IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1244/18

In the matter between:

SWAZILAND NATIONAL YOUTH COUNCIL	**Applicant**
AND	
SWAZI JIVE ENTERTAINMENT (Pty) Ltd	**1st Respondent**
MUSA N. MAVUSO N.O.	**2nd Respondent**

In Re:

SWAZI JIVE ENTERTAINMENT (Pty) Ltd	**Applicant**
AND	
SWAZILAND NATIONAL YOUTH COUNCIL	**Respondent**

Neutral Citation: *Swaziland National Youth Council vs Swazi Jive Entertainment (Pty) Ltd and Another [1244/18] [2019] SZHC 05 (14th February, 2019)*

Coram: FAKUDZE, J

Heard: 31st October, 2018

Delivered: 14th February, 2019

Summary: *Civil Procedure – Rescission of Judgment Application – basis that Applicant always wanted to defend matter notwithstanding that no Notice of Intention to Defend was filed – based on alleged correspondences between the parties, Applicant under impression that Respondent will not proceed with summons – Application for rescission based on Rule 42(1), Rule 31 (3)(b) or on common law grounds – court concludes that rescission under Rule 31 (3)(b) – Application filed within 21 days of Applicant being aware of the judgment against her – However, explanation for failing to defend not satisfactory – Application for rescission dismissed with costs.*

JUDGMENT

BACKGROUND

[1] On 25th October, 2018 the Applicant filed an urgent application on the following terms:

1. *Dispensing with the usual forms and rules relating to service and time limits and allowing that this matter be heard as one of urgency;*

2. *Condoning Applicant's non-compliance with the rules of this Honourable Court;*

3. *Staying the execution of the Judgment of this Honourable Court issued on 14th September, 2018 pending finalisation of this Application;*

4. *Rescinding and/or setting aside the Order granted on 14th September, 2018;*

5. *Granting leave to file his plea in defence to the main action.*

6. *Directing that prayer 3 operates with immediate and interim effect returnable on a date to be appointed by the Court;*

7. *Costs of the Application in the event it is opposed; and*

8. *Further, alternative and/or competent relief.*

[2] The brief background of this matter is that a default judgment was granted by the court in favour of the 1st Respondent and against the Applicant who was the Defendant then. This was on the 14th September, 2018. The reason for the Default Judgment to be granted was that the Applicant had failed to file a Notice of Intention to Defend.

[3] Following the granting of the Default Judgment, the Applicant instituted the present proceedings in a bid to seek rescission of the Default Judgment. The substance of the Applicant's case is that it has always intended defending the action and it would have filed such notice timeously had it not been in continuous belief that the 1st Respondent had stayed legal proceedings pending Applicant's request for discussion on the basis for/and substitution

of the 1st Respondent's claim. The written discussion and non responses in acquiescence by the 1st Respondent and his attorneys created upon the Applicant an impression that there was space for discussion. It is this *bona fide* belief that the Notice of Intention to Defend was not filed. There was no wilful intention on the part of the Applicant not to defend the matter.

AD POINTS OF LAW

[4] Three points of law were raised by the 1st Respondent. The first one pertained to the stay of the Writ issued by the Registrar on the 24th October, 2018. The second one pertained to the prayer for Interim Relief and the last one pertained to the issue of urgency.

[5] After lengthy deliberations by the parties on the above mentioned points of law, it was agreed between them that focus must be on the merits of the Application. The points of law were then abandoned.

THE MERITS

The Applicant's case

[6] In paragraph 8 of the Founding Affidavit, the Applicant states that the Rescission Application is based on Rule 42(1)(a), Rule 31 (3)(b) as well as the common law. During oral argument, the Applicant conceded that his case does not fall under Rule 42(1)(a). It should be considered under Rule 31 (3)(b) or the Common law.

Rule 31 (3)(b) Application

[7] Under Rule 31 (3)(b) a judgment or a Court Order may be rescinded where the Applicant has failed to deliver the requisite Notice of Intention to Defend or where the Applicant has filed the Notice of Intention to Defend but has failed to deliver the Plea.

