IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 04/2016

In the matter between:

LIONEL OSWALD REID 1st Appellant

BEVERELY ANN OSWIN-REID 2nd Appellant

And

MOSES MOTSA 1st Respondent

MOTSA INVESTMENT 2nd Respondent

Neutral citation: *Lionel Oswald Reid and Another v Moses Motsa and Another (04/2016)* [2017] SZSC 15 (01 June 2017)

Coram: DR B.J. ODOKI JA, S.P. DLAMINI JA and J.P. ANNANDALE JA

Heard: 10 May 2017

Delivered: 02 June 2017

Summary: *Notice of Motion and the grant of the prayers therein in the absence of the attorney for the other party – Costs on a punative scale and de bonis propriis and the grant thereof – Contract and the breach thereof –Allegation that a contract is a "dummy" arrangement – Rescission versus appeal against a judgment – Held further that appellant ought to have sought the rescission of the judgment of the Court a quo granted in the absence of their legal representative, – Held that an appeal was irregular step in the circumstances, – Held further that in the result the appeal is dismissed with costs and – Held further that the ex tempore judgment of the court a quo of the 18 December 2015 is upheld.*

JUDGMENT

S.P. DLAMINI JA

[1] The Respondents (Applicants in the *Court a quo*) instituted proceedings against the Appellants (Respondent's in the *Court a quo*) under High Court Case 1301/2015 by way of a Notice of Motion.

[2] The Respondents, in terms of the Notice Motion, sought an order in the following terms;

> "*1. Ordering and Directing the First Respondent and Second Respondent to pay to the Applicant's the sum of* ***E 1824 000.00 (One Million Eight Hundred and Twenty Four Thousand Emalangeni)*** *together with interests at the rate of 9% per annum*

being arrear payment due to Applicants' in terms of the sale of shares agreement in the Landscape Turf and Irrigations Services (PTY) LTD entered into in November 2010.

2. *Ordering and Directing First and Second Respondents to pay* ***E 2 423 975.70 (Two Million Four Hundred and Twenty Three Thousand Nine Hundred and Seventy Five Emalangeni and Seventy Emalangeni being balance outstanding on the loan.***

3. *Alternatively, that the property in issue, to wit, Portion 150 of Portion*

102 of Farm 50, Ezulwini, Hhohho District, Swaziland, measuring 2, 9465 ha (Two comma nine four six five) hectares be put on sale in terms of clause 3 of the Addendum Agreement to the sale of shares agreement.

4. *Failing compliance with prayers 1 and 2 above, that the First and Second Respondents, and/or anyone holding title under them or anyone in the property be and are hereby ejected forthwith.*

5. *Ordering First and Second Respondents to pay costs at attorney and own-client scale, the one paying for the other to be absolved.*

6. Further and/or alternative relief."

[3] The 1st Respondent, Moses Motsa, deposed to the founding affidavit in support of the relief sought in terms of the aforesaid Notice of Motion.

[4] The summary of the relevant issues traversed by 1st Respondent in his affidavit are as follows. In July 2010, the parties entered into a Sale of Shares Agreement (herein after referred to as the Agreement). In terms of the sale of shares agreement, Appellants sold all their shares they held in a company called Landscape Turf and Irrigation Services (Pty) Limited (herein after referred to as Landscape Turf). A copy of the sale of shares agreement attached to his affidavit and marked ANNEXTURE "MM 1".

[5] Upon the conclusion of the Agreement the Appellants, who are husband and wife and were the sole directors, resigned from Landscape Turf. The 1st Respondent was appointed as a Director and a share certificate was accordingly issued in his favour.

[6] In terms of the agreement the purchase price for the total shares in Landscape Turf was Emalangeni Six Million 1st Respondent stated that he paid in full.

[7] The salient articles of the said Sale of Shares agreement are the following;

"1.3 the following words shall have the meanings assigned to the below and cognate expressions shall bear corresponding meanings:-

"SELLERS"	*BEVERLEY ANN OSWIN REID AND LIONEL OSWALD REID*
"PURCHASES"	*MOSES MOTSA*
"THE COMPANY"	*LANDSCAPE TURF AND IRRIGATION SERVICES (PTY) LIMITED*
"SALE SHARES"	*all the issued shares in the Company beneficially owned by the Sellers*
"THE CLAIMS"	*all the claims as at the Effective Date which the Sellers have against the Company of whatsoever nature and howsoever arising including all loan accounts.*
"THE INTERESTS"	*the aggregate of the Sale Shares and the Claims.*
"THE EFFECTIVE DATE"	*A date to be agreed between the parties.*

"PURCHASE PRICE" *defined as the purchase consideration payable to the Sellers for the interests as determined in Clause 3 hereto.*

"THE PARTIES" *The Sellers and the Purchasers*

2. SALE

2.1 The Sellers, warranting that they beneficially own the Sale Shares and are entitled to sell, do hereby sell the interests to the Purchases who hereby purchase such interests.

