IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Civil Case No. 830/10(B)

In the matter between:

Mario Masuku	**APPLICANT**
AND	
Bani Ernest Masuku	**1st RESPONDENT**
SAFA Investments (PTY) Ltd	**2nd RESPONDENT**
MAQBUL & Brothers Investments (PTY) Ltd	**3rd RESPONDENT**
In re: Bani Ernest Masuku	**APPLICANT**
And	
SAFA Investments (PTY) Ltd	**1st RESPONDENT**
MAQBUL & Brothers Investments (PTY) Ltd	**2nd RESPONDENT**
Mario Masuku	**3rd RESPONDENT**
CORAM	MCB MAPHALALA, J
For Applicant	Mr. M. Mkhwanazi
For Second Respondent	Mr. S. Dlamini
3rd Respondent Smith	Mr. M. Boxshall-

Summary

Civil Procedure - Application to rescind a default Judgment - remedy In terms of the Common Law, Rule 31 (3) (b) and Rule 42 (1)

JUDGMENT
8th MARCH 2011

[1] The Applicant brought an urgent application staying execution of an order of this Court issued on the 12th January 2011; he further sought an order rescinding and/or setting aside the said order. The application was brought in terms of Rule 42 (1) (a)

[2] The applicant had received an urgent application on the 5th January 2011 filed by the First Respondent rescinding another court order issued on the 16th April 2010; however, he could not instruct his attorneys immediately because it was a vacation and his Attorney's offices were closed. His Attorney subsequently filed a Notice of Intention to Oppose. On the 6th January 2011, the matter was postponed to the next day in the absence of Applicant's Attorney. His Attorney appeared in court on the 7th January 2011 and it was agreed with the First Respondent's Attorney that the matter should be stood down till 2 pm for arguments; the reason being that he was engaged at the University of Swaziland at 10 a.m. where he is lecturing part-time. Before his departure, applicant's Attorney served the First Respondent's Attorney with an Answering Affidavit to the Application.

[3] Notwithstanding the said agreement, the matter proceeded at 10 am in the absence of Applicant's Attorney, on the basis that the court was not informed of the reason why the matter should proceed at 2.15pm. It is apparent from the pleadings as well as the Court Order of

the 12th January 2011 that the First Respondent's Attorney merely informed the court that Applicant's Attorney wanted the matter to stand down till 2.15 pm; however, he did not disclose to the court that both parties had agreed to stand the matter down till 2.15 pm. Furthermore, he did not disclose the reason why the matter was being stood down.

[4] When the matter appeared in court for hearing, the Attorney representing the Second and Third Respondents moved a similar application for staying execution and rescission of the order of the 12th January 2011 and other ancillary prayers. They brought their application under Civil Trial No. 402/2011; however, the court in an attempt to avoid confusion consolidated the two cases and ordered that the two applications be heard as one under Civil Case No. 830/2010 (B).

[5] The applicant has brought the application in terms of Rule 42 (1) (a); and, the Second and Third Respondents have brought their application in terms of Rule 42 (1) (a) as well as Rule 31 (3) (b).

[6] Rule 42 provides that:

"(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) an order or judgment erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[7] **His Lordship Nathan CJ** in the case of **Munnik v Focus Automotive Engineers (PTY) Ltd** 1977-1978 SLR 152 at 154 stated the Law as follows:

> "But the Court has an inherent jurisdiction to set aside a judgment in a proper case.... This power is indeed tacitly recognised in Rule 42 (1) which empowers a court in "addition to any other powers which it may have", to rescind a judgment on the grounds set out in the sub-rule."

[8] In the case of **De Wet and Others v Western Bank Ltd** 1979 (2) SA 1031 at 1042 F - 1043 **Trengove AJA** stated the Common Law position as follows:

> "Thus, under the Common Law, the courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause... the courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of "sufficient cause" for relief was on the applicant in each case, and he had to satisfy the court, *inter alia,* that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the court's discretion under the Common Law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42 (1) ....Those grounds do not, for example cover the case of a litigant, or his legal representative, whose default is due to unforeseen circumstances beyond his control; such as sudden illness, or some other misadventure; one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness be afforded relief."

8.1 In the case of **Promedia Drukkers & Uitgewers (EDWS) BPK v Kaimowitz and Others** 1996 (4) S.A. 411 at 417-418, **Van Reenen J** stated as follows:

"In terms of the Common Law, a Court has a discretion to grant rescission of judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a *bona fide* defence which, *prima facie,* carries some prospect of success."

8.2 This judgment was issued pursuant to that of the Appeal Court in the case of **Chetty v Law Society, Transvaal** 1985 (2) SA 756 at 764-765 and that of **De Wet and Others v Western Bank Ltd** 1979 (2) SA 1031 (A) at 1042, and **Athmaram v Singh** 1989 (3) SA 953 at 957 (D & CLD)

[9] This judgment shows that under the Common Law the court has a wide discretion to rescind judgments obtained on default of appearance. The court's discretion under the Common Law extends beyond and is not limited to the grounds provided for in Rules 31 and 42 (1). The overriding principle in the exercise of the Court's discretion is the consideration of justice and fairness having regard to all the facts and circumstances of the particular case. The onus lies on the applicants in each case to show the existence of a sufficient cause or some reasonably satisfactory explanation why the judgment was allowed to go by default.

[10] Rule 42 (1) acknowledges that the High Court has a discretion to rescind or vary an order or judgment granted by the court. Furthermore, the Rule acknowledges that the discretionary powers of the court is derived not only from the Rules but from other sources of law including the Common Law, the constitution and the High Court Act No. 20 of 1954. Furthermore, the applicant has to show that the order or judgment was granted erroneously; in so doing he has to outline the circumstances or legal basis why he avers that the order or judgment was granted erroneously. Lastly, he has to establish that when the order or judgment was made neither the applicant nor his legal representative was in attendance in court.

[11] In the case of **Bakoven Ltd v G.J. Howes (PTY) Ltd** 1992 (2) SA 446 at 471 (EC) **His Lordship Erasmus J** put the law as follows:

> "Rule 42 (1) (a) ... 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 a 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 the 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. It is only when he

> cannot rely on an error that he has to fall back on Rule 31 (2) (b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the Common Law (in all other cases). In both latter instances he must show good cause."

[12] At page 468 H, **His Lordship Erasmus** stated as follows:

> "There are three ways in which a judgment taken in the absence of one of the parties may be set aside, viz in terms of Rule 31 (2) (b), or Rule 42 (1).. or at Common Law."

[13] The Second and Third Respondents argue that they were not served with the application wherein First Respondent obtained the order of the 12th January 2011; they further argue that the application was brought during the Christmas vacation when their Attorney's offices were closed. Neither their Attorney nor themselves were present in court when the Order issued on the 16th April 2010 was rescinded and set aside. The said order interdicted the First Respondent from collecting rentals on the property purchased by the Second Respondent from the Applicant.

[14] It is common cause that when the First Respondent obtained the Order of the 12th January 2011 he told the Court that the Second and Third Respondents had been duly served with the application; this is denied by the Second and Third Respondents. Furthermore, in order to

justify urgency, the First Respondent informed the court that he was deprived of his means of livelihood and needed money urgently to pay school fees for his children. However, he did not disclose to the court the following important facts: that the property in respect of which he collected rental had been sold by the applicant to the Second Respondent, that he did not transmit the monies collected to the Applicant, that the purchase price had been paid in full, that his mandate to collect the said rental is disputed on the basis that there is no company resolution authorizing him, and, that the Applicant is the majority shareholder and sole Director of W.E. Masuku Investments in whose name the property in dispute is registered. Furthermore, the First Respondent did not disclose to the court that on the 11th August 2010 his urgent application under Civil case No. 3075/2010 to prevent the transfer of the property into the name of the Third Respondent was dismissed by this court on the basis that he did not have a clear legal right to the interdict sought; he has appealed this judgment to the Supreme Court.

[15] The Second and Third Respondents argue that the First Respondent is the surviving grandson of the late Sylvinah Carina Masuku who was a minority shareholder in W.E. Masuku Investments (PTY) Ltd, and he is merely a beneficiary of the deceased estate and does not have authority to act on behalf of the Applicant. It is further argued that during the sale of the property, the First Respondent was

represented by Attorneys S.M. Kubheka and Associates based in Manzini; hence, he is aware of the sale.

[16] I have no doubt in my mind that if the court had been aware of these factors it would not have granted the application for rescission. It suffices for the applicant in terms of Rule 42 (1) (a) to establish the existence at the time of the granting a fact of which the judge was not aware, which would have precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment.

- **Per Masuku J: Jika Ndlangamandia v Zeiss Investments (PTY) Ltd t/a Zeiss Bearings and Joseph Dlamini N.O** Civil Trial No. 3289/08 at page 11.

[17] The facts and circumstances disclosed by the applicant, the Second and Third Respondents do establish the Common Law grounds for rescission of a judgment obtained by default. The overriding principle under the Common Law is the considerations of justice and fairness having regard to the overall peculiar circumstances of the case. **Trengove AJA** goes further to say that the grounds under the Common Law are wider than those provided for in Rule 42 (1) (a) and Rule 31 (3) (b) in the sense that the judge's discretion is very wide. The non-disclosure by the Attorney for the First Respondent the reason for the non-appearance of applicant's Attorney in Court is very serious.

Similarly, the failure to serve the application on the Second and Third Respondents is equally serious. The failure by the First Respondent to disclose that he is aware of the sale of the property and that a full purchase price has been paid shows a fraudulent intent, the collection of the rental without a proper legal document authorizing same is equally serious, the failure to disclose that he is merely a beneficiary in the estate and not an Executor or Shareholder of the company in whose name the property is registered is equally important in deciding this matter.

[18] Rule 31 (2) (b) which is now cited as Rule 31 (3 (b) of the High Court (Amendment) Rules of 1990 provides as follows:

> "a defendant may within twenty one days after he has had knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of E200.00, set aside the default judgment on such terms as to it seems fit."

[19] The Second and Third Respondents have brought their application on the basis of both Rule 42 (1) and Rule 31 (3) (b) of the High Court Rules. It is apparent from Rule 31(3) (b) that five essentials have to be established. **His Lordship Nathan C.J.** in the cases of **Shongwe v Simelane, Msibi v. Simelane** 1977-1978 SLR 183 approved and

applied two of his earlier decisions of **Msibi v Mlawula** Estates (PTY) Ltd, **Msibi v G.M. Kalla and Co.** 1970 SLR 345 at 348 (HC) His Lordship stated as follows:

> "...the tendency of the court iS to grant the application where the applicant has given a reasonable explanation of his delay, where the application is made bona fide and not with the object of delaying the opposing party's claim, where there has not been a reckless or intentional disregard of the Rules of court, where the applicant's case is clearly not ill-founded, and where any prejudice to the opposite party could be compensated for by an appropriate order as to costs."

[20] In the light of the findings of the Court above, it is apparent that the Applicant as well as the Second and Third Respondents do comply with the requirements of Rule 31 (3) (b). They have given the requisite explanation for the delay, the applications were made within the requisite period of twenty-one days; furthermore, there was no reckless or intentional disregard of the Rules of Court and their case is not ill-founded.

[21] In the circumstances, I make the following order:

(a) That the Order issued by the above Honourable Court on the 12th January 2011 is hereby rescinded and set aside.

(b) The execution of the Order issued by the above Honourable Court on the 12th January 2011 is hereby stayed.

(c) The First Respondent is directed to pay costs of suit on the ordinary scale.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT