

IN THE HIGH COURT OF SWAZILAND

JABULANE A. ZULU

Applicant/Defendant

V

DUMISA SIMELANE

Respondent/Plaintiff

Civ. Case No. 1851/98

Coram

S.B. Maphalala J

For The Applicant

Mr. Mabila

For The Respondent

Miss Dlamini

JUDGMENT

(03/08/99) Maphalala J:

Before court is an application for rescission of judgement entered by this court on the 30th October, 1998 against the applicant and costs in the event that the application is opposed. The application for rescission is brought under the common law. The applicant has filed a founding affidavit with annexures and confirmatory affidavits. The respondent has in turn filed its opposing papers with pertinent supporting papers.

Applicant avers in his papers that on or about May 1998, at or near Nkhamba in the district of Hhohho, he was appointed by one Thomas Nsibandze to act as his agent in the sale of a motor vehicle, BMW 3181 model. The said Thomas Nsibandze is currently in the Republic of South Africa. Pursuant to his appointment and mandate he approached the respondent/plaintiff about the sale of the motor vehicle. The latter was interested to buy the motor vehicle he then introduced him to his principal (the said Thomas Nsibandze) through the phone and the two clinched a deal. Thereafter, the two were in regular contact over the telephone. Still in May 1999, the respondent/plaintiff drew a cheque for the sum of E34, 000-00 in his favour. The reason was that since he had an account with the First National Bank Swaziland (Mbabane Branch) the said Thomas Nsibandze's girlfriend one L. Kokong also had an account with the same bank in South Africa and this would make the transfer of funds easy. He duly transferred the sum of E32, 000-00 (as per "JZ1") to Thomas Nsibandze which amount was less E1, 000-00 which was his commission and less E700-00 which went to bank charges and other expenses thereto.

2

On or about June 1998, the respondent/plaintiff informed him that the motor vehicle has been confiscated by the Royal Swaziland Police on suspicions of being stolen. The matter was then taken by both of them to respondent/ plaintiff attorneys (Shilubane, Ntiwane and Partners) to seek advise who promised them that they will attend to the matter. On or about 12th August 1998, to his surprise and dismay, he was served with summons. He approached respondent/plaintiff attorneys about this new development. On about 11 November 1998, he was served with a court order which he subsequently faxed to Thomas Nsibandze. He is of the view that the judgement entered against him was erroneously sought and/or granted. He was made to believe that talking to respondents/plaintiff's attorneys would result in the staying of the proceedings hence he never filed any papers. He further avers that as an agent in the transaction leading to these proceedings, he is not in any way liable to the respondent/plaintiff in that he carried out his mandate honestly. That he made a full disclosure of the principal and as such he is identifiable.

These are the facts in support of the applicant/defendant's case.

The respondent/plaintiff avers in his opposing papers that he was approached by the applicant who offered to sell him the motor vehicle in question and he accepted the offer and made two cheques payable to the applicant personally (the cheques annexed marked "A" and "B"). He denies that he was in direct contact with the said Thomas Nsibandze through telephone calls. The respondent denies most of the applicant's averments. In a nutshell respondent's case is that he bought the motor vehicle from the applicant in his personal capacity and has nothing to do with the said Thomas Nsibandze.

This is the factual background in support of the respondent/plaintiffs case. The court then heard submissions in the contested motion.

It is contended on behalf of the applicant that this application is brought under the common law. Mr. Mabila for the applicant submitted that the applicant was acting as an agent in this matter and could not be liable as he made full disclosure as to who his principal was. The respondent and its lawyers were aware that the applicant was acting as an agent. The judgement was erroneously granted. It was granted fraudulently. To this effect the court was referred to the case of Schierhout vs Union Government 1927 A.D. 98. The applicant did not benefit anything in this whole transaction.

Miss Dlamini on behalf of the respondent submitted that the applicant should show why he failed to file a notice of intention to oppose and also why that his default was not wilful, (see Mnisi vs Mlawula Estate 1970 - 76 S. L. R. 349). The court should not condone the applicant's failure to issue a notice of intention to defend. Furthermore the applicant has not filed a reply to the answering affidavit (see Khumalo vs Director General 1991 (1) S.A. 167 (A -C)

3

In the case of Smith No. vs Brummer No. and another 1954 (3) S.A. 352 (o) cited in Msibi vs Mlawula Estates (Pty) Ltd (supra) the headnotes have this to say on the question of rescission of a judgement:

"In an application for removal of bar [and the same principles apply in applications for rescission of judgement]. The court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the court is to grant such application where (a) the applicant has given a reasonable explanation of his delay; (b) the application is bona fide and not made with the object of delaying the opposite party's claim; (c) there has not been a reckless or intentional disregard of the rules of the court; (d) the applicant's action is clearly not ill founded; and (e) any prejudice to the opposite party could be compensated for by an appropriate order as to costs. The absence of one or more of these circumstances might [Afrikaans mag I prefer "May"] result in the application being refused"

In the instant case my considered view based on the facts before me is that the applicant has satisfied all the above mentioned requirements. Applicant was acting as agent of another in the sale of the motor vehicle and he disclosed his principal. This objective fact is not denied by the respondent. After the motor vehicle was confiscated by the police on suspicion of being stolen the matter was taken by him and the respondent to respondents attorneys Shilubane, Ntiwane and Partners to seek advise who promised them that they will attend to this matter. On or about the 12th August 1998, he was served with summons. He approached respondent's attorneys about this new development. On or about the 11th November 1998, he was served with a court order which he subsequently faxed to Thomas Nsibandze.

Firstly, the applicant has given a reasonable explanation of his delay that he got assurances from respondent's attorneys that the issue was being attended to.

Secondly, he appear to have a bona fide defence that in this whole transaction he was acting as an agent one Thomas Nsibandze and he disclosed this fact to the respondent. In law he cannot, therefore be held liable.

Thirdly, in view of my observation in the first point above I could not detect any recklessness or intentional disregard of the rules of the court. He was at all material times labouring under a misapprehension that the attorneys for the respondent were on top of the matter.

Finally, in my view it cannot be said that applicant's action is ill founded as I have mentioned earlier in the course of this judgement.

In my view, in the totality of the facts before me I am inclined to grant the order as prayed for and that he defend the matter in a proper action.

Costs to be costs in the cause

S. B. Maphalala

Judge