

HIGH COURT OF SWAZILAND

Held at Mbabane

Gloria Matsebula

Applicant

vs

Oscar Wilmer

Respondent

Civil Case No. 1585/07

Coram
For Applicant For
Respondent

MAPHALALA PJ MR. N.
MABUZA MR. Z. SHABANGU

JUDGMENT
4th August, 2009

[1] Serving before court is an application in the long form for an order rescinding and/or setting aside a Memorandum of Understanding made an order of court and costs.

[2] The brief background of the matter is that the Applicant and Respondent entered into an agreement pursuant to court proceedings regarding a dispute pertaining to the ownership of a business known as Shonalanga Home Funeral. The agreement was later made an order of court by consent of the parties. Pursuant to the Court order, the Applicant now wants to rescind the consent Court order on the basis that the order was granted pursuant to a mistake common to both parties. She has not however, returned the proceeds paid to her under the Court order.

[3] There are two issues for determination by this court, firstly, whether the consent order can be rescinded in terms of Rule 42(1) (c) on the basis of a mistake common to both parties.

[4] Secondly, whether the consent order can be rescinded in terms of the common law, *moreso*, where Applicant has not restored the monies paid to her under the consent order that she now seeks to rescind.

[5] I proceed to consider the first issue for decision under Rule 42(1) © which provides the following:

"42 Variation and rescission of orders

(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)

(b).....

(c) and order or judgement granted as a result of a mistake common to both parties."

[6] The Applicant contends that in terms of Rule 42(1) the court may rescind or set aside its order where the order has a patent error or where there is a mistake common to the parties. That *in casu* the order is patently erroneous since it seeks to enforce a contract that is both *contra bonis mores* and that violates the law of the land.

[7] However, in my considered view this argument cannot hold because the basis of an application in terms of Rule 42(1) (c) is that of a mistake common to the parties.

[8] According to the learned author *Erasmus, Superior Court Practice* at Bl-140 this means that both parties are mistaken as to the correctness of certain facts this occurs where both parties are of one mind and share the same mistake. A typical case would be where the parties had agreed upon a statement of facts which was afterwards found to be incorrect. A common mistake would cover the case of a judgment entered by consent where the parties consented in *Justus error*. It is, not sufficient however, if the error is that of one of the parties only, or of the court, or of a legal representative.

[9] In the instant case the mistake is not a mistake common to both parties as stated by the above learned author. It appears from the papers filed of record that it is only the Applicant who alleges a mistake after benefiting from the consent order by the agreement of the parties.

Therefore, it would appear to me that Applicant cannot succeed under Rule 42(1) (c).

[10] Coming to the second leg of the matter of whether Applicant can be afforded any remedy under the common law. In this regard I am in complete agreement with the Respondent that rescission of a consent order is unheard of at common law. The grounds for rescission at common law are limited to default judgements and orders obtained as a result of fraud or upon the discovery of new documents that were not present when the order was granted.

[11] It appears in the Applicant's own version that the alleged mistake is not one that was common to both parties at the time of granting the consent order. Both parties have always been duly represented hence the question of default does not arise. Rescission of an order under the present

circumstances is unheard of and unprecedented. This is clearly not a case where the court can exercise its discretion in favour of the rescission.

[12] On the issues of the Trading Licence's Order of 1975 and the Registration of Business Act No.42 of 1933 I am also in agreement with the Respondent's arguments.

[13] The Trading Licence's Order does not prohibit the sale of a business from one to another. All it seeks to do is prohibit one party from trading, using a trading licence that does not belong to him or her. The Act would apply only insofar as it prohibits the Respondent from operating the business using a trading licence previously registered under the Applicant.

[14] Further on the Registration of Business Act of 1933 does not prohibit the sale of a business from one person to another nor does it prohibit that a person be bought out of a business and paid the sale proceeds. The intention of the legislature in enacting the Act was to ensure that every trading entity or person is registered, be it a company, individual or partnership.

[15] In any event, these questions do not fall under the prayers specified in the Applicant's Notice of Motion.

[16] Furthermore, the Respondents are correct that even if it were to be accepted that the contract on which the order is based is void for non compliance with a statute be it the Trading Licence's Order of 1975 or the Registration of Business Act of 1933, the result consequent therefrom would be that neither of the parties may seek assistance from the court in respect of the contract. The law provides that;

"the equal guilt, the Defendant is in a stronger position " (par delictum Rule). (See *Jaj Bhay vs Cassim 1939 A.D. 537*).

[17] The law also provides that a person who rescinds an agreement and seeks restitution must himself as a rule make restitution of what he has received under the contract. (See the case of *Extel Industrial (Pty) Ltd & Another Crown Mills (Pty) Ltd 1999(2) S.A. 719 (SCA) at 732*).



S.B. MAPHALALA

Principal Judge

[18] In the result, for the foregoing reasons the application is dismissed with costs.