



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.558/2008

In the matter between:

**THOMAS MASHESHA DLAMINI**

**Applicant**

**And**

**SWAZILAND DEVELOPMENT AND SAVINGS BANK**

**Respondent**

**Neutral citation:** *Thomas Mashsha Dlamini And Swaziland Development and Savings Bank (558/08) [2014] SZHC 197 (08 August 2014)*

**Coram:**

Hlophe J

**For Applicant:**

Mr. S. Dlamini

**For Respondent:**

Mr. T. Mlangeni

**Date Heard:**

21 July 2014

**Date judgment handed down:**

08 August 2014

## Summary

*Civil Law – Application for rescission of judgment – Application allegedly based on error as envisaged by Rule 42 and on the common law – Nature of error relied upon – Whether such error borne out by the facts of the matter – No such error established as court entitled to deal with matter and grant relief sought following that no attorney of record or address for service of process as envisaged by the rules, was appointed within the required number of days leading up to the grant of the default judgment – Upon failure of such ground, court enjoined to consider whether rescission established on other grounds – Whether grounds for rescission at common law satisfied – Requirements of the relief sought at Common Law as the establishment of good cause – Good cause consists of a reasonable and acceptable explanation on the one hand together with a valid and bona fide defence.*

*Facts reveal that pleadings had closed in action proceedings instituted by Respondent against Plaintiff with a plea filed – A misunderstanding allegedly developed between Applicant and his initial attorneys of record – The said attorneys withdrew without the Applicant, whose post box is in a different town than one in which he stays, being aware until after default judgment is obtained against him – Rescission application instituted.*

*Whether requirements of a rescission met in the circumstances – Remedy a discretionary one – Not a case of Applicant having abandoned matter altogether with former attorney – Triable issue revealed in the plea – Settled that a strong defence compensates for a weak explanation – Rescission granted and Applicant ordered to pay costs in view of the sloven manner in which his papers were drawn.*

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## **JUDGMENT**

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- [1] On the 6<sup>th</sup> June 2014, this Honourable court granted a default judgment pursuant to an application for same moved by the current Respondent as Plaintiff therein. It is not in dispute that the grant of the default judgment was informed by a background in terms of which the parties, namely the then Plaintiff and Defendant, who are respectively the Respondent and Applicant, had filed all their pleadings with a pretrial conference being awaited before the matter would be ripe for allocation of a trial date.
- [2] It transpires that this being the position the attorney hitherto representing the Applicant, filed a notice of withdrawal which allegedly however, did not come to the attention of the Applicant until judgment was granted after the period given the Applicant in terms of the Notice of Withdrawal

had lapsed. The notice of application for Default Judgment was not served on either the Applicant (whose address was now not known), nor was it served on his previous attorneys. It was granted on an ex parte basis therefore. It appears from the allegations made that the notice of withdrawal concerned was attempted to be served on the Applicant by means of registered post or mail. I say attempted because he says he did not receive same until after the judgment.

[3] It was contended by the Applicant that he did not receive a copy of the Notice of Withdrawal. It was disclosed that the postal address used was actually a Manzini postal address of the Applicant who however was residing in Nhlanguano at the time. This then resulted in him not becoming aware of the Notice of Withdrawal by his hitherto attorney of record and flowing directly therefrom, his not being aware of the set down of the matter for the grant of the default judgment complained of.

[4] The Applicant avers in his papers that the first time he got to know about his matter being or having been before the High Court was when he met his attorney in a different matter, whom he disclosed to be a Mr. Ndlovu, who he says he met by chance on the 9<sup>th</sup> June 2014, when the latter told him he had seen his matter on the roll for default judgment on the 6<sup>th</sup> June 2014. It was then that he allegedly instructed his current attorneys, the

very ones he had previously instructed to engage with his initial attorneys in the same matter, to find out from the court file what had transpired in court. A report he obtained from his current attorneys was that a default judgment had been entered against him, calling upon him to inter alia pay the current Respondent a sum of E444, 433.13 interest thereon at 9% per annum as well as costs. There was also sought an order of court declaring a certain portion of Farm No. 46, Shiselweni District, executable.

[5] To complete the puzzle presented by the facts, this Applicant contended that after all the necessary pleadings had been filed to the extent referred to above, there developed a misunderstanding between him and his previous attorney's S. C. Dlamini and Associates. This misunderstanding was altogether sparked off by a disagreement over what was remitted to him by the said attorneys from the proceeds of a default judgment in the counter claim he had filed against the Defendant in the same matter. The said attorneys apparently withheld more than what the Applicant had expected or considered to be fair from the aforesaid proceeds.

