IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 176/13

In the matter between

TISUKA TAKANGWANE	**APPELLANT**
And	
MUNICIPAL COUNCIL OF MANZINI	**1ST RESPONDENT**
AMOS DLAMINI N.O.	**2ND RESPONDENT**

Neutral citation	***Tisuka Takangwane vs Municipal Council of Manzini and Another (176/13) [2014]233*** *(08th September 2014)*
Coram:	**Ota J.**
Heard:	**2 August 2014**
Delivered:	**8 September 2014**
Summary:	**Civil Procedure: appeal against the decision of the Magistrates Court refusing to rescind its judgment; principle guiding rescission application in the Magistrates Court; non-service of notice on Appellant before judgment in default of appearance renders the proceedings in the court *a***

***quo* a nullity and constituted a veritable ground for the rescission sought; appeal succeeds.**

JUDGMENT

OTA J.

[1] This is an appeal against the judgment of the Manzini Magistrates Court per His Worship **J.M. Gumedze, Senior Magistrate**, dismissing a rescission application against the judgment of His Worship, **Mr D.V. Khumalo, Principal Magistrate.**

[2] I will not concern myself with the points *in limine* raised and argued by the parties in their respective heads of argument as same are in my view of no consequence. There is no court *a quo* and these legal points

[3] **PARTIES**

The parties herein are described in the following terms:-

The Applicant is Tisuka Takangwane a body corporate established and or incorporated by Royal Prerogative and with power to sue and be sued and having its Principal place of business at Lozitha in the Manzini District.

The First Respondent is the Municipal Council of Manzini, a statutory body capable of suing and being sued and having its Principal place of business in Manzini, Swaziland.

The Second Respondent is Amos S. Dlamini, the Messenger of Court tasked with executing and serving the court process in the matter.

[4] **HISTORY**

What appears to be the facts of this case as can be gleaned from the totality of the papers filed of record, is that the 1st Respondent as Applicant instituted proceedings against Tisuka Houses (now referred to as Tisuka Takangwane – Appellant) claiming the sum of E571,174=90 being arrear rates and other charges on property described as Certain Portion A of Farm 189, Manzini (the property). The 1st Respondent also claimed 15% interest per annum on the amount owing for each month or part of a month for which the default continues; 15% interest of the amount owing towards collection commission as well as costs.

[5] Appellant was duly served with the originating proceedings which was set down for hearing on 26 November 2012, on which day the 1st Respondent

appeared but there was no appearance for the Appellant. The presiding Magistrate declined jurisdiction and postponed the matter to 5 December 2012. Thereafter, the matter was referred to the Principal Magistrate for hearing.

[6] It is common cause that prior to 5 December 2012, the 1st Respondent filed a supplementary affidavit which was not served on the Appellant. It appears that on 5 December 2012, the 1st Respondent appeared but once again there was no appearance for the Appellant. The Principal Magistrate entered a judgment in default of appearance against the Appellant, wherein he ordered it to pay the sum of E571,174=00 being arrear rates and other charges as well as 15% of the amount owing being E85,676=24 towards collection commission.

[7] In the wake of the default judgment of 5 December 2012, the Appellant, Tisuka Takangwane, as Applicant, moved a rescission application, wherein it raised certain alleged errors which it contended would have precluded the court *a-quo* from granting judgment in default, if they were brought to its attention. These errors were detailed as follows:-

(1) That Tisuka Takangwane is not the registered owner of the said property and thus under no duty to pay rates for that property.

(2) That the said property is owned by His Majesty The King and Ingwenyama and registered in the name of the Ingwenyama

(3) That the process was issued against the wrong party, thus a mis-joinder or non-joinder as Tisuka Takangwane and the office of The King and Ingwenyama are two entirely distinct legal persona.

(4) That the process was issued against a non-entity labeled "**Tisuka Houses"** as there is no such and that the proper name is Tisuka Takangwane.

(5) That the order was granted on a day of which the Applicant was not aware, and that was on 5 December 2012.

(6) That the supplementary affidavit filed by the 1st Respondent prior to the decision of 5 December 2012 was not served on the Applicant.

