IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **APPEAL CASE NO. 103/2018**

In the matter between:

RAMASHKA INVESTMENT (PTY) LTD **Appellant**

And

ABAMBISANE CONSTRUCTION CONSTRUCTION (PTY) LTD **Respondent**

Neutral Citation: Ramashka Investment (Pty) Ltd vs Abambisane Construction (Pty) Ltd (103/2018) [2019] SZSC 58 (28 November, 2019)

Coram: S.P. DLAMINI JA, S.B. MAPHALALA JA, and M. J. MANZINI AJA

Heard: 16 and 30 October, 2019

Delivered: 28 November 2019

Summary: *Civil procedure – appeal – application for condonation for late filing of heads of argument and bundle of authorities – applicable principles – no prospects of success on appeal – application dismissed*

Civil procedure – appeal- High Court dismissing application for rescission, setting aside or variation of consent order – alleged common mistake – Rule 42(1)(c) of High Court Rules – applicable

principles – no evidence of shared or common mistake resulting in consent order – appeal dismissed

JUDGMENT

M.J. Manzini, AJA

[1] This is an appeal against a decision of the High Court dismissing an application for the rescission, setting aside or variation of a Consent Order granted by the Court on the 24th February, 2017.

[2] The events leading up to the Consent Order, as gleaned from the papers serving before us, can be summarized as follows:

2.1 On the 13th February, 2017 the Respondent (as Applicant) launched motion proceedings against MICRO PROJECTS, THE MINISTER OF ECONOMIC PLANNING AND DEVELOPMENT, ATTORNEY GENERAL AND RAMASHKA INVESTMENTS (PTY) LTD (as Respondents) wherein it sought an interdict restraining MICRO PROJECTS from making payment to Appellant's bank account in respect of a construction project (the Out Patient Department of the Mbabane Government Hospital) for the Government. The Respondent also prayed for an order directing the Applicant to make payment directly to it any monies due, owing and payable in respect of the project;

2.2 In the affidavit founding the application the Respondent set out its claims for work done and listed the invoices it had submitted to the Appellant for payment;

2.3 The contractual relationship between the parties was also set out in some detail. For purposes of this judgment it suffices to say that MICRO PROJECTS was the employer; Appellant, the Contractor; and the Respondent, a non-nominated sub- contractor;

2.4 The application was opposed by Appellant and the other Respondents. However, no Answering Affidavits were filed by either of the Respondents;

2.5 The parties soon entered into negotiations which culminated in the Consent Order granted by Maphanga J. in the following terms:

"Whereupon hearing Counsel for the Applicant and Respondents; and settlement being reached between the Applicant and 4th Respondent,

IT IS ORDERED:

1. *The undertaking by the 3rd Respondent on behalf of 1st and 2nd Respondents not to make payment to 4th Respondent or any parties pending settlement is hereby uplifted; and*

2. *The 4th Respondent is to make payment to Applicant directly in the agreed sum of E540,221-75 (Five hundred and forty thousand two hundred and twenty one emalangeni seventy five cents)."*

[3] Pursuant to the Consent Order and on or about the 13th March, 2017 the Respondent received a payment of E393,503-75 (three hundred and ninety three thousand five hundred and three emalangeni seventy five cents) from the Appellant, leaving an outstanding balance of E146,718-00 (one hundred and forty six thousand seven hundred and eighteen emalangeni) from the amount stipulated in the Consent Order.

[4] Dissatisfied with the amount received, the Respondent caused to be issued a Writ of Execution on the 21st March, 2017 for the attachment of the movable goods of the Appellant in order to satisfy the outstanding payment of E146,718-00 (one hundred and forty six thousand seven hundred and eighteen emalangeni).

[5] The Writ of Execution was duly served upon Appellant on or about the 12th April, 2017, and this triggered an urgent application by the Appellant on the 4th May, 2017 claiming, inter alia, the following relief-

"3. Interdicting, restraining, and/or staying any execution of the order granted by this Honourable Court on the 24th February 2017 against the Applicant pending finalization of this matter.

