IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 2302/20**

In the matter between:

ESWATINI ROYAL INSURANCE CORPORATION **APPLICANT**

And

TREVOR SHONGWE **RESPONDENT**

In re:

TREVOR SHONGWE **APPLICANT**

And

ESWATINI ROYAL INSURANCE CORPORATION **1st RESPONDENT**

MACHAWE SITHOLE N.O **2nd RESPONDENT**

THE ACTING JUDGES OF THE INDUSTRIAL COURT & MEMBERS OF THE BENCH **3rd RESPONDENT**

Neutral Citation: *Eswatini Royal Insurance Corporation vs Trevor Shongwe & 2 Others [2302/20] [2021] SZHC 30 (15 March 2021)*

Coram: **LANGWENYA J.**

Heard: 8 March 2021

Delivered: 15 March 2021

Summary: *Civil Procedure-application for rescission in terms of the common law-applicant to give a reasonable explanation for in- action-rescission of judgment by consent-such judgment may be set aside on good and sufficient cause shown.*

JUDGMENT

[1] This is an application for rescission of a consent order that was entered by this Court on 3 December 2020 on the ground that the consent order is not in line with applicant's instructions and therefore prejudicial to it. Mr. Jele for the applicant submitted that the application is made in terms of Common law.

[2] 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. A judgment given by consent may be set aside on good and sufficient cause.

[3] The applicant must provide a reasonable explanation in giving reasons for the default. In *De Witts Auto Body (Pty) Ltd v Fegden Insurance Co Ltd*[1] reasonable explanation was defined as follows:

[1] 1994 (4) SA 705(E) at 711E.

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

[4] 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.'

[5] 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[2].

[6] The brief background of the matter is this: The respondent approached this Court on a certificate of urgency requesting review of an interlocutory order issued by the Industrial Court dismissing an application for a stay of execution of a judgment. The respondent further sought an order for the stay of a disciplinary hearing which was due to be heard on 4 December 2020. It was when respondent's Counsel was making his submissions that the Court requested the parties to explore the possibility of settling the matter out of Court and report to Court before the end of the day if that was feasible. The

[2] Herbstein & Van Winsen, 'The Civil Practice of the High Court of South Africa' 5th edition Vol 1 at page 938.

matter was adjourned. The parties engaged, but it would appear the matter could not be settled on the day in question.

[7] Counsel for the respondent sent correspondence to applicant's attorneys with a proposal for settlement. Applicant's attorneys sent a reply to respondent's attorney and indicated that they were taking instructions on the proposal. Counsel for applicant was suddenly taken ill and could not be present in Court when the matter was called in the afternoon. Mr Shabangu, a professional assistant was delegated to attend to the matter. It is averred that Mr. Shabangu consented to an order that was not in line with applicant's instructions. Mr. Shabangu is said to have misunderstood the instructions and inadvertently agreed to the consent order. The consent order, it was submitted was prejudicial to the applicant.

[8] The consent order was couched in the following terms:

> **'By consent; (i) a new chair-person for the disciplinary hearing scheduled to be heard tomorrow on 4 December 2020 will be appointed; (ii) If no new chair-person is found by 4 December 2020, the disciplinary hearing will be postponed to enable appointment of a new chair-person.'**

[9] Respondent submitted that rescission at Common law is available not for flimsy reasons but only in instances where the applicant can show just cause. Where, however the applicant is the author of his own misfortune for reasons of negligence, rescission does not avail him-so the argument goes. In this regard, I was referred to the case of *Mudzingwa v Mudzingwa*[3]. In my view, this legal rule is not cast in stone. The overarching consideration is whether or not the applicant has shown just cause to warrant rescission of a consent order under Common law. There is also the small matter of whether

[3] 1991 (4) 17 (ZS).

or not the respondent will suffer prejudice if the consent order is rescinded. I am satisfied that Mr. Shabangu misunderstood the instructions when he consented to the order on 3 December 2020. The order does not accord with the correspondence exchanged between counsel for both parties pertaining the appointment of a new chair-person to preside over the disciplinary hearing of the respondent. That, in my view is good cause for rescinding the consent order. The second leg of the argument is whether the respondent will suffer any prejudice as a result of the grant of rescission of the consent order. It has not been argued in the papers before me that the respondent will suffer any prejudice if rescission is granted in this matter. If rescission is granted and the parties still fail to settle the matter out of Court, the matter will revert to Court, respondent's attorney will make his arguments and the Court will make its ruling.

[10] It was argued on behalf of respondent further that an application for rescission cannot be instituted by an attorney; that it should be moved only by the applicant. I disagree. The law in this regard is settled. There is nothing that prevents an attorney from moving a rescission application on behalf of his client provided he/she can show that he is privy to the facts and represents the client in question[4].

[11] For the above reasons, the Court has exercised its discretion in favour of allowing the application for rescinding the consent order of 3 December 2020.

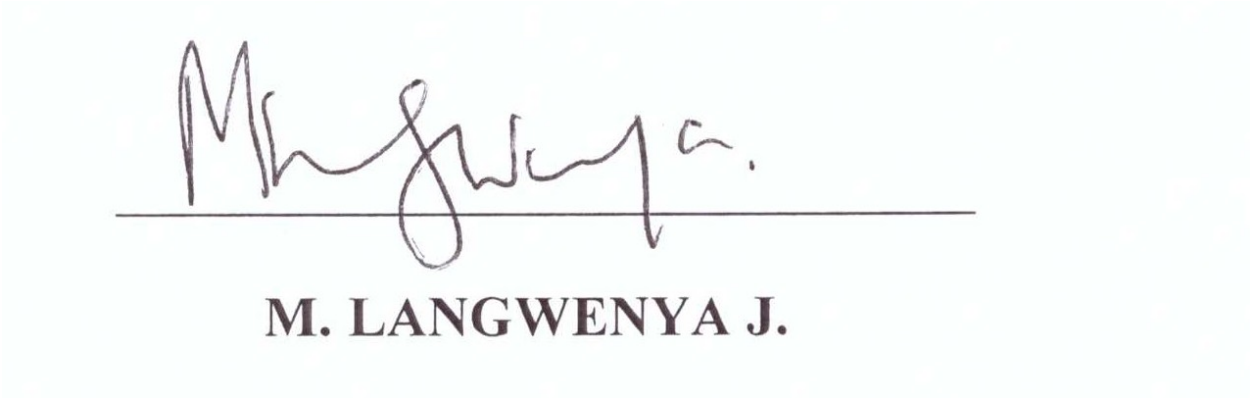
[12] **Order**

[4] *Shiselweni Investment (Pty) Limited v Swaziland Development and Savings Bank* High Court Case No. 2391/1996.

1. Applicant's non-compliance with the Rules of Court on matters of urgency is condoned.

2. The Consent Order of 3 December 2020 is hereby rescinded and set aside.

3. No order as to costs.



M. LANGWENYA J.

JUDGE OF THE HIGH COURT

For Applicant: Mr. Z. D. Jele

For Respondent: Mr. B. S. Dlamini.

.