HIGH COURT OF SWAZILAND

Held at Mbabane

Freeworld Plascon Swaziland (Pty) Ltd

Applicant

vs

Boshengelekati Investments (Pty) Ltd
Respondent

Civil Case No.979/2009

Coram MAPHALALA PJ MR. M. MAMBA MR. M. MABUZA
For Applicant For Respondent

JUDGMENT 2nd September 2009

[1] This is an application brought under Rule 42 of the High Court Rules for an order in the following terms:

"1. That and pending determination of this application, the execution of the order issued by the court on the 17th April 2009 be hereby stayed.

2. Rescinding and/or setting aside the default judgment granted by the above Honourable Court on the 17th April 2008.

3. Granting the applicant leave to defend the proceedings instituted by the 1st Respondent against Applicant in the main action.

4. Cost of suit.

5. Further and/or alternative relief."

[2] The Founding Affidavit of the Applicant is filed where the relevant facts are alleged. Pertinent annexures are also attached.

[3] First Respondent opposes the Application and has filed an Answering Affidavit of one Mr. Peter Baker who is the Branch Manager of the 1st Respondent. In the said affidavit a number of *points in limine* are raised as follows:

"2.1 **WITHDRAWAL OF PREVIOUS PROCEEDINGS - RULE 56(3)(a) & (b)**

The applicant herein previously launched an urgent application for the same prayers herein and upon realizing, after 1st Respondent filing a Rule 30 notice that its affidavit, were inconsistent and were irregular decided to conveniently withdraw the application and tender wasted costs without complying with Rule 56(3)(a) & (b) respectively thus denoting that the previous launched application had been set down for arguments and could not be withdrawn by the applicant in the manner it did, obviously suggesting that as things stand, that application still needs to be argued. Full legal argument will be made at the hearing of this matter.

2.2 NO AUTHORITY TO DEPOSE ON BEHALF OF APPLICATION

The deponent to applicant's founding affidavit has not requisite authority to move this application and/or depose on behalf of applicant as he does not state on what instrument he is relying upon to launch this present application and has further not annexed a resolution by applicant authorizing him to so act on its behalf. Should the applicant in its replying papers attempt to introduce a copy of the resolution, the introduction of such new matter in the replying papers will be strenuously opposed.

2.3 DOCTRINE OF UNCLEAN HANDS

The applicant herein is approaching this Honourable Court with dirty hands. On the 9 July 2009 the applicant designed, as a way of safeguarding its goods an alternative option and thus a consent was agreed upon and made an order herein has only complied with a portion of that order and the remainder still remains uncomplied with the applicant which it still has no intention of rescinding the default judgment granted on the 17th April 2009.

I am advised and verily believe same to be true that a litigant cannot on the one hand seek the assistance of the Court and on the other hand ignore those orders which it has been ordered to comply with."

[4] The attorneys of the parties advanced comprehensive arguments on the above points.

[5] In this judgement I shall address *ad seriatim* these arguments as follows:

(i) Disputes of Facts

[6] In this regard the Respondent argues that on the facts of the case there is a dispute of fact. In that Applicant states it has a *bona fide* defence to the claim, in that 2nd Respondent never delivered goods to the sum of E27, 099.34 and the Applicant in addition queried the invoices and requested a proper statement (Reference to paragraphs 13, 13.1, 13.2 of Founding Affidavit and paragraph 8 of the Replying Affidavit).

[7] First Respondent on the other hand states that it delivered the goods amounting to E27,099.34 and that Applicant is well aware of this amount hence the letters written by Applicant and Applicant's erstwhile attorneys Reference to paragraph 5 of Answering Affidavit and annexure 'PI' and 'P2'"

[8] That the true version cannot be verified by this court without the aid of oral evidence as same goes to the very root of the issues and the Applicant was sold and delivered with goods amounting to E27,099.34.

[9] To determine whether Applicant is entitled to rescission of the default judgement as things stand Applicant is not entitled to the rescission

application. Respondent cited the textbook by *Herbstein vs van Winsen, The Civil Practice of the Supreme Court of South Africa, (4th edition) Juta 1977* at page 234 and the leading case of *Room Hire Company (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 35A.*

[10] The Applicant on the other hand contends that this dispute of fact is not material to the question before court which is an application for rescission under Rule 42.

[11] It appears to me that indeed this dispute of fact outlined above is not material in the determination of an application for rescission under Rule 42. Therefore this point of law in *limine* is accordingly dismissed.

(ii) Withdrawal of previous proceedings - Rule 56(3)(a) and (b)

[12] The argument in this regard is that the Applicant previously launched an urgent application for the same prayers as contained in the present application. Then on the day before the matter was set down for hearing and after the Book of Pleadings had been served and filed First Respondent's attorney filed a Rule 30 Notice as the Applicant's Founding Affidavit and Replying Affidavits were irregular and inconsistent. The Applicant upon realizing that conveniently served and file a Notice of Withdrawal on the day this matter was set down and further conveniently did not show up in court for the matter where the Duty Judge endorsed that the matter was withdrawn.

[13] The argument in this regard is that the above facts show that the way this matter was withdrawn does not comply with Rule 56(3)(a) and (b) as it was not withdrawn with the consent of the parties and further not withdrawn on cause shown with the consent of the court. Furthermore there is also the provision of the Rule 41 which also expounds on the issue of withdrawal of matters which has also not been met by the Applicants and is on all fours with Rule 56(3)(c) and (b).

[14] The Applicant on the other hand contends that the application was correctly withdrawn since costs of withdrawal were tendered.

[15] Having considered the arguments of both Counsel I am inclined to agree with the arguments advanced for the Applicant. The application was correctly withdrawn since costs of withdrawal were tendered. This was endorsed by the court order to the effect that the application is withdrawn and costs tendered. For these reasons the point of law *in limine* in this regards is accordingly dismissed.

(iii) No authority to depose on behalf of Applicant.

[16] In this regard it is contended for the Respondent that the deponent to Applicant's affidavit did not have the requisite authority to move this application and/or depose on behalf of Applicant. As he does not state on what instrument and neither has he annexed a resolution he is relying upon to launch this present application.

[17] Furthermore, the Respondents contend that in the Applicant's Replying Affidavit the deponent has attempted to annex a resolution which is clearly unprocedural and irregular as it is trite that the Applicant stands and falls on its Founding Affidavit and may not make out a case on the Replying Affidavit as is the case in the present case. In this regard the court was referred to a number of cases in this court including that of *Royal Swaziland Sugar Corporation vs Vuvulane Irrigation Farmers' Ltd* and that of *Bhekusisa Mdziniso vs The Commissioner of Police.*

[18] On the other hand the Applicant argues that the authority of the deponent has never been questioned. On one hand they recognise the authority of the deponent and on the other hand they are disputing such authority. However the deponent has provided such a resolution in his Replying Affidavit and same should be considered as there is not prejudice to be suffered by the Respondents.

[19] For this argument the Applicant relies on the *dictum* in the case of *Shell Oil Swaziland vs Motor World (Pty) Ltd t/a Motor Appeal No.23/2006* where the following was stated:

> "Where the resolution of the Applicant's Board has only to be submitted to be accepted, there is really very little harm in allowing an Applicant to put his papers in order in this way".

[20] Having considered the arguments of the parties in this regard I am inclined to adopt the approach given in *Shell Oil (supra)* and accept the resolution filed in Applicant's Replying Affidavit as I find *"very little harm in allowing an applicant to put his papers in order in this way".* For these reasons the points of law *in limine* in this regard is dismissed.

(iv) Doctrine of Unclean Hands

In this regard the Respondents have taken the position that the Applicant is approaching this court with dirty hands. The facts that supports this contention is that Applicant designed, as a way of safeguarding its goods and alternative option and thus a consent order was agreed and entered into by the parties, which the court endorsed on the 9 July 2009. That Applicant has only complied with a portion of that order and the remainder still remains without being complied with by the Applicant. The Applicant still has no intention of complying with the said consent order and now wishes this court to come to its rescue in rescinding the default judgement granted.

The Respondent contends that it is trite law that a litigant cannot on one hand seek the assistance of the court and on the other hand ignore these orders which it has been ordered to comply with. 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. In this regard the court was referred to the *locus classicus* in the case of *Photo Agencies (Pty) Ltd vs The Commissioner of the Swaziland Royal Police and Another 1970-76 SLR 398* at 407.

[23] The Applicant's answer to this argument is that the said order was granted on the 9th July 2009 and that six days later the Applicant instituted a fresh

application and withdrew the former. That the order does not state time limits within which such costs are to be paid. Secondly, that the Respondent is at liberty either to enforce the order of the court or tax a bill of costs and enforce payment of same. In this regard the court was referred to the case of *Nelson Mandela Metropolitan Municipality and Others vs Grey Venouw cc and Others 2004 (2) S.A.81 (SE)* at 95F-96A where the following was stated:

> "The court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs".

[24] After considering the arguments of the parties I am inclined to agree with the explanation given by the Applicant as outlined above in paragraph (22) *supra.* Therefore the point *in limine* is also dismissed.

[25] I now proceed to consider the merits of the application being an application to rescind a court order in terms of Rule 42(1). Applicant must show that the proper order was erroneously sought or erroneously granted. Rule 42(1) provides that the court may in addition to any other powers it may have *mero mutu* or upon the application of any party affected; rescind or vary:

> "(a) An order or judgement erroneously granted in the absence of any party affected thereby;
>
> 6. An order or judgement in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity; error or omission;
>
> 7. An order or judgement granted as the result of a mistake common to be parties."

The Applicant contends that the order was erroneously granted for the following reasons:

8. At the time it was granted, the Plaintiff had already filed its Notice of Motion to defend;

9. If regard is made to the distance the dies expired on the 15th April 2009 and the judgement was set down prematurely. This is so because 10 and 13 April 2009 were public holidays".

The Respondent on the other hand has taken the position that the stance taken by the Applicant is clearly dilatory as it does not go to the merits of the case. That if this court would grant the rescission it still does not vitiate the fact that the Applicant is indebted to the 1st Respondent in the amount claimed. That would obviously point to the fact that there would be no finality in litigation as a court should not readily grant to an Applicant, who seeks to set aside a default judgement.

It is common cause between the parties that the *dies* had not expired as required by the Rules. Should a party forfeit its rights under the Rules to satisfy another in these circumstances? I do not think so.

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S.  Judge

The Rules of Court were made for the conduct of procedures before the court. There is nothing untoward in enforcing the full rigours of the Rules of Court. In the circumstances of this case the application for recession is granted with costs.