3.1 Staying the Notice in terms of Rule 45 (13) (i) issued on the 28th April, 2017;

3.2 That prayer 3 and 3.1 operates with immediate effect pending finalization of this matter;

4. *That the Honourable Court hereby varies, rescinds and/or set-aside Order 2 of the above Honourable Court granted on the 24th February 2017*

4.1 That the Honourable Court amend and/or vary the Order 2 to be:

"2) *The 4th Respondent is to make payment to Applicant directly in the agreed sum of E393,503.75 (Three Hundred and Ninety Three Thousand Five Hundred and Three Emalangeni Seventy Five Cents) in respect of Claim 10.1, 10.2, 10.4 and 10.5;*

3) The 4th Respondent is to make further payment in the sum of E146,78.00 (One Hundred and Forty Six Thousand and Seven Hundred Eighteen Emalangeni) for Claim 10.3;

4) Applicant is ordered to complete all supply, installation, and repairing the defects for the Proposed Temporary OPD Unit at Mbabane Government Hospital project stated herein below and providing evidence for usage of the sum of E67,000.00 (Sixty Seven Thousand Emalangeni) allegedly used for cancellation of gutters;

4.1 Supply and installation of bath tab mixer;

4.2 Supply and installation of soap dishes;

4.3 Supply and installation of mirrors above every wash hand basin. (Only mirrors at the public toilets were installed);

4.4 Supply and installation of large bowl slop hopper instead of the wash hand basin currently fixed on site;

4.5 Supply and installation of toilet paper roll holders for all toilets;

4.6 Supply and installation of paper tower dispenser;

4.7 Attendance of roof leakages;

4.8 Attendance to rain water leaks on upper windows;

4.9 Attendance to front gutter leakages;

4.10 Attendance to doors, door hinges plugging out, doors banging."

5. That the Honourable Court hereby set asides namely;

5.1 Any Writ of Execution against Applicant;

5.2 The Notice in terms of Rule 45 (13) (i) issued against Applicant's director;

6. A Rule Nisi be issued in terms of prayers 1, 2, 3, 3.1, 3.2, 4, 4.1, 5, 5.1,5.2

and 7 made returnable on a date to be fixed by this Honourable Court

calling upon the Respondent to show cause why these prayers should not
be confirmed and made final order of Court."

[6] In the affidavit founding the urgent application the Appellant set out a list of reasons why the outstanding payments were not due and why it was not liable to pay the Respondent. Some of these reasons are unclear, but what emerges therefrom is that the Appellant contends that during the negotiations there was a common understanding between the parties that payment for the claims filed by the Respondent would be made as and when the Appellant received payment from MICRO PROJECTS. In other words, there was a suspensive condition for payment, and which should have been included as a term of the Consent Order. The Appellant contended further that it was agreed that the Respondent would be entitled to full payment upon completion of the works it had been contracted to carry out. But since it had been discovered that the works were incomplete and the Respondent was refusing to attend to completion of the works, the Appellant was entitled to hold on to any outstanding payments as a lien or retention for completion of the works and for fixing of the defects highlighted by a consultant. On the above bases the Appellant contended that it was entitled to an order for rescission and variation of the Consent Order in terms of Rule 42(1) (c) of the Rules of the High Court.

[7] In its answering affidavit the Respondent refuted the existence of the common understanding alleged by the Appellant. The Respondent denied that there was an agreement on a suspensive condition for payment, either during the time of the negotiations or at the time of granting the Consent

Order. The Respondent contended that in the terms of the contract between the parties, whose terms and conditions were accepted, invoices were payable upon presentment, unless there was written notification of defects within a period of ten days from the date of presentment. The Respondent stated that it had completed all the works it was contracted for on the 13th September 2016. The Respondent submitted that it was not obliged to wait for payment, as it had been reliably informed that Appellant had received full payment from MICRO PROJECTS. The Respondent further contended that the Appellant was called upon to obtain a letter from MICRO PROJECTS to confirm that payment in full for the project in had not been made, but the Appellant failed to do so. The Respondent further denied that it was responsible for the works alleged to be incomplete.

[8] In his judgment Maphanga J found that the alleged common mistake was not supported by the evidence in the affidavit of the Appellant, and that there was nothing founding *"the conclusion of fact that when the parties fashioned the consent order they intended it to be conditional upon receipt by RAMASHKA of payments from the Government of Swaziland in respect of any specific invoices or claims"*. He found *"nothing indicating a consensus in the minds of the parties that payment of the agreed amount was contingent on or subject to the condition of prior approval or certification and settlement by Government of the E540,221-00 sum or any specific component thereof*". He held further that following the *"reasoning and grounds advanced for the variation of the Consent Order it becomes clear that the desired objective is to supplement and even supplant the original order with another that imports a variety of terms and conditions"*. He held

that he was not satisfied that the Consent Order was vitiated by a common mistake, and dismissed the application. Hence, the appeal.

[9] The judgment of the court *a quo* has been attacked on a number of grounds in the Notice of Appeal which reads as follows:

> *"That the Honourable Court* a quo *erred in law in fact by holding that the consent order dated 28th February, 2017 cannot be varied in terms of rule 42 (b), (c) and /or common law;*
>
> 1. *That there was no common mistake between the parties that, there was an assumption that the works, certificate, and payment for the room repairs and cleaning were already facilitated for payment by the government and Micro Projects;*
> 2. *That the Honourable Court* a quo *erred in law and in fact by holding that there was no omission on the consent order, of the suspensive clause that the monies will be only paid by the Appellant to Respondent upon receipt of the monies from Micro Project;*
> 3. *That the Honourable Court* a quo *erred in law and in fact by holding that the consent order dated 28th February, 2017 was validly made and issued without involvement of the other parties to either the negotiations and /or appearance in court to confirm the consent order;*
> 4. *That the Honourable Court* a quo *erred in law and in fact by holding that the initial application instituted by the Respondent was not contested by the Appellant, or that the claim thereto was overtaken by the consent order;*

5. *That the Honourable Court* a quo *erred in law and in fact by holding that there are alternative remedies for the Appellant".*

[10] Although having filed the appeal timeously the Appellant was unable to file the Record within the time limits prescribed by the Rules of this Court, and had to move an application terms of Rules 16 for leave for an extension of time to file the Record of Appeal, which was granted. Notwithstanding this grace the Appellant thereafter failed to file its Heads of Argument and Bundle of Authorities timeously, thus necessitating an application for condonation, which was opposed. When the matter first came before us on the 16th October, 2019 the Appellant had to deal with the application for condonation.

[11] Having assessed the issues raised in the pleadings, our initial view was that this was a matter capable of amicable settlement, particularly in light of the fact that the project had been handed over to the employer and MICRO PROJECTS was said to have paid the Appellant in full. On these bases we issued an Order in the following terms:

"Having heard Counsel for the Appellant and the Respondent and having read the papers filed of record, Court makes the following orders:

1. **The matter is postponed to 30/10/2019 in order to explore arrangements to effect the payment of the outstanding invoice;**

2. **Pending that date the parties are free to approach this Court if they have come to an agreement on the outstanding invoice;**
3. **On the return date the Appellant it to file an affidavit of Micro Projects stating whether payment of the outstanding invoice has been effected or not;**
4. **If payment has not been effected, the reasons for the non-payment to be stated;**
5. **If a lien is being exercised, the bases and reasons for the exercise of the lien must be stated; and**

6. **Costs will be costs in the cause."**

[12] On the return date the office of the Attorney General filed an Affidavit in Proof of Payment, and for which this Court expressed its appreciation. The affidavit was deposed to by a Director of MICRO PROJECTS who confirmed that there were no outstanding invoices from the Appellant, and that the last claim was settled by a payment of E637 501 -76 (Six hundred and thirty seven thousand five hundred and one emalangeni seventy cents) on the 24th March, 2017. Proof of payment to the account of the Appellant was annexed. Also annexed to the affidavit was Certificate of Claim prepared by O.C. Thindwa (Quantity Surveyor) and certified by the architect/engineer for the project, E.K. Dlamini, who happens to be the same person who deposed to the Founding Affidavit in support of the application by Appellant. It turns out E. K. Dlamini was the architect/engineer for the project, and at the same time the Managing Director of the main contractor.