[8] The rescission application was argued before **Senior Magistrate J.M. Gumedze** who dismissed the application on grounds that it failed to meet the requisites of such an application both pursuant to section 21 (2) of the Magistrates Court Act as well as the Common Law.

[9] It is against this decision, that the instant appeal lies.

[10] **THE APPEAL**

It is imperative that I observe here, that, when this appeal was heard the Appellant was represented by Mr. T.M. Ndlovu and the 1st Respondent represented by Mr. M.P. Simelane. Both Counsel filed comprehensive heads of argument. The resource that went into both heads of argument is commendable and greatly assisted the court in reaching an expeditious decision. I say many thanks to both Counsel. More grease to your elbows.

[11] **GROUNDS OF APPEAL**

The grounds upon which the appeal is predicated are as follows:-

> **"1. The court *a quo* erred in law and in fact in concluding that no error had been shown to exist either under the common law and / or in terms of section 21 read with order XXIV of the Magistrates Court Act and Rules justifying the grant of a rescission.**
>
> **2. The court *a quo* erred in law and in fact in further finding that the Appellant, as Agent with limited authority to collect only rentals, had**

the necessary *locus standi* to be sued for rates owing in respect of his Principal's property being Portion A Farm 189, Manzini.

3. **The court *a quo* erred in fact and in law in failing to find that the present Appellant Tisuka Takangwane against whom the order sought to be rescinded had been granted had wrongly been joined and / or cited as a party to the main proceedings *a quo.***

4. **The court *a quo* erred further in law and in fact in finding (by necessary legal implication and extension) that, and irrespective of the provisions of section 11 of the Constitution of Swaziland and Practice Directive number 4 of 2011 issued by the learned Chief Justice Ramodibedi M.M, the Registered Owner of the Property – His Majesty King Mswati III could be sued (through his rent collecting agents in form of the Appellants for rates owing in respect of his property.**

5. **The court *a quo* erred in granting final judgment against the Appellant and in failing to find that a triable issue existed necessitating their proper ventilation by trial or otherwise."**

[12] The question here, is, did the court *a quo* err in any of the ways alleged by the Appellant or did the court *a quo* commit any material misdirection occasioning a miscarriage of justice that would warrant this court to interfere with the assailed decision?

[13] Since the application that gave birth to the impugned judgment was a rescission application, it is imperative that we recount the applicable law at the nascent stage of this enquiry.

[14] Rescission application in the Magistrates Court is governed by section 12 (2) of The Magistrates Court Act 66/1938, as read with Order XXIX (2) of the

Rules of the Magistrates Court, as well as, the Common Law. It is apposite that I note that the court *a quo* correctly canvassed the applicable law and the principles that must guide it in reaching a judicial and judicious exercise of its discretion before proceeding to the meat of the impugned decision.

[15] This exercise was carried out by the court *a quo* as appears on pages 95 - 97 of the record of appeal, in the following terms:-

> **<u>"RESCISSION APPLICATION</u>**
>
> **The application for rescission is based on section 21 (2) of The Magistrates Court Act 66 / 1938 as read with ORDER XXIX (2) of the Rules of the Magistrates Court. The above section 21 (2) provides as follows:-**
>
> > **'The court may rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties'**
>
> **It is quite clear from the section that it is incumbent upon an applicant to clearly articulate which particular ground upon which be relies or base (sic) the application for rescission. The essential requirements enshrined above could be chronicled as follows:(1) void ab origine, (2) fraud committed; and (3) mistake common to both parties. Any failure by applicant to clearly state one or all of the above statutory grounds or the common law grounds will constrain the court to dismiss the application. The grounds relied upon must be fully supported by evidence contained in the attached submitted affidavits by stating comprehensively facts in substantiation in a chronological fashion.**
>
> **The procedure of initiating such rescission applications is found in ORDER NO XX1X 1 (1) (2) of the Magistrate's Court Rules which provides as follows:-**
>
> > **'1.1 Any party to an action in which a default judgment is given within one month after such judgment has come to the knowledge of the party against whom it is given apply to the court to rescind or vary such judgment.**

1.2 Every such application shall be on affidavit which shall set forth shortly the reasons why the applicant did not appear and the grounds or defence to the action or proceedings in which the judgment was given or of objection to the judgment'.

