IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No.2809/2008

WANDILE NDZINISA Applicant

And

PROTRONICS NETWORKING CORPORATION (PTY) LTD Respondent

Coram	S.B. MAPHALALA - J
For the Applicant	MR. W. MKHATSHWA
For the Respondent	MR. M. MABUZA

JUDGMENT 12th

September 2008

This is an application for rescission under Rule 31 (3) (b) brought under a Certificate of Urgency.

[2] The Applicant seeks to rescind an order granted by this court on the 12th August 2008.

[3] The order is pursuant to simple summons which were issued and served on the Applicant, which were never defended by it because it alleges that its director received same on 6th and 8th August 2008 and further proceeded to instruct its attorneys on the 8th August 2008. Same was promptly served and filed on 8th August 2008, thus the *dies* had not expired (reference to paragraph 5 of the Founding affidavit and paragraph 6 of its Replying affidavit).

[4] The application for rescission is opposed and Respondent has raised several points *in limine.* The first point raised is based on the doctrine of clean hands as propounded in the landmark decision of this court that of *Photo Agencies (Pty) Ltd vs The Commissioner of the Swaziland Royal Police and the Government of Swaziland 1970 -76 S.L.R.* page *398* at *407.* The argument in this regard is that Applicant designed, as a way of restoring the attached goods an alternative option and thus a consent order was agreed and entered into by the parties, which the court endorsed on the 14th August 2008, for which it was to be complied with by the Applicant before close of business on the 15th August 2008. The Applicant has made no attempt to nor did it have the intention of complying with the said consent order and now wishes this court to come to its rescue in rescinding the default judgment granted on the 12th August 2008. That the court cannot entertain the Applicant as it is enmeshed in the web of deceit of its own creation and as such cannot derive advantage from its own bad faith.

[5] The second point raised is that in this case there are disputes of fact. These disputes are outlined in Respondent's Heads of Arguments at page 4. The third point is that of urgency and the arguments in support thereto are found at page; 5 and 6 where Respondent has cited the following decided cases. *Humphrey Henwood vs Maloma Colliery and Another - Case No. 1623/1994, H.P. Enterprises (Pty) Ltd vs Nedbank Swaziland Ltd - Case No. 788/1999, Ben Zwane vs Deputy Prime Minister and Another -Civil case No. 624/ 2000 and that of Protronics Network Corporation (Pty) Ltd vs Emcom Africa (Pty) Ltd and Another - Civil Case No. 852/2000.*

[6] The third point raised is that Applicant has not satisfied the requirements of an interdict being (i) clear right, (ii) apprehension of harm, (iii) balance of convenience and (iv) no other satisfactory remedy. In this regard the court was referred to the High Court case of *Percy Ngcamphalala and Another vs The University of Swaziland - Civil Case No. 4436/2007.*

[7] The last point raised by the Respondent is that Applicant has not complied with Rule 31 (3) (b) of the High Court Rules. That Applicant has made a fibble attempt to meet the requirements of Rule 31 (3) (b) as the *bona fide* defence is bald, vague or sketchy. In this regard the court was referred to the cases of *Maia vs Total Namibia (Pty) Ltd 1991 (2) S.A. 188 (NM), Terrance Auto Services centre (Pty) Ltd and Others vs First*

National Bank of South Africa Ltd 1996 (3) S.A. 209 (W) and that of *Haulage (PVT) Ltd vs Mumurgwi Bus Services (PVT) Ltd 1980 (1) S.A. 729 (2 RR).*

[8] The Applicant has submitted arguments against the above submissions by the Respondent that they are ill-conceived on the facts of the matter.

[9] I shall proceed to determine these arguments *ad seriatim* as stated by the Respondents above as follows:

(i) The doctrine of clean hands.

[10] Having considered the arguments of the parties regarding this point *in limine* although the Applicant has an election to abide by the terms of the consent agreement which was made an order of this court or reject it he cannot pick and choose the terms that suit him and reject what does not. By doing so Applicant would be guilty of contravening the doctrine of clean hands. Applicant has to go the full hog by adopting all the terms of the consent order. In the instant case it is clear that Applicant is picking and choosing which term of the agreement suit its purposes.

[11] I must say that this cannot be allowed in law and therefore the point *in limine* by the Respondent succeeds. In view of the importance of this matter to the parties I will not dismiss this application on this ground alone, as I should, but will address the other points raised *in limine* for the sake of completeness.

(ii) Disputes of fact

[12] In this regard it is submitted for the Respondents that there is a general judicial agreement that the court can entertain proceedings on motion only where there is no genuine dispute of fact, *(per Herbstein and Van Winsen, 4th Edition Juta 1997* at page *234).* In *casu* the Applicant seeks to explain that he received the summons on the 6th and 8th August 2008 (reference to paragraph 5 of the Founding affidavit and paragraph 6 of its replying affidavit).

[13] Applicant states that a Notice of Intention was served and filed on the 8th August 2008 when in fact it was served on the 13th August 2008. Applicant states further that the summons was served on the 30th July 2008 by a person other than 2nd Respondent and present thereat were. Mbali Dlamini (Applicant's receptionist) and Simphiwe Hlophe (Applicant's Logistics Officer). Summons were served by Bhekithemba Dlamini. In this regard further facts are submitted by Respondent's Counsel at pages 3 to 4 of His Heads of Argument.

