



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.1784/04

In the matter between:

ALLEN MANGO

Applicant

and

EDWARD ALEXANDER HAMILTON

Respondent

In re:

EDWARD ALEXANDER HAMILTON

Plaintiff

and

ALLEN MANGO

Defendant

Neutral citation: *Allen Mango and Edward Alexander Hamilton (1784/04)*
[2014]SZHC 28 (14th March 2014)

Coram: Hlophe J

For Applicant: Mr. S. P. Mamba

For Respondent: Mr. A. Lukhele

Date Heard: 12th July 2013

Date Judgment Delivered: 14th March 2014

Summary

Application proceedings – Rescission of Judgment – Requirements thereof – Under Rule 42 the requirement is whether or not the judgment was granted erroneous – When a judgment is granted erroneously – Whether or not there was a factor which if known to the court would have made court refuse to grant such an order – A judgment granted contrary to law is erroneously granted – Under Rule 31, consideration is whether there exists good cause for the rescission of a judgment – Such an application was to comply with the requirements of Rule 31 (3) (b) as relates to time of moving application including the costs entailed – Good cause entails reasonable and acceptable explanation as well as a bona fide defence. Whether rescission requirements met in the matter.

JUDGMENT

[1] The Applicant instituted the current proceedings seeking inter alia an order staying execution of the order or judgment of this court granted against him by default as well as an order rescinding and setting aside the judgment of this court granted against the Applicant on or about the 11th March 2011 together with costs. The said application was instituted as a matter of urgency.

- [2] It is not in dispute that the judgment or order concerned was granted by default following a failure by the Applicant to file a new address after it's hitherto attorneys of record had withdrawn from the matter.
- [3] The Applicant claims not to have been aware of the withdrawal of its attorneys of record as it had not been served with the Notice of Withdrawal. Although this is disputed by the Respondent who claims to have been informed by the Applicant's previous attorneys that they had served him with a Notice of Withdrawal together with the Respondent further claiming to rely on a Notice of Withdrawal attached to the application, proving such service, no such Notice of Withdrawal was however annexed to the application and none was subsequently filed of record, just as there was no other document annexed as alleged.
- [4] It is also not in dispute that as at the time the judgment in question was granted by default against the applicant all the pleadings in the matter had been closed and all that was awaited was an allocation of a trial date in the matter by the Registrar as duly requested in terms of an appropriate notice asking for that matter to be allocated the suggested number of days as required in terms of the Rules of court.

- [5] The background to the matter is pleaded to be that the applicant had built a structure on some Swazi Nation Land which he claims to have been allocated by its owners whom he refers to as the daughters of one Constance Bennet who is now said to be late together with the Umphakatsi of Logoba which allegedly sanctioned the said allocation.
- [6] It is contended that the Respondent, then as Plaintiff, who claimed to be the owner of the piece of land in question, after he said he was allocated same through Kukhonta (the traditional allocation of land) way back in the 1950's instituted action proceedings seeking inter alia an order of this court demolishing the Applicant's aforesaid structure as well as another one authorizing and directing the Sheriff or his lawful Deputy to demolish and remove the structure including to recover the costs thereof from the Defendant.
- [7] Although the pleadings had been closed with a trial date allocation being awaited, it is clear that the Applicant's attorneys of record withdrew as such with the Applicant failing to appoint a new address and bringing same to the Applicant's attention within the period stipulated, causing the Respondent to set the matter down for judgment.

[8] Claiming the rescission of the judgment or order on the basis of Rule 42 and Rule 31 of the High Court Rules which are effectively on the basis of an error allegedly committed by the court that granted the Default Judgment as well on the basis of the Applicant being able to establish good cause, the Applicant instituted the current proceedings for the rescission of judgment.

[9] As regards the alleged error, it is contended that the grant of the judgment was erroneous because the matter had already been allocated a trial date and the Respondent was not going to be prejudiced by the Applicant's failure to file a new address or new attorneys. The Applicant also claims not to have been served with the Notice of Withdrawal by his erstwhile attorneys. He also claims not to have been served with a Notice of Set Down for the date on which the judgment was granted against him.

[10] As concerns the rescission of judgment sought in terms of Rule 31 of the High Court Rules, the Applicant claims not to have been aware of the hearing of the matter resulting in the judgment being granted against him and that he was not served with both the Notice of Withdrawal by his erstwhile attorneys and the Notice of Set Down by the attorney for the other side resulting in the judgment complained of being granted or issued. The Applicant further claims in this regard to be having a bona

fide defence in that he had been allocated the piece of land concerned through Kukhonta.

