IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 576/2020

HELD IN MBABANE

IN THE MATTER BETWEEN

MADVUBADLE INVESTMENTS (PTY) LTD

t/a DLAMINI TRANSPORT **1ST APPLICANT**

THEMBI DLAMINI **2ND APPLICANT**

AND

HEAVY PLANT CENTRE (PTY) LTD **RESPONDENT**

In re:

HEAVY PLANT CENTRE (PTY) LTD **PLAINTIFF**

AND

MADVUBADLE INVESTMENTS (PTY) LTD

t/a DLAMINI TRANSPORT **1ST DEFENDANT**

THEMBI DLAMINI **2ND DEFENDANT**

NEUTRAL CITATION: **MADVUBADLE INVESTMENTS (PTY) LTD VS HEAVY PLANT CENTRE (PTY) LTD (576/2020) SZHC – 260 [17/11/2022]**

CORAM: **B W MAGAGULA J**

HEARD: **11/10/2022**

DELIVERED: **17/11/2022**

Summary: *Civil Procedure – Rescission of judgments and orders – citation of a Manager of a company as a party before court – No cause of action set out against the Manager.*

Held: *Rescission application against the 2nd Applicant granted. Rescission application against the company which is the Respondent dismissed.*

Held Further: *Application premised in terms of Rule 42 (1) (a) and Rule 31 (31) (b) of the High Court Rules. The basis of the error is that the notice of bar previously issued by the Plaintiff was erroneous in that, it provided a shorter number of days than what is prescribed in the rules. The notice of bar gave the Defendant 2 days instead of 3 days to file a plea. The basis for the error is misconceived and disingenuous. The Plaintiff waited for an even longer period that what is provided for in the Rules before it could set the matter down for default judgment. The Defendant had still not filed a plea.*

JUDGMENT

(RESCISSION APPLICATION)

[1] This is an application for rescission of a default judgment granted against both Applicants on the 24th March 2022. The Applicants launched the current rescission application on the 11th of April 2022 and set it down for hearing on Friday the 15th of April 2022. It came under a certificate of urgency, before his Lordship Maphanga J.

[2] The application is premised on both rule 42 (1) (a) and 31 (31b) of the High Court Rules[1].

[3] The Applicants argue that in the main matter, the Respondents failed to join the executor of the estate late Skhakhane Alfred Dlamini, The Master of the High Court, and the Attorney General.

[4] The Applicants argue that the executor and the estate ought to have been cited on the basis that the former is responsible for the shareholding of the deceased held in the 1st Applicant. It is common cause that the deceased was the sole

[1] Reference is made to para 8 of the Applicant's founding affidavit.

proprietor of Madvubadle Investments (Pty) Ltd. The estate has still not been wound up, hence it is alleged the executor has an interest in the company in his official capacity as such.

[5] The Applicant further argues that there is a misjoinder of the 2nd Applicant in the matter at hand. It is common cause that the 2nd Applicant is one Thembi Dlamini. The basis of the misjoinder is that there is no specific relief that is sought against her, yet she has been cited in the court papers.

[6] The application is strenuously opposed by the Respondent. The grounds for opposition are the following;

6.1 Applicant's case is unsustainable on the basis of the rescission being an error committed by the court as envisaged in terms of rule 42. The Respondent argues that the Applicant is enjoined to demonstrate an error which was committed by the court when granting the order. The Respondent argues that there is no such error committed by the court in the matter at hand envisaged in rule 42. In the matter before court, the error alleged by the Applicant appears to have been committed by the Respondent when it issued an erroneous notice of bar.

6.2 The Respondent further argues that even if the notice of bar was erroneous, the defect thereof is a matter of procedure not a

mistake or an error of law committed by the court as envisaged in rule 42.

6.3 The Applicant failed or neglected to act on the notice of bar. They sat on their laurels and did nothing up until the Respondent set the matter down for default judgment.

6.4 In relation to the ground in terms of Rule 31 (3) (b), the Respondent argues that the Applicants have fallen short of advancing a reasonable and acceptable explanation for not filing the plea. At the time the default judgment was granted the plea was long overdue. The Respondent therefore argues that, the application is not bona fide as the Applicants failed to file a plea even after they had been served with the notice of bar, defective as it may have been.

6.5 The Respondent has also punched holes on the Applicants' conduct, of sneaking a new ground for rescission in their replying affidavit and also in their heads of arguments. The Applicants' in their replying affidavit have alleged that the basis of the error which underpins the rescission is in respect of failure to give notice to the Applicants when the notice of set down for default judgment was made. The failure to serve the notice of application for default judgment contributed to the Applicants' failure to appear in court on the 24th March 2022, when the said default

judgment was granted, and such lack of notice is one that is envisaged by rule 42 paragraph 1(a). The Respondent argues that this constitutes a new ground which was not raised in the Applicants' founding affidavit. As such it is irregular for the Applicants to raise a new ground in their replying affidavit, which was not canvassed in their founding affidavit as it deprives the other side of an opportunity to deal with it.

[7] I will now proceed to consider the points of law raised to ascertain if they pass the muster.

NON JOINDER

[8] Joinder refers to the joining of more than one party or more than one course of action in a single action. The reason for joinder is usually convenience. Time, effort and costs are saved by joining parties or courses in one action instead of bringing separate actions.[2]

[9] An objection of non-joinder maybe raised where a point is taken that the party who should be before the court has not been joined or given judicial notice of the proceedings. The substantial test is whether the party who is alleged to be a necessary party for purposes of joinder, has a legal interest in the subject

[2] Herbstein & VanWinsen; The Civil Practice of the High Court of SA 5th edition volume one at page 208.

matter of the litigation. Such a party may be affected prejudicially by the judgment of the court, in the proceedings concerned.[3]

[10] In the matter at hand, the basis of the non-joinder as raised by the Applicant on the rescission application is that Sipho Madzinane NO, who apparently at the time was the executor of the estate of the late Skhakhane Alfred Dlamini was not joined. The other issue of complaint is that the estate of the late Skhakhane Alfred Dlamini has not been joined.

[11] The argument is developed further, on the basis that the executor is the one responsible for the shares held by the deceased in Madvubadle Investments (Pty) Ltd. The late Skhakhane Dlamini was the sole shareholder in the aforesaid company and the estate has still not been wind up. It does not immediately appear to me what is the difference between joining an executor of an estate and joining the estate itself. I am of the understanding that an executor steps onto the shoes of the deceased. Which means if you join the executor, you are as good as having joined the estate.

[12] It appears to me that the basis of the non-joinder is that the estate has a financial interest in the Applicant's company.

[13] A party who should be joined in proceedings is one that has a direct and substantial interest in the subject matter of the litigation. Not merely a

[3] Bowling NO Vs Vrededorp Properties CC and another 2007 (5) SA 391 (SCA) para 21.

financial interest, which is only an indirect interest in the litigation. [4] It seems as if the estate which is represented by the executor has only a financial interest in this litigation. The subject of the litigation in the main matter is for a debt that is allegedly owing by the 1st Applicant.

[14] A company is a legal person capable of suing and being sued in it's own name notwithstanding who represents the company. It has a separate legal *persona* from it's members and it can institute legal proceedings in its own name. **See Samketi Dlamini Vs Xiphanda Foods (Pty) Ltd High Court Case No. 633/17** at page 10. The *dicta* as expounded by Her Ladyship Judge M. Langwenya in the above cited case, find equal application in the matter at hand. Madvubadle Investments (Pty) Ltd is a company. It is a legal person duly incorporated in terms of the company laws of the Kingdom of Eswatini. As such, it is capable of being sued in its own name. Regardless that the estate of the late Skhakhane Dlamini has a financial interest in the company as a result of the shareholding he held during his lifetime. In any event, the issue of non-joinder should have been raised properly early in the proceedings by way of special plea, before the default judgment was granted. Therefore, other than the fact that the point of non-joinder is without merit it has also been raised belatedly.

[15] For the reasons stated above, I dismiss the legal point of non-joinder as raised by the Applicant.

[4] See Bohlokong Black Taxi Association Vs Interstates Buslines (EDMS) BBK 1997 (4) SA 635 (O) at 644 a-b.

MISJOINDER OF THE 2ND APPLICANT

[16] The Applicant also argues that in the main matter, there was a misjoinder of the 2nd Applicant, who was cited as the 2nd Defendant in the main matter. The basis of the argument is that the 2nd Applicant is not a shareholder in the 1st Applicant and there is no specific relief sought against her in the particulars of claim. Hence, it was not necessary in the first place, to cite the 2nd Applicant her.

[17] The test to determine whether there is a misjoinder is whether or not the party cited has a direct and substantial interest in the subject matter of the action. For instance, a legal interest in the subject matter of the litigation which might be affected prejudicially by the judgment of the court. [5]

[18] The basis for citing the 2nd Applicant in this matter can be ascertained from the particulars of claim. It is stated that she is responsible for running the Respondent (Madvubadle Investments (Pty) Ltd. This is no reason for citing a party in legal proceedings. If running the company means directing the company in it's day to day business, then what direct and substantial interest does she have in the subject matter before court, which is the debt owed by the 1st Applicant to the Respondent?

