IN THE HIGH COURT OF ESWATINI

CASE NO: 2435/2024

HELD IN MBABANE

IN THE MATTER BETWEEN

JOYCE C. NSIBANDE	**APPLICANT**
AND	
PLUMB BUILD INVESTMENTS (PTY) LTD T/A	
SHESHA CAR WASH	**RESPONDENT**

In re:

PLUMB BUILD INVESTMENTS (PTY) LTD T/A	
SHESHA CAR WASH	**APPLICANT**
AND	
JOYCE C. NSIBANDE	**1ST RESPONDENT**
SIBONGILE SIBANDE	**2ND RESPONDENT**
NATIONAL COMMISSIONER OF POLICE	**3RD RESPONDENT**
ATTORNEY GENERAL N.O	**4TH RESPONDENT**

NEUTRAL CITATION:	*PLUMB BUILD INVESTMENTS (PTY) LTD T/A SHESHA CAR WASH VS JOYCE C NSIBANDE & 3 OTHERS (2435/2024) [2025] SZHC – 13 [13/02/2025]*
CORAM:	**BW MAGAGULA J**
HEARD:	**11/12/2024**
DELIVERED:	**13/02/2025**

Summary: *Civil Law – Rescission Application – Application was initially ex parte – Rule confirmed without opposition – Applicant claiming she was never served with the Court documents by the Deputy Sheriff.*

JUDGMENT

BW MAGAGULA J

[1] The Applicant approaches this Court seeking an order rescinding the judgment granted in favor of the Respondent on the 19th of November 2024. The rescission application is premised on the grounds that the Applicant was not served with the urgent application, the notice of set down, and the interim court order, which led to the confirmation of the rule nisi without opposition. The Applicant further asserts that the lease agreement relied upon by the Respondent is invalid and that the Court committed an error in confirming the order. The Respondent opposes the application, arguing that proper service was effected and that the Applicant has acquiesced to the judgment by accepting rental payments in terms of the disputed lease agreement.

BACKGROUND

[2] The Applicant contends that she was not served with the urgent application and the interim court order dated 31st October 2024. Consequently, she was unable to attend the proceedings leading to the confirmation of the rule nisi. The return of service states that the application and the notice of set down

were served on the Applicant's daughter, who is cited as the Second Applicant, purportedly on behalf of the Applicant, in terms of Rule 4(2) (a) of the High Court Rules. The Applicant disputes this service and asserts that she ought to have been served personally. Copies of the return of service are annexed to the application.

[3] The return of service for the interim court order indicates that service was effected on the Applicant personally. However, the Applicant denies having received the order and maintains that she was not at the place where service is alleged to have been effected. She further contends that she has a *bona fide* defense in that the lease agreement relied upon by the Respondent was only for a period of one year and not five years as alleged. The lease agreement, according to the Applicant, was presented to her by the Respondent's director, Abraham Dlamini, in an incomplete state, with blank spaces. She avers that the document was subsequently altered without her consent.

ERROR ALLEGED IN CONFIRMATION OF ORDER

[4] The Applicant submits that the Court erred in confirming the order on 19th November 2024. The errors alleged are as follows:

4.1 The lease agreement is invalid as the landlord is described as Nsibande family, which is not a legal entity capable of contracting.

4.2 The premises in question are subject to a title deed, and the registered owner or executors of the estate were not cited as parties to the proceedings.

4.3 The Applicant was not served with the interim court order. The return of service states that she was personally served at Ezulwini on 31st October 2024, but she contends that she was in Zombodze Emuva, Shiselweni Region, on that date.

4.4 The urgent application and notice of set down were served on the Second Applicant and not on the Applicant personally.

4.5 The notice of motion did not specify the timeframe within which the Applicant was required to file a notice to oppose or an answering affidavit.

NON-DISCLOSURE IN THE EX PARTE APPLICATION

[5] It is the Applicant's case that the Respondent failed in its duty of full disclosure when moving the *ex parte* application. In particular, the Respondent allegedly failed to disclose that the lease agreement was prepared by its director and that the duration of the lease had been altered from one year to five years.

RESPONDENTS OPPOSITION

[6] The Respondent argues that the Applicant was properly served in accordance with Rule 4 of the High Court Rules. It is contended that service was effected

on the Second Applicant, who is both the Applicant's daughter and executor dative of the estate. The Respondent maintains that service on the Second Applicant was proper, given her role as the Applicant's agent.