2.2 The sale shall constitute one indivisible transaction for the purchase of all the shares and all the claims upon the terms and conditions set out in this Agreement.

2.3 The Purchasers are deemed to have acquired the benefits of the interests and taken control of and possession of the Sale Shares upon the Effective Date from which date the interests shall be at the sole risk, loss or profit of the Purchasers save as is provided for hereunder.

2.4 It is understood that the transfer of the shares shall be passed into the name of the Purchasers, subject always to the due fulfilment of the terms and conditions set forth herein.

3. PURCHASE PRICE

The purchase price payable by the Purchasers to the Sellers shall be the sum of E6,000,000.00 (six Million Emalangeni) in respect of the shares in the Company owned by the Sellers.

4. *PAYMENT OF PURCHASE PRICE*

The Purchasers shall pay the purchase price as follows:

4.1 E1,000,000.00 (One Million Emalangeni) to the Sellers on signature of the agreement.

4.2 E1,400,000.00 (One Million four hundred thousand emalangeni) to Nedbank (Swaziland) Limited.

4.3 E1,706.937.04 (One Million Seven Hundred and Six Thousand Nine Hundred and Thirty Seven Emalangeni and four cents) to Swaziland Building Society.

A copy of a letter of Undertaking by the Purchasers in respect of 4.2 and 4.3 is annexed hereto as Annexure "A".

4.4 E380,540.44 (Three Hundred and Eighty Thousand Five hundred and Fifty Emalangeni and forty four cents) to

4.5 Standard Bank Swaziland Limited in respect of the overdraft facility of Impilo Yami (Pty) Limited.

4.6 The balanced of the purchase price to the Seller's attorneys.

4.7 The payments in respect of 4.2 to 4.5 shall be secured by way of four separate guarantees from a recognized financial institution to be provided to the Sellers attorneys within 7 days of signature of the agreement."

[9] In addition to the Agreement, the parties signed an Addendum to the Sale of Shares Agreement. The Salient Articles of the Addendum are as follows;

"1.1. The Sellers sold their shares in the Landscape Turf and Irrigation Services (Pty) Limited("the Company") to the Purchasers for a purchase price of a E6 000 000 (six million Emalangeni) in terms of a Sale of shares Agreement ("the Agreement") dated July 2010.

1.2 In terms of the Agreement the Purchasers would inter alia, pay all creditors of the Company totalling approximately E3 700 00 as recorded in Clause 4 of the Agreement ("the Creditors").

1.2 The balance of the purchase price would be paid to the sellers.

1.3 The Sellers have obtained a loan from Nedbank Swaziland in the sum of E5 200 000 ("the Loan) in order to settle the Creditors and obtain further financial facilities.

2. VARIATION

2.1 The parties agree to vary the agreement by the addition of the following terms and conditions:-

2.1.1 The Purchasers have settled all the Creditors of the Company as at the date of signature of the Agreement.

2.1.1 Save for the Loan obtain from Nedbank, the Purchasers shall not bind the Company as surety nor further encumber it without the written consent of the Sellers.

2.1.2 The Sellers shall remain in occupation of the property owned by the Company in Ezulwini (he Property").

2.1.2 The Sellers shall pay the Purchasers the sum of E48 000 per month which amount the Purchasers shall utilize to settle the Loan until the Loan is settled in full, either by way of instalments or by payment of a lump sum from the Sellers.

Upon re-payment of the Purchasers shall transfer the shares in the Company back to the Sellers and shall sign all and documentation to give effect thereto.

3. DEFAULT

3.1 In the event of the Sellers breaching the agreement and defaulting in paying of E48 000 per month for 3 (three) consecutive months, the purchaser shall be entitled to cancel the agreement and sell the property.

3.1.1 To this end the purchaser shall obtain a valuation of the Property from three recognized Valuators in Swaziland but the purchaser shall have first option to purchase the Property for the amount of the outstanding Loan to Nedbank.

