



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 802/16

In the matter between:

KWANELE QUINTON MAGAGULA N.O.

Applicant

And

INDELEBULI TRACTOR SERVICE (PTY) LTD

1st Respondent

WISEMAN DLAMINI N.O

2nd Respondent

SITHEMBISO BRIAN GAMA

3rd Respondent

**THE NATIONAL COMMISSIONER OF THE
ROYAL SWAZILAND POLICE**

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

Neutral citation: *Kwanele Quinton Magagula N.O vs Indelebuli Tractor and Four Others (802/16) [2016] [SZHC] 116 (15th July, 2016).*

Coram: **MAPHALALA PJ**

Heard: **7th June, 2016**

Delivered: **15th July, 2016**

For the Applicant:

Mr. Sithole

(of Sithole & Magagula Attorneys)

For the 1st and 2nd Respondents: Advocate M. Mabila
(instructed by Magagula Attorneys)

For the 3rd Respondent: Mr. Motsa
(from L.R. Mamba and Associates)

Summary: *Civil Procedure – Applicant is seeking to upset the consequences of a judgment issued under case no. 592/2016 – therefore the relief is accessory to an order granted under case no. 592/2016 – hence it is incidental thereto as envisaged by Rule 6 (24) – therefore Applicant to follow the prescribes of the said Rule – Application is accordingly dismissed with costs.*

JUDGMENT

The Application

[1] Serving before court is an Application under a Certificate of Urgency by the Applicant one Kwanele Quinton Magagula in his capacity as a provisional liquidator of a company called SGGS Construction (Pty) Ltd against cited Respondents for an order in the following terms:

1. **Setting aside the attachment and/or removal of the movable assets of SGGS Construction (Pty) Ltd inclusive of all motor vehicles in the name of SGGS Construction (Pty) Ltd instated and/or as per the instruction or instance of the First Respondent herein.**
2. **Directing that the Second Respondent forthwith and immediately release from his custody all motor vehicles registered in the name of SGGS Construction (Pty) Ltd pursuant to his attachment thereof and deliver said motor vehicles into the care, control of possession of the Applicant and/or the Deputy Sheriff as chosen by the Applicant pending the final winding up of SGGS Construction (Pty) Ltd.**
3. **Directing that the Deputy Sheriff as directed by the Applicant should take into his control all motor vehicles registered in the name of SGGS Construction (Pty)**

Ltd under the present care and control of the Third Respondent and deliver same into the care, control and or possession of the Applicant and/or the Deputy Sheriff as chosen by the Applicant pending the final winding up of SGGS Construction (Pty) Ltd.

- 4. That the fourth Respondent, the Royal Swaziland Police be hereby directed and so ordered to assist the Deputy Sheriff in giving effect to orders 2 and 3 above.**
- 5. Directing that Prayers 1, 2, 3 and 4 above act with immediate and interim effect pending finalization of this application.**
- 6. That the Rule Nisi be hereby issued calling upon the Respondents to show cause why Prayers 1, 2, 3 and 4 should not be made final.**
- 7. Costs of the suit at attorney own client scale in the event of opposition thereto.**
- 8. further and/or alternative relief.**

[2] The Founding affidavit of the provisional liquidator Kwanele Quinton Magagula is file outlining the material facts to this dispute between the parties. The Application was brought **ex parte** as averred at paragraph 33 of t he said affidavit. Various annexures pertinent to the Applicant’s case are filed. These being firstly, annexure “KQM1” being an interim order of the 18 December, 2015 by **Dlamini J**; secondly, annexure “KQM2” being an order by **Annandale J** of the 18the April, 2016; thirdly, annexure “KQM3” being a writ of execution. Further annexures being letters of correspondence between the parties, being annexure “KQM4”, “KQM5”, “KQM5”, “KQM6”, “KQM7” and “KQM8”.

The opposition

[3] The 1st Respondent opposes the Application and has filed an Answering affidavit of one Mr. Sandile Dlamini who is the Managing Director of the 1st Respondent where he has addresses two points **in limine** and also canvassed the merits of the dispute. Confirmatory affidavit of 2nd Respondent Mr

Wiseman Dlamini is filed in support thereto. Further annexures “J151” and “J152”, “J153” are filed in support thereto.

