IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

In the matter between

Civil Case No. 1071/2004

Eric Mawelela Applicant

and

Lungile Magagula Respondent

In re:

Lungile Magagula Applicant

and

Eric Mawelela Respondent

Coram: J. P. Annandale, AC J

For Applicant:Mr. M.D. Mamba of Mamba 85 Company, Nhlangano

For Respondent: Mr. S. Dlamini of Millin and Currie, Mbabane

JUDGMENT

8 December 2005

[1] The High Court issued a Rule Nisi against the present applicant wherein he was to show cause why it should not be made a final order that a certain motor vehicle be restored to the then applicant. This was done on the 22nd April 2004 and thereafter, on the 24th September 2004, the interim order was confirmed. This application is to rescind the latter order. Interim relief, such as staying the taxation of costs, has been ordered prior to the hearing of this application. Should the order of the 24th September 2004 be rescinded, the applicant further seeks leave to oppose the initial and main application against it.

[2] The rescission application does not state on which basis it is sought, whether it be under the common law, Rule 31(3)(b), Rule 32(11) or Rule 42. At the hearing of the application, Mr. Mamba who appeared for the applicant, stated that relief is sought under Rule 42(l)(a) and if need be, then under the common law.

[3] The common law empowers the court to rescind a judgment obtained on default of appearance, provided that sufficient cause has been shown - De Wet v Western Bank Limited 1979(2) SA 1031(A); Chetty Law Society, Transvaal 1985(2) SA 756 (A) at 765 B - C. Rescission can also be ordered on grounds of fraud, (Makings v Makings, 1958(1) SA 338(A)), Justus error, (on rare occasions) (De Wet v Western Bank Ltd supra at 1039H - 1043A), and the discovery of new documents (in exceptional circumstances).

[4] Provision for rescission, as applies to the present application, is set out as follows in Rule 42:-

"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 of judgment erroneously granted in the absence of any party affected thereby, (b)... (c)...»

[5] It is this provision under Rule 42(1)(a) which the applicant relies upon to have the order against it to be set asid and to be granted leave to  oppose the application. It is common cause that the present applicant, the respondent in the main application, did not appear at the time when the rule nisi was confirmed. He wanted to do so, but the proverbial horse had already bolted the stable at the time when the opposing affidavit was filed, some five days too late.

[6] Unlike rule 32(11), which is not presently applicable, Rule 42(1)(a) does not also have a

requirement that an applicant must show "good" or sufficient cause, that is, to present a reasonable and satisfactory explanation for his failure to appear at the hearing of the application and satisfy the court that on the merits he has a bona fide defence, which, at least prima facie, carries some prospect of success (See the (unreported) judgment of Dunn J in Civil Case 1644/97 Leonard Dlamini v Lucky Dlamini at page 2 in fine and 3 supra.

[7] The applicant's contention is that had the court been aware of the existing circumstances at the time it confirmed the interim order against him, it would not have done so, in other words, that it was done in error. The error it contends is that he was not aware of when this would be done and therefore did not timeously place his case before court for consideration of the merits of his answer. He says that if the court was aware of his ignorance, the order would not have been made due to his unintended default of appearance.

[8] The applicant furthermore says, more as an aside than holding it forth as a reason to rescind, that in any event, even if the order remains as it is, he would not be able to comply with it as he does not have the vehicle which he must restore to the respondent's possession, thus an impossibility to perform his obligation.

[9] The brief history of the applicant's case, is that the respondent came to court, as the then applicant, on an urgent basis, and obtained a rule nisi against him. The essence of the interim order was to authorise the deputy sheriff to seize, attach and keep in his possession, pending the

outcome of the application, a certain Toyota Cressida motor vehicle. He was then to show cause on the return date why the vehicle should not be returned to the then applicant and why he should not pay the costs of the application on a punitive scale.

[10] The notice under which the application was brought had it that the application would be made ex parte on the 22nd April 2004, on which date it was obtained. The order filed in the book of pleadings reflects that the return date was the 30th April 2004, further it is endorsed by hand that the matter is postponed to the 27th August 2004, not the 30th April as typed at first, and as endorsed by the court on the court file. The court file further reflects that the matter was thereafter postponed many times (ten in all) until the 24th September 2004, when on the contested roll, the rule nisi was eventually confirmed, with my endorsement "No opposing papers filed".

[11] The deputy sheriff states in his return of service of the court order that he served the then respondent personally with the Order on the 24th August 2004 and that he amended the postponement date on it from the 30th April to the 27th August 2004. What he does not also state in his return is that he also would have served the application itself.

[12] On the 27th August, the then respondent had barely been aware of the matter, having

received a copy of the interim order but not also the application itself, together with the founding and supporting affidavits. It was on that day transferred to the contested roll of the 24th September, a practice followed when an application is contested or opposed. At all time in between the interim relief was extended.

