IN THE HIGH COURT OF SWAZILAND
Held at Mbabane

Case No. 1018/2010

In the matter between: -

KENNETH B. NGCAMPHALALA	APPLICANT
And	
SWAZI BANK	1st RESPONDENT
NEDBANK SWAZILAND LTD	2nd RESPONDENT
CORAM	HLOPHE J
FOR THE APPLICANT	MR. S. C. DLAMINI
FOR THE FIRST RESPONDENT	MR. M. SIBANDZE
FOR THE SECOND RESPONDENT	MR. E. HENWOOD

JUDGMENT

HLOPHEJ

[1] The Applicant instituted application proceedings seeking an order *inter alia* directing the 1st Respondent to pay it a sum of E l 13 795.12 together with interest thereon fixed at 9% per annum as well as costs of suit.

[2] The amount prayed for is said to be one deducted by the 1st Respondent from a judgment debt initially granted by the Industrial Court in favour of the Applicant as compensation for an unfair dismissal. It is common course that when deducting the said amount from the judgment debt, 1st Respondent was acting in terms of a document called a garnishee notice, issued in terms of Rule 45 (13) (a). The document was apparently issued at the instance of the 2nd Respondent who however had not initially been joined in the proceedings as a parry. It is common course that the amount deducted was liquidating a debt the Applicant owed to the 2nd Respondent for which a High Court Judgment had already been obtained by the 2nd Respondent against the Applicant.

[3] It was the contention of the Applicant that the 1st Respondent's deduction of the amount prayed for in the application was illegal and should not have been done because the document on the basis of which it was deducted (garnishee notice) was not properly issued and was not executed by the Sheriff or his lawful deputy as provided for in the Rules. I have noted that other than this bare assertion by the Applicant there is no material presented on why he contends that the document was not properly issued or even that it was not executed by the Deputy Sheriff. The need for such information by the Applicant becomes more apparent when one considers the fact that the Respondent has denied this and has actually contended that same was issued by the Sheriff and executed by the Deputy Sheriff.

[4] It was contended further by the Applicant that the deduction of the amount complained of amounted to executing against the Applicant's salary as the amount in question was part of an award calculated in terms of a salary as the Industrial Court Judgment awarding same stipulated it was to be computed in terms of specific months salaries.

[5] When the matter first came before me for hearing on the 28th May 2010, the parties ex-facie the pleadings were the Applicant and the 1st Respondent. The 2nd Respondent was not a party and had not been served with the application. Furthermore, the 1st Respondent who had been served with the Court process in the form of the application, and had entered a Notice of Intention to oppose through its attorneys, was not represented or no appearance was made on its behalf. This was notwithstanding the fact that a Notice of Set down had been served on the said attorneys. This therefore meant that the application was effectively unopposed.

[6] Given that from the Applicant's case alone it was clear that the deduction of the amount sought to be recovered by the Applicant was at the instance of the 2nd Respondent (who had already obtained a judgment of this Court which had not been challenged), including the fact that it was made apparent that the deduction was in favour of or was eventually benefiting the Applicant as it extinguished his indebtedness to the 2nd Respondent, I directed that the 2nd Respondent be joined as a party. I did this because it had become

apparent to me that the fairest way of dealing with the matter, in case I was acceding to the Applicant's request, was to order the 2nd Respondent to refund 1st Respondent the amount deducted in terms of the Garnishee Notice; whilst ordering 1st Respondent to pay Applicant the amount prayed for. I was convinced it would be unconscionable for the Applicant to keep both sums as that was to be the natural effect of acceding to his request without the 2nd Respondent being joined.

[7] At that stage I was convinced that the 1st Respondent had deliberately decided not to oppose or defend the application given the apparent service of both the Notice of Application and the Notice of Set down upon it. Save for giving the party who had not been served when he had an apparent interest in the proceedings an opportunity to deal therewith, I had no doubt that the application was to go as unopposed against the 1st Respondent. I therefore directed in terms of my Judgment dated the 17* June 2010, that the 2nd Respondent be joined in the proceedings.

