IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. APPL. NO. 3217/08

In the matter between:

KENNETH STEVEN LUE — **Applicant**

And

STANDARD BANK SWAZILAND LIMITED — **1st Respondent**

MARTIN AKKER — **2nd Respondent**

Date of hearing: 26 January, 2009.
Date of judgment: 3 March, 2009.

Mr. Attorney M. Nkhomondze for the Applicant
Mr. Attorney K.J. Motsa for the Respondent

J U D G M E N T

MASUKU J.

[1] At what point in a matter can a Court be said to be *functus officio* and to have fully and finally exercised its jurisdiction in relation to that particular matter? That is the crisp point of law requiring this Court's determination in this judgment.

In order to place the reader in a position to understand the context in which this question arises, it would be apposite, at this juncture, to briefly outline the historical background to the extent necessary for purposes of this judgment. I do so presently.

The 1st Respondent, to whom I shall henceforth refer as such, or alternatively as "Standard Bank", sued M.K. Building & Fencing (Pty) Ltd, the Applicant and one Marcus Kenneth Stewart, in the first claim, for the payment of E 517.99, interest thereon, costs on the attorney and client scale and a further amount of E49, 928.37, interest thereon and costs at the higher scale in respect of the second claim. The amounts were alleged to have been in respect of overdraft facilities extended by Standard Bank to M.K. Building & Fencing and in respect of which both the Applicant and Stewart allegedly signed as sureties and co-principal debtors with M. K.

After the Applicant and his co-defendants filed their notice to defend, an application for summary judgment was granted by this Court at Standard Bank's behest on 3 November, 2006, the Applicant and his co-defendants having failed to file an affidavit resisting summary judgment. In the aftermath of the said judgment, the Applicant, on an urgent basis, made application for the stay of execution of the judgment, simultaneously with an application for the rescission of the summary judgment and other ancillary relief.

There are allegations regarding what may have happened leading to the non-opposition of the summary judgment application but the long and short of it is that the application for rescission of the judgment

served before Mamba J. on 22 January, 2008, it having been postponed by him from 13 December, 2007. It would appear that the Applicant was not represented on that latter date and effectively, his lawyers were not in attendance to move the application on his behalf. The circumstances in which this came about and deposed to by the Applicant in his papers are somewhat disconcerting and I shall make some comments thereon at the end of the judgement. Needless to say, Mamba J. dismissed the application for rescission of the summary judgment with costs.

The present application, with which this Court is now seized, is couched as follows in the notice of motion:

6.1 Staying execution of the writ issued under Civil Case No. 2043/06 pending finalization of these proceedings.

6.2 Rescinding the order dismissing the application for summary judgment granted by this Honourable Court on the 22nd January, 2008 under Case No. 2043/06.

6.3 Payment of costs of this application in the event of unsuccessful opposition; and

6.4 Further and or alternative relief which the Honourable Court may deem just and equitable.

As will be seen from the chronicle of events narrated above, the Applicant effectively seeks an order from this Court rescinding an order issued by this Court on 22 January, 2008, dismissing his application for rescission of the summary judgment. It is alleged by the Applicant that he is advised that the Court dismissed his

application for rescission on the grounds that his attorney was not in attendance on 22 January, 2008, to which date the matter had been postponed for hearing. He protests his innocence regarding his attorney's failure to attend Court and states that his attorney's failure to attend Court was beyond his control and should not be attributed to any fault on his part.

A reading of the Applicant's papers shows that the application for rescission of judgment was not only postponed to 22 January, but acting *ex abudanti cautela,* as it were, the 1st Respondent set the matter down for hearing as early as 18 December, 2007. The Applicant also attached to his papers the Order issued by Mamba J. on 22 January and it shows ineluctably that the Applicant's attorney was not in attendance, whereas Mr. Motsa appeared for and on Standard Bank's behalf during the hearing. The Order issued by the Court on the said day reads: "Application for rescission be dismissed with costs."

