THE HIGH COURT OF SWAZILAND

ADELAIDE SIYAPHI MKHONTA T/A PANDORA RESTAURANT

Applicant

And

SEBGOLD INVESTMENTS (PTY) LTD

1st Respondent

MARTIN AKKER

2nd Respondent

In Re:

SEBGOLD INVESTMENTS (PTY) LTD

Plaintiff

And

ADELAIDE SIYAPHI MKHONTA T/A PANDORA RESTAURANT

Defendant

Civil Case No. 108/2005

Coram: S .B MAPHALALA - J

For the Applicant: MISS R. MAMOGOBO

For the Respondent: MR. RODRIQUES

JUDGMENT

(18/03/2005)

[1] The application before court was brought under a Certificate of Urgency for a rescission of an order by this court entered on the 4th February 2005. The application was brought under Rule 42 of the High Court Rules.

[2] On the 21s1 January 2005, the Respondent sought to perfect the landlord's hypothetic by way of ex parte application. A rule nisi returnable on the 4th February 2005, was issued and same |was served on the Applicant on the 24lh January 2005. The Applicant made payment on the 3rd February 2005 and the Respondent proceeded to confirm the rule nisi on the 4th February 2005, without alerting the court that the Applicant had settled rentals by making full payment at the offices of the Respondent's attorneys.

[3] In the Founding affidavit the Applicant avers, inter alia, that the order of the 4lh February 2005, was fraudulently sought and erroneously granted in her absent. '

[4] The Respondent opposes the application for rescission and states amongst other things, that the acceptance of

the payment of the arrears on the 3rd February 2005, was not a condition precedent to stay proceedings against Applicant as there was other outstanding issues in their application to perfect a landlord hypothetic i.e. cancellation of the agreement of lease; ejectment and so forth. The Respondent was perfectly entitled to perfect its landlord hypothetic as it did on the 4th February 2005, when the rule nisi was confirmed by the court.

[5] Miss Mamogobo who appeared for the Applicant relied heavily on the dicta by Innes J in the Appellate Division case of Webster vs Ellison 1911 A.D. 73 at 86 where the remedy of the perfection of the landlord's hypothetic was defined in the following terms:

"...though it springs directly and immediately from the relationship of landlord and tenant, it is operative only when so long rent is in arrears".

[6] Therefore, so the argument goes, the Applicant having made full payment was no longer in arrears and the remedy of perfection of the landlord's hypothetic was no longer available to the Respondent. The court was misled into pronouncing the final order which the Applicant seeks to rescind. The court would not have confirmed the rule nisi had the Respondent brought it to the attention of the court that payment had already been made and received by its attorneys on its behalf. In this regard the court was referred to the case of Swart vs Wessels 1924 OPD 189 - 190 where the following was said:

"... a parry seeking to set aside a judgment on the grounds of fraudulent evidence must prove three items namely;

a) That the evidence was in fact incorrect;

b) That it was fraudulently and with intent to mislead; and

c) That it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than what it was induced by incorrect evidence to give".

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[7] The second argument advanced on behalf of the Applicant is that she was not given notice regarding her late payment of arrears rentals. In this regard the court was referred to the case of Putco> vs T.V. Tradio Guarantee Co. 1985 (4) S.A. 809 (A). Further, that it is standard practice in the landlord and tenant relationship that if the lessee breaches a material term of the contract of lease, notice should first be given allowing the lessee to remedy the breach and then failing same the lessor is then entitled to cancel the agreement of lease and then evict the lessee. No notice was ever given to the Applicant and when she was served with the notice of application she made good the breach by settling the entire arrears rentals.

[8] The present application is under Rule 42 (1) (a) of the High Court Rules. The said Rule reads as follows:

"The court may, in addition to nay other powers it may have, mew 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:"

[9] According to the author Erasmus, Superior Court Practice, Juta at B - 306 in order to obtain a rescission under this sub-rule the Applicant must show that the prior order was "erroneously sought or erroneously granted". Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the sub-rule to apply. An order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such an order, or if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment (see Nyingwa vs Moolman N.O 1993 (2) S.A. 508 (TK)).

[10] In Bakoven Ltd vs G J Howes (Pty) 1992 (2) S.A. 466 (E) at 471 F Erasmus J held that a judgment may be set aside in terms of Rule 42 (1) (a) on the ground that it was eiToneously granted only if the court has made a

"mistake in a matter of law appearing on the proceedings of a court of record", and in deciding whether a judgment was erroneously granted, the court is confined to the record of the proceedings.

[11] The ground in the present case under Rule 42 (a) is that there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment. In casu that the court was not alerted that Applicant had settled the arrears in making full payment at the offices of the Respondent's attorneys.

[12] It appears to me on the facts that the Applicant is the author of its own problems in that it chose to sit on its rights despite having due notice of the proceedings against her in particular the return date. It cannot be said on the facts that the order was erroneously sought or erroneously granted in the absence of a party affected thereby. Further, it appears to me that the payment of arrear rentals by the Applicant was not the end of the matter as there were other forms of relief still outstanding. In the totality of the facts and the submissions by Mr. Rodriques I am in agreement with the dictum propounded in the case of De Wet and others vs Westers bank Ltd 1979 (2) S.A. 1031 (A) at 1043 B - 1044E that the Appellants were the authors of their own problems and that it would be inequitable to visit the other party to the action with the prejudice and in convenience flowing from such conduct.

[13] For the afore-going reasons I find that Applicant has failed to satisfy the requirements of Rule 42 arid therefore the application for rescission is refused by costs.

S.B. MAPHALALA

JUDGE