# IN THE SUPREME COURT OF ESWATINI

# JUDGMENT

**Case No. 15/2022**

**HELD AT MBABANE**
In the matter between:

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|---|---|
| **LOBULAWU INVESTMENTS (PTY) LTD** | **1st Appellant** |
| **FIKILE MTHEMBU** | **2nd Appellant** |
| And | |
| **NGWANE MILLS (PTY) LTD t/a FEEDMASTER** | **Respondent** |

**Neutral Citation:** *Lobulawu Investments (Pty) Ltd and Another vs Ngwane Mills (Pty) Ltd t/a FeedMaster* (15/2022) [2022] *SZSC* 50 (25/10/2022)

**Coram:** **N.J. HLOPHE JA, J.M. CURRIE JA AND S.M. MASUKU AJA.**

**Heard:** 13 September, 2022.

**Delivered:** 25 October, 2022.

**SUMMARY** : *Civil law – Appeal against default judgment granted by court a quo after service of notice of bar – No heads of argument filed by appellants – No application for condonation – Held that appellants adopted wrong procedure – Order capable of being rescinded by court a quo – Default judgment not appealable – Appeal dismissed – Costs awarded to respondent.*

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**JUDGMENT**

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**J.M. CURRIE – AJA**

## INTRODUCTION

[1] This matter arises as a result of a default judgment granted by the court *a quo* on 9 March 2022.

## BACKGROUND

[2] The first appellant is a company which operated a chicken broiler business in Eswatini and the second appellant is a surety of that company. The respondent, who was the plaintiff in the court *a quo*, issued a Combined Summons against the defendants/1st and 2nd appellants claiming the sum of

E1 026 956.00 jointly and severally from defendants together with costs and interest.

[3] Respondent applied for summary judgment and was granted same in terms of the particulars of claim.

[4] The appellants/defendants appealed against the judgment of the court *a quo* and on the 4th October 2021 this Court found in favour of the appellants and ordered as follows:

> **"1) The appeal is upheld to the extent that the disputed amount of E 400 000 is referred to trial in the High Court.**
>
> **2) The appeal against the rate of interest is upheld. The order in this regard is set aside and substituted with an order that: "Interest shall accrue at the rate of prime plus 3% from the date on which the debt arose until the date of final payment.**
>
> **3) Costs of the appeal are ordered to be costs in the cause."**

[5] Thereafter, on 18 October 2021 the appellants then attorneys, NE Ginindza attorneys, withdrew as attorneys of record.

[6] Presumably, as a result of the withdrawal of the attorneys of record, on 8 February 2022 respondent's attorneys, through the deputy sheriff, Manzini District, served a notice of bar on second appellant at his home.

[7] On 11 February 2022 Sibusiso B. Shongwe & Associates served and filed a notice of appointment of attorneys of record on respondent's attorneys.

[8] Despite this notice of appointment, no plea was filed in response to the notice of bar.

[9] On 9 March 2022 respondent's attorneys applied for default judgment in the sum of E 400 000 and interest calculated at the rate of 9% per annum from the date the debt arose until final payment, together with costs on the attorney and own client scale. The notice of application for default judgment was not served on appellants' attorneys. Default judgment was granted in terms of the notice of set down but in breach of the order of this Court which

specifically ordered the matter to trial. Although a trial did not proceed the respondent was obliged to lead oral evidence or produce evidence on oath in proof of the damages claimed.

[10] Dissatisfied with the default judgment granted by the court *a quo* on 22 March 2011 the appellants, filed a notice of appeal as follows:

> "1. **The Court a quo erred in law and in fact by granting the default judgment in the face of a finding that the matter between the parties be referred to trial for the specific purpose of evaluating all the relevant facts around the disputed sum of E400, 000.00 Four-Hundred Thousand Emalangeni) where after an informed and judicially considered evaluation shall be made subsequent to a full-blown trial.**
>
> 2. **The Court a quo erred in law and in fact by failing to order that the Appellants' Affidavits resisting summary judgment to stand as a plea and let the matter proceed to trial. To this extent, the Court a quo preferred form over substance.**

