IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

CIVIL APPEAL 72/2015

In the matter between:

MAJAZI INVESTMENTS (PTY) LTD **Appellant**

And

SWAZILAND BUILDING SOCIETY **Respondent**

Neutral Citation: ***Majazi Investment (Pty) Ltd v Swaziland Building Society (72/2016) SZSC 31 [2016] (30th June 2016)***

CORAM: **K. M. NXUMALO AJA**
J. MAGAGULA AJA
M. J. MANZINI AJA

Heard: **19th May 2016**

Delivered: **30th June 2016**

Summary: *Civil Procedure application to correct an order drafted by Respondent's attorneys and issued by the Registrar of the High Court – Competency of application to correct as opposed to rescind – omission of certain words of an order and substituting with other words – typographical error – omission, substitution not an error of the court but poor draftsmanship – can be corrected as opposed to an error of the court which should be rescinded.*

JUDGMENT

K. M. NXUMALO, AJA

[1] This is an appeal of a judgment of a *court a quo* delivered on the 10th November 2015 in which the *court a quo* dismissed an application made by the Appellant for correcting an order of the *court a quo* drafted by the Respondent's attorneys and issued by the Registrar of the High Court on the 10th March 2014 and confirmed on the 30th September 2015.

BACKGROUND

[2] As part of the record this court was provided with a copy of the original Notice of Motion moved by the Respondent in the *court a quo* together with a copy of the Judges' notes.

[3] In the original application the Respondent was an Applicant and the Appellant was the 1st Respondent together with 2 others. The Respondent made an *ex parte* application against the Appellant and 2 others for the following prayers as numbered in the Notice of Motion:

> 3. Pending payment of the arrear rentals and other charges in the amount of E80,412.87 (Eighty Thousand four hundred and twelve Emalangeni eighty seven cents) claimed by the Applicant from the Respondents in respect of Shop No.6, Asakhe House, Mbabane, situate in the District of Mbabane, Swaziland (the Premises) that the removal of any movables and/ or in particular the fittings and fixtures from such premises be and hereby interdicted pending the finalization of prayer 7 of the Notice of the Motion;

4. That the Deputy Sheriff to be appointed by the Registrar of the High Court is hereby directed and required to:

   a) Forthwith to serve this Notice of the Motion and this order upon the Respondents and to explain the full nature and exigency thereof to it;

   b) Do all that is necessary to prevent the Respondents from removing and or alienating the items referred to in paragraph 2 hereof;

   c) To make a return to the Applicant's attorneys and the Registrar of what he has done in the execution of this Order;

5. That prayers 3 and 4 of the application operate as an interim Order forthwith;

6. That a Rule Nisi returnable on a date to be determined by the above Honourable Court calling upon the Respondent to show cause why prayers 3, 4, 5, 6 and 7 should not be made final.

7. The Applicant's claim based in the allegation in the affidavit is for:

   a) Payment of the arrear rentals and other charges in the amount of E80,412.87 (Eighty Thousand four hundred and twelve Emalangeni eighty seven cents)

   b) Ejectment of the Respondent and all those holding through or under it from the said premises;

   c) Interest on the sum of E80,412.87 (Eighty Thousand four hundred and twelve Emalangeni eighty seven cents) at the rate of 9% per annum *a tempore morae*;

   d) Costs of suit including collection commission;

   e) Further and / or alternative relief.

[4] The application of the Respondent was granted. The Judges' notes read: "*On the 7th March 2014 - Application granted in terms of prayers 5 and 6 of the Notice of Motion. Rule returnable on the 14th March 2014*".

[5] According to the Judges' notes, the matter was postponed before various Judges of the *court a quo* until the 25th September 2015 when the rule was confirmed.

[6] After the rule was confirmed the Appellant made the application to the *court a quo* on the 15th of October 2015 for correcting the order of the *court a quo* as issued by the Registrar of the High Court on the 7th March 2014 and also confirmed on the 25th September 2015.

[7] The application by the Appellant was dismissed in the *court a quo*. It is against this decision that this appeal arise.

[8] In its application to the *court a quo*, the Appellant attached:-

8.1 The interim Order granted on the 7th March 2014 the relevant portion of which reads as follows: "*IT IS HEREBY ORDERED THAT:*

The Respondents make payment of the arrear rentals and other charges in the amount of E80,412.87 (Eighty Thousand Four Hundred and twelve Emalangeni Eighty Seven cents) claimed by the Applicant from the Respondents in respect of Shop No.6, Asakhe House, Mbabane, situate in the District of Hhohho, Swaziland and (The Premises) that the removal of any movables and/pr in particular the fittings and fixtures from such premises be and hereby interdicted pending the finalization of prayer 7 of the Notice of Motion."

8.2 The Judge's notes reads: "*Application granted in terms of prayers 5 and 6 of the Notice of Motion. Rule returnable on the 14th March 2014*".

8.3 The final Order granted on the 25th September 2015 which reads as follows:

"IT IS HEREBY ORDERED THAT:

1. *The Respondent makes payment of the arrear rentals and other charges in the amount of E80,412.87 (Eighty Thousand Four Hundred and Twelve Emalangeni Eighty Seven cents) claimed by the Applicant from the Respondent in respect of Shop No.6, Asakhe House, Mbabane, situate in the District of Hhohho, Swaziland (The Premises) and the removal of any movables and/or in particular the fittings and fixtures from such premises is hereby interdicted.*

2. *That Respondents be and is hereby ejected from the said premises.*

3. *Interest on the sum of E80,412.87 (Eighty Thousand Four Hundred and twelve Emalangeni Eighty Seven cents) at the rate of 9% per annum a tempore morae.*

4. *Costs of suit, including collection commission."*

FINDINGS OF THE *COURT A QUO*

[9] **Justice Mlangeni** in the *court a quo* makes the following observations:

9.1 When the matter was called on the 7th March 2014 a rule nisi was granted in terms of prayers 5 and 6 of the Notice of Motion the effect of which was to grant an order in terms of prayers 3, 4, 5, 6, and 7 of the Notice of Motion.

9.2 On the 25th September 2015 the rule was confirmed.

9.3 Confirmation of the *Rule Nisi* on the 25th September 2015 meant that the order became final.

9.4 Amongst other things this has the effect that the amount of E80 412-87 (Eighty Thousand Four Hundred and Twelve Emalangeni and Eighty Seven Cents) in alleged rental became payable by the Respondent to the Applicant.

9.5 The Respondent (the Appellant) has instituted the application where it seeks correction of the order granted on the 7th March

2014 and confirmed on the 25th September 2015 instigated by the execution of the final Order.

9.6 The hypothec at common law is not intended and cannot be a final relief. It seeks to obviate disposal of the goods by the defaulting tenant pending the final Order to be sought for payment of arrear rental, ejectment etc.

9.7 It is a two staged process, that is, interim attachment usually sought *ex parte* and a return date is set where the rule may or may not be confirmed. Thereafter the landlord is required to issue summons for arrear rentals and / or cancellation of the lease and ancillary relief.

9.8 Prayer 7 is not free of problems. It is not a conventional prayer as it has the potential to seek final judgment on arrears.

9.9 Relying on the Supreme Court Case of **Swaziland Polypack (Pty) Ltd v The Swaziland Government and Another, Civil appeal No. 44/2011**, the Learned Judge states that the case does

not advocate for departure from the well established procedure of a two stage approach to the court by an aggrieved landlord. To consequently depart from the time honoured procedure of obtaining a Rule Nisi and then suing for final relief would create unnecessary confusion in an otherwise clear area of the law.

[10] Having considered the above, the Learned Judge came to the conclusion that the application to correct the interim order of the 7th March 2014 was incompetent and the application of the Respondent (the Appellant) was dismissed accordingly.

APPELLANT'S SUBMISSION

[11] On his Heads of Argument the Appellant submits that:

11.1 The interim order drafted by the Respondent's attorneys and issued by the Registrar of the High Court is the interim order referred to in paragraph 8.1 above.

11.2 The order is not in accordance with the order granted by **Justice Hlophe N**. who granted the order in terms of prayers 5 and 6 of the Notice of Motion which is set out in paragraph 3 above.

11.3 The incorrect order prepared by the Respondent's attorney and issued by the Registrar was confirmed by **Justice Nkosi** on the 25th September 2015. Hence the final order is as set out in paragraph 8.3 above.

