

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 7/06**

**In the matter between:**

**SWAZI M.T.N. LIMITED**

**APPLICANT**

**And**

**MV TEL COMMUNICATIONS (PTY) LIMITED**

**1<sup>st</sup> RESPONDENT**

**E TOP UP (PTY) LIMITED**

**2<sup>nd</sup> RESPONDENT**

**In re :**

**MV TEL COMMUNICATIONS (PTY) LIMITED**

**1<sup>st</sup> PLAINTIFF**

**E TOP UP (PTY) LIMITED**

**2<sup>nd</sup> PLAINTIFF**

**AND**

**SWAZI M.T.N LIMITED**

**DEFENDANT**

**CORAM: MAMBA AJ**

**FOR PLAINTIFF: MR. L.R. MAMBA**

**FOR DEFENDANT: MR. M. MAGAGULA**

**JUDGEMENT**

**8<sup>th</sup> MARCH, 2006**

[1] For the sake of convenience, I shall refer to the parties as they appear in the main action herein.

[2] The Plaintiff filed summons against the Defendant on the 9<sup>th</sup> day of January 2006. A copy of this summons was served on the Defendant on the same day. The defendant was, as per the rules of this Court allowed ten days within which to file and serve its notice of intention to defend. It would appear that this period expired on the 23<sup>rd</sup> day of January 2006.

[3] On the 31<sup>st</sup> day of January, 2006 the Plaintiff filed with the Registrar a notice of set down for default judgement, setting down the matter for hearing on the 1<sup>st</sup> day of February, 2006. At 1616 hours on the 31<sup>st</sup> day of January, 2006 the Plaintiffs Attorneys were served with a Notice of intention to defend by the defendant's attorneys. This notice was also filed with the Registrar on the same day.

[4] The defendant did not apply for condonation of the late filing of its notice to defend. For its part, the plaintiff did not apply to have the said notice removed as an irregular step as per rule 30 of the rules of this Court, but insisted on it being granted judgement by default. Such judgement was granted by the Court on the 3rd day of February, 2006. It is not clear from the court record whether indeed the judgement was granted on this day because the written judgement is dated the 6<sup>th</sup> day of February, 2006.

[5] The defendant has filed an application to rescind the default judgement referred to above and has sought the suspension and or stay of the operation of the default judgement pending the determination of the rescission application.

[6] The application for the stay of the judgement was heard by this court on the 19<sup>th</sup> and 21<sup>st</sup> day of February, 2006 and on the latter date I allowed the application and ordered that the costs thereof be paid by the defendant. I indicated then that my reasons for judgement would be handed down in due course. These are my reasons.

[7] In the Republic of South Africa the position or issue under consideration is governed by rule 49 (11) of the Uniform Rules of Court. Regrettably, we do not have a similar or equivalent rule in our rules of court. The South African rule provide as follows;

"49 (11) where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."

[8] If we had a similar rule of court, this application for a stay and this judgement would not have been necessary. The filing of the application for rescission would have automatically suspended the execution or operation of the order.

[9] H.J. ERASMUS in his work SUPERIOR COURT PRACTICE at page B1-369 commenting on this

rule states that:

"there is no substantive rule of law that an application to vary or rescind an order or judgement suspends its operation. Insofar as this sub rule purports to create a substantive rule to such effect the rule is invalid." It is invalid to the extent that it purports to alter the common law position.

[10] In terms of the common law, this court has an inherent jurisdiction to order the suspension of its own orders or orders of other lower courts and or tribunals. In exercising such powers the court has a discretion and such discretion, as usual has to be exercised judicially and judiciously. An injudicious discretion is after all no discretion at all.

[11] In the case of **STRIME vs STRIME, 1983 (4) SA 850 (C)** at page 852 the court stated as follows; "Execution is a process of the court and the court has an inherent power to control its own process subject to the rules of court. It according has a discretion to set aside or stay a writ of execution. ...The court will generally speaking, grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice would not otherwise be done." And in **WHITFIELD vs VAN AARDE, 1993 (1) SA 332** at page 337 NEPGEN J stated that "execution is the process which enables a judgement creditor to obtain satisfaction of a judgement granted in his favour. The effect of holding that the court is unable to control its own process would be to deprive a court of what has always been considered to be an inherent power of such court. Of course, the discretion which a court has must be exercised judicially, but it can not be otherwise limited, for example by stating that such discretion can only be exercised in favour of a judgement debtor in certain circumscribed circumstances.\*'

[12] This common law powers of the court to suspend the operation and execution of its orders has in the Republic of South Africa been made a rule of court. Rule 45 A of the uniform rules of court reads as follows;

"The court may suspend the execution of any order for such a period as it may deem fit."

