



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

Civil Case No: 1269/2004

In the matter between:

**KENNETH NGCAMPHALALA**

**APPLICANT**

**AND**

**NEDBANK (SWAZILAND) LTD**

**RESPONDENT**

Neutral citation: *Kenneth Ngcamphalala vs Nedbank (Swaziland) Ltd (1269/2004)*  
[2013] SZHC166 8<sup>th</sup> August 2013

**CORAM:**

**M.C.B. MAPHALALA, J**

**Summary**

Civil Procedure – effect of noting an appeal on the judgment of a lower Court – application declaring a judgment of the High Court executable notwithstanding the noting of an appeal to the Supreme Court – held that the execution of a judgment is automatically suspended upon the noting of an appeal except with the leave of the Court which granted the judgment – held further that the purpose of the rule is to prevent irreparable damage from being done to the intending appellant – application dismissed with costs.

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**JUDGMENT**  
**8 AUGUST 2013**

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- [1] This is an application declaring that there is no longer a stay of execution of the judgment by default granted on the 11 July 2012; the applicant further seeks an order for costs at attorney and client scale.
- [2] The applicant obtained judgment by default against the respondent on the 11<sup>th</sup> July 2012; the judgment was granted by *Justice M. Dlamini*. A writ of execution was subsequently issued and served upon the respondent on the 16<sup>th</sup> July 2012; the respondent noted an appeal against the said judgment on the 17<sup>th</sup> July 2012.
- [3] The appeal was abandoned; and the respondent launched an urgent application for rescission of the judgment as well as a stay of execution. *Justice Annandale* heard the application and issued an order staying execution of judgment pending arguments on the rescission application; the matter was argued before *Justice Stanley Maphalala*. His Lordship heard the Point in *Limine* raised by the applicant relating to the urgency of the application for rescission. His Lordship upheld the point in *limine* and held that there was no urgency in the matter on the basis that the respondent became aware of the Writ of Execution three (3) months before launching the application. He dismissed the application with costs on the 21<sup>st</sup> February 2013.
- [4] The respondent noted another appeal against the judgment of *Justice Stanley Maphalala*; and, the respondent contends that this appeal has the effect of

staying execution of the judgment by default. It is apparent that the dismissal of the application by *Justice Maphalala, PJ* has the effect of nullifying the interim order granted by *Justice Annandale* staying execution of the judgment by default. However, the present application cannot succeed in view of the appeal against the judgment of *Justice Stanley Maphalala* dismissing the whole application for rescission and stay of execution. It is trite law in this jurisdiction that the noting of an appeal automatically stays execution of the judgment of the Court *a quo*.

- [5] *Gowora J* in the case of *Mydale International Marketing (PTY) Ltd v. Kelly and Another* Civil case No. 1747/2009 (HC) at pp 4-5 said the following:

**“It is a generally acceptable principle that at Common Law the noting of an appeal suspends the operation of a judgment, and that the consequence of the noting of the appeal is that the execution of the judgment is stayed unless the Court directs otherwise. Normally the party intending to execute against the judgment would approach the Court for leave to execute pending appeal which is a necessary procedural step. The leading case in South Africa which has been followed by our Courts is that of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at pp 544 - 545 Corbett JA stated:**

**‘Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland... it is today the accepted Common Law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal with the result that, pending the appeal, the judgment cannot be carried out and given effect thereto, except with the leave of the Court which**

**granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application.... The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to intending appellant either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.... The Court to which application for leave to execute is made has a general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised.... This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments.”**

[6] This rule was also applied by the Supreme Court of Zimbabwe in *Net One Cellular (Pty) Ltd v. 56 Net One Employees and Another* civil case No. 55 of 2005 (25) at pp. 5-7; the Supreme Court was following the South African Appellate Division in *South Cape Corporation v. Engineering Management Services* (supra). It is worth mentioning that in South Africa, this Common Law rule has since been enacted as Rule 49 (11) of the Uniform Rules of Court. In this country we still follow the Common Law position. *His Lordship Mamba J* deals succinctly with the issue in *The Minister of Housing and Urban Development v. Dlamini and Others*, in re: *The Municipal Council of Mbabane and Others v. the Chairman of the Commission of Enquiry into the Operations of the Municipal Council of Mbabane and Others* Civil case No. 1356/2008 (HC) at pp 5-9.

See also the South African Constitutional case of *Minister of Health and Others v. Treatment Action Campaign and Others* case CC 9/02 which approved and followed the South African Appellate Division case of *South Cape Corporation (PTY) Ltd v. Engineering Management Services* (supra).

[7] Accordingly, the application is dismissed with costs.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Applicant

Attorney S.C. Dlamini

For Respondent

Attorney J. Henwood