[9] As earlier indicated in the judgment, the question that arises is whether it is competent, in the circumstances, for this Court to grant the Orders sought as indicated in paragraph 6 above, particularly because it is Standard Bank's case that this Court, having issued the dismissal of the application for rescission has since become *functus officio.* It is contended on the 1st Respondent's behalf, that if the Applicant had any ought against the dismissal of the application for rescission, the proper route was to appeal against the said decision. This argument entails that I briefly consider the law relating to

Courts being *functus officio* as can be gleaned from the authorities.

[10] One of the leading authorities regarding this issue is the judgment of TROLLIP J.A. in *Firestone South Africa (Pty) Ltd v Genticuro A.G.*

1977 (4) S.A. 298 (A.D.) at 306 F-G. In that case, the learned Judge of Appeal propounded the applicable law as follows:

> "The general principle, now well established in our law, is that once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio:* its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. . . There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. This, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases . . ."

[11] In the Botswana case of *Monnanyana v The State* [2002] 1 B.L.R. 72 (C.A.) at 78, TEBBUTT A.J.P. (as he then was), after quoting liberally from the above judgment, including the above excerpt, continued to say the following:

> "In the *Firestone* case, supra, the court held that there were four exceptions to the general principle and that the court may correct, alter or supplement its judgment or order (i) in respect of accessory or consequential matters e.g. costs or interest on a judgment debt which the court overlooked or inadvertently omitted to grant; (ii) in order to clarify if its meaning is obscure, ambiguous or uncertain provided it does not alter the 'sense or substance' of the judgment or order; (iii) to correct a clerical, arithmetic or other error in expressing the judgment or order but not altering its sense or substance; (vi) making an appropriate order for costs which had not

> been argued, the question of costs depending on the court's decision on the merits of the case".

It would appear to me, from reading the above excerpt, that the Court would be entitled to exercise its jurisdiction in such matters, notwithstanding that it would otherwise be regarded as being *functus officio* and this would be in respect of merely superficial procedural issues or matters and which do not affect the substance of the judgment or order in issue. The question to determine in the circumstances is whether by applying to this Court to overturn the decision to dismiss the application for rescission, the Court would not thereby be doing violence to the principle so carefully set out above.

[12] Put differently, the question would be this - if the Court were to exercise jurisdiction in this matter as asked of it by the Applicant, would its action fall within any one or more of the four exceptions mentioned above? Would that not eventually result in this Court changing the 'sense and substance' of the Order in question?

[13] In the instant case, I am not satisfied that if the Court were to entertain the Applicant's application, its role would merely be confined to the exceptions mentioned above. It would certainly have to overturn its decision and allow the Applicant once again to contest the propriety of the granting of the application for summary judgment. There would certainly be nothing superficial about that. In point of fact, the Court's earlier order would have to be set aside in a major way, such that its sense and substance would materially be affected if not altogether obliterated.

I must mention one critical issue regarding the Applicant's allegations in favour of the relief he seeks. He states that he is advised that the Court dismissed the application for rescission only on the grounds that his attorney was conspicuous by his absence at the hearing. In the first place, it is clear that the Applicant, on his own papers, was not present at the hearing and to that extent, his assertions in that regard constitute inadmissible hearsay evidence. To compound matters, he did not file an affidavit of a person who attended the hearing and who could vouch for the truthfulness of his assertion. This fact, in my view, fundamentally affects the basis of his application to the core, making it more difficult, if not impossible to bring the matter within the realms of any one or more of the exceptions in the above cases.

Furthermore, it is clear from the Order of Court that the Court heard the attorney for Standard Bank and it was after hearing him most probably having read all the papers filed of record, including those deposed to by the Applicant that the Court dismissed the application. If the allegations by the Applicant had any grain of truth in them, the order that the Court would in all probability have issued would have been one striking the matter off from the roll for non-appearance, which the Court, in its wisdom, clearly did not.

