IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 633/17

HELD AT MBABANE

In the matter between:

SAMKETI DLAMINI **APPLICANT**

And

XIPANDA FOODS (PTY) LTD **RESPONDENT**

In re:

XIPANDA FOODS (PTY) LTD **PLAINTIFF**

And

SAMKETI PREPACKING **1st DEFENDANT**

SAMKETI DLAMINI **2nd DEFENDANT**

Neutral Citation: *Samketi Dlamini vs Xipanda Foods (Pty) Ltd & 2 Others [633/17] [2020] SZHC 109 (9 June 2020)*

Coram: M. LANGWENYA J

Heard: 7 March 2020

Delivered: 9 June 2020

Summary: *Civil Procedure-application for rescission in terms of rule 42 of High Court Rules-judgment granted in error and in the absence of another party may be rescinded-rule 42 has within its remit judgments tainted by irregularity-applicant contends respondent has no locus standi in judicio because it is a company owned by a Trust-a company, regardless of who owns it has power to sue and be sued-application for rescission refused.*

Civil Procedure-application for rescission in terms of rule 31(3)(b) of the High Court Rules-application to be filed within twenty-one days after applicant has knowledge of default judgment and on notice to the other party-applicant did none of the above-application for rescission in terms of rule 31(3)(b) refused.

Civil Procedure-application for rescission in common law-applicant must give a reasonable explanation for inaction-no such explanation canvassed by applicant-rescission refused-application for rescission dismissed with costs.

JUDGMENT

[1] This is an application for rescission of default judgment granted by this Court against the applicant (the second defendant in the main action) on 14 July 2017 on the ground that such order was granted in the absence of the applicant. The application is based on the provisions of Rule 42(1)(a) of the Rules of this Court. This application is opposed by the respondent.

[2] In terms of Rule 42(1) the Court may, in addition to any other power it may have *mero motu* or upon application of any party affected, rescind or vary:

2.1 An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

2.2 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;

2.3 An order or judgment granted as the result of a mistake common to the parties.

[3] The rule encompasses within its remit judgments tainted by irregularity[1].

[4] The purpose of Rule 42(1)(a) is to correct an obviously wrong judgment or order and requires proof that the judgment or order could not lawfully have been granted; that it was granted in the absence of a party and that such party's rights or interests were affected by the judgment[2].

[5] An order or judgment is erroneously granted in the absence of a party, if irrespective of whether or not such judgment or order is otherwise correct, the absent party was not notified or did not know of the date of the hearing.

Background Facts

[1] *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411(C), 417.
[2] *Mutebwa v Mutebwa* 2001 (4) SA 193(TKH), para 15.

[6] On 3 May 2017, the respondent (Xipanda Foods (Pty) Ltd) (Xipanda) instituted action proceedings against the applicant Samketi Dlamini (Mr. Dlamini) (the action) seeking refund of the sum of E135, 000.00 (one hundred thirty-five thousand Emalangeni) in respect of an agreement of sale and transfer of sugar rights to the plaintiff concluded on 16 June 2016. Mr. Dlamini was personally served with summons dated 3 May 2017 on 16 May 2017. He did not enter an appearance to defend the action; thereafter Xipanda set the matter down to be heard on 14 July 2017. There being no appearance by Mr. Dlamini default judgment was granted in favour of Xipanda on 14 July 2017.

[7] On 17 July 2017, Xipanda issued a writ of execution for the sum of E135, 000.00 (one hundred and thirty-five thousand Emalangeni). The writ of execution was served personally upon the second defendant on 8 August 2017. Upon execution a *nulla bona* return of service was made as no executable movables were found to satisfy the judgment debtor.

[8] A notice in terms of Rule 45(13)(i) was personally served on Mr. Dlamini on 13 March 2019 and he was informed to appear in court on 22 March 2019. He did not. The matter was heard in court on 22 March 2019 in the absence of Mr. Dlamini and an application compelling Mr. Dlamini to appear personally before Court on 5 April 2019 was made. The applicant did not appear in court on 5 April 2019. The matter was postponed to 12 April 2019. For the first time since the proceedings commenced, the applicant appeared

in court on 12 April 2019. The matter was postponed to 10 May 2019 in order for Mr. Dlamini to file pleadings. On 10 May 2019, Mr. Dlamini filed an application for rescission of judgment of 14 July 2017. Xipanda's answering affidavit was filed on 10 October 2019. There were no replying papers filed by Mr. Dlamini. On 21 February 2020 the matter was postponed to 28 February 2020 as Mr. Dlamini had still not filed his replying affidavit. The matter was heard on 6 March 2020 and Mr. Dlamini had still not filed his replying papers.

The Issues

[9] Mr. Dlamini's counsel, Mr. A Hlatshwayo advanced three bases for rescission:

9.1 The July 2017 judgment was erroneously sought or erroneously granted as contemplated in Rule 42 of the Rules of this court.

