

**IN THE HIGH
SWAZILAND**



COURT OF

JUDGMENT

Case No. 163/13

In the matter between

HELEN J. MATSEBULA

Appellant

VS

**SANTA INVESTMENTS (PTY) LTD
t/a SANTA FINANCIAL SERVICES**

Respondent

Neutral citation: *Helen J. Matsebula v Santa Investments (Pty) Ltd
t/a Santa Financial Services (163/13) [2014]
SZHC 359 (07 October 2014)*

Coram: **Mamba J**

Heard: **15 September 2014**

Delivered: **07 October 2014**

- [1] Civil Law and Procedure – Appeal against judgment refusing rescission application where the applicant’s attorney’s non appearance is not explained at all. Such want of explanation is failure to show good cause. Court justified in the circumstances to hold that failure to appear willful. Appeal dismissed with costs.

- [1] This is an appeal against a decision of the Siteki Magistrate dismissing an application for a rescission of a judgment by the same Court.
- [2] The history leading to the rescission application is as follows:
- 2.1 In April 2013, the respondent sued the Appellant, for a sum of E9261.60 in respect of monies lent and advanced to her in or about July 2011. Attached to the simple summons was an acknowledgment of debt in the said amount allegedly signed and executed by the appellant on that date.
- 2.2 The appellant through her attorneys, duly filed her notice of intention to oppose the action by the respondent. The latter responded by filing a notice of application for summary judgment, stating therein *inter alia*, that the appellant had no bona fide defence to the action and had filed the said notice merely to delay judgment being entered against her. This application was slated for 23 May 2013.
- 2.3 In response to this application for summary judgment, the appellant filed and served a notice to set aside this application, alleging that it was an irregular step inasmuch as the respondent had not filed a declaration to its summons or in amplification of its allegations therein.

2.4 When the matter appeared in Court on 23 May 2013, Counsel for the respondent applied to file from the bar the declaration requested by the appellant and this was granted. The appellant's Counsel then applied to have the matter postponed to 06 June 2013 and this application was allowed or granted by the Court too. However, on that date, only Counsel for the respondent appeared in Court. She submitted to Court that although a declaration had been submitted, this was not required by the rules of the Magistrate's Court. She then successfully applied for summary judgment.

2.5 By notice of motion dated 15 August 2013, the applicant made application for *inter alia*, the rescission of the judgment of 06 June 2013. In its application the appellant stated that:

'8. The first respondent appears to have taken an unlawful short cut in a highly secretive manner when applying for judgment in this matter in that it did not serve either a notice of bar or an application for default judgment to my attorneys' given address or to any address of my attorneys which falls within 3 kilometres from Siteki Magistrate's Court inline with the magistrate's court rules. The first respondent went further to mislead the above Honourable Court to believe that Court papers were served yet whatever service that was done was

irregular and did not meet the fundamental requirements of the *audi alteram partem* rule when they knew very well that I had raised a notice to defend the action and I was therefore not in default of defending the action. On this basis, the court judgment was therefore granted erroneously because had the Court been aware about this irregularity and illegality, it would have refused to grant the judgment.’

- 2.6 As a defence, she stated that “...I never signed [the acknowledgement of debt] document on the date alleged and my signature appearing on that document was cut from a previous July 2010 agreement with the first respondent and pasted on the purported acknowledgment of debt appearing on the summons. This is plain forgery and is tantamount to the criminal offence of fraud. Furthermore, I will prove that I was loaned in August 2011 only 2000.00 and not E9261.60”
- 2.7 She also applied for punitive costs against the respondent, for ‘... misleading the court into believing that I was in default of defending the matter yet I was not.’
- 2.8 The rescission application was, on 19 September 2013, correctly in my judgment dismissed by the Court *a quo*. The Court held that the appellant had totally failed to explain her non appearance on 06 June

2013 and had not filed an affidavit resisting the summary judgment application. The court *a quo* held that the appellant's non-appearance on 06 June 2013 was unexplained and willful.

[3] It has to be noted that it was the appellant's Counsel who on 23 May 2013 applied for the matter to be postponed to 06 June 2013. There was no appearance by or on behalf of the Appellant on 6 June, 2013 when the summary judgment application was argued and granted. To compound matters for the appellant, there was absolutely no explanation given for this failure to appear, in the rescission application. Instead, and rather startlingly, the appellant accused the respondent of stealing a court order behind its back and misleading the Court. That was of course, false as the matter had been postponed in Court and at the instance of the appellant. There was therefore no need for the respondent to serve any notice of set-down for that date on the appellant.

[4] In its judgment on 6 June 2013 the Court, correctly in my view, held that there was no requirement for the filing of a declaration in the Magistrate's Court rules, as a pre-requisite for an application for summary judgment, where a simple summons had been issued. Again, I cannot fault the Court *a*

quo in the rescission application for rejecting the contention by the appellant that the court erred in ruling that the respondent was not obliged to file a declaration to its summons. Further, one should not lose sight of the fact that the respondent's case was based on the acknowledgment of debt that accompanied the said summons.

[5] Finally, because there was no explanation at all why there was no appearance by and on behalf of the appellant on 06 June 2013, when the appellant's Counsel had specifically applied for this date; I am unable to find fault on the Learned Magistrate's reasoning that such non appearance was willful default as defined in the relevant law.

[6] For the foregoing, this appeal is unmeritorious and is hereby dismissed with costs.

MAMBA J

For the Appellant : Mr. S.S. Simelane

For the respondent : Mr. Manyathi