1304

THE HIGH COURT OF SWAZILAND

MATSAPHA TOWN BOARD

And

ANKA (PROPRIETY) LIMITED
1st Respondent

THE DEPUTY SHERIFF MANZINI
2nd Respondent

IN RE:

ANKA (PROPRIETY) LIMITED
Plaintiff

And

MATSAPHA TOWN BOARD
Defendant

Civil Case No. 2766/2000

Coram	S.B. MAPHALALA – J
For the Applicant	MR. W. MKHATSHWA
For the Respondents	MR. K. MOTSA

JUDGEMENT
(15/08/2003)

Before court is an application brought under a certificate of urgency for an order as follows:

1. Waiving the rules of this Honourable Court regarding service, forms and time limits and hearing the matter as one of urgency.

2. Directing that rule nisi do hereby issue, returnable on a date to be determined by this Honourable Court, calling upon

   2.1 The 2nd Respondent to show cause why he should not be interdicted and restrained from removing and selling by public auction, the goods of the Applicant placed under judicial attachment on the 3rd April 2001 as listed in the notice of attachment annexed to the Applicant's affidavit marked "MT5".

   2.2 The 1st and or 2nd Respondent to show cause why they should not pay the costs of this application in the event of unsuccessful opposition hereto.

3. Staying execution of the judgment granted by this Honourable Court in the main action under Case No. 2766/2000 pending the finalisation of this application.
4. Rescinding and/or setting aside the judgment granted by this Honourable Court on the 13th October 2000.
5. Granting the Applicant leave to defend the main action instituted by the Respondent in terms of the Summons dated 23rd August 2000.
6. Directing that the 1st and or 2nd Respondents pay the costs of this application only in the event of unsuccessful opposition hereto.
7. Granting the Applicant such further and/or alternative relief as to the Honourable Court may seem meet.

The founding affidavit of the Chairman of the Applicant Myekeni E. Vilakati is filed in support of the application. Pertinent annexures are filed viz, a notice of application for judgement by default in terms of Rule 31 (2); annexure "MT3" – being an order of this court dated the 13th October 2000; annexure "MT4" being a writ of execution and annexure "MT5" – being a notice of attachment by Inalda Antonio dated the 3rd April 2001. A confirmatory affidavit of one Vusi Dlamini is also filed.

The Respondents has raised a number of points of law *in limine* which are the subject matter of this judgement. However, before dealing with the points of law raised I find it imperative to sketch the history of the matter. The Applicant is a statutory body duly established in terms of Section 111 of the Urban Government Act, No. 8 of 1969 (hereinafter referred to as the "Act"). The first Respondent is Anka (Proprietary) Limited, a company with limited liability duly registered and incorporated in accordance with the Laws of the Kingdom of Swaziland, with its principal place of business situate at King Sobhuza II Avenue, Plot No. 180, Matsapha, district of Manzini.

The second Respondent is the Deputy Sheriff for the district of Manzini.

On or about the 24th August 2000, the first Respondent commenced proceedings and set in train a course of events which have led to the institution of the current proceedings. These events are outlined in paragraphs 5.1 to 5.6 of the Applicant founding affidavits as follows:

"5.1 On the 24th August 2000 the combined summons in the action was caused to issue;

5.2 The combined summons was served on one Vusie Dlamini, at the Applicant's premises at Matsapha on the 22nd September 2000. A copy of the return of service is hereto annexed and marked MT1.

5.3 On the 16th day of October 2000 the 1st Respondent made an application for judgment by default, a copy of which is annexed and marked MT2. For ease of reference, two 92) aspects of annexure MT2 are highlighted.