3. **The Court a quo erred in law and in fact by granting costs against the Appellants on the scale between an Attorney and own client without the bases justifying same more particularly as same was awarded without the benefit of a full-blown trial whereat such bases would be tested through the rigors of a trial. To this end, the Appellants' right to a fair hearing in terms of the Constitution Act was violated.**

4) **The Court a quo erred in fact and in law by granting the default judgment as such default judgment undermines the authority of the Supreme Court as a higher Court to the High Court. Once the Supreme Court had recognized the need for a trial the High Court had to give effect to the judgment of the Supreme Court as opposed to contradicting it by granting the default judgment."**

## CONDONATION

[11] At the date of hearing there were no heads of argument filed by the appellants whilst the respondent had filed its heads of argument on 18 August 2022. Despite the filing of these heads of argument and service of same on appellants' attorneys on 19th August 2022 there was no

response from appellants' attorneys. No application for an extension of time was sought in terms of Rule 16, nor was there an application for condonation in terms of Rule 17.

[12] When appellant's counsel was questioned in this regard by this Court counsel stated that the reason why there were no heads filed was because the Registrar of the Supreme Court refused to accept same as they were out of time. Counsel submitted that, in his view, they were not out of time despite the calculation of days enunciated in the matter of **Tuntex Textile (Pty) Ltd vs Eswatini Government & Others (86/2018) [2018] SZSC 28 (31st May 2019)**. The day before the hearing he had brought an application in the court *a quo* seeking an order to compel the Registrar of the Supreme Court to accept the appellants' heads of argument which application was dismissed.

[13] The court in this appeal gave the appellant's counsel considerable latitude to persuade the Court that condonation should be granted however there was nothing submitted by him to justify deviation from the well established practice that in compliance with the rules of this Court that a party is obliged to file heads of argument timeously in terms of the rules. If he does not he should apply, without delay, for an extension of time in terms or

Rule 16 and/or apply for condonation in terms of the Rule 17 and must fully address the prospects of success on appeal. The requirement that a full and detailed application for condonation be filed is in accordance with the basic practice that the other side should have an opportunity to respond to the affidavit filed on matters of fact and/or law depending on the circumstances. Again there was nothing to justify a departure from what is in effect comes down to *audi alterem partem.*

[14] P*rima facie* the respondent should have given notice to the appellants' attorneys of the date of hearing and led oral evidence at the hearing in terms of the order of this Court. Taking into account the fact that default judgment was granted in the court *a quo* in the absence of the appellants' legal representatives this Court gave the appellants considerable latitude although there was nothing to justify such a radical departure from the rules and the respondent's counsel wished to proceed to the merits of the appeal in order to avoid further delay. However, this case is not to be considered a precedent for by-passing the rules of this Court.

## ARGUMENT OF THE APPELLANT

[15] The appellants contend that default judgment should not have been granted by the court *a quo* and the court was not entitled to disregard an order of this Court. They relied on the case of **Meshack Dlamini vs Sandile Thwala N.O. & 8 Others (68/2014) [2014] SZSC** where the court held:

> *"....High Court Judges are not entitled to disregard or reverse orders handed down by the Supreme Court. On the contrary, they are duty bound to accept loyally the decision of the higher tier."*

[16] In granting default judgment, the court *a quo* subverted the authority of the Supreme Court which specifically ordered that "the disputed amount of E400 000 is referred to trial in the High Court"

[17] The second issue appellant's counsel argued at some length. He submitted that the court *a quo* should have considered substance over form and that the Court should have *mero motu* ordered that the affidavit opposing summary

judgment should stand as a plea although no application had been made in court to have the said affidavit converted to a plea.

[18] Appellants' counsel could not provide any explanation as to why appellants did nothing to comply with the order of this Court and ensure that the issue of the E 400 000 was referred to trial.

**ARGUMENT OF THE RESPONDENT**

[19] Respondent contends that, despite the fact that Sibusiso B.Shongwe Associates filed a notice of appointment of attorneys of record on the 11 February 2020 they did nothing in terms of the judgment of the Supreme Court, nor after service of the notice of bar on 8 February 2022. It was only after a default judgment order was served on the appellants' attorneys that any response was elicited from said attorneys.

