IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CRIMINAL CASE NO. 811/2022**

In the matter between:

AULIN INVESTMENTS t/a AUTIN INVESTMENTS (PTY) LTD 1st Appellant

AUBREY MPHUMELELO DLAMINI 2nd Appellant

And

DEMARA PLANT HIRE (PTY) LTD 1st Respondant

MBUSO GININDZA 2nd Respondant

Neutral citation: *Aulin Investments t/a Autin Investments (Pty) Ltd. v. Demara Plant Hire (Pty) Ltd. (811/2022) SZHC 294 (20 October 2023)*

CORAM: **N.M. MASEKO** – Judge

FOR THE APPELLANT: **Attorney M. Ndlangamandla**

FOR THE DEFENDANTS: **Attorney K. Ginindza**

DATE HEARD: **12/08/2022**
DATE DELIVERED: **20/10/2023**

Preamble

Civil Procedure: Civil Appeal – Application for rescission – requirements for grant of rescission discussed – acknowledgement of debt is a liquid document proving the debtor's indebtedness to the creditor – Proper citation of

parties crucial in legal proceedings.

JUDGMENT

MASEKO J

[1] On the 8th August 2022, the 1st Respondent who is the plaintiff before the Court *a quo* sued out a Combined Summons against the Appellants who are defendants in the Court *a quo* at the Mbabane Magistrate's Court, District of Hhohho for the sum of E431 481-83 (Emalangeni Four Hundred and Thirty One Thousand Four Hundred and Eighty One, Eighty Three cents) under Case No....

[2] The Combined Summons was served on the Appellants on the 10th February 2022, and they were supposed to file their Notice to Defend the Action on or before the 15th February 2022.

[3] It appears that the Appellants filed a Notice of Intention to Defend on the 16th February 2022 however, this Notice of Intention to Defend had a wrong citation of the parties as well as a wrong case number. Whilst the actual parties in this matter in the Court *a quo* are Demara Plant Hire Swaziland (Pty) Ltd v Aulin Investments t/a Autin Investment (Pty) Ltd and Aubrey Mphumelelo Dlamini under Case No. 125/2022, the Notice of Intention to Defend filed by the Defendants in the Court a quo was in respect of:-

Simms Leasing Services Eswatini (Pty) Ltd (Plaintiff)

v

Aulin Investments t/a Autin Investment Pty Ltd (Defendant)

The Case No. being 446/2021

[4] This Notice of Intention to Defend was served on the Respondent's attorneys on the 16th February 2022 at 1241hours bearing the parties herein described above as well as bearing the Case No. 446/2021.

[5] As an act of courtesy, despite no Notice to Defend having been filed in Case No. 125/2022, the 1st Respondent's attorney Mr K. Ginindza caused the Court Order of the default judgment issued on the 23rd February 2022 to be served on the Appellants. Upon realisation of the default judgment, the Appellants then launched urgent motion proceedings for a stay of execution and rescission of the default judgment.

[6] The matter came before His Lordship S. Vilakati who granted the stay of execution and then allocated the 07/03/2022 as the date for arguments of the rescission application. Indeed the rescission proceedings were argued before Magistrate Vilakati and on the 21/04/2022 His Worship Vilakati dismissed the application for the rescission of the default judgment of the 23/02/2022.

[7] The Appellants then appealed to this Court on the following grounds of appeal:-

1. The Court *a quo* erred in law in holding that the reasons advanced by the Appellants in the Magistrate's Court for non-appearance were baseless and flimsy.
2. The Court *a quo* committed an error of law, in that a party cannot acquiesce with a decision and at the same time challenge the decision it acquiesced to.

The Court was in simple terms stating that the Appellants were supposed to approbate and reprobate or blow hot and cold approaching it for rescission, yet such is impermissible in law. This is a glaring basics error of law in proceedings of impugning an order or decision.

3. The Court *a quo* erred in law and in fact in concluding that the Appellant was duly served with the summons and elected not to defend same within the stipulated timelines upon having filed a Notice of Intention to Defend on the 16th February 2022 yet same was served upon the Respondent's attorneys on the same date.

4. The Court *a quo* committed an error in law in that in his ruling the implication is that the Appellants further failed to take necessary steps to correct the error after being aware of same. The Court *a quo* did not take into account the fact that Demara Plant Hire and Simms Leasing Services are/were under the same directorship hence the Appellant's error with regard to the citation of the parties in the Notice of Intention to Defend filed and served upon the Respondent's Attorneys on the 16th February 2022.

