IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO.4437/08**

In the matter between:

ALBERTINA MTHUPHA N.O. **1st Applicant**

ESTATE LATE SONDELANI MTHUPHA

t/a SIPHIWO BUS SERVICE **2nd Applicant**

SIBONISO C. DLAMINI **3rd Applicant**

MASTER **OF** THE HIGH COURT 4th Applicant

ATTORNEY-GENERAL **5th Applicant**

And

PHINEAS MALINGA **1st Respondent**

BHEKITHEMBA DLAMINI N.O. **2nd RESPONDENT**

In re:

PHINEAS MALINGA **Plaintiff**

And

ESTATE LATE SONDELANI MTHUPHA

t/a SIPHIWO BUS SERVICE **1st Defendant**

MFANZILE MHLANGA **2nd Defendant**

SIBONISO C. DLAMINI N.O. **3rd Defendant**

ALBERTINA MTHUPHA N.O. **4th Defendant**

MASTER OF THE HIGH COURT **5th Defendant**

ATTORNEY-GENERAL **6th Defendant**

Date heard: 01 July, 2009.

Date of judgment: 14 July, 2009.

Mr. Attorney M.S. Simelane for the Applicants

Mr. Martin Dlamini for the Defendant

JUDGEMENT

MASUKU J.

[1] This is an interlocutory application for the rescission of a judgment of this Court granted by default on 16 December, 2008. The judgment, in favour of the 1st Respondent, was in the amount of E20 584.20, being in respect of damages allegedly sustained by the 1st Respondent, as a result of a motor vehicle accident which allegedly occurred between the 2nd Applicant's vehicle and the 1st Respondent's vehicle on 3 May, 2007.

[2] It is unclear, regard had to the *pro forma* filed in respect of the default judgment as against which of the Defendants the said judgment was granted and this point remains moot. In his submissions, Mr. Simelane, for the Applicants, stated that the application for rescission was moved in terms of the common law. I shall briefly consider the requirements for success under the common law, although a reading of the papers in proper detail would suggest, as I pointed out during argument, that the head under which this application can most properly and conveniently be brought, is Rule 42 (1) of this Court's Rules.

[3] In the case of *Lucky Dlamini v Leonard Dlamini* Case No. 1644/97, Dunn J, pointed out and

correctly so, if I may add, that in this jurisdiction, an application for the rescission of a judgment, may be moved under four different heads: namely, Rule 31 (3) (b) for judgments by default; Rule 32 (11) for rescission of a summary judgment; Rule 42 and the common law.

[4] Where an applicant moves such application in terms of the common law, such party must satisfy two requirements *viz:* (i) that he or she has a reasonable and acceptable explanation for the delay in filing the relevant papers in the absence of which the judgment in question was granted and; (ii) that on the merits, he or she has a *bona fide* defence, which *prima facie* carries a prospect of success at trial. See *Grant v Plumbers* 1949 (2) S.A. 470 (O) and Herbstein & van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, Juta, 1997 at p 691.

[5] As I have mentioned above, in the instant case, I have come to the conclusion that there are a number of errors which were unfortunately not brought to the attention of the Court when the judgment by default was entered. I am also of the considered view in this regard that had the Court's attention been so drawn at the relevant

time, it is unlikely to have entered the judgment that it did.

[6] In the light of my views expressed in the immediately preceding paragraph, I am of the considered opinion that this case that falls neatly within the rubric of the provisions of Rule 42 (1) (a) above. This is not, however, to say that there are no prospects of success of the application under the common law, as contended on the Applicants' behalf. Rule 42 (1) (a) has the following rendering:

"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; .

I interpolate to observe that the Applicants have, in the instant case, made the mandatory application referred to above and on notice to parties who may be affected by the Order that the Court may be minded to grant, as necessarily

required by the provisions of Rule 42 (2). In this regard, the Applicants stand on *terra firma.*

[7] I should point out, however, that there are certain parties who do not stand to be affected whatsoever by any order that may be granted but who have, however, been cited and served with the relevant papers in these proceedings. I have in mind particularly the 4th and 5th Applicants. They do not, in my view, stand to suffer any prejudice and have no interest whatsoever in the granting of the application for rescission sought on the papers. This is therefore a clear case of misjoinder. It is neither necessary nor desirable to merely regurgitate the citation of the parties as they appear in the order or judgment sought to be rescinded if they do not have any or sufficient interest in the said rescission application. The citation of the parties in the rescission application need not be a replica of the initial proceedings.

