IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 745/2015

In the matter between:

NHLANHLA PHAKATHI **Applicant**

VS

SWAZILAND TELEVISION AUTHORITY **Respondent**

Neutral citation: Nhlanhla Phakathi v Swaziland Televison Authority [745/2015] *[2016] SZHC 17*

Coram: FAKUDZE, J

Heard: 8th December, 2015

Delivered: 15 February, 2016

RESCISSION APPLICATION

Summary: ***Civil Procedure – In an application for rescission of judgment in terms of Rule 42 (1) (a) of the High Court, the Applicant must prove that an order or judgement was erroneously granted in the absence of any party affected thereby – where there is no prima facie proof of service, the court is inclined to grant judgment by default. Rescission of same may also be founded on another ground other than Rule 42 (1) (a) – Common law rescission requires a party seeking for such to establish that he or she was not in wilful default and must demonstrate "good cause" to be entitled to the rescission sought. This entails that an Applicant must (a) give a reasonable explanation for his default (b) show that his application is made bona fide and (c) show that there are some prospects of success- Application for rescission succeeds in terms of Rule 42 (1) (a) and the common law. Each party to bear its own costs***

JUDGEMENT

[1] On the 24th July, 2015, the Applicant filed a notice of Motion on a certificate of urgency seeking the following:-

(1) That the above Honourable Court dispenses with the time limits, forms and provision of services as required by the Rules of this court and that the matter be heard as one of urgency;

(2) Condoning Applicant's non-compliance with the Rules of the above mentioned Honourable Court.

(3) Directing that the *rule nisi* do hereby issue calling upon Respondents to show cause,

on a date to be determined by the court, why the *rule* as follows should not be made final:-

3.1 Staying execution of the Order granted by this Honourable Court on the 3rd July, 2015, pending finalisation of rescission proceedings; and

3.2 Reviewing or rescinding the Order granted by the Honourable Court on 3rd July, 2015.

(4) Costs of suit.

(5) Such further and/or alternative relief.

[2] The 1st Respondent filed the Notice of Intention to Oppose the application and subsequent pleadings and the Applicant replied accordingly. Applicant and 1st Respondent have filed comprehensive heads of argument and bundles of authorities. This court remains indebted to both counsel for their tireless effort in ensuring that the work of the court is made a lot easier.

BORNE OF CONTENTION

[3] In opposing the application 1st Respondent raised two points of law. The first point was that Applicant had not stated under which head it seeks a rescission of the court order; therefore the Application is defective. The other point of law was that the Applicant failed to advance a valid reason for not defending the main application. When the matter came before this Honourable Court, Counsel for 1st Respondent withdrew the two points of law and the court entered the withdrawal in its records.

[4] Applicant's contention for rescission is premised on Rule 42 (1) (a) which states that:-

"*The Court may, in addition to other powers it may have, mero motu or upon application of any party rescind or vary an order or judgment erroneously granted in the absence of any party affected thereby.*"

[5] The basis for the application is that:-

5.1 The application was not served by a Deputy Sheriff or any other authorised person as envisaged in terms of Rule 4 (1) of the High Court Rules.

5.2 The proviso to Rule 4 (1) has the effect that service ought to be originally effected by the Sheriff or Deputy Sheriff as the case may be. It is only in instances where the Sheriff or Deputy Sheriff has failed to serve same, that any person may be authorised to effect service.

5.3 Although the application for review was received by the Applicant, there is no *prima facie* proof that the notice of Motion and the contents of the application for Review were explained to the Human Resources Officer in Applicant's employ. No proof of service has been filed.

5.4 There was no notice of set down or Order served on the applicant regarding postponement of the matter to the 3rd July 2015, that being the date on which the order being challenged in this application was issued by the court.

5.5 The application was delivered at Applicant's registered office but not with the responsible person. Reference was made to Section 8 (1) of the Swaziland Television Authority Act, 1983 which Act states that the Chief Executive Officer is the responsible person by virtue of being responsible for the day to day conduct of the Applicant's affairs subject to the direction of the Board.

[6] In the light of the above mentioned grounds, Applicant alleges that since the Application was not served by the Sheriff or Deputy Sheriff, that the nature and contents of the application were not explained to the Human Resources Officer as requires by the Rules and that the Application was not served on the responsible person, should suffice for the Order of 3rd July, 2015 to be rescinded in terms of Rule 42 (1) (a).

[7] On the common law grounds for rescission, Applicant argues that the court has power to rescind a judgment obtained on default of appearance, provided that sufficient cause is established and when the party seeking relief, presents a reasonable and acceptable explanation for his default, and that on the merits, such party has a bona fide defence which *prima facie* carries some prospects of success.

[8] On the issue that Applicant was not in wilful default, Applicant submitted that even though the application was received by the Human Resource Officer, the Chief Executive Officer was not aware of it. He cites the case of **Cargo Carriers Swaziland (Pty) Ltd V Luis Trigo De Morais and Another High Court Case No 1799/05** to support that proposition. Applicant further referred this Court to paragraphs 13; 13.1; 13.2; and 13.3 of the application for rescission to prove that there was no wilful default on her part. Applicant's Counsel referred the Court to paragraph 14 of the Application to prove the remedial steps that are being taken by Applicant to ensure that such a thing never happens in the future. There was also reference to paragraphs 15.1, 15.1.1, 15.1.2 and 15.1.3.

[9] Applicant contends that the grounds for unwilful default also applies to the issue of a bona fide defence. Applicant further argues that the relief sought by 1st Respondent is unenforceable because the position in which 1st Respondent wishes to be reinstated was abolished and hence non-existent.

[10] On the issue of prospects of success, Applicant contends that 2nd Respondent correctly applied his mind to the issue before him prior to coming to the conclusion that 1st Respondent's dismissal was substantively fair but procedurally unfair. The fact that the relief sought by 1st Respondent, that is, reinstatement, is not possible because upon termination of the contact of employment, the Applicant went through some restructuring process which resulted in 1st Respondent's position being abolished.

[11] Respondent's case is that:-

11.1 The Application for Review was served by 1st Respondent's messenger on the 26th May 2015;

11.2 The officer who received the application affixed the Corporation's stamp on the Application evidencing receipt of same;

11.3 The service of the Review Application was not defective because the Rules allow service to be effected by the Sheriff or Deputy Sheriff and in cases where application proceedings are being instituted, by attorney or any person in his employ….

11.4 Since the Applicant in the initial application did not file a Notice of Intention to Oppose, default judgment was justified. Respondent made reference to the case of **Polo Dlamini V Martha Siphiwe Nsibande Case No 181 of 2000** to support this proposition;

11.5 There is no error made by the court that the Applicant can pin point except for the feeble attempt that the person who effected service did not explain the nature and exigency of same. This is vitiated by the fact that the officer who received the application in the Applicant's corporation affixed the Corporation's stamp as an acknowledgement of receipt of same. When that was exhibited to the court, it then granted default judgment;

11.6 The Application was delivered and served on a responsible officer. It need not be served on the Chief Executive Officer. 1st Respondent cited the case of **Terbanche Transport (Pty) Ltd V Bhekizwe Delano Dlamini and Another High Court Case No 3973/2004** to support this point;

11.7 The Applicant does not mention that on the 3rd July, 2015, an Order was made by the Court compelling the 3rd Respondent to file the record of proceedings at CMAC and that Order and Record were served on the Applicant;

11.8 The Applicant has not advanced a reasonable explanation for default as required by Common law in an application for rescission.

[12] In the light of all the foregoing, Respondent alleges that the above application should therefore be dismissed.

THE APPLICABLE LAW AND THE COURT'S FINDINGS

[13] As indicated earlier, Applicant bases her application for Rescission on Rule 42 (1) (a) and the Common law. Let us now deal with Rescission under Rule 42(1) (a) and we will later consider the common law position.

UNDER RULE 42 (1) (a)

Rule 42 (1) (a) of the High Court Rules states that :-

"(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….."

[14] Applicant's contention is that service was not effected by the Sheriff or Deputy Sheriff as per the provisions of Rule 4 (1). Applicant alleges that in the absence of the Sheriff or the Deputy Sheriff, the *proviso* to Rule 4 (1) should apply. This *proviso* enables the Registrar to appoint another person to effect the service. 1st Respondent alleges that the initial proceedings were initiated by means of an Application. An Application should be served by an Attorney or any person in his employ as per Rule 4 (1). Rule 4 (1) states that:-

"Service on the person to be served of any process of the court directed to the Sheriff or Deputy Sheriff or in the case of a document instituting application proceedings by an Attorney or any person in his employ."

[15] Rule 4 (1) is clear that processes directed to Sheriff or Deputy Sheriff should be served by the Sheriff or Deputy Sheriff. If the Registrar is satisfied that the Sheriff or Deputy Sheriff has failed to effect service within twenty one days from receipt by him such process or document he may authorise in writing any person to effect service. The *proviso* only applies where the process is served by a Sheriff or Deputy Sheriff. With respect to Application proceedings, the Application must be served by an attorney or any person in the attorney's employ. Applicant in the initial Application had instituted the proceedings by way of Application. It is this court's considered view that applicant's point on this issue has no leg to stand on. This Court fully agrees with 1st Respondent that service of an application effected by the Attorney or a person in the Attorney's employ is proper service. Applicant's case is failing on this ground.