[13] Notwithstanding the clear evidence that there was no outstanding payments due by MICRO PROJECTS to the Appellant in respect of the Out Patient Department Hospital project Counsel for the Appellant urged us to proceed and determine the application for condonation and the appeal. I shall deal with this stance by the Appellant when determining the question of costs.

[14] In exercising our discretion with respect to the control of proceedings in an appeal we invited counsel to address us on the application for condonation simultaneously with the merits of the appeal. Although the Heads of Argument and Bundle of Authorities were filed a day or two late, which is a negligible delay and in our view in no way prejudicial to the Respondent, the major hurdle facing the Appellant was convincing the Court that it had any prospects of success on the appeal, in the face of the affidavit in proof of payment. The core of the Appellant's arguments in the application for rescission or variation being that it had not received payment from MICRO PROJECTS. The Appellant's managing director (Elena Dlamini) stated on oath, in an affidavit dated 4th May, 2017, that the Appellant had not received payment from MICRO PROJECTS so as to be able to pay the Respondent the sum of E146,718-00. Yet, she signed a certificate dated 23rd November 2016 which triggered the payment of E638, 501 -76, on or about the 24th March 2017, to the Appellant's bank account. Try as he might, counsel for the Appellant had no coherent explanation for this glaring and misleading information bordering on perjury. On this basis alone there are zero prospects of success in the appeal and the application for condonation is dismissed with costs.

[15] Even on the merits counsel for the Appellant was at pains to point out misdirection complained of. On the papers before us there is clearly no evidence that the parties had agreed to a suspensive condition which was omitted through a common mistake. On this basis there is no reason to fault the findings of Maphanga J. The same applies to his refusal to import additional terms and conditions to the Consent Order which were clearly not the subject matter of the negotiations leading up to the Order.

[16] In summing up the legal position with respect the application of Rule 42 (1) (c)

Nestadt JA in ***Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (A) 862*** stated as follows:

> ***"I agree with the statement of Vivier J. in Theron NO v United Democratic Front (Western Cape Region) and Others 1984 (2) SA 532 (C) at 536G that the Court has a discretion whether or not to grant an application for rescission under Rule 42 (1). In relation to subrule (c) thereof, two broad requirements must be satisfied. One is that there must have been a 'mistake common to the parties'. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem (see Christie Law of Contract in South Africa 2nd ed. At 382 and 397-8). A mistake of fact would be the usual type relied upon. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions***

which, on the facts of our matter, arise. Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been as the result of the mistake. This requires, in the words of Kloff J. M Seedat v Arai and Another 1984 (2) SA 198 (T) at 201D, that the mistake relate to and be based on something relevant to the question to be decided by the Court at the time… The principle is that you cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made. The reason is obvious: the Court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake".

[17] I agree fully with the above statement. A litigant who relies on Rule 42 (1) (c) must allege and prove sufficient facts to enable a Court to conclude that the parties were of the same mind and shared the same mistake resulting in the judgment or order. If the parties are not of the same mind or share the same mistake how can it be "common" as between them? Furthermore, a party cannot create a "retrospective mistake" based on evidence which was not relevant to the order or judgment, as does the Appellant in this case. There is no evidence that the parties agreed to, let alone discussed, the "supply, installation, and repairing of defects" set out in prayer 4.1 (4) of the Notice of Motion. The purported additional terms cannot be imported by way of an application for rescission and variation in terms of Rule 42 (1) (c). Accordingly, the appeal has no merit and stands to be dismissed with costs.

Costs

[18] In light of the conduct of the Appellant, that is, by launching an application for rescission or variation based on an alleged suspensive condition, whilst having received payment from MICRO PROJECTS, clearly deserves censure by this Court. Counsel for Appellant was invited by this Court to address us on why the Appellant should not be mulcted with costs on the attorney and own client scale because of the reprehensible conduct alluded to, and nothing was said to sway us otherwise.

ORDER

[18] In the result, the Court makes the following Order:

1. **The application for condonation is dismissed.**
2. **The appeal is dismissed.**
3. **The judgment of the High Court is hereby upheld.**
4. **The Appellant is to pay the costs of the appeal on the attorney and own client scale.**

M. J. MANZINI

ACTING JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I also agree

S.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant	**:**	**H Mdladla**
For Respondent	**:**	**M Boxall-Smith**