[11] In response to these contentions by the applicant the respondent, contends that it was not true that a book of pleadings was filed and that there was no reason for the Respondent to claim to be prejudiced. It was also denied that the Applicant was not served with the Notice of Withdrawal. Reference was made to a Notice of Withdrawal proving service which was however not annexed to the pleadings. It was also denied that Applicant had not been served with the Notice of Set down resulting in the judgment being contested. Again reference was made to a Notice of Set Down and certificate of posting which was not annexed however.

[12] The position of the law is settled that for an Applicant to succeed on a rescission sought on the basis of error of Rule 42, there has to be established only such error. Once such has been established, the rescission ought to be granted without any further enquiry. The question is therefore whether on the basis pleaded by the Applicant, there has been established an error. The case of *Tshabalala and Another v Peer 1979 (4) SA 27 (T) at 30 D-E* is instructive in this regard just as is the case with what is provided at page 697 of **Herbstein and Van Winsen's; The**

Civil Practice of the Supreme Court of South Africa, Fourth Edition,

Juta, where the position is expressed as follows:-

“An Applicant who seeks to set aside in terms of Rule 42 (1) (a) a judgment granted in his absence is not required to establish good cause. If the court holds that an order or judgment was erroneously granted in the absence of any party affected by it, the order should without further enquiry be rescinded or varied.”

- [13] The error was allegedly that the Applicant was not going to suffer any prejudice as a result of Applicant’s failure to appoint a new address. It seems to me that there is no merit in this contention. The point is not whether Applicant was to suffer prejudice or not but whether a new address had been provided within the period stipulated ex facie the Notice of Withdrawal and in terms of the Rules including the effect of the failure to provide such an address in terms of the Rules and practice of this Court. It is a settled practice in this court that a failure to appoint such an address after the withdrawal of a party’s attorneys would lead to the dismissal of an application or a setting aside of a defence at the instance of an interested party followed by the grant of the judgment sought. It is not in dispute that no new address had been provided herein subsequent

to the withdrawal of the Applicant's attorneys which means that there was no error on the part of the court that granted the default judgment and therefore this ground cannot succeed as there was no basis for considering whether or not Respondent was going to suffer prejudice if an address had not been filed. It is clear that by failing to provide such an address, the defaulting party is deemed not to be no longer interested in pursuing the matter.

- [14] It was contended as well that the error was in that Applicant had not been served with the Notice of Withdrawal informing him to appoint a new address for service within the period stipulated. There is only annexed a Notice of Withdrawal by the Applicants previous attorneys with no proof of service whatsoever on the Applicant. Of course this Notice of Withdrawal was annexed to its papers by the Applicant. The Respondent, whilst disputing that the Notice of Withdrawal had not been served, did not annex any such proof of service. Although it referred to such proof and claimed same was an annexure, none ended up being annexed to the pleadings. This apparent short coming was not addressed even when it was pointed out in the replying affidavit that same was not annexed. It is surprising that the matter could have gone on without this being addressed for years if as a matter of fact such proof of service did exist.

I am therefore constrained to find that the said notice was not served on the Respondent notifying it of what to do upon receipt of such notice.

[15] Having found that the Applicant was not served with the Notice of Withdrawal does it mean that the grant of the judgment or order was erroneous? In other words was this the kind of error contemplated by Rule 42? A judgment is in law said to have been granted in error where there is an irregularity in the proceedings or where the court is not legally competent to grant the judgment or order or put differently, where it would not have granted same, were it aware of the error. See in this regard *President of the Republic of South Africa v Eisenberg & Associates 2005 (1) SA 247 at 264.*

[16] The question is, from the facts of the matter was there such an irregularity in the grant of the judgment or put differently, was the court legally competent to grant the judgment? From the facts I am convinced there is no suggestion of an irregularity. Can the same thing be said about the legal competence of the court in granting the judgment it did? I do not think so. Usually the court would not grant a default judgment, including the setting aside of a pleaded defence, where there is no proof of service of the Notice of Withdrawal, including the lapse of the period stipulated ex facie the Notice of Withdrawal. Owing to the Respondent's failure to

annex such proof of service of the Notice of Withdrawal where the Applicant has annexed a Notice of Withdrawal to its papers which indicates no such proof of service on its face, I must find that there was no service of same. It clearly would not be legally competent for this court to grant such judgment in the circumstances. I must conclude that before the court granted the judgment there was no proof of service as there is none on record and in the file before me just as there is none I am being referred to by the parties.

[17] As indicated above, once the court found that there was an error in the grant of the said judgment, the court must, without further enquiry, rescind the judgment concerned, it is apparent that having found there to have been an error, the rescission of the judgment concerned must succeed on the basis of error as envisaged in Rule 42 of the High Court Rules. This is because as noted above, had the court been made aware of this factor, it would not have granted the default judgment. At page B1-308 of Erasmus, **Superior Court Practice** Service 1996 Juta and Company, this position is put as follows:-

“An order or judgment is erroneously granted 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 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.”

[18] Seeing that the rescission of judgment was also based on Rule 31 (3) (b) of the Rules of this court, it is paramount for me to address the matter from this angle as well.

[19] The legal position is long settled in this regard being that an Applicant for the rescission of a judgment under Rule 31 (2) (b) is required not only to comply with the requirements of the rule as regards the number of days within which the application has to be brought after gaining knowledge of the existence of the judgment as well as the tender for costs, but has to show or establish good cause. See in this regard **Chetty vs Law Society, Transvaal 1985 (2) SA 756 (A)**

[20] It has been held before that good cause entails two requirements which are namely a reasonable and acceptable explanation for the default as well as a bona fide defence in the merits which carries some prospects of success. See in this regard **Chetty v Law Society, Transvaal judgment**

(Supra) at page 765 A-C, as well as *Harris v ABSA Bank LTD t/a Volksas 2006 (4) SA 527 (T) at 528 – 529.*

[21] These two elements of good cause, it has been held, should co-exist in a case in order for on Applicant for rescission to succeed. For instance a party who is only able to establish one of the two requirements and not the other will not succeed. See in this regard the unreported judgment in *Cash N' Carry Swaziland (PTY) LTD vs Intercom Construction Court of Appeal Civil Case No....*

[22] From the facts of the matter has there been compliance with Rule 31 (3) (b) as regards the time frame within which such application ought to be moved together with the tender for costs as well as from the point of view of good cause – that is as concerns the establishment of its two elements as referred to above.

[23] It has not been made an issue that the application was brought timeously after the Applicant claimed to have gained knowledge of the judgment's existence. Whilst he said he got to know about its existence on the 24th April 2012, the application itself was instituted in court on the 27th April 2012 per the Registrar's stamp. In terms of the relevant rule such application should be moved within 21 days of gaining such knowledge.

So clearly the application was moved timeously although the tender for costs was made by the Applicant in line with the rule, there was a contention by the Respondent with regards same which does not seem to carry much weight. I am therefore convinced there was compliance with the rule in this regard. This leaves me with the issue of whether the elements of good cause were met. For the record it is not in dispute that these requirements of good cause are as stated above, the reasonable and acceptable explanation for the default as well as a bona fide defence carrying prospects of success. See the case of *Nyingwa vs Moolman N. O. 1993 (2) SA 508*

[24] I am convinced that the Applicant's application would not succeed on the first hurdle, that is, the reasonableness or acceptability of the explanation for the default. Whereas Applicant claims to have entrusted his matter with his attorney, no sound explanation is given why he would have left his matter with his attorneys for over a year without bothering to ascertain its status. Such behavior has in the past been found to be unreasonable and therefore to justify the dismissal of an application to rescind such a judgment by this court. See in this regard *Leonard Dlamini vs Lucky Dlamini High Court Civil Case No. 1644/07*. In that case a Defendant who had failed to sign an affidavit resisting Summary Judgment resulting in such a judgment being entered against him following his not being

available as he could not check on his attorneys, instituted application for the rescission of a judgment which however could not succeed as the court found his failure to check on his attorneys of record after leaving a matter with them for such a long time to be unreasonable.

[25] From the facts I cannot say that a bona fide defence has not been established but as indicated above, the two requirements ought to co-exist. It is clear therefore that were it not for the conclusion I have come to with regards the error, I would have had to dismiss the said application.

[26] I am convinced that this approach is correct and appropriate when considering that I have come to the conclusion that the defence cannot be said to be illusory in this matter which means that I have exercised my discretion correctly when considering that at the heart of the rescission of judgment proceedings, is the exercise of discretion by the court.

[27] For the foregoing considerations I have come to the conclusion that the Applicant's application should succeed on the basis of error following my being constrained to find, that the Notice of Withdrawal was not served on the Applicant, for him to decide on the next step.

[28] Consequently I make the following order:-

- 28.1 The judgment granted by this court on the 11th March 2011 be and is hereby rescinded.
- 28.2 The Applicant be and is hereby granted leave to defend the action proceedings instituted by the Respondent in the main matter.
- 28.3 The Applicant be and is hereby directed to serve and file a Notice of Appointment of fresh attorneys of record in the main matter or alternatively to file the required address within five (5) court days from the date of delivery of this judgment.
- 28.4 Although costs would often follow the event, it is directed that owing to the peculiar circumstances of this matter, each party bears its own costs as regards the current proceedings.

Delivered in open Court on this the 14th day of March 2014.

**N. J. HLOPHE
HIGH COURT JUDGE**