had

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not yet pleaded, as I have already indicated, and there was insufficient information before the court to enable it to make a proper assessment. In particular, the appellant was not given an opportunity to deal with the issue of quantum, and even though the amount that was ordered (E50 000) was only intended by the court a quo to provide security for costs "up to the commencement of trial". I consider that this portion of the order should be set aside and that the parties must go before the Registrar for the amount of security to be determined.

Appellant's counsel submitted that each party should pay its own costs of appeal in the event of the appeal against the ruling that security be provided being dismissed, but it being ordered that the amount must be fixed by the Registrar. In my view, however, the issue as to the liability to provide security is the cardinal issue that was in dispute, and having succeeded on that issue the first respondent has been substantially successful and is entitled to an order for costs. The second respondent has taken no part in the proceedings either in the court a quo or in this appeal, and abides by the decision of the court.

Accordingly the appeal against the order that the appellant must provide the first respondent with security is dismissed with costs, but the order of the court a quo fixing an amount of E50 000 is set aside and the parties are directed to go before the Registrar for the amount of security to be determined. It is further ordered that all proceedings in the action that the appellant has instituted be stayed until the amount of security as determined by the Registrar is paid by the appellant.

In the light of the limited relief that has been obtained the application for leave to appeal that was made, in so far as such leave may be necessary, is granted.

C. E. L. BECK A. J. A.

I agree

W.H.I. SCHREINER A. J. P.

I agree

R. N. LEON J. A.