IN THE HIGH COURT OF SWAZILAND

Case No: 1494/2011

In the matter between:

SIMISO CHARLES MOTSA **APPLICANT**

AND

THE SWAZILAND CONFERENCE OF THE

SEVENTH DAY ADVENTIST **RESPONDENT**

Neutral citation: *Simiso Charles Motsa v. The Swaziland Conference of the Seventh Day Adventist (1494/2011) [2014] SZHC60 (3rd April 2014)*

Coram: M.C.B. MAPHALALA, J

Summary

Civil Procedure – rescission application in terms of Rule 31 (3) (b) as well as application for leave to be granted to defend the main action – requirements for Rule 31 (3) (b) considered – held that the applicant has failed to establish "good cause" – application dismissed with costs.

JUDGMENT
3 APRIL 2014

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[1] This is an urgent application for rescission of judgment in terms of Rule 31 (3) (b) of the Rules of this Court; the applicant further sought an order for leave to defend the main action. The applicant also sought an order that pending the determination of this application, the execution of the writ of attachment issued herein and dated 20th May 2011 be stayed and the status quo ante be restored. He sought an order for costs of suit in the event the application was opposed. At the hearing of this matter, the applicant's attorney Mr. Mavuso intimated that he would not pursue the point of law but would proceed on the merits.

[2] The applicant was served with a simple summons in July 2010 for payment of the sum of E245 753.44 (two hundred and forty five thousand seven hundred and fifty three emalangeni forty four cents) based on Unjust Enrichment. It is not in dispute that the applicant subsequently instructed Attorney Sibusiso Kubheka to defend the action proceedings.

[3] The applicant alleges that he never heard anything pertaining to this matter until 4 July 2013 when a deputy sheriff served him with a Writ of Execution and further attached a motor vehicle in his possession leased by his wife Silindile Motsa (Nee Mlambo) from Nedbank. The deputy sheriff, on the same day, further attached and removed from his home at

Mbekelweni household furniture including an LCD LG brand television set, a Samsung band home theatre sound system, a television stand, a leather lounge suit, a digital satellite television decoder and a KIC refrigerator pending a sale in execution to satisfy the judgment debt of E245 753.44 (two hundred and forty five thousand seven hundred and fifty three emalangeni forty four cents).

[4] The respondent denies that Attorney Mr. Kubheka has ceased practising as alleged by the applicant; and the applicant has mentioned in his founding affidavit that after the attachment, he consulted with him in his new premises at Makabongwe Building in Manzini. Mr. Kubheka is alleged to have told the applicant that he was not aware of the current status of the matter, and, the file could not be traced in his office.

[5] The respondent further denies as alleged that the applicant only became aware of the judgment by default when he was served with the writ. The respondent contends that the deputy sheriff had initially served the Writ upon applicant's wife at Hlatikulu, and, that on the 1st December 2010, the deputy sheriff had also served the Notice of Taxation upon the applicant's wife at Hlatikulu.

[6] It is common cause that subsequent to the service of summons upon the applicant, his attorney filed a Notice of Intention to Defend which was duly served. The respondent's attorneys, in turn, filed and served upon the applicant's attorney, the Plaintiff's Declaration; this was followed by a Notice of Bar calling upon the applicant to file the Defendant's Plea within three days failing which he would be ipso facto barred from pleading.

[7] It is not in dispute that the applicant did not file the Defendant's Plea until the period had lapsed. During the application for judgment by default, the applicant sought and obtained an order setting aside the Notice of Intention to Defend for failure to file the Plea, and, the Court further granted an order directing the respondent to prove damages by means of affidavit. It is common cause that Reverend Canada Mndzebele in his capacity as the secretary of the respondent's Executive Committee and Kobla Quashie in his capacity as respondent's Chartered Accountant performed a forensic audit of the respondent's books of account, and, thereafter prepared an audit report on the basis of which the suit was instituted. The affidavits as well as the Audit Report were presented to Court during the application for judgment by default.

[8] The Audit Report disclosed that the applicant had misappropriated respondent's funds in the amount of E245 753.44 (two hundred and forty five thousand seven hundred and fifty three emalangeni forty four cents). This is denied by the applicant on the basis that he was not present and did not participate in the forensic audit; and, that he was never invited to give an input to the exercise. However, the respondent denies this and argues that the applicant was invited to give an explanation in the misappropriation of the funds and that he elected not to avail himself. This is borne out by the conclusion of the Audit Report itself where it states:

> **"At the date of compiling this report, the scope of our investigation has been limited by the fact that we have still not been provided with any information and clarification from Simiso Motsa. Several attempts to engage him for an interview failed."**

[9] It is not in dispute that the attached motor vehicle was subsequently released after Nedbank had claimed ownership. However, the applicant has not furnished evidence that the household furniture and utensils attached are the subject of a hire-purchase agreement as alleged. The deputy sheriff who dealt with the matter Bongani Zikalala and Similo Dlamini have filed confirmatory affidavits in support of the respondent.

[10] Incidentally Attorney Kubheka has filed an affidavit in support of the respondent. In particular he contends that the applicant merely left the summons with him and asked him to file a Notice of Intention to Defend; however, he did not give him full instructions financially as well as his defence to the matter. He further contends that the applicant promised to return with full instructions soon thereafter; however, he did not return for further consultations. According to Mr. Kubheka, he tried to trace the applicant but to no avail since he was not available on his cellphone and that he had not left his postal or residential address with his office. He concedes receiving the pleadings in the matter; however, he could not respond thereto in the absence of full instructions. To that extent he denied telling the applicant that he was not aware of the status of the matter. Similarly, he denied any misconduct, negligence or dereliction of duty on his part.