[6] The Applicant contends that as a result of this dispute, the said attorney refused to pick up his phone calls nor did he agree to meet and engage him in any way. He was eventually to approach his current attorneys,

Sibusiso B. Shongwe And Associates who he instructed to liaise with the said attorneys about the dispute between them. The engagement was still on going between the two firms of attorneys when the default judgment complained of was entered against the Applicant as the Defendant.

[7] The Applicant averred that he ascertained that the default judgment had been entered against him on the 6<sup>th</sup> June 2014. On the 24<sup>th</sup> June 2014 his attorneys moved the current application for rescission of judgment. In the founding affidavit in support of the said application, the Applicant set out the foregoing facts.

[8] I must record that the allegations by the Applicant stood uncontroverted when considering that the Respondent did not file an answering affidavit as it contended itself only with a Notice to raise points of law. From the points raised it was clear that the Respondent was concerning itself only with the sufficiency of the allegations made to sustain the relief claimed. Indeed, whereas the points raised included such points as Lack of Urgency, a failure to meet the requirements of an interdict and a failure to satisfy or meet the requirements of an interdict as either contemplated by Rule 31 (3) (b), Rule 42 and the common law, the only point to be pursued was the last one, that the failure to satisfy or to meet the

requirements of all the legally conceivable grounds of rescission proceedings as listed herein above.

[9] The basis of the application, ex facie the papers filed of record is that the default judgment complained of was allegedly granted erroneously which entitled this court to rescind the judgment concerned as contemplated by Rule 42 of the rules of this court. Why the Applicant contends the judgment was granted erroneously is not elegantly set out ex facie the papers. It appears that the alleged error was in the court granting the judgment on the belief that he had been served with the Notice of Withdrawal when he infact had not been so served. Indeed during the hearing of the matter I asked the Applicant's counsel what the alleged error was. He maintained that was in the court granting the judgment under the belief that he had received the notice of withdrawal and had decided not to pursue the matter, when he infact had not received the said Notice and was he claimed, intent on defending the matter.

[10] I have no hesitation in coming to the conclusion that there are no basis for the alleged error. This I say because there is no denial by the Applicant that before the judgment could be entered against him there was filed and served with him and the court a notice of withdrawal giving him a specific period within which to appoint an address for service of court

process. Attached to the Notice concerned was a postal slip confirming same had been served to the Applicant by registered mail. The Applicant could also not deny that in terms of the rules and practice in this court, failure to appoint such an address does entitle the other party to set a matter down at the end of the specified period (10 days in terms of the rules) and obtain a judgment which the court is entitled to grant in such circumstances.

[11] A judgment or order is erroneously granted according to H. J. Erasmus' Superior Court Practice, 1994 Publication, Juta and Company:-

*“If there was an irregularity in the proceedings or if it was not legally competent for the court to have made such an order, or if there existed at the time of its issue of 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”.*

In the matter at hand, and subsequent to the failure by the Applicant to appoint an address, the matter was set down for default judgment which was subsequently granted in the Applicant's favour. There is clearly no error in this regard and the judgment can certainly not be rescinded on the basis of error as envisaged in Rule 42 in as much as there was no error on



the part of the court which granted the judgment as a matter of course in the circumstances.

[12] Having concluded that there was no error on the part of the court resulting in the grant of the judgment, does it then signal the end of the matter? According to the practice in this court, as well as the law on the subject this cannot signal the end of the matter as this court is enjoined to consider if the judgment can be rescinded on any of the other basis which are respectively the provisions of Rule 31 (3) (b) or the common law. In *Nyingwa v Moolman 1993 (2) SA 508 at page 510 C- D* this position was expressed in the following terms:-

*“Although I agree with Mr. Locke’s submission that the application cannot be brought under Rule 31 (2) (b), I do not believe that that is the end of the matter. That would be too formalistic an approach. This court must also decide whether the application can succeed under the provisions of either Rule 42 (1) (a) or the common law”.*

[13] Indeed at the commencement of the hearing I asked specifically from Applicant’s counsel what the basis of the application were. His response was that it was both the error as contemplated by Rule 42 as well as the

Common Law. He was very clear therefore that Rule 31 (2) (b) was not the basis at all. I have accepted this and confirm that I will not consider that basis at all as it prima facie appears to be unsuited in the circumstances. I therefore have to consider the common law as a ground at this stage given that I have already dealt with the question whether or not there was an error as envisaged by Rule 42 of the High Court rules and concluded there was no such error.

- [14] A judgment or order can be rescinded under the common law. The issue for consideration being whether such a judgment was granted after considering the merits or on a default basis without such having been considered. If it was granted after considering the merits, either through hearing oral evidence or through considering an affidavit filed of record in that regard, then the grant of rescission can only be in very limited circumstances which are whether or not there was fraud in the obtainance of the judgment or whether there was Justus error, or whether there has since been a discovery of new documents. The judgment of *Childerly Estate Stores (PTY) LTD v Standard Bank of SA Ltd 1924 OPD 13* is apposite in this regard. Otherwise the grant of a judgment in situations where evidence is led and or the judgment is granted in the merits renders the court functus officio.

