



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 4660/2008

In the matter between

REGENT PROJECTS (PTY) LTD

APPLICANT

And

STEEL & WIRE INTERNATIONAL (PTY) LTD

1ST RESPONDENT

FIRST NATIONAL BANK SWAZILAND

2ND RESPONDENT

SANDILE R. DLAMINI N.O

3RD RESPONDENT

In Re:-

STEEL AND WIRE INTERNATIONAL

(PTY) LTD

PLANTIFF

And

REGENT PROJECTS (PTY) LTD

DEFENDANT

Neutral citation: *Regents Projects (Pty) Ltd vs Steel & Wire International (Pty) Ltd and two others*
(4660/2008) 18th October 2012 [SZHC] 249

Coram: OTA J

Heard 17th September 2012

Delivered: 19th October 2012

Summary: Rescission application : rules 42 (1) , 31 (3) (b) and the common law considered: return of service prima facie evidence: where service challenged on compelling grounds conclusive proof of service required: application granted.

OTA J.

[1] In this application the Applicant claims the following reliefs:-

1. *That the rules of court be dispensed with in so far as they relate to forms, service and time limits, and that the matter be heard as one of urgency.*
2. *That the Respondents show cause on a date to be set by the Honourable court why an order in the following terms should not be issued.*

2.1 That the judgment entered by the Honourable court against the Applicant on the 13th February 2009, in the above stated matter, be rescinded and or set aside.

2.2 That the garnishee notice issued on the 20th October 2009 in the above matter be set aside and any sums of money deducted from the Applicants account as a result thereof be restored to the account forthwith.

3. *That pending finalization of this application:-*

3.1 *The second Respondent be interdicted and restrained from paying out funds in terms of the garnishee notice.*

Alternatively:

3.2 *In the event that the second Respondent has paid out funds in terms of the garnishee notice, to the third Respondent, that the Third Respondent be interdicted and restrained from disbursing.*

3.3 *In the event that the third Respondent has received a cheque which has not yet been cleared, that the second Respondent be interdicted and restrained from clearing such cheque as may have been paid by it in terms of the Garnishee Notice.*

4. *Further and / or alternative relief”*

[2] The application is premised on a 22 paragraph affidavit to which is exhibited annexure RP1. The 1st Respondent opposed this application with an answering affidavit of 18 paragraphs, exhibited thereto are annexures TD1 to

TD7 respectively. The 3rd Respondent for his part filed a supporting affidavit to the 1st Respondent's answering affidavit.

[3] I notice that the Applicant has not indicated on the papers which procedure it premised this application on. I will therefore proceed to consider it under the three procedures which are recognized as grounds for launching such an application viz

(a) Rule 42 (1) (a)

(b) Rule 31 (3) (b)

(c) The Common Law

[4] Rule 42 (1) (a)

This rule of court provides as follows:-

“The court may in addition to other powers it may have, meri motu or upon application of any party affected, rescind or vary (a) an order or judgment erroneously granted in the absence of any party affected thereby”.

[5] This rule of court was given judicial interpretation in the case of **Bakoven v G.J Howes (Pty) Ltd 1992 (2) SA 466 at 471 E-G**, where **Erasmus J** declared as follows:-

“Rule 42 (1) (a), it seems 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 a court of record”----- . It follows that a court 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 bonafide defence --- Once the Applicant can point to an error in the proceedings, he is without further ado entitled to a rescission”

[6] What then is the error of law which the court made and which appears *ex facie* the record that would entitle the Applicant to the rescission sought pursuant to rule 42 (1) (a) ante.

[7] From the Applicant's affidavit, the error it has alleged, in a nutshell, is that it was not served with the summons which originated the litigation culminating in the default judgment sought to be set aside. The Applicant alleges that though there is a Return of Service alleging that the summons was served on Bongani Kunene, the deponent of its founding affidavit, however that is not true. Further, that in any case the service was defective in that it did not comply with the mode of service upon a company as prescribed by Rule 4 (2) (e) of the rules of the High Court.

[8] For its part the 1st Respondent contends that service was effected upon Mr Bongani Kunene as the Managing Director of the Applicant company and as such the service was in compliance with the rules. That the service took place at Luyengo and not at the registered office or Principal place of business of the Applicant as required by the rules because the offices of the Applicant were closed down at the time. Therefore, the deputy sheriff, 3rd Respondent, who knows Mr Kunene very well, deemed it fit to effect service on him outside the offices. The 3rd Respondent, filed a supporting affidavit where he confirmed that he indeed effected service of the summons on the Applicant through Mr Kunene at Luyengo on the 28th of December, 2008.

