

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 267/1998

FIRST NATIONAL BANK (SD) LIMITED

Applicant

And

THABILE VIVIAN MALINGA

1* Respondent

UBOMBO SUGAR LIMITED

2nd Respondent

Coram

S.B. MAPHALALA - J MR.

For the Applicant

S. MDLADLA MR. Z.

For the Respondents

MAGAGULA

JUDGMENT 12th

February 2009

[1] Before court is an application for rescission of a court judgment in terms of Rule 42 (1) (a) of the High Court Rules issued on 12th November 2007.

[2] The Founding affidavit of attorney Mr. Sidumo Mdladla is filed in support of the application. Pertinent averments are made therein stating the history of the matter from paragraph 5 to 10 of the said affidavit.

[3] The crux of their case is that 1st Respondent's attorney obtained an order on 12th October 2007, in the absence of *Mr. Mdladla*. That 1st Respondent acted in bad faith in that he proceeded to obtain judgment when clearly served with Applicant's opposing affidavit with the court on the 11th October 2007. That 1st Respondent attorney set the matter down on this day and were not ignorant of the fact that Applicant had already filed their opposing papers with their correspondence and as such the matter was to be postponed to enable Respondent's attorneys to reply to the contested roll.

[4] As a result, the court proceeded and granted an order in favor of the 1st Respondent in their absence.

[5] The Respondent on the other hand contend that a party cannot having been properly served with a Notice of Set-down stay away from court and hope that judgment will not be entered against him.

[6] It is further argued that the Answering Affidavit was a knee-jerk reaction upon receipt of the Notice of Set-down. The bank's attorneys then filed the Answering Affidavit without seeking condonation for the late filing.

[7] Furthermore, that the Answering Affidavit was way out of time even if the **dies** is calculated from the 13th September 2008 when they were asked to file. For this argument the court was referred to the South African cases of *Tshabalala and Another vs Peer* 1979 (4) S.A. 27, *De Wet and Others vs Western Bank Ltd* 1979 (2) S.A. (03) and that of *Bukoven Ltd vs GJ Howes (Pty) Ltd* 1992 (2) S.A. 466.

[8] It would appear to me that the Respondent's argument is correct that the Answering Affidavit was way out of time even if the **dies** is calculated from the 13th September 2008 when they were asked to file. I agree further with the Respondents that a party cannot after having been properly served with a Notice of Set-down stay away from court and hope that judgment will not be entered against him. Furthermore, I also do not think that the error which the Applicant relies on is the error envisaged by Rule 42 (1) (a) of the High Court Rules.

[9] It appears to me that the delay in the matter was extremely prejudicial to Malinga whose salary was being deducted unlawfully in that no inquiry was held as envisaged by Rule 45 (13) (1) and she never consented to the deductions, (see *Foley vs Taylor and Another 1971 (4) S.A. 516 at 517* paragraph G - E).

[10] In the result, for the afore-going reasons the application for rescission in terms of Rule 42 is dismissed with costs.

S.B. MAPHALALA
PRINCIPAL JUDGE