IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No. 4407/2009

In the matter between:

S. V. INVESTMENTS (PTY) LTD **1st Applicant**

SIPHO DLAMINI **2nd Applicant**

And

WORLD WIDE INTERNATIONAL SECURITY SERVICES (PTY) LTDt/a SECURITY SERVICES (PTY) LTD **Respondent**

In re:

WORLD WIDE INTERNATIONAL SECURITY (PTY) LTD SERVICES (PTY) LTD t/a SECURITY SERVICES **Plaintiff**

And

S. V. INVESTMENTS (PTY) LTD **1st Defendant**

SIPHO DLAMINI **2nd Defendant**

Neutral citation: *S. V. Investments (PTY) LTD and Another vs World Wide International Security Services (PTY) LTD t/a Security Services (PTY) LTD In re: World Wide International Security Services (PTY) LTD t/a Security Services (PTY)*

LTD vs S. V. Investments (PTY) LTD and Another (4407/09) 2016 SZHC 118 (12 July 2016)

Coram: Hlophe J

For the Applicant: Mr. O. Nzima

For the Respondent: Mr. N. Dlamini

Summary

Recession of Judgment – Judgment granted after the Defendant's (Now Applicant's) defence had been struck out for failure to file a Discovery Affidavit notwithstanding being compelled to do so – Applicant Contends that Judgment was granted erroneously and files and serves application for rescission – Whether case made for the relief sought – Court's approach to rescission applications considered – Applicant's case very weak and neither sustaining rescission based on rule 42 nor one based on common law – application for rescission dismissed with costs.

JUDGMENT

[1] This is an application for rescission in which the Applicants seek an order of this court rescinding a judgment granted in favour of the Respondent after the Applicants had failed to discover notwithstanding the 1st Applicant having been served with an order of court compelling them to do so within a certain specified period. This failure to comply with the order compelling discovery culminated in the matter being set down for the dismissal of the defence as envisaged by Rule 35 (11) of the High Court Rules. It is worth mentioning that notwithstanding the said Notice of Set Down for striking out the said defence having been served on the Applicants through their correspondence the latter still failed to attend court and present their side before a decision granting the relief sought was made.

[2] In their aforesaid application the Applicants claim not to have been aware of either the Notice to Compel Discovery or any other document notifying them of what was happening in the matter before the Judgment complained of was granted against them. Surprisingly, even at the stage after the Judgment had been handed down against them, the Applicants do not seem to appreciate that same was granted because the defence as

raised in their plea was struck out after they could not comply with an order calling upon them as Defendants to discover within a certain specified period.

[3] This I say because contrary to the position the record unequivocally sets out to be as stated hereinabove, the Applicants in their application for rescission suggest that the Judgment was granted against them as a default judgment following their failure to comply with a Notice of Bar. Of course the record says nothing about a Notice of Bar or a failure to comply with one so as to result in the judgment concerned and none has been attached to the pleadings or shown as having resulted in the judgment. Although this may appear like a casual approach to the matter by the Applicants it has far reaching implications for them when considering that the application is founded on wrong grounds altogether. This is all the moreso if one considers the common Law grounds for rescission as they tend to require a reasonable and acceptable explanation for the default as shall be seen herein below. I say this acknowledging the difficulty Applicants may have in giving such an application if they are not sure how the judgment was granted without them attending in the first place.

[4] Futherstill, it is clear that the Applicants' application is founded on hearsay evidence. At paragraph 8 of the Founding Affidavit, the deponent to the founding affidavit states the following which confirms this observation:

> **"8…Thereafter Respondent's attorney served a Notice of Bar upon our erstwhile attorneys correspondence in Mbabane, however the Notice of bar was not brought to our erstwhile attorneys' timeseously and they became aware of (sic) when the matter was set down for Judgment by default".**

At paragraph 9 of the Founding Affidavit, the following is averred:

> **"9. Upon enquiry I am advised that, it transpired that the document was inadvertently put in a file that carries correspondence for attorneys L. M. Simelane who also use the same offices that my erstwhile attorneys use for the purposes of receiving their correspondence".**

[5] Despite that these excerpts from the Founding Affidavit indicate hearsay in so far it is clear from their tone that the deponent to the Founding Affidavit on behalf of the Applicants has no first-hand information, he neither discloses his source nor does he file a Confirmatory Affidavit by the source of such information. The position is long settled that hearsay is no evidence and should be struck out with the question that immediately

crops up being after having struck it out, would there still remain a case or an explanation, as the case may be?

[6] A clear import of this is that the Applicant has not given any explanation, let alone a reasonable and acceptable one, why it had not discovered despite being compelled to do so and why it did not comply with the Notice of Set Down of the matter for the judgment that culminated therefrom. A reasonable and acceptable explanation for the failure to appear in court to defend a matter which culminate in a judgment being granted is one of the common law requirements for the setting aside or rescission of a judgment granted against a Defendant in his absence. See in this regard ***Leonard Dlamini vs Lucky Dlamini Civil Case No. 1644/1997 (Unreported.)***

[7] The other requirement that has to be met for a party to obtain rescission of a Judgment under Common Law is the setting out of a valid defence. The closest to establishing a valid or bona fide and bona fide defence was laid down at paragraphs 14 and 15 of the Founding Affidavit. There the Applicant said the following:

> **"14. It is my strong belief that the court granted the order erroneously, this is premised upon (sic) that I do not owe any amount or (sic) whatsoever to the Respondent and the amount**

claimed was paid. In actual fact I was defending this matter through and through, and I do not know what happened to my attorney, as to why he failed to discover when I had signed the documents.

15. Furthermore I submit that I have a bona fide defence in the main application and this application is not meant to delay the said proceedings as I am of the strong view that I have a strong case in the main matter".

[8] This is all the Applicants say about the defence they say they have. There is no mention of when the amounts admittedly owed were allegedly paid, where, to whom and how. The Applicant seems to have contended itself with the belief that if it makes a bare assertion as a defence then that is enough. Unfortunately that cannot be. By a valid defence in rescission matters is meant much more than a bare assertion. It is meant a defence which if raised would possibly raise a triable issue.

[9] The Applicants would have met the requirements of a valid defence in my view if they showed how the amount they are said to be owing was supposedly paid including when it was paid and to who. Otherwise if the

defence amounts to a bare denial it is no defence at all. Again this Common Law rescission requirement was not met.

[10] I am therefore convinced that the Applicant did not meet the requirements for the rescission of Judgment under the Common Law because it has been said in various judgments of this court that a court dealing with rescission of a judgment is not confined to the ground sought to be relied upon but should consider the other competent grounds like for instance the common Law rescission if the ground relied upon was merely Rule 42 or Rule 31 (3) (b) if it was granted by default in terms of the said rule. I am alive to the fact that in the present matter, the Applicant sought to rely on Rule 42 which in terms of the applicable law does not require any further allegations than the establishment of the error relied upon. See such cases as ***Nyingwa vs Moolman N. O. 1993 (2) SA 508 at 510 C-D; Thomas Mashesha Dlamini v Swaziland Development and Savings Bank And Others High Court Civil Case No. 558/2008; Thulani Richard Nkhabindze v Swaziland Development and Savings Bank High Court Case No. 560/2013.***

[11] I have however had to deal with the requirements of a Common Law rescission because for some in explicable reason there was a casual reference to the common law requirements for rescission which, as indicated above are a valid defence and a reasonable and acceptable explanation for the default or failure to appear in court. Due to the wekness of the Applicant's case in this regard, I have clearly discount the Common Law rescission. See on these principles with regards rescission such cases as ***Thomas Dlamini vs Swaziland Development and Savings Bank (Supra)*** as well as the South African case of ***Nyingwa vs Moolman N. O. 1993 (2) SA 508.*** See also ***Topol & Others vs L. S. Group Management Services (PTY) LTD 1988 (1) SA 639 (W)*** on the difference in the requirements for rescission under rule 42 from those of a rescission under Common Law, particularly the principle that under a Rule 42 rescission based on an alleged error the other side has to do no more than establish the error after which he is entitled to rescission.

[12] In paragraph 13 of the Founding Affidavit, the basis for the rescission sought is set out as follows:

> **"I am advised and verily believe that this court can rescind and or vary a court order which was granted in the absence of the other party, <u>when the court was not aware of certain</u>**

<u>information when it granted the order and when such order was granted by mistake or fraud</u>. This is based in terms of the rules of this court especially Rule 31 and Rule 42 as well as the Common Law".

[13] As referred to above, Judicial authority is abound that a party who relies on an error by the court in the grant of the impugned Judgment as envisaged under Rule 42 needs only establish the error and that once he does so, the court shall without further ado grant the rescission. In other words such a party need not establish good cause. See in this regard ***Bakovan LTD vs G. J. Howes (PTY) LTD 1992 (2) SA 466***.

[14] According to the Applicant the error necessitating the rescission of the Judgment herein is that the court granted the Judgment it did because it was unaware of certain information. At paragraph 14 of the Founding Affidavit, this information of which the court was unaware as at the time it granted the Judgment was that the amount claimed was paid. Instead of setting out how the amounts were paid and annexing the proof of payment, the Applicant made no disclosure so much so that the court still has the same scant information it had when it granted the Judgment and,

nothing has changed yet the application should ordinarily have been aimed at revealing those facts it is contended were unknown to the court and making them known together with the necessary proof.

[15] The error the court has allegedly made has in my view not been established which means that nothing has in law been placed before this court to make it change its position vis-a-vis the Judgment earlier granted. I have already indicated above that after a careful analysis of the facts, I am convinced the requirements for rescission under the Common Law have also not been met. Of course the rescission of Judgment under Rule 31 (3) (b) does not arise as the Judgment was, from the record, not granted under the said Rule 31 (3) (b).

[16] For the above stated reasons I am convinced that the Applicant's application cannot succeed and that it falls to be dismissed. Consequently I make the following order:

16.1 The Applicant's application for the rescission of the Judgment of this court be and is hereby dismissed.

16.2 The Applicant is ordered to pay the costs of these proceedings.

N. J. HLOPHE
JUDGE - HIGH COURT