5.3.1. At paragraph (a) the cause of action is described as: *"Damages sustained as a result of the Defendant's failure to carry out its obligations in terms of the Urban Government Act NO. 8 of 1969"*, and

5.3.2. At paragraph (e) the "time for the filing of the Notice to Defend expired on the 6th October 2000".

5.4 On the 13th day of October 2000, His Lordship, Mr. Justice Maphalala made an order in the following terms:

"1. **That the Defendant pay the sum of E197 774-86**

2. **Interest on the sum of E197 774-86 at the rate of 9% per annum a *tempore morae* to date of final payment.**

3. **The Defendant is compelled to forthwith install or cause to be installed a proper drainage system in respect of the property of the Plaintiff.**

4. **The Defendant is forthwith compelled to take whatever steps and/or decisions may be required in order to give immediate effect to the order referred to in (3) above.**

5. **Costs of suit.**

6. **Such further and/or alternative relief".**

7. A copy of the court order is hereto annexed and marked MT3.

5.5 A writ for payment of the sum of E197 774-86 was caused to issue on the 8th November 2000 a copy of which is annexed hereto marked MT4.

5.6 Pursuit to the writ certain goods belong to Applicant were attached and a copy of the Notice of Attachment is hereto annexed and marked MT5.

The Applicant avers that the service of the summons upon Vusi Dlamini was defective in paragraph 6.1, 6.2, 6.3, 6.4, 6.5, 6.6 and 6.7 of the founding affidavit.

In paragraph 7 of the founding affidavit the Applicant challenges the default judgment granted on the ground that the Plaintiff's claim was clearly illiquid and that this fact is borne out by paragraph (6) of annexure "MT2" the first Respondent states that an affidavit in proof of damages was attached. (see paragraphs 7.1, 7.2, 7.3 and 7.4 of the founding affidavit.

At paragraph 9 the Applicant avers urgency as follows:

"Urgency

9.1 The matter is urgent by virtue of the fact that writ has been caused to issue as the order directing the Applicant to rectify the drainage problems.

9.2 An attachment was in fact effected by the Deputy Sheriff Inaldo Antonio (nee Herpes) and a copy of the said notice of attachment is annexed.

9.3 I am advised and verily believe that presently the 2nd Respondent, Martin Akker has been appointed on ad hoc basis to finalise execution against the Applicant.

9.4 I am further advised and believe that our attorneys of record herein had secured indulgence from the 1st Respondent's attorney for an extension of time up to the 7th February 2003 whilst they considered amicable solution of this matter. As the said period has expired, the 2nd Respondent may at any time remove the attached property and thereafter cause the same to be sold by public auction to the loss and prejudice of the Applicant.

9.5 Further, an application may be sought seeking the committal of the Applicant to contempt in failing to comply with an order of court.

Reverting to the points of law *in limine*. These points are couched in the following language:

1. Applicant moved an urgent application under certificate of urgency.
   1.1 Respondent states that the application should fail as Applicant has failed to state the reasons of urgency and why it will not be afforded a remedy in future in terms of the normal limits as required by Rule 6 (25)
   1.2 Applicant has also failed to explain why it waited for two years before it launched an urgent application.
   1.3 Consequently, this application should fail on this basis.

2. Secondly, Applicant has failed to show this Honourable Court either under Rule 31 (3) (b) and the common law the following:
   2.1 it has failed to show that it made a reasonable explanation why the rescission was launched; and
   2.2 why instead of advancing its defence in court, for two years it was offering to settle the judgment.
3. Applicant has for almost two years represented through its representatives and attorneys to Respondent that the court judgment will be settled.
   3.1 Consequently, Applicant is estopped from repudiating its representations and now coming to court and seek to rescind the said judgment.

They came for arguments before me. *Mr. Motsa* for the Respondent argued that the Applicant has not complied with the peremptory provisions of Rule 6 (25) of the High Court rules in that the Applicant has not firstly, stated why it cannot be afforded a remedy in due course. The court in this regard was referred to the case ***Lindiwe Kunene (born Dludlu) vs Bheki Kunene – High Court Case No. 2390/99.***

Mr. Motsa further contended that the Applicant has not complied with the rule relating to rescission. That under the common law and Rule 31 (3) (b) a party applying for a rescission has to give a reasonable explanation for the delay in bringing the application. As stated in paragraph 4.2 of the reply the Applicant has failed to do so and hence its application ought to fail. The court was referred to the cases of ***Richard John Perry N.O vs Musa Magongo Civil Trial No. 127/97; D.M.M. Estates (Pty) Ltd vs Daniel Mamba Case No. 3151/2001*** at page ***8; and Herbstein et al The Civil Practice of the Supreme Court of South Africa (4th ED)*** at page ***691*** to support this point.

