IN THE HIGH COURT OF SWAZILAND

Civil case No: 1582/2012

In the matter between:

ELPHAS MABHAWODI DLAMINI	**APPLICANT**
AND	
THABSILE MBALI NKOSI	**FIRST RESPONDENT**
BHEKITHEMBA MZWANDILE NKOSI	**SECOND RESPONDENT**
KHANYISILE NOMSA NKOSI	**THIRD RESPONDENT**
SIBUSISO CHARLES NKOSI	**FOURTH RESPONDENT**
THAMSANQA EDWARD NKOSI	**FIFTH RESPONDENT**
NTOMBIKAYISE ROSEMARY MANANA	**SIXTH RESPONDENT**
GCINAPHI NONKULULELO NKOSI	**SEVENTH RESPONDENT**
THABISO FAKUDZE	**EIGHTH RESPONDENT**
SANDILE HLATSHWAKO	**NINTH RESPONDENT**

Neutral citation: *Elphas Mabhawodi Dlamini v. Thabsile Mbali Nkosi (1582/2012) [2014] SZHC64 (3rd April 2014)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Civil Procedure – rescission of judgment in terms of rule 42 – essential requirements thereof discussed – held that there is an error as required by the rule 42 – application granted.

JUDGMENT
3 APRIL 2014

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[1] This is an application in terms of Rule 42 for rescission of judgment granted by the Court on 15 July 2013 dismissing the applicant's claim in the main action with costs for failure to appear in Court. He further sought an order for a stay of the order issued by this Court pending the determination of this application. He also sought an order for leave to proceed with the main action instituted against the respondents.

[2] It is common cause between the parties that the applicant instituted action proceedings against the respondents before this Court for payment of the sum of E5 946 260.00 (five million nine hundred and forty six thousand two hundred and sixty emalangeni), interest at the rate of 9% per annum as well as costs of suit. The claim arose pursuant to the demolition of the applicant's home by the respondents; and, the applicant contends that the demolition was not sanctioned by a Court order. The action proceedings was defended by the respondents who subsequently filed the Defendant's Plea and counterclaim; in response thereto, the plaintiff filed the Plaintiff's Plea to Defendant's Counter-Claim.

[3] The applicant contends further that he learnt on the 15th July 2013 that his claim had been dismissed by the Court for non-appearance with costs at a punitive scale. According to the applicant he was not aware that the matter had been set for that day since he was advised by his attorney that pleadings were not closed. In as much as the applicant alleges that the application is in terms of

Rules 31, 42 as well as the Common law, it is evident from the founding affidavit that the application is based on Rule 42.

[4] The applicant argues that the judgment was erroneously granted on the following basis: firstly, the action proceedings was not ready for trial on the ground that pleadings had not been closed; secondly, a pre-trial conference had not been held; thirdly, a notice to request a date of hearing had not been issued as well as a Notice of Set Down; fourthly, he was not aware that his erstwhile attorneys had withdrawn their services. Accordingly, he argued that the matter was erroneously placed on the roll.

[5] On the other hand the respondents deny that the judgment was granted in error as alleged by the applicant. They argue that pursuant to the delivery of the Defendant's Plea and Counter-claim, the applicant delivered a plea to the counter-claim but failed to deliver a replication in the claim in convention until the "dies" lapsed fourteen days thereafter. Accordingly, they contend that the pleadings were closed and that the matter was ripe for trial. It is not disputed as alleged by the respondents that the applicant's attorney sought and was granted a date of hearing being the 15th and 16th July 2013; however, there was no appearance on behalf of the applicant.

[6] The applicant's attorney filed a Notice of withdrawal as Attorneys of Record and served it upon the applicant personally on the 25th June 2013 as well as to

the fourth respondent attorney's. Furthermore, on the 6th June 2013, applicant's attorneys advised the fourth respondent's attorney that they have since secured a trial date from the Registrar of the High Court. Whilst it is apparent from the evidence that the former attorneys of the applicant were aware of the date of trial, it is not clear however, when the applicant's current attorneys were instructed. Similarly, it is not apparent from the evidence which applicant's attorneys were called by Attorney Mzwandile Ntshangase to attend trial in Court; he had deposed to an affidavit in which he stated that he appeared in Court in the main action on the 15th July 2013 on behalf of the second to the eighth respondents, and, that he telephoned applicant's attorney to attend Court as the matter had been stood down for two hours awaiting the arrival of the said attorney. There is no evidence either that the applicant was aware of the date of trial in the absence of a notice of Set Down served upon him or his attorneys whoever they may be.

[7] At the hearing of this matter, the fourth respondent's attorney informed the Court that he was abandoning the Notice in Terms of Rule 30. The fourth respondent had filed the notice seeking an order to have the replying affidavit filed by the applicant set aside as being irregular on the basis that it was filed out of time, and, that applicant had not applied for condonation for the late filing of the replying affidavit. The parties agreed, therefore, that the matter would be argued on the merits.

[8] It is the contention of the applicant that the judgment was granted in error. As stated in the preceding paragraphs, the implication from a reading of the founding and replying affidavits is that the application is being brought in terms of Rule 42. This rule provides the following:

> **"42. (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:**
>
> **(*a*) an order or judgment erroneously granted in the absence of any party affected thereby;**
>
> **(*b*) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;**
>
> **(*c*) an order or judgment granted as the result of a mistake common to the parties.**
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> **(2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.**
>
> **(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."**

[9] Rule 29 deals with the close of pleadings, and it provides the following:

> **"29. Pleadings shall be considered closed if —**
>
> **(*a*) either party has joined issue without alleging any new matter, and without adding any further pleading;**
>
> **(*b*) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;**

(*c*) the parties agree in writing that the pleadings are closed and such agreement is filed with the Registrar; or

(*d*) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed."

[10] The contention by the respondents that the pleadings were closed when the applicant failed to file a Replication is correct; however, the matter was not at that stage ripe for hearing. Certain procedural steps had to be taken in terms of Rules 37, 55, 55A and 56.

[11] Rule 37 provides the following:

"37. (1) An attorney desirous of having an action placed on the roll as referred to in rule 55 shall as soon as possible after the close of pleadings and before delivering a notice in terms of rule 55A (1) and (2), in writing request the attorneys acting for all other parties to such action to attend a conference on a date and at a time stated in the request, being not less than five or more than ten days after delivery of the request, with the object of reaching agreement as to possible ways of curtailing the duration of such trial and in particular as to all or any of the following matters:

(i) the possibility of obtaining admissions of fact and of documents;

(ii) the holding of an inspection or examination;

(iii) the making of discovery of documents;

(iv) the exchange between parties of the reports of experts;

(v) the plans, diagrams, photographs, models, and the like, to be used at the trial;

(vi) the consolidation of trials;

(vii) the quantum of damages;

(viii) the preparation and handing in at the trial of copies of

correspondence and other documents in the form of a paged bundle with copies for the Judge and all parties."

[12] In terms of rule 37 the attorneys are required to draw up and sign a minute of the matters agreed upon at the conclusion of the conference. The rule further provides the following:

"37. ...

(5) An attorney requesting that an action be placed on the roll shall at the time of the request file with the Registrar the minute referred to in sub-rule (4) or, if no conference has been held, a statement to that effect and setting out the reasons therefore. The Registrar shall not place the action on the roll until the provisions of this sub-rule have been complied with.

(6) At the commencement of the trial counsel for the respective parties shall report to the court whether such conference has been duly held and, if so, shall hand in the signed minute referred to in sub-rule (4).

(7) Before the trial proceeds the Judge may call into his chambers counsel for the parties with a view to securing agreement on any matters likely to curtail the duration of the trial.

(8) When giving judgment in the action the court may make an order for the payment by a party of portion of the costs when the attorney for such party has failed to attend a conference in terms of sub-rule (1)."

[13] A reading of Rule 37 shows clearly that compliance therewith is mandatory upon the close of pleadings and before delivering a notice in terms of rule 55A (1) and (2). Sub-rule (4) requires the attorneys to draw up and sign a minute of

the matters agreed upon during the pre-trial conference. Sub-rule (5) further emphasises that "the Registrar shall not place the action on the roll until the provisions of this sub-rule have been complied with". Sub-rule (5) provides that an attorney requesting that an action be placed on the roll shall at the time of the request file with the Registrar the minutes of the pre-trial conference. A party who fails to attend the pre-trial conference may be ordered by the court to pay costs of suit when judgment in the action is delivered. It is common cause that the parties in this matter did not hold a pre-trial conference prior to the request and allocation of the date of hearing contrary to Rule 37.

[14] The respondents complied with Rule 55 which provides that prior to each session of the Court, the Registrar after consultations with the Chief Justice shall prepare and publish a role of cases for hearing during the next session. Annexure "SN2" is the Court Roll for the second session beginning 1st June 2013 to 9th August 2013, and this matter is allocated the 15th and 16th July 2013.

[15] Rule 55A provides that after the close of pleading in an action and subject to rule 37, any of the parties may deliver a notice requesting the Registrar to allocate a date of hearing. The notice shall be as near as may be in accordance with Form 25 in the First Schedule and should contain an estimate of the anticipated duration of the hearing, the period of notice of set down which should not be less than ten days. Rules 55A and 56 applies in all defended actions; proceedings instituted by way of notice of motion or petition, including

proceedings for review in which the Court has ordered that evidence shall be heard or any other matter which the Court may direct for hearing. However, no Request for a Date of Hearing was filed by either party in accordance with Rule 55A.

[16] The respondents have further not complied with Rule 56 which provides, *inter alia,* that when the Registrar has allocated a date of hearing of a civil case in terms of rule 55A, he shall notify the party who made the request in writing of the date and time of the hearing and that party shall deliver a notice of set down accompanied by one set of the copy of pleadings and all other documents to be used by the Court, the pages of which shall be numbered seriatim, bound bookwise and have attached thereto an index showing the title of every pleading included in the set and the page number thereof. The sub-rule 56 (1) (a) is subject to the following provisos. Firstly, that where the circumstances so require, the notification by the Registrar may be verbal, or by telephone or telegram or telex and subsequently confirm in writing. Secondly, that such notification shall be given at such time as will enable the party notified to give the period of notice of set down between the parties or in the absence of such agreement not less than ten days. The rule further provides that if such notice of set down or book of pleadings is not received by the Registrar not less than ten days before the date allocated for hearing of the matter, the allocation shall no longer be of force or effect and the matter shall be deleted from the roll.

[17] It is possible that the Registrar advised the applicant's attorney verbally of the date of hearing and subsequently produced the roll of cases; however, it is common cause that applicant's attorney did not confirm the notification by the Registrar in writing. Similarly, it is clear from rule 56 (1) (b) that if the notice of set down or Book of Pleadings is received in not less than ten days before the date of hearing, the allocation shall no longer be of force or effect and the matter shall be deleted from the roll. It is not in dispute that this sub-rule was not complied with.

[18] There is no tangible evidence that the applicant was personally aware of the date of hearing in view of the withdrawal of his attorneys on the 25th June 2013 when the matter was due for hearing on the 15th July 2013. This coupled with the other procedural steps which were not observed in terms of Rules 37, 55A and 56 show that the judgment was erroneously granted.

[19] *Erasmus J* in *Bakoven Ltd v. G.J. Howes (Pty) Ltd* 1992 (2) SA 466 ECD at 471 states the following:

> **"Rule 42 (1) (a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is erroneously granted when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a court record.... It follows that a court in deciding whether a judgment was erroneously granted is, like a court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the Common law, the applicant need not show good cause in the**

sense of an explanation for his default and a bona fide defence.... Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an error that he has to fall back on Rule 31 (2) (b) ....”

[20] *Nepgen J* in *Stander and Another v. Absa Bank* 1997 (4) SA 873 E at 882 said the following:

“It seems to me that the very reference to “absence of any party affected” is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the court in order to have such order or judgment rescinded or varied on the basis of facts, of which the court would initially have been unaware, which would justify this being done. Furthermore, the Rule is not restricted to cases of an order or judgment erroneously granted, but also to an order or judgment erroneously sought. It is difficult to conceive of circumstances where a court would be able to conclude that an order or judgment was erroneously sought if no additional facts, indicating that this is so, were placed before the court.”

[21] It is trite law that if the Court holds that an order or judgment was erroneously granted in the absence of any party affected, it should rescind the order on the application of such party. However, the Court retains a discretion whether or not to rescind or vary the order in accordance with Rule 42. The Court has a discretion whether or not to grant an application for rescission under Rule 42 (1). The Court will normally exercise that discretion in favour of an

applicant where it was through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified.

See *De Wet and Others v. Western Bank Ltd* 1977 (4) SA 770 (TPD) at 777
Van der Merwe v. Bongero Park (EDMS) BPK 1998 (1) SA 697 at 702-703
Theron NO v. United Democratic Front and Others 1984 92) SA

[22] The respondents had initially lodged action proceedings for the eviction of the applicant under Civil Case No. 4486/2010. Subsequently, the respondents lodged application proceedings under Civil Case 1678/2011 seeking a rule nisi interdicting and restraining the applicant from erecting or constructing any building on the Remaining Extent of Portion 2 of the Farm *claisuate* 11 *calaisvales* No. 693 in the Manzini region. They further sought an order interdicting and restraining the applicant from interfering with the respondents' right to access use and enjoyment of the said property pending final determination of the action for ejectment on the property under Civil Case No. 4486/2010. The rule nisi was accordingly granted on the 27th May 2011. However, on the 27th June 2012, the eviction proceedings under Civil Case No. 4486/2010 was withdrawn in accordance with a Notice of Withdrawal of Action filed by respondents' attorneys.

[23] It is common cause that the applicant subsequently lodged the present action for damages arising out of the demolition of his homestead by the respondents. It is not in dispute that the respondents did not have a Court order authorising the demolition. In this regard the applicant has a good cause of action in the matter. Furthermore, if the Court had known that the applicant had not been informed of the trial date in the wake of withdrawal by his attorney, it would not have dismissed the action.

[24] Accordingly, the following orders are made:

(a) The judgment issued by the Court on the 15th July 2013 dismissing the applicant's claim in the main action with costs at a punitive scale is hereby rescinded and set aside.

(b) The applicant is granted leave to proceed with the main action instituted against the respondents under Civil Case No. 1582/2012.

(c) The parties are directed to comply with rules 37, 55A and 56 prior to the date of hearing.

(d) No order as to costs.

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

For Applicant — Attorney Simo Simelane
For Respondent — Attorney Hlomendlini Mdladla