[9] Now, service on a corporation or company like the Applicant is governed by rule 4 (2) (e) of the rules of this court which provides as follows:-

“ 2. Service under sub rule (1) shall be effected in one or other of the following manners:-

(e) In the case of a corporation or company, by delivering a copy to a responsible person at its registered office or a responsible employee thereof at its principal place of business within Swaziland, or if there is no such person willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law”

[10] Sub rule (2) (e) ante therefore permits service on a corporation or company in the alternative at (a) it's registered office (b) or it's principal place of business within Swaziland or (c) in any manner provided by law

[11] It is clear from the above that though the law permits service on a company at it's registered office or principal place of business, this mode of service is

however not obligatory. This is because service can also be competently effected in any manner provided by law, which entails any other mode of service which in terms of the law is open to a party who has sued a company or corporation. It is also an established practice that service on the Managing Director, Director, Company Secretary or any other responsible employee of a company is competent service on the company. The rationale behind this practice and the principle that underpinnes rule 4 (2) (e) is to ensure that the company is aware that action has been taken against it and to prepare to defend such action if it so wishes. Therefore, service on a responsible member of the company as those detailed ante, is one that effectively ensures that the company has such notice. However service on these group of people is usually effected at the company's registered office or it's principal place of business. See **Shiselweni Investments (Pty) Ltd v Swaziland Development and Savings Bank Case No. 2391/96.**

[12] In casu, the 1st and 3rd Respondents have alleged that when the 3rd Respondent visited the registered office of the Applicant to effect service of the summons, he discovered the office closed and was informed by people there that the office had been closed for some time. The Applicant failed to file any replying or counter affidavit to controvert the foregoing allegations

of fact. It is an established position of the law that in these circumstances, these allegations of fact must be taken as established. See **SC Dlamini & Company and Another v The Motor Vehicle Accident fund Appeal Case No. 17/12.**

[13] It appears to me therefore that since it is established that the registered offices of the Applicant had been closed down at the material time of service of the summons, it was quite competent for the Deputy Sheriff to take the steps to serve Mr. Bongani Kunene who it is not disputed was at the time of said service and is still, the Managing Director of the Applicant Company. This was to ensure that notice of the pending action was given to the Applicant. The proper procedure to my mind since service was going to take place on Mr Kunene outside the registered office or principal place of business of the Applicant, was for the 1st Respondent to apply to court for substituted service on Mr Kunene in these circumstances. This was not done. I do not however think that failure to obtain a substituted service order rendered any service on Mr Kunene as Managing Director of the Applicant incompetent. This is because as I earlier stated herein, the whole essence of service is to bring notice of the action to the opposite party. The Applicant as a non juristic entity carries out it's functions through its responsible officers such as it's Managing Director, directors, company secretary etc. Service

upon any of these persons, anywhere, is certified notice to the company in the peculiar circumstances of this case where the company was closed down. It would be unreasonable, unrealistic and absurd for the court to hold that upon the facts and circumstances of this case where the service that took place on Applicant's Managing Director outside its registered office is incompetent.

[14] Having stated as above, the paramount question at this juncture is: Has it been established or proved that service was effected on Mr Kunene on behalf of the Applicant?

[15] The 1st and 3rd Respondents say it was. They have referred me to annexure RPI a Return of Service of summons exhibited to the Applicant's founding affidavit as well as the supporting affidavit of 3rd Respondent as proof of this fact.

[16] Even though the Applicant did not file a replying affidavit to counter any of the allegations of fact of the 1st and 3rd Respondents on the issue of service, I

agree with Applicant's counsel Mr Simelane that this is not damaging to the Applicant's case nor is it a ground for the court to view the allegations of the 1st and 3rd Respondents on this issue as admitted and established in the circumstances of this case.

[17] I say this because a party on whom an affidavit is served, need not file an affidavit in opposition or in reply thereto, if

- (1) He or she intends to rely on the facts in the affidavit served on him as true and other facts in the other records of the court in the substantive case as a whole, or
- (2) The affidavit served on him contains facts that are self contradictory and unreliable or
- (3) He or she intends to oppose the application on grounds of law alone.

[18] Therefore, the mere fact that a party did not file an affidavit in reply to an affidavit in opposition served on him should not be taken to mean that he has conceded to the application. The failure of the Applicant to file an affidavit in reply therefore does not preclude it from responding on facts. In that event

it can rely on facts contained in the affidavit in support or in opposition and on facts in the record of the court.

[19] Having carefully weighed the facts contained in the totality of the affidavits serving before the court, I am inclined to agree with Mr Simelane that the need for the Applicant to file a reply to the allegations of 1st and 3rd Respondents on the issue of service of the summons was rendered nugatory by its founding affidavit. I say this because the Applicant canvassed the issue of the service and the Return of Service in the founding affidavit. It alleged that though there is a Return of Service filed, it was however not served on Mr Kunene as alleged. By the allegations in the founding affidavit the Applicant sought to rebut the evidence of service as alleged by 1st and 3rd Respondents.

[20] It is the entrenched position across jurisdictions that the Return of Service by the bailiff is not conclusive proof of service. It is prima facie evidence of service and thus can be impeached by rebutting evidence. I hold the firm view that it was incumbent upon the bailiff, in the face of the dispute over the issue of service and in the peculiar facts and circumstances of this case,

where service on Mr Kunene took place outside the registered office of the Applicant, to have gone the extra mile of exhibiting a dispatch book showing that Applicant signed for the summons allegedly served on him. This is because the Applicant to my mind has challenged the fact of service upon very compelling grounds as it was required by law to do to rebut the prima facie evidence of service by way of a Return of Service.

[21] I am not however availed of such evidence. As this case lies, I cannot on the papers reach the concluded opinion that service of the summons was duly effected on the Applicant through Mr Kunene as alleged. In coming to these conclusions I am mindful of the fact that the question of notice which service of processes ensures goes to the root of the action between the parties. Absence of it defeats the right of fair hearing as guaranteed by the Constitution and renders the whole action incompetent. So where the fact of service is challenged on compelling grounds as in this case and there is no conclusive proof of same, it behoves the court to err with caution on the side of the Applicant.

[22] It is apparent that the court relied on the Return of Service in proceeding to grant default judgment against the Applicant. It appears to me therefore that

by so doing, the court proceeded erroneously in granting default judgment. This state of affairs brings this application within the contemplation of rule 42 (1) (a).

[23] Rule 31 (3) (b) and The Common Law

Similarly, the application stands to succeed both pursuant to Rule 31 (3) (b) and under the common law, which require that the Applicant demonstrates “*good cause*” to be entitled to the rescission sought. The term “*good cause*” was interpreted by the court in the case of **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (b) SA I (SCA)** at para 11, page 9 as follows:-

“----- the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default (b) by showing that his application is made bona fide and (c) by showing that he has a bona fide

defence to the Plaintiff's claim which prima facie has some prospects of success -----“

See **Savannah N. Maziya Sandanezwe v GDI Concepts and Project Management (Pty) Ltd Case No. 905/2009.**

[24] What the court has to determine in ascertaining whether or not an Applicant to a rescission application has demonstrated a reasonable explanation for his default, is whether in the Applicant's affidavit he has shown that he was not in willful default. **Moseneke J**, in the case of **Harris v ABSA Bank Ltd t/a Volkskas, 2006 (4) SA 527 (1)** para 8 page 520 enunciated the parameters that must guide the court in determining whether an applicant was in willful default, in the following terms:-

“Before an Applicant in a rescission of judgment application can be said to be in “willful default” he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an Applicant must deliberately being free to do so, fail or omit, to take the step

which would avoid the default and must appreciate the legal consequences of his or her actions”

[25] It is apparent to me therefore, when the facts of this case are juxtaposed with the foregoing principles, that I cannot hold the Applicant to be in willful default. This is because I have already held in this judgment that the fact of service of the summons on the Applicant is not established on the papers. That being so I cannot find that he had knowledge of the action and deliberately failed to take steps to defend it.

[26] Furthermore, the bona fides on this application is also firmly tied to the fact of service and thus lack of knowledge of the action instituted. Though the 3rd Respondent has filed a *nulla bona* return of service to show that a writ of execution subsequently issued against the movable properties of the Applicant, that process however serves no useful purpose in this case. This is because it has failed to demonstrate when it was served, where it was served and upon whom it was served. That process does not tell the court anything other than that there were no assets found to satisfy the writ of execution. It was important for the particulars of such service, e.g. the date

to be detailed on the *Nulla Bona* Return. That will help the court gauge the dilatoriness of the Applicant in bringing the rescission application and thus gauge its bona fides.

