IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

NTOMBINTOMBI KUNENE **Applicant**

And

MUZI MAPHALALA **Respondent**

In Re:

MUZI MAPHALALA **Applicant**

And

NTOMBINTOMBI KUNENE **Respondent**

Coram S.B. MAPHALALA- J

For the Applicant MR. B.S. DLAMINI

For the Respondent MR. S. SIMELANE

Civil Case No. 4424/2006

JUDGMENT

3rd August 2007

[1] The Applicant instituted application proceedings on an urgent basis against Respondent seeking the following relief:

(a) Rescission of a judgment or a rule *nisi* that was confirmed on the 16th February 2007 in his absence;

(b) Stay of execution of the rule nisi which was confirmed on the 16th February 2007 pending finalization of this application and all other legal proceedings relative hereto.

(c) A directory order that the motor vehicle in question be placed in his attorney's custody or other neutral person pending finalization of this application.

(d) Calling upon the Respondent to show cause why the interim order seeks should not be confirmed.

(e) Costs of suit.

(f) Other alternative relief.

[2] The Applicant has annexed an affidavit founding his application where it is stated as follows:

5.1 On or about September 2005, and at all material times, I acted as a disclosed agent acting for and on behalf of the Applicant, I duly sold to the Respondent a motor vehicle described as a Sedan Honda Odyssey registered SD 319 MN, engine number F22Z32000203 and chassis number JHMRA18800C102377. (A copy of the motor vehicle Blue Book is annexed and marked "NK1").

5.2 The purchase price of the motor vehicle was agreed to be fixed at E35, 000-00 payable to the Applicant in the following terms:

5.2.1 E10, 000-00 (Ten Thousand Emalangeni) as deposit to be paid by Respondent to the Applicant upfront and before delivery of the motor vehicle.

5.2.2 Upon payment of the deposit, the Applicant would deliver the motor vehicle to the Respondent with its original Blue Book to enable Respondent to use the vehicle for transport business purposes, in particular in cross border trips.

5.2.1 The balance was to be paid and liquidated within a period of one calendar year calculated from September 2005 to September 2006.

5.2.3 Ownership of the motor vehicle would only pass to the Respondent upon payment in full of the purchase price and upon change of ownership and receipt from Swaziland Government of the necessary documents in the form of Blue Book reflecting change of ownership.

5.3 Between September 2005 to September 2006, and after payment of the deposit of E10, 000-00 to the Applicant, the outstanding balance due and payable to Applicant was a sum of E25, 000-00. I submit that the Respondent only paid a sum of E8, 000-00 instead of the balance of E25, 000-00 and the remaining balance was reduced to El7, 000-00.

5.4 On the 30th September 2006, the last date and the due date of payment of the outstanding balance, I verbally demanded payment of the outstanding balance of El7, 000-00 and the Respondent refused and/or failed to pay and alleged that he is not liable for the balance because he attended to some alleged body repairs and mechanical attention on the vehicle which cost him El7, 000-00, and that he had set off the amount from the outstanding balance. I humbly submit that no term providing for set off of any amounts from the selling price formed part of the agreement of sale.

5.5 To-date the Respondent is refusing and/or neglecting to pay the outstanding balance despite a final demand made by letter from my attorneys on Friday the 3rd November 2006. (A copy of the letter is attached and marked "NK2").

5.6 The Respondent is liable to pay to the Applicant the outstanding balance of El7, 000-00 failing which and as an alternative to return the motor vehicle to the Applicant with immediate effect.

[3] The Respondent on the other hand opposes the application on a number of grounds. Firstly, that the Applicant has not set out material averments to substantiate the relief he seeks i.e. (a) interim relief, (b) good and acceptable grounds for the alleged urgency and (c) no security for costs in the sum of E200-00 has been furnished

to the Respondent. In support of this position the court was referred to a plethora of legal authorities including *Prest* on *Interdicts* at page *52, 61* and page *75* and the cases of *Sandzile Khoza and 6 others vs The Vice Chancellor University of Swaziland and another - High Court Case No. 1454/92, Humphrey Henwood vs Maloma Colliery - High Court Case No. 1623/1994* and the *South African legal authority in Setlogelo vs Setlogelo 1914 A.D. 221.*

[4] On urgency it is the Respondent's argument that Applicant has not met the peremptory requirements of Rule 6 (25) (b). Applicant has unreasonably delayed in instituting these proceedings in that it has taken him more than one month to do so and has not set out in his affidavit why he delayed. The alleged urgency is therefore self-created (see *Humphrey Henwood vs Maloma Colliery - High Court Case No. 1623/1994.*

[5] The second argument advanced by the Respondent is that the Applicant has not complied with Rule 31 (3) (b) being security for costs. That when a party applies for the setting aside or rescission of a default judgment, he must **furnish** to the Defendant, security for costs in the maximum of E200-00.

[6] The above arguments are also stated in the Respondent's Notice to raise points of law where the following is stated:

1. The Applicant seeks interim relief which is interdictory in nature in its paragraph (c) of its Notice of Motion and such interim relief is sought to operate with interim and immediate effect pending the

return date of this application. The Applicant has however failed to set-out explicit grounds in its founding affidavit substantiating a case for grant of interim relief as prayed for. For this reason the Applicant's application is fatally defective for lack of grounds substantiating the grant of interim relief.

2. The Applicant has unreasonably abridged the time limits set out in the High Court Rules relating to service of court process initiating applications proceedings and has served the application, which it allege is urgent at 16:43 hours on the 19th March 2007 and set the matter down for hearing on the 20th March 2007 at 9:30am in the above Honourable Court. He has however failed to set out explicit grounds which renders the matter so extremely urgent in his Founding affidavit and as such this matter is not urgent as it lacks convincing and sufficient grounds supporting urgency. (Arguments in support of this position will be made at the hearing of this matter).

3. The Applicant has failed to tender and furnish security for costs for rescission of the default judgment it seeks to be rescinded and as such has failed to comply with the Rules of court.

[7] The Applicant advanced *au contraire* arguments to the general argument that Applicant is not seeking an interdict and therefore the rules which apply in interdicts do not apply. Further that this application has not been brought in terms of Rule 31 (3) (b) of the High Court Rules. The court was further referred to what is stated by the learned author, *Prest, The Law and Practice of Interdicts* at page *49* and was referred to page 50 of the textbook.

[8] In my assessment of the arguments by the parties I am inclined to agree with the submission by Respondent for a number of reasons. Firstly, it appears to me that Applicant has not satisfied the peremptory requirements of Rule 6 (25) (a) and (b) as stated in the often cited case of *Humphrey Henwood vs Maloma Colliery (supra).* It is

trite law that a party who institute an urgent application must clearly and explicitly set out the grounds upon which he alleges urgency of the matter in its affidavit. In the instant case Applicant has advanced paragraphs 22 and 23 of his Founding affidavit to prove urgency.

22. This matter is clearly urgent because a judgment has already been issued which Applicant is expected to comply with and the Respondent may conduct a sale in execution of the property attached or cancel the contract of sale to Applicant's prejudice any time.

23. The matter is further urgent by reason that if we were to wait for the normal time limits afforded by the rules by the time this application is brought, the matter would be academic. Further should there be a sale in execution it would be extremely difficult for the Respondent to replace whatever she may have pocketed as a result of the sale in execution.

[9] As it can be seen from the above-cited paragraph the peremptory provisions of Rule 6 (25) (b) have not been met that **"the Applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".** In *casu* the Applicant has not advanced any averments in this regard.

[10] This point of law *in limine* on urgency succeeds on the above-mentioned reasons.

[11] The second issue for decision is whether Rule 31 (3) (b) of the High Court Rules applies on the facts of the present case. It appears to me that the first point I have addressed on urgency disposes of the application and that whatever mention is made to the remaining points *in limine* will be purely academic.

[12] **In the result, for the afore-going reasons the point of law** *in limine* **urgency succeeds and therefore the application is dismissed with costs.**

S.B. MAPHALALA

JUDGE