[16] Applicant further alleges that the initial Application was served on the Human Resources Officer of Applicant and not on the Chief Executive Officer. Applicant states that Section 8 (1) of the Swaziland Television Authority Act, 1983 makes the Chief Executive Officer responsible for the day to day operations of the Corporation. By virtue of this Act, the legal process should have been served on him instead of the Human Resources officer. 1st Respondent contends that in terms of Rule 4 (2) (e) in the case of a corporation, service may be effected by leaving a copy to a responsible person at its registered office or a responsible employee thereof at its principal place of business in Swaziland……..

Rule 4 (2) (e) states that -

> *"(2) Service under sub rule (1) shall be effected in one or other of the following manner:*
>
> *(e) In the case of a corporation or a company by delivering a copy to 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 a main door of such office or place of business or in any manner provided by law."*

[17] In the case before this Court, service was effected on the Human Resources Officer and this officer qualifies as a responsible person. There is no specific provision in the Swaziland Television Authority Act, 1983 that provides that service of a legal process should be effected on the Chief Executive Officer. Section 8 (1) only provides for the general powers of the Chief Executive Officer. In the case of a Local Government, Section 119 of the Urban Government Act, 1969 specifically states that *"any legal process served on a council is deemed to have been effectively and sufficiently served when it has been handed to the Town Clerk*." There is no similar provision in the Applicant's enabling legislation. This Court is in full agreement with the submission by 1st Respondent on this point. Service was effected on a responsible person at Applicant's registered office.

[18] Further authority that, in the case of a corporation, service may be effected on a responsible person at the place of business of the corporation is found in the case of **Cargo Carriers Swaziland (Pty) Ltd V Luis Trigo de Morais and Another High Court Case No 1799/05 where Her Lordship Mabuza A.J**. as she was then, was stated in paragraph 14 that:-

> *"In my opinion, as a Human Resources Officer, Mr. Simelane qualifies as a responsible officer in terms of the above definition."*

[19] I entirely agree with Her Lordship's observation and therefore Applicant cannot succeed to rescind the judgment of the 3rd July, 2015 on this ground. I therefore find in favour of the 1st Respondent on this point.

[20] Applicant argues that there was no Notice of Set down notwithstanding that she was an interested party in the proceedings. The 1st Respondent makes it clear that the Order of Court compelling CMAC, who is 3rd Respondent in this case, to avail the Record of proceedings when the matter was adjudicated upon by the 3rd Respondent, was served on the Applicant. The same applies to the Order of the 3rd July, 2015. Applicant's Human Resources officer stamped it as a proof of service and Applicant did nothing about these legal processes.

[21] The Court's view on this point is that the court that heard the initial Application was justified in granting default judgment because there was no intention on the part of the Applicant to challenge the legal process that had ensued. Applicant did not file any Notice to Oppose the Application and did nothing even after being served with the Record of proceedings from 3rd Respondent and the Order of the 3rd July 2015. The matter proceeded on the basis that it was unopposed. The Applicant should not succeed on this point.

[22] The last issue advanced by the Applicant in her application under Rule42 (1) (a) is that although Applicant was served with the initial application, there is no proof that the Application was ever served on the Applicant. If there was such proof of service it should have been part of the court papers exhibited before court before Default Judgment was granted. Applicant further argues that there is no proof that the contents of the application were explained to the Human Resources Officer in terms of Rule 4 (5) of the High Court Rules. Compliance with this Rule is evidenced by a Return of Service in the case of action proceedings and in application proceedings, by an affidavit of service

attested to by the Attorney or person in the Attorney's employ. 1st Respondent counters this argument by saying that the fact that Applicant's employee or responsible person affixed the corporation's stamp is full proof that there was effective service. This consideration led to the Court to grant the Application for default.

[23] Let us consider the applicable law on this point before I make a ruling on it. Rule 42 (1) (a) states clearly that "a court may rescind or vary an order or judgment erroneously granted thereby." Rule 4 (5) of the High Court Rules further states that:-

> *"It shall be the duty of the Sheriff or other person serving the process or documents to explain the nature and contents thereof to the person upon whom service is effected and so state in his return that he has done so."*

[24] No where has 1st Respondent shown in his papers that this Rule 4 (5) was compiled with. After all, in the case of **Regent Projects (Pty) Ltd V Steel and Wire International (Pty) Ltd and Others, Civil Case No. 4460/2008 Her Lordship Ota J** said in page 28:-

> *"Bailiff should have gone the extra mile of exhibiting a dispatch book showing that Applicant signed for the summons allegedly served on him. This is because the Applicant to my mind has challenged the fact of service upon very compelling grounds as it was required by law to do to rebut the prima facie evidence of service by way of a Return of Service."*

In Nyingwa V Moolman N.O. 1993 (2) SA 508 (TK.GD) at 510 F it was said that –

"it seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment."