[8] I am also of the considered view that the Applicants cannot properly hide behind the

facade of Rule 6 (23) of the Court's Rules for citing and serving the said Applicants. I say so for the reason that in terms of the said sub-Rule, where the application sought to be brought to Court is in connection with the estate of a deceased person or one under legal disability, then the party initiating the proceedings "shall, before such application is filed with the Registrar, be submitted to the Master for consideration and report; . . ." This provision does not require the Master to be cited as a party. Submission of the said report is not equivalent to citation and service, considering that the submission of the application is required even before the application is filed with the Registrar.

I now revert to Rule 42 (1). The proper interpretation to be accorded the provisions of the above-quoted sub-Rule is to be found in the cases of *Bakoven Ltd v G.J. Howes (Pty) Ltd* 1992 (2) S.A. 466 (E) and *Nyingwa v Moolman* 1993 (2) S.A. 508 (Tk G.D.) In the former case, the learned Erasmus J. stated the applicable position, which it has been held in numerous cases of this Court equally applies in this jurisdiction, as the

following at 471 E-G:

> "Rule 42 (1) (a), it would seem to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment 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 the Court record . . . It follows that a Court, in deciding whether a judgment was 'erroneously granted' is like a Court of appeal confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the common law, 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 rescission."

[10] In the *Nyingwa* case (op *cit),* at 510 C, White J. stated the position as follows:

"It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have induced the Judge, if he had been aware of it, not to grant the judgment."

It then becomes abundantly clear that the question which this Court has to determine at this juncture, is whether there was an error in law from a consideration of the record of proceedings and of which the learned Judge who granted the default judgment was unaware and that if he had been made aware thereof, would have induced or precluded him from granting the aforesaid judgment.

[11] In my view, there were some errors in the papers; both on procedural and matters of substantive law, the existence of which the Court's attention was not drawn to, but would otherwise have inevitably led to the Court not granting the judgment. In the first place, a reading of the particulars of claim shows that same was defective. I say so because although

the summons was signed and dated by both the Registrar or her representative, and the 1st Respondent's attorneys of record, the particulars of claim were not dated and the page on which the Plaintiffs attorney's signature ought to appear is conspicuously but inexplicably missing from both the certified copy of the combined summons and indeed the copy in Mr. Dlamini's possession.

[12] This was contrary to Rule 18 (1). Although not specifically prescribed in the Rules of Court, the particulars of claim must be dated and it must be stated that the Plaintiffs attorney was alive to this requirement as provision for the same was made in the process in question. The date was however, not inserted. It is not enough, as Mr. Dlamini sought to argue, that the summons had been signed and dated. It is also necessary that the annex thereto, being the particulars of claim, be signed and dated by the plaintiffs attorney, because it is not only desirable but mandatory that only duly admitted attorneys should prepare and sign such documents because only they, (save for self-actors), have the authority in law to do so. Otherwise, floodgates would be swung

wide open for unauthorized persons to draft the same and there would, as a result, be no knowing if the person who drafted the same was authorized by law and the client concerned, to do so, particularly in the absence of a signature of the author.

[13] Secondly, it is clear that the claim was based on the alleged negligence of the 2nd Respondent's employee, namely the 2nd Defendant. In essence, it was being alleged that the 1st Defendant was vicariously liable for its aforesaid servant's negligence. For a claim such as the present to hold against an employer, it is necessary that clear and proper averrals are made. According to the learned author and Judge, Harms, Aimer's Precedents of Pleadings, 6th ed, Lexis Nexis, 2003, at p 348, a claimant for damages for vicarious liability must allege and prove that the person who committed the delict was (i) an employee of the defendant; (ii) he performed the delictual act in the course and scope of his or her employment; and (iii) what the employee's duties were at the relevant time. See also the authorities therein referred to. Nothing less than that would suffice.

[14] In his particulars of claim, the Plaintiff stated at paragraph 3 that the 2nd Defendant was "believed" to be in the 1st Defendant's employ. Belief, whether justified or not, is not proper or warranted in pleadings. There must be a clear averral of fact to that effect. The only other allegation made regarding vicarious liability is to be found in paragraph 8 of the particulars of claim where it was alleged that the said vehicle was driven by the 2nd Defendant "on his Lawful employment *(sic)* to the 1st Defendant".