[16] It would appear to me, with the history of the matter as stated by the 1st Respondent in its papers, and which is not controverted, the rescission application was brought by the Applicant, at whose instance the matter had previously been postponed until issues came

to a head before Mamba J. on 13 December, 2007. On that day, the Applicant's attorney moved an application for a postponement of the matter, which application was vigorously opposed. Notwithstanding that opposition, the learned Judge found it fitting in those circumstances, to grant the postponement to a fixed date i.e. 22 January, 2008. Notwithstanding that postponement, acting *ex abudanti cautela* as it were, the Applicant still filed a notice of set-down more than a month before the scheduled hearing.

[17] In the circumstances, I am of the considered view that the probabilities lie in favour of the 1st Respondent in this case and the order issued by the Court, which is clear in its terms, shows indubitably that the Court read the papers filed, listened to the only attorney present and granted the order, which appears to me to have been final, given the circumstances of the case. For the Applicant to surmise that the order was granted for nonappearance was evidently incongruent to the facts, circumstances and history of the matter. For him to expect the Court to rely on his *ipse dixit* in such circumstances, is not warranted or proper.

In any event, there was nothing, in my view, that would have served to prohibit the Applicant, if he was so minded, from requesting for the reasons behind the order to avoid proceeding on a conjectural premise in moving this application. Had the Applicant taken that route, which was clearly less precipitous, he would have known and appreciated the true nature of the order issued by the Court, together with its full effect and consequences.

In the circumstances, I have come to what I consider to be an inexorable conclusion, given the facts and circumstances of this case that this Court is now *functus officio,* it having fully and finally exercised its jurisdiction in this matter. I also hold that this is not a case that can remotely be regarded as falling within any one or more of the exceptions mentioned in the *Firestone* case above, and as adumbrated by Tebbutt A. J.P. It would appear to me that the Applicant's relief, in the circumstances, lies elsewhere than within this Court's jurisdiction.

One thing that I do need to point out emphatically is this - this application is not for the rescission of the summary judgment. As indicated above, it is for the rescission of the order dismissing the application for summary judgment. For that reason, I am of the view that unless strictly necessary, regard should ordinarily not be had to the merits or the demerits of the application for summary judgment. To the extent that time and energy was expended in the heads of argument to the application for summary judgment, I am of the view that the said reference was certainly misguided.

The other issue, which I consider to be relatively minor, raised by Mr. Motsa, in his papers is the Applicant's common cause failure to indicate in his papers the head(s) under which the application for rescission was moved. In support of his argument, Mr. Motsa referred to my judgment in *Shiselweni Investments (Pty) Ltd v Swaziland Development and Savings Bank* Case. No.2391/96 at page 5 where I pointed out the embarrassment and prejudice that a respondent stands to suffer in applications for rescission where the head(s) under which the application is moved have not been disclosed.

That notwithstanding, I am of the view that an applicant cannot be non-suited for no reason than that he has failed to disclose the head(s) under which he has decided to proceed in a quest to obtain a rescission of judgment. It is, however, a good and salutary practice to be encouraged for attorneys to indicate in their founding papers the head(s) under which they bring the application. This serves a good professional purpose. It enables both the Court and the respondent to prepare adequately for the case it has to meet. To that end, the element of surprise is ameliorated if not eliminated altogether. Furthermore, this practice enables the respondent to determine whether the applicant has made any, or sufficient allegations in support of the relief sought. I do need to emphasise though that litigation by ambush is opprobrious and must be eschewed at all costs.

Support for the conclusion to which I have arrived can be found in the case of *Nyingwa v Moolman* 1993 (2) SA 509 (TK. G.D) where the Court, after finding that the application could not be sustained under Rule 31 (2) (b) proceeded to consider whether it could be sustained under Rule 42 (1). This avoidance of sterile formalism must not, however, be regarded as a licence issued by this Court for practitioners to be extremely chary with information regarding the proper head under which the application is brought. In order to enforce compliance with the desirable practice; to assuage the respondent and to discourage the prejudice and embarrassment that may be occasioned thereby to a respondent, the Court may well consider mulcting the errant party with an adverse order as to costs after considering all the relevant heads however.

