CIV/APN/415/2010

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO BUS AND TAXI OWNERS ASSOCIATION	**1st Applicant**
LESOTHO PUBLIC MOTOR TRANSPORT COMPANY (PTY) LTD	**2nd Applicant**
V	
REGISTRAR OF SOCIETIES	**1st Respondent**
REGISTRAR OF COMPANIES	**2nd Respondent**
ATTORNEY GENERAL	**3rd Respondent**
MOEKETSI TSATSANYANE	**4th Respondent**

JUDGMENT ON COSTS

Coram	**:**	**Hon. Monapathi J.**
Date of hearing	**:**	**20th March 2012**
Judgment Delivered	**:**	**25th April, 2012**

***Summary*:**

A notice of withdrawal of application /claim appointing a day agreed to by court is sufficient. There need not be a notice of motion/application. An order of court on the court's file need to be substantially similar to what has been prayed. It is a matter of choice that an Applicant who is dominis litis withdraws an application. Insisting to argue over this issue was vexatious. Fourth Respondent was accordingly ordered to pay costs of the argument.

CASES CITED:

Firestone Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306-8

[1] It is easy for Counsel to make any matter as complex as possible. At the same time it is often difficult to understand why this is an every day occurrence. Furthermore, is often difficult to find out how Counsel benefits from this. This matter is one of the examples. In the end Counsel agreed about what the order of court should have been. The Applicant and Fourth Respondent argued about costs of the hearing of the 20th March 2012.

[2] On the 1st November 2011 Mr. Maqakachane for the First Applicant appeared and filed a notice of withdrawal in this matter. Mr. Ndebele on the other hand appeared for the Fourth Respondent. The Second Respondent had been later joined in this proceedings but significantly it does not appear that it was "fully" part of the notice of withdrawal. One finds its difficult to understand why that should not have been so. One other anomaly remained as to why the Fourth Respondent really disputed when costs was awarded in his favour. It was a mystery, allowing for the fact that Counsel will sometimes disclose only part of their instructions or *raison de'etre.*

[3] Barring for paragraphs 1,2,3,4and5 the notice of withdrawal reads:

> "…….
> ……...
> Wherefor the *dominis litis* the First Applicant with the concurrence of the First Applicant hereby withdraw the matter.
> First Applicant as *dominis litis* tenders to pay costs of the application incurred so far."

It is just sufficient to record that the five (5) included paragraphs contained mostly the reasons for withdrawal of the application, for example that:

> "Continuance of the matter will not serve any purpose than to increase the costs and waste more time unnecessarily "and" the judgment that may be handed down by this court will only be academic, having been overtaken by events."

[4] A draft court order came out subsequently with similar proceeding paragraphs to those (1,2,3,4 and 5) alluded to above. Mr. Ndebele consequently complained that this was not how the court order should have been. Mr. Maqakachane informed the court that he was quickly persuaded that a different court order should be drawn. That is the one that is similar to what is contained in paragraph 3 above that is: "whereas the *dominis litis* hereby no *w*ithdraws this matter." Still Mr. Ndebele was not satisfied that the order was not similar to what is recorded by "the Judge on his file". And he insisted despite Mr.

Maqakachane's concession which he was aware of before the hearing. And as he says in his Heads of Arguments:

> "… the First Applicant has no problem with the corrections of the final court order by deleting the first 5 paragraphs therefrom". The question would seemingly be, whether the court ordered (as recorded) what was required by the First Applicant. But before them that we say that:.

[5] In the beginning of my judgment, I spoke about manufactured complexity of issues. I had had regard to the issues raised by Counsel. These are just but a few of them: Firstly, a notice of withdrawal did not constitute a true application for withdrawal, secondly, a notice of withdrawal may contain a consent to pay costs. Thirdly, a principal judgment or order may be supplemented. Fourthly, the court may correct a cleared arithmetical or other error in its judgment or order so as to give effects its true intention and so forth. If these were answered it is not clear how they would lead to a true conclusion to the real issues before me. I thought they would not.

[6] To illustrate how Counsel had really lost the plot, in addition to the multiplication of issues Counsel for the First Applicant says:

> "The real argument of the Fourth Respondent is that the formal order filed is erroneous as <u>first includes certain phraseology which was not part of the order of court in chambers and secondly</u> the tender to pay costs should not only me made by First Applicant but by all the Applicants. We may agree on the first point but certainly not in

> respect of the second point. But now the real issue is whether the Honourable court after pronouncing itself by giving the order has power to later revisit, alter or otherwise deal with that court order. The question relates to the power (jurisdiction) of the court in the circumstances." (My emphasis).

It will be revealed that the first underlining ended up being the real concern by Mr. Ndebele, while the second underlining shows the extent to which Counsel misconceived the real dispute before court. In my view once Applicant's Counsel conceded, then there was absolutely no reason why any matter would have to be pursued. It is because that part of Mr. Maqakachane formal order, which was left after his concession, was part which the court accepted as the intention of the Applicant to withdraw and tender costs.

[7] In the end, it should have been much earlier Counsel, requested to be shown or appraised as to how the court recorded the order of the 17th November 2011on the file. It read thus:

> "Notice of withdrawal of application and offer to pay costs of the application. Court: This application is hereby granted with costs to the Fourth Respondent."

Without having seen the above order Mr. Ndebele was asked to suggest and draft a suitable court order. "This is what he recorded."

> "The withdrawal by the Applicants is allowed. Costs are granted to the Fourth Respondent."

Except for use of "applications" and "application" it is just difficult to understand how at all the courts rendition of the court orders (on the file) differs from what Mr. Ndebele has always perceived to be the correct order. All it says is that if not mischief then there must have been vexatiousness of the first order. This is not difficult to find out why.

[8] It is correct, in my view, that Mr. Ndebele, on later reflection, was not satisfied with the very order that First Applicant sought and which the court granted. It is precisely according to him because the tender to pay costs should have been made by all the Applicants not only the First Applicant. That appear to be the real reason for the number of visits to the court, discussions and the proceedings when a whole array of issues were raised from both sides. It is significant that without there being an objection on the 17th November 2011 Mr. Maqakachane was entitled on principle to apply for one applicant and not for both Applicants, as akward as it may seem.

[9] Mr. Maqakachane submitted that all that would have been sought to be done, if Mr. Ndebele insisted on varying the order it would have been to either apply for rescission or apply based on one of the exceptions to the general principle that:

> "once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter or supplement it. There are however a few exceptions to that rule which are mentioned in the old authorities and have authoritatively been accepted by the court."

See ***Firestone Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306-8***: Or alternating to apply for leave of court. All it means, if Mr. Ndebele accepted that

there would be need to disturb the court order (as recorded) would have been to take one of the steps as are prescribed by our procedure and practice. If not he must accept the order as it is. For the present, the order is good and it stands. There is nothing that persuades the Applicant nor the court to substitute "Applicants" for "Applicant".

[10] It is therefore clear in the circumstances that there was absolute no need for the wastage and unnecessary arguments. In my discretion I ordered the Fourth Respondent to pay the costs of the hearing of the 26th March 2012.

T. E. MONAPATHI
JUDGE

For Applicant	:	Mr. Maqakachane
For Fourth Respondent	:	Mr. Ndebele