IN THE HIGH COURT OF SWAZILAND

Civil case No: 1379/2012

In the matter between:

PAUL IVAN GROENING	**APPLICANT**
AND	
SIPHO MATSE ATTORNEYS	**FIRST RESPONDENT**
BONGANI NDWANDWE	**SECOND RESPONDENT**

In re:

Sipho Matse Attorneys	Applicant
And	
Paul Ivan Groening	Respondent

Neutral citation: *Paul Ivan Groening v Sipho Matse Attorneys & Another (1379/12) [2013] SZHC35 (2013)*

Coram: **M.C.B. MAPHALALA, J**

For Applicant Attorney W. Maseko
For Respondent Attorney M. Mabuza

Summary

Civil Procedure – rescission application in terms of Rule 31 (3) (b), Rule 42 as well as the Common Law – requirements thereof discussed – application granted.

JUDGMENT
28 FEBRUARY 2013

[1] This is an urgent application for rescission of judgment granted by this court on the 7th September 2012 in favour of the first respondent. He further sought an order setting aside the warrant of execution issued on the 12th September 2012 against the movable goods of the applicant pending finalization of this application. He also sought an order for costs in the event of opposition of this application.

[2] It is common cause that in 2010 the applicant instructed the first respondent to represent it in a suit it had with Standard Bank Swaziland Limited; subsequent thereto the first respondent wrote a letter to the applicant demanding "estimate costs of E8 500.00 (eight thousand five hundred emalangeni) to cover the exchange of all pleadings".

[3] It is not in dispute that after this correspondence, the first respondent proceeded to draw up the necessary pleadings and further appeared in court to oppose Summary Judgment; and it was dismissed by this court on the 18th March 2011. The matter was referred to trial; and, it is currently awaiting the allocation of a date by the Registrar of the High Court.

[4] The first respondent then demanded payment of legal fees of E36 082.00 (thirty six thousand and eighty two emalangeni) for services rendered. The

applicant inturn demanded a Statement of Fees for work done including an account of the initial payment of E8 500.00 (eight thousand five hundred emalangeni); however, according to the applicant, the first respondent did not furnish the Statement of Fees despite numerous reminders. Subsequently, he was served with a Writ of Execution for attachment of movable property for the amount of E36 082.00 (thirty six thousand and eighty two emalangeni) in respect of legal fees owed.

[5] The applicant denies being served with summons or a Court order to pay the amount in the Writ of Execution; and, he argued that his failure to defend the matter was not wilful in the circumstances. He further argued that the Court Order was erroneously sought and granted in his absence.

[6] The Return of Service indicates that the summons were served upon the applicant personally at his place of residence at Two Sticks Township, House No. 196, in Manzini. However, the applicant denies receiving the summons or that his place of residence is at Two Sticks Township; he argued that his place of residence is at Maphungwane in the Lubombo region.

[7] The applicant argues that he has a *bona fide* defence in this matter partly because he had not been furnished with a Statement of Account and partly

because the first respondent had advised him that the estimate fees would be E8 500.00 (eight thousand five hundred emalangeni).

[8] The first respondent has raised certain points in *limine* which were argued simultaneously with the merits. Firstly that the application is not urgent as required by Rule 6 (25) on the grounds that the applicant has failed to set forth explicitly the circumstances which he avers render the matter urgent, and, that the applicant has failed to state the reasons why he cannot be afforded substantial redress at a hearing in due course. Contrary to these arguments, the applicant has complied with Rule 6 (25) in paragraph 12 of his founding affidavit; hence, this point of law stands to be dismissed.

[9] The second point of law relates to Rule 45 (8), and, the first respondent argued that the Rule provides for attached goods to be sold twenty one days after the attachment; according to the first respondent, the present application is not urgent since the application could still be brought before the sale. This point of law is misdirected and overlooks the fact that the applicant intends to prevent the attachment and not the sale of the goods. The fact that the Writ of Attachment has been issued and awaits enforcement justifies urgency; hence, this point of law is bound to fail as well.

[10] The third and final point of law is that the applicant has failed to comply with Rule 42, Rule 31 (3) (b) or the Common law. Rule 31 (3) (b) provides the following:

> **"A defendant may within twenty-one days after he had 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."**

[11] *His Lordship Chief Justice Nathan* dealt with the requirements of Rule 31 (3) (b) in the cases of *Msibi v. Mlawula Estates (PTY) Ltd*, *Msibi v. G.M. Kalla and Company* 1970-1976 SLR 345 (HC) at 348 where he stated the following:

> **"It is 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 with in a number of 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."

[12] At pages 348-349 *His Lordship Chief Justice Nathan* stated the following:

"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, that it must not show that his default was wilful or was due to gross negligence on his part."