[20] Respondent's main contention is that appellants adopted the wrong procedure in filing an appeal to this Court and that their actions amount to an abuse of this Court. Appellants ought to have filed a rescission

application to the default judgment in the court *a quo*. In this application appellants would have been obliged to justify why they did not file their plea, having been served with a notice of bar.

[21] Respondent submits that the court *a quo* correctly granted default judgment in favour of the respondent in that appellants failed to file their plea after service on them of the notice of bar and become *ipso fact* barred. A trial would only have been possible if the pleadings required for action proceedings had been filed and closed whereupon a trial date would be allocated after a pre-trial conference was held. From the month of November 2021 until February 2022 the appellants did nothing despite the fact that they were called upon to do so.

[22] The respondent submits that it is entitled to costs on the attorney and own client scale. The appellants made no effort to have the matter finalized when this Court referred the matter back to the court *a quo* and when default judgment was granted, they adopted a further delaying tactic by filing a notice of appeal instead of applying for rescission.

[23] As a result respondent has been put to expense in opposing the appeal which could have been avoided had the appellants filed their plea when called upon to do so and taken appropriate action to have the matter finalised in the Court *a quo* in terms of the order of this Court. Respondent relied on the matter of **Inter Agencies (Pty) Ltd versus Corban Electrical and Electronics (Pty) Ltd (71/2018) [2018] SZSC48 (31/10/2018)** where the Court stated: *"Whilst the granting of costs is in the discretion of the court, it should consider all the circumstances of each case, the conduct of the parties in the proceedings ...."*

## THE LAW AND FINDINGS OF THE COURT

[24] The crisp issue to be decided is whether the default judgment obtained in the High Court is appealable.

[25] The first attribute of an appealable order is that it must be final in effect and not susceptible to alteration by the court of first instance. In other words the court which made the decision must have no power to reconsider such decision and must be *functus officio.*

[26] Section 146 (1) of the Constitution provides:

> *"(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".*

[27] Section 151 of the Constitution provides:

> " (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".*

[28] Based on the above provisions in the matter of **Lionel Oswald Reid and Another v Moses Motsa and Another (04/2016) [2017] SZSC 15 (01 June 2017)** this Court dismissed an appeal filed against a default judgment of the High Court on the basis that the Supreme Court may not deliberate on matters arising before it as if it were a court of first instance. The court found that the appeal constituted a premature step and was thus an

irregularity on the part of the appellants as it is the High Court that possesses original jurisdiction and not the Supreme Court and therefore that the appellants ought to have proceeded by way of rescission of the judgment in terms of the rules of that Court and not appeal procedure.

[29] In the matter of **Van Niekerk and Another V Van Niekerk and Another**, court found, *per* Van Heerden JA:

> *"[6] In considering the question of appealability, the underlying consideration is that it is undesirable to have a piecemeal appellate disposal of the issues in litigation and that it is advisable to limit appeals to certain 'orders'. (See, e.g., Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* ***1948 (1) SA 839*** *(A) at 866 - 71; Guardian National Insurance Co Ltd v Searle NO* ***1999 (3) SA 296*** *(SCA) at 301B - D.)"*

[30] In the present matter there was no finished business in the court *a quo* and the default judgment is susceptible to rescission and the law has not yet run its due process in the court *a quo*.

[31] Regarding the rescission of a judgment, High Court Rule 42 (1) provides as follows:

> *"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 a result of a mistake common to the parties."*

[32] This rule provides for a remedy amongst other where a judgment is granted in the absence of an affected party. In the present case the complaint of the appellants relates exactly to what is envisaged in terms of this rule. The appellants had failed to file their plea in response to the notice of bar and

default judgment was granted in the absence of appellants. The appellants' failure to attend court may be due to the fact that the notice of set down for default judgment was not served on appellants' attorneys.

[33] On examining the notice of set down it emerges that the cause of action is described as "Goods sold and delivered" and the court would not have been aware of the fact that this Court had referred the disputed amount of E400 000.00 (Four Hundred Thousand Emalangeni) to trial in the court *a quo*.

