IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1926/12

In the matter between

PRESIDENT STREET PROPERTIES (PTY) LTD	**1ST APPLICANT**
MOTSA-MANYATHI ASSOCIATED ATTORNEYS	**2ND APPLICANT**

And

MAXWELL UCHECHUKWU	**1ST RESPONDENT**
THE DEPUTY SHERIFF FOR THE DISTRICT OF MANZINI	**2ND RESPONDENT**

In re:

MAXWELL UCHECHUKWU	**PLAINTIFF**

And

PRESIDENT STREET PROPERTIES (PTY) LTD	**1ST DEFENDANT**
MOTSA-MANYATHI ASSOCIATED	

ATTORNEYS **2ND DEFENDANT**

Neutral citation: *President Street Properties & Another v Maxwell Uchechukwu & Another (1926/12*) [2014] SZHC 75
(9 April 2014)

Coram: **M. S. SIMELANE J**

Heard: **28 March 2014**

Delivered: **9 April 2014**

Summary: **Civil Procedure; Rescission; Rule 31 (3) (b), Rule 42 (1) (a) and Common Law, Return of service, Application dismissed.**

Judgment

SIMELANE J

[1] The 1st Respondent was ejected from his business premises after an order had been obtained by the Applicant for ejectment. Certain goods were confiscated by the Deputy Sheriff in the process of execution of the ejectment order. There was a rescission of the said order by the Manzini Magistrates Court on 12 July 2012.

[2] On 19 November 2012 the 1st Respondent who is the plaintiff in the main matter issued summons against the Applicant (as 1st Defendant) claiming damages in the sum of E528, 331.67 (Five Hundred and Twenty Eight Thousand Three Hundred and Thirty One Emalangeni Sixty Seven Cents) in respect of the goods seized from his business premises. The 1st Defendant, **President Street Properties (Pty) Ltd** did not oppose the claim, hence it was treated as a default judgment application in terms of Rule 31 (3) (a) of the High Court Rules. The matter appeared before the Principal Judge (High Court) and the Court ordered that *viva voce* evidence should be led in proof of the damages sought in the particulars of claim. Judgment by default was granted on 12 June 2013.

[3] It is this judgment that is the subject matter of the present rescission application, wherein, the Applicant claims *inter alia* the following reliefs under a certificate of urgency.

> **"(1) That the usual forms and procedures relating to the institution of these proceedings be hereby set aside and allowing the matter to be heard and enrolled as one of urgency.**
>
> **(2) That the Default Judgment entered against the 1st Defendant on the 14th day of March 2013 be hereby rescinded and set aside.**
>
> **(3) That the judgment awarding the 1st Respondent damages in the sum of E528, 331.67 (Five Hundred and Twenty Eight Thousand Three Hundred and Thirty One Emalangeni Sixty Cents) be hereby rescinded and set aside.**

(4) That the writ of execution by the 2nd Respondent be stayed pending finalization of the application and particularly prayer 2 and 3.

(5) That a *Rule Nisi* do hereby issue, calling upon the Respondents to show cause at such time as this Honourable Court may direct, why prayers 2,3,4 hereof should not be made final.

(6) Costs of the application.

(7) Granting further and/or alternative relief."

[4] Rule 31 application was abandoned on grounds that the Applicants did not tender the surity of E200.00. The Application was brought under Rule 42 (1) (a) of the Rules of the High Court and the Common Law.

[5] **Rule 42 (1) (a)**

Under Rule 42 (1) (a) of the High Rules, it is provided 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 an order or ejectment unreasonably granted in the absence of any party affected thereby".**

[6] This rule of Court was given judicial interpretation in the case of **Bakoven v G. J Howes (Pty) Ltd 1992 (2) SA 466 at 471 E-G**, where **Erasmus J** declared as follows:-

> **"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 of record" ---. It follows that a court 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 a rescission"

[7] The next question is what is the error of the law which the Court made and which appears *ex facie* the record that would entitle the Applicant to the rescission application sought pursuant to Rule 42 (1) (a) above.?

[8] From the Applicants' affidavit the error they alleged in a nutshell, is, that they were not served with the summons which originated the litigation culminating in the default judgment sought to be set aside .

[9] The Applicants contend that though there is a return of service alleging that the summons were served, they were however not served at their principal place of business rather service was effected at Progress Stationers.

[10] The Respondents are saying they served the Applicants and there is a return of service compiled by the Deputy Sheriff Mancoba Ndlangamandla attesting to the fact that on 12 December at about 1300hrs the Deputy Sheriff duly served the summons to the 1st Defendant's Director, Mr Mansoor at Buy and Save Power Trade

Manzini in the District of Manzini after having exhibited the original and explained the nature and exigency thereof as per High Court Rule 4 (2). The Deputy Sheriff also noted that Mr Mansoor advised that he serve same on the other Company Director being Ms Silvia Mthethwa at her place of business, Progress Stationery, Manzini, which was duly done through her Personal Assistant Mrs Carolina Masina on the same day.

[11] The Deputy Sheriff has also sworn to a confirmatory affidavit, wherein he states as follows:-

> "**1. I am an adult male Deputy Sheriff for the Manzini District, 2nd Respondent herein and facts deposed to herein are within my personal knowledge and belief are true and correct.**
>
> **2. On the 12th December 2012 at 13.00hrs, I served 1st Applicant being President Street Properties through its Managing Director Mr. Mansoor, at Buy and Save Power Trade Manzini after exhibiting the original summons and explaining what the summons meant and what was required of him.**
>
> **3. After I had served 1st Applicant Mr. Mansoor whom I learnt was Arshad Mansoor, they requested that I should serve his co-director being Silvia Mthethwa at Progress Stationery at Manzini.**
>
> **4. When I served Mr. Arshad Mansoor, I found him at his other business Buy and Save Power Trade Manzini as President Street Properties does not have any physical address (offices) known to either myself or the instructing Attorneys then Mssrs Mabila Attorneys.**

5. Mr. Arshad Mansoor perused through the summons and directed that I serve Sylvia Mthethwa as well at Progress Stationers whom I was meant to believe was a co-director of same company and the other copy to be served on 2nd Defendants being Motsa-Manyatsi Associated Attorneys.

6. When I served the summons on 1st Applicant, Maxwell Uchechukwu was present and he actually drove me to Arshad Mansoor, a person he knew very well.

7. It is therefore not correct that I did not serve the summons on 1st Applicant and that I served Progress Stationers."

[12] It is an established fact that Ashard Mansoor was served at Applicants principal place of business. Even though the Applicants allege that service was not effected as one of the Manssoors' was out of the country. The Deputy Sheriff in his confirmatory affidavit says that it was Arshad that was served. In their replying affidavit the Applicants allege that Arshad was out of the country at this material time. They have however failed to show any evidence of this reducing it to a bare allegation of fact. I am inclined to accept the return of service and the Deputy Sheriff's confirmatory affidavit.

[13] I notice that the Applicants have also not disputed the allegation that the 1st Applicant does not have any physical address known to the Respondents. All they say is that they were not served at their principal place of business or registered office. I notice from the lease agreement annexure F that the 1st Applicant's Domicillium reflected in paragraph

12 therein is not a physical address, but is rather a postal address described as **"P. O. Box 361, Manzini branch of the Swaziland Property Market (Proprietary) Limited"**. This in my view goes to buttress the allegation that the 1st Applicant does not have a physical address. I notice that they have not even bothered to allege any such physical address in all the papers they filed of record. In these circumstances, the case for the Respondents that the 1st Applicant does not have a physical address is established.

[14] In my view, the Deputy Sheriff was quite entitled in law to serve any of the Directors of 1st Applicant wherever in these circumstances. This is proper service in terms of the Rules.

[15] Speaking on an analogous situation in the case of **Regent Project (Pty) Ltd v Steel and Wire International (Pty) Ltd and Others Civil Case No. 4660/2008, paras [8]-[13],** the Court made the following apposite remarks:-

> **"[8] For it's part the 1st Respondent contends that service was effected upon Mr Bongani Kunene as the Managing Director of the Applicant company and as such the service was in compliance with the rules. That the service took place at Luyengo and not at the registered office or Principal place of business of the Applicant as required by the rules because the offices of the Applicant were closed down at the time. Therefore, the deputy sheriff, 3rd Respondent, who knows Mr Kunene very well, deemed it fit to effect service on him outside the offices. The 3rd Respondent, filed a supporting affidavit where he confirmed that he indeed effected service of the summons on the Applicant through Mr Kunene at Luyengo on the 28th of December, 2008.**

[9] **Now, service on a corporation or company like the Applicant is governed by rule 4 (2) (e) of the rules of this court which provides as follows:**

> **'2. Service under sub rule (1) shall be effected in one or other of the following manners.**
>
> **(e) In the case of a corporation or company, by delivering a copy to a responsible person at its registered office or a responsible employee thereof at its principal place of business within Swaziland, or if there is no such person willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law.'**

[10] **Sub rule (2) (e) ante therefore permits service on a corporation or company in the alternative at (a) it's registered office (b) or it's principal place of business within Swaziland or (c) in any manner provided by law.**

[11] **It is clear from the above that though the law permits service on a company at it's registered office or principal place of business, this mode of service is however not obligatory. This is because service can also be competently effected in any manner provided by law, which entails any other mode of service which in terms of the law is open to a party who has sued a company or corporation. It is also an established practice that service on the Managing Director, Director, Company Secretary or any other responsible employee of a company is competent service on the company. The rationale behind this practice and the principle**

that underpinnes rule 4 (2) (e) is to ensure that the company is aware that action has been taken against it and to prepare to defend such action if it so wishes. Therefore, service on a responsible member of the company as those detailed ante, is one that effectively ensures that the company has such notice. However service on these group of people is usually effected at the company's registered office or it's principal place of business. See Shiselweni Investments (Pty) Ltd v Swaziland Development and Savings Bank Case No. 2391/96.

[12] In casu, the 1st and 3rd Respondents have alleged that when the 3rd Respondent visited the registered office of the Applicant to effect service of the summons, he discovered the office closed and was informed by people there that the office had been closed for some time. The Applicant failed to file any replying or counter affidavit to controvert the foregoing allegations of fact. It is an established position of the law that in these circumstances, these allegations of fact must be taken as established. See S C Dlamini & Company and Another v The Motor Vehicle Accident Fund Appeal Case No. 17/12.

[13] It appears to me therefore that since it is established that the registered offices of the Applicant had been closed down at the material time of service of the summons, it was quite competent for the Deputy Sheriff to take the steps to serve Mr. Bongani Kunene who it is not disputed was at the time of said service and is still, the Managing Director of the Applicant Company. This was to ensure that notice of the pending action was given to the Applicant. The proper procedure to my mind since service was going to take place on Mr Kunene outside the registered office or principal place of business of the Applicant, was for the 1st Respondent to apply to court for substituted service on Mr Kunene in these circumstances. This was not done, I do not

however think that failure to obtain a substituted service order rendered any service on Mr Kunene as Managing Director of the Applicant incompetent. This is because as I earlier stated herein, the whole essence of service is to bring notice of the action to the opposite party. The Applicant as a non juristic entity carries out it's functions through its responsible officers such as it's Managing Director, directors, company secretary etc. Service upon any of these persons, anywhere, is certified notice to the company in the peculiar circumstances of this case where the company was closed down. It would be unreasonable, unrealistic and absurd for the court to hold that upon the facts and circumstances of this case the service that took place on Applicant's Managing Director outside it's registered office is incompetent."

[16] I am persuaded by the aforegoing exposition. I have no wish to depart from it.

[17] It was on the strength of this return of service that **Maphalala PJ** proceeded to judgment by default in terms of Rules. In my view the service was competent.

[18] There is therefore no error that was not visible on the record that would entitle the Applicants to the rescission sought in terms of Rule 42 (1) (a) of the High Court Rules. The Rescission sought in terms of that Rule 42 (1) (a) fails and is dismissed.

[19] **<u>The Common Law</u>**

Under the Common Law the applicants must demonstrate

(1) good cause

(2) *bona fide* defence

to be entitled to the rescission sought.

[20] **Good Cause**

The term good cause was interpreted by the court in the case of **Colyn vs Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at para 11 page 9** as follows:-

> **"---the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default (b) by showing that his application is made bona fide and (c) by showing that he has a bona fide defence to the Plaintiff's claim which prima facie has some prospects of success--."**

[21] What the court has to determine in ascertaining whether or not an applicant to a rescission has demonstrated a reasonable explanation for his default is whether in the applicant's affidavit he has shown that he was not in wilful default. **Moseneke J**. in the case of **Harris ABSA Bank Ltd T/a Volkskas 2006 (4) SA page 527 para 8 page 520** stated the parameters that must guide the court in determining whether the applicant was in wilful default in the following terms;-

> **"Before an Applicant in a rescission of judgment application can be said to be in "willful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an Applicant must deliberately being free to do so, fail or omit, to take the step which would avoid the default and must appreciate the legal consequences of his or her actions."**

[22] On the grounds of wilful default the Applicants allege that they were not served but I have already found that they were served. Both the return of service and Deputy Sheriff's confirmatory affidavit show that the original process was exhibited and explained to Mr Monsoor. The nature and exigencies thereof were also explained as per High Court Rule 4 (2).

[23] The Applicants have not disputed that the summons were explained to them and they have not said they did not know what steps to take to avoid the consequences of such a process. In my view they were clearly in wilful default. They have thus failed to show reasonable or good cause for their default.

[24] In these circumstances, the question of a *bona fide* defence falls away because the law states that they must satisfy all the requirements which are reasonable cause and *bona fide* defence to be entitled to the rescission.

CONCLUSION

[25] I am of the considered view that this application is unmeritorious. It fails.

ORDER

[26] I hereby order as follows:-

(1) Applicants application to rescind the High Court judgment of 14 March 2013 by **Maphalala PJ** be and is hereby dismissed.

(2) Costs to follow the event.

M. S. SIMELANE

JUDGE OF THE HIGH COURT

For the Applicants : Mr. S. V. Mdladla

For the Respondents : Mr. B. J. Simelane