9.2 The respondent (Xipanda) lacks *locus standi in judicio* to institute the action proceedings.

9.3 Mr. Dlamini only became aware of the proceedings at a very late stage when he was served with the Court order compelling him to appear before court.

Rule 42 Rescission

[10] The purpose of rule 42 is to correct an obviously wrong judgment or order and this requires proof that the judgment or order could not lawfully have been granted; that it was granted in the absence of a party and that such party's rights or interests were affected by the judgment. It is correct that good cause need not be shown for an applicant to succeed in the rule 42 application[3] for rescission. As held in *Tshivhase and Another v Tshivhase and Another*[4] however, the court retains discretion to refuse the application for rescission under rule 42, even if all the formal requirements are satisfied. The presence of discretion is underscored by the use of the word '*may*' in rule 42(1).

[11] The discretion must be exercised judicially, but it is not, narrowly circumscribed to deciding whether the court will act only on application by a party or *mero motu* in considering rescission. Such a narrow reading is not supported by the words used in rule 42. 'May' is not limited in this fashion. It is clear from the rule that 'may' qualifies and relates to the words 'rescind or vary' and not the words 'in addition to any other powers it may have *mero motu* or upon the application of any party affected.' The words in parenthesis simply grant the power to the court to consider the matter either on its own initiative or on application by a party, and clarify that the power to rescind or vary is in addition to all other powers a court may have.

[3] *De Wet and Others v Western Bank Ltd* 1977(4) SA 770, 777.
[4] 1992(4) SA 852 (A).

[12] The discretion is a wide one which must be exercised with reference to all the circumstances. Relevant factors to be taken into account in exercising the discretion may, without limitation, include:

12.1 Whether there is a triable issue between the parties, or whether the rescission would be an exercise in futility; the nature, extent and materiality of the irregularity; past and potential future delays in the proceedings and any delays in the applicant pursuing its rescission application; the importance of the matter to the parties; whether rescinding the judgment will serve the interests of justice; and any evidence of abuse of process.

[13] In this regard, while there is no *onus* on the defendant to establish that he has a potential or arguable defence on the merits at this stage of the enquiry, it is nevertheless relevant to a Judge asked to exercise his/her discretion as to whether to rescind, to ascertain whether there is a serious issue to be tried. If there is not such issue, then the court may justifiably be inclined to refuse rescission[5].

[14] Mr. Dlamini was served personally with summons on 16 May 2017 and he did nothing to prevent default judgment being granted; he took no steps to forestall impact of writ of execution which was personally served on him on 8 August 2017 and only came to court on 12 April 2019 following an application compelling him to appear in terms of Rule 45(13)(i). It therefore

[5] *Bonaero Park*, 703-704

seems doubtful that Mr. Dlamini had any intention to defend the matter because he did not act to forestall default judgment nor did he bother to respond to court papers following being served with a writ of execution on 8 August 2017. He also did not file his replying affidavit in the application for rescission.

[15] Mr. Dlamini states that judgment was granted in his absence and that he was without legal representation and was not advised on what legal steps to take once he was served with summons. Annexture 'XF' which is a return of service states that when the summons were served personally on the applicant-its nature and exigency was explained to him in accordance with the provisions of Rule 4(2)(a) of Act 20/1954. Mr. Dlamini also wrote, certified and signed on the summons that he had received the court process regarding the action proceedings.

[16] Mr. Dlamini's defence is not strong in this rescission application. He does not deny that he entered into a contract of sale and cession of sugar rights and that money amounting to E135,000.00 (one hundred and thirty-five thousand Emalangeni) was paid into his account by DMI Noah-who represents the respondent in these proceedings. All that the applicant says is that DMI Noah did not, at the time the contract was entered into-disclose that he was acting on behalf of Xipanda. Mr. Dlamini also argues that he was not in breach of the terms of the agreement as he had engaged Swaziland Sugar Association and had the sugar rights transferred to DMI

Noah who in turn failed to utilize the sugar rights until Swaziland Sugar Association enquired about the inactivity of the said account by DMI Noah. Mr. Dlamini does not cite any meaningful context which is intended to corroborate his case.

[17] Mr. Dlamini only attached annexture 'SD1' as proof that he ceded the sugar rights he held with Swaziland Sugar Association to DMI Noah. *Ex facie*, 'SD1' is a letter in which the applicant requests Swaziland Sugar Association to allow him to 'hand over directorship' of Samketi Pre-packing to DMI Noah of South Africa. The letter which is signed by the applicant is written on the letter heads of the first defendant in the action proceedings-Samketi Pre-packing. There is nothing to suggest that annexture 'SD1' was consented to by Swaziland Sugar Association. For completion I reproduce in full the contents of the said letter:-

Swaziland Sugar Association

P.O. Box 445,

Mbabane H100 **28 May 2018**

Dear Sir,

Re: Handing over of Directorship

With due respect sir, I kindly request SSA to accept my handing over of directorship of the Samketi Pre-packing to Mr. DMI Noah of South Africa. There are many reasons why am doing this. Among them are: He has the availability of the market, because his wholesales in Johannesburg and Pretoria need a lot of sugar. I have also engaged myself in politics; I am not going to have enough time for doing the nit critics (sic) of the organization. All queries of this organization must be directed to him.

Thanking you in advance for accepting my request.

Yours Faithfully,

Samketi Dlamini (signed)

[18] In its answering affidavit, where it is represented by David Mark Noah-the respondent states that in concluding the agreement, Mr. Dlamini represented Samketi Pre-packing (the first defendant in the main action) while David Mark Noah represented Xipanda Foods (Pty) Ltd in his capacity as director[6]. There is no replying affidavit from the applicant disputing respondent's case in this regard.

[19] Mr. Dlamini argues also that Xipanda is a wrong party before court and it is seeking to uphold a contract that it is not party to. According to the applicant, the respondent does not have *locus standi in judicio* to institute the action proceedings because it is a company owned by a Trust. It is Mr Dlamini's argument that a company cannot be owned by a Trust because a Trust lacks legal personality; it is therefore a misnomer in law that a company is owned by a Trust-so the argument goes. In disposing of this argument, it has not been disputed that Xipanda Foods (Pty) Ltd is a limited liability company duly registered as such in the Republic of South Africa. A company is a legal person capable of suing and being sued. Regardless of who owns the company, as a separate legal person, it can institute legal proceedings in its own name.

[6] See paragraph 3 of David Mark Noah's answering affidavit at page 13 of the Book of pleadings.

[20] Mr. Dlamini contends also that Samketi-Pre-packing is a non-existent company. It is his argument further that if the court had been aware that a non-existent party was cited and sued by the plaintiff in the main action, it would not have granted the default judgment. In the letter where Mr. Dlamini purports to cede the sugar rights to DMI Noah-annexture 'SD1' he uses letter-heads of Samketi Pre-packing which has the physical address and other particulars of the first defendant in the main action. The Court is none the wiser how it is that Mr. Dlamini wrote a letter on letter-heads of a non-existent company. In that letter, Mr. Dlamini writes that he is handing over directorship of Samketi Pre-packing. Now if Samketi Pre-packing is a non-existent company what directorship was Mr. Dlamini handing over to Mr. Noah or was this glib? In any event, Mr. Dlamini does not dispute that the amount of E135, 000.00, that is the subject of the main action was paid to him by Mr. Noah[7]. Mr. Dlamini has failed to show the court the instrument which authorizes him to cede sugar rights from himself/Samketi Pre-packing to Mr. Noah.

[21] It is my view that based on the above factors, and also on the law regarding application for rescission as stated in rule 42, the judgment of the court of 14 July 2017 was not erroneously sought and granted. Consequently, the application for rescission on the basis of rule 42 must fail.

[7] See paragraph 7 of the affidavit in support of the rescission application page 5 of the Book of Pleading.

Rule 31(3)(b) rescission

[22] In terms of rule 31(3)(b) of the High Court Rules an application for rescission of a judgment entered into in default of a notice of intention to defend must be made within twenty-one days after the applicant has knowledge of the default judgment and on notice to the other party. The rule also provides that the applicant must furnish security to the respondent for payment of the costs of the default judgment and the application for rescission of such judgment to the maximum of E200.00.

[23] The applicant was served with summons on 16 May 2017 and default judgment was granted on 14 July 2017. The writ of execution was served on the applicant personally on 8 August 2017. The applicant was personally served with an application in terms of rule 45(13)(i) on 13 March 2019 and ordered to appear in court on 22 March 2019; he did not. An application compelling the applicant to appear on 5 April 2019 was made. The applicant appeared in court on 12 April 2019.

[24] There is no application for condonation for the late launching of the application for rescission, neither has the applicant furnished the Court with a reason(s) for this omission. The court is no less-wiser about the reason(s) the application for rescission of judgment was not made for one year and nine months. The writ of execution was served personally on the applicant on 8 August 2017 and the application for rescission of judgment was filed on 10 May 2019.

[25] The applicant failed to enter an appearance to defend the action within the time prescribed by the summons. Pursuant to the rules, the respondent applied for and obtained a default judgment on 14 July 2017. A warrant of execution was duly issued thereafter and the warrant of execution was served on the applicant personally on 8 August 2017. The applicant has failed to satisfy the requirements of rule 31(3)(b). For these reasons, the present application has failed to comply with the requirements of rule 31(3)(b) and rescission cannot be granted on the basis of rule 31.

Rescission-common law

[26] The requirements for rescission in common law are that: the application for rescission must be *bona fide;* the applicant must have a *bona fide* defence to the respondent's claim which *prima facie* carries some prospects of success on the merits; and lastly, the applicant must give a reasonable explanation of his default and if it appears that his default was willful or was due to gross negligence, the court should not come to his aid.

[27] The applicant must provide a reasonable explanation in explaining reasons for the default. In *De Witts Auto Body (Pty) Ltd v Fegden Insurance Co Ltd*[8] reasonable explanation was defined as follows:

> **'An application for rescission is never simply an enquiry whether or not to penalize a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable**

[8] 1994 (4) SA 705(E) at 711E.

inference that there is no *bona fide* defence, and hence the application for rescission is not *bona fide*.'

[28] Under common law, the applicant is required to show sufficient cause. In common law, the court's discretion goes beyond the grounds provided for in rule 31 and rule 42. Trengrove AJA (as he then was) stated as follows:

'Broadly speaking the exercise of the court's discretionary power [under the common law] appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default.'

[29] Sufficient cause has two essential elements: (a) the party seeking relief must present a reasonable and acceptable explanation for default; and (b) the applicant must, on the merits have a *bona fide* defence which *prima facie* carries some prospects or probability of success[9].

[30] The applicant has not argued that he has a *bona fide* defence against the main action for damages. He admits receiving the amount claimed in the action proceedings and fails to attach a document showing that the sugar rights he held with the Swaziland Sugar Association were indeed transferred to Mr. Noah or the respondent. Applicant argues that Xipanda has no *locus standi in judicio* in this matter and that Mr. Noah never told him that he was acting on behalf of Xipanda Foods (Pty) Ltd. What has not been denied is that the amount of E135,000 was paid to the applicant. Applicant is now

[9] See Herbstein & Van Winsen, 'The Civil Practie of the High Court of South Africa' 5th edition vol 1 at page 938.

engaged in obfuscation of issues instead outlining a *bona fide* defence of failing to defend the action proceedings. It is rich, coming from the applicant to say Samketi Pre-packing is a non-existent company when he purportedly wrote a letter and said he was transferring directorship of Samketi Pre-packing to Mr. Noah.

[31] The pleadings reflect that the applicant is a police officer. It is inconceivable that a person of his standing would not know what to do on receipt of court process. I have considered the applicant's explanation for the default. I do not accept the applicant has provided the court with a reasonable explanation regarding his inaction subsequent to the receipt of the summons dated 3 May 2017 which was served personally on the applicant on 16 May 2017. As pointed out above, there is also no explanation for the applicant's inaction after he had been served with the writ of execution. After receiving the writ of execution the applicant was fully aware of what awaited him but there is no proper explanation for the inaction. The matter lay fallow.

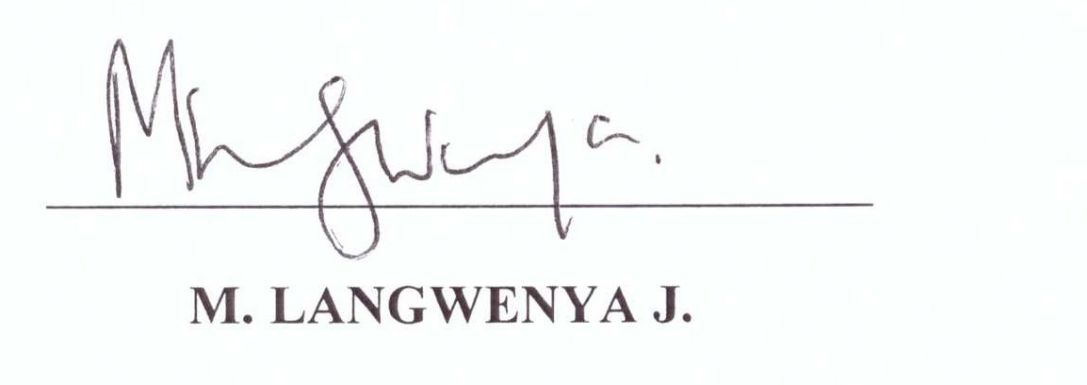
[32] A person who is determined to defend a claim against him should significantly be more proactive after receiving the writ of execution or have a clear explanation for failing to be proactive. None was forthcoming from the applicant.

[33] The application for rescission of judgment was delivered on 10 May 2019 some twenty-one months after default judgment was granted on 14 July

2017 and twenty two months after a writ of execution was served on the applicant on 8 August 2017. This, in my view constitutes an inordinate delay considering the fact that the applicant did not apply for condonation. Consequently the application for rescission in common law fails.

Order

[34] The application for rescission of judgment of 14 July 2017 is dismissed with costs.



M. LANGWENYA J.

For the applicant: Mr. A. Hlatshwako

For the Respondent: Mr. S. Mthethwa