It is therefore of great importance that any party initiating application for rescission to categorically specify the particular head the application is based that is, whether the application is based on common law or statutory law, Dunn J in the case Leonard Dlamini vs Lucky Dlamini Civil Case No. 1644/97 at page 2 stated as follows:-

> **'Under the common law an applicant in such an application must:**
> **1. present a reasonable and acceptable explanation for the default, and;**
> **2. show that he has, on the merits a *bona fide* defence which *prima facie* carries some prospect of success'**

And if applicant relied on the head under the statute he must likewise. Nathan CJ as he then was in the case Msibi vs Mlaula Estate (PTY) LTD 1970 – 1976 SLR p. 345 p. 348 par E-F stated as follows:-

> **'The tendency of the courts is to grant such an application where:**
> **(a) the applicant has given a reasonable explanation of the delay;**
> **(b) the application is *bona fide* and not made with object of delaying the opposite party's claim;**
> **(c) there has not been a reckless or intentional disregard of the Rules of Court;**
> **(d) the applicants' 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. The absence of one or more of these circumstances might result in the application being dismissed'**

From the above, the duty of the court is fully explained of assessing all surrounding circumstances to reach a just and fair decision of the case as whether to grant or dismiss such rescission application under adjudication. It is clear that an applicant must furnish the court with an explanation ---- which the court may find to be reasonable and that there is *bona fide* in the application itself.

It is also worthy to articulate Rule 2, 1 and 3(2) of the above stated Order which reads as follows:-

> **'2.1 The court may on the hearing of any such application, unless it is proven that the applicant was in willful default, and good cause shown, rescind or vary the judgment in question and**

may give such direction as extension of time as may be necessary in regard to the further conduct of the action or application.

3.2 Where rescission or variation of judgment is sought on the ground of invalidity, fraud or mistake, application may be made not later than the one year after the applicant first had knowledge of such invalidity, fraud or mistake.'

Flowing from the above quoted prescription of the Rules, it is quite clear that it is fundamentally imperative upon an applicant to succinctly articulate the reasons on the affidavit itself of the failure to appear in court on the said date, and further to state his/her defence to the action or proceedings in which the judgment was given or objection to the judgment. As seen from the above, the court will refuse to grant an order for rescission if the court finds that the default was willful and no good cause shown by the applicant. The applicant must in the founding affidavit state chronologically the reasons supporting the ground of invalidity, fraud or mistake relied on. And where the reasons are found to be insufficient to support the ground relied upon, the court shall dismiss the application."

[16] I cannot agree more with the court *a quo* on the principles of law as stated and expounded above, save to add that I am also inclined to agree with learned counsel for the Appellant, Mr T. M. Ndlovu, that rescission under section 21 of the Magistrates Courts Act is akin in principle to rescission under Rule 42 (1) (a) of the High Court Rules, which states as follows:-

"The court may, in addition to other powers it may have, *mero motu* or upon application of any party affected, rescind or vary

(a) An order or judgment sought or erroneously granted in the absence of the party affected thereby."

[17] In dissecting the above Rule of court, the courts of the Kingdom have unanimously held that a party would be entitled to rescission pursuant to the

Rule of court, only if the court has made a mistake in a matter of law appearing in the proceedings of a court of record, which has occasioned a miscarriage of justice. Once an Applicant can point to such error in the proceedings, he is without further ado entitled to a rescission. See **Innovations (Pty) Ltd vs RMS Tibiyo and Another Civil Case No. 1944/02.**

[18] The poser here is, was there any error in the record of proceedings *a quo,* that would have warranted the rescission sought? The Appellant submits that the court *a quo* failed to take cognizance of three alleged errors appearing in its record which, would have warranted the rescission sought. These alleged errors encompass the grounds of appeal wholistically and are articulated in the Appellant's heads of argument as follows:-

1. Mis / non - joinder of interested parties.
2. Issue of an order on date of which Applicant not made aware.
3. Non – service of supplementary affidavit (effectively an amendment) on Applicant before order granted.

[19] Let us now consider these issues *ad seriatim* to guage the efficacy of the Appellant's cries in this appeal.