3.1.2 In the event of the purchaser not existing not exercising their option to purchase the Property for the amount of the outstanding Loan, the Property shall be offered for sale at the aggregate amount of the three valuations, and amount obtained in excess of the outstanding Loan,

which shall include any amount obtained in respect of the increase in the value in the Property, shall be paid to the Sellers.

4. DEATH

4.1 In the event of the death of Lionel Reid his Executors shall be entitled to settle the amount of the amount of the Loan to Nedbank and claim transfer of the shares into the name of deceased's wife or any other entity she may nominate."

[9] On the one hand, the Respondents claim that the Appellants committed a breach of the Agreement hence they launched the proceedings in the *Court a quo* referred to in paragraph [2] above.

[10] On the other hand, the Appellants dispute that they committed a breach of the Agreement. The Appellants further alleged that it was common knowledge between the parties that the Agreement was a **"dummy''** agreement hence not binding on them and that they have counter-claims that far exceed the Respondents' claim.

[11] On the 18th December 2015 *Court a quo* granted an ex tempore judgment against the Appellants in view of the non-attendance of their attorney in court. After the ex tempore judgment, there were series of development that gave rise to the judgment of the *Court a quo* dated 14th February 2016. I turn to these in the latter part of the 18 December 2015.

[12] The circumstances leading to the granting of the judgment are set out at page 2 of the judgment of the *Court a quo* dated 14th February 2016. Her Ladyship Justice Mumcy Dlamini states the following;

"A notice of set down was duly served upon respondents' Counsel (as evident by it). On the hearing date, Counsel on behalf of respondents failed to appear. The court waited for him from 9:30 a.m. until 11:45 a.m. This was despite that respondents' Counsel had not communicated with the Registrar. The court did order the Registrar to call Counsel for the respondents but his mobile was switched off. It is then that the court re-convened and granted applicant the prayers in the notice of motion."

[13] There are disputes regarding the hearing of this matter in the *Court a quo.* These include the Notices of set down and delivery of same to the Appellants

Attorneys of record and the sitting of the Court (whether it was in or out of Session).

[14] Clearly when the *Court a quo* granted the prayers in favour of the Respondents per the Notice of Motion, the Court did so on the basis of the non-attendance of Appellants' attorneys on the 18th December 2015.

[15] The Learned Judge at page 3 of the judgment dated 14 February 2016 regarding the events subsequent to the granting of the judgment of the 18th December 2015 says the following;

"On 22nd December 2015, during court sitting on other matters, Mr. Nkomonde stood up to call the matter. The court indicated to him that the matter was dealt with on 18th December 2015. Mr. Nkomonde from the bar, without any written application, and in the absence of applicants' Counsel, moved that I stay the prayers granted under the application and issue reasons for granting the prayers. He boldly submitted that I, as a judicial officer, ought to have disregarded that he was absent from court on the 18th December 2015. I ought to have dismissed the applicants' application. The reason I granted applicants the prayers sought in the Notice of Motion, is because I failed, as a judicial officer, to exercise my duties of reading the full set of papers which were before me. Had I done so, I would not have granted the prayers."

[16] From the aforegoing, it is obvious that neither Counsel for Respondents nor Counsel for the Appellants addressed the Court on the substantive issues. The transpired record of the proceedings reflect what transcribed in court on the 18th December 2015 as follows;

"18/12/2015

AC: If I may interrupt my learned friends My Lady, it is past 11, actually to

5 12 and I still haven't seen my learned friend…

JUDGE: Who is your learned friend?

AC: It is Mr Nkomonde Attorneys.

JUDGE: Ey, I don't know what's wrong with Mr Nkomonde… At what tie, what is the time now?

10 AC: It is 1145 My Lady

JUDGE: So, what do you say, you want to be granted your prayers?

AC: Eh, my Lord, the prayers…

JUDGE: Or you want the matter to be postponed?

AC: My Lord, the prayers will be prejudicial to my learned friend's client because part of the prayers is ejectment. So I will…

JUDGE: But he is not before court?

AC: He is not before court and he was served with the papers and in actual fact, yesterday I called his office and found the secretary and the secretary told me that he took the file, the file, to court My Lord, I don't know to do what. I believe he is aware of this matter My Lord.

JUDGE: Where is your notice of set-down?

AC: It is, I believe…

JUDGE: For today

AC: … it is before court My Lord, I have a copy

JUDGE: Let me see the copy I will return it to you. Did he file his papers?

AC: All the papers were filed My Lord

JUDGE: Yes… so take your copy back

AC: The problem in this matter is that my client Mr Motsa, loses E50 000.00 each and every month while this matter is pending and on-going…

JUDGE: It is rentals?

AC: Actually he is paying a bond in respect of the respondents and they were supposed to refund him that amount, they are not doing that My Lord…

JUDGE: Yes

AC: No they are owing close to 2 million.

JUDGE: So what are they saying, what is their defence?

AC: Actually there is no defence at all.

JUDGE: What did they say, let's read their answering…

AC: They are raising all sorts of counter-claims which are not relevant to this matter. They are saying he was working for Motsa in South Africa, Durban Hotels. He says…

JUDGE: Oh, I think I remember reading this matter now.

AC: Yes…

JUDGE: Now that you say so.

AC: But all those My Lady have bearing in the agreement, in this matter.

JUDGE: So what is your prayer today?

AC: My Lord, my prayer is in terms of prayer…it is either they pay in terms of Prayer 1, 2 or they leave the house My Lord in terms of prayer 3.

JUDGE: Yes?

AC: Prayer 3, 4 and 5 My Lord. In actual fact my client does not want to take over the house but in the circumstances, in terms of the agreement he is compelled to take over the house because these people are owing him, they are in areas actually in the amount of E2 000 000.00 now. But I they pay My Lord, my client is willing to let them go and stay in the house

JUDGE: So what do I do here, I grant the prayers?

AC: My Lord, I am applying for the order My Lord in terms of prayer 1,2,3,4 and 5 of the Notice of motion.

JUDGE: So be it."

[17] Pursuant to the ex tempore judgment, the Appellants then launched the application to stay the judgment of the *Court a quo* in the following terms;

"*1. Dispensing with the procedures in relation to time limits and manner of service prescribed by the Rules of Court and hearing this matter as one of urgency;*

2. Condoning the Applicant for non compliance with the Rules of this Honourable Court;

3. Ordering that the Order issued by this Honourable Court in the main application on the 28th December 2015 (sic) be suspended pending handing down a written judgment; the instituting of an appeal in relation thereto; and further pending the finalization of the appeal in the Supreme Court of Appeal.

4. Costs of this application in the event of unsuccessful opposition;

5. Further and or alternative relief."

[18] Obviously 'the 28th December …' appearing in prayer 3 above was an error because the correct date is the 18th December. After a series of developments in the *Court a quo* regarding this matter, the *Court a quo* delivered the judgment which reflect the matter was heard on the 18th February 2016 and the judgment delivered on the 14th March 2016. The *Court a quo* ordered that;

"*[40] On the above, the respondents' defence is without merit. It is for the above reasons that I granted the orders as prayed, viz,.*

1. *First and second respondents are hereby ordered to pay the applicants the sum of E1,824,000-00.*

2. *First and second respondents are hereby ordered to pay the applicants the sum of E2,423,975-00.*

3. *Alternatively, that the property in issue, to wit, Portion 150 of Portion 102 of Farm 50, Ezulwini, Hhohho District, Swaziland, measuring 2,9465 hectares is hereby ordered to be put on sale in terms of clause 3 of the Addendum Agreement to the sale of shares agreement.*

4. *Failing which compliance with prayers 1 and 2 above the first respondent and second respondent and/or anyone holding title under them or anyone in occupancy of the said property be and is hereby ejected forthwith.*

5. *First and second respondents are ordered to pay costs at attorney client scale one paying the other to be absolved."*

[19] The Appellants filed the present appeal against the judgment of the Court a quo which they subsequently amended to read as follows;

" 1. The Court a quo erred in law and in fact in ordering that the Appellants Counsel must pay cost de bonis propriis of the appearance of the 22nd and 23rd December 2015 and 2nd February 2016. The court a

quo in ordering such costs did not exercise its discretion judiciously. The court a quo omitted to consider that the appearances on the dates mentioned were necessary appearances aimed at securing the rights of the Appellants and were not in the circumstances frivolous, vexations and or abuse of court process. The order of cost de bonis propriis amount to a punitive gesture by the Judge a quo against Appellants Counsel for having come to court to (a) seek suspension of the order of the 18th December 2015 pending the delivery of a written judgment and (b) to request the court a quo delivers written reasons for its order on the 18th December 2015. This order for costs can be interpreted to have been meant to punish the Appellant Counsel than to compensate the Respondents for being put out of pocket.