[13] In his affidavit wherein he motivates why he seeks the order against him to be rescinded, the applicant confirms that he received only the interim order on the 24th August 2004, not also the application with supporting papers, also that the amendment of the date thereon (from the 30th April) to the 27th August was done in his presence.

[14] He continues to state that on the 26th August, he made enquiries by telephone at the office of the Registrar of the High court and that he was told that the court was in recess, also that there would be no motion court on the 27th. It is common cause that whatever he may have been told, the court indeed sat on the 27th August, it being the last day of the second session.

[15] The applicant says that it was on the 27th August when he consulted with his attorney, Mr. Mamba, presenting to him the papers he was served with. At the same time, his attorney also told him that the court was in recess. That same day, his own attorney telephoned the erstwhile applicant's attorneys and informed them that the application and its ancilliary papers were not

also served. He says he was not told of a future court date at the time.

[16] Attorneys Millin and Currie acting for the then applicant, by way of a letter dated the 31st August 2004, confirm the telephone conversation of the 27th August with Mamba. They further state that further process would be served on his local correspondents.

[17] Thereafter, on the 1st September 2004, a full set of the application papers were served on the correspondent attorney's office, constituting service on the then respondent. During hearing of this application, I recorded this date to be stated as the 8th and not the 1st September, according to Mr. Mamba. It is possible that an error could have been made by either myself or Mr. Mamba, but the correct date is indeed the 1st September, as evidenced by the recipient's recording of the date as well as the now respondent's affidavit (paragraph 9.1).

[18] The dispute about the absence of knowledge by the applicant of the court proceedings against him on the 24th September, when the interim relief was confirmed, is central to the issue at hand.

[19] The applicant states in paragraph 7 of his affidavit that seemingly the papers served on the 1st September, were intended to also include a copy of the order placing the matter in court on

the 24th September, the "final" return date. He is supported in this contention by a sworn statement made by his own attorneys correspondent's receptionist, in Mbabane. She received the application and supporting papers on the 1st September, constituting service thereof on the applicant, but adds that "there was no court order accompanying such documents served on me", referring to the order dated the 27th August which extended the rule nisi to the 24th September, when it was confirmed in the absence of the present applicant, by default of resisting it.

[20] The respondent contests this, relying on a filing certificate that "...clearly states that there is a Court Order served along with the initial ex parte application." She is correct insofar as the filing certificate goes, but the filing certificate itself does not explain away the sworn statement to the contrary. It is quite possible that the two pages containing the order might have been omitted from the served papers.

[21] The respondent has a point to querie the omission by the applicant or his attorney, blaming them for the failure to do so in the three weeks before the interim order was confirmed. Whoever may be blamed, it does not prove that the then respondent indeed did have knowledge that on the 24th September, the matter against him would be before court to obtain finality.

He states under oath that he did not know about it. Prima facie he is corroborated in it by the

person who received the papers, sans the order. The filing certificate which indicates otherwise does not, in my view, override their sworn statements. If the applicant or his attorney was somewhat lax in the matter, it still does not follow that he must be deemed to have known about the matter but failed to oppose it. He did oppose it, but only after the order was made against him. He filed and served his opposing affidavit on the 29th September, the third court day after the final order.

The applicant states that he only became aware of the final order on the 8th October, when it was served on him. He lacked alacrity to seek a rescission of it, only filing his present application on the 28th October, twenty days later, but it does not debar him from doing so.

The present facts lead to a conclusion that the applicant cannot be held to have known that on the 24th September, finality of the rule nisi would be sought against him. He cannot be found to have failed to timeously oppose it, though in fact he was just too late.

When the court ordered the rule nisi to be confirmed, it was done under the erroneous supposition that he was in default, which he actually was not. Had the full position been known, the matter would have had to be held in abeyance and his opposing affidavit would have been considered, which it was not.

In my view, this brings the matter squarely within the ambit of Rule 42(1)(a). This rule is a

procedural step designed to correct expeditiously an obviously wrong judgment or order, which is "erroneously granted", when the court commits an "error" in the sense of a "mistake in a matter of law appearing on the proceedings of a court of record". To decide if the order was "erroneously granted", the court is confined to the record of proceedings before it and no more. 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 recession. See Bakoven Limited v G J Howes (Pty) Limited 1992(2) SA 466 (ECD).

It is for the reasons as set out above that it is found that the order in this matter was erroneously granted, on the mistaken belief that the then respondent was in default of opposing the matter. It was an error to deem him to have known that he was out of time to file his opposition to the application, or that he chose to abide by the decision of the court, based on only the version of the applicant, without consideration of his own version. It was an error to act under the mistaken belief that he knew about the date when order was to be made final.

[27] Therefore, it follows that he has to succeed in his application to have the erroneously granted order rescinded, as is provided for under Rule 42(l)(a). Costs are ordered to follow the event and the order to keep the taxation of costs on hold until finalisation of the matter is extended until that time. The applicant is granted leave to defend the main application, wherein he has already filed his papers.

J.P. ANNANDALE

ACTING CHIEF JUSTICE