[25] It is this Court's considered view that the Applicant has established the existence of a fact which the court was not aware of which would have precluded the granting of the said judgment or order and which would have induced the court, if it had been aware of it, not to grant the judgment. This issue is the failure on the part of the 1st Respondent to establish that the nature and contents of the Application were explained to the Applicant's employee and that such was not stated in an affidavit of service. The Corporation's stamp affixed on the Application served to prove that service had been effected. It did not prove that the nature and contents of the Application were explained to the Applicant's employee. There was no proof of compliance with Rule 4 (5). The Applicant should therefore succeed under Rule 42 (1) (a) on this point.

UNDER COMMON LAW

[26] The requirements for the granting of rescission of judgement on common law grounds were well canvassed in the case of **Paul Ivan Groening V Sipho Matse Attorneys and Another (1379/12) 2013 SZHC 35 (2013), where His Lordship Maphalala M.C.B. J**, as He then was, said in paragraph 17:-

"(*17) in the case of Chetty V Law Society, Transvaal 1985 (2) SA 756 (AD) at 765, Miller J A stated that in terms of the Common law, the court has power to rescind a judgment obtained by default of appearance provided sufficient cause has been shown. He continued and said the following: 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 judgment by default are:*

(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 bone 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 prospects of success on the merits will fail in an application for a rescission of a default judgement 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 disdain of the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits."

[27] A similar thought was captured by Ota J in the case of **Regents Projects (Pty) Ltd V Steel and Wire International (Pty) Ltd and Others Case No. 4660/2008** in paragraph 23, where Her Lordship says:-

> *"Similarly the application stands to succeed pursuant to Rule 31 (3) (b) and under the common law, which requires that the Applicant demonstrates "good cause" to be entitled to the rescission sought. The term "good cause" was interpreted by the court in the case of Colyn V Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (b) SA (SCA) at paragraph 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 Plantiff's claim which prima facie has some prospect of success……"*

[28] Finally, His Lordship Ebrahim J.A in the matter between **Mbukeni Maziya V The Motor Vehicle Accident Fund Civil Appeal Case No. 18/13** said in paragraph 16:-

> *"I quote from the head note to Smith's case (Smith N.O. V Brummer NO and Another 1954 (3) SA 352 (O). In an application for removal of bar (and same principles apply in applications for rescission judgment), the court has a wide discretion which it will exercise in accordance with the circumstances of each*

case. The tendency of the court is to grant such 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 opposing 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 appropriate order as to costs. The absence of one or more of these circumstances might result in the application being refused."

[29] The words "good cause shown" suggest that the Applicant for rescission has a burden to actually prove, as opposed to merely alleging, good cause for rescission. Such good cause can include but not being limited to the existence of a substantial or good defence.

Wilful Default

[30] Now, let us turn to consider the facts pertaining to this case against the background of the above cited authorities. Applicant establishes that she is not in wilful default by referring this court to paragraphs 13, 13.1, 13.2 and 13.3 of the Founding Affidavit. Mr Bongani Austin Dlamini, Applicant's Chief Executive Officer attests to the fact that :-

"13 *On or about the 10th July, 2015, I was advised by Applicant's Corporate Affairs Manager, one Mr. Mncedisi Mayisela, that he had 1st Respondent's internal file placed on his desk and on perusal of the contents therein he found that there were court processes or documents particularly the Court Order and the Application."*

13.1 He was initially confused by the filing notice of the court order because it reflected Swaziland Television Authority as the Applicant and simultaneously the 1st Respondent. Attached hereto and marked "STVA 5" is the filing notice to the Court Order.

13.2 It is apparent that from the filing notice the Court Order was once again received by the Human Resource Manager.

13 I further hasten to state that I was not aware of both court processes until same was brought to my attention by the Corporate Services Manager on the 10th July 2015."

[31] Paragraph 14 of the Founding Affidavit is also instructive on the issue of whether Applicant was in wilful default or not. This paragraph says:-

"14. *I wish to bring to the Court's attention that the Applicant was not in wilful default in not opposing the Application and has since conducted an internal investigation regarding the relevant officer's failure to advise myself or other members of management about the said court processes."*

[32] Paragraph 14 seeks to prove that Applicant was not in wilful default; she has gone further to investigate the matter with a view to providing remedial measures so that such incident does not occur in the future. Applicant's affidavit is supported by that of Mncedisi Mayisela and of other persons in the employ of the Applicant.

[33] 1st Respondent's response to the issue of wilful default is in paragraph 17 of the Heads of argument where 1st Respondent states that "it is worthy to mention that the Applicant herein has not advanced a reasonable explanation for default……." It is this Court's humble view that Applicant has convincingly advanced a reasonable explanation for the default as stated in paragraphs 13, 13.1, 13.2, 13.3 and 14 of the Founding Affidavit. Applicant has also furnished more reasons for the default in paragraphs 15.1, 15.1.1, 15.1.2 and 15.1.3 of the Founding Affidavit.

Bona Fide Defence

[34] The next enquiry is whether the Applicant has a good defence to the claim or not. Applicant states in paragraph 15.2 why she has a bona fide defence to the claim. She says that:-

15.2.1 *The 2nd Respondent had carefully considered the evidence and submissions made before him before coming to the conclusion that dismissal was substantively fair and procedurally unfair. The 2nd Respondent went to the extent of stating that the matter was starting afresh notwithstanding the evidence and submissions heard by the chairperson of the initial hearing.*

15.2.2 The 2nd Respondent found that it was reasonable to terminate the services of the Respondent and had the correct date been inserted in the letter of dismissal, the termination of Respondent's services would have been deemed to be fair. In support of the defence, Applicant referred the court to paragraph 6.9 page 54 of the Arbitration award to substantiate this point.

15.2.3 The Respondent, in his application, made averment which were incorrect and misleading such as the availability of phone records at the initial enquiry. I state that we would have successfully demonstrated to the court that this was incorrect had we been able to file our court papers; and

15.2.4 I state that we would have advised the court that the relief sought in respect of reinstatement was not practically possible in that the Applicant went through some restructuring processes after Respondent services had been terminated which rendered interalia the Respondent's position redundant."

[35] 1st Respondent's attitude to this ground for rescission is "that there is no valid and bona fide defence raised. All that is said in the founding papers is that the Respondent's position has been abolished." 1st Respondent referred this court to the case of **De Wilts Cuto Body Repairs (Pty) LTd V Fed-Gen Insurance Co. Ltd (1994) (4) S.A. 705** to support his case. 1st Respondent further states that "this is not a defence at all; in fact, the Applicant has an option of paying off the Respondent should he be unwanted in the

Applicant's employ. This is a position that has been upheld in our labour law and has been restated in numerous other cases."

[36] In the case of **Regent Projects (Pty) Ltd (Supra)**, the Learned Judge referred to Erasmus: Supreme Court Practice (Juta) 1995, at B1-203-4 where the Learned author says:-

> *"The requirement that the Applicant must show the existence of a substantial defence does not mean that he must show a probability of success. It suffices if he shows a prima facie case, or the existence of an issue which is fit for trial. The Applicant need not deal fully with the merits of the case, but the grounds of defence must set forthwith sufficient detail to enable the court to conclude that the application is not merely for the purpose of harassing the respondent.……"*

It is this Court's considered view that the reasons advanced in paragraphs 15.2, 15.2.1, 15.2.2, 15.2.3 and 15.2.4 suffice to establish that Applicant has a bona fide. I also rule in favour of Applicant on this point.

Prospects of Success

[37] The final enquiry is to establish if there are prospects of success should the rescission of default judgment be granted. Applicant argues that paragraphs 15.3, 15.3.1 and 15.3.2 of the Founding Affidavit constitutes the ground for prospects of success. Paragraphs 15.3, 15.3.1 and 15.3.2 state as follows:-

"*15.3 It is stated that the Applicant would have likely succeeded in defending the claim for the following reasons;*

15.3.1 There was no irregularity committed by the 2nd Respondent in reaching his decision hence the Applicant complied with the award made by the learned 2nd Respondent; and

15.3.2 Relief sought for reinstatement is not possible because the position held by Respondent was abolished."

[38] Applicant further advances more reasons in paragraphs 16 and 17 to justify her prospects of success. Respondent has not responded to this point. This Court holds the view that there are prospects of success should Applicant be allowed to defend the proceedings.

[39] In the light of totality of the foregoing, the rescission application succeeds on Rule 42 (1) (a) and on Common Law and I therefore make the following orders:-

1. That the default judgment granted on the 3rd July, 2015 be and is hereby rescinded.

2. Each party shall bear its own costs.

FAKUDZE J.

JUDGE OF THE HIGH COURT

For Applicant: T. Simelane

For 1st Respondent: S. Jele