



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case 898/16

In the matter between:

**SWAZI MTN LIMITED**

**Applicant**

And

**WANDILE NXUMALO**

**1<sup>st</sup> Respondent**

**NEDBANK SWAZILAND LIMITED**

**2<sup>nd</sup> Respondent**

**Neutral citation:** *Swazi MTN Limited vs Wandile Nxumalo and Another ( 898/16)*  
*[2016] [SZHC ] 114 (15<sup>th</sup> July, 2016)*

**Coram:** **MAPHALALA PJ**

**Heard:** **14<sup>th</sup> May, 2016**

**Delivered:** **15<sup>th</sup> July, 2016**

**For Applicant:** **Mr B. Gamedze**  
**(from Musa M. Sibandze Attorneys**

**For Respondents:** **Mr. V. Nhlabatsi**  
**(from Nhlabatsi Attorneys)**

**Summary:** *Civil Procedure – Application for stay of court order where the said court has become **functus officio** – both attorneys agree that the court is now **functus officio** – Applicant contends that the court can still grant a stay of the order that has rendered it **functus officio** – this court is of the view that it cannot have anything to do with the case in the circumstances – that Applicant’s remedy lie in applying for rescission of the said order – in terms of the Rules – it is so ordered.*

## **RULING**

15<sup>th</sup> May, 2016

### **Issued for decision**

[1] On 15<sup>th</sup> June, 2016 Mr Nhlabatsi for the Respondents was in attendance and there was no appearance for the Applicant. Mr Nhlabatsi proceeded to apply for the dismissal of the Application filed by the Applicant on the 17<sup>th</sup> May, 2016 under a Certificate of Urgency for the following orders:

- 1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.**
- 2. Condoning Applicant’s non-compliance with the rules of court.**
- 3. Granting a rule nisi, to be made returnable on a date to be determined by the above Honourable Court, calling upon the 1<sup>st</sup> Respondent to show cause why an order on the following terms should not be made final.**
- 4. That, pending the completion of proceedings instituted by the Applicant against the 1<sup>st</sup> Respondent for the recovery of monies defrauded by 1<sup>st</sup> Respondent from Applicant, the 2<sup>nd</sup> Respondent, is to withhold payment of the 1<sup>st</sup> Respondent’s monies received by it from Tibiyo Insurance Brokers, such monies being benefits from the Retirement Fund.**

- 5. Prayer 4 to operate with interim and immediate effect.**
- 6. Granting costs of this Application against any of the Respondents who oppose same; and / or**
- 7. Any further and / or any alternative relief as to the above Honourable Court may seem fit.**

- [2] The attorney for the Respondents at 9.30 a.m. of the 15 June, 2016 applied that the Application be dismissed on the basis of the no appearance of the Applicant's attorney.
- [3] The Court granted the Application in the circumstances of the case.
- [4] An hour later at 10.30 a.m. the attorney for the Applicant Mr Gamedze applied to recall the matter stating that the attorney for the Respondent has sought a dismissal of the Application when he knew that he was around the court premises.
- [5] Thereafter the matter appeared before this court to deal with the efficacy of the stay of the order issued on the 15<sup>th</sup> June 2016.
- [6] The attorneys for the parties appeared before this court for arguments on this aspect of the matter. And I shall in brief outline such arguments for one to understand the issue for decision by the court. I must also mention for the record that on that day I requested the attorneys for the parties to furnish me with brief Heads of Arguments on their contentions.

**(i)      Applicant's arguments**

[7] The attorney for the Applicant filed detailed Heads of Arguments for which I am grateful. Firstly relating the background of the dispute at paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and in paragraph 12, contends the following:

12. **It is not in dispute that the Court is now functus officio, however, we submit that the above circumstances justify a stay of the execution of the order granted by this Honourable Court on the 15<sup>th</sup> June 2016.**
13. **We further submit that we have also prepared a Rescission Application and further submit that there are prospects of success as there is a reasonable and just explanation of how the Order was granted in our absence.**
14. **We submit that it is in the interest of justice that this Order be stayed pending finalization of the Rescission Application to be filed by the Applicant, such Rescission Application will be filed before close of business on Wednesday 29<sup>th</sup> June 2016, as same has already been prepared.**

**(ii)      Respondents' arguments**

[8] The attorney for the Respondents also filed Heads of Arguments outlining the factual background of the dispute.

[9] However, contended that the essence of the dispute between the parties is that this court is now **functus officio** and in paragraph 1 thereof stated the following:

- Once a court has made an order disposing of the matters in issue, the court becomes functus officio and may not make further orders not sought in the papers that set out and define the lis before the Court, unless the parties agree otherwise.
- It is submitted that the Court has decided on the matter as per procedure and within the confines of the Rules of this Honourable Court, Applicant has an option to rescind the order if displeased with it and such can prove to be problematic as there are no grounds for the rescission.
- It is submitted that Applicant's attorney is aware of this fact and has resorted to deceiving this court in everyway possible.
- It is submitted that no agreement or arrangement was ever made by the parties in the matter and to prove that, Miss Hlophe who has been coming to Court to postpone the matter, never once did she inform the Court about any agreement nor arrangement, it was just a desperate submission by Mr. Gamedze.

[10] In paragraph 2 the attorney for the Respondent outlined the overview of the matter. In paragraph 3 thereof dealt with the Applicant's misconduct. And in paragraph 4 advanced his contention to the following:

- It is submitted that even if Applicant's attorney had honoured the hearing of the matter, the Application would have been dismissed on the grounds that;
- Applicant failed to annex or file annexure "MN3" which forms the basis of the application.

**Wherefore it may please the above Honourable Court to discharge the stay of the order granted on the 25<sup>th</sup> June, 2016 with costs De Bonis propriis for the attendance of the 22<sup>nd</sup> June, 2016.**

### **The Court's analysis and conclusions thereof**

- [11] Having considered all the papers filed of record and the arguments of the attorneys of the parties. It common cause between the parties that this court is now **functus officio**. However, as contended for the Applicant the circumstance justify a stay of execution of the order granted by the Court on the 15<sup>th</sup> June, 2016.
- [12] It appears to me that this is the only question for decision by this Court whether it can order a stay of an order where the court has been rendered **functus officio**. This is the crux of the matter.
- [13] In my understanding of the phrase **functus officio** it means the court that made that order has no further business in the conduct of the case. I agree **in toto** with the arguments of the attorney for the Respondent that once a court becomes **functus officio** it may not make any further orders not sought in the papers that set out and define the **lis** before parties, unless the parties agree otherwise.
- [14] In the instant case the Applicant can only apply for rescission of the order advancing proper grounds for such an Application.

- [15] Further, I have considered the arguments of the parties concerning costs. The attorney for the Respondent has sought costs **de bonis propriis** for the appearance of the 22<sup>nd</sup> June, 2016. The attorney for the Applicant has not addressed the Court on costs.
- [16] In the exercise of my discretion on costs I rule that costs to be in the ordinary scale.
- [17] In the result, for the foregoing reasons the Application to stay the order of this court of the 15<sup>th</sup> June, 2016 is refused with costs on the ordinary scale.

**STANLEY B. MAPHALALA**

**PRINCIPAL JUDGE**