THE HIGH COURT OF SWAZILAND

ALPHEOUS MALANCHI

1st Applicant

GLADYS MALANCHI

2nd Applicant

And

ALBERT MAMBA

Respondent

In re:

ALBERT MAMBA

Applicant

And

ALPHEOUS MALANCHI

1st Respondent

GLADYS MALANCHI

2nd Respondent

THE COMMISSIONER OF POLICE

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Civil Case No, 2087/2002

Coram S.B. MAPHALALA - J

For the Applicants MR. E. MAZIYA



For the Respondents MR. Z. MAGAGULA

JUDGEMENT

(On application for rescission in terms of Rule 42)

(04/04/2002)

This is an application for rescission of a spoliation order on the grounds that such Order was granted by the court in error. The rescission is being sought under Rule 42 of the High Court Rules. The Order was issued by Sapire CJ on the 9th July 2002.

On the 3rd October 2002, a further Order was issued by the learned Chief Justice as follows:

"Having heard Counsel for the 1st and 2nd Respondent and there being no appearance for the Applicant:

It was ordered that a rule nisi and us hereby issued returnable on the 18th October 2002, for the Applicant Albert Mamba to show cause why on the following terms should not be
granted;

a) The application (Notice of Motion) is postponed to the 18th October 2002.

b) That this order, together with the Notice of Motion and Supporting affidavits be served on the Applicant namely Albert Mamba.

c) That the Applicant is interdicted and restrained from in anyway disposing of, slaughtering, or otherwise parting with possession of the cattle which are the subject matter of these proceedings pending the final order and determination therein.

d) That the Applicant, may file affidavits to oppose by not later than 15th October 2002.

e) That the Deputy Sheriff when serving this order shall make an inventory of the cattle subjects to the interdict.

f) That the costs be are hereby reserved".

Reverting to the matter at hand, viz the application for rescission in terms of Rule 42 the Applicant pray for an order inter alia that the order granted in favour of Albert Mamba on the 9th July be rescinded; interdicting and restraining the Respondents from in anyway disposing of the herd of cattle attached under the said order pending finalization of this application for rescission of judgement of the said order; and the attached herd of cattle



be returned to the rightful 2nd Applicant Gladys Phongwane Malanchi (born Dlamini) with immediate effect.

The founding affidavits of both Applicants are filed in support thereto. The gravamen of the Applicants' case is that the order of the 9th July 2002, was granted in error since the grounds upon which it was granted are not correct in that the Respondents omitted to inform the court about the correct events leading to him being unlawfully deprived of his possession of the said herd of cattle. The 1st Applicant's version of events is that she is the owner of the sixteen (16) herd of cattle in dispute having owned same since sometime in the 1970's. She brought theses cattle from his natural father's homestead at Mankayane to keep some on behalf of her younger brother at her present homestead.

She deposed that 1st Respondent who is her husband to one Winile Myeni, alias Mamba by Swazi Law and Custom, sometime in 1995 and said Winile deserted her husband sometime in 1997 to date hereof. After the expiry of 3 years since Winile had deserted her husband's common marital homestead Albert Mamba approached the chiefs kraal and demanded payment of lobola. Subsequently on or about the 15th June 2002, which is the period alleged by Mamba to have been paid lobola of her 16 herd of cattle. Mamba was in fact not paid lobola by her husband or herself. The truth of the matter is that the 1st Respondent stole the said 16 herd of cattle from her kraal and drove some to his homestead without any court order or lawful authority on the 15th June 2002.

She avers that in the circumstances, it is not true that the 1st Applicant enjoyed undisturbed possession of the said cattle. Since he forcefully stole her herd of cattle on the 15th June 2002, he slaughtered one of them on the same day. For this reason she reported a case of theft of the said cattle and requested the assistance of the Royal Swaziland Police stationed at Manzini to endeavor to recover same from the 1st Respondent.

The police then went ahead to recover the cattle from the Respondent who had hidden them at Dzingabaleni Mazibuko's homestead and drove some back to her homestead.

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She was informed by her husband that certain man whom she believes was the Deputy Sheriff of this court did bring some papers in relation to this matter to him while she was away from her homestead but he had refused to accept service of same and had requested the Sheriff to serve same to the "mgijimi" of the area since he was illiterate to read same and further because the community had been warned not to sign any papers from strangers for fear of being defrauded.

She, therefore never received any papers regarding this matter to-date hereof and she was shocked when the Deputy Sheriff arrived to drive her cattle away on Thursday the 12th September 2002.

The Applicant avers therefore, that this court granted the order in favour of the Respondent because of an error and incorrect facts as furnished by Applicant and because she was not present during the hearing of this matter to give this court the true facts leading to the attachment of her cattle.

The 2nd Applicant also filed an affidavit in support of the application for rescission of judgment in terms of Rule 42. His affidavit in the main compliments that of the 1st Applicant. He deposed that when the Deputy Sheriff arrived with the High Court Order to drive all the cattle away from his homestead, he informed the "white man" whom he was informed was Mr. Mark Akker that he never had any cattle in the homestead since he was a foreigner and that the cattle belonged to his wife the 2nd Applicant. He further informed him that he must approach the Veterinary Attendant at the dipping tank to verify the truthfulness of his statement.

The Respondents have joined issue with the Applicants and an opposing affidavit of Albert Mamba is filed in opposition thereto. The Respondents have raised three points of law in limine as follows:

"Points in limine.

i) Security for costs.

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ii) Applicant has not paid security for costs either to Registrar of Respondent's attorneys in terms of the rules of this honourable court.

iii) The Applicant's have brought their application to court out of time as the notice was served on Respondent on the 20th November 2002, yet the Order against them was granted on the 9th July 2002, and the became aware of the Order on the 12th September 2002.

