



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 687/2022

HELD AT MBABANE

In the matter between:

FARAMAZ DADGAR

Applicant

And

LATHAM STEVEN KINGS

1st Respondent

BONGANI MOTSA N.O.

2nd Respondent

In re:

LATHAM STEVEN KINGS

Applicant

And

FARAMAZ DADGAR

Respondent

Neutral Citation: *Faramaz Dadgar vs Latham Steven Kings and Another*
(687/2022) [2023] SZHC 15 (03/02/2023)

Coram: **J. M. MAVUSO J**

Heard: 09th August, 2022.

Delivered: 03rd February, 2023.

SUMMARY: *Application for rescission brought under a certificate of urgency, stay of execution of a Writ of Execution dated the 30th June 2022 sought – Default Judgment to be rescinded or set aside granted on the 16th June 2022 – That pending finalisation of this matter the Deputy Sheriff be ordered not to attach and remove Applicant’s property from the premises – Applicant’s application brought in terms of Rules 31, 32 and 42 of the High Court Rules and in terms of the Common Law – Application for rescission dismissed with costs.*

JUDGMENT

J.M. MAVUSO - J

[1] (i) The Applicant in this matter, has under a certificate of urgency, brought

before Court an application for rescission and the setting aside of a default Judgment awarded by this Court, against it, on the 16th June 2022. Applicant also prays for a stay of execution of the aforesaid Judgment, pending finalisation of this matter.

(ii) Applicant has brought this application in terms of Rule 31, 32 and 42 of the High Court Rules and also in terms of the Common Law.

[2] The background to this application is as follows:

- (i) After having been served with a combined summons Applicant, (who is cited as defendant in the action proceedings) proceeded to file his Notice of Intention to Defend and appointed the offices of M.V. Dlamini Attorneys, C/O Sithole & Magagula Attorneys, Mbandzeni House, Mbabane as the address at which all notices and service of process in this matter would be accepted.

- (ii) On the page signed by Applicant's attorney the correspondents address is more fully described, as:

C/O Sithole & Magagula Attorneys

Defendant's Attorneys

6th Floor, Mbandzeni House

Mbabane

The notice of intention to defend, whereat appears the above, was issued and served upon Plaintiff's attorneys, S.M. Dlamini Attorneys on the 29th April 2022.

- (iii) When the period allowed for filing a plea expired without one, having been filed by Defendant, 1st Respondent caused to be issued a Notice of Bar, on the 3rd of June 2022, specifically calling upon Applicants to file their plea within 3 (three) days of receipt of the Notice of Bar.

- (iv) The Notice of Bar was addressed to M.V. Dlamini Attorneys (Defendant's Attorneys) C/O Sithole Magagula Attorneys, 6th Floor, Mbandzeni House. Notably, there is no acknowledgement of receipt of the Notice by the correspondent attorneys, Sithole and Magagula Attorneys.

- (v) On the 16th June 2022, 1st Respondent successfully applied for default Judgment to be awarded in his favour on the basis that the time for filing a Notice of Intention to defend had expired on the 29th April 2022 without one having been served and filed with the Plaintiff's attorneys.

[3] The Court notes that the filing of process, in this matter went beyond the filing of a notice of intention to defend. A notice of bar, was filed with the Court on the 3rd of June 2022. What is in contention, is whether same was

served upon Applicant's correspondent attorneys at 6th Floor, Mbandzeni House, Mbabane.

[4] (i) Following Applicant's failure to file a plea after he had been supposedly

served with the Notice of Bar, 1st Respondent was on the 16th June 2022, awarded default Judgment against Applicant.

(ii) The legal basis upon which the Court granted default Judgment is that the Applicant failed to file a notice of intention to defend timeously or at all. It's time for filing a notice of intention to defend having expired on the 29th April 2022.

[5] On the 7th July 2022 Applicant under a certificate of urgency, faced with a writ of execution to attach movable property, to realize by public auction the sum of E60, 277.00 (Sixty Thousand, Two Hundred and Seventy Seven Emalangeni) with interest at the rate of 9% per annum, calculated from date of summons to date of final payment and taxed costs amounting to E13, 084.49 (Thirteen Thousand and Eighty Four Emalangeni and Forty Nine cents) moved the present application, among other orders, seeking:

- (i) A stay in execution of the writ of execution (whose contents are stated above) dated the 30th June 2022;
- (ii) Rescission and/or setting aside of the default Judgment granted on the 16th June 2022;
- (iii) That the Deputy Sheriff be interdicted from attaching Applicant's property pending finalisation of this matter; and
- (iv) That the Applicant be ordered to pay costs of suit.

The prayer for costs in this matter is peculiar in as much as it is unheard of for a party to seek an order for costs to be awarded against itself. This may be an error but it is what it is.

BASIS FOR RESCISSION APPLICATION

- [6] (i) The basis for Applicant's application for rescission is that, the Notice of Bar was served upon Applicant's correspondents Sithole and Magagula Attorneys and that his aforesaid correspondents did not inform him of the process having been served at their offices. At

paragraph 10 of the Applicant's Founding Affidavit, Applicant states as follows:

“I wish to state categorically that when Mr. Dlamini (my attorney) probed as to what happened to the Court processes pursuant to the Default Judgment being granted. He discovered that a Notice of Bar was served to the corresponding offices only (sic) that the non-communication was due to the fact that Sithole and Magagula Attorneys were moving offices from the fourth floor to the sixth floor within the same building at Mbandzeni House....”

- (ii) The Managing partner at Sithole and Magagula Attorneys, Mr. Machawe Sithole, has filed a confirmatory affidavit, in which he explains that during the month of June (no year given) the law firm moved offices within the same building at Mbandzeni House. His statement captured in paragraph 3 (three) of his confirmatory affidavit is as follows:

“I wish to confirm that during the month of June we moved offices within the same building at Mbandzeni House and some law firms which we (sic) are their correspondence office were affected in terms of their Court processes served to us including but not limited to M.V. Dlamini Attorneys.”

The foregoing does not explain how the notice of intention to defend preceding the filing of the notice of bar was served at the Applicants correspondent offices situate at 6th Floor, Mbandzeni House. The notice of intention to defend was filed on the 29th April 2022 whilst the notice of bar bears the Registrar’s stamp of the 3rd June 2022 and was issued on the same day the 3rd of June 2022.

THE LAW UNDER WHICH THE RESCISSION IS SOUGHT

[7] From a reading of paragraph 12 of Applicant’s founding affidavit, it is clear, that he wishes to base his application for rescission on Rules 31, 32 and 42 of the High Court Rules and also to base same on the Common Law.

Rule 32 of the High Court Rules.

- (i) Rule 32 of the High Court Rules provides the procedure to be followed in instituting a summary Judgment application. I do not think that Applicant intended to rely on it, in a rescission application, as it is irrelevant thereto.

Requirements for Rescission under Rule 31 and 42 of the High Court Rules and under the Common Law.

- (i) Rule 31 (3) (b) states as follows:

“(b) 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.”

- (ii) **Requirements for a rescission application under Rule 42.**

Rule 42 states as follows:

“Variation and Rescission of Orders (42(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 ambiguity, or 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.”

In a matter involving a rescission under Rule 42 of the High Court Rules as amended, Otta J. (as she then was) in the case of **Regents Projects (Pty) Ltd vs Steel and Wire International (Pty) Ltd and Two Others (4660/2008) 18th October 2012 [SZHC] 249** cited with approval the Judgment of **Bakoven v G J Howes (Pty) Ltd 1992 (2) SA 466 at 471 E – G**, where Erasmus J declared as follows:

“Rule 42 (1) (a), it seems to me is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is “erroneously granted” when the Court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a court record – It follows that a court deciding whether a judgment was erroneously granted is like a court of appeal, confined to the record of proceedings. In contradistinction of relief in terms of Rule 31 (2) (b) or under Common Law, in the sense of an explanation for his default and a bona fide defence – Once the Applicant can point to an error in the proceedings, he is without further ado entitled to a rescission.”

In the case of Nyingwa v Moolman N.O. 1993 (2) SA 508 (TK GD) at **510 F** it was said that:

“It seems that a judgment has been erroneously granted if there existed at the time of its issue a fact which the judge was unaware, which would have precluded the granting of the

judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.”

Requirement for rescission under Common Law.

- (iii) In the case of **Paul Ivan Groening v Sipho Matse Attorneys and Another (1379/12) [2013] SZHC 35 (2013)** commenting on the grounds for rescission under common law, his Lordship Maphalala M.C.B. J, (as he then was), cited with approval the *dictum* in **Miller JA, in Chetty v Law Society Transvaal 1985 (2) SA 756 AD at 765** where the Learned Justice of Appeal stated as follows:

“...in terms of the Common Law, the court has power to rescind a Judgment obtained by default of appearance provided sufficient cause has been shown. He continued and said the following: But it is clear that in principle and in the long standing practice of our courts, two essential elements of sufficient cause for rescission of judgment by default are:

- (i) *That the party seeking relief must present a reasonable and acceptable explanation for his default; and*

(ii) That on the merits, such party has a bona fide defence, which prima facie carries some prospects of success.

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for a rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits.”

The term good cause was interpreted by the Court in the case of **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Milk (Cape) 2003 (b) SA (SCA) at paragraph 11 page 9** as follows:

“.....the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default (b) by showing that his application is made bona fide and (c) by showing that he has a bona fide defence to the Plaintiff’s claim which prima facie has some prospects of success.....”

- [8] (i) On the basis of the above observations this Court is of the considered view that Applicant’s explanation of its failure to file a plea is not plausible and or alternatively unreasonable. As a result of the foregoing there being no “*good cause*” shown by Applicant for the rescission application, the Court finds that, the application cannot succeed in terms of Rule 31 (3) (b) of the High Court Rules nor in terms of the Common Law, as in both instances the element of a reasonable and acceptable explanation, for his default needs to be fulfilled.
- (ii) In **Paul Ivan Groening** (*supra*) citing with approval the *dictum* of **Miller J. in Chetty v Law Society** (*supra*) our Court came to the conclusion that all the elements of the Rule on which a rescission application is based, should be fulfilled before such an application can be granted. *In casu*, the Court’s finding as above stated, is that

Applicant has failed to give a reasonable explanation for his default.
On the basis of this ground this application stands to be rejected.

- (iii) With regards to a rescission application in terms of Rule 42 (1) (a) of the High Court Rules as amended, in the case of **Regents Projects (Pty) Ltd vs Steel & Wire International (Pty) Ltd and Two Others (4660/2008) 18th October 2012 (SZHC) 249**. Judge Otta (as she then was) quoted with approval the case of **Bakoven v GJ Howes (Pty) Ltd 1992 (2) SA 466 at 471 E – G** where Erasmus J declared that:

“An order or judgment is erroneously granted “when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a court record.”

In casu, the Applicant’s application does not allege that the Court committed any error in the sense of a mistake in a matter of law, which appears on the record of the proceedings.

- [9] Accordingly, the Court finds that Applicant’s application for rescission on the basis of Rules 31, 32, 42 of the High Court Rules as amended and in

terms of the Common Law, cannot succeed, the Court makes the following orders:

- (i) The rule nisi granted by this Court of the 7th July 2022 is discharged.
- (ii) Applicant's rescission application is dismissed.
- (iii) Applicant is ordered to pay for the costs of this application at the ordinary scale.

J. M. MAVUSO
JUDGE OF THE HIGH COURT

For the Applicant: S.M. DLAMINI ATTORNEYS

For the Respondents: M.V. DLAMINI ATTORNEYS C/O SITHOLE &
MAGAGULA ATTORNEYS