



THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 3480/05

In the matter between:

SEBENZILE MALINGA

Plaintiff

And

CHRISTOPHER DLAMINI

Defendant

Neutral citation: *Sebenzile Malinga v Christopher Dlamini 3480/05 [2012] SZHC.....*
(11th April 2012)

CORAM: M. Dlamini

Heard: 28th March 2012

Delivered: 11th April, 2012

For the Plaintiff: S. C. Simelane

For the Defendant: T. Mlangeni

rescission – common law ground – what constitutes patent error

Summary

This is an application for rescission of this court's judgment issued on 3rd March 2009 ordering the applicant to pay the sum of E50,000.00 arising from damages as a result of an assault by applicant against respondent on 28th April 2005. Action commenced by combined summons. Applicant, through his counsel, defended the matter from the onset. All necessary pleadings were filed as between both parties and the matter came for hearing where respondent gave *viva voce* evidence in support of her claim. Even at that stage, respondent was represented by his counsel. Having been ordered to pay a sum of E50,000 applicant paid the sum of E13,000 in April 2009 and now seeks an order for rescission. Applicant, through his counsel informed the court that the application for rescission was based on common law and also section 42 (1) (b).

[1] The general rule is that once a “*court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased*”. **Erusmas, Superior Court Practice at page B1–309.**

[2] **Herbstein and Winsen, The Civil Practice of the Supreme Court of South Africa 4th Edition Juta & Co. Ltd 1997, Western Cape:** wisely state in relation to the exception to the general rule at page 686:

“There are, however, a few exceptions to that rule, which are mentioned in old authorities and have been authoritatively accepted by our courts. Thus provided that the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following. (i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example costs or interest on the judgment debt, that the court overlooked or inadvertently failed to grant. (ii) The court may clarify its judgment or order if on the proper interpretation the meaning of it remains obscure, ambiguous or otherwise uncertain so as to give effect to its true intention, provided

that it does not thereby alter ‘the sense and substance’ of the judgment or order.
(iii)The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order and does not extend to altering its intended sense or substance.(iv)If counsel has argued the merits but not made submission as to costs and the court, in granting judgment, also makes an order relating to costs, it may thereafter correct, alter or supplement that order” .

[3] I now turn to look at the requirements of the law for a judgment to be set aside at common law in relation to the evidence adduced by applicant in this case.

[4] **Erasmus, supra at page B1 – 308** states

“There are three way in which a judgment taken in the absence of one of the parties may be set aside namely in terms of this sub-rule (42 (1) (a), (i) rule 31 (2) (b) or (iii) at common law”.

[5] **Promedia Drukkers & Uitgewers (EDMS) BPK v Kaimowitz and Others 1996 (4) 411 at 412** reads.

“In terms of common law a court has a discretion to grant rescission of a judgment where sufficient or good cause has been shown. The two essential elements of sufficient cause in our courts are: (i) That the party seeking relief must present a reasonable and acceptable explanation for his default (my emphasis) and (ii) That on merits such a party has a bona fide defence which prima facie carries some prospects of success. It is not essential if only one of the elements is established”.

[6] Now the court is called upon to determine whether:

- i) the explanation advanced by applicant for his default or non-appearance could be said to be reasonable and acceptable in the circumstances.
- ii) the applicant has established *ex facie bona fide* defence which indicates prospects of success.

[7] It is obvious from the first element that before the court can embark on the question of reasonable or otherwise of the explanation, it has to first ask, under the circumstances, was the plaintiff in default or absent from court on the 8th March 2009.

[8] As already highlighted in the summary herein that upon service of summons applicant duly filed all the necessary pleadings and the matter was finally set for hearing on 8th March 2009 proceedings having commenced on the 27th September 2005. At the hearing, the applicant was represented by his erstwhile attorney, one Mr. Mabila who was appointed on the 29th March after B. S. Dlamini. The appointment of Mabila came before the close of pleadings. It is common cause that all pleadings were filed accordingly and Mr. Mabila attended the trial of the applicant. In support of his application for rescission, the applicant avers as follows in terms of his founding affidavit which appears at page 4 of the book of pleadings:

- “3. Sometime in September 2005, the respondent caused a summons to be issued against me under the above case number, in which she claimed damages amounting to E140,500.00 (One hundred and forty thousand five hundred Emalangeneni only).*
- 4. I also instructed attorneys to defend the action and the necessary papers were filed in my defence. I may herein state that during the course of the proceedings, I had to change attorneys from B. S. Dlamini and Associates to Mabila Attorneys. By September 2008, the pleadings were closed and the matter was ready for trial.*
- 5. In March 2009, I was called by my attorney Mduduzi Mabila who advised me that my matter had been tried in court and that I had lost the case. He further advised me that a judgment had been entered against me, in the sum of*

E50,000.00 (Fifty thousand Emalangi only) which amount, it was said, I was obliged to pay to the respondent as well as legal costs and interest.

- 6. This development took me by surprise since I had never been advised that a trial date had been set and had not been told to attend court for the trial. When I enquired from my attorney Mr. Mabila as to how such could have happened, I never got a clear answer. He advised me that the manner in which the case had turned out, was such that, I had no prospects of success on appeal and the best I could do was to negotiate a settlement of the judgment debt in terms.*
- 7. As he was my attorney and I had trust in him, I reluctantly agreed to negotiate the payments terms, which he also undertook on my behalf. Indeed with his assistance I made certain payments towards liquidation of the judgment debt and costs. In this respect I have already paid amount in excess of a sum of E13,000.00.*
- 8. I must state that the judgment was granted at a time when I was in dire financial straits, and ever-since then, I have been struggling financially, as a result of which even the payments that I have been making have been made in an irregular manner.*
- 9. Whilst I was making arrangements to source out funds to liquidate the judgment debt, it came to my attention that the respondent was boasting that I was stupid and that was why even in court my attorney had not defended the matter. This came as a surprise since, I had been advised that the matter had been fully defended and that was why I had no prospects of success on appeal. This occurred towards the end of last year, particularly in the middle of December 2010.*
- 10. In view of the fact that I had never really got a clear answer as to how the matter had been enrolled, set down and tried without me knowing, I then decided to investigate the circumstances surrounding the trial independently.*

11. *I actually attended at the High Court to peruse the file with the assistance of my present attorneys. Upon perusal of the court file, I found that indeed the matter had come before court and a judgment had been entered against me. Even though it did not appear ex-facie the court file that the matter had not been fully defended, it became obvious to me that it was not.*
12. *This I say because, the trial was indeed a very short trial in which the merits do not appear to have been contested. The only documents seeking to prove damages were handed into court by consent (presumably between the attorneys handling the matter at the time), after which the honourable court assessed the damages and entered the judgment in the sum of E50,000.00.*
13. *I must say that I had given my attorney full instructions regarding my defence as contained in the plea and had never made any concessions nor had I instructed my attorney to make any on my behalf.*
14. *I had anticipated that I would be called to give evidence in my defence whereupon such would be ventilated fully and adjudicated upon by the court. This of course never happened as I was never advised by my attorney to come and give evidence in support of my defence.*
15. *In the result the court dealt with the matter, without my side of the story. Further the documents that were allowed by consent as proof of damages, had not been discovered and I had not been made aware of their existence. I never, at any stage gave the instruction to consent to their admission as part of the record. Had I been aware of same, I would have objected to their admission or at the very least, I would have insisted on the authors thereof giving evidence viva voce so they could be tested by way of cross-examination. The documents referred to herein are annexed hereto as "A", "B" and "C".*
16. *They are basically medical reports which constitute expert evidence for which we had not been notified in terms of the rules of the above honourable court. They were, therefore objectionable.*

17. *Further as stated herein above, I never instructed my attorney to concede the merits of the matter and had I been aware that the trial had been set down, I would have insisted that same be fully contested. The only reason I did not do so, was because I was not aware that the matter was due for trial on the date it came to court. That is why I did not attend.*
18. *Further, the only reason I did not challenge the judgment of the court, was because I had been advised by my attorney that the matter had been fully contested and that I had no prospects on appeal. I trusted his word that the matter had been fully defended which obviously was not true.*
19. *I did not therefore act negligently in any manner, neither did I act with wanton disregard of the authority of the court and its rules. I submit further that I have a bona fide defence to the action as the pleadings do show. In particular, I never assaulted the respondent as she fell on her own whilst she was running away from me after I confronted her about the scandalous remarks and rumours she had spread about me and my family. I submit that credence to this story could even be obtained from the very evidence that had been led in court. I submit therefore that good cause exists for a rescission of the judgment under the circumstances.*

[9] From paragraph 9 of applicant's affidavit in support of the application for rescission, it is clear that what precipitated this application was the allegation that "came to" his attention to the effect that he:

"was stupid and that was why even in court my attorney had not defended the matter".

[10] On the first question, it is common cause, as confirmed by counsel for the respondent that *viva voce* evidence was led in order to establish not only the quantum but also the nature of respondent's cause of action as clearly outlined by ***Maasdorp C. J. in Marais v Mdown 1919 OPD*** page 34 at 36:

“Now this court would never dream of giving judgment in a matter of damages for an assault without hearing some evidence to show what was the nature of the assault”.

[11] Further documentary evidence was admitted during trial. This was after discovery as clearly seen from the book of pleadings which was filed in court for purposes of the trial at page 25. It is worth noting that the applicant himself deposed to the discovery affidavit.

[12] On the above factual evidence appearing *ex facie* the record, it is clear that applicant's averments as appears at page 5 paragraphs 11, 12 and page 6 paragraphs 15 and 16 on evidence and discovery should be rejected outright on the basis of being misleading.

[13] The following is common cause as confirmed by plaintiff's attorney who conducted the trial.

- i) that plaintiff who gave *viva voce* evidence in further support of her evidence was never cross-examined by the defendant's erstwhile attorney, Mr. Mabila;
- ii) the two medical reports which formed part of plaintiff's evidence were admitted by consent;
- iii) defendant, in person, was not present during trial and therefore never gave evidence.

[14] It would appear to me from the above and from defendant's founding affidavit that on a balance of probabilities, he has proved that his erstwhile attorney has acted contrary to his instructions. He failed to inform him of the trial date and to invite him to come and give evidence as per the plea filed. Why in the face

of an action that has been strenuously opposed from the onset, the defendant cannot be privy for obvious reasons.

[15] **Murray J. in Scott v Trustee Insolvent Estate Comerna 1938 W.L.D. 129 at 136** states in a similar case as *in casu*;

“Where defendant has clearly never acquiesced in the plaintiff’s claim (as in casu) but actually persisted in disputing it, it seems to me that the court should be slow to refuse him entirely the opportunity of having his defence heard”. (words in brackets my own).

[16] **Webster and Another v Santam Insurance Co. Ltd. 1977 (2) S.A. 874** is analogous to this case in that appellant instructed an attorney to institute a claim for damages arising from an accident against the respondent who was an insurer. The lawyer failed to do so until there was prescription in relation to the claim.

[17] In allowing the appellant time to file Kotze J. A. in his wisdom held:

“A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily, he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfill his professional responsibility. It is of course not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual and a fortiori to lay client it would be a most unusual and unexpected occurrence. To hold, without qualification that a client is bound by the negligence of his legal advisers is, in my respectful view wrong.It may well be that to attribute to a client the negligence of his attorney would be justifiable in cases where he (the client) is partly to blame through his supineness or otherwise for his attorney’s dilatoriness”.

[18] Nothing has been said by respondent to indicate that applicant contributed to his erstwhile attorney's conduct of the 8th March 2009. In the premises, I hold that applicant has discharged the onus expected of him in respect of the first requirement of advancing a reasonable and acceptable reasons for his default.

[19] The second enquiry which is whether the applicant has established a *bona fide* defence which *ex facie* carries some prospects of success, I refer to paragraph 19 page 6 of defendant's founding affidavit which reads:

*"19. I did not therefore act negligently in any manner, neither did I act with wanton disregard of the authority of the court and its rules. I submit that I have a good and bona fide defence to the action as the pleadings do show. In particular, I never assaulted the respondent as she fell on her own **whilst she was running away from me, after I confronted her** (my emphasis) about the scandalous remarks and rumours, she had spread about me and my family. I submit that credence to this story could even be obtained from the very evidence that had been led in court. I submit therefore that good cause exists for a rescission of the judgment under the circumstances".*

[20] From this paragraph defendant states:

- he never assaulted the plaintiff: however he adds in support thereof:
- the plaintiff *"fell on her own whilst running away from me, after I confronted her"*

[21] In line with the legal definition of assault (being the raising of apprehension that force is about to be applied) with that respondent fell as a result of a confrontation meted out against her by the applicant, I do not accept that such averments establish a defence in favour of applicant. In fact, on a balance of

probabilities the scales of justice seem to me to tilt in favour of the respondent from applicant 's own showing. In this regard applicant has failed to satisfy the court that *ex facie* he has a *bona fide* defence on the merits of respondent's cause of action and therefore is likely to succeed should the orders of 8th March 2009 be rescinded.

[22] Applicant, both in his founding affidavit and submissions attacked the *quantum* awarded to the respondent. This calls for the court to revert to the declaration as filed by respondent:

“4. On the 28th April 2005 the defendant wrongfully, unlawfully and intentionally assaulted the plaintiff who was at the time visiting a friend who resides adjacent to the homestead of the defendant.

5. As a result of the assault plaintiff sustained severe injuries to the head and to the right arm, resulting in the plaintiff suffering extreme pain and persistent headaches.

6. The plaintiff was born in the year 1984.

Copy of her birth certificate is attached, marked “A”.

7. As a result of defendant's unlawful act as described above, and a result of the injuries sustained, the plaintiff has incurred and sustained damages as follows:

7.1	<i>Medical and hospital expenses</i>	<i>E 500.00</i>
7.2	<i>Pain and suffering</i>	<i>E20,000.00</i>
7.3	<i>Permanent disability</i>	<i>E100,000.00</i>
7.4	<i>Disfigurement</i>	<i><u>E 20,000.00</u></i>
	<i>Total</i>	<i><u>E140,000-00</u></i>

8. *The defendant is liable to compensate the plaintiff in the above stated amount.*
9. *Despite demand the defendant fails and / or refuses to pay the said amount.*

[23] An application for rescission lies in favour of the applicant where the applicant either in whole or part establishes that he has a *bona fide* defence and therefore prospects of success. In brief, by so submitting applicant asserts that he has prospects of success in relation to the *quantum* awarded in the following manner.

20. *I am further advised and humbly submit further, that even if the matter had not been defended, as it was not, the honourable court ought not to have granted the judgment that it did, under the circumstances. The honourable court therefore erred in the following respects:*

- 20.1 *The respondent claimed a total sum of E140,500.00 (One hundred and forty thousand five hundred Emalangeni) as damages which amount included amongst others, a sum of E100,000.00 (One hundred thousand Emalangeni) in respect of permanent disability and a sum of E20,000.00 (Twenty thousand Emalangeni) in respect of disfigurement.*
- 20.2 *The Honourable Court did not specify in its judgment how much it had awarded the plaintiff (respondent) under each head of the claim. The assumption is therefore that the amount of the award catered for all the heads of claim.*
- 20.3 *No evidence whatsoever, was led before court of any permanent disability suffered by the respondent. Instead, it is clear from the evidence led (Annexure C), that the respondent never complained of any disability neither way any such found out from the medico-legal examinations conducted upon the respondent.*

- 20.4 *No evidence of any disfigurement was led before court, with the medical reports only alluding to unsightly scars which had completely healed at the time of examination and were of no functional or cosmetic consequence.*
- 20.5 *The evidence contained in annexure “C” hereto could at best be regarded as evidence of future expenses, for which, the respondent had made no claim. I am advised and humbly submit there could be no award for future medical expenses as such had not been claimed in the summons.*
- 20.6 *The evidence of the actual injuries sustained by the respondent was not corroborated by the medical expert evidence led before court. For instance, the respondent alluded in its summons to have sustained severe injuries to the head and right arm. However the medical practitioner that first attended to the respondent found no injury to the right arm but only lacerations to the forehead and nose. There was further no evidence of how deep the lacerations were, which fact could have assisted the court in determining the extent of the pain and suffering sustained by the respondent.*
- 20.7 *I submit therefore that the court in its assessment of the damages, took into account, factors which it ought not to have taken into account and failed to take into account other factors it ought to have as a result of which the award was based on a largely exaggerated claim. The honourable court therefore erred in this regard.*
- 20.8 *In summary no evidence was led before the honourable court justifying the award of damages that was made by the honourable court. Even if the honourable court had allowed the amounts claimed as they were in respect of those claims properly before it, it still could not have made the award that it did. The judgment of the court is therefore liable to be rescinded.*

[24] The medical reports read: (page 10)

“This is to certify that the above named female aged 21 years was admitted at Hlathikhulu Government Hospital on the 28/04/2005 after having been assaulted.

Was found to have a laceration on the forehead and nose.

Was treated and discharged by the Ward Surgeon – Dr. Bobet Jean on the 03/05/2005.

Medical report - Page 12

“ This patient was interviewed in my rooms at Rosebank Clinic, Johannesburg on the 22nd January, 2009. The entire history was provided by the patient.

History

Miss Malinga, a twenty-four year old scholar, was assaulted on the 31st April 2005. She was hit with a shambock and sustained injuries to the tip of her nose, forehead and right upper arm. She was treated in a Government hospital in Swaziland with dressing only. Records of the hospitalization were not available at the time of the consultation. She spent five days in hospital.

Current Complaints

Headaches, unsightly scars on the nose and the right arm. Her past medical history is non-contributory.

Examination

Miss Malinga is a twenty four year old African woman in no apparent distress. Concentrating on the consequences of the assault the following was noted:

- *35mm healed scar is present extending from the columella of the nose across the right dome and into the right alar base. The scar is a hyper pigmented and associated with slight contour depression suggesting a fracture of the underlying lower lateral cartilage*

lateral crus. The nose is central, the boney skeleton appears intact and airways are patent and septum appears grossly uninjured.

- *The wound on the forehead has healed to perfection without any functional or cosmetic consequence.*
- *Two scars are present on the right upper arm measuring 25 mm and 35 mm in length. Both scars are fully matured and are associated with no functional deficit.*

Impression

The nasal tip scar can be improved by surgical revision. This would involve excision of the scar and on-lay graft over the depressed right lower lateral cartilage lateral crus.

Estimated cost

Estimated cost of the operation would be R17,500 (seventeen thousand five hundred rand). The patient would require treatment of the scar after surgery including emollients and sun block for a period of one year. Total cost of R1,000 (one thousand rand) for this part would be appropriate.

[25] The local practitioner as reflected in his report found laceration in the forehead and nose. The foreign doctor corroborates this as he observed 35 mm scar “*from the columella of the nose across the right dome.*” This is a clear indication of a visible scar although healed. In fact respondent’s attorney submitted that the court observed the visible scar on respondent’s face as supported by two medical practitioners one from Swaziland and another from South Africa. Paragraphs 20.3, 20.4, 20.5, 20.6 should be rejected on the basis that two reports corroborating each other were submitted and considered by court.

[26] As demonstrated by respondent, applicant initial claim was for the some of E140 500. However, on the conclusion of the trial, the court awarded respondent the sum of E50,000, an amount far less than what was initially applied for. This is

an indication that the court applied its mind fully on the matter before it. Further, from the fact that respondent was awarded just a quarter of the total claim, one can safely hold that applicant succeeded partly in his defence. Therefore applicant's assertion as appears at paragraph 20.7 & 20.8 has no basis".

[26] The Applicant indicated during submissions that the application is also brought in terms of rule 42 (1) (b) which reads:

“ *The court may, in addition to any other powers it may have, mero murtu or upon application of any affected, rescind or vary:*

(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.

[27] Applicant argued that there were patent error in that the judgment of the court granted damages in respect of disfigurement and disabilities in the absence of evidence supporting the same. The least that the court should have granted damages was in respect of medical and hospital expenses and pain and suffering which totaled E2,500.00 and not E50,000.00.

[28] Patent error has been defined as an error as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it.

[29] An application under this rule (42 (1) (b)) was brought in **Seadle v Protea Assurance Co. Ltd 1984 (2) S.A.** 537. A recapitulation of the evidence is that the court *a quo* had awarded damages before a final report on the amount of the damages to be awarded was filed. The court, in dismissing the application for rescission for purposes of reconsideration of the quantum held”

“...the court could not alter (b)as the court had not made a patent error or omission, on the contrary the order made was the considered decision of the court and its true intention was to make the awards in the amount stated by the court”.

[30] As already indicated, the plaintiff prayed for damages to the tune of E140,500.00. The court granted plaintiff E50,000.00 as damages. This court considered fully the action before it before awarding the amount stated in the unwritten judgment. In the circumstances, this court is not persuaded to set aside the judgment of 8th March 2009.

[31] I now turn to consider the question of costs.

[32] The judgment of this court which the applicant is calling for its rescission was granted on 8th March 2009. From his founding affidavit at paragraph 9, the applicant asserts that respondent revealed that his attorney did nothing in court and this was in the middle of December 2010. The application for rescission was brought on 27th January, 2011. **Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) S.A.** 298 at 306 is authority for the question as to when should an application for rescission be brought to court. The court held:

“ Thus provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more...”

[33] As the application for rescission was filed within 2 months of becoming aware that the applicant was not fully represented at the hearing, I consider this period to be reasonable as he had to solicit services of a new attorney.

[34] As already alluded, nothing has been shown that the applicant contributed to his former lawyer’s conduct of failing to represent him fully on the trial date.

[35] On the basis of the above, this court is not persuaded to grant costs on attorney client scale.

[36] In the circumstances the following orders are entered against the applicant:

- i) Application for rescission is hereby dismissed.
- ii) Applicant is ordered to pay respondent costs

M. DLAMINI

JUDGE

