



**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**JUDGMENT**

**Civil Appeal Case No. 19/2013**

**In the matter between**

**ROBERT SAMKELO HADEBE**

**Appellant**

**And**

**NELISIWE NDLANGAMANDLA  
SIFISO KHUMALO  
ATTORNEY GENERAL**

**First Respondent  
Second Respondent  
Third Respondent**

**Neutral citation:** Robert Samkelo Hadebe v *Sifiso Khumalo and Attorney General (19/2013)* [2013] SZSC 51 (29 November 2013)

**Coram:** RAMODIBEDI CJ, MOORE JA, and LEVINSOHN JA

**Heard:** 6 NOVEMBER 2013

**Delivered: 29 NOVEMBER 2013**

**Summary: Civil procedure – Appeal against the order of the High Court granting rescission of default judgment – Interlocutory order – Section 14 (1) of the Court of Appeal Act – No leave of the Court of Appeal obtained – Flagrant disregard of the Rules of Court – Appellant’s counsel applying from the bar for postponement in order to file a formal application for leave to appeal – Application refused – Appeal dismissed with costs.**

## **JUDGMENT**

**RAMODIBEDI CJ**

[1] This is an appeal brought against the order of the High Court granting the first respondent’s application for rescission of a judgment which the appellant had obtained by default. The appellant has not obtained the leave of this Court to appeal in the matter. Accordingly, the sole issue which arises for determination in this matter is whether the appellant has the right of appeal without leave of this Court?

[2] The facts lie in a narrow compass. They may briefly be stated since it is, in my view, strictly not necessary to traverse the merits of the dispute between the parties in light of the decision I have arrived at on the non-appellability of the matter without leave as will become apparent shortly.

[3] It is not in dispute that on 25 January 2013, the first respondent was served with a court order, annexure “A”, granted by the High Court in favour of the appellant who is her husband’s grandfather and, therefore, her own grandfather-in-law. In relevant parts the order was in these terms:-

*“2. The Respondent and all those holding or claiming title through or under her are hereby ejected from the Nyonyane property at Ezulwini in the District of Hhohho located ahead of the Islamist worship centre on land that is about 5000 square metres and consisting of a three (3) bedroom main house, and (1) bedroom flat, a two (2) room storage facility and nine (9) two room flats.*

3. *The Respondent is directed to surrender keys to all doors in the said Nyonyane homestead referred to in order 2 above to the Applicant.”*

[3] The parties are on common ground that the order of the *court a quo* referred to in the preceding paragraph was made by default despite the fact that the first respondent had admittedly instructed attorneys NDZ Ngcamphalala to defend her and that they had in turn duly filed a notice of intention to oppose on her behalf.

[4] Pursuant to the service of the *court a quo*'s order upon her, the first respondent instituted notice of motion proceedings in which she sought, *inter alia*, rescission of the order in question.

[5] It is of crucial importance to note that in paragraph 17 of her founding affidavit, which is admitted in paragraph 28 of the appellant's answering affidavit, the first respondent made the point that, at the time it granted the order in question, the High

Court was not aware that the same court had already held in a previous judgment that the appellant had no title to the disputed homestead because he had formerly relinquished it to his son, namely, the first respondent's father-in-law. It was the first respondent's case that the father-in-law in turn passed on the homestead to her husband who in turn passed it on to her including his children.

[6] On 15 March 2013, and in light of the foregoing factors, the High Court granted the first respondent's application for rescission of default judgment in the matter. As indicated in paragraph [1] above, the appellant has purported to appeal to this Court.

[7] The right of appeal to this Court in civil matters is governed by s 14 (1) of the Court of Appeal Act. It provides as follows:-

*“14. (1) An appeal shall lie to the Court of Appeal –*

*(a) from all final judgments of the High Court; and*

*(b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only.” (Emphasis added.)*

This section has been considered in several decisions of this Court. See, for example, **Lucky Mahlalela v Gilfillan Investments (Pty) Ltd, Civil Appeal Case No. 20/2005; Jerry Nhlapho and 24 Others v Lucky Howe N.O. (in his capacity as liquidator of VIP Limited in Liquidation), Civil Appeal No.37/07; The Minister of Housing and Urban Development v Sikhatsi Dlamini and Others, Case No. 31/2008; Malcos Bhukumthetho Sengwayo v Thulisile Simelane and Others, Civil Appeal No. 5/2011; Swaziland Agricultural Enterprises Ltd v Doctor Lukhele, Case No. 7/2012.**

[8] As is plainly evident from s 14 (1) of the Court of Appeal Act, the right of appeal is circumscribed. It only pertains to final judgments of the High Court. An appeal from an interlocutory

order of the High Court does not lie as of right but by leave of the Court of Appeal.

