



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No.08/13

In the matter between:

**NEDBANK (SWAZILAND) LIMITED**

**Appellant**

**vs**

**KENNETH G. NGCAMPHALALA**

**Respondent**

**Neutral citation:** *Nedbank (Swaziland) Limited vs Kenneth G. Ngcamphalala & Another (08/13) [2013] [SZSC] 57 (29 November 2013)*

**Coram:** M.M. Ramodibedi C.J.  
A.M. Ebrahim J.A.  
P. Levinsohn J.A.

**Heard:** 07 November 2013

**Delivered:** 29 November 2013

**Summary:** *Civil Appeal – Application for Rescission of Judgment – Dismissed on the basis on lack of urgency – Appeal allowed as such dismissal incompetent in the circumstances.*

## JUDGMENT

### **EBRAHIM J.A.**

[1] The Appellant (which I will refer to as “the bank”) instituted proceedings against the Respondent in May 2004 for judgment in the sum E277 998.04, for monies lent to the Respondent. The matter was brought to trial and on 21 September 2009 judgment was obtained for the sum of E113 795.12. In seeking to execute the writ of execution, the Appellant effected an attachment of certain immovable property belonging to the Respondent. The debt was settled by a garnishee order against the Swazi Bank.

[2] On 13 January 2012 the Respondent instituted application proceedings on Notice of Motion against the Appellant, seeking:

- The removal of the attachment of the property;
- Interest at the rate of 9 per cent per annum on the amount of E113 795.12, being the interest on that sum from the date of attachment until the date of release from attachment;
- Rates and taxes on the property for the same period;
- Costs of suit and other relief, which it is not necessary to deal with here.

[3] This application was opposed and a special plea in abatement raised, to the effect that the Respondent had not complied with the peremptory provisions of

section 93 of the Deed Registries Act, which requires that any such application should be served upon the Registrar of Deeds.

[4] On 18 June 2012 *Dlamini J* upheld the preliminary point. She granted leave to the Respondent (Ngcamphalala) to join the Registrar of Deeds, ordered the Registrar to file his report, if any, in terms of section 93, and ordered the Appellant (Nedbank) to file its answering affidavit within 14 days.

[5] The answering affidavit was not filed (the Appellant puts this down to “a miscommunication in the offices of the Appellant’s attorneys”) and the Respondent obtained default judgment from *Dlamini J* on 11 July 2012. The court’s order was that the attachment should forthwith be removed and that the Appellant should pay “interest at the rate of 9% per annum for the period of double attachments viz October 2009 to date of release of the property from attachment.” The amount on which the interest was payable was not specified in the order, although the amount of E113 795.12 had been stated in the application filed in January 2012.

[6] In the circumstances, there is little doubt that the amount on which interest was to be calculated was E113 795.12. However, the Appellant had, on 14 March 2012, filed a Notice of upliftment of the interdict placed on the property. Consequently, as the Appellant’s attorney says in his Heads of Argument

(paragraph 18.4), the proceedings were, in that respect at least, pointless. He is also correct in pointing out that the order of payment of interest was vague, in that it simply referred to the period from “October 2009 to date of release of the property from attachment.” The precise date in October 2009 is not specified, nor is the date of release.

[7] The Respondent’s attorneys produced an “interest calculations schedule” (page 34 of the record), which gives the start date as October 2009 and the end date as 13 July 2012. The Respondent’s attorneys, having made their own calculations, reached a figure of E31 514.79, and on 16 July 2012 obtained a writ of execution against the Appellant in this amount. The following day the Appellant noted an appeal against the order of *Dlamini J.* Its grounds of appeal were that the learned Judge had erred:

- In concluding that there was a “double attachment”;
- In ordering payment of interest at 9% per annum, there being no basis for doing so;
- In failing to call on the Registrar of Deeds to file a report, which would have shown that the attachment had been uplifted in March 2012.

[8] The Appellant also notified the Sheriff that the appeal had been noted.

- [9] Having noted the appeal, the Appellant then, according to its counsel, came to the conclusion that the judgment of *Dlamini J* was not competent at law and that an application for rescission would be a more appropriate course than an appeal. It accordingly launched an application for rescission on 15 October 2013 and withdrew the appeal.
- [10] On 12 October 2012, the Appellant paid the sum E31 514.79 to the Registrar of the High Court.
- [11] The application was made on the basis of urgency. Argument was heard on 2 November 2012 before *Maphalala PJ*, who gave his decision on 21 February 2013. He dismissed the application in its entirety on the basis that it was not urgent, in that any urgency was of the Appellant's own making. It is against *Maphalala PJ's* decision that the present appeal is being heard.
- [12] Assuming the decision that the matter was not urgent was correct, the learned Judge's course should simply have been to dismiss the application to hear the matter on an urgent basis, to make no decision as to the merits, and to direct that the matter be enrolled in the normal course. It would have been up to the Appellant to decide how to proceed. As *Cameron JA* pointed out in *Commissioner, SARS v Hawker Air Services (Pty) Ltd 2006(4) SA 292 (SCA)*, urgency is the reason which may justify deviation from the times and forms

that the rules prescribe. It relates to form, not substance. If a matter is not urgent, the court declines to hear it. The Applicant can then set the matter down in the normal manner. See also *South Africa: South Gauteng High Court Johannesburg 2012 [2012] AGPJHC 165* and in particular paragraph 18 where the learned Judge observed:

**“[18] Urgency is a matter of degree. See *Luna Meubel Vervaardiger (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W)*. Some applicants who abused the court process should be penalised and the matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the respondents to file affidavits should in my view similarly be removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing, with costs reserved.”**

[13] See too: *Humphrey Henwood v Maloma Colliery and Anor CIT 1633/1994 Swaziland Law Reports 1987-1995 Volume 4* at pages 48 to 55.

[14] In any event it seems to me that the learned Judge was incorrect in concluding that the matter was not urgent. What all the parties concerned with this matter, appear to have overlooked is, that once the appeal was withdrawn by the bank against the judgment of *Dlamini J* the “writ of execution” automatically fell away and the Respondent could then have sought to have secured payment in terms of that writ. It follows that common sense dictates that it would have

been ill advised for the Bank not to have approached the court on the basis of urgency to protect its interests.

[15] I agree therefore with the submissions of learned counsel for the Appellant that in this matter the order of *Maphalala PJ* of the 21 February 2013 falls to be set aside and that the rescission application succeeds and that the default judgment of *Dlamini J* granted on the 11 July 2012 be set aside.

[16] Accordingly I make the following order:

The appeal is allowed with costs. The order of *Maphalala PJ* is set aside and there is substituted therefor the following order:-

- (a) The default judgment granted by *Dlamini J* on 11 July 2012 is hereby rescinded.
- (b) The Respondent is directed to pay the costs of the application for rescission.

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A.M. EBRAHIM  
JUSTICE OF APPEAL

I agree

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M.M. RAMODIBEDI  
CHIEF JUSTICE

I agree

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P. LEVINSOHN  
JUSTICE OF APPEAL

**For the Appellant** : E.J. Henwood

**For the Respondent** : S.C. Dlamini