

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 1517(B)/2017

In The Matter Between

ECEMBENI BOTTLE STORE (PTY) LTD

Applicant

And

THE ROYAL ESWATINI POLICE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

ROBERT ZWANE

3rd Respondent

In re:

ROBERT ZWANE

Applicant

And

SEHLULE MNGADI

1st Respondent

MAPHIKELA MASEKO

2nd Respondent

MALAMLELA VILAKATI

3rd Respondent

MPHILE NKOMONYE

4th Respondent

THE ROYAL ESWATINI POLICE

5th Respondent

THE ATTORNEY GENERAL

6th Respondent

Neutral Citation: *Ecembeni Bottle Store (Pty) Ltd V Royal Eswatini Police & 2 Others (1517B/2017) SZHC 162 [2022] (28 July 2022).*

Coram : D Tshabalala J

Heard :03/04/20

Delivered :28/07/22

Summary: Civil procedure: Application for rescission succeeds, it having been shown that the order was erroneously granted in the absence of the Applicant due to misinformation regarding ownership of the motor vehicle, thus satisfying the provisions of Rule 42(1)

JUDGMENT

[1] On the 27th October 2017 the 3rd Respondent, (Applicant in the main application) was granted an order confirming a *rule nisi* issued on the 6th October 2017. The said court order interdicted one Sehlule Mngadi and three others¹ from gaining control, possession and access to the motor vehicle described below, pending finalization of action proceedings for damages and costs of suit against the said quartet. The motor vehicle in question was described thus:

Make Isuzu KB LDV

Reg# DSD 659 AS

Model 2003

Engine# 4JH1218595

Chassis# ADMTFR77H4C2405

¹ The four were, respectively, 1st – 4th Respondents in the main Application.

- [2] Following the said interim order, the present Applicant, Ecembeni Bottle Store launched these proceedings for rescission of the said order. The Applicant's prayers are, firstly, condonation for the late filing of its application for rescission launched two years later on the 29th August 2019. Secondly, that the court directs the 1st and or 3rd Respondent or those acting under their authority, to release to the Applicant or its director Zethu Mngadi, or Deputy Sherriff or Applicant's attorneys, the said motor vehicle described at paragraph [1] above; and costs of suit.

Background Facts

- [3] The Applicant, a company incorporated in accordance with the laws of Eswatini is the registered owner of the said Isuzu KB LDV. On the 19th September 2017 the said motor vehicle was impounded by the 1st Respondent² from the possession of Sehlule Mngadi, one of the Applicant's directors, on allegations and suspicion that it was used in the commission of stock theft involving a beast allegedly belonging to the 3rd Respondent.³
- [4] This Application is for rescission or setting aside the said order on the ground that it was erroneously sought and granted. The Applicant notes that the purpose of attaching the motor vehicle was to provide security for satisfaction of any judgment in the event that the 3rd Respondent's civil claim against Sehlule Mngadi was successful. The Applicant asserts that it was incompetent for the court to grant the order for attachment or preservation of the motor vehicle for the said purpose because it did not belong to Sehlule Mngadi but to the Applicant company. It is common cause that when the order of the 27th October 2017 was made, the motor vehicle was already

² Royal Eswatini Police Service.

³ Robert Zwane.

under police⁴ detention as an exhibit for the criminal case against the said Sehlule Mngadi and others.

Points in limine

- [5] Before delving into the merits the court must consider the points *in limine* raised by the 3rd Respondent. (The 1st and 2nd Respondents filed no papers, an indication to abide the order of the Court).
- [6] The 3rd Respondent avers that the Application for condonation fails to meet legal requirements in that it does not give details or account of the cause for the delay in bringing the rescission application. The 3rd Respondent submits that in the light of a two-year delay it is paramount for the Applicant to furnish acceptable explanation as well as show prospects of success.
- [7] The Applicant states in response that Rule 31(3)(b) which stipulates time limit within which to file a rescission application was not applicable, that rather the application was brought in terms of Rule 42 which sets no time limit.

Rule 31(3)(b) reads:

“(a) Wherein a defendant is in default of delivery of notice of intention to defend or of a plea, the Plaintiff may set the action down as provided in subrule (5) for default judgment and the court may... grant judgment against the defendant...”

⁴ The 1st Respondent.

- (b) *A defendant may within twenty-one days after he has had knowledge of such judgment, apply to court..... to set aside such judgment, and the court may upon good cause shown... set aside the default judgment....” [Underlining added]*

[8] Relevant provisions of Rule 42(1)(a) read:

“(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;

(b) An order or judgment in which there is an ambiguity, or a patent error or omission,

(c) An order or judgment granted as a result of a mistake common to both parties.

(2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.” [Underlining added]

- [9] The second point raised is that there was no service of process on the the 1st Respondent, who detained the motor vehicle in question and therefore had an interest in the matter. The 3rd Respondent submits that omission to do so is fatal to the rescission application. While it is correct that service of the application on the 1st Respondent is important, however, the objection raised has no merit in that sufficient service was achieved in so far as the application was served on the 2nd Respondent⁵ which is the 1st Respondent's legal representative. The Attorney General was duly served with the rescission application on the 29th August 2019.

Ruling on Points of Law

- [10] I have pointed out that the point of law relating to non-service of the application directly on the 1st respondent as a defect is ill-conceived because service on the 2nd Respondent was sufficient. The 1st and 2nd Respondents were represented during arguments and counsel informed the court that they would abide decision of the court.
- [11] On the delay to bring rescission application the court is satisfied with the explanation that Applicant's director who misused the company motor vehicle bears the blame for the delay. The court opines later in this judgement⁶ on the legal approach to the dilemma faced by a company in the position of the Applicant whose director's private machinations collide with the interests of the company. The court finds that the Applicant cannot be penalized for the delay in these circumstances, and that condonation for the delay is justified. The court's finding equally applies to the objection raised that the application does not satisfy the requirements of Rule 42(1)(a) which

⁵ The Attorney-General.

⁶ See paragraph [14] below.

require that the adverse order must have been made in the absence of the party seeking rescission. For the reasons set out herein it is found that the application fits squarely under Rule 42(1)(a).

The Merits

- [12] The 3rd Respondent has pleaded over. He alleges on the merits that the Applicant failed to satisfy requirements for rescission application. It is argued that the Applicant failed to contest the application for attachment of the motor vehicle, resulting in the *rule nisi* being confirmed, despite that the application was served on the Applicant's director Sehlule Mngadi. The 3rd Respondent further points out that another director of the Applicant, who deposed to the founding affidavit *in casu*, became aware of the proceedings for attachment of the company car as well.
- [13] The Applicant's response is that the director from who the motor vehicle was seized was cited as a party to the application and was served with the papers in his personal capacity. It is common cause that Sehlule Mngadi was the 1st respondent in an application brought by the 3rd Respondent against him together with three others, seeking to attach the said motor vehicle as security for anticipated damages award. The Applicant submits that the Applicant was neither cited nor served with that application, and that in this scenario, it had no knowledge as a company of the attachment proceedings in respect of its property. The Applicant highlights the separate identity of the company from its directors or shareholders and the fact that the said director was not on company business but on his personal private mission when he got entangled in the alleged criminal activity while in possession of the company car.

[14] It is my considered view that where the company's interests conflict with those of the director, the law operates to protect the company which depends on its directors' duty to act legally and honestly towards it, among other duties. The proper approach is to consider the fact that the director was, in his personal capacity sued and served with court process in exclusion of the company and this may not provide a basis for adverse assumption against the company that it knowingly took no action to its own detriment. This approach finds weight in the English case of **Houghton & Co. v Nothard, Lowe & Wills Ltd**⁷ wherein the court had this to say:


"While the knowledge of directors is in ordinary circumstances the knowledge of the company, this is not so 'if the knowledge of the director is the knowledge of a director who is himself particeps criminis, that is, if the knowledge of the infringement of the right of the company is only brought home to the man who himself was the artificer of such infringement...'"

[15] All in all the requirements for rescission of the order in terms of Rule 42(1)(a) of the Rules of the High Court have been satisfied. The Applicant has shown *prima facie* ownership of the motor vehicle, and that if the court had the correct facts before it, it would not have granted the order in question. The Applicant's failure to oppose the main Application has been sufficiently explained in the founding affidavit. One of the reasons being that the Applicant's director, Sihlule Mngadi dragged the company property into his private exploits of the alleged stock theft, leading to the detention of the motor vehicle and its subsequent attachment at the instance of the 3rd

⁷ [1927] 1 KB 246 (CA), quoted with approval by Hoexter AJ in *R v Kritzing* 1971 (2) SA 57 (A) at 59, 50. See *Halo's South African Company Law Through the Cases* Fifth ed. Juta p399.

Respondent. That belated attempts by the directors to oppose attachment proceedings were to no avail.

- [16] The court's granting of the interim order and subsequent confirmation of that order was grounded on misinformation by the 3rd Respondent that it was the property of Sehlule Mngadi in whose possession it was found. As stated above, had the court been aware of true ownership of the motor vehicle in question, it would not have granted the order. The order made by the court was therefore erroneously made as envisaged by Rule 42(1)(a). See for the requirements of an application for rescission, **Nhlanhla Phakathi v Swaziland Television Authority**.⁸
- [17] The Application for rescission is granted and the order made on the 27th October 2017 is set aside.
- [17] The order is made that 1st Respondent and or 3rd Respondent or those acting under their stead or authority release to either Applicant or its agent, the Deputy Sherriff or Applicant's attorneys, the motor vehicle described in paragraph [1] above.
- [18] An order for costs is made against the 3rd Respondent.



D Tshabalala
Judge

For the Applicant: Mr T Bhembe (TM Bhembe Attorneys)

⁸ Case No. 745/2015.

For the 1st & 2nd Respondents: Mr M Sibandze (Attorney General's Chambers)

For 3rd Respondent: Mr L Manyatsi (Manyatsi & Associates)