2. *The Court a quo erred in law and in fact in ordering that the Appellants must pay costs of the application on the scale as between Attorney and own client. This order for costs does not reflect that the court a quo exercised its judicious discretion in reaching same because:-*

2.1 No facts were alleged in the founding affidavit justifying the prayer for costs on the Attorney and own client scale.

2.2 Even at the hearing on the 18th December 2015, Attorney for the Respondents (applicants a quo) did not make or advance any submissions motivating the prayer for costs at the punitive scale.

3. *The court a quo erred in law and in fact and misdirected itself in holding that the Respondents (Applicants a quo) were entitled to the prayers sought in the Notice of Motion because the Appellants Counsel did not attend court on the 18th December 2015 to motivate otherwise. The court a quo omitted to consider that the Respondents (Applicants a quo) Notice of Re-Instatement of the matter for the 18th December 2015 did not amount to notice of a hearing date in terms of the Rules of the High Court and therefore there was an infringement of the Appellant's (Respondent's a quo) right to fair hearing.*

4. *The Court a quo erred in law and in fact in granting the Order of the 18th December 2015 without having considered the merits of the matter and weighing the Applicant's case as against the Respondents' case.*

5. *The court a quo erred in law and in fact in holding that the Appellants' counter-claim was unmeritorious and amounted to a fishing expedition. The court a quo disregarded that the surrounding facts of the Appellants'*

counter-claim were also in support of the points of law raised in respect of non-joinder and material dispute of fact are bound in the application.

6. *The court a quo erred in law and in fact in holding that the Appellants in order to secure a stay of execution of the order of the 18th December 2015 by filling just a Notice of Appeal and stating therein that they reserve the right to amplify the ground of appeal upon delivery of written judgment. The court a quo misdirected itself in holding that this was a rule of practice which was part and parcel of the court and has been recognised by the Supreme Court."*

[20] The jurisdictions of the High Court and the Supreme Court are different. The former has both original and appellate jurisdiction and the latter has appellate jurisdiction only.

[21] The Constitution of the Kingdom of Swaziland Act No.1 of 2005 provides that;

"151.(1) The High Court has —

(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution"

[22] Section 146 (1) of the Constitution provides as follows;

"(1) The Supreme Court is the final Court of Appeal. Accordingly, the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by this Constitution or any other law".

[23] It follows from the above that the Supreme Court may not deliberate on matters arising before it as if it were a court of first instance. It is the High Court that possesses original jurisdiction and not the Supreme Court.

[24] Accordingly, since the High Court not deliberate on the substantive issues now falling for consideration by this court, the Supreme Court is not entitled to consider them. Therefore, the appeal constitutes a premature step thus an irregularity on the part of the Appellants.

[25] The Appellants ought to have proceeded by way of rescission of judgment before the High Court in terms of the Rules of the High Court.

[26] It appears in the judgment of Her Ladyship Justice Mumcy Dlamini that the issue of the rescission of the judgment was raised in the *Court a quo*.

[27] Regarding the rescission of a judgment, the High Court Rules provides as follows;

"42 (1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[28] Rule 42 seeks, *inter alia,* to provide for a remedy in instances where a judgment is granted in the absence of any affected party and/or a judgment granted in error. It seems to me that the complaints of the Appellants to me that the complaints of the Appellants relate exactly to what is envisaged in Rule 42.

[29] I am aware that subsequent to the judgment, the *Court a quo* delivered a written judgment on 14th February 2016. However, the said judgment of the *Court a quo* combined together different proceeding namely the judgment of the 18th December 2015 and the hearings that took place thereafter including the application for the stay of the judgment pending written judgment.

[29] It is my view that the Appellants were supposed to apply for a rescission of the judgment in terms of Rule 42 of the High Court Rules.

[30] Appellants may well have a good explanation regarding the non-appearance as well as prospects of success. However, this Court is prevented by the law

to enquire into these issues because they were not dealt with by the High Court that has original jurisdiction.

[31] The 1st Appellant, Lionel Oswald Reid, deposed to the founding affidavit in support of the said application. The 1st Appellant, *inter alia*, stated the following;

"3. The Court is seized with jurisdiction to hear and determine this application which is incidental and interlocutory to the main application.

4. On the 18 December 2015, this Honourable Court granted the Orders prayed for in the main application.

5. On the 22nd December 2015, my Attorneys moved, form the bar, an application requesting the Court to render a written judgment in the matter.

6. I must mention that I intend appealing the Order/ Judgment of the Court in the main application hence my request for a Written Judgment.