[9] It need hardly be stressed that rescission of default judgment is not a final judgment because the court has not said the last word. It is not definitive. It is as such a simple interlocutory order as laid down in the leading cases of **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A)** at 870; **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)** which have consistently been followed in this jurisdiction in the cases referred to in paragraph [7] above. Accordingly, it is not appealable without leave of the Court of Appeal. It is common cause that the appellant has not obtained such leave.

[10] Faced with these difficulties, **Mr S. Dlamini**, counsel who appeared for the appellant at the hearing of this appeal, made an application from the bar to have the matter postponed in order to enable him to go back and prepare a formal application for leave

to appeal. Mr Z. Magagula counsel who appeared for the first respondent opposed the application, mainly on the ground that such a step was unnecessary in the circumstances of the case. He submitted that the rescission of the judgment in question means that it is open for the appellant to deal with the merits of his case in that court. He will be at liberty to appeal after final judgment, if he so wishes. I see much force in that submission.

[12] The principles governing applications for postponement are well-known in this jurisdiction. In the Industrial Court of Appeal case of **Abel Sibandze v Stanlib Swaziland (Pty) Ltd and Another, Case No.5/2010**, I had occasion to state the following apposite remarks at para [10]:-

*“[10] It cannot be over-emphasised that an application for postponement is an indulgence which lies pre-eminently within the discretion of the court. It must be stressed, however, that the discretion is not an arbitrary one. It is a judicial discretion which must be exercised upon a*



*consideration of all the relevant factors including, but not limited to, prejudice. As was correctly said, in my view, in **Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (A)** at 315:-*

*“A court should be slow to refuse a postponement where the true reason for a party’s non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demand that he should have further time for the purpose of presenting his case.”*

It need hardly be stressed, however, that judicial officers should ordinarily decline to grant postponements of cases unless adequate reasons are advanced.

[13] It is of crucial importance to note that apart from prejudice, some of the relevant factors which the court will ordinarily take into account in its discretion in an application for postponement are:-

- (1) whether the applicant has explained fully his/her non-preparedness. Put differently, the question is whether the applicant has established sufficient cause for the granting of the application;
- (2) prospects of success;
- (3) the convenience of the court and that of the respondent;
- (4) the avoidance of piecemeal litigation;
- (5) the respondent's interest in the finality of litigation.

[14] As can be seen, these factors relate to factual issues which should ordinarily be proved by way of an affidavit. Indeed, an application for postponement is not just there for the taking. It must be fully justified on the facts.

[15] In the present matter, the application for a postponement was not made by way of a formal notice. It was not supported by an

affidavit. It follows that the appellant has not established any of the factors set out in paragraph [13] above.

[16] If the truth be told, Mr S. Dlamini simply had no clue about the Rules of this Court pertaining to the matter. In particular, he had no clue that the matter was governed by s 14 (1) of the Court of Appeal Act as fully reproduced in paragraph [7] above. Surprisingly, Mr Z. Magagula was similarly in the dark. The point was simply raised by the Court *mero motu*.

[17] It is appropriate at this stage to refer to the following apposite remarks of this Court in **Johannes Hlatshwayo v Swaziland Development and Savings Bank and Others, Civil Appeal No.21/06** at para[14]:-

*“[14] This Court has on diverse occasions warned that flagrant disregard of the Rules will not be tolerated. Thus, for example, in **Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998** the Court expressed itself, per Steyn JA, in the following terms:-*

*‘It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient justice.*

*The disregard of the rules of Court and of good practice have so often and so clearly been disapproved of by this Court that non-compliance of a serious kind will henceforth result in appropriate cases either in the appropriate procedural orders being made - such as striking matters off the roll - or in appropriate orders for costs, including orders for costs **de bonis propriis**. As was pointed out in **Salojee vs The Minister of Community Development 1965(2) SA 135** at 141, ‘there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence.’ Accordingly matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services of practitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subjected to orders prohibiting them from recovering costs from their clients and having to disburse these themselves.’”*

See also, **Zama Joseph Gama v Swaziland Building Society and Others Civil Appeal No. 85/12.**

This is clearly such a case. As can be seen, there was flagrant disregard of the Rules of Court. The time has now arrived for this Court to put its foot down to ensure strict observance of its Rules as well as the relevant provisions of the Court of Appeal Act.

[18] In the result, the following order is made:-

(1) The appellant's application for postponement is refused.

(2) The appeal is dismissed with costs.

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**M.M. RAMODIBEDI**  
**CHIEF JUSTICE**

**I agree**

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**S.A.MOORE**  
**JUSTICE OF APPEAL**

**I agree**

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**P. LEVINSOHN**  
**JUSTICE OF APPEAL**

**For Appellant** : **Mr S. Dlamini**

**For 1<sup>st</sup> Respondent** : **Mr Z. Magagula**