[20] **ERROR NUMBER ONE**

Mis / non – joinder of interested Parties

In this regard, the Appellant contends that the default judgment granted against it, was granted against the wrong party. This, Appellant says is because, it has never been the owner of the property in issue. It is not the registered owner of the property. The property is owned and registered in the name of His Majesty The King and Ingwenyama as evidenced by the title deed annexure TT3.

[21] The Appellant is a mere Agent acting for the Principal, His Majesty the King, for the limited purpose of colleting rents on the property. Since the Appellant fully disclosed the name and details of its Principal, both in the negotiations prior to litigation as well as the papers filed of record, it being an Agent falls away and cannot be sued for its Principal's transgressions. There was thus a clear mis-joinder or non-joinder as the proper party to be sued should have been His Majesty The King, so goes the argument.

[22] The Appellant further contended that assuming the Agent by the greatest stretch of the imagination could be sued on behalf of the Principal, since His Majesty The King and Ingwenyama is immune from legal proceedings, in terms of section 11 of the Constitution as backed up by **Practice Directive No. 4 of 2011,** issued by the learned **Chief Justice, Michael M. Ramodibedi**, such immunity will extend to the Agent who cannot be sued on the same facts and cause of action attributable to the Principal. Since the property in issue belongs to His Majesty The King and the King is immune from legal proceedings, it follows that the Appellant as Agent of an immune Principal also basks under such immunity, so further contended the Appellant. The Appellant concluded that the foregoing are errors which attended the proceedings *a quo* which should have precluded the grant of the default judgment and warranted the rescission sought.

[23] It is crystal clear from the impugned decision that the court *a quo* considered these issues raised by the Appellant and dismissed them as not constituting errors which would entitle the Appellant to the rescission sought. I think I agree with the findings of the court on this wise.

[24] There is no doubt that the Ingwenyama is the registered owner of the property which he holds in trust for the Swazi Nation.

[25] It is common cause that the Appellant is an Agent of the King. The Appellant is given management powers over the property, which is to manage it for commercial purposes. Indeed, learned Counsel Mr Ndlovu acknowledge this agency relationship in para 18 of the Applicant's heads of argument as follows:-

> **"18.2 It is not in dispute by the applicant that indeed at times it is tasked to perform certain functions by the Owner and Registered Title Deed Holder of the property.**
> **18.3 In short the applicant acts, in some instances, as Agent for the Title Deed Holder being the Ingwenyama and collects rentals on his behalf -------."**

[26] It is clear from the lease agreement exhibited as annexure MCM4, appearing on pages 74 to 78 of the record, which it is common cause is a lease agreement for a tenant in the property, that the duties of the Appellant who is named as lessor therein, in the property, transcends far beyond mere collection of rentals. For the avoidance of doubts some of the duties of the Appellant as lessor are detailed as follows:-

> **"10 Not withstanding anything to the contrary herein contained it is agreed and understood that the Lessor shall maintain the exterior of**

the Premises but shall not be liable for any damage that the Lessee may suffer from time to time owing to defects in the building nor may the Lessee withhold payment of rental by reason of such defects. On notification by the Lessee shall take all steps necessary as soon as reasonable to remedy the same.

11. The Lessor undertakes to ensure that all electrical fittings and kitchen stove (if any) are in good working order at the commencement of the Lease and Lessee undertakes to maintain the same in good order during the currency of the Lease.

12. The Lessor or Workmen shall at all reasonable times have the right to enter in and upon the leased Premises to inspect same and carry out any work therein which may be deemed necessary by the Lessor.

13. If the Lessee fails to pay the monthly rent within (7) days of the date it falls due or commits any other breach of the conditions of this Lease, the Lessor shall be entitled forthwith to cancel the Lease, without notice and without prejudice to the Lessor's right to claim payment of any rent in arrear and of any other recoverable damages by the Lessor. Any relaxation of the right indulgence which may be granted by the Lessor or any condonation by the Lessor of the right of the Lessor in respect of any subsequent breach of the terms of the lease by the Lessee.

