IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HOLDEN AT MBABANE Civil Appeal No.20/2018

In the matter between:

Inter Agencies (PTY) LTD	**Appellant**
Versus	
Corban Electrical and Electronics (Pty) Ltd	**1st Respondent**
Thembinkosi Nkonyane	**2nd Respondent**
Duduzile Mahlalela – Ndlovu	**3rd Respondent**

Neutral Citation: *Inter Agencies (Pty) Ltd versus Corban Electrical and Electronics (Pty) Ltd (71/2018) [2018] SZSC48 (31st October, 2018)*

Coram: **SJK MATSEBULA AJA**

Heard: 9th October 2018
Judgment: 31st October 2018

Summary

Civil matter-application for leave to appeal an order of costs granted by a court a quo against appellant – an application to succeed, amongst other considerations, there must be reasonable prospects of success in the main application.

JUDGMENT

MATSEBULA AJA

[1] The Appellant in seeking leave of this Court to appeal a costs order that was issued by the court a quo in a summary judgment order in favour of the Respondents. The 1st Respondent is resisting this application.

[2] A summary judgment is by its nature a ruling of a court premised on the facts that there are no factual issues in dispute and that the cause of action in a complaint can be decided upon certain facts without trial. Put differently, a summary judgement is a judgement entered by a court for one party and against another party summarily, without a full trial. It is a procedural device used in civil litigation to promptly and expeditiously dispose of a case without a trial. It is used when there is no dispute as to material facts of the case and a party is entitled to judgement as a matter of

law. An applicant or plaintiff who applies for summary judgment is actually saying there are no disputed facts, no triable issues and therefore the court should find for the applicant and the respondent be ordered to pay the applicant, as in the present case, forthwith without the expense of the parties going for trial. Summary judgement, as already stated, affords speedy completion of a matter but is attended by the risk of dismissal of the case in the event the court finds there are disputed facts in which case the applicant is visited with costs. That is, in the event the defendant comes up with a plausible and legally acceptable defence. A complete defence kills an application for summary judgment.

The case at hand.

[3] The appellant's case is that-

> "3.1 The learned Judge *a quo* did not exercise a judicial discretion when awarding the costs order in favour of the respondents. The costs order was unsubstantiated by any adverse findings that appellant knew prior to launching the summary judgment proceedings that respondents would rely on a contention which entitle them to an unconditional leave to defend the said proceedings.

3.2 The court *a quo erred* in law and in the exercise of its judicial discretion in unjustly deviating from the basic principle that costs for summary judgment be costs in the course.

3.3 The court a quo *erred* in law and in fact when awarding costs to the respondents and thus failing to take into account the interlocutory nature of a summary judgment order and further the fact that the respondents were not substantially successful in the ongoing suit between the parties.

3.4 Directing the Respondents to pay costs of suit at attorney and own client scale".

[4] The 1st respondent is resisting the application for leave to appeal the costs order of the court *a quo* in its favour in that the order was justified in the circumstances because -

4.1 The appellant sought summary judgment when it knew that there was a dispute, a contention that would entitle the respondents to unconditional leave to defend.

4.2 The court a quo correctly applied the provisions of Rule 32 (7) of the High Court Rules, which states that-

> "if the plaintiff makes an application under sub-rule (1) where the case is not within this rule or if it appears to the court that the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, then without prejudice to any other powers, the court may dismiss the application with costs and may require the plaintiff to pay the costs forthwith."

The respondent in support of the court a quo's judgment and that it correctly applied Rule 32 (7) cited Herbastein and Van Winsen "the Civil Practice of the High Courts and Supreme Court of South Africa" volume 1, 5th edition by Andries Charl Cilliers et al at page 542, Primrose Brick Works (1936) Ltd V. Metropolitan Timber Co Ltd 1959 (1) SA 35 and numerous others.

[5] Both attorneys for the Applicant and for the respondents appeared before this Court and argued their points of law vigorously as if they were arguing the case on its merits. The mandate of this court is derived from the application, that is, leave or permission of this

Court to allow the applicant to challenge the costs order of the court *a quo*. It ends there and it does not go to the merits of the case. For the Applicant to succeed in its application, it must put forth sound and reasonable prospects of success at the trial.

[6] The test to be applied for "sound and reasonable prospects of success" would be: with the submissions as put or as they are, could any other court below have decided otherwise or could any other court have decided in favour of the Appellant/Applicant herein. If the answer is on the affirmative, then the test of prospects for success would have been satisfied, as is the case herein.

[7] The Appellant has also argued that the court *a quo* should, its discretion respected, have ordered the costs to be costs in the cause because summary judgment proceedings are interlocutory by their nature. Whilst the granting of costs is in the discretion of the court, it should consider all the circumstances of each case, the conduct of the parties in the proceedings, the potential existence of disputes, whether these were apparent or could be foreseeable or not.

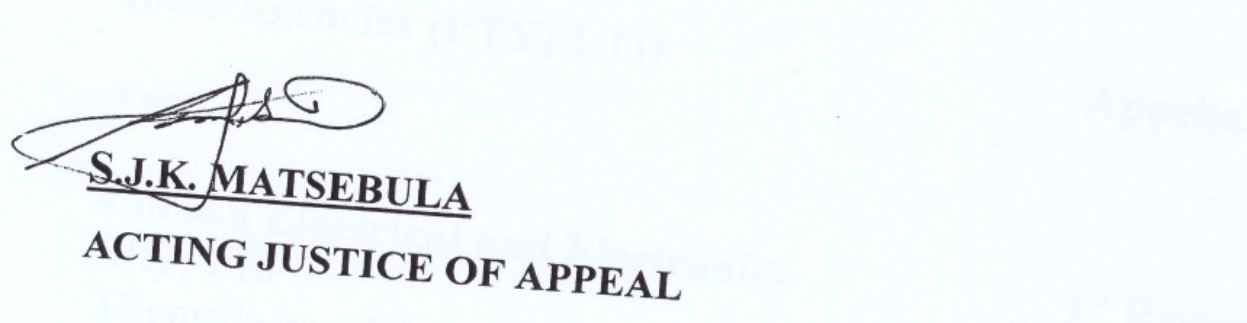
[8] As I have pointed out an order for costs is within the discretion of the court and as to whether it has been judiciously exercised or not is beyond this application but could be ventilated in a subsequent trial or appeal proceedings.

[9] In my opinion based on the submissions by the appellant and on the face of the facts, the test on the prospects of success has been satisfied.

[10] As a result –

(a) the application for leave to appeal is granted; and

(b) costs shall be costs in the cause.



The Appellant: L.Manyatsi

Counsel for the Respondent: T.Hlanze