[5] Jenkins Vs Government of the Republic of South Africa 1996 (3) SA 1083 (TK) at 1088 d-e.

[19] I agree entirely with this objection. The 2nd Applicant should not have been a party to these proceedings. I will accordingly grant the rescission, specifically in favor of the 2nd Applicant. She should not have been cited in the summons.

The Rescission application on the merits

[20] The whole purpose of a Rule 42 rescission application is to correct an obviously wrong judgment or order. This requires proof that the judgment or order could not lawfully have been granted; and that it was granted in the absence of a party. And that such party's rights or interests were affected by the judgment. I refer to the matter of **Samketi Dlamini Vs Xiphanda Foods (Pty) Ltd High Court Case No. 633/17**. Also the matter of **Tshivhase and another Vs Tshivhase and another.**[6]

[21] In the present matter, I understand the argument of the Applicants' to be that the Applicants' were not before court on the 24th March 2022, due to the failure by the Respondent to serve them with the notice of application for default judgment. The Applicants' argue that they were not served with the notice of application for default judgment, which should have made them aware that the matter was to be heard in court for the judgment by default. The Applicants' advance this argument notwithstanding that they were out of time to file their plea in terms of the Rules. They failed to do so, despite being served with a notice of bar. Even after the short notice as contained in the

[6] 1992 (4) SA 885 2A it was held that the court retains the discretion to refuse an application for rescission of judgment under rule 42. Even I all the formal requirements are satisfied.

notice of bar had run over and beyond the abridged period of two day. If the Applicants wanted to take issue with the defective notice of bar, would have presented an opportunity to them. It is for exactly that reason that this court will not award a costs order to the 2nd Applicant, despite being successful in her rescission application.

[22] In as much as I accept that the notice of bar provided a shorter period than what is provided for in the Rules as the allowable *dies* was 2 days instead of the 3 days provided in the Rules. If the Applicants' were desirous to raise issue with the defectiveness of the notice of bar, they should have file a Rule 30 application setting aside the notice of bar as an irregular step. That was not done.

[23] Even if I would entertain the Applicants' argument that the notice of bar was defective and they were given a shorter notice. The Applicants' notwithstanding, still did not file their plea, way beyond the 2 day period that had been given in the notice of bar had elapsed. It would be a different case if the default judgment was moved immediately after the expiry of 2 days, before the mandatory 3 day period could run. In the matter at hand, the default judgment it was instituted way after the expiry of 3 day period that is provided for in the Rules of court. The Applicants' sat on their laurels and neglected to file a plea. Hence, they were then *ipso facto barred* from filling because they were out of time. As such, the Respondent was then entitled to set this matter down and apply for a default judgment. There was no longer any obligation to serve the default judgment on the Applicants' because they had been barred.

BONA FIDE DEFENCE

[24] In as much as the 1st Applicant in its application has pleaded that it has a *bona fide* defence to the claim by the Respondent, it has only disputed three invoices which are allegedly to have been duplicated. Even if those amounts are deducted, which the court will not do because the Respondent has given a plausible explanation for same. There would still a substantial balance that would be owing. The invoices that are allegedly to have been disputed or duplicated are E9, 613.15, E11, 802.62 and E28, 782.00. The total claim by the Plaintiff is E279, 887.24. This leaves a balance of E229, 689.47 in respect of which the 1st Applicant has not proffered any defence to at all, let alone a *bona fide* defence. Clearly the 1st Applicant has failed to satisfy the requirement of a *bona fide* defence. On this ground alone, the 1st Applicant cannot be granted the rescission. It follows that the application stand to be dismissed.

COSTS

[25] The Respondent has prayed that the Applicant's application be dismissed with costs at an attorney and own client scale. [7] However, no motivation has been made for the punitive cost order sought. It is now trite that courts will only grant costs on the attorney and own client scale, in exceptional circumstances. No such exceptional circumstances have been put forward by the Respondent. Further, the 2nd Applicant has been successful in her application, which on it's own would mitigate any punitive costs order the Respondent may have been entitled to.

[7] See paragraph 17 of the answering affidavit.

[26] Due to the aforegoing reasons, the court will make the following order;

a) The default judgment granted by this court on the 24th March 2022 against the 2nd Applicant in favour of the Respondent is hereby rescinded and set aside.

b) The 1st Applicant's rescission application against the Respondent is hereby dismissed.

c) The 1st Applicant to bear the costs of suit at an ordinary scale.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the 1st and 2nd Applicants:	Mr. M. Mabuza
	(Khumalo Attorneys)
For the Respondent:	Mr M. B Nkambule
	(Dlamini Nkambule Mahlangu Attorneys)