[15] Where the judgment is granted by default and without the merits of the matter having been considered; that is to say where neither oral evidence no evidence on affidavit was heard prior to the grant of such a judgment, then the instances for the rescission of default judgments, is not limited. All that is required is the establishment of good cause which at times is referred to as sufficient cause.

[16] To ascertain whether or not good cause or sufficient cause has been established, there has to be a reasonable and acceptable explanation for the default on the one hand taken together with a bona fide defence in the merits which carries some prospects of success. See in this regard ***Chetty v Law Society, Transvaal 1985 (2) SA 756 A at 765 B-C***. Of course these requirements have to co0exist at a given point for a rescission to be granted such that the absence of one, as a general rule, would result on the dismissal of such an application.

[17] The Applicant's papers do not appear to have been drawn with a clear appreciation of these requirements necessitating that the papers be closely considered to discharge the duty placed by law on the court to ascertain whether the said judgment can be rescinded on the basis of the common law, after failure to establish an error. It is not in dispute that Applicant's papers indicate that the Applicant was unaware that the matter had been

set down for default judgment just as he claims he was not aware that his hitherto attorneys of record had withdrawn. The Applicant further claims that he had not abandoned his matter with his said attorneys but claims that he was not receiving cooperation from his attorneys who were refusing to see him despite his making concerted regular efforts to see them. In fact he claims that he went to the extent of engaging other attorneys to liaise with his said initial attorneys who later withdrew without having effectively informed or notified him or the attorneys he had engaged to liaise with them about the same matter.

[18] Approached from this angle only, the Applicant's case on the requirement of a reasonable and acceptable explanation appears strong and sound until such time that one considers the reason why the Applicant did not receive the Notice of Withdrawal sent to the registered mail as well as the time it apparently took him after having become aware of the notice of withdrawal, to take action.

[19] In his own words, the Applicant could not receive the Notice of Withdrawal in time because the postal address used was in a different town from the one in which he resides – that is, it was sent to his Manzini postal address when he resides in Nhlanguano. I doubt this can ever be said to be logical as it obviously was self-inflicted harm. If he chose to

use such a postal address he then should have made it a point that he checks his mail regularly. Failure to check such regularly has been found in the past not to be a sound reason or explanation for a rescission. This was in the case of *Leonard Dlamini vs Lucky Dlamini Civil Case No. 1644/97* (Unreported). Of course every matter turns on its own special circumstances and it is a fact the circumstances of this one are not on all fours with the Leonard Dlamini one.

[20] Further whilst the Applicant claims to have received the Notice of Withdrawal in May 2014 when it was itself signed on the 26<sup>th</sup> March 2014 and posted to him on the same day as well as received by Respondent's attorneys on that same day; the Applicant did not immediately engage their counterparts about filing the required address by agreement failing which to move an application for condonation for late filing of the said notice. This is despite him becoming aware that the Notice of Withdrawal he received in May 2014 told him to provide the required address within 10 days of its service. This does not sound logical either.

[21] Having said this, however, I note that other than the foregoing lapses, the Applicant never abandoned the desire to defend the matter including the fact that the closure of the pleadings was almost reached with the matter

being ripe for trial. The above lapses should therefore be viewed in context and particularly the failure or refusal by Applicant's initial attorneys to meet him and even to disclose his then intended withdrawal to him or even to the attorneys engaged solely for the said purposes. This therefore enjoins me to consider whether a bona defence carrying prospects of success has been disclosed in the matter.

[22] I say this because the position is settled that rescission is not only a discretionary remedy but if the defence is strong then such may compensate for a weak explanation albeit only where there is no willfulness no gross negligence. This principle was expressed in the following words in ***De Witts Auto Body Repairs (PTY) LTD v Fedgen Insurance Co. LTD 1994 (4) SA 705 at 709 B-E:-***

*“While it was said in grans case that a court should not come to the assistance of a Defendant, whose default was wilful or due to gross negligence, I agree with the view of Howard T. in the case of **Saraiva Construction (PTY) LTD v Zululand Electrical and Engineering Wholesalers (PTY) LTD 1975 (1) SA 612 (D) at 615,** that while a court may well decline to grant relief where the default has been wilful or due to gross negligence it*

*cannot be accepted “ that the absence of gross negligence in relation to the default is an essential interior, or an absolute prerequisite, for the granting of relief under Rule 31 (2) (b)”*

*It is but a factor to be considered in the overall determination of whether good cause has been shown although it will obviously weigh heavily against the Applicant for relief. The above does not in my view detract in anyway from the decision I this court in **Vincolette v Calvert 1974 (4) SA 275 ( E)**: in **Zealand v Milborough 1991 (4) SA 836 (SE)**, I cited and applied the above passage at 837 H-838D, and added the comment that:*

*“A measure of flexibility id required in the exercise of the Court’s discretion. An apparently good defence may compensate for a poor explanation (Harms’ Civil Procedure in The Supreme Court 313 (K6) and visa versa”.*

The case of **HDS Construction (PTY) LTD v Wait 1979 (2) SA 298 (E)** at 301C instructive in this regard.