The last point advanced in argument in support of the points of law *in limine* raised is that assuming that the Applicant had a defence which is denied, Respondents submits

that it is estopped from raising a defence as for two years has represented to Respondents that it was going to settle the debt and the court is referred to paragraph 4.2 to 4.1.4 of the reply. The court was further referred to the following cases: ***Freeman vs Lockeyern Buckhorst Part Property (Maga) Ltd 1964 (1) E.R. 630 CCA*** and the work by Rabbie P.J. ***The Law of Estoppel in South Africa (1992) P. 18.***

Mr. Mkhatshwa for the Applicant advanced arguments *per contra.* Firstly, on the point of urgency he contended that this aspect of the matter has become academic, however, what prompted the Applicant to launch these proceeding is what is contained in paragraph ***9.4*** of the founding affidavit. The said paragraph reads as follows:

> "I am further advised and believe that our attorneys of record herein had secured indulgence from the first Respondent's attorneys for an extension of time up to the 7th February 2003, whilst they considered amicable solution of this matter. As the period has expired, the second Respondent may at any time remove the attached property and thereafter cause the same to be sold by public auction to the loss and prejudice of the Applicant.

Secondly, *Mr. Mkhatshwa* argued that *Mr. Motsa's* reliance on the correspondence between the parties should not be taken into account by the court. The contention here is that correspondence which takes place between the parties is always "without prejudice". None of these letters constitute any admission of liability on the part of the Applicant.

Thirdly, it is contended on behalf of the Applicant that this application is brought in terms of Rule 42 (1) of the High Court Rules. The application is premised on a *dictum* by Erasmus J, in the case of ***Bakoven Ltd vs GJ Howes 1992 (2) S.A. 466*** at *471 E – H* where the learned Judge stated the following:

> "It follows that a court in deciding whether a judgement was "erroneously granted" is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the common law, the Applicant need not show "good cause" in the sense of an explanation for this default and a bona fide defence" (my emphasis).

The learned Judge went further to say at paragraph *G – H* of page *471* of the judgement:

> "Once the Applicant can point to an error in the proceedings, he is without further ado entitled to rescission...".

Mr. Mkhatshwa contended that it is common cause that in *casu* no *viva voce* evidence or affidavit was led despite the fact that this was an illiquid claim. That this was an error of law. It does not matter, so the argument ran when the application is brought. It can be brought even after 20 years. *Mr. Mkhatshwa* cited the cases of ***Dawson & Fraser (Pty) Ltd vs Havenga Construction (Pty) Ltd 1993 (3) S.A. 397 (BGD); Hardroad (Pty) Ltd Veibi Motors (Pty) Ltd 1977 (2) S.A. 576 (w)*** at *578 B – C, De Wet and others vs Western Bank Limited 1977 (4) S.A. 770* and ***Nyingwa vs Norman 1993 (2) S.A. 508 (TK)*** at *510* to buttress his point.

On the third point of estoppel *Mr. Mkhatshwa* reiterated what he said on the correspondence between the parties that all correspondence between the parties is on "without prejudice" basis. Out of all the correspondence between the parties there was no admission of liability at all by the Applicant.

The Applicant cannot be estopped from protecting its right which were reserved.

These are the issues raised in this matter. There are three issues raised viz, i) urgency; ii) whether Rule 42 is applicable; and iii) whether the Applicant has been estopped.