[7] The Respondent further avers that the lease agreement was validly concluded and signed by both parties, including the Second Applicant acting on behalf of the Applicant. The lease agreement, it is argued, provided for a five-year term, and the Applicant was aware of and accepted rental payments under this agreement. The Respondent contends that significant improvements were made to the leased premises based on the expectation of a long-term lease.

[8] The Respondent also submits that the Applicant has acquiesced to the judgment by accepting rental payments and that the requirements for rescission under Rule 42 of the High Court Rules have not been met. It is further argued that no reasonable explanation has been provided for the Applicant's failure to appear at the proceedings leading to the confirmation of the *rule nisi*.

APPLICANT'S REPLY

[9] In reply, the Applicant denies that an agency relationship existed between her and the Second Applicant. She maintains that the lease agreement was only for a one-year term and that the Respondent's director altered the document without her consent. The Applicant further disputes that the premises were improved as alleged by the Respondent.

[10] The Applicant reiterates that she was never served with the court papers and that the Respondent failed to join a necessary party the other executor of the estate. She contends that the Court, in confirming the order, effectively imposed a five-year contract on the parties, which was never agreed upon.

LEGAL PRINCIPLES

[11] It is trite law that where parties have reduced their agreement to writing, no extrinsic evidence is admissible to alter or add to the terms of the written contract. In **Johnstone v Leal**,[1] Corbett JA articulating the parole evidence rule stated as follows:

> *It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add or modify the writing by reference to extrinsic evidence and in that way redefine the terms of the contract.*

SUBMISSIONS BY RESPONDENT'S COUNSEL

[12] Counsel for the Respondent, Miss Hlophe, submitted that the Applicant has been receiving rental payments under the disputed lease agreement and has, therefore, acquiesced to the judgment. It was further argued that the Applicant's replying affidavit contains inconsistencies and lacks evidentiary support.

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[1] 1980(3) SA 927 (A) at 942I – 943G

[13] The Respondent also relies on the doctrine of acquiescence, contending that the Court should not rescind a judgment that the Applicant has complied with. Additionally, the Respondent asserts that the improvements made to the premises create a right of retention in its favor.

[14] Reference was made to the case of **Aledaurable Siyaphi Mkhuter t/a Pandard v Sebgodl Investment (Pty) Ltd (Case No. 108/2005)**, which held that:

> An order or judgment is erroneously granted if there was an irregularity in the process a fact which the judge was unaware of.

[15] The Respondent submits that Rule 42 applies only where a court makes an error on a question of law and that the Court is confined to the record of proceedings.

[16] Lastly, it was argued that the Applicant failed to act timeously in seeking rescission and that no reasonable explanation has been provided for the delay.

[17] The Applicant raises several issues in support of the rescission application. These include allegations of improper service, non-joinder of a necessary party, an invalid lease agreement, and an alleged failure by the Respondent to disclose material facts in the ex parte application. Each of these points must

be considered in light of the applicable legal principles and the arguments raised by the Respondent in opposition.

IMPROPER SERVICE OF COURT PROCESS

[18] The Applicant contends that she was not personally served with the urgent application, the notice of set down, or the interim court order. The return of service indicates that service was effected on her daughter, cited as the Second Applicant, in terms of Rule 4(2) (a) of the High Court Rules. This Rule provides that where personal service is not possible, service may be effected on a person apparently in charge of the premises or on an agent authorized to accept service.

[19] The Respondent argues that the Second Applicant was the Applicant's daughter and acted as her agent, having previously engaged in lease negotiations with the Respondent on behalf of the Applicant. Furthermore, the return of service is prima facie proof that service was duly effected, and the onus is on the Applicant to rebut its contents with cogent evidence. See **Matsenjwa v Swaziland Development and Savings Bank [2002] SZSC 12**. The Applicant merely disputes the service without providing independent evidence to contradict the return. In the absence of such rebuttal, the Court is bound to accept the return of service as valid.

[20] The argument that the interim court order was not properly served is equally unpersuasive. The return of service states that the order was served on the Applicant personally. Her mere denial of receipt is insufficient to displace this

prima facie proof. The law is clear that a return of service must be accepted unless convincingly challenged. In this regard reference is made to the case of **Fakudze v Fakudze [2010] SZHC 25**. The Applicant's failure to produce corroborative evidence, such as an alibi or a sworn statement from an independent witness, renders her claim of non-service unsustainable. Accordingly, the point of law concerning improper service is without merit.

NON-JOINDER OF A NECESSARY PARTY

[21] The Applicant argues that the Respondent failed to cite the registered owner or the executor of the estate as a party to the proceedings, rendering the application defective for non-joinder. However, the Respondent contends that the Applicant has been dealing with the property as if she had full rights over it and has, at all material times, represented herself as the lawful lessor.

[22] The test for non-joinder is whether the party not cited has a direct and substantial interest in the subject matter of the litigation. See; **Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)**. The courts have consistently held that where a party has represented themselves as having authority over a property and has engaged in transactions in that capacity, they cannot later raise non-joinder to escape the consequences of their own actions. In this regard reference is made to the decided case of **Matsebula v Malinga [2015] SZHC 204**.

[23] The Respondent's argument that the Applicant has accepted rental payments under the disputed lease agreement further weakens the non-joinder claim. By accepting rental, the Applicant has, in effect, treated the lease as valid, thereby assuming the role of a lessor. In **Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA)**, the Court held that a party who has acted as if they have full authority cannot later challenge the validity of their own acts based on a technical point. Accordingly, the point of non-joinder does not hold water and cannot support the relief sought which is a rescission of the order.

ALLEGED INVALIDITY OF THE LEASE AGREEMENT

[24] The Applicant submits that the lease agreement relied upon by the Respondent is invalid because the Nsibande family is not a juristic person capable of contracting. The Respondent, however, argues that the Applicant executed the lease in her personal capacity and, therefore, cannot now argue that the contract is void.

[25] It is settled law that a party cannot approbate and reprobate **(Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA)**. The Applicant, having represented herself as a party to the lease and having accepted payments under it, cannot now seek to escape its terms on the basis that the named landlord entity lacks legal personality. The maxim *nemo potest venire contra factum proprium* (*no one can go against their own act*) applies in this case.

[26] Furthermore, the principle of *pacta sunt servanda* dictates that contractual obligations must be honored unless proven to be unlawful or contrary to public policy **(Barkhuizen v Napier 2007 (5) SA 323 (CC).** The Applicant has failed to establish that the lease agreement was unlawful, nor has she instituted a separate action to have it declared void. In the absence of a formal declaration of invalidity, the contract remains enforceable. This point of law is, therefore, dismissed.

ALLEGED NON-DISCLOSURE OF MATERIAL FACTS IN THE EX PARTE APPLICATION

[27] The Applicant contends that the Respondent failed to make full and frank disclosure when seeking the interim order. The duty of disclosure requires an applicant in ex parte proceedings to present all material facts, including those adverse to its case **(Schlesinger v Schlesinger 1979 (4) SA 342 (W).**

[28] The Respondent counters that the material facts were fully disclosed, including the fact that the Applicant had been engaging with the Respondent regarding the lease. The Court must also consider whether any alleged non-disclosure was so material that it would have affected the outcome of the interim order. In **National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA)**, the Court held that an applicant's failure to disclose a fact must be willful and material in the sense that it was likely to lead the Court to grant relief it would otherwise not have granted.

[29] In the present case, the Applicant fails to establish how the alleged non-disclosure prejudiced her or how it materially affected the Court's decision to grant the interim relief. The Respondent, on the other hand, has demonstrated that the essential facts, including the existence of the lease agreement and the basis of its claim, were properly disclosed. The failure to disclose a disputed fact does not, in itself, constitute material non-disclosure warranting rescission **(Phillips v Phillips 1953 (3) SA 144 (A).** This point of law is, therefore, dismissed.

[30] The Applicant further seeks to have the default judgment set aside on the grounds that;

(i) She has a *bona fide* defense to the Respondent's claim;

(ii) She was not in willful default, and

(iii) It is in the interests of justice to rescind the judgment. These contentions must be assessed in light of the applicable legal principles, the Rules of Court, and the arguments raised by the Respondent in opposition.

APPLICABLE LEGAL FRAMEWORK FOR RESCISSION

[31] A party seeking rescission of judgment must satisfy the requirements set out in Rule 42(1) (a) of the High Court Rules or, where applicable, the common law. Rule 42(1) (a) provides that:

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 an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[32] Where Rule 42(1) (a) does not apply, the Applicant must satisfy the common law test for rescission, which requires proof that:

(a) The applicant was not in willful default;

(b) The applicant has a bona fide defense that carries some prospect of success; and

(c) It is in the interests of justice to grant rescission (**Chetty v Law Society, Transvaal 1985 (2) SA 756 (A).**

[33] The Court now proceeds to examine whether the Applicant has met these requirements.

WHETHER THE APPLICANT WAS IN WILFUL DEFAULT

[34] The Applicant contends that she failed to oppose the initial application because she was not aware of the proceedings, owing to the alleged improper service of court documents. However, as determined in the preceding section, the return of service confirms that the application was duly served in accordance with the Rules. In the absence of credible evidence to rebut this,

the Applicant cannot rely on ignorance of the proceedings to escape default **Mkhabela v Swaziland Building Society [2011] SZHC 75.**

[35] The Respondent submits that the Applicant's failure to act was deliberate, given that she was aware of the dispute regarding the lease agreement and had previously engaged with the Respondent regarding rental payments. Furthermore, even if the Applicant had not been personally served, she was placed in a position to become aware of the proceedings when her daughter received the documents. A reasonable litigant in her position would have taken steps to ascertain the status of the matter rather than simply ignoring the process **(Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C).**

[36] Wilful default is established where a party, despite knowing of a legal process, deliberately fails to act. In this case, the Applicant has not demonstrated that her failure to defend the initial application was due to factors beyond her control. On the contrary, the evidence suggests that she either knew or ought to have known of the proceedings and chose not to act. Accordingly, the Applicant has failed to establish that she was not in wilful default.

WHETHER THE APPLICANT HAS A BONA FIDE DEFENSE

[37] The Applicant claims that she has a valid defense to the Respondent's claim, arguing that the lease agreement relied upon by the Respondent is invalid. However, as previously established, the Applicant executed the lease in her

personal capacity, accepted rental payments, and treated the agreement as binding. The principle of *pacta sunt servanda* applies, and she cannot approbate and reprobate **(Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA).**

[38] A *bona fide* defense must be one that carries some prospect of success if the matter were to be reopened **(Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA).** Mere allegations of invalidity, unsupported by substantive evidence or a counterclaim seeking declaratory relief, do not constitute a defense. The Respondent correctly argues that the Applicant's defense is an afterthought, raised only as a means to avoid the consequences of her failure to oppose the original application.

[39] Moreover, the Applicant has not taken any steps to set aside the lease agreement through separate proceedings, further undermining her claim of invalidity. The absence of concrete evidence or a formal challenge to the contract reinforces the conclusion that she lacks a *bona fide* defense. Accordingly, this requirement for rescission is not met.

WHETHER IT IS IN THE INTERESTS OF JUSTICE TO GRANT RESCISSION

[40] The Applicant finally argues that rescission should be granted in the interests of justice. The courts have recognized that the interests of justice are a relevant consideration in rescission applications **(MEC for Economic Development,**

Environment and Tourism v Kruisenga 2008 (6) SA 264 (SCA). However, the interests of justice do not override the requirement that an applicant must show a valid reason for failing to defend proceedings in the first instance.

[41] The Respondent contends that granting rescission would serve no purpose other than to delay the enforcement of a valid court order. The Court agrees. The interests of justice require finality in litigation, and a party who has been afforded procedural fairness cannot invoke justice as a basis for undermining the legal process **(S v Ndhlovu 2002 (6) SA 305 (SCA).** The Applicant's failure to act timeously, coupled with the absence of a *bona fide* defense, militates against granting rescission.

[42] Consequently, the Applicant has failed to satisfy the requirements for rescission under both Rule 42(1) (a) and the common law. The application must, therefore, fail.

COSTS

[43] The general rule is that costs follow the event, meaning the unsuccessful party bears the costs of the application **(Union Government v Gass 1959 (4) SA 401 (A)**. The Respondent has had to incur legal costs in defending an application that was devoid of merit and based on technical objections that were without foundation.

[44] In circumstances where an application is frivolous or amounts to an abuse of process, punitive costs may be awarded **(Plastic Converters Association of SA v National Union of Metalworkers of SA 2016 (3) SA 568 (SCA)**. While the present application does not necessarily reach the threshold of abuse, it is clear that the Applicant pursued rescission without a sound legal basis. An order for costs on the ordinary scale is therefore justified.

[45] Accordingly, the Applicant is ordered to pay the costs of this application.

CONCLUSION

[46] In the result, the following order is made:

1. The application for rescission of judgment is dismissed.
2. The Applicant is ordered to pay the costs of this application.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: W. Maseko (Maseko Tsambokhulu Attorneys)

For the Respondent: N. Hlophe (T.L Dlamini & Associates)