[27] To my mind such particulars are most fundamental in the face of the fact that the Applicant has also denied that a writ of execution was ever served on it and that it only became aware of the matter upon service of the garnishee proceedings which the record shows issued on the 20th of October 2009. Therefore, in view of the fact that the Applicant is a company, it is imperative that the *Nulla Bona* return demonstrates, on whom, where and how service was effected. Since these particulars are conspicuously absent from the *Nulla Bona* return, it serves no useful purpose. On these premises, I find that this application is made bona fide.

[28] Similarly, I am firmly convinced that on the papers the Applicant has demonstrated a prima facie defence to the 1st Respondent's claim. I say this because he has raised issues fit for trial. As **Erasmus** stated in the text: **Supreme Court Practice (Juta 1995) at B1- 203-4:-**

“The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he must show a probability of success, it suffices if he shows a prima facie case, or the existence of an issue which is fit for trial. The Applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that the application is not made merely for the purpose of harassing the respondent -----“

[29] Then the test was concluded by **Brink J** in the case of **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (0) at 478** as follows:-

“----- i.e he has made sufficient allegations in his petition which if established at the trial would entitle him to succeed in his defence”

[30] In casu, even though the Applicant failed to file a replying affidavit, it however alleged in it's founding affidavit that it does not owe the 1st Respondent the judgment debt. Mr. Kunene the deponent of the Applicant's affidavit averred that neither himself nor the Applicant purchased the goods in respect of which action was instituted against the Applicant by 1st Respondent. That Mr Kunene was surprised when in October 2008, he was

called by an accountant from 2nd Respondent who alerted him of an outstanding account which Applicant has with 1st Respondent. That as a result he attended the offices of 1st Respondent in Matsapha where he was apprised of two invoices for approximately E15,000-00 and E9,000-00 respectively, for goods which Applicant is alleged to have purchase from 1st Respondent.

[31] That he was further shown two dishonoured cheques from the bank allegedly issued by him. That a close perusal of the cheques and invoices would reveal that the signatures thereon purported to be his are forged. That he raised these issues with the 1st Respondent's accountant who assured him that the matter will be investigated. That though he was not subsequently contacted on the outcome of the investigations, he however learnt that an investigation was conducted during which some of the 1st Respondent's employees, including one Mr Van Zyl were implicated and some disciplinary process had commenced against those employees. Mr Kunene alleged that in view of the foregoing, he was taken completely by surprise when served with the garnishee proceedings.

[32] 1st Respondent has filed an affidavit controverting the foregoing allegations of fact and urging the court to hold that the signature appearing in the invoices and cheques and the details which are behind these documents all belong to Mr Kunene.

[33] I however find that on the facts, the Applicant has raised triable issues relating to it's alleged purchase of the goods from the 1st Respondent and the authenticity of the signatures which appear on the invoices and cheques. These are issues which are best suited for a trial and if established in favour of the Applicant at the trial will entitle him to succeed in his defence.

[34] In the light of the totality of the foregoing, the rescission application succeeds. I however find that I cannot grant the orders sought in paragraphs 2.2, 3.1, 3.2 and 3.3 of the notice of motion, wherein the Applicant prayed that any money deducted from it's account with the 2nd Respondent as a result of the garnishee notice be restored. That the 2nd Respondent be interdicted and restrained from paying out such money as well as 3rd Respondent be interdicted and restrained from disbursing such funds as have been received by him in terms of the garnishee notice. This is because

it is common cause that the sums involved have since been paid over by the 2nd Respondent to the 1st Respondent on the strength of the garnishee notice. In these circumstance, I am of the firm belief, that the question as to whether or not the 1st Respondent was entitled to payment and whether such payment could be validly made from the Applicant's account held by 2nd Respondent based on the garnishee proceedings, must abide the outcome of the hearing of this matter on the merits.

[35] In the result, I make the following orders:-

1. That the default judgment granted on the 13th February 2009 be and is hereby rescinded
2. Costs.

For the Plaintiff

S C Simelane

For the Respondent:

M. Dlamini

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE.....DAY OF2012

OTA J.

JUDGE OF THE HIGH COURT