IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE
In the matter between:

Case No.: 61/2019

KUKHANYA CIVIL (PTY) LTD **Applicant**

And

MORMOND ELECTRICAL CONTRACTORS (PTY) LTD **Respondent**

Neutral Citation: *Kukhanya Civil (Pty) Ltd v Mormond Electrical Contractors (Pty) Ltd In re Mormond Electrical Contractors Ltd and Kukhanya (Pty) Ltd* (61/2019) [2025] *SZHC* 26 (27/02/2025)

Coram	:	**K. MANZINI J**
Date heard	:	**09/07/2024**
Date delivered	:	**27/02/2025**

SUMMARY : *Civil Procedure- Points of law raised by Respondents herein - Applicants purport to withdraw Notice Of Appeal utilizing Rule 13(1) Supreme Court Rules, then an Application to Rescind judgment at the High Court- Respondents allege that the matter should be deemed to be deemed abandoned and the same dismissed. –Lack of Urgency – Lis Pendens – Peremption -Res Judicata also raised.*

Held: The Default Judgement, not being final remains rescindable, and not appealable. Application to declare the appeal abandoned and/or dismissed, does not succeed. As a result, all the other points of law that stem therefrom also fail.

RULING POINTS OF LAW

27/02/25

K. MANZINI J:

[1] The Applicant herein is Kukhanya (Pty) Ltd, a company duly registered and incorporated in terms of the Company laws of Eswatini, having its principal place of business at Moneni, within the Manzini District.

[2] The Respondent in Mormond Electrical Contractors Ltd a limited liability company, duly registered and incorporated in terms of the Company Laws of Eswatini, having its principal place of business in the City of Manzini, Manzini District.

[3] Applicant herein has moved an urgent application, for an order in the following terms:-

1) Condoning the Applicants non-compliance with the rules and forms with to regard service and time limits provided for in the Rules of the above Honourable Court and that this matter be dealt with as an urgent matter in terms of the provisions of Rule 6 (25) of the Rules of the above Honourable Court.

2) Staying the exception of the judgment granted in the main matter herein on the 25th of June, 2024 pending final determination of this interlocutory application and any other proceedings emanating therefrom.

3) Rescinding the judgment granted by this Honourable Court on the 25th of June, 2024 in the main matter herein;

4) Directing that the main matter herein under High Court Case No. 61/2019 be referred to trial to start *de novo*.

5) That prayer 1 and 2 operate with interim and immediate effect pending finalization of this interlocutory application and any other proceedings emanating therefrom.

6) That a Rule Nisi be hereby issued returnable on a date to be determined by the above Honourable Court, calling upon the Respondent to show cause why Prayers 1, 2, 3, 4, 5, 6 and 7 should not be made final.

7) Costs of suit at attorney own client scale.

[4] The Respondent's Counsel herein entered an intention to oppose, and further raised the following point(s) of Law to the application for rescission dated the 3rd July, 2024; and while application bears the Registrar's stamp of the 4th July, 2024.

4.1 **POINTS OF LAW**

4.1.1 Lis Pendens

4.1.2 Urgency

4.1.3 Effect of Abandoning Appeal filed against judgment

4.1.4 Peremption

4.1.5 Res Judicata

4.2 When the matter was argued before Court. Respondent's Counsel opted to argue his case on the preliminary points of law in the order as presented herein below:

5. **AD EFFECTS OF ABANDONMENT OF APPEAL AGAINST JUDGMENT**

5.1 Citing to Rule 13 (1) of the Supreme Court Rules, Counsel for the Respondent contended that the withdrawal and / or abandonment of the appeal is deemed, in terms of the law, to be tantamount to be a dismissal by the said Court. The Respondent's Counsel cited Rule 13 (1) which reads as follows:

> *"13 (1) An appellant may at any time abandon his appeal by giving notice of abandonment thereby to the registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal "(underlining my emphasis")* (see paragraph 1 of the Respondent's Heads of Argument).

5.2 It was further contended by Counsel that in terms of our law, a litigant is not permitted to "willy nilly abandon and re-launce the same CAUSA *"couched and sugar coated as Rescission"*. He

argued that as the Supreme Court is the Highest Court in the land, hence a matter that has been dismissed this Court, cannot be re-instituted in the lower Courts.

[6] **AD PEREMPTION**

6.1 It was also the assertion of Counsel that the act of withdrawing or abandoning the appeal amounted to a premption of the right to challenge the Default Judgment. According to Respondent's Counsel in his Heads of Argument, quoted below, the following must the gleaned from the Applicant's act of appealing, and then withdrawing that appeal against the Default judgment.

> *"[3] ...The right of an unsuccessful litigant to appeal (or rescind) an adverse judgment or order is said to be preempted if he, by unequivocal conduct inconsistent with the intention to appeal, shows that he acquiesces in the judgment or order."*

To this end, the Respondent's Attorney cited the following authorities.

