

THE HIGH COURT OF SWAZILAND

MDUDUZI NELSON KUNENE

Applicant

And

QUICK MOTORS (PTY) LTD

1st Respondent

THE DEPUTY SHERIFF

2nd Respondent

Civil Case No. 3485/2005

Coram: S.B. MAPHALALA-J

For the Applicant: MR. MABILA

For the Respondent: MR. SIMELANE

RULING

(On points of law *in limine*)

(7th April 2006)

[1] The Applicant has filed an application in terms of Rule 6 (24) of the Rules of Court for an order, *inter alia*, stopping the sale in execution scheduled for the 5th October 2005; staying execution of the writ herein; rescinding and/or varying the default judgment herein and costs of the application. The Founding affidavit of the Applicant is filed of record setting forth the material facts relied upon. Essentially that the application is brought in terms of Rule 42 (1) and the common law.

[2] The background of the matter is that sometime in or around October 2004, Applicant took his motor vehicle, being a VW Caravelle registered SD 809 LG to the 1st Respondent for repairs. It was agreed between Applicant and the representatives of the 1st Respondent that the total costs of the repairs will be the sum of E3, 500-00 which Applicant was to pay in 3 months instalments upon completion of the repairs. Pursuant to this agreement with Defendant, Applicant

accordingly paid the Defendant the first instalment of E1, 000-00 leaving a balance of E2, 500-00. This balance is however disputed by the Respondent who has taken the position that the total costs for the repairs was E4, 535-00 and on the 5th October 2004 the Applicant made a down payment of E1, 000-00 leaving a balance thereto of E3, 538-00.

[3] Unfortunately before settling the balance of E2, 500-00 Applicant was posted by his employer (FINCORP) to attend a training course in Asia which lasted for 3 months. After his return in around March 2005, his motor vehicle was attached by the 2nd Respondent and the reason given was that it was in execution of a writ issued pursuant to a default judgment against him. The motor vehicle remains under attachment and the 2nd Respondent advertised its sale for 5th October 2005. He avers that the default judgment granted against him was entered in error. Had the court known that he had not had sight of the summons as they were served in his absence, it would have declined to grant judgement. Further, had the court known that he had already paid 1st Respondent the sum of E1, 000-00 it would have declined to grant judgment in the amount claimed.

[4] The 1st Respondent has filed an Answering affidavit where points of law *in limine* have been raised. These points are the subject-matter of this judgment. These points read *ipssimma verba* as follows:

2.1. The Notice of application is totally defective in that the orders sought *viz* prayer 1 and 2 seek a final order without applying for a rule nisi.

2.2. The Applicant has not complied with the requirements of an interdict yet he is praying for a probatory interdiction in prayer 1 therefore the application as a whole is fatally defective in substance.

2.3. The application is irregular if brought in terms of Rule 6 (24) because the court having granted an order is *functus officio* and that this application is not an interlocutory application or an application pending any proceedings.

2.4. The Applicant has failed to satisfy the essential elements to sustain rescission of the default judgment in terms of the common law therefore cannot rely on the common law for such an application. There is nowhere in the affidavit has the Applicant mentioned that he has a *bona fide* defence on the merits which *prima facie* carries prospects of success or has he adduced a reasonable and acceptable explanation of his default.

[5] When the matter came for argument only paragraph 2.3 (*supra*) was pursued that this application is irregular in terms of Rule 6 (24) because the court having granted an order is *functus officio* and that this application is not an interlocutory application or an application pending any proceedings.

[6] Rule 6 (24) provides that notwithstanding the afore-going sub rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a Judge.

[7] An application is incidental to pending proceedings if it is subordinate or an accessory to while at the same time being distinct from the main proceedings (see *Erasmus, Superior Court Practice, Juta at BI - 53* and the cases cited thereat).

[8] The Respondent contends that the application in *casu* is not an interlocutory application or an application incidental to pending proceedings therefore the failure of the Applicant to comply with Rule 6 (9) and (10) or Form 3 of the First Schedule.

[9] It appears to me that the Respondent is correct in its contention that the application is not an interlocutory application or an application incidental to pending proceedings. Therefore Respondent ought to succeed on this point of law in *limine*. In the result, for this reason the application is dismissed with costs.

S.B. MAPHALALA

JUDGE