[15] This allegation, in my opinion, does not go far enough to allege that when the said accident occurred, the said 2nd Defendant was acting in the course of duty. He may well have been on a frolic of his own. To this extent, it is clear that the particulars of claim were excipiable as they did not disclose a cause of action against the 1st Defendant and I have no doubt that had this issue been brought to the Court's attention, it would not have granted the judgment. Furthermore, because of the use of the word

"belief, recorded above, it cannot be said that a clear and forceful allegation was made as to what the 2nd Defendant's duties with the 1st Defendant were at the material time.

[16] Furthermore, although the present claim is based on the 2nd Defendant's alleged negligence, the particulars thereof were not disclosed. In such claims, the plaintiff has a duty to particularize the nature of the defendant's negligence e.g. that he failed to keep proper look-out; drove the vehicle at an excessive speed in the circumstances e.t.c. Harms *[op tit)* at p256, states that "The plaintiff must allege and prove that the defendant was negligent. <u>It is not sufficient to allege negligence alone. The particular grounds of negligence must be detailed."</u> (Emphasis added). All such allegations are conspicuous by their absence in the present claim. The particulars of claim were again defective in this regard and had this defect been brought to the attention of the learned Judge, I have no hesitation that he would not have granted the judgment he did.

[17] I am also under no illusion that had it been brought to the attention of the learned Judge that the returns of service were not in accord with any of the provisions of Rule 4, he would not have been satisfied that proper service had been effected on the relevant defendants. Regarding service on the 1st

Defendant, there is no return of service or affidavit on file which was placed before the learned Judge at the time default judgment was entered. The allegation of service was made belatedly in the answering affidavit, where the Deputy Sheriff alleged for the first time that he had served the process on one Fana Mthupha. This clearly amounts to an afterthought.

[18] Fana, is on record in his affidavit, as stating that he was never served with the said process. It was incumbent upon the Plaintiff to satisfy the Court in the circumstances, that at the time that default judgment was applied for and eventually granted, the 1st Defendant had been properly served. As I have said, there was no instrument or document before Court which showed that service had been properly effected on the 1st Defendant or at all, considering that the latter

had been cited as a separate party.

[19] Regarding the 1st Applicant (4th Defendant), the return of service records that service was effected on her in terms of Rule 4 (2) (i), by service of the same on the 3rd Applicant (3rd Defendant). This was by means of "pasting" the process on the door of the 3rd Applicant's law firm. There is no provision in the Rules for such service, save in respect of companies and even then only where there is nobody willing to accept service, in terms of Rule 4 (2) (e). In that event, service is effected by affixing the process on the main door. One cannot even be certain at any rate *in casu* that the door where the "pasting" of the process was done was actually the 'main door', the term employed in the said sub-Rule in question.

[20] Reliance was also placed by Mr. Dlamini, in support of the service, on the provisions of Rule 4 (2) (i). That sub-Rule applies "if two or more persons are sued in their joint capacity as trustees, liquidators, executors, administrators, curators or guardians, or in any other joint representative capacity . . ." It is common cause that the 1st and 3rd Applicants were not appointed

in any joint capacity in connection with the deceased's estate in question. Although both were appointed in respect of the estate of the late Sondelani Mthupha, their respective duties and offices were different.

[21] The 1st Applicant was the administrator, whereas the 3rd Applicant was the executor. The allegation that the 1st applicant was an administrator of the estate was not denied in the answering affidavit. It is therefore clear that the two Respondents were not appointed in any joint capacity. The common denominator, being that they were appointed in respect of the same estate, was not sufficient to justify service of one on the other. To this extent, it is clear that the purported service on the 1st Applicant was bad and not consonant with the Rules. Had the Court been made aware of this error, it would no doubt not have been satisfied with the service and would have accordingly refused to grant the judgment.

[22] The service on the 3rd Applicant also had problems of its own. It is alleged that service on the 3rd Applicant was effected by "pasting" the process on the door of his law firm, after several

aborted attempts at service. As indicated earlier, this type of service is resorted to only when consequent to there being no person willing, but otherwise available, to receive service at the said premises. This was certainly not the case because there was simply nobody at the said office. The doors were locked. The 3rd Respondent, in any event, denies the allegation that he was told on the telephone about the service. Even if he had been told, that would not have served to regularize an otherwise irregular mode of service. If the service of process is bad and is particularly not in compliance with the Rules of Court, then *cadit quaestio:* no judgment may properly be granted in those circumstances.

