IN THE HIGH COURT OF SWAZILAND

Civil Case No. 2753/2005

MINISTER OF FINANCE	**1st Applicant**
THE ACCOUNTANT GENERAL	**2nd Applicant**
THE ATTORNEY GENERAL	**3rd Applicant**

And

NQABA DLAMINI	**Respondent**

In Re:

NQABA DLAMINI	**Applicant**

And

THE CENTRAL BANK OF SWAZILAND	**1st Respondent**
THE FIRST NATIONAL BANK	**2nd Respondent**
THE MINISTER OF FINANCE	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**

Coram: **S.B. MAPHALALA – J**

For the Applicant: **MISS N. VILAKATI**

For the Respondent: **MR. S. MDLADLA**

JUDGMENT

13th April 2007

[1] Serving before court is an application in terms of Rule 42 (1) (b) of the High Court Rules. The application is brought under a Certificate of Urgency. The Applicants are claiming for an order in the following terms:

1.1. Dispensing with the forms, time limits and manner of service provided for in the rules of court and granting leave for this application to be made as one of urgency.

1.2. Condoning Applicant's non-compliance with the Rules of Court.

1.3. Granting a rule nisi calling upon the Respondent to show cause, if any, on a date to be fixed by the court, why an order should not be granted in the following terms:

1.3.1. Staying execution of the order made by His Lordship Justice M. Mamba under the above case number on Friday the 20th January 2006;

1.3.2. Rescinding the order made by His Lordship Justice M. Mamba on Friday the 20th January 2006, on the ground that it was erroneously granted;

1.4. Paragraph 3.1 and 3.2 thereof to operate with interim and immediate effect pending the return day;

1.5. Costs of suit in the event the application is opposed;

1.6. Granting such further and/or alternative relief as this Honourable Court may deem fit.

[2] The application is founded on the affidavit of Nozipho Vilakati, an officer at the Attorney General's Chambers who has been assigned to handle the matter on behalf of the Attorney General.

[3] In summary, the Applicants allege that on the 20th January 2006, the court issued an order that is not capable of enforcement because it called upon them to comply with a previous order of the 7th October 2005, which was never granted against them. Applicants contend that had the court been aware that they would not comply with the order of the 7th October 2005, because it was not granted against them, it could not have granted the order compelling them to comply with that order. In this regard the court was referred to the South African case of *Nyingwa vs Moolman NO 1993 (2) S.A. 508* where it was held that **"a judgment has been erroneously granted if there existed at the time of issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment".**

[4] The Applicant contends that on the 7th October 2005, the court granted an order in

terms of prayers 1, 2, 3 and 4 of the Notice of Motion dated the 27th July 2005. Prayer 2 therein states that an order was being sought against the 1st Respondent for the payment of E59, 345-00 other than a mere statement that the sum of money was held by the Central bank of Swaziland on behalf of the 1st Applicant herein, no evidence was brought before court to substantiate this allegation. Applicant state further that there is no where in the prayers of the said Notice of Motion where the Is Applicant herein was being called upon to pay the Respondent the said sum of E59, 345-00.

[5] Applicants further contend that Applicants received a document purporting to be the order of court granted on the 7 October 2005. That this is not the order that was granted by the court. The purported order was drafted to read as if the court granted an order calling upon 1st Applicant to pay the Respondent the sum of E59, 345-00. The Applicants were never given notice that such an order would be sought against them. Nor did the Respondent apply for such an order in his prayers. Therefore the court could not grant an order that had not been applied for. The order of the 20th January 2006 should be set aside because it is unenforceable against the Applicants. It would be against the doctrine of effectiveness to allow the order of the 20 January 2006 to stand when in actual fact it cannot be enforced. This would compromise the court's reputation.

[6] In arguments against the above-cited submissions Counsel for the Respondent contended otherwise that when rescission is sought under Rule 42 (1) it is only granted if the court has made a mistake in a matter of law appearing on the proceedings of a court record. In this regard the court was referred to the textbook by *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa* and the case of *First National Bank of South Africa Ltd vs Jorgen and others 1993 (1) S.A. 345.* It was further argued that if the Applicant is the author of his own problems, the court is not likely to order rescission, (see *De Wet and others vs Western Bank Ltd 1979 (2) S.A. 1031.* Furthermore, it was contended that acquiescence in the execution of a default judgment is just as much a bar to the success of the rescission of that judgment as acquiescence in the

granting of judgment (see *Sohidlin vs Multi-Sound (Ply) Ltd 1991 (2) S.A. 151*.

[7] On the arguments, it would appear to me that *Mr. Mdladla* for the Respondents is correct that on the facts of this case this court cannot grant the application sought on the reasons outlined at paragraph [6] of this judgment.

S.B. MAPHALALA

JUDGE