[8] It is common cause between the parties that at this particular period there were a number of civil suits between these parties. However, each matter had its own separate case number and the parties were also different and therefore the basic requirement of proper citation was never relaxed nor waived because of the multiple between the parties. Each matter was and should be treated on its merits, and be correctly cited in terms of case number and the parties.

[9] I have carefully perused the record of proceedings of the Court a quo and I am not convinced by the Appellant's grounds of Appeal that the Court *a quo* committed errors of law as alleged for the following:-

(i) Firstly, the Appellants failed to rectify the critical error of a wrong citation even before filing the rescission application before the Court *a quo*. They have not annexed any notice purporting to correct or rectify that, so much so that as things stand, the Notice of Intention to Defend still bears the wrong parties and the wrong case number 446/2021.

(ii) The fact that the plaintiff in the Court *a quo* is under the same directorship with Simms Leasing Services is not a justifiable reason why the Court *a quo* should have granted a rescission. The Appellants were under a legal duty to amend their papers and possibly file an application for condonation explaining the mistake and further explaining why the Notice to Defend filed on the 16/02/2022 was not filed within the stipulated dies of three days. The plaintiff *in casu* is not Simms Leasing Services, and the case number is certainly not 446/2021, instead this is a year 2022 matter bearing **Case No. 125/2022 between Demara Plant Hire and Another v Aulin Investments t/a Autin Investments (Pty) Ltd and Another**.

(iii) Thirdly, it is this Court's view that the defendants in the Court *a quo*, the Appellants *in casu*, were duly served with the Combined Summons and afforded the dies prescribed in the Magistrate's Court Rules to file their Notice to Defend, further the Respondent did not immediately file their application for default judgment but only obtained the order on the 23/02/2022.

(iv) Fourthly, the appellants *in casu* seem to insist that the Notice of Intention to Defend filed on the 16th February 2022 was or is the correct Notice to Defend, this in my view is a wrong approach because it looks like the Court *a quo* was expected to read in between the lines regarding such a grave error of citing a wrong party and also citing a wrong case number. The failure to rectify this grave error renders the Notice to Defend defective and irregular and such error cannot be condoned at this stage of the proceedings, this being a Court of record.

[10] In my view a party cannot be allowed to file defective processes, and fail to correct that defectiveness within a reasonable time and then take a further step of applying for a rescission of a default judgment still relying on the defective process. There has been no attempt by the Appellant before Court to correct the defective **"notice to defend"**. On the other hand the Court *a quo* was expected to grant a rescission when no proper Notice to Defend was filed to replace the defective one, and there is no application for condonation for the filing of a defective notice to defend and for leave to file a proper and corrected or rectified notice to defend reflecting the correct case number and the correct parties.

[11] Despite the fact that the notice to defend is defective because of the wrong case number and wrong parties, the appellants insist that the notice to defend is not defective and that the Court *a quo* should have pronounced that the said notice to defend is not defective when *ex facie* the notice to defend refers to a wrong case number as well as wrong parties. The appellants expect this Court to uphold the appeal despite the wrong and defective notice to defend as filed at page 38 of the Record of Proceedings before the Court *a quo*. Despite the attempt to cancel the wrong

case number and insert the correct case number, this did not in any manner whatsoever validate the notice to defend because the parties reflected thereon remain the wrongly cited parties. The plaintiff is wrongly cited and so is the defendant. In the correct case number 125/2022, there is one plaintiff and two defendants, whereas in the defective notice there is one plaintiff and one defendant. The appellants are pursuing their appeal predicated on a wrong and defective notice to defend.

[12] In any litigation before Court where a party to such litigation has been wrongly cited, and an order is granted against that wrongly cited party, whatever order that may be granted or has been granted will not be enforceable against that wrongly cited party. In the circumstances any process issued by the Court consequent to that order may not be executable against that wrongly cited party, even where there is non-compliance with that order, no competent contempt of Court proceedings can be instituted against that wrongly cited party.

[13] *In casu* the appellant has not shown sufficient cause why the appeal should be upheld because, firstly, there is no reasonable and acceptable explanation for the default, and secondly, that on the merits of the matter, the appellant has a *bona fide* defence, which *prima facie* carries some prospect. See: **Chetty v Law Society, Transvaal 1985 (2) SA 756 AD at 265.**

[14] The defective notice to defend itself was filed after the dies has lapsed and there is no reasonable explanation in the Founding Affidavit why the aforesaid notice was not fled within the mandatory three days.

[15] The second element refers to the existence of a *bona fide* defence which *prima facie* carries some prospect of success. The respondents' case in the Combined Summons is predicated on the existence of an **"acknowledgement of debt agreement"** entered into between the parties on the 13th August 2021 for the liquidation of the E431 481-83 (Emalangeni Four Hundred and Thirty One Thousand, Four Hundred and Eighty One, Eighty Three cents) in monthly instalments of E35 956-82 (Emalangeni Thirty Five Thousand, Nine Hundred and Fifty Six, Eighty Two cents), the first instalment being due on the 30/09/2021. The Combined Summons was sued out against the appellants because they had not honoured the monthly instalments agreed upon between the parties. It is common cause that the 2nd Appellant is a surety. On those basis the respondent then sued out the aforesaid Combined Summons on the 8th February 2022.

[16] The Appellants raised a defence before the Court a quo that they have prospects of success in this matter and that their appeal must be upheld, at paragraphs 8 and 10 of the Founding Affidavit found at page 30 of the Record of Proceedings, the Appellants state as follows:-

> **"(8) I state that, I was given an invoice which I did not know or acknowledge save for the fact that I was threatened with repossession in the event I did not sign the acknowledgment of debt thereof.**
>
> **(10) I state that there were about 65 employees who had to be paid or remunerated and I went to the Respondent's office to sign an acknowledgement of debt on the 13 August 2021 and since there were people dependent on me and I duly signed the acknowledgment of debt so that the machinery could be released back to the workstation. On the 25th February 2022, I was served with a Court Order accompanied by a writ of execution against my movable property. I am taken aback by the Respondent's conduct."**

[17] At pages 80-81 of the Record of Proceedings paragraph 76, the Appellants state as follows in their Replying Affidavit:-

> **"(6) The contents of this paragraph are denied. Applicant aver that he is indebted to the Respondent to the sum of E56 431-00 (Emalangeni Fifty Six Thousand, Four Hundred and Thirty One).**
>
> **I submit that the signature in the acknowledgement of debt is mine however I wish to bring it to the attention of the Court that I was pushed by circumstances beyond my control to sign the same as the respondent threatened to deprive me of the leased machinery if I refuse to sign, and that would have proved fatal to my business. In an effort to save my business I reluctantly appended my signature. I wish to state that I am not aware how the respondent arrived at the amount stated therein as the respondent would now and then send people to collect the machinery thereby stalling my production on those days, however, to my surprise it appeared like the respondent has included in his claim those hours that the machinery was either at his disposal or broken, which was not part of our agreement."**

[18] The Appellants made these statements before the Court *a quo* in their effort to convince the Court to grant the rescission they were seeking. The learned Magistrate was not convinced, and remarked that the Appellants have alleged that the 1st Appellant was not personally served with the Summons nor was anything explained to him, however, that was proven to be an untruth because the return of service filed before the Court indicated that the 1st Appellant was served personally with the Summons on the 10th February 2022 at Millsite Kusa Street Piggs Peak.

[19] It was further submitted before the Court *a quo* by Counsel for the Appellants that the 2nd Appellant was not informed about the Summons and that as a businessman he did not know what to do with same upon being served and that the Applicant only approached their office on the 15th February 2022 hence they filed the Notice to Defend on the 16th February 2022.

[20] The Court *a quo* made a finding that the Notice to Defend dated the 15th February 2022 was not in respect of Case No. 125/2022 but in respect of Case No. 446/2021 which also had different parties to case No. 125/2022. The Court *a quo* went on to make the following findings and I agree entirely with His Worship S. Vilakati when he states the following:-

(i) that the Appellants were duly served with the Summons, and filed a defective Notice to Defend

(ii) that having filed a defective Notice to Defend they failed to take necessary steps to correct the error after being aware of it

(iii) that the issue of Demara Plant Hire and Simms Leasing Services being under the same directorship is no excuse. His Worship stated further that the Appellants who are duly represented by Counsel in both matters is aware that the cause of action with respect to both matters is different and also the parties are different.

(iv) that whilst the Appellants claim to be indebted to the respondents in the amount of E56 431-00 and that 2nd Appellant was forced by circumstances to sign the acknowledgment of debt on the 13th August 2021:-

- the Summons were issued on 8th February 2022 and served on Appellants on 10th February 2022.
- the Appellants chose to fold their arms from the 13th August 2021 when the agreement was signed by the parties, without challenging or seeking a variation of the agreement or at least to have it set aside, only to raise this issue in their Replying Affidavit and deny the respondents the opportunity to respond to same.

[21] In the case of **Formulated IT Group CC Registration No. 2008/005399/23 v North Gauteng Mental Health Society Case No. 2020/18385 High Court of South Africa Gauteng Local Division, Johannesburg** Maier-Frawley J: stated as follows at paragraph 5:-

> **"[5] The Constitutional Court has affirmed that the requirement for rescission of a default judgment at common law are twofold: First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind."**

[22] *In casu* it is my considered view that Appellants failed to furnish a reasonable and satisfactory explanation for their default. The Appellants failed dismally to explain why a wrong citation and wrong case number on the Notice to Defend were never rectified before the Court *a quo* despite having been aware of such defect more particularly because it goes into the root of the matter, as a matter of fact and as things stand, as at the date of launching this appeal, the Appellants are deemed in law and in fact not to have filed a Notice to Defend. The question then becomes, on what grounds would the Court *a quo* rely on to grant a rescission of the default judgment because there is no valid Notice to Defend, further this Court sitting as an Appellate Court, where is the Notice to Defend which it should consider to uphold the Appeal if the defective Notice to Defend in its unrectified state is the one in the Record of Proceedings. How was the Court *a quo*, and how is this Court (Appellate Court) supposed to come to the aid of the Appellants and rescind the default judgment if there is no Notice to Defend in respect of Case No. 125/2022?

[23] The Court *a quo* observed that the parties in Case No. 446/2021 and Case No. 125/2022 are different and further that the causes of action in these two cases are different. I agree entirely with these observations, one case is for the year 2021 and the case *in casu* is for the year 2022.

[24] As regards the prospects of success, the Appellants made a startling revelation that the 2nd Appellant signed the acknowledgment of debt under duress. His Worship S. Vilakati observed further that the Appellants signed acknowledgment of debt agreement on the 13th August 2021, and did nothing to challenge its validity until they launched these rescission proceedings on the 25th February 2022 after the Combined Summons was issued and served personally on the 2nd Appellant, and default judgment granted on the 23rd February 2023. Therefore it cannot be said that they have prospects of success in the face of the acknowledgment of debt which they acknowledged to have signed only to turn around and allege duress.

[25] An acknowledgment of debt confirms that a debt is due, and sets out an undertaking by the debtors to pay the debt in a single instalment, or in monthly instalment terms for a determined period until the debt is liquidated. This is the case *in casu*, the agreement was entered into by the parties on the 13th August 2021 and the Appellants failed to honour their obligations in terms of the aforesaid agreement. It is my considered view that the Court a quo correctly dismissed or refused the rescission application. It is my view further that there are no prospects of success more particularly because the acknowledgment of debt is a liquid document which shows the liquidated sum of money as E431 481-83.

[26] **Herbstein and Van Winsen** in their book titled *THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA VOL. 5 2012 JUTA* at page 1315 state as follows when describing a liquid document:-

> **"A liquid document may be defined as a document in which the debtor acknowledges, over his signature or that of duly authorised agent, or is in law regarded as having acknowledged without his signature being actually affixed to the document, his indebtedness in a fixed and determinate sum of money. Examples of documents to which the debtor or his agent has affixed a signature are cheques, promissory notes, mortgage bonds, acknowledgment of debt and deeds of sale."**

[27] It is trite law that an acknowledgment of debt is an undeniable admission of liability by the debtor to the creditor. The agreement usually contains the payment terms, a breach clause, and the signatures of both the creditor and the debtor. Where the debtor fails to satisfy the payment terms agreed upon, the creditor has a right to approach the Court to enforce the aforesaid agreement.

[28] In my view it is unfair on the part of the Appellants to allege that they have a *bona fide* or *prima facie* against the respondents' claim in the summons before the Court *a quo* when there is an acknowledgment of date which is being challenged now in the rescission proceedings which have resulted to this appeal *in casu*.

[29] The Appellants have, in my view, failed to discharge the two common law requirements for the grant of a rescission:-

1. They have failed to provide a reasonable and satisfactory explanation for their default for the reasons stated above herein, and:-

2. They have failed to show that on the merits they have a *bona fide* defence which *prima facie* carries some prospect of success.

[30] *In casu* it is my considered view that the Appellants have failed to establish these two requirements for the grant of a rescission of the default judgment granted by the Court *a quo* on the 23rd February 2022.

Consequently;

1. The Appeal is dismissed with costs.

N.M. MASEKO
JUDGE