THE HIGH COURT OF SWAZILAND

SIBUSANI DLAMINI

Applicant

And

ZAMEKILE INVESTMENTS (PTY) LTD

Respondent

Civil Case No. 2050/2003

Coram: S.B. MAPHALALA – J

For the Applicant: MR. S. MAGONGO

For the Respondent: MR. S. DLAMINI

JUDGMENT

(24m November 2006)

[1] The issue before me concerns the unusual liability of a successful party to pay costs.

[2] According to the *dictum* by Innes CJ in the South African case of *Kanger Bros & Wasserman vs Ruskin 1918 A.D.* at page *69* the rule of our law is that all costs unless expressly otherwise actual 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. Further that the general rule is that the party who succeeds should be awarded his costs and this rule should not be diverted from except on good grounds, (see *Herbstein et al, The Practice of the Supreme Court of South Africa (4th ED)* at page *505.*

[3] A successful party may in certain circumstances be ordered to pay the costs of the proceedings but this is an unusual order and is seldom given, (see *A.C. Cilliers on Law of Costs* at page *639* paragraph *3.20).* A successful party may be deprived of its costs on certain grounds, (see *Herbstein et al* at pages *716* to *717).* Circumstances in which this may occur are the following: Where the Defendant has induced the litigation by withholding certain information; where the misleading conduct or misleading statements of the successful party have been the cause of all the costs of the proceedings; where the successful party has either misled another party into litigating or has cause unnecessary litigation or procedural steps; or where the haste of the Plaintiff has been wholly responsible for legal proceedings that would have been unnecessary had a measure of prudence been employed. These are instances in which the court usually disapproves of the actions of the successful party, (see *Mahomed vs Nagaze 1952 (1) S.A. 410 (A)* and *Herbstein (supra)* at *716* to *717* and the cases cited thereat).

[4] The above-cited legal principles govern the current dispute between the parties in this case. The 1st Respondent served a Notice of

Bar (as Plaintiff in the main action) on the Applicant (as Defendant) on 9 March 2004. The Applicant did not file its plea and on 24 January 2006, the 1st Respondent obtained judgment in terms of her claim in the main action. The 1st Respondent had initially set the matter down for judgment on 20 January 2006, but my Brother Mamba J postponed the matter to 24 January 2006 directing that

the Applicant be notified of the orders sought against it. On the next court day after the said direction by the court, the Applicant was duly notified at its principal place of business.

[5] The Applicant served the 1st Respondent's attorneys with its application for rescission on 10 February 2006, after the latter enquired by means of letters dated 30 January 2006 and 7 February 2006. The 1st Respondent offered to abandon judgment against tender of her costs incurred in obtaining judgment. This offer was rejected by the Applicant and the Respondents duly filed their Notice to oppose on 17 February 2006. The Applicant reinstated and set down the matter for 24 March 2006, insisting on being paid costs of its rescission application.

[6] The position of the Applicant on these facts is that although it was not inclined to apply for costs, now that it has been unnecessarily placed on arguments, the application for costs is now moved. The Respondents on the other hand prays that this court orders the Applicant to pay costs of obtaining judgment in the main action as well as those of the rescission application.

[7] After hearing the arguments on both sides on this question on costs I have come to the considered view that Applicant failed to limit or curtail proceedings and costs. The Applicant defaulted in filing its plea and was negligent in relation to the litigation. The Applicant further rebuffed the Respondent's reasonable attempts to settle the matter notwithstanding the latter's indication from the onset that they only wished to be placed in the same position they would have been but for the Applicant's default in the main action. On these facts I find that the *dictum* in the South African case in *Michael vs Linksfield Park Clinic (Pty) Ltd 2001 (3) S.A. 1188 SCA* at *1204* is apposite where the Supreme Court of Appeal observed:

> **"It is beyond question that the circumstances of a case may warrant court's discretion, depriving a successful party of costs particularly or entirely and even warrant an order requiring the successful party to pay the unsuccessful party's costs again particularly or entirely".**

[8] In the result, for the afore-going reasons I order that the Applicant pays costs of obtaining judgment in the main action as well as those of the rescission application.

S.B. MAPHALALA
JUDGE