



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 330/2014

In the matter between:

**INTAMAKUPHILA FARMERS ASSOCIATION**

**(PTY) LTD**

**1<sup>ST</sup> APPLICANT**

**HAZEL MAHLALELA**

**2<sup>ND</sup> APPLICANT**

AND

**MFANASIBILI MATHONSI**

**RESPONDENT**

*IN RE:*

**MFANASIBILI MATHONSI**

**APPLICANT**

And

**INTAMAKUPHILA FARMERS ASSOCIATION**

**(PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**SALAPHI MAHLALELA**

**2<sup>ND</sup> RESPONDENT**

**LUCKY LUSHABA**

**3<sup>RD</sup> RESPONDENT**

**JABULANI NKALANGA**

**4<sup>TH</sup> RESPONDENT**

*Neutral citation: Intamakuphila Farmers Association & Another v  
Mfanasibili Mathonsi (330/2014) [2014] SZHC 189  
(7<sup>th</sup> August 2014)*

**Coram : M. E. SIMELANE, AJ**

**Heard : 29<sup>th</sup> July 2014**

**Delivered : 7<sup>th</sup> August 2014**

**Summary**

*Rescission in terms Rule 42 (1) (a) – matter allocated hearing date during roll call – no notice of set down prepared – respondent appearing in court and granted judgment – failure to comply with Rule 6(16) – rescission granted – applicant to pay costs.*

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**JUDGMENT  
7<sup>th</sup> AUGUST 2014**

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[1] Under a Certificate of Urgency the Respondent applied for an Order in the following terms:

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1. *Dispensing with the normal time limits and manner of service provided for in the Rules of the above Honorable Court and hearing this matter as one of urgency.*
2. *Condoning Applicant's non-compliance with the Rules of this Honorable Court.*
3. *Staying the execution of court order and writ of execution in this matter pending finalization of this application.*
4. *That a rule nisi be and is hereby issued calling upon the Respondent to show cause on the date to be determined by the above Honorable Court why;*
  - 4.1 *The order made by the above Honorable Court under case no: 330/2014 on the 03<sup>rd</sup> July 2014 should not be rescinded and/or set aside.*
  - 4.2 *The writ of execution on this matter should not be set aside.*
  - 4.3 *The Respondent should not be ordered to pay costs of this application.*
5. *That prayers 1,3 and 4 hereof be granted as an interim to operate with immediate effect pending the return date to be determined by the court.*

6. *Grating further and/or alternative relief.*”

**FACTS OF THE MATTER**

- [2] On the **16<sup>th</sup> of June 2014** I conducted a roll call and Mr. Thulane Sibandze, the current Applicant’s attorney, attended same according to my records.
- [3] The main matter was allocated for hearing on the **3<sup>rd</sup> of July 2014**. During the roll call no one represented the Respondent.
- [4] The date was however relayed to the Respondent’s attorney and when the matter was called for hearing on the 30<sup>th</sup> July 2014 at 1130 hours the Respondent’s attorney, Mr. Mzwandile Dlamini, appeared alone.
- [5] I directed him to telephonically call the officers of Applicant’s attorney namely, Mr. Nzima, who he called but found his phone off.
- [6] He thereafter called Mrs. Mamba at Applicant’s law firm and the latter said she did not know as to who is handling the matter.
- [7] Mr. Dlamini came back to report what had transpired and further went on to state that earlier on in the morning he had called Mr. T. Sibandze about the matter to be heard he said he did not know as to who was handling the file.

- [8] Mr. M. Dlamini argued that he had made all means to notify the Applicants about the pending matter and that they should have diarized same or at least attended to court. In any event it was them that related the date of hearing.
- [9] It is worthy to mention that at paragraph 5 of Applicant's replying affidavit the Applicants do concede that they sent someone to attend the roll call on their behalf.
- [10] During arguments and in the affidavits, Mr. Sibandze denied ever talking with Mr. Dlamini on the day of the hearing but argued that their conversation was prior to the date of hearing.
- [11] It further transpired that the file of Applicants was handled by lawyer MR. MAQHAWE DLAMINI who has left the Applicant's practice hence that is why there was confusion as to who was handling the file in the office. The Applicant's attorney was aware that the matter was being handled by the said attorney.
- [12] The Applicant contended that in as much as the matter was allocated a hearing date, the Respondent ought to have served them with a NOTICE OF SET DOWN in terms of RULE 6(16) hence the omission thereof entitles them to be granted a rescission order.
- [13] They tendered costs of the rescission which Mr. Sibandze argued that it will cure any prejudice suffered by the Respondent.

[14] Their further argument was that on the 3<sup>rd</sup> of July 2014 the Respondent should have postponed the matter and asked for costs because they ought to have known that they had raised a formidable opposition.

### **THE LAW APPLICABLE**

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[15] RULE 42 (1)(a) of the Court Rules as amended provides as follows;

*“The court may, in addition to any other powers it may have, mero motu or upon the application of any part affected, rescind or vary –*

*(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”*

[16] In ***Bakoven v G. J. Howes (Pty) Ltd 1992 (2) SA 466 at 471 E-G***, Erasmus J. reasoned as follows regarding the scope of Rule 42(1)(a), whose wording in South Africa is *in pari materia* with the local Rule. I quote:-

*“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. (The shorter Oxford Dictionary) 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 his 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.”*

[17] From the totality of the argument and seeing that no Notice of Set Down was served on the other party, I exercise my discretion to allow the rescission. I was unaware that a Notice of Set Down had been prepared in the matter.

[18] Regarding the circumstances under which it can be said that a judgment has been erroneously granted, White J. stated as follows in ***Nyingwa v Moolman NO 1993 (2) SA 508 (Tk G.D) at 510 F;***

*“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.”*

[19] I am alive to the fact that the Respondents attorney did all that he could to notify the Applicants about the date of hearing and the fact that the Applicants attorney attended the roll call.

[20] In the premise I make the following orders;

- a) The *rule nisi* granted on the 11 of July 2014 with the exception of prayer 4.3 in the Notice of Motion dated 9<sup>th</sup> July 2014 is confirmed.
  
- b) The Respondent is granted costs incurred from the 2<sup>nd</sup> July 2014 to the 7<sup>th</sup> August 2014 inclusive of Sheriff's costs.

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**MBUSO E. SIMELANE**  
**ACTING JUDGE**

**For Applicants : T. Sibandze**

**For Respondents : M. Dlamini**