- **Dabner v S.A Railways and Harbors 1920 AD 583 at 594**
- **Genturuco AG v Firestone SA 1972 (1) SA 589 A at 600 A**
- **Hlatshwayo v Mare and Deas 1912 AD**, and went on to quote from this case in the following manner:-

> *"...when once a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it – per Solomon JA at 253."*

[7] AD RES JUDICATA AND FUNCTUS OFFICIO

The Respondent's Counsel submitted that the entire application for rescission, and other attendant issues thereto, is now Res Judicata and this Court is now Functus Officio.

[8] In the Alternative the Respondent's Counsel argued that the following points should be considered by the Court with a view to dismissing the application in its entirety on account of it being an abuse of Court.

[9] **AD LIS PENDENS**

9.1 By appeal dated the 26th June, 2024 the Applicant has

a) Instituted the very same cause (by appeal)

b) Between the same parties

c) Seeking the very same relief before the Supreme Court under Civil Case No. 54/24.

9.2 The very same issues are pending before the Supreme Court for adjudication,

9.3 The Court herein is not clothed with the jurisdiction to hear the matter,

9.4 The appeal is live and pends before the Supreme Court notwithstanding the applicants attempts at withdrawing the same. The attempt at withdrawal has been opposed by the Respondent thus rending it (appeal) above and pending before the Supreme Court.

URGENCY

[10] According to the submissions of Respondent's Counsel, the Applicant had not adequately pleaded urgency. He stated that the matter is not urgent. It was the submission of Respondent's Counsel that the Court herein need not grant a stay of execution because, while an appeal pends, the order of this Court is automatically stayed.

THE APPLICANT'S RESPONSE

[11] In his response to the points of law Mr. Dhlamini who appears for the Applicants in the rescission, submitted the following:

LIS PENDENS

11.1 The argument of the Applicant's Counsel in this regard was that they have filed a Notice of Withdrawal of the matter from the Supreme Court. This according to Mr. Dhlamini precludes the Respondents herein from relying on *lis pendens*. He stated that this point of law should fail on account of this. He explained that in a bid to stay the execution of the Default Judgment his office decided to institute the

Appeal proceedings, but having had sight of the Court file at a later stage, they realized that the Notice of Re-appointment, wherein the Applicant in the Rescission purportedly gave the office of S.V. Mdladla and Associate the mandate to continue representing it in the main action, had not made it into the said file. This was not the fault of the Applicant, nor its Attorney since there was clearly a clerical mishap that occurred after the Notice of Re-appointment was filed in the court registry.

AD EFFECT OF ABANDONMENT OF APPEAL

11.2 The Counsel for the Applicant herein fervently urged that he was relying on the South African authority of **Wingprop (Pty) Ltd v Bahlekazi, Appollo Pepsi and Others (28781/2021 [2023] ZAGPJHC (19 May 2023).**

11.3 The argument of the Applicant's Counsel was that the above authority succinctly holds that the legally correct procedure to pursue is to apply for a rescission, hence the decision to withdraw the appeal. He stated that the Respondents cannot validly rely on this to preclude the

withdrawal, and cannot also not allege that the matter is pending before the Supreme Court. He stated that the only claim that the Respondents can make is that they are entitled to costs which were occasioned to them on account of the appeal being lodged, and subsequently withdrawn. He stated that this is only the issue outstanding and the tender for costs can be made by the Applicants herein, failing which the matter may be set down for the Court to hear the parties on this issue of costs.

11.4 The contention of Mr. Dlamini was that all of the points of law ought to be dismissed as they lack merit, and are in any event, linked to the point relating to the effect of withdrawing the appeal from the Supreme Court.

ANALYSIS OF SUBMISSIONS AND FINDING OF THE COURT

11.5 The crisp issue for determination herein is whether or not the Effect of Withdrawing this appeal from the Supreme Court, by the Applicant herein has the effect of rendering it dismissed. The Respondent's Counsel in his arguments relied heavily on the local authority, being

Metropolitan Evangelical Church International and 4 Others **v** ***Solomon N. Nhlengetfwa and 5 Others (69/2021) [2022] SZSC 06*** **(21/04/2024).**

11.6 The Court in this case surveyed the law, and made reference to Rule 13 (1) of the Supreme Court rules to address the issue of whether a withdrawal of as appeal from the Supreme Court should be deemed to be abandoned and dismissed. Rule 13 (1) of the Supreme Court Rule reads as follows:-

> *"13. (1) An appeal may at any time abandon his appeal by giving notice of abandonment thereof to the Registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal.*
>
> *(2) In a civil appeal the Respondent shall be entitled to costs up to the date on which he receives notice of such abandonment.*
>
> *(3) The Registrar shall forthwith give notice of such dismissal to the Respondent and the Registrar of the High Court.*

(4) A Respondent who has given notice under Rule 35 shall be entitled to proceed with his application under such rule notwithstanding the abandonment of the appeal by the appellant."

11.7 The Court in relation to the rule above did make the following observation in paragraph 11 of the Supreme Court judgment.

"[11] Despite the wording of Rule 13 (3) it has become practice in this jurisdiction for the matter to be set down before Court to be withdrawn / abandoned / as or dismissed and not for notice of such dismissal being given to the Registrar."

11.8 The Court in case of Metropolitan Evangelical Church international (supra), at paragraph 29 held the following:-

"[29] The matter has a long and troubled history and finality in the litigation must be reached. Furthermore, a litigant is entitled to a fair hearing as enshrined in Section 21 of the Constitution and in my view to dismiss the Appeal without hearing the merits could be construed as a violation of this right. However I must point out that Court Rules are an integral part of the right to a fair hearing – ***Refer Giddey N.O. v JC Banard Partners 2007 (5) SA 525 (cc) at 532*** where O' Regan said:

"[16] But for Court to function fairly, they must have rules that regulate their proceedings. These rules will often require parties to take certain steps on paid of being parented from proceeding with a claim or defence."

11.9 The Court in the Metropolitan Evangelical Church case (supra) found that there was no compelling basis for dismissing the appeal, and not heavily the merits of the matter. The Court was

moved to do so by the apprehension that he dismiss the matter would be denying the litigant its right to be heard.

11.10 I have also referred to another authority from the High Court of ***South Africa (Gauteng Division, Johannesburg) Alexandra*** **Lee** ***v Road Accident Fund Case No. 22812/20*** wherein it was held that a judgment or order granted in default of appearance is not appealable. The Court in paragraph 10, per Wilson J made the following dictum:-

"Is the default judgment appealable? Ms. Lee's case is based squarely on the Supreme Court of Appeal's decision in Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA) ("Pitelli") there, Nugent JA, writing for a unanimous Court , held that a Court order is not appealable until it becomes final. A Court order does not become final if it is not rescindable. It follows that an order that can be rescinded is not appealable."

11.11 For the reasons stated above this Court is dignity itself with the above authorities. The correct procedure to pursue, in the endeavor to overturn a judgment obtained in default is by way of rescission, and not through an appeal. The judgment issued by this Court *in casu* was one in default, and this Court cannot hold that the mater should be deemed to have been dismissed by the Supreme Court on the basis that the appeal route was erroneous in the first place. The Applicant *in casu*, has the right to apply for rescission of the Court order. The matter is therefore not Res Judicata.

PEREMPTION / DOCTRIME OR AQUIESCENCE

[12] The Work of legal authors **Herbstein and Van Winsen – The Practice of the Superior Courts of South Africa at 637** express the following position:-

"Under the Common Law a person who has acquiesced in a judgement cannot appeal against it. Acquiescence can be inferred from any unequiensced act inconsistent with the interim to appeal. It is not necessary to show an agreement not to appeal or conduct which would

stop the Appellant from denying acquiescence, or an abandonment of the appeal, but there must be conduct leading to a clear conclusion of intention not assail the judgment. The onus of proof of course, rests on the person alleging acquiescence and in doubtful cases it must be held not proven. ***Dabner v S.A.R 1920 AD 583 @ 894*** *– A voluntary unconditional payment or acceptance of payment under a judgment therefore preempts the right of appeal at Common Law – Hlatshwayo vs Mare and Deas 1912 AD @ 232."*

12.1 *In casu* it is clear that the Applicant did not acquiesce in the judgment. That this the case is gleaned from the act of the filing a Notice of Appeal, withdrawing same, and ultimately filing the present application for rescission. The Applicant did albeit, perform the misstep of filing the appeal, but as stated in the above authority where the circumstances are doubtful acquiescence must be held not to be proven.

LIS PENDENS

[13] It is trite that the Applicant's Counsel did file a Notice of Withdrawal of the appeal. It was through this act of withdrawal made clear that they had no

intention of prosecuting their appeal. By merely filing a Notice to Oppose, does not preclude nor deny the Applicant, who was the *dominis litus* in the *"would be appeal"* from withdrawing same. The Respondent herein would of course be entitled to costs in the circumstances.

[14] The Respondents therefore cannot rely on this point of law, and it must fail as a consequence. There is no live matter relating to this same *causa* pending before Supreme Court. The Respondent's Counsel did not in his submissions make any reference to the issue of costs, and as a result this Court will not make such a judgment, save to point out that the Applicant would in the ordinary course of events, be expected to tender costs.

URGENCY

[15] The matter is, it is the Court's finding, indeed urgent since the execution of the judgment has not been stayed; and it remains executable. This point of law must therefore also fail.

ORDER

[16] The Court herein having found that all of the points are dismissed, the rescission application is to continue to be heard on the merits. The Respondent herein is ordered to file their papers in response to the Application for Rescission forthwith, and matter to be set down for hearing.

K. MANZINI
JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI

For the Applicant: Mr M. Dhlamini (S.V. Mdladla and Associates)

For the Defendant: Mr. M.TM. Ndlovu (MTM Ndlovu Attorneys)