IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 04/2014

In the matter between:

JOHN BOY MATSEBULA	Appellant
And	
INGCAYIZIVELE ASSOCIATION	1st Respondent
ZONKHE MAGAGULA	2nd Respondent
ZONKHE MAGAGULA & COMPANY	3rd Respondent
ZWELI MBULI	4th Respondent
THE TAXING MASTER	5th Respondent

Neutral Citation:	*John Boy Matsebula v Ingcayizivele Farmers Association & 4 Others (04/2015) [2015] SZSC 40 (29 July 2014)*
Coram:	QM MABUZA AJA, R CLOETE AJA and SA NKOSI AJA
Heard:	06 July 2015
Delivered:	29 July 2015

JUDGMENT

S. A. NKOSI AJA

The Appellant came before this court on appeal for a determination of;

[1] (a) Whether it was lawful for the deputy Sheriff to leave Swaziland without finalizing the execution process and without handing over an attached motor vehicle to the registrar of the High Court and, this vehicle having been attached from the Appellant.

(b) Whether the case of several litigants who are jointly liable for costs, it is correct for the Deputy Sheriff to execute against one of them for the full amount;

[2] It is the contention of the Appellant that the court *a quo* erred by not holding that the length of time that the Deputy Sheriff took without finalizing the execution justified an order that he failed in the exercise of his duties and should release the attached vehicle.

[3] Secondly, Appellant further contends that the court *a quo* erred in failing to consider that the Respondents were shown to be clearly lying regarding the whereabouts of the attached vehicle.

[4] Lastly, the Appellant states that the court *a quo* erred by holding that the fact the writ of execution for costs referred to a judgment that did not award costs was of no consequence.

[5] The issue before this court cannot be taken any further than to determine

(a) Whether or not the litigants are jointly liable for costs only against one of them, and,

(b) Whether the court *a quo* erred by holding that the fact that the writ of execution for costs referred to a judgment that never granted costs was of no consequence. This is an issue that was dealt with in argument and it is clear that the judge *a quo* considered it in his judgment and found that an error had clearly been made on the face of the writ of execution. I shall deal with this issue.

[6] The learned judge *a quo* at page 10 of the judgment states:-

> **"The Applicant has almost solely based his application on the fact that the writ of execution that resulted in the attachment of his motor vehicle states that the costs were awarded to the first Respondent in 2006. He says, correctly in my view, that there was no such order granted by the Court in June 2006. I have already stated that this is clearly an error in the writ. The order was in fact granted in 2008 and the Bill was taxed and allowed on the 11 June 2009…The Applicant carped and harped at this obvious error notwithstanding his own knowledge of the true facts even in the face of the Bill of costs while numerous items or claims for services done after the 21st day of June 2006".**

[7] Therefore the issue raised under 4 of the Notice of Appeal is of no merit and is accordingly dismissed. The further points raised in terms of 1(a), 2 and 3 of the Notice of Motion equally have no merit. These are issues that must be dealt with by the Sheriff of the High Court. Administration of Deputy Sheriffs is in the ambit of the Sheriff's office and not to be determined by the Court.

[8] From the meagre record presented to me, I can only discern that as presented to this Court on the merits of the judgment, there are no further issues to be determined by this court on the merits per ser. The only issue left for the decision of this Court is whether the Appellant should be made to singularly bear and pay the costs awarded by the Court of first instance.

[9] There is absolutely no reason why I should refashion or seek to transmute the findings of Mamba J. In fact I tend to agree with his findings after due regard to the manner the facts were dealt with. This fully appears in his judgment with regard to the discharge of the onus resting upon the Appellant in terms of the law. However the remaining issue seemingly, is not one

which was ever canvassed in the court *a quo*. It is trite that review proceedings must deal with any new issues borne by the facts on the merits.

[10] It is imperative that the law relating to costs be examined in light of the current case. In this regard let us refer to **AC Cilliers, Law of Costs Issue 17 2008.** This court bestowed with inherent jurisdiction, must determine to a finality, the basis upon which the basic principle of costs is premised in light of Applicant's ground for review. In this regard see ***Kruger Bros & Wasserman vs Ruskin 1918 AD 63 at 69*** where learned Innes CJ said in pronouncing the basic principle with regard to an award of costs:

> **"the rule of our law is that all costs-unless expressly otherwise enacted-are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission".**

[11] With regard to the above, it seems to me that having due regard to the facts and the determination of the court *a quo*, the question of costs that is being challenged by the Appellant, has, ordinarily to be premised on this fundamental principle of the law.

[12] However, it was argued by counsel that under the circumstances, the costs should be borne by the parties in equal proportions; this is a novel and interesting argument. This court has been required to set the law in so far as, where and how does an order of costs against multiple litigants apply; does the court recognize that multiple litigants who have been ordered to pay the costs of litigation must do so jointly and severally the one paying, the others to be absolved.

[13] The Learned Chief Justice Banda (as he was then) in granting the application in the High Court simply said:-

> **"This application will therefore succeed with costs".**

The issues that comprised the merits were based on the complication of rural agriculture life by the advent of the cash crop sugar. Justice Banda, C. J. dealt with the facts rather thoroughly in his judgment and I need not re-iterate them here.

[14] The Appellant contended that he should not be singularly liable to bear the responsibility of paying all the costs awarded to the 1st Respondent under ***Civil Case No. 4539/05 Nicholas Matsebula and Khuzwayo Dlamini*** where

there were co-Respondents in that case. These parties had brought the application jointly before the High Court. The learned Justice R.A. Banda, CJ (as he was then known) ruled in favour of the Applicant and granted the application as against the three Respondents with costs as aforesaid.

[15] The issue to be determined is, where there are more than two parties to a suit, does the court have a discretion in awarding costs proportionately? Rule 10 of the High Court Rules provides as follows:-

> **"10. In any action in which any cause of action or parties have been joined in accordance with this rule, the court at the conclusion of the trial shall give such judgment in favour of such of the parties as shall be entitled to relief,**
>
> **or grant absolution from the instance, and shall make such order as to costs as shall to it seem to be just, provided that without limiting the discretion of the court in any way:-**
>
> **(a) The court may order that any plaintiff who is unsuccessful shall be liable to any other party, whether plaintiff or defendant, for any costs occasioned by his joining in the action as plaintiff;**
>
> **(b) If judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may order:**

(i) the plaintiff to pay such defendant's costs, or

(ii) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the successful defendants, he shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess, and the court may further order that, if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants, he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants.

(c) if judgment is given in favour of the plaintiff against more than one of the defendants, the court may order those defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the plaintiff he shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess.

[16] In terms of the above, it seems that the rules of court have always anticipated that unsuccessful parties, against whom an order for costs is granted, have to pay the costs jointly and severally. The rules clearly stipulate that where there is more than one defendant, a successful party shall recover his costs

from anyone of the defendants so ordered to pay costs. It goes without saying that this court being invested with inherent power is at liberty to exercise its discretion, and may in appropriate circumstances depart from the general rule that the liability of co-litigants is joint, each being liable for his *aliquot share.* The wording in Rule 10 is:-

> **"…and shall make such order as to costs as shall it seem to be just provided without limiting the discretion of the court in any way…"**

[17] Notwithstanding, such departure must be only exercised in exceptional circumstances which must be specifically pleaded. To deprive a successful party of his rightful award of the costs of litigation because the successful litigants are not able to pay their *pro rata* share would ordinarily be inequitable. This view has been articulated in our Roman-Dutch common law over time. The rationale is succinctly captured in the celebrated case of ***Minister of Labour v Port Elizabeth Municipality 1952 (2) SA 522 (A) at 537 GS38A*** where the South African Appellate Division held that:-

> **"In Minister of Labour v Port Elizabeth Municipality the Appellate Division, considering that a party is compelled to join all other parties who have a direct interest in the proceedings, expressed the view that if one of those other parties is not a financial position to pay his aliquot share of the costs awarded, an order simply for costs would result in the successful party not**

being able to recover all his taxed costs, which would be inequitable in cases where the parties condemned to pay costs make common cause with one another. The Appellate Division dismissed the appeal, ordering the appellants to pay the respondent's costs of appeal jointly and severally, the one paying the others to be absolved. This case has been followed since by the Appellate Division. Orders to pay costs jointly and severally where the litigants concerned had made common cause with one another have subsequently been granted. Save for the authorities mentioned above, the cases do not appear to lay down any general guide as to the circumstances in which an award of costs should be made jointly and severally against co-litigants". (My emphasis)

[18] Even though there are no hard and fast rules laid down by this court, or for that matter, the South African Courts from which we derive substantial authority in the development of our common law, the circumstances of each and every case must be adjudged on its merits. So, in *casu*, the question would be, are there any exceptional circumstances that would warrant this court to deviate from the general principles as hereinabove stated.

[19] I have no doubt that given the facts, and the circumstances pertaining to the initial application; this matter is one relevant and pertaining to the evolution of indigenous subsistence farming by rural folks to a hitherto unknown phenomena of modern agricultural culture. Rural communities, due to

economic development had to grasp the ethos of modern agricultural standards and the effects of civil suits that followed such as in this case. In Swaziland, we have to balance the expectations of those rural communities and the concomitant and probable new standards that they have had to face. Formality has to be grappled as assertions and other farmers' grouping came into being.

[20] Given this scenario, I find that there are exceptional circumstances given the fact that the litigants were not involved in a mere personal dispute but in one which has had real social consequences for the Swazi Nation as a whole. The issues here involve traditional land and homesteads being converted into modern agricultural undertakings.

[21] As such I rule that the appeal is allowed on the grounds that the Appellant must only pay his *pro rata* share of the costs due by him in terms of the judgment of the court *a quo*.

[22] With regard to all the other issues raised in the Notice of Appeal. I deem that they have no relevance one way or the other. If the motor vehicle is in his possession, this court orders that the Sheriff of the High Court to execute the judgment in order that the Appellant pay his *pro rata* share of the costs as hereinabove ordered.

[23] I deem that it only follows from the ruling hereinabove that there is no order as to costs of appeal. Each party must pay its own costs.

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S. A. NKOSI

ACTING JUSTICE OF APPEAL

I Agree

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Q. M. MABUZA

ACTING JUSTICE OF APPEAL

I Agree

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R. CLOETE

ACTING JUSTICE OF APPEAL

For Appellant: Robinson Bertram Attorneys

For Respondent: M. P. Simelane Attorneys