[14] In arguments before me Counsel for the Applicant conceded the point that indeed there is a dispute of fact as stated by the Respondents but that this dispute of fact can be resolved by calling *viva voce* evidence.

[15] It is trite law as stated in the landmark case of *Room Hire Co. Pty Ltd vs Jeppe Street Mansions (Pty) Ltd (3) S.A. 35* that **"an Applicant who deliberately initiates proceedings by**

way of motion when he knows that a real dispute of fact must inevitably arise, and for which an action is the appropriate procedure, does so at his peril".

[16] The learned authors *Herbstein et al (supra)* at page *234* state that **"it is clearly undesirable in cases in which the facts relied upon are disputed to endevour to settle the disputes of fact on affidavit, for the ascertainment of the true facts on affidavit, by the trial judge in considerations not only of probability, which ought not raised in motion proceedings, but also of credibility of witnesses giving evidence *viva voce.*"''**

[17] It appears to me that on the facts of the present case that the true version cannot be verified by the court without the aide of oral evidence and the Applicant ought to have foreseen the situation. I further agree with the Respondent's contention that it is imperative that it be ascertained when the Applicant was served with the summons and to whom they were served because that is the determining factor whether the Applicant has a *bona fide* defence and has shown good cause to entitle it to a rescission of the default judgment. For these reasons I would rule in favour of the point *in limine* and thus the application also falls to be dismissed on this point.

(iii) Urgency

[18] It is contended for the Respondent that this matter is not urgent because the Applicant states that the basis for urgency are that 2nd Respondent has attached its movable property and that attachment has effectively shut business down for the Applicant. Furthermore, that it cannot be afforded substantial redress in due course as the Applicant would have shut down business by the time the application is finalized. The Applicant has failed to lay explicitly, the circumstances that render the matter urgent.

[19] In support of this argument Respondent has cited a number of decided cases which has been outlined in para [5] of this judgment.

[20] The Applicant in para 12 has outlined facts proving urgency. These points are the following:

(a) **It is my submission that the matter has now assumed a significant degree of urgency as the 2nd Respondent has now attached movable property from the Applicant, barely twenty-four (24) hours after judgment was granted. I have annexed a copy of the Notice of Attachment marked annexure "B".**

(b) **It is worthy of note that the attachment by virtue of all the items attached, has effectively shut business down for the Applicant.**

(c) **I am advised and believe that if this matter were to be heard in due course, observing the usual time limits, Applicant could as well shut down business by the time the application is finalized.**

[21] Having considered the arguments of the parties in this regard I am inclined to agree with the arguments of the Respondent that a matter is not urgent because of a decision taken by a party at whim but certain circumstances have to be alleged and proven to persuade the court to hear the matter as one of urgency. Further, Applicant has failed to show that it cannot be afforded substantial redress in a hearing in due course, in that it has failed to even allege that an order including an order for damages cannot be enough redress should the application be granted.

[22] For the afore-going reasons I rule that the Applicant has not proved urgency in accordance with Rule 6 (25) (a) and (b) of the High Court Rules and therefore the application would fail even on this ground.

(iv) Requirements of an interdict.

[23] The fourth point raised *in limine* is that Applicant has failed in its affidavit to meet the requirements of an interim interdict which are:

(d) clear right

(e) apprehensive of convenience

(f) balance of convenience

(g) No other satisfactory remedy.

[24] In this regard the court was referred to the High Court case of *Percy Ngcamphalala and Another vs The University of Swaziland 4436/2007.* The above requirements do not appear *ex facie* the papers of the Applicant herein and if same are not met then Applicant cannot be afforded the relief it seeks.

[25] It would appear to me that Applicant has not attempted to deal with this point of law but has merely stated that this ground has been waived by the issuance of the interim relief which interim relief Applicant is relying upon has not even complied with, thus defeating the so-called "waiver". It is clear in this case that Applicant for certain purposes recognizes the consent order but for others would want the court to believe that there was no consent order. For these reasons therefore this points *in limine* succeeds.

(v) Non compliance with Rule 31 (3) (b).

[26] The argument in this regard is that the Applicant has failed to meet the requirements of Rule 31 (3) (b) of the High Court Rules. This Rule requires that a Defendant who has knowledge of a judgment may apply to court to set aside such judgment and the court may upon good cause shown, that is present a reasonable doubt and acceptable explanation for his default and have a *bona fide* defence with some prospects of success set aside the default judgment.

[27] It is the Respondent's contention that Applicant has failed to meet the requirements of this Rule which is peremptory. On the other hand Applicant contends that it has met the requirements of the relief sought in that the application has been brought within twenty-one (21) days after gaining knowledge of the said judgment. That

Applicant has set out in its papers a good reason for its default in defending the action timeously. The summons was served on the Applicant on the 30th July 2008, upon Applicant's receptionist in the presence of the Applicant's Logistic Officer.

[28] It appears to me that Applicant's evidence from which it can be inferred that it has a *bona fide* defence to the action is that 1st Respondent's claim is not a liquid claim as the breach of the agreement of the parties was committed by the 1st Respondent in failing to render the said services to completion. It would appear to me also that this defence is bald, vague or sketchy. I find the legal authorities outlined above in para [7] of this judgment are apposite.

[29] In the result, for the afore-going reasons the points *in limine* advanced by the Respondents succeed and therefore the application is dismissed *in limine* with costs to follow the event.

S.B. MAPHALALA

PRINCIPAL JUDGE