Mr. Magagula for the Respondent further put forth two additional points of law in limine in the Respondents amended Heads of Argument, these are;

i) The 2nd Applicant as a married woman has no locus standi in judicio to move this application unassisted by her husband;

ii) .....

iii) .....

iv) Ex facie the affidavit of the Applicants no irregularity has been shown to have been committed.

When the matter came for arguments on the 25th February 2003, Mr. Magagula for the Respondent abandoned the point of law that the Applicant has not paid security for costs in terms of the rules of court. Therefore, no further comment is required thereto. The points which were covered can be summarised as follows:

i) The 2nd Applicant as a married woman has no locus standi in judicio to move this application unassisted by her husband; and

ii) The application is time barred in that it was not brought to court within a reasonable period of time;

iii) Ex facie the affidavit of the Applicant no irregularity has been shown to have been committed.

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Counsel filed comprehensive Heads of Argument for which I am most grateful. I shall proceed to examine these points sequentially, thus:

i) Whether 2nd Applicant has locus standi in judicio.

The requirement of Rule 17 (4) that a Plaintiff or Defendant, if a female, must state her "marital status" renders it necessary to indicate whether she is a married or unmarried, widow or divorced. Failure to allege a female party's marital status in compliance with Rule 17 (4) has been held to render summons defective (see Rich & others and Lagerwey and another 1973 (1) S.A. 485 (w)).

With regard to application proceedings, it has been held that it is not necessary to state the sex of the party, whether a female party is married or not and, if married, her marital status, since Rule 6 does not require this (see Carson & others NNO vs Spencer 1982 (2) S.A. 755 (T)). In this respect, I agree with the learned authors Herbstein et al The Civil Practice of the Supreme Court of South Africa (4th ED) at page 130 that the decision in Rich and others (supra) appears to overlook the fact that a civil summons is defined as including a notice of motion. My considered view, is that it is necessary to state the "marital status" of a party.

In casu, this has not been done. The founding affidavit of the 2nd Respondent/Applicant merely states the following at paragraph 1:

"I am an adult Swazi female of Luhlokohla, near Engculwini School, Manzini district and cited in the above matter as the 2nd Respondent and I am duly authorised to make this affidavit, facts stated herein being within my personal knowledge and belief, true and correct".

In the premise I would uphold the point of law raised by the other side that she has not established her locus standi in terms of the law.

ii) That the Applicant is time barred in that it was not brought to court within a reasonable period of time.

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I have considered the arguments for and against this point of law in limine and my considered view is that this point has no substance in law. There are no time limits under Rule 42 of the High Court Rules. I have considered the facts in this matter I do not think that the Applicants can be time barred in enforcing their rights. I must say though that in casu there is no explanation given ex facie the papers why the application

for rescission is only moved on the 19th November 2002 when the order which is sought to be rescinded was granted on the 9th July 2002.

I hold therefore, that this point of law in limine ought to fail.

iii) Ex facie the affidavit of the Applicant no irregularity has been shown to have been committed.

Rescission may be granted in this jurisdiction under one or more of the following Heads:

a) Rule 31 (3) (b);

b) Rule 32 (ii);

c) Rule 42; and

d) The common law (see Leornard Dlamini vs Lucky Dlamini Case No. 144/97 (per Dunn J, unreported).

Rule 42 reads 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 judgement erroneously sought or erroneously granted in the absence of any party affected thereby.

In Bakoven Ltd vs G.J. Howes (Pty) Ltd 1992 (2) S.A. 466 at 471 F - H Erasmus J delineated the scope of application of this Rule in the following terms:



"Rule 42 (1) (a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is erroneously granted when the Court commits an 'error' in the sense of a mistake in a matter of law appearing on the proceedings. In contradistinction to relief in terms of Rule 32 (2) (b) or under the common law, the Applicant need not show "good cause" in the sense of an explanation for his default and a bona fide defence ... Once the Applicant can point to an error in the proceedings, he is without further ado, entitled to rescission".

There is no dispute in the present case that the application is confined to the provisions of Rule 42(1) (a).

It is my view that the above statement of law is clearly and accurately reflective of the application of our Rule 42, which is in part materia with that in the Republic of South Africa. I will therefore follow the requirements set out as operative in casu. The question I am now called upon to answer is whether in relation to the points raised by the Applicants, there is an error by the court, which if had been aware of would have induced it not to grant the order that it did. In the instant case the Applicants in my view have not shown the "error" in the sense of a mistake in a matter of law appearing on the proceedings. The "error" which the Applicants are relying on is that the court only had one version of events when it granted the Order it did not have the Applicants' version. Had the court heard, so the argument ran, the Applicant's version it would not have granted the Order. In my view, this cannot be an error contemplated by Rule 42, in any event the nature of spoliation proceedings is that invariably courts grant such Orders on the basis of the Applicant's version ante omnia. The mandament van spoile is aimed at summary restoration of unlawfully disturbed control without an investigation into the merits of the dispute, in order to undo the results of the spoliation, thus the maxim spoliatus ante omnia restituendus est. (see Olivier et al, Law of Property (2nd ED) at page 189 paragraph (4.4.4).

For the above-mentioned reasons the Applicants cannot succeed under Rule 42.

The point of law in limine is therefore good in law and ought to succeed.



It would appear to me that the only course open to the Applicants is to proceed by way of rei vindicatio or any other possessory actions which may be available to them.

In the result, the application is dismissed with costs.

S.B MAPHALA

JUDGE