

Not Repaid

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 006 of 2004
High Court Miscellaneous Civil Application No. F149 of 2003

In the matter between

SAM KOBOYANKWE
T. J MOTLOGELWA'S EXPRESS (PTY) LTD
JNG EXPRESS (PTY) LTD

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

AND

SLUMBER MASHADZA

RESPONDENT

Lobatse, 16 and 27 January 2006

Mr. Makuyana for the appellants
Mr. L. T. Mothusi for the respondent

J U D G M E N T

CORAM: GROSSKOPF JA
McNALLY JA
LORD COULSFIELD JA

LORD COULSFIELD JA

1. Order 47 rule 1 of the Rules of the High Court provides:

“(1) A person instituting any proceedings may at any time before the matter had been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs at the request of the other party.

(2) If no such consent to pay costs is embodied in the notice of withdrawal, or such costs are not

paid within 14 days of demand, the other party may apply to the court on notice for an order for costs.”

2. The respondent in this appeal applied to the Department of Roads, Transport and Safety for a road permit, which was refused. He then filed an application at the High Court at Francistown on 3 July 2003. The application was directed against the Attorney General, as representing the Department, and the present first appellant, who had objected to the respondent’s application for a permit. The orders which the respondent sought were to set aside the Department’s decision and to grant a permit to the respondent.. On 3 July 2003, Mothusi & Co. on behalf of the respondent gave written notice to set down the application for hearing on 8 August 2003. On 23 July 2003 the second and third appellants filed an application for joinder, in terms of Order 16 rule 9(4) of the Rules of the High Court. It is not clear what interest the second and third appellants claimed to have in the matter, but they appear to be transport operators. The second and third respondents also filed a notice of opposition to the principal application, in anticipation of leave for joinder being granted. The second and third appellants set down the application for joinder to be heard, also on 8 August 2003. On 6 August, Mothusi & Co. filed a notice of withdrawal of the principal action, in terms of Order 47 rule 1 (1): the notice proposed that there should be no order as to costs (Record p.89). Some confusion seems to have

arisen thereafter about the date for hearing, but the matter did come before the court on 22 August. On that date, according to the judgement of Phumaphi J. aftermentioned, Mr. Mothusi applied for leave to withdraw his client's application and tendered costs: it would appear that the tender applied only to the costs of the first appellant. Mr. Makuyana who appeared on behalf of all three of the present appellants, argued that Mr. Mothusi was not entitled to withdraw the principal application before the application for joinder had been heard. Phumaphi J. made orders for heads of argument to be lodged and the matter was eventually heard before him. His judgement was given on 30 April 2004.

3. Unfortunately, the argument before Phumaphi J. proceeded on a wrong assumption. The judge was led to believe that the principal application had not been set down for hearing before the date on which the notice of withdrawal was filed. He therefore held, correctly on the information before him, that the respondent was at liberty to withdraw the proceedings without leave. He then had to deal with an argument on behalf of the second and third appellants that they should be joined to the proceedings before the matter of withdrawal was dealt with. The only object of this would have been to allow these appellants to ask for costs. The judge held that the appellants could not validly object to the withdrawal because their consent was not necessary and that once the application was validly withdrawn there was no action

pending to which the second and third appellants could be joined. Again, there is no reason to criticise the judge's conclusion on the basis on which the case was approached before him.

4. It is not easy to understand how the case came to be put before the judge in the way it was, and both attorneys must share the blame for failing to state the facts correctly. The confusion was perpetuated in the lengthy and convoluted heads of argument filed for the purposes of the appeal. There are obscure references to setting down which suggest that there may have been some vague awareness of the correct position, but that position was only made clear at the start of the hearing in the appeal, when Mr. Makuyana produced copies of the Notice of Set Down dated 3 July 2003, and Mr. Mothusi made it clear that he conceded that the notice had been filed. Mr. Mothusi did try to present some argument to the effect that the notice of set down was not effective until the matter had been, as he put it, "enrolled" by the Registrar, but he did not refer to any rule or authority to support that distinction and in my view there is no merit in that argument.
5. It is now clear, therefore, that when the matter came before the judge, he should have been asked to consent to the withdrawal. In some cases in which a mistake of this kind has been made, the proper course is to send the case back to the judge to obtain the benefit of his opinion. In view of the amount of time and expense

already wasted in this case, however, that would be quite inappropriate and we must deal with the issue ourselves. It is clear that the appellants never had any objection to the withdrawal as such. The only purpose in arguing that joinder should be dealt with first was to put the second and third appellants in a position to ask for an order for costs. In my view, however, it would have been pointless to conduct an argument about the question whether the second and third appellants should be joined when it was clear that the application would not proceed. The application, even if granted, could have had no direct impact on the second and third appellants and could not have affected any of their legal rights. In choosing to apply to be joined, they must have proceeded on some calculation of their own interest. Any expense which they incurred, therefore, was expense which they chose to incur for their own purposes and there is no good reason why they should be enabled to apply for an order for costs. Mr. Makunyana referred to **Cassimjee v Vather Bros. 1958 2 SA 310** and some other authorities for the proposition that the court has a discretion to refuse an application for withdrawal: that may be so where there is some outstanding issue which cannot be resolved otherwise, but there is nothing of that kind in the present case. Mr. Makuyana also submitted that it was the duty of the court to see that all interested parties had an opportunity to be represented: but for the reasons indicated

above, the second and third appellants had no direct interest in the application.

6. In my opinion, therefore, this court should grant leave for the application to be withdrawn and find the first appellant entitled to costs in the application up to the date when the issue first came before the court, namely 22 August 2003. Mr. Makuyana sought costs on the higher scale but there is no reason why the ordinary scale should not be applied. No order for costs should be made in favour of the second and third appellants. As regards the proceedings after 22 August, both sides bear responsibility for the complication and delay which ensued and in particular for the fact that the judge was misled about the correct position. It would, in my view, be reasonable to make no order for costs as regards the period between 22 August 2003 and 30 April 2004. The appeal proceedings are in a different position. Although the respondent shared the responsibility for the fact that the confusion about the facts of the case was not resolved until long after it should have been, the real cause of the expense incurred has been the appellants' persistence in a pointless appeal. Accordingly, the respondent is entitled to the costs of the appeal from 30 April 2004.

7. Finally, I should observe that the respondent's application was begun as an ordinary civil action under Order 6 of the Rules. In

