THE HIGH COURT OF SWAZILAND

VJR ESTATE AGENTS	Applicant
And	
TANYA STANLEY	1st Respondent
WILLIAM KELLY NO.	2nd Respondent
In Re.	
TANYA STANLEY	Applicant
And	
VJR ESTATE AGENTS	Respondent
Civil Case No. 1228/2004	
Coram	S. B. MAPHALALA – J
For the Applicant	MR. M. MABILA
For the Respondent	MR. G. MASUKU

JUDGMENT

02/12/2004

[1] Serving before Court is an application brought under a Certificate of Urgency for an order rescinding and/or setting aside the Order granted by this Court on the 6th

May 2004, for the Respondents, in particular the 2nd Respondent, to forthwith restore possession of the attached items to the Applicant; that the execution of the order granted by the Court on the 6th May, 2004 be stayed and/or set aside; and costs.

[2] The Managing Director of the Applicant one Brian Martin has filed a Founding affidavit outlining the facts of the matter leading to the lis between the parties. The facts of the matter are that the Applicant is an estate agent. On the 1st September 2003, the Applicant, acting for and on behalf of Ngwane Mills (Pty) Ltd (hereinafter referred to as the "landlord"), entered into an oral agreement of lease in terms of which the landlord leased to the Respondent, who accepted, certain premises being Plot 37, Kelly Street, Coates Valley, Manzini district (hereinafter referred to as the "premises"). The lease was on a month-to-month basis and the rental payable was E3, 500-00 per month payable with the Applicant for onward transmission to the landlord.

[3] According to the Applicant the Respondent breached the agreement between the parties when the latter defaulted in payment of the rental as she only paid the sum of E2, 000-00 from March 2004, leaving a balance of El, 500-00 and did not pay any amount at all for the month of April 2004, May 2004 and June 2004 and as such was in arrears in the sum of E12, 000-00. On the 4th May 2004, the landlord instructed the Applicant to lock out the Respondent from the premises. On the 2nd August 2004, the Applicant was served with a writ of execution by one William Kelly who is the Acting Deputy Sheriff for the district of Manzini wherein payment of the sum of E4, 956-22 was being claimed in respect of a taxed Bill of Costs.

[4] The 1st Respondent successfully moved a spoliation application before this Court after she was locked out by the Applicant on the 4th May 2004. The court granted the said Order on the 6th May 2004.

[5] The Applicant then launched the present application for the rescission of the Order of the 6th May 2004. In paragraph 11 of the Founding affidavit the Applicant avers that the said Order was granted in error in that no proper service was effected on the Applicant before the same was obtained. That where a company is being served the purported service must be done in accordance with Rule 4 (2) (e) which requires

that same be done at that particular company's registered office and/or principal place of business on a responsible employee.

[6] The second leg of the application for rescission of the Order of the 6th May 2004, is that the Applicant was not given sufficient notice to instruct attorneys to enter an appearance in the matter as it was served hardly three hours before the hearing of the matter.

[7] The third leg of the application is that there was non-joinder of the landlord viz Ngwane Mills (Pty) Ltd as a Respondent in the principal application yet the 1st Respondent had been informed that the instruction to lock the premises had come directly from the landlord and when she moved the application she failed to bring this to the attention of the court.

[8] The fourth argument advanced in support of the application for rescission is that the 1st Respondent failed to inform the court on the 6th May 2004 of the existence of an oral lease agreement between the parties and that 1st Respondent was in arrears amounting to E12, 000-00 and therefore, so the argument goes, has breached the principle of uberramae fides in ex parte applications.

[9] After hearing the parties and reserved judgment and on perusal of the Judge's file I discovered that I had granted the Order which is the subject-matter of this application. Thereafter I called Counsel to chambers with a view to let another Judge to hear the matter, so as to give the matter an independent consideration as sitting in judgment over your own judgment may raise suspicions of one or other kind. However, both sides managed to persuade me to hear the matter.

[10] I proceed to examine the above questions ad seriatim: thus i) Whether the spoliation order was granted in error.

[11] In this regard, it is contended for the Applicant that the initial urgent application for a spoliation order was granted in error as no proper service on Applicant had been effected in terms of Rule 4 (2) (e) of the Rules of Court

Rule 4 (2) (e) thereof provides as follows:

"In the case of a corporation or company, by delivering a copy to a responsible person at its registered office or a responsible employee thereof at its principal place of business within Swaziland, or if there is to such person willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law",

[12] Annexure "VJR3" to the Applicant's Founding affidavit being the affidavit of service reads, inter alia, as follows:

"...3 I did on the 6th day of May 2004 at ll00hrs effect service upon the Respondent's Grace Maseko

as follows:

3.1 Exhibiting the original along with copies and carefully explaining the nature and exigency thereof;

3.2 Issuing her with process to receive and sign for same;
3.3 Leaving behind a copy of the urgent application;

4. Grace refused to sign for a receipt of service of process..."

[13] The said Annexure "VJR3" is an affidavit of service deposed to by one Zanele Fakudze who describes herself therein as an adult female messenger of Masuku & Company attorneys. Her duties, inter alia, involve serving court process on behalf of Masuku & Company.

[14] The attack by the Applicant is that it is not clear ex facie Annexure "VJR3" that the person named therein viz Grace Maseko is a "responsible employee" in terms of the Rule.

[15] It would appear to me that the Applicant bases its application for rescission on Rule 42 of the High Court Rules though this has not mentioned in the application as per the dicta in the case of Leonard Dlamini vs Lucky Dlamini - Civil Case No. 1644/97 (unreported).

5 Rule 42 of the High Court Rules thereof reads as follows:

42. (1) 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 judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rale shall make application therefore upon notice to all parties whose interests may be affected by any variation sought

(3) The Court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

The Applicant seems to be relying on Rule 42 (1) (a) that the Order of the 6th May 2004, was erroneously sought or erroneously granted in the absence of any party affected thereby.

[16] According to the dicta in the case of Deary vs Deary 1971 (1) S.A. 227 (C) and at 230 H an Applicant must satisfy the court that the judgement was granted, not only in his absence, but erroneously. The question of what constitutes an error for purposes of Rule 42 has been a subject matter of a number of decided cases (see Topol & others vs L.S. Group Management Services (Pty) Ltd 1988 (1) S.A. 639 (W) at 648 E - 650 C, Dawson 's Fraser (Pty) Ltd vs Havenga Construction (Pty) Ltd 1993 (3) S.A, 397 (B) at 402 - 403 B and Bakoven Ltd vs G. J. Howes (Pty) Ltd 1992 (2) S.A. 466 (E) at 417 F). In casu it appears to me that the service being attacked was good for purposes of the application made by the Respondent as it did, on urgent basis. Therefore I find that the Applicant cannot succeed under the Rule 42 (1) (a).
ii) Short service.

[17] In this regard the Applicant contends that it was given insufficient time of three (3) hours to instruct an attorney. The Respondent on the other hand argues that the court granted 1st Respondent relief in terms of Rule 6 (25) (a) and (b) exempting her from strict compliance to the rules relating to time limits and service. In this regard I agree with the submissions made by the Respondent and also wish to add that a court has a wide discretion in such matters and important factors taken into account

are the relative strengths of the parties' respective cases and whether any other adequate remedy is available, (see in general, Herbstein and Van Winsen, The Civil Practice in the Superior Courts of South Africa, 3rd ed at page 59 - 60 and Jourbert, The Law of South Africa (Vol. 3) in paragraph 348 at page 300).

[18] For the afore-going reasons the Applicant cannot succeed in this argument. iii) Non-joinder of landlord,

[19] In this regard, it is contended by the Applicant that the other error which is glaring in the matter is the non-joinder of the landlord being Ngwane Mills (Pty) as a Respondent in the principal application yet the 1st Respondent had been informed that the instruction to lock the premises had come directly from the landlord. It appears to me that the argument advanced by the 1st Respondent countering that of the Applicant is correct that the lease agreement was entered into by the former with the latter and not Ngwane Mills and therefore the issue of non-joinder does not arise. Even if the source of the instruction to lock the Applicant out eminated from Ngwane Mills, it was an illegal act despoiling her without a lawful order hence both landlord and Applicant both stand at fault in law. In any event, it is trite law that it is no defence for the spoliation that the despoiler acted as an agent of another person. Since the mandament van spolie is aimed at discouraging unlawful spoliation the remedy should be instituted and enforced against the person who has actually committed the spoliation, and therefore this defence is inadmissible, (see Bennett vs Black 1918 EDL 253, Silberberg and Schoeman, The Law of Property, 1983 Butterworths at page 139 and Olivier et al, The Law of property (Students' Handbook), 2ndEdition, Jut a & Co. at page 293 and the cases cited thereat).

[20] For the afore-going reasons I find that the argument of non-joinder has no merit in law.

iv) The principle uberramae fides.

[21] It is trite that in all ex parte applications, the Applicant must observe the utmost good faith in placing material facts before the court (see Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition, Juta at page 312 and the cases cited thereat). In the present case the argument advanced on behalf of the Applicant is that the 1st Respondent failed to inform the court that she was in arrears in respect of rental and thus breaching the principle of uberramae fides. This argument in my view, overlooks the general principle in spoliation proceedings that even a lessee who is in arrears is entitled to the spoliation remedy should he be ousted of his possession, (see Silberberg and Schoeman (supra) at page 138).

[22] In the final analysis, no basis is shown for rescinding the Order, which was obtained on an application by mandament van spolie.

[23] The present application is therefore dismissed with costs.

S.B.MAPHALALA

JUDGE