[34] At the very least the respondent should have either led oral evidence or provided the court with an affidavit in proof of the damages claimed.

[35] It is not unusual for this Court to remit matters to the court *a quo* on all issues including constitutional issues raised by the parties and dealt with by a trial Judge. There is also authority of this Court where a matter was referred back to the court *a quo* for the second time. It had come on appeal simply because the court *a quo* had disregarded or ignored orders handed down by the Supreme Court. See **Meshack Dlamini v Sandile Thwala** (*supra* at page 12). His Lordship Ramodibedi CJ (with Hon. Ebrahim, Moore, Dr. Twum J, and

Dr Odoki JJA concurring) with reference to an earlier appeal by the same parties held at paragraph [4] that:

> *"This court remitted the matter to the High Court because of the strong view which this court holds on the doctrine of binding or stare decisis...."*

Similarly in **Sambo v Mabanga (6 of 2011) [2011] SZSC 26 (31 May 2011)** this Court remitted to the High Court for rehearing and determining of the improvements effected by the respondent on appellant's land. The parties were unable to agree on the form of the order and the court formulated the order by setting aside the Judgment of the court *a quo* and remitted back to the High Court for hearing of oral evidence. See Judgment of the court by Hon. Farlam JA (Hon. W.M. Rammodibedi CJ and A.M. Ebrahim JA concurring). Both these cases were applied in a more recently decided case of **Bernard Nxumalo and Another v Principal Secretary – Ministry of Agriculture and 2 others (42/2021) [2022] SZSC 21 (09 June 2022)**.

[36] It is for these reasons that the specific order of this Court that the disputed amount of E400 000 referred to trial in the High Court ought not to be subverted in any way.

[37] The appellants were not in court when default judgment was granted and undoubtedly their remedy was to apply for rescission of the default judgment in terms of rule 42(1). I can therefore find nothing to justify the procedure the appellants have embarked upon. At the end of the day a default judgment is not appealable because it can still be altered by a court of first instance.

[38] In the matter of **Pitelli v Everton Gardens Projects CC (191/09) [2010] ZASC 35 (29/3/2010)** the court stated:

> *"An order is not final, for the purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. "*

[39] In my view the appellants have adopted a cavalier attitude in the conduct of this litigation. Since judgment was handed down by this Court on 4 November 2021 the appellants did nothing to bring the matter to finality. After the withdrawal of the previous attorneys of record and the substitution of the current attorneys of record, no plea was filed in response to service of the notice of bar. When default judgment was granted in the court *a quo* they failed to apply for rescission but no doubt chose to note an appeal in order to delay proceedings and not to have to disclose any defence.

[40] At the hearing of this appeal, no heads of argument were timeously filed, and no application for an extension of time and no application for Condonation had been made.

[41] In the circumstances the Court would be inclined to grant costs to the respondent on the attorney and own client scale as sought by the respondent but the respondent also breached the order of this Court and obtained a default judgment in circumstances when it should not have done so. This forced appellants to take further action and it is unfortunate that they adopted the

incorrect procedure by noting an appeal. If they had applied for rescission, the outcome may well have been different.

[42] Given the fact that respondent was compelled to oppose the appeal, and given that the appellants have not succeeded, it is appropriate to order that the appellants pay the costs of this appeal.

[43] It follows from these considerations and taking into account all the circumstances, the interest of justice and in compliance with the previous judgment of this Court, the following order is made:

1) The appeal is dismissed.

2) The issue of the E400 000 is referred back to the court *a quo* for trial to be dealt with in terms of the High Court Rules, as ordered in the Judgment of this Court dated 4 October 2021.

3) Costs are awarded to the respondent.

**J.H. CURRIE**
**JUSTICE OF APPEAL**

I agree

**N.J. HLOPHE**
**JUSTICE OF APPEAL**

I agree

**S.M. MASUKU**
**ACTING JUSTICE OF APPEAL**

**For the Appellants:** SIBUSISO B. SHONGWE & ASSOCIATES

**For the Respondent:** BOXSHALL-SMITH ATTORNEYS