804

THE HIGH COURT OF SWAZILAND

THE GOVERNMENT OF THE KINGDOM OF SWAZILAND
Applicant

ATLAS INVESTMENTS (PTY) LIMITED
Respondent

Civ. Case No. 1955/99

Coram S.W. SAPIRE,

For Applicant Mr. L. Maziya
For Respondent Mr. P. Flynn

JUDGMENT
(23/02/2000)

This is an application for rescission of judgment. The judgment which it is sought to have rescinded was granted as a summary judgment in terms of the rules.

The Respondent in these proceedings had instituted an action against the applicant as defendant claiming payment of amounts said to be owing in terms of an agreement providing for the acquisition by the applicant of property to be registered in the respondent's name. The issue of summons had been preceded by the delivery of a letter of demand as required when the Government is sued, and the applicant had opportunity at least from the time of receipt of such letter to investigate the validity of the claim. The applicant had at that point made part-payment in terms of the agreement and there was no reason to believe that any defence existed to the plaintiff's claim.

The applicant gave notice of intention to defend the action. The plaintiff in response made application for summary judgment and in due course set the matter down for hearing.

At the hearing the applicant was represented by Mr. Simelane of the Attorney General's office. When the matter was called Mr. Simelane informed the court that he had not yet had instructions as to what the defence was and was not in a position to obtain instructions because the Minister of State involved was overseas at the time no affidavit had ever been filed.. In reply to a question as to why the Principal Secretary could not furnish the details of any defence which the applicant may have, Mr. Simelane told the court that his instructions from the Principal Secretary were that

there was in fact no defence to the action. He went on to mention that Parliament had directed that no further payments were to be made. This of course is in itself no answer to the plaintiff's claim. The court cannot take cognisance of the directions of Parliament unless in the form of a duly promulgated statute assented to by the King. If indeed such a directive had been given one would have expected that the principal Secretary knew about it and would have been able to inform the court thereof and the reason therefor. There was however no affidavit before the court, and no acceptable reason advanced for the non-filing. In these circumstances there was no option but to refuse the application for postponement and to enter summary judgment as prayed.

It is important to bear in mind in relation to this application that the respondent was not in default and that the summary judgment was granted after the applicant had an opportunity of being represented presenting its defence and arguing the same. That this was not done does not constitute a default in the technical sense, of non-appearance which would entitle the applicant to a rescission of a judgment given in the absence of the defendant. The applicant seeks to rescind the judgment on the basis of having found a defence which it was not able to disclose to the court hearing the application for summary judgment.

There are a number of ways in which rescission of judgment can be granted. Rules also provide for variation of judgment in certain circumstances. None of these are applicable because the applicant was not in default when the summary judgment was granted.

Once the judgment was granted this court became *functus officio* and the granting of a rescission of a judgment is incompetent either in terms of the rules or under the common law.

Both Counsel appearing at the hearing of this application referred to **Chetty V Law Society, Transvaal** [1]. The relative potions of the Judgment of Miller JA to which my attention was drawn reads as follows: -

> "In the Supreme Court, a judgment granted by default can be set aside in terms of Rule 31 (2) (b); in terms of Rule 42 (1); and under the common law. De Wet and Others v Western Bank Ltd 1979 (2) SA at 1037H - 1038A. Neither Rule 31 (2) (b) nor Rule 42 (1) has any application to the facts of the present case. The appellant can only seek relief under the common law"

This it was common cause is the position in the present case. Later the Learned Judge said: -

> "It must be noted that a distinction is drawn between "the rescission of default judgements, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgements, whether by default or not, after evidence had been adduced on the merits of the dispute". De Wet and Others v Western Bank Ltd (supra at 1041B - D). In the case of default judgment granted without going into the merits of the dispute between the parties, the Court enjoyed the relatively wide powers of rescission described above. In the case of a final and definitive judgment, whether by default or not, granted after evidence had been adduced, the Court was regarded as functus officio. Such judgements could only be set aside on the limited grounds mentioned in the case of Childerly Estate Stores v Standard Bank of South Africa Ltd 1924 OPD 163; De Wet and Others v Western Bank Ltd (supra at 1041D - E); Seme v Incorporated Law Society 1933 TPD 213."

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[1] **1985 (2) SA 756 (A)**

In the present case, there were at the time of the application for summary judgment, no merits to be canvassed. The applicant had failed to put a defence before the court. On the contrary Counsel for the applicant disavowed any knowledge of a defence and went so far as to inform the court that the Permanent Secretary, who presumably was informed of the issues, was of the view that there was no maintainable defence. The Applicant now seeks to reopen the case to advance a defence not previously raised or even contemplated. If contemplated such contemplation was not intimated to the court, timeously or at all. The defence would appear to have been thought of after judgment had been given. The judgment is however final, subject to appeal but not capable of being rescinded.

Again the Learned Judge observed: -

> The appellant's claim for rescission of the judgment confirming the rule nisi cannot be brought under Rule 31 (2) (b) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See De Wet and Others v Western
> 1985 (2) SA p765
> Bank Ltd 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank of SA Ltd 1924 OPD 163.)

What is important to notice is that the common law remedy of rescission is available only in respect of judgments given where the party was in default of appearance. Only judgments, which may be rescinded, are those granted where the defending party was in default. Where there is no default no claim for rescission lies.

In this case if there was any error in the granting of the summary judgment the applicant's remedy would lie in an appeal. If not and if there is still any reason why the judgment should not be observed and obeyed then it is open to the applicant to institute fresh proceedings probably by way of action to seek *restitutio in intergrum* on the grounds of mistake or fraud.

See **De Wet and Others v Western Bank Ltd**[2]

I therefore hold that I have no power to grant the relief sought in this misconceived application. The application is accordingly dismissed with costs.

S.W. SAPIRE, CJ

[2] 1979 (2) SA 1031 (A)