



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No: 180/2013

In the matter between:

SWAZILAND WATER SERVICES

APPLICANT

AND

BARNABAS KHUMALO

RESPONDENT

In re:

Barnabas Khumalo

Plaintiff

And

Swaziland Water Services

Defendant

Neutral citation: *Swaziland Water Services vs Barnabas Khumalo (180/2013) [2013] SZHC171 (9 August 2013)*

CORAM:

M.C.B. MAPHALALA, J

Summary

Civil Procedure – application for a stay of execution and rescission of judgment by default – the essential requirements of rescission of judgment by default discussed – held that the applicant has satisfied the peremptory requirements of the relief sought – held further that the applicant is given leave to defend the main action – applicant to pay costs of the application.

**JUDGMENT
9 AUGUST 2013**

- [1] This is an urgent application for a *rule nisi* to issue with interim and immediate effect calling upon the respondent to show cause why the following should not be made final: firstly, staying the execution of the judgment granted by this Honourable Court in the main action dated 27th March 2013 pending the finalization of the above matter. Secondly, rescinding and/or setting aside the judgment of the Court dated 27th March 2013 in the above matter. Thirdly, granting the applicant leave to defend the main action instituted by the respondent by summons dated 8th February 2013 in the above matter.
- [2] This is an application for rescission in terms of Rule 31 (3) (b) of the Rules of the above Honourable Court. The applicant contends that the judgment came to its attention on the 27th March 2013; and, that its attorney who was in Court for another business, found the Taxing Master taxing a bill of costs in the matter.
- [3] The applicant contends that from a perusal of the Court Record, it found that the respondent obtained judgment by default against the applicant on the 22nd March 2013 in terms of a Combined Summons alleged to have been served upon Clement Dlamini, the Employee Relations Officer of the applicant, on the 25th February 2013; and that he was directed to hand over the summons to its attorneys with instructions to defend the action. However, he travelled on duty outside the country before handing the summons over to the attorneys.

- [4] The applicant alleges that in October 2010, it received information that the respondent had connected water supply illegally to his home. The applicant subsequently conducted investigations and found that the allegation was true. It further contends that the investigation involved digging underground water pipes.
- [5] The applicant contends that it was entitled to investigate the allegations of illegal connection of water including the digging for underground pipes leading to the homestead of the respondent in order to verify the allegations. The results established the illegal connection of the water through an underground piping system leading to the respondent's homestead. During the hearing of this matter, a *rule nisi* was issued staying execution of the judgment granted by default in the main action pending finalization of this application.
- [6] The application is opposed by the respondent and he has accordingly filed a Notice of Intention to Oppose as well as an Opposing Affidavit. He contends that the applicant has not satisfied the essential requirements of Rule 31 (3) (b). However, he concedes that the applicant learnt of the default judgment when the Taxing Master enquired from applicant's attorney about the bill of costs in the main action.
- [8] The respondent denies that the applicant's employees found underground pipes at his homestead as alleged and that he only uses water purchased from the

applicant's tankers. He further alleges that the applicant's employees came to his homestead aboard more than two vans and accused him of being a thief; and, that such statements were very harmful to him as a man of seventy-nine (79) years of age and a local preacher with the Seventh Day Adventist Church at Kwaluseni area. He argued that his dignity was impaired in the process; and contends that the applicant has no *bona fide* defence to the Action proceedings; similarly, he argues that the applicant has failed to disclose 'good cause' for the rescission of judgment by default.

- [8] The applicant filed a replying affidavit in which it reiterated the allegations in the founding affidavit. Furthermore, it argues that it meets the requirement of Rule 31 (3) (b) including furnishing security for costs. The applicant argues that it intends defending the Action proceedings, and, that the prospects of success in the main action are good on the ground that an illegal connection was found.
- [9] The applicant reiterated that it did find underground pipes at the homestead of the respondent, and, to that extent, it intends to defend the main action. The applicant denies insulting the respondent and calling him a thief. Applicant contends that its employees were merely carrying out their normal duties. Applicant further contends that it reserves the right to carry out an inspection whenever there is a reasonable ground for suspecting that there is an illegal

water connection; and that such inspections are done professionally without an intention to impair the dignity of its customers.

[10] Rule 31 (3) (b) of the High Court Rules provides the following:

“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 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, set aside the default judgment on such terms as to it seems fit.”

[11] It is common cause that the respondent obtained judgment by default against the applicant on the 27th March 2013; and, that the applicant became aware of the said judgment on the 27th March 2013 when the bill of costs was being presented to the Taxing Master for taxation. The respondent does not dispute that the present application was filed timeously in terms of Rule 31 (3) (b), and, that the applicant has paid security for costs as required.

[12] *His Lordship Chief Justice Nathan* in the cases of *Msibi v. Mlawula Estates (Pty) Ltd*, *Msibi v. G.M. Kalla and Company* 1970 -1976 SLR 345 (HC) at 348 said the following:

“It is to be noted that the Court has a discretion in the matter and that ‘good cause’ must be shown. The requirements which must be satisfied before the Court will grant a rescission of a default judgment have been dealt in a number a cases....

The tendency of the Court is to grant such an application where: (a) the applicant has given a reasonable explanation of his delay; (b) the application is bona fide and not made with the object of delaying the other party’s claim; (c) there has not been a reckless or intentional disregard of the Rules of Court; (d) the applicant’s action is clearly not ill-founded; and (e) any prejudice to the opposite party could be compensated for by an appropriate order as to costs.”

[13] At pp 348-349 *His Lordship Nathan CJ* said:

“it seems clear that by introducing the words ‘and if good cause be shown’, the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence.... In addition to having to establish a prima facie defence, an applicant for rescission must furnish good reasons for his default....

The explanation must be reasonable ... namely it must not show that his default was wilful or was due to gross negligence on his part.”

[14] *Miller JA* in the case of *Chetty v. Law Society, Transvaal* 1985 (2) SA 756 (AD) at 765 states:

“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.”**

[15] It is well-settled in our law that a Court has a discretion, in rescission applications, which should be exercised judiciously in accordance with the tenets of fairness and justice. In exercising that discretion, I am satisfied that good cause has been shown. The explanation given by the applicant for its default is reasonable. There is no evidence before Court that the default was wilful or that it was due to gross negligence on its part. The applicant has shown that on the merits, it has a bona fide defence which carries some prospect of success.

[16] Accordingly, the following order is made:

- (a) The execution of the judgment by default granted by this Court in the main action on the 27 March 2013 is hereby stayed.
- (b) The judgment by default granted by this Court on the 27 March 2013 is hereby rescinded and set aside.

(c) The applicant is granted leave to defend the main action instituted by the respondent in terms of the summons dated 8th February 2013 in the above matter.

(d) The applicant is directed to pay costs of the rescission application.

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

For Applicant Attorney Nosipho Mazibuko

For Respondent Attorney Lucky Vilakati