11.4 The Respondent never made a prayer for the payment of rentals claimed to be due. The Respondent merely sought an order for the attachment of the movables on the premises pending payment of the arrear rentals.

11.5 Paragraph 7 of the Notice of Motion is not a prayer as it does not describe what remedy the Respondent seeks but is merely descriptive of the order the Respondent would seek in due course.

11.6 A prayer according to **Black's Law Dictionary at pages 1213** is a request addressed to the court and appearing at the end of a pleading – especially a request for specific relief.

11.7 No such prayer is contained in paragraph 7 of the Respondent's Notice of Motion.

11.8 It is a principle of our law that a litigant cannot be granted a remedy it has not sought in the *lis.* There was no prayer for the payment of rentals and consequently there could not have been an order to that effect. The court was referred to **Bernard Nxumalo vs The Attorney General, Civil Appeal No.50/2013** and **Commissioner of Correctional Services against Nontsikelelo Hlatjwayo, Civil Appeal Case No.67/2009.**

11.9 The Learned **Justice Mlangeni** came to a wrong conclusion that the Appellant should have applied for a rescission of both orders, such rescission being based on an error on the part of the court. The court was referred to **Herbstein and Van Winsen's**:

The Civil Practice of the Spreme Court of South Africa, 4th Edition at pages 695 and 696.

11.10 The court was also referred to **Nelisiwe Ndlangamandla vs Hadede and two Others, High Court Case No. 2148/2012** where **Justice Ota** found that a rescission application 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.

11.11 The Respondent's affidavit concedes that:-

11.11.1 there is an error where he states: *"There is merely a typographical /clerical error in the interim order by the omission of the words "Pending payment of the arrear rentals..."."*

11.11.2 No prejudice was suffered by the Applicant (the Appellant) in respect of the error in the omission of the words: "*Pending payment of the arrear rentals ...*"

RESPONDENT'S SUBMISSION

[12] The Respondent oppose the appeal and on its Heads of Argument which are full of repetitions can be summarized as follows:

12.1 The Appellant has dismally failed to adhere to the peremptory provisions of Section 14 (1) of the Court of Appeal Act No. 74/1954 which reads as follows:

> 14 (1) an appeal shall lie to the Court of Appeal –
>
> (a) from all final judgment of the High Court; and
>
> (b) by leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to costs only.

12.2 The appeal by the Appellant against the judgment of his Lordship **Justice Mlangeni J** is interlocutory. It is therefore a mandatory procedure to first apply and approach the court for leave to appeal. However *in casu* the Appellant has blatantly failed to seek leave first which renders the entire appeal fatally flawed.

12.3 The *court a quo* having granted the final order as prayed for and recognized by the *court a quo*, that confirmation of the *Rule Nisi* meant confirming prayer 7 which meant payment of the arrear rentals, ejectment of the Appellant, interest and costs of suit.

12.4 The *court a quo* when it granted the final order was *functus officio* and it cannot amend, alter and correct its own judgment as the courts' intent, substance and effect is crisp, clear and unambiguous. There are no exceptional grounds for the *court a quo* to alter the order.

12.5 Whilst the Respondent's prayers were to perfect the landlord's hypothec, the Respondent also prayed for payment of arrear rental, ejectment, interest, costs in the Notice of Motion.

12.6 Appellant never at any point in time disputed the claim of the arrear rentals. The Appellant failed to institute any counterclaim or anticipate the Rule Nisi and further file any opposing affidavit.

12.7 The Appellant has never disputed the quantum of the arrears owing in the sum of E80.412,87 (Eighty Thousand Four Hundred and Twelve Emalangeni Eighty Seven Cents) and the *court a quo*, with the facts before it, was entitled to grant prayer 7 of the Notice of Motion.

12.8 In the main founding affidavit there is no single averment or allegation that the Respondent shall thereafter institute proceedings and sue for the outstanding rentals

12.9 The Appellant will not be prejudiced by a dismissal of the appeal with costs because this will not preclude it from

subsequently instituting action proceedings for damages that it alleges to have suffered by virtue of the alleged breach of contract by the Respondent.

FINDINGS OF THIS COURT

[13] There is no substance in the submission that Appellant is appealing against an interlocutory or interim order. In his own submission referred to in paragraphs 12.3 and 12.4, the Respondent states that the order was made final. This is also confirmed by **Justice Mlangeni** where he states in his judgment referred to in paragraph 9.5 where the Learned Judge states that the Respondent (the Appellant) instituted the application instigated by the execution of the final order. Consequently there is no substance in the submission that the Appellant should comply with section 14 (1) of the Court of Appeal Act No.74/1954.

[14] The Appellant was justified in seeking the correction of the Interim Order as drafted by the Respondent's Attorneys and issued by the Registrar of the High Court. The Interim Order as drafted and issued

is not in terms of the Order granted by **Justice Hlophe** who granted the application in terms of prayers 5 and 6 of the Notice of Motion. Prayer 5 of the Notice of Motion is an Interim Order that Pending payment of the amount of the arrear rental and other charges, there is an interdict against the removal of movables in particular fittings and fixtures of the Appellant from the premises of the Respondent. The Order as drafted and issued not only does it omit some words, but changes the Interim Order to a final Order in so far as the Appellants are ordered to make payment of the arrear rentals and other charges in the amount claimed and also interdicts the removal of the movables.

[15] The Interim Order as drafted by the Respondent's attorney and issued by the Registrar, not only omits words but makes the Order final in so far as it orders the Appellants to make payment of the rental and other charges in the amount claimed. Certainly this is not in terms of the prayers in the Notice of Motion as granted by **Justice Hlophe**.

[16] The court was referred to **Herbstein and Van Winsen – The Civil Practice of the Supreme Court of South Africa, Fourth Edition** on page 695 on error states:

"The rules of court provide that the court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind:

(b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of the ambiguity, error or omission."

[17] The court was also referred to **Nelisiwe Ndlangamandla v Hadede and 2 Others – High Court Case No.2148/2012** which deals with a rescission sought pursuant to rule 42 (1) (a), where the Learned **Justice Ota** in paragraph 46 states:- "*This is the error in proceedings which, if **Hlophe J** was aware of, would have precluded him from granting the assailed orders*".

[18] The quotation from **Herbstein and Van Winsen** and the **Ndlangamandla** case are distinguishable from the case before this court for the simple reason that the error that the Appellant seeks to be corrected is an error not made by the *court a quo*. The *court a quo* was correct and indeed did correctly grant prayers 5 and 6 of the

Notice of Motion of the Respondent. What gave rise to error was the order as drafted by the Respondent's attorneys and signed by the Registrar of the High Court. The error by the Respondent's attorneys is conceded by the Respondent's attorneys as a typographical error by omitting words in the Notice of Motion and substituting them with words not in the Notice of Motion. This error is not an error of the *court a quo* but an error of the Respondent's attorneys.

[19] On the submission that prayer 7 of the Notice of Motion is not a prayer as it does not describe what remedy the Respondent seeks, I am in full agreement with the comments of **Justice Mlangeni** where he says in paragraph 3: "*The quality of these prayers, in arrangement and in print, cries out loud for improvement. ... the prayers can even make it difficult for the court to readily discern what is sought*." It cannot be overly emphasized that Counsels should take utmost care in drafting pleadings and prayers when it comes to prayers in areas of the law which are frequently litigated upon.

[20] Although the manner in which prayer 7 is phrased as ambiguous it is clear that the Respondent seeks the prayers set out in the sub-paragraphs of paragraph 7 of the Notice of Motion.

[21] I do not agree with the Appellant's submission that the Respondent never made a prayer for the payment of the rental claimed to be due. I hold that the Respondent did make a prayer but in a clumsy manner.

[22] The prayers in sub-paragraphs a-d of paragraph 7 constitute "*Ancillary orders (which) call upon the lessee to show cause why it cannot be ordered to pay arrear rentals and why it cannot be ejected from the premises*" as held by **Maphalala JA** at paragraph 15 in the matter **Swaziland Polypack (Pty) Ltd v The Swaziland Government and Another, Civil Case No. 44/2011**. It is ingenious for the Appellant to submit that prayer 7 is merely descriptive of an Order the Respondent would make in due course.

[23] The reference to **Silberburg and Schoeman's The Law of Property Fifth Edition** dealing with Tacit Hypothec of the Lessor in paragraph 17.2.2 confirms the correct procedure adopted by the Respondent to

institute proceedings to attach the movables on the premises where the writer states: "*The hypothec as such does not enable the lessor to summary execution of property without recourse to the court. In order for the hypothec to become effective, the lessor has to attach the property in terms of a court order or by obtaining an interdict restraining removal or alienation pending an action for rent.*"

[24] The case of **Bernard Nxumalo v The Attorney General, Civil Appeal No.50/2013** is a case where the issue was whether the *court a quo* was correct to grant an interdict or restraining order where the particulars of claim was for:

a) Ejecting the Defendant from the property;

b) Costs of suit; and

c) Further and/or alternative relief.

In that case, the *court a quo* made the following orders:

- "*The Defendant is restrained from using the said farm pending the signing of a lease agreement which shall be before the next ploughing season*". The court held: "*It is clear from the claim, that the Respondent did not seek an interdict or restraining order against the Appellant. The order was not granted by consent of*

both parties. The restraining order could not be granted as an ancillary relief as it was not related to main relief of ejectment (ejection) which was sought. Therefore the court a quo erred in granting the Respondent a relief it has not sought in Lis". The case of **Bernard Nxumalo** is distinguishable from the present case where the Respondent has asked for the prayers albeit in a clumsy manner.

[25] In the matter of **Commissioner of Correctional Services v Ntsetselelo Hlatshwako, Civil Appeal No.67/2009 Ramodibedi CJ** said in paragraph 7: "*At the outset it is instructive to note that the first order setting aside the decision of the Disciplinary Board was not prayed for. Accordingly, it was in my view, incompetent for the court a quo to make the order in the absence of an amendment to the Notice of Motion. This part of the order was unfair both procedurally and materially. It is trite that a litigant can also not be granted that which he/she has not prayed for in the* Lis*"*.

[26] In the matter before us the Respondent has made a request to the *court a quo* for the reliefs set out in the sub paragraphs of prayer 7. The Respondent has made this request in a very clumsy manner.

[27] It is unfortunate that the Respondent's Attorneys did not appreciate the statement of the Learned **Justice Mlangeni** where he said in paragraph 12 of his judgment that "*Prayer 7 is therefore not free of problems.*" The Respondent's attorney did not appreciate when it was drawn to his attention the inelegant manner in which prayer 7 in the Notice of Motion was drafted.

[28] The Appellant was justified in applying to the *court a quo* for corrections of the interim order dated 7th March 2014 and the final order dated 25th September 2015, both drafted by the Respondent's attorney and issued by the Registrar of the High Court.

[29] The Appellant did not file an affidavit in opposition to the application made by the Respondent in the *court a quo*. The Appellant in its application for the corrections of the interim and final orders did not make any allegation disputing the allegations made in the application

against it by the Respondent. Even in the appeal to this court, the Appellant has not disputed any of the allegations made against it by the Respondent.

[30] The confirmation of the rule on the 28th September 2015 had the effect that:

30.1 The interdict against the removal of any movables and/or in particular the fittings and fixtures from the premises was confirmed.

30.2 The prayers in the inelegantly drafted prayer 7 come into effect i.e.:-

30.2.1 Appellant pays the arrear rentals and charges in the sum of E80,412.87 (Eighty Thousand Four Hundred and Twelve Emalangeni Eighty Seven Cents;

30.2.2 Ejectment of the Appellant (Respondents) and all those holding through or under it the premises;

30.2.3 Interest on the sum of E80,412.87 (Eighty Thousand Four Hundred and Twelve Emalangeni Eighty Seven Cents;

30.2.4 Costs of suit including collection commission.

[31] The correction of the interim order does not advance the case of the Appellant in so far as the interim order was made final. In the circumstances it is ordered that:

1. The appeal is dismissed with costs.

K. M. NXUMALO
ACTNG JUDGE OF APPEAL

I agree

_____
J. S. MAGAGULA
ACTING JUDGE OF APPEAL

I agree

_____
M. J. MANZINI
ACTING JUDGE OF APPEAL

For the Appellant: **Mr. L. R. Mamba**

For the Respondent: **Mr. H. Mdladla**