I shall proceed to determine each in *seriatum,* thus;

i) **Urgency**

When the matter came for argument *Mr. Motsa* for the Respondent withdrew point 1.1 in his Heads of Arguments *viz* that the Applicant has failed to state the reasons of urgency and why it will not be afforded a remedy in due course in terms of the normal limits as required by Rule 6 (25). This he did in view of paragraph 9 of the Applicant's founding affidavit which sets out the grounds for urgency. However, *Mr.*

Motsa contended that the Applicant has not explained *ex facie* the papers why it waited for 2 years to file this matter under a certificate of urgency. *Mr. Mkhatshwa* answered by referring the court to paragraph 9.4 of the founding affidavit. The explanation given for launching these proceeding as such an urgent basis is as follows:

> "9.4 I am further advised and believe that our attorney of record herein had secured indulgence from the 1st Respondent's attorney for an extension of time up to the 7th February 2003, whilst they considered amicable solution of this matter. As the said period has expired, the second Respondent may at any time remove the attached property and thereafter cause the same to be sold by public auction to the loss and prejudice of the Applicant".

There is correspondence between the parties which indicate that from the time the order which is sought to be rescinded was obtained the parties were engaged in some negotiations with the view to settle the matter out of court.

My view, on the basis of the facts before me is that Applicant has proved urgency to satisfy the strictures of Rule 6 (25) and thus the point of law *in limine* raised in this regard is without merit.

ii) Whether Rule 42 is applicable

It has become trite in this division that an Applicant when applying for a rescission of a judgement has to state under which head the rescission is sought. The *dicta* by Dunn J (as he then was) in the case ***Leonard Dlamini vs Lucky Dlamini Civil Case No. 1644/97*** is instructive in this regard and counsel for the Applicant is well advised to appraise himself with the wisdom contained therein.

It can only be gleaned from the various averments made in the founding affidavit and from what counsel for the Applicant has stated from the bar that the rescission is sought in terms of Rule 42 of the High Court Rules.

The Applicant's case is premised on the dictum in ***Bakoven Ltd (supra)*** where Erasmus J stated the following at paragraph ***F*** to ***H*** of page ***471***: "It follows that a court in

deciding whether a judgment was "erroneously granted" is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to the relief in terms of Rule 31 (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...".

The learned Judge went on to state the following:

> "Once the Applicant can point to an error in the proceedings, he is without further ado entitled to rescission. (my emphasis).

The Applicant contends that in *casu,* the judgment granted by this court on the 13th October 2000, in favour of the 2nd Respondent was clearly in error. The error lay on the fact that since this was an illiquid claim the Respondent ought to have filed an affidavit to proof damages or lead *viva voce* evidence. In the present case no such evidence was led.

In ***Bakoven Ltd (supra)*** Erasmus J held that a judgment may be set aside in terms of Rule 42 (1) (a) on the ground that it was erroneously granted only if the court has made a **"mistake in a matter of law appearing on the proceedings of a court of record".** The issue that presents itself in *casu* is whether there was a mistake in a matter of law. In the present case I am inclined to agree with *Mr. Motsa* that the non-filing of the affidavit to prove damages by the Respondent is not an error of law but a procedure followed by the courts. Therefore the *ratio* in ***Bakoven Ltd (supra)*** cannot apply. Further, the court will normally exercise its discretion in favour of an Applicant who, through no fault of his own, was not afforded an opportunity to oppose the order granted against him and who, having ascertained that an order has been granted, takes expeditious steps to have the position rectified. (see ***Herbstein (supra)*** at page ***698*** and the cases cited thereat). It is common cause that the Applicant knew of the judgment as far back as the year 2000. In *casu* the Respondent has surely not taken expeditious steps as required in the circumstances. There has to be finality in legal proceedings.

For the above reason I find that the point of law *in limine* raised in this regard is good in law and the application ought to be dismissed on this ground.

Coming to the last point of law *in limine*, viz iii) the issue of estoppel I find that in view of the conclusion I have reached above, any further discussion would be merely academic. I find it not necessary to determine this point of law *in limine*.

In the result, I dismiss the application with costs.

S.B. MAPHALALA

JUDGE