THE HIGH COURT OF SWAZILAND

Civ.Case. No.3018/98

In the matter between:

CHRIS MATSIAS **Plaintiff**

And

EDMUND DE SOUZA **Defendant**

CORAM **: MASUKUJ.**

For the Plaintiff For the Defendant **Mr P.R. Dunseith No Appearance**

JUDGEMENT
7th April 2004

This case has a chequered and convoluted history. This history has a material bearing on the Order that will eventually be handed down. It is therefor necessary, in this light, to highlight the important and relevant aspects of the history.

Brief History

By summons dated 4th December, 1998, the Plaintiff claimed the delivery of a motor vehicle described as a Toyota Land Cruiser bearing Chassis No. FJ 62105843 and engine number 3 F-0224983 which was in the Defendant's possession. The Defendant was in the summons described as a motor mechanic.

In his Plea, the Defendant averred that he effected substantial repairs to the said motor vehicle in the amount of El7, 420.00. The Defendant further averred that he would not release the vehicle to the Plaintiff in exercise of a repairer's lien he held over the said vehicle.

The Defendant, simultaneously with the Plea, filed a counter-claim for payment of the aforesaid amount of El 7, 420.00 in respect of the repairs.

I must also point out that I have called up the file from the office of the Master of the High Court, which on perusal shows clearly, that since the death of the deceased, no one was appointed executor or executrix to date.

It would appear that the Defendant passed on during the 20th April, 2001 and this necessitated a substitution of the Defendant by the Executor. It is apparent that the substitution, despite demand from the Plaintiffs attorney has not been effected by the Defence.

On the 16th October 2002, Sapire C.J. (as he then was) granted an Order in the following terms;

1. That the sum of E17,420.00 is to be deposited into a savings account at a local commercial bank by the Applicant (Plaintiff), which account is to be operated under the joint signatures of the parties' attorneys.

2. That the Respondent, Edmund de Sousa, is to deliver the vehicle namely;

   Toyota Landcruiser 4 x 4
   Station Wagon Chassis No. FJ
   02/105843 Engine No. 3F-
   0224983
   to the Applicant Chris Matsias against proof of the aforesaid deposit.

3. Costs to be costs in the main action.

There appears to be no dispute that the Order stated above was complied with. It is implicit from the said Order that the Plaintiffs claim was disposed off, leaving the counter-claim awaiting determination. In particular, there is a letter from Mr Dunseith dated 23rd October, 2000, in which he informs the Defendant's attorneys of the deposit of the aforesaid amount

of El 7, 420.00 into a Bank Account as ordered by the Court in prayer 1 of the said Order of Court.

There is correspondence filed by Mr Dunseith, showing that attempts to have the matter settled out of Court failed after the issue of the Order of the 16th October. The matter was then set down for hearing unsuccessfully in October, 2002, and this was due to the unavailability of a Judge to hear the matter.

The matter was finally allocated a hearing date i.e. 22rf March 2004 by the Registrar on the 19th January 2004. The notice of the allocation of trial was sent to the parties' legal representatives by the office of the Registrar. The Plaintiffs attorneys filed a notice of set down for the said date and Mr Dunseith, an officer of this Court informed the Court that he was in contact with the Defendant's attorneys two weeks before trial regarding the hearing. Mr Mabuza from the Defendant's attorneys promised to revert to Mr Dunseith but to no avail. I have no reason not to accept Mr Dunseith's version given as it is by him as an officer of the Court, more so *in casu* where the Defendant's attorneys did not attend Court to explain their position or to controvert what he placed on record.

On the 19th March, 2003, the Defendant's attorneys purported to withdraw as the attorneys of record. Mr Dunseith has, in view of the purported withdrawal urged the Court to consider the notice of withdrawal ineffectual and to grant absolution from the instance with costs in respect of the counterclaim. In the alternative, he urged the Court to order the release of the security held in terms of the Order of the 17th October, 2000, as aforesaid with wasted costs to the Plaintiff.

The question of the representation of the parties is governed by the provisions of Rule 16 of the Rules of this Court, as amended. Of particular relevance to this case are the provisions of Rule 16 (4) (a), which provide as follows: -

> *"Where an attorney acting in any proceedings for a party ceases so to act, he shall, forthwith deliver notice thereof to such party, the Registrar and all other parties: provided that notice to the party for whom he acted may be given by registered post. "*

The learned author Erasmus, in his work entitled "Superior Court Practice", Juta, 1995, states the following in respect' of service of a notice of withdrawal by registered post as recorded above at page Bl-121: -

> *"The proviso to the sub-rule now entitles an attorney to notify his client of his withdrawal by registered post. Such notification by registered letter at an address furnished to the attorney by the client would seem to be sufficient proof that the client had in fact received the letter. "* (underlining my own).

It is worth noting that *in casu,* the purported notice was sent by Registered post, not to the Defendant's postal address, but to the Plaintiffs attorneys address. That address was not the one furnished by the Defendant to the attorneys. There was therefor no hope that the notice of withdrawal would reach the Defendant. It is therefor ineffectual and the Defendant's attorneys must bear the consequences of whatever Order this Court is minded to hand down, given the peculiar circumstances of this case.

In **MACDONALD** t/a **HAPPY DAYS CAFE VS NEETHLTNG 1990 (4) SA 30 (NPD)** at **31,** Didcott J. cited with approval the case of **S VS NDIMA 1977 (3) SA 1095 (N),** where the following applicable principles were enunciated.

> *"It is quite plain that an attorney must if he is going to withdraw from a case, withdraw from it timeously and inform his client that he is withdrawing so that the client can make other arrangements or, if there are none which he can make and if he wishes to do so, so that he may appear in person to argue his appeal. If an attorney wishes to carry on, hoping that at the last minute he will be given funds, and does not wish to withdraw at an earlier stage of the case because he will jeopardise his chance of being paid, then he must be willing to take the risk that he will find himselffinancing the appeal and go on with it. In other words, he either withdraws at an appropriate stage or he takes the risk and carries on and does the work. Prima facie, and I emphasise those words because I do not have the attorneys' explanation before me,.... The attorneys in this case are guilty of gross discourtesy and a neglect of their duty as officers of the Court. "*

Ifis apparent from the 'foregoing that if the attorney does not file a notice of withdrawal timeoulsy, he reaches what I term a point of no return, in terms of which he must proceed with the case regard less.

In casu, the withdrawal was not only incorrectly made in so far as the wrong address is concerned, but it was also not made timeously. This was barely forty-eight hours (over the week-end) before the commencement of the trial. It is clear that the Defendant could not get notice of withdrawal, not only because of the wrong address, but also because of the short notice given to him. The Defendant could not make any other contingency plans. Worse still, the Defendant's attorney did not come to Court to explain what their predicament was. .

This was grossly discourteous, particularly when the notice was given at such a late stage and so shortly before trial. It is not out of place to consider the circumstances of this case i.e. that the matter has been pending since 1998 and the Plaintiffs money is held in a bank and the Defendant has no desire to prosecute its counter claim.

The notice of trial was given for a sufficiently long time and that should have given the Defendant sufficient time to prepare for trial. It is grossly unfair in the circumstances to prejudice the Defendant, who is any event no longer the *dominis litis.* There is no other inference that can be drawn save that the withdrawal was designed as a delaying tactic or tactical manoeuvre which will see the Defendant having his money held up as security for an indefinite period of time. It is necessary for the Court to step in and come to the assistance of the Plaintiff who has been agitating for a trial for about five **(5)** years.

I am of the view in the circumstances that the provisions of Rule 39 (3) should apply in this case. The said Rule reads as follows: -

> *"If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with a view to satisfying the Court that final judgement should be granted in his favour and the court, if so satisfied, may grant such judgement. "*

I regard the Plaintiff as a Defendant *in casu*, because as earlier stated, the main claim was finalised and what is outstanding is the Defendant's counter claim. The Defendant/Plaintiff has not appeared. It does not appear that there is any need for the Plaintiff/Defendant to lead any evidence. The proper Order to grant in the circumstances is one of absolution from the instance with costs.

It is clear in this case that the relief sought by the Plaintiff herein is not in the nature of an execution of a judgement obtained against the deceased person or his executor. I am of the view therefor that the provisions of Section 43 of the Administration of Estates Act, No.28 of 1902, and the respective periods mentioned therein have no application. The said section, in my view, constitutes no bar to the relief sought by the Plaintiff herein.

I must however express a word of caution regarding the ever-increasing incidents of withdrawal at the eleventh hour, thus causing manifold inconveniences to the Court and to the other side. Some type of censure should visit attorneys who withdraw at such critical times and further do not bother to attend Court to explain their predicament, if any. The provisions of Rule 16 must not be abused to the extent that litigants who are desirous of bringing their matters to speedy finality are frustrated and left licking their bleeding wounds with disappointment and at the same time having to settle their lawyers' bill for the preparations done for the aborted case. Courtesy, respect and a modicum of sensitivity all point in the direction of avoiding this ugly practice by withdrawing from a case, if necessary, timeously.

T.S. MASUKU
JUDGJEJ