14. The Lessee hereby consents to the Jurisdiction of the subordinate court in respect of any action or proceedings which may be brought against (sic) by the Lessor. The Lessee shall pay all legal fees and disbursement incurred by the Lessor arising from any legal action taken by the Lessor against the Lessee under and in terms of this lease, based on the Attorneys and Client Scale, which costs shall include collection commission on any amount recovered by the Lessor from the Lessee on a scale approved by the Law Society of Swaziland.

15. The Lessee acknowledges that he is aware that the Lessor holds a lien over assets belonging to or owned by Lessee and situate upon the premises hereby let which lien constitutes security for the payment of all rentals and arrears in terms of this agreement. The Lessee agrees and undertakes that if at any time there is any rental due, owing and / or payable by him to the Lessor under this agreement he shall not remove from the premise hereby let any such assets aforementioned including without limiting the generality of the foregoing, any furniture household equipment or appliances, stock-in-trade, fixtures and fittings and the like, without the written consent of the Lessor, The Lessee hereby agrees and consents to the Lessor at taking such lawful steps to protect the aforesaid lien as the Lessor may consider

reasonably necessary, and in the event of the Lessee being in arrears with the payment of any rent in terms of the agreement, such reasonable steps shall include locking the premises to prevent the removal of any such assets from the said premises. The Lessor shall also sell on auction all belongings possessed due to non payment of rent within a period to be decided by the court of law.

16. The Lessee shall notify Tisuka Takangwane, P.O. Box 1385, Manzini in writing not later than two months before the expiry of this lease whether he / she intends renewing the lease or not or if the Lessee intends terminating the lease before it expires."

[27] It is also of paramountcy to observe here that the terms and conditions of the lease agreement includes payment of rates by the Tenant to the Appellant (lessor). In these circumstances, and as correctly found by the court *a quo,* the Appellant as Agent of the owner is a proper party to be sued.

[28] I say this because the word **"owner"** in the Rating Act is expanded to include the Agent. This position of our law was acknowledged by the court *a quo* in the impugned judgment as appears on page 98 to 99 of the record of appeal, as follows:-

"An "Owner" in terms of section 2 of the Rating Act with regards to immovable property means any of the below

'(a) the person in whom the legal title to such property is vested;
(b) where the person in whom the legal title to such property is vested , is insolvent or dead or of unsound mind;
(c) where such property has been leased for a period of fifty years or more, the lessee of such property;
(d) <u>where the person who is the owner of such property in terms of paragraphs (a), (b), or (c), as the case may be, is absent, his agent;</u>

(e) where such property is beneficially occupied under a fideicommissum, unsufruct or other servitude, or right analogous thereto, the occupier of such property;

(f) any person who has purchased such property from the Government or a local authority but has not yet received transfer thereof, including every such person who pays the purchase price in instalments.'

According to the above interpretation, besides the registered owner of the property other categories of individuals from whom the local authorities can recover the owed rates -----As seen from (d) above, included agents ----------" (emphasis mine)

[29] For the purpose of payment of rates, the whole notion of the definition of the **"Owner"** including the Agent is so that in the absence of the Owner for any reason, the Agent can be sued. It follows that an action for the collection of tenement rates can lie against the Agent of the owner who is managing the property on behalf of the owner. The general principle that an Agent need not be sued where the principal is disclosed cannot apply here by virtue of section 2 of the Rating Act which defines **"Owner"** as including the Agent of the owner. This is more so in the peculiar circumstances of this case, for the further reason that by virtue of section 11 of the Constitution Act, His Majesty The King and Ingwenyama, who is the owner of the property is not suiable.

[30] This entrenched position of our Constitution was succinctly captured by the court *a quo* in the assailed decision as follows:-

"The King and Ingwenyama is not subject to legal suit or process as clearly provided in section 11 of the Constitution, which reads as follows:-

> **'The King and Ingwenyama shall be immune from**
> **(a) a suit or legal process in any cause in respect of all things done or omitted to be done by him, and**
> **(b) being summoned to appear as a witness in any civil or criminal proceedings'**

The above section must be read with section 228(2) of the Constitution which reads as follows:-

> **'Ingwenyama enjoys the same legal protection and immunity from legal suit or process as the King'**

From the above, its beyond any shadow of doubt that The King and Ingwenyama cannot be summoned to appear in any court proceedings in Swaziland and any thought that the King can be sued is an exposition of total ignorance, misapprehension and fallacy".

