THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Appeal

No. 12/07

In the matter between

FIRST NATIONAL BANK OF SWAZILAND LIMITED t/a WESBANK Appellant

and

JOSEPH S. DLAMINI 1st Respondent

TRENCOR INVESTMENTS (PTY) LTD T/a INFINITE CHICKENS 2nd Respondent

WILSON FAKUDZE 3rd Respondent

Coram Banda, CJ
Maphalala, J

For the Appellant Mr. Manzini

For the Respondents Mr. Mabuza

BANDA, CJ

[1] This is an appeal against the ruling of the Magistrate's Court sitting at Mbabane which dismissed the appellant's application to have the order of attachment declared null and void.

[2] The facts in the case would appear to be as follows: The second respondent had issued a summons against the third respondent and judgment was obtained against him. The second respondent caused a warrant of execution to be issued against the property of the third respondent.

[3] The first respondent, as Deputy Sheriff was engaged to serve and execute the warrant and in the process of doing so, he attached the property of the appellant which happened to be a motor vehicle. When the appellant discovered that his motor vehicle had been attached in execution he approached the first respondent and advised him that the motor vehicle, which he had attached, belonged to the appellant. The appellant's attorneys also wrote to the first respondent to inform him that the motor vehicle which he had attached belonged to the appellant. The first

respondent refused to release the vehicle and averred that he had the right to detain the vehicle because he had a lien over it for his costs. It was after the receipt of the first respondent's letter refusing to release the vehicle that the appellant applied to the Magistrate's Court to have the vehicle released from attachment.

[4] In the application the appellant sought an order for condonation and the following orders:-

1) declaring that the first respondent's attachment of the applicant's motor vehicle described hereunder to be wrongful and unlawful:

   MAKE: 2002 Isuzu KB 300 TDI D/C 4 X 2 LX
   ENGINE NO: 45H1910036
   CHASSIS NO: ADMTFR77D2C146976
   REGISTRATION NO: SD 747 IN

2) Directing the first respondent to forthwith surrender and/or release the abovementioned motor vehicle to applicant.
3) Declaring that the first respondent is not entitled to recover from applicant any storage, and incidental costs incurred by first respondent arising out of the unlawful attachment of applicant's motor vehicle.

4) Costs of suit on the attorney and client.

5) Further and/or alternative relief.

[5] Mr. Mabuza for the respondent has taken points in *limine*. He first contends that under Rule 50(1) of the High Court Rules an appeal from the Magistrates Court to this court has to be prosecuted within six (6) weeks of noting such an appeal. He has submitted that the appeal, in this matter, has been prosecuted after nine (9) months of noting the appeal and that, therefore, the appeal had lapsed and is not properly before this court. Mr. Mabuza has further submitted that the appeal record has been prepared in contravention of the provisions of Rule 50(7) of the Rules of the court in that the record has not been numbered on every tenth line and that the record does not contain the evidence that was adduced in the court below. It is also the contention of Mr. Mabuza that the appellant has failed to pay into court security for the costs and because there is no such payment made, the appeal is not properly before this court. He has therefore prayed that the Court should uphold the points in *limine.*

[6] Mr. Manzini conceded these points which Mr. Mabuza raised but contended that technical failure to observe rules should not prevent the merits of the case to be

argued unless it can be shown that such failure has occasioned prejudice.

[7] We dismissed the points raised in *limine* and we now proceed to give our reasons for that decision. Mr. Manzini must be right in his contention when he submits that prejudice must be proved. We asked Mr. Mabuza to show to us the material which was excluded from the record and which ought to have been included. He was not able to show to us any such material except by suggesting that Counsel's submissions, in the court below, should have been included. But counsel submissions are not part of the record and nor was Mr. Mabuza able to point to us what prejudice, if any, which had been occasioned to him. None was provided. Schreiner JA with Centlivres, CJ; Reynolds, JA; Brink, JA and Beyers, JA concurring stated the principle as follows in the case of **TRANS-AFRICAN INSURANCE CO. LTD VS MALULEKA** 1956(2) SA. 273A at 278-FG

> ***"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objection to less than perfect***

procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[8] And in the case of **PRUDENTIAL ASSURANCE CO. LTD VS CROMBIE** 1957(4) SA 699(C) at 702-C – E Herbstein J stated as follows:-

"Many of the earlier decisions in our courts must be approached with care in as much as there now exists a different attitude; instead of the rigid formalism and insistence on technical perfection which appears to have been the approach of some courts, more and more attention is being paid to the need to avoid the delay and expense consequent on such formalism and to enable litigants to come to grips with the real issue between them. Where, therefore, there has been a failure to comply with formal legal requirements the court will, where it has a discretion, be ready to condone any irregularities provided only that this can be done without injustice or prejudice to the

other side."

[9] The failure to observe the rules in the case was purely procedural and we are satisfied that no injustice or prejudice was occasioned to the other side by the failure to observe the rules. It is substantial justice which should be done between the parties without undue regard for technicalities. We are prepared to condone such failure which we hereby do so that the matter can be heard on merits and we so order.

[10] On the merits of this appeal Mr. Manzini has submitted that the court below erred when it held that the appellant's application was for an order for specific performance because, in his view, the remedy of specific performance is only premised on a contract between the parties. He, therefore, submitted that since there was no contract between the parties the appellant could not have made an application to compel the first respondent to comply with a non-existent contractual obligation between them. Mr. Manzini has contended that the appellant's claim in the court below was for the release of its motor vehicle which had been unlawfully attached and that the only remedy available, as the property was still in the possession of the first respondent, was to apply to the

court which had issued the order for attachment to have it set aside and that the motor vehicle should be released to it. He has, therefore, contended that the court below should have dismissed the points in *limine* and should have granted the order sought by the appellant.

[11] On the authority of the case of **WEEKS AND ANOTHER VS AMALGAMATED AGENCIES LTD** 1920 AD 218 at 226 where the first respondent had no legal basis for refusing to release the motor vehicle to the appellant, De Villiers AJA referring to an attachment by a messenger of court (which the first respondent here was) said:

> ***"He is ordered, of the movable property of the debtor, to attach enough to satisfy the judgment and costs. He is therefore not entitled to attach the property of third parties. If he does so he acts outside the limits of his function and is liable"***
>
> ***"….The authorities are unanimous that messenger is liable if he attaches the***

goods of
third parties”

“…Naturally if the messenger knows or is
satisfied that such property does not belong to
the debtor it would be dolus on his part to attach and sell”.

[12] Mr. Mabuza for the respondents has submitted that a magistrate’s court has no jurisdiction to order specific performance under S 29(d) of the Magistrate Court Act. He has contended that the court below being a creature of statute cannot adjudicate upon issues or orders which are outside the purview of S 29(d) of the Act. It is also his submission that the remedy of specific performance is not confined or limited to contract. He cited authorities in which he contended that the remedy of specific performance was applied although, in his view, there was no contract. Mr. Manzini sought to distinguish those authorities from the present case. Another point on which Mr. Mabuza has taken issue with the appellant’s appeal is that the remedy which the appellant was seeking from the court below was a declaratory order and that a magistrate’s court cannot issue such an order. However, Mr. Mabuza is not able

to point to any provision in the Magistrates Court Act which shows that a magistrate court cannot issue a declaratory order. It is interesting to note that when a summons is taken for inter pleader proceedings in the magistrates court, the order that the court will make at the end of the proceedings will be declaratory in nature. We are satisfied that the court below had jurisdiction to make a declaratory order and we also find that the remedy the appellants were seeking, in the court below, was not specific performance. The order of this court is as follows: The motor vehicle with the following details:-

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Engine No: 45H1910036
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and which was wrongly attached is hereby ordered to be released and delivered to the appellant. The appeal must accordingly succeed with costs.

Delivered in open court this……day of June 2008

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R.A. BANDA
CHIEF JUSTICE

I agree

S.B. MAPHALALA
JUDGE