[8] Rule 31 (3)(b) of the High Court Rules states that *"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 upon good cause shown and upon the defendant furnishing to the Plaintiff security for payment of costs of the default judgment and of such application to a maximum of E200.00, set aside the default judgment on such terms as to it seems fit."*

[9] In *casu*, the facts in the Founding Affidavit at paragraph 21 and paragraphs 7.5 and 7.6 of the Applicant's Replying Affidavit, reveal that the Applicant registered and issued the application within the prescribed period in compliance with Rule 31 (3) (b). This is so particularly when taking into account that the Applicant only gained knowledge of the judgment sought to be rescinded on the 24th September 2018 and the Application was registered and issued on the 23rd October, 2018, that is, on the 21st day after the date that the Applicant gained knowledge of the existence of the judgment.

[10] It is Applicant's contention that an Applicant for the rescission of a judgment under Rule 31 (3)(b) is required not only to comply with the requirements of the Rule as regards the number of days within which the application has to be brought after the gaining of the knowledge, but must also show or establish good cause. Courts generally expect an Applicant to show good cause by (a) giving a reasonable explanation for the default; (b) by showing that the application is made bona fide; (c) by showing a *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospects of success.

[11] In giving a reasonable explanation of his default, if it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance. This means that the Defendant must at least furnish an explanation for his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives. When applying the principle to the Applicant's case the Applicant states that it cannot be said that there was gross negligence on the part of the Applicant. A continuous outline and narrative of the occurrence of linked events after receipt of the knowledge of the judgment including seeking assistance from Attorneys and the correspondence between the Applicant and the 1st Respondent's clearly shows acquiescence and substantiation of the Applicant's belief that a space for discretion and clarification on the basis for the court action had been created after the receipt of the summons. The Applicant was under *bona fide* belief that the court action had been stayed. At all times the Applicant did not sit on his laurels upon receiving the summons

and that throughout, the Applicant desired and intended that the matter should proceed defended.

[12] On the issue that the Application is made *bona fide*, the Applicant states that the Application must be *bona fide* and not made with the intention of merely delaying the Plaintiff's claim. Speaking of the *bona fide* defence, the Applicant says that it is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which if established at the trial would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. The Applicant's defence is that the 1st Respondent was informed in various meetings that the launching of the National Youth Summit was subject to the approval by the Board of Directors of the Applicant, the Youth Enterprise Revolving Fund (YERF) and the Cabinet of the Kingdom of Eswatini. Since Applicant and the National Youth Summit were government entities, the 1st Respondent had to furnish Applicant and the Youth Enterprise Revolving Fund with all necessary company registration documents of 1st Respondent and company profile. The 1st Respondent did not fully comply not withstanding subsequent reminders.

[13] Sometime later, a proposal for the launching, subject to the necessary approval and furnishing of document was, tabled. The 1st Respondent undertook not to launch but later turned around and launched to the exclusion of the Applicant and YERF. The Applicant was therefore under the reasonable belief that the launch was solely at the whim of the 1st Respondent at his own

cost and had nothing to do with the Applicant and YERF. The cost is now the subject of the present litigation.

[14] On the issue of prospects of success, the Applicant submits that it has a *bona fide* defence which *prima facie*, carries prospects of success in the merits in that:

(a) The conviction of the National Youth Summit although proposed and planning did never find facilities as the authorising procedure had never been finalised and the authority to proceed never obtained;

(b) At all times the 1st Respondent was continuously made aware of the basic requirements for service engagement with the Applicant that:

(i) Primarily, all the company documents required needed to be filed in strict compliance the prescribed policy and this never materialised. The primary compliance was not met by the 1st Respondent;

(ii) The Applicant and the YERF had expressly repudiated their participation prior to the launch and the 1st Respondent was on numerous meetings requested to postpone the launch pending the Board of Directors' Approval. The 1st Respondent insisted on proceeding with its own launch introducing a different concept altogether than what was being discussed during the various meetings.

Common law

[15] On the issue of common law rescission, the principle that apply is that it will be granted where sufficient or good cause has been shown. Good cause has two elements to it. Firstly, that a party seeking relief must present a reasonable and acceptable explanation for his default which gave rise to the court order or judgment; secondly, that such a party has to establish that on the merits he has a *bona fide* defence which *prima facie*, carries some prospects of success. The Applicant further submitted that the consideration with respect to Rule 31 (3)(b) rescission application, except for the 21 day period after a party has become aware of judgment granted against it, apply with the same force and effect to common law rescission.

[16] The Applicant therefore requests the court to uphold the Application for rescission with costs.

The 1st Respondent's Case

[17] The 1st Respondent states that the Applicant asserts that it had no authority to enter into the service agreement with the 1st Respondent. The 1st Respondent pleads that the Applicant's C.E.O had ostensible authority to enter into the agreement. The papers filed of record show that there was a general understanding that the 1st Respondent should plan for an event, only they hoped that this would not be a cost to them; this cannot be. There is no service provider who would provide a service for free.

[18] Moreover, the Applicant continuously gave instructions to the 1st Respondent until such time that they discovered that they did not have authority. This defence does not carry any prospects of success, should the matter go to trial.

[19] On the Rule 42 (1) ground for rescission, a party must allege facts which show that the court made an error in granting judgment. In the current proceedings, the Applicant has not established any error on the part of the court, nor introduced a fact which would have prevented the court from granting Judgment by default.

[20] On the Rule 31 (3) (b) ground for rescission, a party must approach the court within 21 days of having had knowledge of the judgment. The letter of demand was served upon the Applicant on the 20th September, 2018. A Writ of Execution was then issued and therefore the Applicant became aware of the Judgment on the 20th September, 2018. The Applicant alleges that he became aware of the Court Order on the 24th September, 2018. The 1st Respondent states that it took the Applicant close to 30 days to file an Application for rescission. This was well beyond the 21 days stipulated in the Rule. There was also no application for condonation for the late filing of the Rescission Application.

[21] On common law rescission, an applicant must show that he has good cause which is made of a reasonable and acceptable explanation for the default,

coupled with a *bona fide* defence which carries prospects of success. In applying this principle a party must first show the court that there is a reasonable and acceptable explanation for the default before the court can consider whether or not there is a *bona fide* defence. It is Respondent's contention that the Applicant does not state why it did not file the notice to defend. The letter that was sent by the Applicant does not expressly or impliedly state that the matter be stayed. All that the Applicant stated is dissatisfaction about the filed process and further indicating that in the event proceedings are instituted, the Applicant will defend them.

[22] The Applicant goes on to say that the letter created an impression that the proceedings would be stalled. The 1st Respondent never created such impression, hence the explanation. The 1st Respondent therefore requests the court to dismiss the application for rescission with costs.

THE APPLICABLE LAW

[23] Rule 42 (1)(a) states that "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 effected thereby."

In **Nhlanhla Phakathi V The Swaziland Television Authority High Court Civil Case No. 745/2015 [2016]** Fakudze J. observed that:

"It seems that a judgment has been erroneously, granted if there existed at the time of its issue a fact 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."

[24] It is important to note that the error must be *ex facie* the record for Rule 42 (1) (a) to find application. A party seeking rescission based on the Rule need not establish good cause. If the court holds that an order or judgment was erroneously granted in the absence of any party affected by it, the order should without further enquiry, be rescinded or varied.

[25] Rule 31 (3)(b) states that "a defendant may, within twenty-one days (21) after he has had knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court upon good cause shown and upon the defendant furnishing to the plaintiff security for costs of the default judgment and of such application to a maximum of E200.00, set aside the default judgment on such terms as to it seems fit."

[26] **In Allen Mango V Edward Alexander Hamilton, High Court Case No. 1784/04**, His Lordship Hlophe J, in determining whether or not a Rescission Application had been filed within the stipulated period specified in the Rule, used the date stamp of the Registrar of the High Court as the date on which the Applicant made the Application to the court.

[27] On the issue of good cause it was stated in **Colyn V Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)** Paragraph 11 as follows:

> *"The courts generally expect an Applicant to show good cause:*
>
> *(a) by giving a reasonable explanation for the default;*
> *(b) by showing that the application is made bona fide;*
> *(c) by showing a bona fide defence to the plaintiff's claim which prima facie has some prospect of success."*

[28] As stated earlier in this judgment, the principles applicable to Rule 31 (2)(b) applies to common law rescission.

Court's analysis and conclusion

[29] In this court's assessment, this matter falls for determination under Rule 31(3)(b). We indicated earlier that a defendant seeking rescission under this Rule must do so within 21 days after having had knowledge of the judgment. He must also furnish a reasonable explanation for failing to defend the proceedings.

[30] In *casu*, at paragraph 21 of the Founding Affidavit and paragraphs 7.5 and 7.6 of the Replying Affidavit, the Applicant alleges that he registered and issued the Application within the 21 days prescribed by the Rule. This is so particularly when taking into account that the Applicant gained knowledge of the judgment sought to be rescinded on the 24th September, 2018 and the Application for rescission was filed on the 23rd October, 2018 which is exactly 21 days. The Applicant's version of when he became aware of the

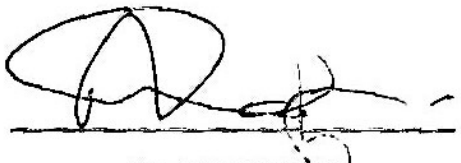
judgment sounds credible. One instance suffices to prove this point. In paragraph 12.3 of the Respondent's Supplementary Affidavit, dated 29th October, 2018, the 1st Respondent states that "the Applicant became aware of the Judgment on the 19th or alternatively 24th September, 2018 and not the 17th October, 2018." "Annexure H" of the Founding Affidavit shows that the Applicant stamped it on the 24th September, 2018. There is no reason for this court to doubt that the Applicant only became aware of the judgment on the 24th September, 2018. I am therefore inclined to find in favour of the Applicant that the 21 day period was complied with for purposes of Rule 31 (2)(b).

[31] On the issue of reasonable explanation, the Applicant states that he thought the Respondent should first respond to the correspondences between the parties that were exchanged on the 19th March, 2018 (marked "Annexure D" to the Founding Affidavit) and that of 21st August, 2018. The Respondent further says that in the absence of a response to the 21st August correspondence it was assured that 1st Respondent had acquiescenced to the position in our letter of the 21st August, 2018. An email from the 1st Respondent was received in response directing that the Applicant deal directly with the Attorneys of the 1st Respondent. The 1st Respondent's response is straight forward. There was never any intention on its part to stall the legal process.

[32] The court's view on whether the explanation offered by the Applicant is reasonable or not, it is clear from the facts of the matter that the Applicant was aware of the summons issued against it and it did nothing to defend same. This manifests an element of gross negligence or recklessness on its part. The explanation of the default in the present circumstances cannot be reasonable.

The second hurdle which an Applicant for rescission based on Rule 31 (2)(b) has to cross has not been crossed. The Applicant's application for rescission cannot succeed on this ground. I need not consider the requirement of a *bona fide* defence carrying prospects of success because of the conclusion this court has come to with respect to the reasonableness of the explanation for failing to defend the matter.

[33] The Application for rescission stands dismissed with costs at an ordinary scale. The *Rule nis*i issued by this court on the 25th October, 2018 is hereby discharged.



FAKUDZE J.

JUDGE OF THE HIGH COURT

APPLICANT: Z. Hlophe

RESPONDENT: T. Hlanze