[31] I respectfully subscribe to the foregoing proposition on the entrenched state of our Supreme Law on the immunity of the King and Ingwenyama to legal processes.

[32] In the face of the immunity which His Majesty The King and Ingwenyama enjoys in terms of the Constitution and in the spirit of the Rating Act as per section 2 (d) thereof, it follows that the Appellant who is the Agent whom His Majesty The King has handed over to the management of the property in issue, can be sued to collect the tenement rates.

[33] Having stated as above, it is imperative that I observe that it cannot be gainsaid that in terms of the Rating Act, certain properties registered in the name of His Majesty The King and Ingwenyama are exempt from the payment of rates. However, the property in issue does not fall within the purview of this exemption. For the avoidance of doubts section 7 (2) and (3) of the Rating Act provide as follows:-

> **"(2) In addition to the properties referred to in subsection (1), the following properties shall also be exempt from the payment of rates:**
>
> **(a) properties registered in the name of the Ingwenyama and the Ndlovukazi;**
> **(b) properties registered in the name of the Ingwenyama in trust for the Swazi Nation:**
> **Provided they are not used for any purpose mentioned in subsection 3 (a) (b and (c); and**
>
> **(c) properties owned by foreign governments and used for diplomatic purposes.**
>
> **(3) No exemption from rates shall be granted in respect of any immovable property by virtue of subsection (1).**
>
> **(a) if the use of such property has as one of its objects the private pecuniary profit of any person, whether as a shareholder in a company or otherwise;**
> **(b) if any rent, other than a nominal rent, is paid to the owner, lessee or occupier of any property; or**
> **(c) where such property is used for the residential accommodation of members of the staff or staff of any institution referred to therein"** (emphasis added)

[34] Against the backdrop of the foregoing legislation, since it is common cause that rent is collected from the property in issue and it is indisputable that one

of the objects of the property is for private pecuniary interest, it falls outside the contemplation of those exempt from payment of rates. The court *a quo* was thus correct when it held as follows:-

> **"It is paramount appreciating that from the above stated quoted piece of legislation that properties registered in the name of the Ingwenyama in trust for the Swazi Nation that are exempt from paying rates are those properties which its objects is NOT for private pecuniary profit, which in simplicity means that, those properties having its object for private pecuniary profit are not exempt or immune from paying of rates. This, therefore renders the property in this matter NOT exempt or immune from paying of rates".**

[35] It appears to me in light of the totality of the foregoing, that the issues raised and canvassed by the Appellant as the alleged Error One lack merits. They fail and are dismissed in their entirety.

[36] **ERROR NUMBER TWO**

Issue of an order on date of which Applicant not made aware.

[37] It is common cause, that the originating process was initially set down for hearing on 26 November 2012. On that day the Appellant did not appear even though duly served. The Appellant alleges that some of its top Board members sat outside the court room on a bench waiting for the case to be called, but this never happened. Therefore, Appellan failed to appear in court because its official did not know when the matter was dealt with. Be that as

it may, the presiding Magistrate apparently declined jurisdiction, postponed the matter to 5 December 2012 Thereafter, the matter was referred to the Principal Magistrate who has jurisdiction for decision.

[38] Although the record of appeal does not demonstrate the actual minutes of the court evidencing the above analogy, however, the court *a quo* detailed these facts in the impugned decision as appears on pages 92 to 93 of the record, in the following terms:-

> **"The service was thus effected on the 16th November 2012 and on the set date on the 26th November 2012, the matter was postponed to the 5th December 2012 and referred to the Principal Magistrate because of fundamental issue of jurisdiction -----"**

[39] Furthermore, still in the assailed decision and on page 107, the court *a quo* made the following observation:-

> **"In fact, it is correct that no order was made by the court on the 26th November 2012 as the Magistrates scheduled for that month to deal with contested matters correctly stated to the clerk of court the reason why she could not attend that respective file. The recordings made on the 26th November 2012 by the sitting Magistrate as seen in the court record are only informative and directive to the clerk of court that, the file is to be allocated to the appropriate Magistrate with the necessary jurisdiction."**

[40] It is clear that the matter was effectively removed from the roll of the Presiding Magistrate on 26 November 2012 and thereafter placed before the Principal Magistrate for determination on 5 December 2012. It is common

cause that the Appellant was not served with any notice prior to the matter proceeding and being decided by the Principal Magistrate on 5 December, wherein his worship entered judgment against the Appellant in default of appearance. The non-service of the Appellant with notice prior to the decision of 5 December 2012 is where my concern lies.

[41] I say this because when the case was called on 26 November 2012 and the Appellant did not appear, if the court had proceeded to judgment there and then, the Appellant would have had no case. But when the case was postponed to 5 December 2012, and thereafter was referred to and placed before another Magistrate, i.e the Principal Magistrate, the court was duty bound to order that notice of set down before the Principal Magistrate should be served on the Appellant.

[42] When the matter came up on 5 December before the Principal Magistrate and the Appellant did not appear, the court should have enquired and first satisfied itself that the Appellant was served with notice that the matter would be coming up on that day before that presiding judicial officer. So, in my view, it was wrong to have determined the matter behind the Appellant's

back when there was nothing showing that it was served with notice and it failed to attend court.

[43] The mere fact that Appellant was served with the originating process does not obviate the need for such hearing notice to be ordered when the matter is adjourned in its absence, and effectively removed from the roll of the presiding Magistrate and placed before another Magistrate.

[44] The argument by the Respondent that as at 26 November 2012, the Appellant had not entered an appearance to oppose and was out of time thereby rendering any further service on it nugatory, is not sustainable. The application before the court was not for default judgment. It was an originating process. In my view, the mere fact that the Appellant had not entered an appearance to oppose and the *dies* had expired, did not preclude it from attending court to oppose same if it was notified of the date and the court where the matter was set down for determination on 5 December 2012. Therefore, notwithstanding the lackadaisical attitude of Dr N.T. Nyawo General Manager of the Appellant and the entire top brass of its Board to these proceedings, which attitude was acknowledged and vociferously deprecated by the court *a quo*, the Appellant was still entitled to be notified

of the hearing on 5 December 2012 before the Principal Magistrate. The absence of service rendered the whole proceedings *a quo* incompetent.

[45] I had occasion to pronounce on this selfsame issue while dealing with a rescission application in the case of **Regent Projects (Pty) Ltd vs Steel and Wire International (Pty) Ltd and Others Civil Case No. 4660/2008 para's [21] and [22],** where I stated as follows:-

> **"[21] ----------As this case lies, I cannot on the papers reach the concluded opinion that service of the summons was duly effected on the Applicant through Mr Kunene as alleged. In coming to these conclusions I am mindful of the fact that the question of notice which service of processes ensures goes to the root of the action between the parties. Absence of it defeats the right of fair hearing as guaranteed by the Constitution and renders the whole action incompetent. So where the fact of service is challenged on compelling grounds as in this case and there is no conclusive proof of same, it behoves the court to err with caution on the side of the Applicant.**
>
> **[22] It is apparent that the court relied on the Return of Services in proceeding to grant default judgment against the Applicant. It appears to me that by so doing, the court proceeded erroneously in granting default judgment. This state of affairs brings this application within the contemplation of rule 42 (1) (a)."**

[46] My view on this matter is further fortified by the case of **Mgobodze Motsa and Sam John Khumalo High Court Civil Unreported Case No. 1058/01**, which was correctly urged by Mr Ndlovu in Appellant's heads of argument. In that case, as in this case, the period within which the Applicant was to enter appearance to defend had elapsed. Thereafter, the Respondent

set the matter down for hearing without notifying the Applicant. The Applicant moved for rescission of the judgment. The court held the judgment to have been erroneously granted in the absence of the Applicant because the notice of application indicated a different date from that upon which the eventual order was granted without there being notice given to the Applicant. The court posited as follows:-

> **"The respondent was not after the lapse of the period set out for opposing this application, entitled to regard the matter as unopposed as to appoint a new date for hearing without notifying the applicant of the new date. The applicant clearly did not appear on the 25th June because he was not aware of that date and for that reason, I am of the view that the judgment was erroneously granted in the applicants absence notwithstanding that he was affected thereby. Had the Judge been aware of the fact that the applicant was not notified of the matter being set down on the 25th June, he clearly would not have granted the order".**

[47] *In casu*, it seems to me that failure to serve the Appellant with notice before the matter proceeded before the Principal Magistrate on 5 December 2012, is the error in the record, which if the learned Principal Magistrate had adverted his mind to would have precluded him from granting default judgment. This would be the position even if the court *a quo* had been aware of the lack of service on the Appellant, but notwithstanding, wrongly ignored it and proceeded to judgment.

