IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Appeal Case No. 106/2017

In the matter between:

MANGALISO DLAMINI **Appellant**

and

SIKHATSI DLAMINI N.O. **Respondent**

Neutral Citation	:	*Mangaliso Dlamini vs Sikhatsi Dlamini N.O.* (106/2017) [2019] *SZSC* 11 (02/05/2019)
Coram	:	**S. P. DLAMINI JA, R.J. CLOETE JA AND J. M. CURRIE AJA.**
Heard	:	11th PRIL, 2019.
Delivered	:	2nd MAY, 2019.

SUMMARY : *Civil procedure – provisions of Rule 6 (16) mandatory –That upon allocation of date of hearing by Registrar formal Notice of set-down an absolute requirement – An emailed Roll from the Registrar to litigants not provided for in the Rules and not a replacement of the requirements of Rule 6 (16) – Once it is proven that a Judgment is granted in genuine error, it is unnecessary to prove any other matters and a rescission automatically follows in terms of Rule 42 (1) (a) – Appeal upheld – Matter referred to High Court for trial.*

JUDGMENT

CLOETE – JA

[1] At the outset it needs to be recorded that the Court enquired from Mr. Sikhatsi Dlamini on what basis he was appearing in the matter and he responded that he was appearing in his capacity as the Executor of the estate which was the subject matter of the proceedings. The Court expressed concern about the matter but made no ruling for reasons not necessary to set out herein.

[2] The first matter before us was an application for Condonation for the late filing of the Respondent's Bundle of Authorities. Initially the application

was opposed by Mr. Mthethwa but he subsequently agreed that the order be granted with no order as to costs.

[3] The Appellant (1st Respondent in the Court *a quo*) brought an application to the High Court for an order in the following terms:-

1. **That the 1st Respondent and all those holding title under him be hereby evicted from the homestead situate at Plot No.1438, Extension 2, Msunduza Location, Mbabane, in the District of Hhohho with immediate effect.**

2. **That 1st Respondent is directed to surrender keys to all doors in the said homestead referred to in 1 above, to the 2nd Respondent;**

3. **That the 3rd Respondent do what is necessary in assisting the Deputy Sheriff in the execution and/or enforcement of the Order;**

[4] The Respondent (The Applicant in the Court *a quo*) opposed the application and the parties filed various papers.

[5] On 10th July 2017 Respondent served a Notice of Set-down on the Registrar of the High Court and the Appellant stating that the matter has been set down for argument on the opposed Roll on Friday 21st July 2017.

[6] It is customary practice, although not specifically provided for in the Rules, that the Registrar would forward the Roll for the opposed motions to all Attorneys on the Thursday prior to the Friday on which the matter was enrolled. For some unexplained reason the matter was not enrolled on Friday 21st July 2017 and clearly did not appear on the Roll forwarded to all Attorneys and as such was not heard.

[7] The Registrar apparently allocated the matter for hearing on Friday 28th July 2017 and purportedly sent notice to all Attorneys, including the Appellant's Attorneys, on Thursday 27th July.

[8] According to the affidavit before us, the matter was duly called on the morning of Friday 28th July 2017 but since the Appellant's Attorney was not present, the matter was stood down to the end of the Roll on that day. There is no evidence of any nature that the Registrar or the representative of the Respondent made any attempt to make contact with the Appellant's Attorney or indeed that the issue of the set down was in any manner canvassed with the learned Judge in the Court *a quo*.

[9] The matter then proceeded on an unopposed basis and the Respondent led the evidence of a witness and this culminated on the learned Judge Hlophe

J. handing down a well-reasoned written judgment on 11th August 2017 in the following terms:

[20] In these circumstances I am convinced that while the applicant's application, ejecting the First Respondent from the premises appears to be indefensible, same cannot ignore the First Respondent's right to be given a calendar month notice. Consequently I make the following order:

1. The Applicant's application succeeds to the extent that:-

1.1 The First Respondent and those holding under him are to be given a full calendar month from the day of this Judgement, to vacate the premises in question.

1.2 Failing the First Respondent's vacating the premises in question after the full calendar month from the date of this Judgement, the applicant be and is hereby entitled to eject the First Respondent and those holding under him from the premises known as plot 1438 Msunduza Township, Extension No.4, Mbabane, Hhohho District, Swaziland.

1.3 Should the First Respondent fail to vacate the premises at the expiry of the period of notice referred to above, the 4th Respondent is directed to assist the Deputy Sheriff in executing the order referred to.

1.4 Owing to the peculiar circumstances of the matter, each party will have to bear its own costs.

[10] On 25th August 2017 the Appellant launched proceedings in the High Court in an application in terms of Rule 42 (1) (a) to rescind the said judgment which was handed down on 11th August 2017 in the following terms:

1. **That the rules of this Honourable Court relating to time limits, service and form be and is hereby dispensed with and the matter be heard as one of urgency.**

2. **Condoning Applicant's non-compliance with the rules of this Honourable Court.**

3. **That the Judgment of the above Honourable Court dated the 11th August 2017 be and is hereby rescinded.**

4. **That pending finalisation of these proceedings the execution of the judgment of the above Honourable Court dated 11th August 2017 be stayed.**

5. **That the Respondent pays costs of the matter in the event he unreasonably opposes this application.**

[11] The matter was placed before Hlophe J. who had heard the matter originally and he granted the stay of execution of his own judgment as prayed for in prayer 4 above.

[12] The application, which was opposed, was subsequently heard on the opposed motion Roll by Maseko J. on 26th September 2017 and his judgment was handed down on 12th December 2017 in the following terms:

1. **The Application for Rescission of the Judgment of Hlophe J. handed down on the 11th August 2017 in Case No. 627/2017 is hereby dismissed.**

2. **The *rule nisi* granted by Hlophe J. on the 25th August 2017 as regards Prayer 4 of the Notice of Motion (being the stay of execution of the Judgment) for the Rescission Proceedings is hereby discharged.**

3. **The Applicant is ordered to pay costs on the ordinary scale.**

[13] On the same day 12th December 2017 the Appellant filed a Notice of Appeal in the following terms:

1. **The Court *a quo* misdirected itself in holding that the late Samson T. Dlamini by means of a will bequeathed Plot No. 1438, Extension 2, Msunduza Location, Mbabane Hhohho District to the late Vusi Dlamini.**

2. **The Court *a quo* misdirected itself in holding that despite that no notice of set down had been served on the Appellant's attorneys for the 28th July 2017 the court was entitled to hear the matter on the 28th July 2017 because the matter was on the Court Roll.**

3. **The court *a quo* misdirected itself in holding that when a litigant wants to invoke Rule 42 to rescind a Judgment, the primary onus that he or she must discharge is whether he or she has a bona fide claim or defence to issues for determination by the court.**

[14] Mr. Mthethwa, the Attorney for the Appellant, having filed extensive Heads, mainly argued the following issues:

1. He firstly conceded that the first ground of appeal was not applicable as it related to the merits of the matter whereas the appeal before us related to the issue of rescission and as such that ground fell away.

2. As regards the second ground, he stated that the provisions of Rule 6 (16) are mandatory due to the clear wording of the subsection. He

admitted that the matter had been set down for the 21st July 2017 but when the matter did not appear on the Roll emailed to his firm on 20th July 2017, he did not attend Court on that day. He further stated that he did not look at the Roll sent out on 27th July 2017 as he had not received any Notice of Set down from the Respondent and as such did not deem it necessary.

3. As regards the provisions of Rule 42 (1) (a) he argued that there was no requirement in that rule for an Applicant to satisfy the Court of its prospects of success and all that needed to be proved was that the Judgment was granted in error in absence of the Applicant.

4. That it is clear and trite law in Eswatini and specifically in terms of the Constitution, that a litigant is entitled to a fair hearing according to the maxim *audi alterem partem.*

[15] Mr. Dlamini in his capacity as the Executor had also filed Heads of Argument and his main arguments were as follows:

1. He immediately admitted that he had made a mistake in not complying with Rule 6 (16) in filing a formal Notice of Set down for 28th July 2017 as soon as the Registrar had allocated the said date.

2. He advised the Court that after he had set the matter down for 21st July 2017 and when it was not on the Roll, he went to the Registrar who advised him that she had allocated 28th July 2017 for the matter to be heard and although he had not complied with Rule 6(16) he argued that the emails sent to all Attorneys on 27th July 2017 by the Registrar was sufficient and as such the matter was correctly heard on that date. He also admitted that he had made no attempt to call the Applicant's Attorney on 28th July 2017.

3. As regards to Rule 42 (1) (a), he insisted that it was a requirement, as found by Maseko J., that the Appellant had not proved to that Court that it had prospects of success on the merits.

[16] I state here that there is inherent danger in a person who is not a qualified and admitted legal practitioner engaging in litigation in the Superior Courts of Eswatini as they simply cannot be expected to have a thorough knowledge of all of the Rules and Procedures in these Courts and there is

real danger that such activity would be detrimental to themselves and/or those that they purport to represent.

[17] Let it immediately be said that in my view the Appellant's Attorney cannot remotely be said to have acted diligently in the matter including the fact that he admitted that his firm had received the emailed Roll from the Registrar on the 27th July 2017 but, negligently in my view, did not bother to study the Roll as he had not received any Notice of Set-down as is required in terms of Rule 6 (16). Added to that it appears that he attempted to file his Heads of Argument in the matter heard by Hlophe J., after the Judgment of Hlophe J. had been handed down.

[18] Rule 6 (16) provides as follows:

(16) Notice in writing of the <u>date allocated by the Registrar</u> <u>shall forthwith be given</u> by applicant or respondent, as the case may be, to the opposite party. (My underlining)

[19] The Rule is clear and unambiguous that the Registrar is required to allocate a date for hearing. Once the Registrar has done so, it is mandatory for either party to give notice thereof to the other party. The Respondent had admitted that he had failed to give such notice to the Appellant bearing in

mind that the Respondent had stated that when the matter was not on the Roll on 21st July 2017 he personally went to the Registrar who advised him that the date for the hearing was to be 28th July 2017. It is clear and unambiguous that the Respondent should have, but did not, given notice to the Appellant of the date of hearing allocated by the Registrar, namely 28th July 2017.

[20] I pause here to say that the Registrar is not entirely blameless in this matter. There is no explanation why the Registrar did not set the matter down for hearing on 21st July 2017 in terms of the Notice of Set-down filed and served on 10th July 2017 nor is there any explanation why the Registrar, having allocated 28th July 2017 to the matter in conjunction with the Respondent, did not approach the duty Judge with the facts relating to the non-compliance with the Rules relating to set down in which event, in my view, for the reasons set out below, this matter would not be before us.

[21] Accordingly the argument of the Respondent and the Judgment of Maseko J. to the effect that the email sent by the Registrar on 27th July 2017 was sufficient and as such that no formal notice of set down was required and that the matter was accordingly properly heard by Hlophe J. simply cannot be sustained. The provisions of Rule 6 (16) are mandatory and in absence

of such a formal notice the matter should not have been heard and accordingly the second ground of Appeal must succeed.

[22] It is apposite that I record that no misdirection of any nature can attach to Hlophe J. who, in the absence of the Registrar and the Respondent having brought to his attention the issues relating to the non-compliance of Rule 6 (16), would have been unaware of the problem and one cannot fault him for having proceeded to hear the matter on an unopposed basis and as such to hand down his judgment. I have no doubt that if it had been correctly brought to his attention he would not have dealt with it in the manner he did. Accordingly in my view the matter was heard and adjudicated on in error.

[23] The provisions of Rule 42 (1) (a) provides as follows:

> **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;** (My underlining)

[24] In my view, this Rule is also clear and unambiguous. In other words once it has been proven that a Judgment was granted in error in the absence of an affected party, it is not incumbent on the Applicant to have to prove in addition that it has a good case of defence on the merits. For the reasons I set out above, I am satisfied that the Judgment handed down by Hlophe J. was handed down in error, not of his making, and it materially affected the Appellant who was not present or represented at the hearing of the matter.

[25] Maseko J., at paragraph 37 of his Judgment states that when a litigant wants to invoke Rule 42, the primary onus that it must discharge is whether the litigant has a *bona fide* claim or defence to issues for determination by the Court but rather perplexingly at paragraph 31 and 32 of his Judgment he quotes two cases which make it clear that once a Judgment is granted in error, one is entitled to a rescission and I cannot accordingly agree with the finding of Maseko J. in that regard. On the contrary the provisions of Rule 6 (16) are mandatory and in the absence of compliance therewith, that should have been the end of the matter.

[26] In the case of **Bakoven v G.J. Howes (Pty) (Ltd 1932 (2) SA 466 at 471** Erasmus stated 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 of Record. ***It follows that a court in deciding whether a judgment was erroneously granted is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the common law, the applicant need not show "good cause" in the sense of an explanation for his default and a bona fide defence. ---once the applicant can point to an error in the proceeding, he is without further ado entitled to rescission.'*** (My underlining)

[27] In the case of **Nyingwa v Moolman N.O. 1993 (2) SA 508 at 510 F** White J stated as follows:

> ***'It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of 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.'*** (My underlining)

[28] The lackadaisical attitude of the Applicant's Attorney relating to the hearing of the matter was unacceptable. However if the outcome of the matter was based purely on the payment of a liquid some of money one may have given thought to referring to and invoking the *dictum* in **Salojee and Another, NNO v Minister of Community Development, 1956 (2) SA 135 (A)** at 141 C – E, which was also referred to in **Unitrans** *(supra),* are apposite. With reference to **R v Chetty, 1943 AD 321** at 323 and **Regal v African**

Superslate (Pty) Ltd, 1962 (3) 18 (AD) at 23, where non-compliance with the Rules was also attributed to the laxity of legal representatives, he held that, **"There is a limit beyond which a litigant cannot escape the results of his Attorneys' lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court, Considerations *ad misericordiam* should not be allowed to become an invitation to laxity… The Attorney, after all, is the representative whom a litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with the Rule of Court, a litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are",** but the matter in fact relates to personal, fundamental and constitutional rights and as such one cannot punish a litigant for the actions or omissions of his Attorney and the Appellant is accordingly entitled to have his day in Court and to be heard.

[29] For the reasons set out above the Appeal of the Appellant must succeed on grounds two and three of this Notice of Appeal.

[30] I have wrestled with the issue of costs and seriously gave thought to awarding punitive cost order but in the end I have decided that this Court will make no order as to costs largely in view of the fact that the dispute is

largely of a family nature relating to inheritance issues and that accordingly the costs of this Appeal shall be costs in the cause in the retrial in the Court *a quo.*

[31] I accordingly make the following order:

ORDER

1. The Appeal of the Appellant is upheld and the Judgment of the Court *a quo* is set aside.

2. The Judgment of the Court *a quo* dated 11th September 2017 is hereby rescinded.

3. The matter is referred back to the High Court for the matter to be heard *de novo.*

4. The *status quo* prevailing before the Judgment of 11th September 2017 shall be maintained pending the outcome of the hearing in the High Court.

5. The costs of this Appeal shall be costs in the cause in the matter referred back to the High Court.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

S. P. DLAMINI
JUSTICE OF APPEAL

I agree

J. M. CURRIE
ACTING JUSTICE OF APPEAL

For the Appellant : X. MTHETHWA

For the Respondent : IN PERSON