[8] In effecting service of the joinder Notice upon the 2nd Respondent, the Applicant also served same on the 1st Respondent as it was enjoined to do so in law. It would appear that not only the attention of the 2nd Respondent was drawn to the existence of the matter but that of the 1st Respondent as well. Whilst the 2nd Respondent filed its opposing affidavit to the application, seeking to justify its entitlement to issuing the Garnishee Notice it did, so as to result in the deduction

of the sum of money prayed for; the 1st Respondent filed an application for condonation of the late filing of its answering affidavit together with its own answering affidavit. This necessitated that we deal firstly with the application for condonation of the late filing of the answering affidavit by the 1st Respondent.

[9] Although initially showing an inclination towards opposing the application, the Applicant later abandoned this opposition which now meant that the main application was now opposed by both the 1st and 2nd Respondents as I had to condone the 1st Respondent's late filing of its application and allow it to go into the merits of the matter in its opposition. Of course I must clarify that this was after the Court had made known its observation that the Judgment the Court had issued on the 17th June 2010 had not been *res judicata* as the final decision had been postponed until the 2nd Respondent would have made known its position.

[10] Reacting to the Applicant's case as set out above, the 1st Respondent, in summary contended that it was obliged to deduct the sum of money it did and pay it to the 2nd Respondent, who had issued out the Garnishee Notice. It contended that it had an obligation to honour a Court document which on the face of it was lawful. It further contended that the said document was not set aside, and it remained, valid to this day. It was argued further that Applicant's application had no merit as what it sought to achieve was against public policy in that it sought to ensure that Applicant was paid twice in the sense that it

was not accepting that it remained indebted to Nedbank after the deduction and payment of the amount to the 2nd Respondent, but that it sought to have its debt with the latter treated as settled whilst at the same time it sought to have 1st Respondent pay it the money deducted and paid to the 2nd Respondent. This it was submitted was unconscionable. It was further denied that the amount deducted amounted to a salary or part of a salary because its calculation was in terms of monthly salaries, and that it was therefore not subject to judicial attachment. It was contended this was compensation in terms of the Industrial Relations Act which went on to provide a method for its calculation.

[11] On the other hand the 2nd Respondent opposed the Applicant's application and denied that the garnishee notice was not properly issued and executed and that the amount deducted amounted to attaching salaries. The 2nd Respondent went on to clarify why it became necessary for it to attach the amount deducted from the Applicant's compensation. It stated that Applicant was aware he owed it the sum in question following a judgment of this Court. Subsequent thereto Applicant had proposed payment methods which were however rejected resulting in attachment of the latter's immovable property which was however found to be bonded to Swazi Bank which held a mortgage bond over it for a sum much higher than that of the Judgment debt obtained by 2nd Respondent. It was this mortgage bond which made it not viable for 2nd Respondent to even consider selling the property as it was not feasible according to the latter. It was

because of this state of affairs that 2nd Respondent decided to fall back to the provisions of Rule 45 13) (a) -garnishee notice - to attach the amount deducted from the Judgment debt granted Applicant by the Industrial Court as soon as it got to know about it.

[12] The 2nd Respondent contended further that the garnishee notice concerned was issued by the Registrar of the High Court; who it was alleged, also doubled up as Sheriff of Swaziland. The attachment itself was said to have been made by the Deputy Sheriff for the Hhohho District. Furthermore it was denied that the amounts attached or deducted from Applicant's salary ever amounted to a salary as same was compensation awarded Applicant by the Industrial Court.

[13] These were the issues before me which upon which I had to decide the Applicant's application. Firstly as concerns the point *in limine* raised by the Applicant to the 1st Respondent's application for condonation; to the effect that the latter was not entitled to the relief sought because it had not rescinded the judgment this Court had already issued, I was urged to dismiss the condonation application. It was contended this made it procedurally improper for such an application to be made.

[14] When considering the nature and effect of the Judgment made by this Court and delivered on the 17th June 2010, I cannot uphold this point *in limine.* The Judgment aforesaid directed that the 2nd Respondent be joined without making any final judgment as such

against the 1st Respondent. I have no doubt that had a specific order been made against the 1st Respondent, the point would have been good as the matter would be *res judicata,* which is not currently the point herein. It was for this reason I could not uphold the point and directed that the merits be argued with the 1st Respondent having to state its case.

[15] The point I need to decide in my view and at this stage, is whether in reality, there is any merit in the contention that the judgment debt from which the Applicant's sum of El 13 795.12 is claimed amounts to an execution against a salary. According to the Compact Oxford English Dictionary, a salary is a "fixed regular payment made by an employer to an employee, especially a professional or white collar worker."

[16] There is no dispute that the amount of money awarded Applicant by the judgment of the Industrial Court of which the sum of El 13 795.12 was a part is defined in terms of the Industrial Relations Act as a compensation whose formula for fixing is specified in the Act as a number of months salary. It is otherwise called a compensation.

[17] I therefore do not agree that the amount claimed by the Applicant as having been deducted from the Judgment is part of a salary. Whatever the merits or demerits of executing against a salary, I am of the view I need not determine that issue the matter for determination has sufficiently been answered on the decision to which I have come

that the amount deducted is not a salary or a part of but is a compensation. In fact one would be stretching the parameters of a salary too far if he were to agree with the Applicant's contention in this regard.

[18] The question for decision as concerns the 1st Respondent is whether in law, and upon being served with a Court document (the garnishee notice in terms of Rule 45 (13) (a)) it was opened to the Applicant to refuse to comply therewith on the contentions raised by him that same was not issued and executed by the Sheriff or his lawful Deputy.

[19] I do not see how this question can be answered in the affirmative or as contended by the Applicant. In my view, a party who receives a Court process is required to comply therewith and cannot be allowed to ignore one because according to him it was not properly issued. The position is more stronger in my view, in a case where the document does not appear to be having any deficiencies on its face. Indeed this Court has not been referred to any authority by the Applicant and I have not been able to find one supporting the Applicant's contention or making it mandatory for a person in 1st Respondent's position to ignore such a document.

[20] Consequently, it is my considered view that the 1st Respondent was bound to comply with the Court process served on it and it was not for it to question its validity where on its face it appeared proper.

This view that I have taken is bolstered or supported by the 2nd Respondent's assertion that such a document was issued by the Sheriff and was served by an officer entitled to serve same in the person of the Deputy Sheriff, which contention has not been disputed by the Applicant who as observed above had merely made a bald assertion alleging the contrary. This decision is supported by what has come to be known as the Plascon-Evans Rule. Se in the regard **Placon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**

[21] The 1st Respondent was therefore entitled in my view to rely on the document and comply with the directives therein contained and it cannot be faulted for doing so.

[22] Having come to the foregoing conclusion, it seems to me that if Applicant was genuine, it would have challenged the garnishee notice concerned and have it set aside and thereafter seek a restoration order. Of course for it to succeed, it would have had to serve the 2nd Respondent with such an application who would have been the major party as the beneficiary of the money whose restoration would have been sought.

[23] I am convinced, for the following reasons, that the garnishee notice, on the basis of which the amounts concerned were attached and deducted, cannot be quibbled because:-

23.1. The fact that the amounts deducted extinguished Applicant's liability to the bank - the 2nd Respondent.

23.2 What Applicant is asking for, if done, would have amounted to a double payment to him, particularly because he did not seek to set aside the garnishee notice concerned.

23.3 The amount deducted benefited Applicant himself as it extinguished his own liability.

23.4 The Applicant has not been able to substantiate its bare assertion that the document concerned had not been issued or executed by the Sheriff or his lawful Deputy.

[24] It is for these considerations that I do not find it necessary to make a finding on whether the document, the garnishee notice issued in terms of Rule 45 (13) (a) was issued and executed by the Sheriff and his lawful deputy respectively. This is more so because, it seems to be common course between the parties that the amounts deducted which is now in 2nd Respondent's possession who is owed by the Applicant, amounts to a set off. Consequently Applicant's application cannot succeed.

[25] Having considered all the circumstances of the matter, is this the kind of matter, where costs must follow the event? I do not think so. Firstly as concerns the 1st Respondent it had apparently failed to file its opposing papers timeously and still failed to attend the hearing of the matter notwithstanding having been served with the papers. Although I accepted the reasons for its failure to do so and condoned it, I still have to consider this in determining the question of costs as a judgment would otherwise have been entered against it had the Court not *melo mutiL* raised the question of 2nd Respondent's joinder.

[26] As concerns the 2nd Respondent on the question of costs, I have also found it not necessary to grant a costs order in favour of the 2nd Respondent considering the justices of the matter. This is because their having to be involved in the matter was at the instance of the Court which required clarity in the matter which it has since obtained.

[27] Consequently this is the order I make,

27.1 The Applicant's application be and is hereby dismissed.

27.2. Each party is to bear its own costs.

Delivered in open Court on this the 20th day of July 2011.

N. J. Hlophe

JUDGE