[13] The default judgment was obtained on the 7th September 2012 and the Warrant of Execution was lodged on the same day; however, it is not clear when the applicant was served with the Warrant of Execution. At paragraph 8 of his Founding Affidavit, he merely states that it was in September 2012. Rule 31 (3) (b) requires that the application for rescission should be lodged within twenty-one days after the applicant has knowledge of the judgment. This application was lodged on the 28th November 2012; clearly, the period for lodging the application in terms of Rule 31 (3) (b) had lapsed.

[14] Rule 42 provides the following:

> **"42. 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."**

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

"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."

[16] In the case of *Bakoven Ltd v. G.V. Holmes (PTY) Ltd* 1992 (2) SA 446 at 471 (EC) *Erasmus J* stated the following:

"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 contra- distinction to relief in terms of Rule 31 (3) (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 application can point 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 (3) (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 both latter instances, he must show good cause."

[17] In the case of *Chetty v. Law Society, Transvaal* 1985 (2) SA 756 (AD) at 765, *Miller JA* stated that in terms of the Common Law, the Court has power to rescind a judgment obtained on default of appearance provided sufficient cause has been shown. He continued and said the following:

> **"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....**
>
> **It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."**

[18] Similarly, the applicant has shown "good cause" as required by the Common Law. He has given a reasonable explanation for his default; in

addition, he has set out the basis of his defence, which in my view, is *bona fide*.

[19] In terms of Rule 42 (1), the court may rescind an order or judgment granted erroneously and in the absence of any other party affected. The applicant must establish the existence of a fact which the court was not aware of which would have precluded the granting of the said judgment or order and which would have induced the Court, if it had been aware of it, not to grant the judgment. In the case of *Nyingwa v. Moolman NO* 1993 (2) SA 508 TK GD at 510, *White J* stated:

> **"It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, 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.'**

[20] It is not in dispute that the matter was heard in the absence of the applicant or his legal representative; similarly, it is not in dispute that the judgment was granted in his absence as envisaged by Rule 42. This application should succeed in terms of Rule 42 on the basis that the court would not have granted judgment if it was aware that there was a dispute whether or not the applicant was served with summons. Similarly, the court was not

aware that the fees were disputed on the basis that no statement of account was given to the applicant. In addition the fees were not agreed between the parties or taxed; the amount of fees is seriously contested.

[21] The applicant contends that he was never served with the summons as alleged by the second respondent. He denies ever residing at House no. 196 Two Sticks in Manzini. Ntombifuthi Mahhwayi, a resident of House No. 196 Two Sticks in Manzini has deposed to a confirmatory affidavit denying that the applicant resides there. At paragraph 3 she states as follows:

> **"I have seen and read the Applicant's Replying Affidavit and I wish to confirm all allegations contained therein as they relate to me in particular that the applicant does not reside and had never resided at my place of residence, that being house No. 196 at Two Sticks, Manzini and that there was never at any point in time that the applicant was served with any court papers of whatever kind in my place of residence."**

[22] The applicant concedes receiving a Notice of Motion and a Rule *Nis*i in the same matter on the 27th September 2012 which were served upon him personally at House No. 95 Two Sticks in Manzini. This is borne out by Annexure 'SM2' being the Return of Service filed by the second respondent. This casts doubt on whether the applicant was served with the summons as alleged.

[23] Meanwhile Phemba Mahhwayi, a resident of Two Sticks House No. 196 in Manzini in support of the first respondent states the following at paragraph 3 of her Confirmatory Affidavit:

> **"In particular, I confirm that applicant herein was personally served at Two Sticks House No. 196 in my presence with summons commencing action and Notice of Motion with Rule *Nisi* Order on the 13th August 2012 and 27th September 2012 respectively."**

[24] This clearly shows that there is a material dispute of fact with regard to the Return of Service of summons which cannot be resolved on the papers. Similarly there is a dispute of fact on whether or not the applicant received the statement of account dated 31st August 2011. According to the applicant, he approached the first respondent after being made aware of the judgment and asked for the statement; he asked to negotiate the fees with first respondent to no avail.

[25] It is apparent from the pleadings that the fees charged by the first respondent were not agreed between the parties or at least taxed to the satisfaction of the parties. Similarly, it is apparent that the applicant considers the fees to be excessive. In the circumstances, it will not assist any of the parties to refer to matter to trial in view of the material disputes

of fact alluded above because that will not bring finality to the matter since the real issue for determination is the amount of fees charged by the first respondent. This court is not in a position to determine whether or not the amount of fees charged by the first respondent is in the circumstances excessive.

[26] The application succeeds as follows:

(a) The judgment by default granted by this court on the 7th September 2012 in respect of this matter is hereby rescinded and set aside.

(b) The Warrant of Execution dated the 12th September 2012 against the movable goods of the applicant is set aside.

(c) The Taxing Master is directed to tax the Statement of Account prepared by the first respondent for the attention of the applicant within fourteen days of this Order in the presence of the parties and/or their legal representatives.

(d) No order as to costs.

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M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT