THE HIGH COURT OF SWAZILAND

FERMA SWAZI (PTY) LIMITED

Applicant

And

PHIWOKWAKHE MASUKU

1st Respondent

SIKELELA DLAMINI

2nd Respondent

In Re:

PHIWOKWAKHE MASUKU

Applicant

And

TRANS UNION ITC (PTY) LIMITED

1st Respondent

FERMA SWAZI (PTY) LIMITED

2nd Respondent

Civil Case No. 1344/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MISS N. MULELA

For the Respondents: MR. BHEMBE

JUDGMENT

(29th July 2005)

[1] Serving before court is an application for rescission of a judgment by default under Rule 42 (1) (a) of the Rules of the High Court. The application was brought under a Certificate of Urgency for an order, ***inter alia,*** rescinding and/or setting aside the Court Order granted against the Applicant in favour of the Respondent on the 13th May 2005; the 2nd Respondent release Applicant's property from attachment under Case No. 1344/2005 pending determination of prayer 2; interdicting and restraining the 2nd Respondent from removing, selling and/or disposing the attached goods in any manner pending the final determination of this application; and granting the Applicant the costs of this application only in the event of opposition thereto.

[2] The Founding affidavit of one Ntokozo Mabuza, who is Manager of the Applicant, is filed in support thereto. In the said affidavit averments are made explaining the background of the matter. At paragraph 13 and 14 Applicant sets out the basis of this application as follows:

13.

The Applicant never anticipated any action by the **1"** respondent on this issue as it knew that it was not collecting from him when the Applicant was served with the Notice of Motion under Case No. 1344/2005 wherein the l'1 Respondent was moving an application against the Applicant as 2,uJ Respondent for it to withdraw his name from the black list of 1TC. the

Applicant merely thought that it was being cited as an interested party since it had assisted the 1st Respondent earlier on and that the main person responsible for sending the names to 1TC was Real people (Pty) Limited and not the Applicant, furthermore the Applicant was not the debt collector in this matter. The Applicant therefore submits '-hat the order which was granted against the Applicant was granted erroneously.

The Applicant farther submits that, it should not have been made party to these proceedings at the onset, since it has never handled any debt collection against the 1st Respondent for any of its clients

[3] The 1st Respondent opposes the application for rescission and in this regard has filed his Answering affidavit of record. The 1st Respondent has made a number of averments where in answer to paragraph 13 of the Applicant's Founding affidavit the following is stated:

AD Paragraph 13

Contents hereof are vigorously denied and Applicant is put to strict proof thereof.

"9.1 Applicant was served with the application under Case No. 1344/2005 wherein it (Applicant) was the 2ai Respondent.

9.2 The application or Notice of Motion itself had a specific prayer sought against Applicant who was the 2nd Respondent.

9.3 My Founding affidavit has averments specifically directed to the Applicant which could not have escaped any eye. Clearly therefore it is not correct that 1" Respondent's application was never anticipated by Applicant and that the order against Applicant was granted erroneously. I refer to prayer (b) of the initial notice of Motion and paragraphs 8 and 9 of my Founding affidavit in "SB 1" attached hereto".

[4] Further at paragraph 15 he avers as follows:

"H AD paragraph IS

Contents hereof are denied and Applicant is put to strict proof thereof. Applicant was clearly aware of the application by myself as the deponent of Applicant's Founding affidavit was served with the application and chose to disregard it. I refer to

the supporting affidavit of Mxolisi Mkhonta hereto attached who served Ntokozo Mabuza with the application."

[5] When the matter came for arguments Miss Mulela relied heavily on two South African decided cases, namely Tshabalala and another vs Peer 1979 (4) S.A. page 27 and that of De Sousa v Kerr 1978 (I) S.A. 635 on good cause shown and contended that in casu such has been shown by the Applicant.

[6] Or. the other hand, Mr. Bhembe who appeared for the Respondent advanced arguments au contraire that Applicant received the Notice of Motion but failed to act on it and therefore is the author of its own problems. He relied on what is said by the authors Herbstein et al. The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 698 and the cases cited thereat including the celebrated case of Chetty vs Law Society, Transvaal 1985 (2) S.A. 756.

[7] Rule 42 (1) (a) thereof 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 judgment erroneously granted in the absence of any party affected thereby".

[8] The position of the law as regards the operation of the Rule was clearly enunciated by Erasmus J in Bakoven Ltd vs GJ. Howes (Pty) Ltd 1992 (2) S.A. 466 E at 471 F, 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", and in deciding whether a judgment was erroneously granted, the court is confined to the record of the proceedings.

[9] Clearly in this case, Applicant has not averred any mistake of law on the part of the court appearing within

the confines of the record. It appears from the facts on affidavits that Applicant sat of its rights and this much was conceded by Counsel for Applicant in argument. It is abundantly clear on the affidavits that the 1st Respondent's application in which the order of the 13th May 2005 was granted involved the Applicant. The 1st Respondent fully complied with procedural rules of this court in that it served Applicant timeously with the Notice of Motion which clearly named Applicant as 2nd Respondent. Applicant neglected to oppose this application and therefore it cannot rely on the provisions of Rule 42 (1) (a) in its application for rescission and that the order was not erroneously granted. 1 agree, in toto with the submissions made by Mr. Bhembe when he cited the legal authorities in Herbstein (supra) where the learned authors say, " if the Applicant is the author of his own problems, the court is not likely to order rescission". The present case is a classical example of the scenario described by the learned authors cited above.

[10] In the result, for the afore-going reasons the application is dismissed and the costs to follow the event.

S.B. MAPHALALA
JUDGE