[11] The applicant has filed a replying affidavit in which he reiterated the averments in the founding affidavit. His wife, Silindzile Mlambo, has deposed to an affidavit denying receipt of Court process in this matter other than the Writ served upon her on the 13th June 2013 at Hlatikulu. However, it is apparent from the Record of Proceedings that she was served with a summons by Bongani Zikalala, the deputy sheriff, on the 12 July 2010.

She was further served with a Notice of Taxation by the same deputy sheriff on the 1st December 2010 at Hlatikulu Government Hospital

[12] This application has been brought in terms of Rule 31 (3) (b) of the Rules of this Court. The rule provides as follows:

> **"a defendant may, within twenty-one days after he has had knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of E200, set aside the default judgment on such terms as to it seems fit."**

[13] In the cases of *Msibi v. Mlawula Estates (Pty) Ltd, Msibi v. G.M. Kalla* and Company, 1970-1976 SLR 345 (HC) at 348, *Nathan CJ* dealt with the rescission of a default judgment:

> **"It is to be noted that the Court has a discretion in the matter and that "good cause" must be shown. The requirements which must be satisfied before the court will grant a rescission of a default judgment have been dealt with in a number of cases...**
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> **The tendency of the Court is to grant such an application where (a) the applicant has given a reasonable explanation of his delay; (b) the**

application is bona fide and not made with the object of delaying the other party's claim; (c) there has not been a reckless or intentional disregard of the Rules of Court; (d) the applicant's 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."

[14] At pages 348 of the judgment, His Lordship Chief Justice Nathan said the following:

"It seems clear that by introducing the words 'and if good cause be shown', the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging good cause for rescission, such as good cause including but not being limited to the existence of a substantial defence.... .

In addition to having to establish a prima facie defence, an applicant for rescission must furnish good reasons for his default."

See also the case of *Shongwe v. Simelane; Msibi v. Simelane* 1977-78 SLR 183 (HC) at 185.

[15] The judgment of His Lordship Chief Justice Nathan in *Msibi v. Mlawula Estates (Pty) Ltd, Msibi V. G.M. Kalla and Co.* (supra) was followed and approved by the Supreme Court of Swaziland in the case of *Mbukeni Maziya v. The Motor Vehicle Accident Fund* Civil Appeal Case

No. 18/2013 at para 16. In addition the Supreme Court emphasised that the onus lay upon the defendant to prove good cause.

[16] His Lordship Miller JA in *Chetty v. Law Society, Transvaal* 1985 (2) SA 756 AD at 765 had this to say:

> **"The term "sufficient cause" (or "good cause") defies precise or comprehensive definition for many and various factors require to be considered.... but it is clear that in principle and in the long-standing practice of our courts two essential elements of "sufficient cause" for rescission of a judgment by default are:**
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> **(i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and**
> **(ii) That on the merits such party has a *bona fide* defence which, prima facie, carries some prospect of success....**
>
> **It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disclaim of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."**

[17] It is apparent from the evidence that the applicant has failed to given an explanation for his default. The deputy sheriff contends that service upon applicant's wife of the Notice of Taxation was effected on the 1st December 2010; and this is denied by the applicant who contends that he only became aware of the judgment when his property was attached on the 4th July 2013. However, there is also evidence that his wife was initially served with the writ on the 13th June 2013; and, this is admitted by his wife in her confirmatory affidavit. A simple arithmetic would show that even if the days for purpose of Rule 31 (3) (b) were counted from that day, twenty-one days had long lapsed when the applicant lodged the proceedings on the 5th August 2013.

[18] Furthermore, the applicant cannot rely on the alleged negligence of his attorney. It is apparent from the evidence that after instructing the attorney in July 2010, the applicant did not consult the attorney to monitor the matter until he was served with a writ on the 4th July 2013. The applicant himself states in his affidavit that after giving instructions to the attorney, he never heard from him until he consulted him on the 5th July 2013 after being serviced with the writ. Notwithstanding knowledge of the judgment, the applicant only lodged the application for rescission on the 5th August

2013 after the lapse of twenty-one days, and, no reasonable explanation has been given of the delay. To that extent he was in wilful default.

[19] Attorney Kubheka contends that the applicant failed to give him full instructions both financially and in terms of a defence to the action. Similarly, he didn't even give the attorney a postal or residential address for purposes of communication. Applicant's cellphone was not available on the MTN network. I fail to understand how the attorney could be accused of negligence, misconduct or dereliction of duty in the circumstances.

[20] I am convinced that the applicant has failed to establish "good cause", not only has he failed to present a reasonable and acceptable explanation for his default but, he has failed, on the merits to present a bona fide defence which prima facie carries some prospect of success. He merely made a bare denial. It is the applicant's contention that he never misappropriated the funds and that the misappropriation which is alleged against him was uncovered after he had been dismissed; in addition, he argued that he never participated in audit investigations even though he was invited by the auditors but he declined to attend.

[21] Accordingly, the application is dismissed with costs.

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M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant	Attorney Thabiso Mavuso
For Respondents	Attorney Ben Simelane