[23] Herbstein and Van Winsen's, *The Civil Practice of the Supreme Court of South Africa, Fourth Edition, at page 540*, puts the same position in the following words:-

*“[T]he mere fact that the fault lies with the Defendant personally is not a ground for refusing relief, although it is a factor which will weigh with the court in deciding whether or not to exercise its discretion in favour of the Defendant”.*

The same author emphasized the position as follows at page 691-692:-

*“It has been held that there is no room for the exercise of a discretion in favour of an application for rescission who was in wilful default, but that approach has been questioned and the better view seems to be that wilful default or gross negligence on the part of an Applicant for default will not constitute an absolute bar to the grant of rescission; rather, it is but a factor – albeit a weighty one to be taken into account, together with the merit of the defence raised to the Plaintiff's claim, in the determination whether good cause for rescission has been shown”.*



[24] As indicated above when it comes to the defence requirement, again the Applicant's application does not elegantly plead same. In the application itself the Applicant made a bare assertion claiming that he has a good and bona fide defence to the Respondent's claim. What that defence or where it can be found is again not set out ex facie the papers. During the hearing of the matter, I was however referred to the plea filed of record and my attention was drawn to paragraph 9 and paragraph 10 which states the following:-

*“Defendant denies the contents hereof. Plaintiff disbursed an amount of E384, 197.00 and not E497, 555.18 as appears in annexure “C”. It appears on annexure “C” that on 28<sup>th</sup> February 2006 interest was charged twice. Defendant denies owing the Plaintiff the sum of E440, 433.13 or any at all as Plaintiff is liable to the Defendant in the sum of E615, 000.00 as in respect of his counter claim”.*

[25] Besides these averments there were also others evenly spread in the plea which can be summed up as follows:-

[25.1] A denial that the loan amount was advanced and a claim it never was;

[25.2] Allegations that the statement relied upon was incorrect and had its interests calculated at a wrong rate;

[25.3] Allegations that some payments by the applicant were not reflected on the statement which means that the amounts paid were understated.

[26] In my view the Applicant in terms of his plea did plead a bona fide defence. It is something else whether that defence will be proved during the trial, it sufficing to say a prima facie defence carrying prospects of success has been disclosed.

[27] Given that this was only disclosed in the plea without it being disclosed on the application nor even a reference to it being made ex facie the application; does this court have to disregard it? The rules as relate to pleading are very clear. A party stands or falls by his founding papers. This however is in my view a general rule as opposed to a rule of thumb. Given the seriousness of the matter taken together with the fact that although not mentioned in the founding affidavit, the said defence is disclosed in formal pleadings contained under the same file and case number as this application, I am of the view that this court is obliged to consider the defence as disclosed in the plea. This is more so because the modern trend in the adjudication of matters is to avoid the decision of matters on technical grounds which do not dispose off the merits of a

matter. See in this regard Shell Oil Swaziland Ltd vs Motor World (PTY) LTD T/A Sir Motors – Appeal Case No. 23/2006 (Unreported)

[28] I am fortified in this view, by the fact that the relief sought is a discretionary one in a matter of a serious claim and where there is no prejudice to be engendered by the approach taken than to enhance the interests of justice as it necessitates that matters be decided on their merits.

[29] Taking into account that the grant of the judgment was not wholly attributable to the Applicant than it is to his initial attorneys; and also that this is a serious matter when looking at the amount claimed together with the fact that the defence does appear strong prima facie and that the court has to exercise a discretion which favours the enhancement of the interests of justice; I am of the considered view that a case has been made for the relief sought, although costs may not necessarily follow the event.

[30] Accordingly it is ordered as follows:-

[30.1] The Applicant's application succeeds;

[30.2] The Default Judgment entered by this court against the Applicant on the 6<sup>th</sup> June 2014 be and is hereby rescinded.

[30.3] The matter be and is hereby removed from the roll to take its normal cause, with either party taking as soon possible the next step as required in the record.

[30.4] Owing to the fact that there are obvious lapses on the part of the Applicant, coupled with the sloven manner in which his application is pleaded, the Applicant be and is hereby ordered to pay the costs of the rescission application on the ordinary scale.

**Delivered in open Court on this the 08<sup>th</sup> day of June 2014.**

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**N. J. HLOPHE**

**JUDGE - HIGH COURT**