[4] The 2nd Respondent Mr Wiseman Dlamini has also filed a fully fledged Answering affidavit. He has also filed a Confirmatory affidavit of one Nolwazi Mabuza. 2nd Respondent also filed relevant annexures from annexure “WD1” to “WD5” in support thereto.

[5] The 3rd Respondent Mr. Sithembiso Brian Gama has also filed an Answering affidavit to the Applicant’s Founding Affidavit.

[6] The Applicant then filed a Replying affidavit and in accordance with the Rules of this court.

The background facts

[7] The facts of dispute are stated in the Applicant’s Founding affidavit at paragraph 9 to 14 and I shall outline them in the following paragraphs of this judgment:

9

AD BACGROUND

On or about the 18th December, 2016, this Honourable Court issued out an order for provisional liquidation of SGGS Construction (Pty) Ltd.

10

I state that in terms of the said order, I was appointed as Provisional Liquidator and I was mandated to exercise all powers, direct incidental

and ancillary to the winding up of SGGs Construction (Pty) Ltd. I state that same order is still in full force and effect. (I annex a copy hereof of a same order marked "KQM1").

11

I state that pursuant to having been appointed as Provisional Liquidator, I accordingly took inventory of the assets registered in the name of SGGs Construction (Pty) Ltd including but not limited to the following vehicles:-

11.1 Model: Chevrolet Trail Blazer

Registration: JSD 991 BM

11.2 Model: Ford Ranger

Registration: USD 101 BM

11.3 Model: Isuzu

Registration: DSD 020 AH

12

It is apposite to bring to this court's attention that the forementioned motor vehicles has prior to the issuing of the provisional liquidation order been for the personal usage of the Third Respondent (being the Ford Ranger and Isuzu and his wife, one Gcebile Gama, Chevrolet Trail Blazer, both being co-directors and shareholders in SGGs Construction (Pty) Ltd.

12.1 I state that it was pursuant to these circumstances and with the common understanding that the Third Respondent and his wife would not surrender said vehicles to any Third Parties; that I directed that the Deputy Sheriff not take same motor vehicles into his possession albeit they be deprived of a mode of transport pending finalization of the winding up proceedings.

On or about the 21st April 2016, the Second Respondent acting presumably under the instruction of attorneys of the First Respondent purported to attach and remove motor vehicle: Chevrolet Trail Blazer, registration number JSD 991 BM on the strength of a Court order dated 15th April 2016 and a Writ of Execution dated 15th April 2016 for a purported sum of E390,000.00 (Three Hundred and Ninety Thousand Emalangen) said to be owed to the First Respondent by SGGS Construction (Pty) Ltd.

[8] This court heard arguments of the attorneys of the parties on the 7th June, 2016 where they filed Heads of Arguments for which I am grateful. I shall in brief outline the salient features of such Heads of Arguments commencing with the arguments of the Respondents on account of the points **in limine** raised in the opposition of the Application.

(i) The 1st and 2nd Respondents arguments

[9] The gravamen of the 1st and 2nd Respondents argument is that the Applicant is claiming to have a direct and substantial interest to the assets attached under case no. 592/2016, a provision which both the 1st and 2nd Respondents do not dispute. However, both 1st and 2nd Respondents contended that the relief sought by the Applicant is incidental to case no. 592/2016 which is pending before this court and Applicant ought to have instituted his Application in terms of Rule 6 (24).

[10] In this regard the attorney of the 1st Respondent and 2nd Respondent has cited the legal textbook by **Erasmus, Superior on Courts Practice** who described an application in terms of Rule 6 (24) as follows:

“An Application is incidental to pending proceedings if it is subordinate on accessory to while at the same time being distinct from the main proceedings.”

[11] That in the present matter the Applicant is seeking to upset the consequences of a judgment issued under case number 592/2016. That the relief he is seeking is accessory and / or pursuant to an order granted under case no 592/2016 hence it is incidental thereto as envisaged by Rule 6 (24). In this regard Advocate Mabila cited the South African case of **Antares (Pty) Ltd vs Hammond 1977 (4) SA 29 (W) at 30** where **Elloff J** said the following:

“In my judgment the application is also incidental to pending proceedings with the meaning of the sub-rule---

The present application is subordinate or accessory to the grant of the provisional sentence judgment and the automatic suspension of the right to execute which follows in terms of Rule 49 (11) (a) when an application for leave to appeal has been delivered. On either basis this application relates to more that an incident either of the grant of provisional sentence judgment or of the consequences flowing from the noting of an application for leave to appeal. It is also subordinate to both.”

[12] It is further contended for the 1st and 2nd Respondents that the present Application is subordinate of accessory to the grant of the provisional sentence judgment and the automatic suspension of the right to execute which follows in terms of Rule 49 (11) (a) when an Application for leave to appeal has been delivered. On either basis this Application relates to more than an incident either to grant of provisional sentence judgment or on the consequences flowing from the noting of an Application for leave to appeal. It is also subordinate to both.

[13] Advocate Mabila cited the **High Court case of Iveanah Johnston vs Marlin Christopher Johnston and Another High Court Case No. 17766/2014 (unreported)** and that the Supreme Court case of **Reckson Mawelela vs MB Association of Money Lenders and Another case no. 43/99** to the legal principle stated by the **Tebbutt JA** to the following:

“----- it clear that in interlocutory proceedings no new proceedings are initiated ----- this requires a new case number.”

[14] That Applicant, as opposed to instituting fresh proceedings (under a new case no. 802/2016, ought to have sought to intervene under case 1524/14 as provided for by Rule 12 of the High Court Rules.

[15] Further arguments are advanced in paragraphs 17, 18 19, 20, 21, 22, 23, 24, 25 and 26 of the 1st Respondent’s Heads of Arguments. Finally it is contend that Applicant’s Application be dismissed with costs.

[16] The attorney for the 1st and 2nd Respondent aligned himself with the above contentions of the 1st to 3rd Respondents and filed Heads of Arguments. I shall revert to pertinent arguments as I proceed with my analysis in this judgment.

(ii) The Applicant’s arguments

[17] Mr Sithole advanced arguments of the Applicant and filed Heads of Arguments. The answer to the arguments of the 1st to 3rd Respondent states the following:

Before court is an Application instituted by the Applicant who is a provisional liquidator of SGGGS Construction (Pty) Ltd in terms of a court order granted by the above Honourable Court on the 18th December 2015. The Application is for an order, as reflected in the notice of motion seeking to set aside the attachment and removal of all movable assets of SGGGS Construction inclusive all motor vehicles registered in the name of the company at the instance of the 1st Respondent. It is worth mentioned that the Directors of SGGGS Construction (Pty) Ltd are husband and wife who are at the middle of divorce proceedings.

- 1. The Applicant also seeks other ancillary prayers as reflected in the notice of motion. The Application is vigorously opposed by the 1st, 2nd and 3rd Respondents. The 2nd Respondent has filed a detailed opposing affidavit as well.**
- 2. The 1st Respondent's defence is that the court order and the writ of execution under case no. 592/16 obtained in April 2016 is lawful and valid because he was not aware of the existence of the court order granted by this court on the 18th December 2015. The Respondents have raised other issues in which the Applicant is of the view that such issues are misplaced in opposing this application.**

[18] The attorney for the Applicant then posed the questions for determination to be the following:

- 3.1 Whether or not, assets and movable property of a company which is under provisional liquidation should be attached before finalization of the winding up?**
- 3.2 The procedure to be followed when a creditor has claim against a company under liquidation?**

- [19] The attorney for the Applicant then outlined the application of the law in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 and cited pertinent cases.
- [20] The essence of the Applicant's position is found in paragraph 15 that the two court orders cannot co-exist or be effective simultaneously. That the winding up should be finalized first, then the 1st Respondent can only come with its writ of execution and the court order under case no. 592/16 only to prove its claim in due cause like any other creditor without disturbing the creditors order of performance.
- [21] The attorney for the Applicant then cited the learned author **CR Graham, Administration of Insolvency Estate at page 215** that the order of creditors preference should not be unduly be affected by the 1st Respondent's attachment.
- [22] Finally is contended for the Applicant that the preliminary points raised by the 1st to 3rd Respondents have no merit and that the matter should be addressed on the merits of the case.

The Court's analysis and conclusions thereon

- [23] Having considered the affidavits filed by the parties and the legal arguments by attorneys of the parties the first port-of-call is a determination of the four (4) points **in limine** raised on the notice to the following:
1. **The Applicant's Application is defectively irregular in terms of Rule 30 (1) of the Rules of the above honourable Court in that it does not comply with Rule 6 (24) of the Rules of Court on the basis**

that same, despite seeking the setting aside of an order granted under High Court case no. 592/2016, has instituted under High Court case no. 802/2016.

2. A Court of similar jurisdiction cannot reverse an order of the same Court under distinct proceedings unless an application for rescission on the same proceedings resulting in the order challenged and/ or sought to be set aside.
3. The Applicant, in his Notice of Motion, has not sought the setting aside of the Court Order authorizing the attachment of the assets already under attachment.

Alternatively

4. The relief sought by the Applicant is incompetent and/or cannot be granted unless and until the writ of execution (under High Court case no. 592/2016) authorizing the attachment of the assets has been set aside.

[24] It is contended for the 1st and 2nd Respondent that in the present matter (High Court case no. 802/2016), and on the 25th April, 2016 the Applicant move an Application, **inter alia** seeking the following:

- 1.1 An order setting aside the attachment and removal of assets belonging to SGGs Construction (Pty) Ltd and
- 1.2 Further demanding the immediate release, from the 2nd Respondent, of motor vehicles attached pursuant to a Writ of Execution dated the 15th day of April 2016 under High Court case no. 592/2016.
- 1.3 An order directing the Deputy Sheriff to take into his control all motor vehicles registered in the name of SGGs and those under the care and control of the 3rd Respondent.

- [25] It is contended that the challenged attachment was pursuant to a writ of execution issued by the High Court consequent to an order (of the 15th April, 2016) granted in favour of the 1st Respondent by this court under High Court case no. 592/2016.
- [26] That despite being aware of order and such an order proceedings (under case no. 592/2016) the Applicant more the present Application on an **ex parte** basis under a different (and on new) case number (being case no. 802/2016).
- [27] The attorney for the 1st and 2nd Respondent advanced in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 to the final argument at paragraph 26 thereof that in the present matter, the argument facts and submissions made by the Applicant in support of this Application ought to be made under case no, 592/2016 as it is the appropriate formal at which he could advance his argument that by virtue of section 301 of the Company Act, no legal proceedings may be commenced or proceeded when a company is being winding up.
- [28] The attorney for the Applicant was not clear in his reply of the 1st and 2nd Respondents arguments on the above cited point **in limine**.
- [29] It appears from the papers and the affidavit of the parties that both 1st and 2nd Respondents contend that the relief sought by the Applicant is incidental to case no. 592/2016 which is pending before this court and therefore Applicant ought to have instituted his Application interest of Rule 6 (24).

[30] I find the legal authority of Erasmus, Superior Court Practice which describes an application in terms of Rule 6 (24) as follows:

“An application is incidental to pending proceedings if it is subordinate or accessory to while at the same time being distinct from the main proceedings.”

[31] It is abundantly clear in the present case that the Applicant is seeking to up set the consequences of a judgment issued under case no. 592/2016. Therefore, the relief Applicant is seeking is accessory and / or pursuant to an order granted under case no. 592/2016 hence it is incidental thereto as envisaged by Rule 6 (24).

[32] I find the **dictum** in the South African cases of **Antares (Pty) Ltd vs Hammond 1977 (4) SA 29 (W) at page 30**, the case of **Massey-Ferguson (S.A) vs Ermelo Motors Ltd 1973 (4) SA 206 at 214 G**, that of **Iveanah Johnston vs Marlin Christopher Johnston and Another High Court case no. 1766/2014** and that of **Reckson Mawelela vs MB Association of Money Lenders and Another Appeal case no. 43/99** apposite.

[33] In the Appeal Court judgment of **Reckson Mawelela** cited above in paragraph [32] **Tebbut JA** stated the following:

“--- it is clear that in interlocutory proceedings no new proceedings are initiated --- thus requiring a new case number.”

[34] I agree in **toto** with the 1st and 2nd Respondents contentions that the Applicant, as opposed to instituting fresh proceedings (under a new case number 802/2016

ought to have sought to intervene under case no. 592/2016 as provided for in Rule 12.

[35] Rule 12 provides as follows:

“Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to the further procedure in the action as to it may seem meet.”

[36] I refer the learned authors **Herbstein and Van Winsen, the Practice of the Supreme Court of South Africa, 4th Edition page 177 – 178.**

[37] In the result, for the foregoing reasons the Application is dismissed with costs inclusive of costs of Counsel to be certified in terms of the Rules. The Applicant can still bring its Application as stated above.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE