IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 1662/2022

In the matter between:

BTL INVESTMENT (PTY) LTD Applicant

and

SIMPHIWE MAZIYA 1st Respondent

TWINNIES INVESTMENTS 2nd Respondents

DEPUTY SHERIFF BONGANI MAGAGULA 3rd Respondent

In re:

SIMPHIWE MAZIYA Plaintiff

TWINNIES INVESTMENT

Neutral citation : ***BTL Investments (Pty) Ltd v Simphiwe Maziya and Others (1662/2022) [2022] SZHC* 254 (9th November, 2022)**

Coram : **M. Dlamini J**

Heard : **29th October, 2022**

Delivered : **9th November, 2022**

Rescission : ***The applicant must give a reasonable and acceptable reasons or explanation for the default and that he has a bona fide defence on the merits in terms of the common law. The court therefore has a wider discretion and cannot be confined to the circumstances defined under Rules 42(1)(a) – (c) and 31 (3)(b). It can go beyond and seek for grounds found under common law. The purpose is to discharge justice and fairness, judging from the circumstances of the case at hand.[9]***

Summary: The applicant seeks for a rescission order and a return of goods seized in execution of an order of this court. The ground is that in as much as it was served with the summons, the default judgment was entered in its absence as the person served could not fully comprehend the import and purpose of the summons. This was due to her lack of understanding of the language therein. The matter is opposed on the ground that there was sufficient service in terms of the law.

The Parties

[1] The applicant is a company duly incorporated and registered in terms of the company laws of the Kingdom. Its principal place of business is situate at Mbabane, district of Hhohho.

[2] The 1st respondent is an adult female residing at Mbabane. Hhohho region. Her further particulars are unknown to the applicant.

[3] The 2nd respondent is a company duly registered as per the laws regulating companies in Eswatini. Its main business area is situate at Mbabane, district of Hhohho.

[4] The 3rd respondent is an adult male liSwati. He is the deputy-sheriff for the region of Hhohho.

Legal principles to a rescission application

[5] Grounds applicable to rescission applications are clearly outlined under the Rules of this court and common law. Rule 42(1) stipulates:

> *"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, but only to the extent of such ambiguity, error or omission;*

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

[6] Rule 31(3)(b) provides:

> *"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 may upon* ***good cause shown*** *and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of E200, set aside the default judgment on such terms as to it seems fit."*

[7] In terms of common law, the applicant must establish sufficient cause in order to succeed on an application for rescission. **M.C.B. Maphalala J**[1] as he then was meticulously discussed the principles regulating rescission applications. He referred to **Cohen CJ**[2] and quoted:

> *"But the Court has an inherent jurisdiction to set aside a judgment in a proper case.... This power is indeed tacitly*

[1] **Mario Masuku v Bani Ernest Masuku 830/10B (8th March 2011) at para 7**
[2] Munnik v Focus Automotive Engineers (PTY) Ltd 1977-1978 SLR 152 at 154

recognised in Rule 42 (1) which empowers a court in "addition to any other powers which it may have", to rescind a judgment on the grounds set out in the subrule."

[8] He also quoted **Trengove AJA**[3] where the learned justice of appellate division stated of the common law position:

> *""Thus, under the Common Law, the courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on* ***sufficient cause shown****. This power was entrusted to the discretion of the courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause... the courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the court's discretionary power 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.*** *It follows from 5 what I have said that the court's discretion under the Common Law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42 (1) ....Those grounds do not, for example*

[3] De Wet and Others v Western Bank Ltd 1979 (2) 1031 at 1042F - 1043

cover the case of a litigant, or his legal representative, whose ***default is due to unforeseen circumstances beyond his control;*** *such as* ***sudden illness,*** *or* ***some other misadventure;*** *one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness be afforded relief."*

[9] The applicant must give a reasonable and acceptable reasons or explanation for the default and that he has a *bona fide* defence on the merits in terms of the common law. The court therefore has a wider discretion and cannot be confined to the circumstances defined under Rules 42(1)(a) – (c) and 31 (3)(b). It can go beyond and seek for grounds found under common law. The purpose is to discharge justice and fairness, judging from the circumstances of the case at hand.

Case at hand

[10] In asserting a reasonable and acceptable ground for the default to appear and defend the summons, the deponent who is applicant's director deposed that he was of Chinese origin. He was not aware that there were proceedings against applicant in court. The reason he did not appear to defend the summons is because he did not understand the "*nature and effect*"[4] of the summons. The employee of applicant who received the summons failed to explain to him what the deputy-sheriff told him of the nature and exigence of the combined summons. He also

[4] See para 19 at page 10

deposed: *"I point out that as a Chinese, I do not understand English language well and was not able to make out what the summons required of the Applicant."*[5] The director of applicant further asserted that had he been made aware of the exigence of the summons, he would have filed the necessary papers and defended the matter. The respondent's summons have no justification in law. A confirmatory affidavit of **Sandile Maseko** was attached where he deposed: *"I confirm in particular that when I was served with the summons the nature and effect of the summons was not explained to me and I did not explain to Mr. Lin Chuan Jun the nature and effect of the summons as it had not been explained to me and what was required of the Applicant to do when the summons was served."*[6]

[11] In establishing a bona *fide defence* to the combined summons, it was contended on behalf of applicant that applicant desired to dispose its immovable asset. It employed the services of the 1st and 2nd respondents as agents. They agreed on an agent commission of E50 000. 00. The agent approached **Phetsile Mamane Mswane** as the purchaser. The agreed purchase price between the applicant as the seller and the purchaser was E1 800 000. 00. A deed of sell was concluded. However, the purchaser failed to fulfill her side of the bargain a she failed to secure a loan. The applicant then advertised the property in social media, namely facebook. **Thembi Eval Mswane** responded by buying the said property at a sum of E1 660 000.00. In essence, the 1st and 2nd

[5] Para 21, page 10
[6] Para 3 at page 87

respondents failed to carry their agent mandate and therefore cannot claim the sum in the summons.

[12] The 1st and 2nd respondents opposed the application by first raising a point of law of peremption. They pointed out that the applicant paid part of the debt on 20th September, 2022. Applicant, although filed a reply, did not address this point.

[13] Discussing the doctrine of peremption, **S.B. Maphalala PJ**[7] as he then was, with reference to **Hlatshwayo v More and Teas 1912 AD 242** quoted:

> *"--- the doctrine is based upon the application of the principle* ***that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate.***"

[14] I have already stated that reading the replying affidavit, applicant chose not to challenge this averment on peremption. Applicant did not challenge the said averment despite that it was repeated by the respondents under paragraph 10 of the answering affidavit. The default judgment under challenged was entered by this court on 22nd September, 2022. Now if the applicant paid on 20th September, 2022 and clearly this was at the date way after the service of the summons – as summons

[7] **L.R. Mamba and Associate v Mphetsieni Co-operative Society, Case No. 649/2012 at para 18**

were served on 31st August, 2022. This is an indication that the applicant acquiesced to the claim in the summons. Applicant is not allowed in law to take up two causes of actions which are inconsistent with each other. On this point alone the application for rescission stands to fall.

[15] I note that the applicant in its founding affidavit avers that it paid a sum of E12 000.00 to the 3rd respondent in order to avert attachment. This is another payment different from the one paid on 20th September, 2022. It is a payment done after the default judgment which was taken on 22nd September, 2022. Again, applicant responded to the writ of execution as it did upon service of summons by tendering part payment of the debt. The doctrine of peremption applies with equal force.

[16] Considering a *bona fide* defence on the merits of the case, the respondents have pointed out that the introduction of the sale of the applicant's property was done to the **Mswane** family and not just **Phetsile Mswane.** When they took the **Mswane** family to do the inspection of the property, **Thembi Mswane**, the mother, **Phetsile Mswane**, the daughter and two children were all present as a family. The directors of applicant, namely deponent to the founding affidavit and **Yuan Yoangqin** were also present. The applicant advertised the property in facebook after the inspection by the **Mswane** family on 20th January, 2022 and 19th February, 2022. In June, 2022, the 1st respondent communicated to the applicant and advised it that the

Mswane family were still interested in buying the property. This was after the director of applicant had informed her that applicant was still looking for the buyer. She then gave applicant the numbers of **Mswane** family, viz., the mother and daughter.

[17] In reply, the applicant averred that the relevant document to be considered is the first deed of sale which failed to materialize and not the second one. The averment by the respondents that they introduced the **Mswane** family to the applicant for purposes of buying the property is not just only not denied but confirmed by the applicant in its reply. Again, the assertion that the respondents called the applicant in June, 2022 where they advised it that the **Mswanes** are still interested in buying the property and that they then gave applicant the numbers for both mother and daughter are not denied by the applicant in reply.

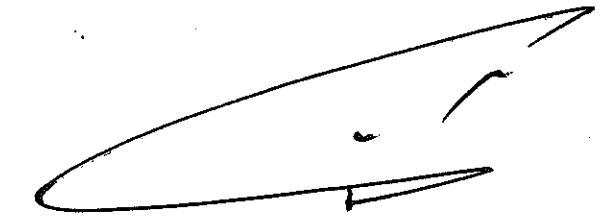
[18] From the above, material facts are common cause. There is no *bona fide* defence to respondent's cause of action. I have already demonstrated that the doctrine of peremption must be upheld.

Orders

[19] In the above, I enter the following orders:

[19.1] Applicant's application is dismissed;

[19.2] Costs to follow the event.



M. DLAMINI J

For the applicant : **P. M. Dlamini of P. M. Dlamini Attorneys**

For the respondents : **W. Maseko of Maseko Tsambokhulu Attorneys**