I do, however, have to caution myself, despite a strong and lingering temptation, not to delve into the merits of the application for rescission. This is simply because the argument was confined to points of law *in limine.* What I cannot, however, avoid pointing out on the entire conspectus of the facts as stated by the Applicant, is the sympathy that is evoked by the disservice to which he was subjected by his attorneys. In saying so, I am, however, not unmindful of the remarks of MELAMET J.A. in *Dewet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A.D.) at 1034 H, where the following appears:-

> "Since the common law defines the circumstances in which judgments may be set aside and since the Rules of Court make a specific provision for such contingencies, it would be anomalous, indeed, if Courts had the inherent power to grant relief merely because of sympathy for litigants in default. Logic or common sense might suggest that a litigant should be afforded relief. Logic and common sense, however, are no basis for a general discretion or power particularly when it has been deemed necessary to make rules specifically dealing with the position. It would be equivalent to legislating if the courts, on grounds of sympathy, went beyond the common law. The power must be found in the Rules and in the Common law because the ordinary principle is that when judgment has been pronounced the Court is thereupon *functus officio.* "

I now revert to the matter I indicated would be subject to my comment in paragraph 5 of this judgment. This concerns the reasons for the Applicant's erstwhile attorney not appearing in Court. It would appear from the papers that the Applicant's attorney, given the history of the matter, knew full well that the matter would be proceeding on 22 January. Very early that morning, he sent a text message to the Presiding Judge and to the 1st Respondent's attorney, indicating that he would not be able to attend Court as he had to send his daughter to school that morning for a maiden appearance in formal school, an event that happens once in a lifetime. The

fact of the text message was confirmed by letter also dated 22 January, 2008.

I find the conduct of the attorney, as stated above very much untoward. Notwithstanding the convenience of modern technological advancement, it is not proper in this profession for a practitioner, to send text messages to a Judge in respect of pending Court matters, even if the said practitioner be a personal friend to the Judge. I say this fully aware that it was not alleged that the Judge was a friend to the attorney in question. The proper way to deal with any real difficulty that may come the attorney's way, is to communicate with the Registrar and ask that office to liaise with the Judge concerned. Telephoning the Judge or sending him or her a message directly is reprehensible.

In cases where the matter was set down, particularly where the case had a chequered history of delay on the part of the Applicant as appears to be the case herein, it may well be proper to appear before the Court and move a proper application for a postponement and not seek to do so by the instrumentality of a text message, convenient and cost effective as it may appear to be. That conduct erodes seriously the esteem, dignity and authority of the Court and is an affront to the Judge concerned and whose impartiality and probity may be caused to be put into question by the reckless conduct of an attorney as happened *in casu.* The Applicant's attorney is in fact a senior lawyer in this jurisdiction and who, on account of that status would have been expected to have known and behaved better.

The Applicant, as mentioned earlier, does not have a case before this Court. He may well feel that he was let down by his attorney but in the

circumstances, there is authority to the effect that there is a limit beyond which a client may not escape the consequences of the acts of his or her attorney. See *Unitrans Swaziland Ltd v Inyatsi Construction Ltd* (a judgment of the Court of Appeal with no case number) at page 13 - 14.

In the circumstances, I am of the view that this application is not meritorious and ought to be dismissed. It is in my view, unnecessary to consider the other issues that arise from this matter. I therefore grant the following order:

28.1 The application to set aside the order granted on 22 January, 2008, dismissing the summary judgment entered against the Applicant be and is hereby dismissed.

28.2 The order staying the writ of execution levied against the Applicant's property dated 23 January, 2008, be and is hereby discharged.

28.3 The Applicant is ordered to pay costs of this application on the scale between attorney and client.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 3RD DAY OF MARCH, 2009.

TS MASUKU

JUDGE

Messrs. Nkomondze Attorneys for the Applicant

Messrs. Robinson Bertram Attorneys for the 1st Respondent