7. The purpose of this application is to seek an Order for suspension or stay of execution of the Order granted on the 18th December 2015 pending the

handing down of the judgment and the prosecution of the intended appeal.

8. *I am advised that it is in the Court's discretion to suspend the Order in question for whatever period.*

9. *I am advised and verily believe that the Court may suspend the Order of the 18th December 2015 pending the handling down of the written judgment on the following grounds:-*

10. *It follows therefore that, since a written judgment has not yet been handed down, the time for exercising my right of appeal will start running from the date the written judgment is handed down."*

[32] The *Court a quo* granted the relief sought by the Appellants staying the operation of the judgment of 18th December 2015 pending appeal on the lapse of time of the appeal. Counsel for the Appellants was ordered to **"pay costs de bonis propriis at a punitive scale for the three days viz 22nd and 23rd December 2015 and 2nd February 2016."** (Page 6 at para [15] of the judgment of the *Court a quo* dated 14th February 2016].

[33] At the hearing of the matter, this Court heard lengthy arguments and was provided with voluminous documents to go through. One of the question paused by the Court to Counsel for the Appellants was whether the correct legal avenue open to the Appellants was not seek a rescission of the judgment of the *Court a quo* delivered on 18th December 2015 as opposed to the Appeal. His response to the question was not clear.

[34] As things stands, the matter turns on the response to this very question. On the other hand, if the *Court a quo* considered the substance of the application when it delivered the judgment on 18th December 2015 then the Appellants would be entitled to lodge an appeal against the judgment.

[35] On the other hand, if the court did not consider the substance of the application but merely treated an otherwise contested matter as being uncontested and then proceeded to grant the Respondents the relief sought in the Notice of Motion then appeal constitutes an irregular step. The correct legal avenue open to the Appellant in such circumstance, would be an application for the rescission of the judgment of the *Court a quo.*

[36] Her Ladyship Justice Mumcy Dlamini in pages 34 and 35 of the transcribed record says the following;

" I grant you the stay, the matter was not heard on the merits… and I wonder why, instead of seeking for a rescission and then asking for a stay."

Again further on in the record, her Ladyship says that;

"And I am telling you, this matter was dismissed because I reasonably thought, believed that you had abandoned your defence,that is why you didn't come. After seeing, because even yesterday you told me that Mr Nzima never served you with a notice of set-down for that data, for the 17th, and I said to you, before I issued the orders and I said, Mr Nzima, did you serve a Notice of Set-down for this date, that was the 17th and he showed me one, I don't know whether it is still there or it has disappeared, but you submitted from the bar that you were never said.

And I say, the reason I granted the order is because I satisfied myself that you were served but you decided not to come and this matter was dismissed purely on that ground. That you have abandoned your defence so I take it… it was highly contentions after you told me that you went up and down looking for a judge, this matter has been postponed from the contested roll

several times, no one was willing to hear it. So I was ready to hear it on the 17th, you were not there."

[37] It is abundantly clear from the aforegoing passages of the record that the *Court a quo* on the 18th December 2015 did not consider the merits or elements of the substantive issues. The *Court a* quo merely created the matter to be not contested. The correct legal avenue for the Appellants was an application for the rescission of the judgment of the 18th December 2015 and not an appeal.

[38] Accordingly, the appeal constitutes a premature step and there is no way to remedy it. Strange enough, Counsel for the Appellant did reflect on an application for the rescission of the judgment of the *Court a quo* but dismissed it at page 10 of the transcribed record, Counsel for the Appellants says the following;

"Today we are in court asking for a written judgment because to file a rescission application would be a waste of time. So obviously…"

[39] With regard to the judgment of the Court a quo dated the 14th February 2016, the Court makes the following observation;

(i) As already stated, the judgment combines the hearing of the 18th December 2015 and the subsequent hearings thereafter that included the explication for the stay of execution of the judgment; and

(ii) Notwithstanding the pronouncements and orders contained in the judgment regarding the hearing on the 18th December 2015, these do not detract from the fact the *Court a quo* did consider that the substantive issues when it granted the reliefs sought.

[40] Therefore, all the grounds of appeal fall through in view of the fact that an appeal is premature in the circumstances of this case.

[41] In view of the aforegoing, the Court orders that;

(a) The appeal be and is hereby dismissed; and

(b) The Respondents is awarded costs.

S. P. DLAMINI JA

I agree

DR B.J. ODOKI JA

I also agree

J. P. ANNANDALE JA

For the Applicants : Mr M. Nkomondze

For the Respondents : Mr O. Nzima