[23] It can also not be correct, as Mr. Dlamini sought to argue, that the service on the 3rd Applicant was at his chosen *domicilum citandi.* I say so for the reason that the 3rd Applicant was appointed as an executor in his personal capacity and not in his capacity as the senior partner of his law firm. For that reason, he would have had to be served either in person, at his place of business or in some other permissible manner stipulated in the Rules of Court. In this regard, where a

domicilium citandi has been chosen as the proper mode of service, this would normally have specifically been by agreement of the parties, usually recorded in a memorial. There is no such allegation of such agreement in the instant case. I therefore discount the service as being on the 3rd Applicant's chosen *domicilium citandi.*

[24] In view of the foregoing, it becomes abundantly obvious that there were errors in the granting of the judgment and that if these had been brought to the attention of the Court, it would not have granted the same. This would obviously satisfy the requirements of Rule 42 (1) (a). It would also appear to me, regard had to the issues adverted to above, which I found to have been errors, within the meaning of the above-mentioned

Rule, that in the first place, that the Applicants had a reasonable and acceptable explanation for their default as they were simply not served properly or indeed at all with the relevant process.

[25] It would also seem to me that because the particulars of claim were excipiable, failing to disclose a cause of action, as indicated above, the Applicants would not, in the circumstances, even have been required to enter the arena of the main trial. Furthermore, the Applicants contended and quite forcefully too, that the vehicle in question did not belong to the estate, though it is accepted that the estate's trade name was being utilized. In support thereof, they filed a bluebook of the said vehicle, which ascribes the registered ownership of the vehicle to somebody else. This would, if the matter were to be ventilated on the merits, constitute a valid and *bona fide* defence, which carries a prospect of success.

[26] It would therefore appear to me that on both fronts, the Applicants have made a good case for the judgment issued by this Court to be set aside. It follows also that the attachment of the vehicle pursuant to the judgment, should, likewise, be set aside. This is an eminently meritorious matter in which the relief prayed for should be granted.

[27] The outstanding issue relates to costs. The

ordinary rule in cases of rescission is that because an applicant therefor seeks an indulgence from the Court, he or she should ordinarily pay the costs. See *Promedia Drukkers & Uitgewers & Others* 1996 (4) S.A. 677 (TPD) 411 at 421; *H D S Construction (Pty) Ltd v Wait* 1979 (4) S.A. 298 (E) at 302 B-C and *New Zealand v Millborough* 1991 (4) S.A. 836 at 840 J-841 A. This is, however, not a hard and fast rule as the Court retains a discretion, as in all matters appertaining to costs. In the instant case, I am convinced that the proper order should be that the costs should follow the event. I say so for the reason that the

Respondents' opposition was not, in my judgment, regard being had to the entire conspectus of issues, justifiable at all.

[28] There was, as stated earlier, a number of errors in both the procedural and substantive law aspects of the case. The returns of service, as earlier indicated, were bad and inconsistent with the Rules of Court but that notwithstanding, the Respondents saw it fit to argue in opposition to the rescission, a position that is untenable in the circumstances. I should mention that the costs

shall equally have to be borne by the 2nd Respondent, who also made common cause with the 1st Respondent in opposing the application, which was, objectively viewed, otherwise meritorious.

[29] In the view that I hold of this matter, particularly the defects in the pleadings, I am of the considered opinion that the Applicants should not even be put to the vexation and the attendant expense of filing papers to defend the suit. This is a matter in which the procedural and substantive law matters raised would require the 1st Respondent, if properly advised, to initiate fresh action proceedings.

[30] In view of the foregoing, I issue the following order:

30.1 The judgment by default issued by this Court on 16 December, 2008, be and is hereby set aside.

30.2 The Deputy Sheriff for the District of

Hhohho, Mr. Bhekithemba Dlamini N.O., be and is hereby ordered to release from attachment a vehicle bearing registration number SD 700 BG to the 1st and 2nd Applicants forthwith.

30.3 The 1st Respondent, if so advised, be and is hereby granted leave to institute fresh proceedings within a period of 21 days from the date of this judgment.

30.4 The 1st and 2nd Respondents be and are hereby ordered to pay costs on the ordinary scale jointly and severally, the one paying the other to be absolved.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 14th DAY OF JULY, 2009.

T.S. MASUKU

JUDGE

Messrs. Mlungisi C. Simelane & Associates for the Applicants

Messrs. P.K. **Msibi & Associates for the Respondents**