[13] This rule was introduced in 1991. We do not have a similar rule in our rules of court. We therefore

rely on the common law.

[14] The manner and the scope of the exercise of the court's discretion in such matters has been dealt with in amongst others the following cases in the Republic of South Africa, namely:

GRAHAM vs GRAHAM. 1950 (1) SA 655 (T)

FIRST CONSOLIDATED LEASING CORPORATION LTD vs THERON. 1974 (4) SA 244

SOJA (PTY) LTD vs TUCKERS LAND AND DEVELOPMENT CORPORATION

(PTY) LTD, 1981 (2) SA 407 STRIMH vs STRIME (supra)

WHITFIELD vs VAN AARDE (supra)

[15] In the case of SOUTH CAPE CORPORATION vs ENGINEERING MANAGEMENT SERVICES (PTY) LTD, 1977 (3) SA 534 (A) CORBETT JA (as he then was) dealing with an application for leave to execute a judgement pending appeal, stated that

"The purpose of this rule as to the suspension of a judgement on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgement in any other manner appropriate to the nature of the judgement appealed from. ...The court to which application for leave to execute is made has a wide general discretion to grant or to refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised. ...The court should in my view, determine what is just and equitable in all the circumstances, and in doing so. would normally have regard, inter alia, to the following factors:

1. The potentiality of irreparable harm or prejudice" to be occasioned by either side if and when the application is granted or turned down.

[16] The court has also to take into account the prospects of success of the main application, in this case the rescission application to which this interim application is incidental. For instance, if the rescission application is a non-starter, or is frivolous or vexatious or mala fide, then the court would be inclined to refuse the application.

[17] I have considered the circumstances under which the default judgement was granted as outlined above and it was argued before me by Mr. Mamba for the plaintiff that I should find that the judgement sought to be rescinded is not rescindable. I refrain from commenting on this aspect of the application. Suffice to say that for purposes of this interim application, it is a contentious issue which is best left for the main application itself. I am unable though to hold that the rescission application is frivolous or vexatious or an abuse of the process of the court aimed at harassing the plaintiff herein.

[18] Because of the following reasons or factors I am persuaded to exercise my discretion in favour the defendant. These are the factors;

- (a) The plaintiff would suffer no substantial prejudice if the execution is stayed. The parties shall retain their respective positions they had, through a court order before the judgement sought to be rescinded was granted, regard being had to the fact that plaintiff coped without such execution for quite sometime.
- (b) The rescission application has already been filed and would be heard soon by this court.
- (c) The defendant on the other hand, would suffer real and substantial injustice or irreparable prejudice if the application is refused because the defendant would stand to lose substantial monies invested on certain of its services and or operations that would be taken over by the plaintiff.
- (d) Defendant would be barred from dealing directly with the public.
- (e) Defendant would further be compelled to pay an uneconomically high commission to the plaintiff.
- (f) Defendant's service centres would be forced to close down resulting in a lose of profit, investment on equipment and also employment to its workforce if its affected services are handled by the plaintiff.
- (g) The defendant should, without prejudice to its operations, be afforded the chance to have its rescission application heard to prove that the judgement sought to be rescinded ought to be rescinded. In effect to prove that the judgement in question should be set aside. I pause here to mention that there could well be merit in the application for rescission that in the particular circumstances of this case the negligence or lack of diligence on the defendant's erstwhile attorneys may not be good enough to be equated to wilful default on the part of defendant. This

court is. however, alive to the fact that the plaintiff has a judgement in its favour and it wants to have the full benefits of that judgement now rather than later - later being after the determination of the rescission application. The prejudice or injustice posed by this is, however, outweighed by the considerations stated above.

[19] In the result I made the following orders:

1. Pending determination or finalisation of the application for rescission of the judgement granted by this court on the 3<sup>rd</sup> day of February, 2006 herein, the operation and or execution of the said judgement is stayed or suspended.
2. The defendant is to bear the costs of this application.
3. The application for rescission shall proceed in the normal way.

**MAMBA AJ**