[48] In coming to this conclusion, I am guided by the case of **Maria Mavimbela N.O. v SEDCOM Swazi And 4 Others, Civil Appeal No. 27/08.** In that case the court *a-quo* had issued an order regarding certain fixed property while in full knowledge that the property was registered and belonged to another party who had not been cited in the proceedings. The Supreme Court held as follow:-

> **"In STANDER AND ANOTHER V ABSA BANK 1997 (4) SA 873 (ECD) Nepgen J held that the statement in BAKOVEN that in considering an application for rescission under rule 42 (1) (a) the court is limited to the record of the hearing is clearly wrong. I respectful agree. The law reports are replete with cases in which it was held that if there were facts which were unknown to the court which would have induced the court not to grant the order, that order would have been made erroneously. <u>The converse (namely that if the trial judge knew all the facts, the judgment or order could not be said to have been made erroneously) is not necessarily true. Certainly it can not be true if the trial Judge, while knowing all the facts wrongly ignores a clear non-joinder."</u>** (emphasis mine)

[49] It follows from the above stated facts, that the refusal by the court *a quo* to rescind the default judgment was wrong in these circumstances. It appears that not only was the Appellant not in willful default but the entire proceedings leading up to the judgment in default, was a nullity.

[50] **<u>ERROR NUMBER 3</u>**

<u>Non-service of supplementary affidavit (effectively an amendment) on Applicant before order granted.</u>

[51] I do not intend to belabor myself with this issue as my findings under Error Number Two which rendered the whole proceeding *a quo* incompetent, have rendered a determination of this issue merely academic.

[52] However, out of the abundance of caution, let me say straight away that generally the law requires that all processes in a case should be served on all parties before decision. Mr M P Simelane who appeared for the 1st Respondent conceded as much though with qualification, when this appeal was argued. The contention by 1st Respondent in para 13.5 of the answering affidavit that the Appellant waived its right to be served with the supplementary affidavit as it failed to either enter its opposing papers or attend court on 26 November 2012, is unsustainable .

[53] The mere fact that a party did not attend court or enter notice to defend does not preclude all material processes upon which the court's decision is premised from being served on the party.

[54] Failure to serve processes on the other party could constitute a veritable ground for setting aside a judgment except where it is shown that it occasioned no prejudice to the party.

[55] Having stated the general position of the law on this subject matter, I hasten to add here that in this case, I am inclined to agree with Learned Counsel for the 1st Respondent Mr. M. P. Simelane, that the Appellant suffered no prejudice by reason of the non-service of the supplementary affidavit upon it. This is because the supplementary affidavit did nothing more than reiterate a legal position which is already provided for in the Rating Act. The presence or absence of the supplementary affidavit in these circumstances, does not impinge on the judgment.

[56] **CONCLUSION**

In light of the above stated facts, this Appeal succeeds on the grounds of Error Number Two which rendered the proceeding *a quo* a nullity.

[57] **ORDER**

I order as follows:-

1. The Appeal hereby succeeds.

2. The Judgment of the court *a quo* dismissing the application to rescind its judgment of 5 December 2012, be and is hereby set aside.

3. The Default Judgment of the court *a quo* rendered on 5 December 2012 be and is hereby set aside.

4. The Appellant be and is hereby granted leave to defend the proceedings instituted by the 1st Respondent against it in the main action, and is to file its opposing papers within 14 days from the date hereof.

5. Each party to bear its own costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE …….. DAY OF ……2014

OTA J.
JUDGE OF THE HIGH COURT

For the Appellant:	**T.M. Ndlovu**
For the 1st Respondent:	**M.P. Simelane**
The 2nd Respondent :	**Unrepresented**