IN THE HIGH COURT OF SWAZILAND

Case no. 1649/11B

In the matter between:-

SIZWESONKE KUHLASE	**1st Applicant**
TERENCE GININDZA	**2nd Applicant**
Le'Z INVESTMENTS (PTY) LTD t/a Le' Zone Club	**3rd Applicant**

And

YANGMO INVESTMENTS (PTY) LTD	**1st Respondent**
NATHI DUBE	**2nd Respondent**
In re:	
YANGMO INVESTMENTS (PTY) LTD	**Plaintiff**
And	
Le'Z INVESTMENTS (PTY) LTD t/a Le' Zone Club	**1st Defendant**
SIZWESONKE KUHLASE	**2nd Defendant**
TERENCE GININDZA	**3rd Defendant**

Neutral citation: *Sizwesonke Kuhlase & 2 others v Yongmo and another* (1649/11B) [2013] SZHC265 (26th November 2013)

Coram: HLOPHE J

Heard: 14/09/2012

Delivered: 26th November 2013

Summary:

Civil Law – Application to stay execution pending finalization of Rescission application – Rescission Application – Rescission in terms of Rule 31 (3) (b) and Common Law – What application ought to entail – Good cause to be shown –Good cause entails a reasonable and acceptable explanation of default and a bona fide defence – Applicants having failed to show or establish both a reasonable and acceptable explanation and a bona fide defence, application is dismissed.

JUDGMENT

[1] The Applicants, who were all Defendants in the main proceedings instituted application proceedings under a certificate of urgency seeking *inter alia* the following orders:-

1. Dispensing with the usual forms and procedure relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

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

3. That the execution of the writ issued in the main action be stayed pending the finalization of this application.

3.1 That the 2nd Respondent be ordered to release to the 2nd Applicant all the movable items attached and removed from his house and his office at gables complex.

4. That the judgment of this Honourable Court entered into on the 10th day of June 2011 be rescinded and set aside.

5. That the Defendants be granted leave to defend the main action.

6. That the 1st Respondent pays the costs of this application.

7. Further and/or alternative relief.

[2] The Applicant's case is set out in a founding affidavit deposed to by one Sizwesonke Kuhlase who is first Applicant in this application, who informs the Court that they as Applicants were served with a writ of execution on the 14th August 2012 by the second Respondent. When serving them with the writ of execution the Deputy Sheriff informed them he had been instructed to attach and remove certain goods belonging to the Applicants herein in settlement of a debt owed the first Respondent by the Applicants for arrear rentals. The judgment debt was a sum of E 117 390.00 in all.

[3] After explaining to the Deputy Sheriff that they (that is 1st and 2nd Respondent) were not indebted to the first Respondent herein, the Applicants claim to have gone to their attorney Mr. Sipho Simelane and enquired from him if he was aware of the matter. Mr. Simelane, he

says, refuted knowledge the matter resulting in the judgment sought to be rescinded and claimed knowledge or awareness of a different matter which was an application and not the action proceedings that resulted in the judgment complained of. He says they instructed their current attorney, who upon perusing the Court record, discovered that a combined summons had been issued from this Court sometime in May 2011, for the recovery of the amount reflected as a judgment debt in the writ of execution, which was the claim in the particulars of claim.

[4] The summons had, according to the contents of Applicants' files allegedly been served on the current Applicants, then Defendants, through copies allegedly left with one Lungile Sibandze at the Applicants' place of business. It was also revealed that the default judgment was granted per the Principal Judge on the 10th August 2011.

[5] It was contended that none of the three Applicants were aware of the issuance of the summons against them and furthermore, it was contended they had not been served with the summons as the person with whom the Court process was left did not bring it to their attention and was now late. The Applicants contended that they only became aware of the existence of the Court proceedings against them when they were served with the writ of execution on the 14th August 2012. They claimed, they would have defended the proceedings had same come to their attention prior to the Judgment.

[6] It is further denied that the service of the summons was proper and in accord with the Rules of Court. If same was served on Lungile Sibandze as contended, that is allegedly as a manager to the Applicants,

then such service was not in accord with the rules of Court as they were not the employees of Lungile but were her employers. The summons, it was argued, was, in such circumstances served on a person not in authority over them as required in terms of the rules and therefore that the service was irregular as it was not in accord with the Rules of Court.

[7] The deponent further expressed his belief that the summons were not served on Lungile Sibandze on the 20th May 2011, because the only process served on Lungile Sibandze on the said date was allegedly an application together with a Court order, which was taken to S. C. Simelane Attorneys, who allegedly filed opposing papers in response. As the Notice of motion concerned is annexed to the papers, it is clear that same was in relation to the application for the perfection of the Landlord's Hypothec. Clearly the order referred to was the one perfecting the Landlord's hypothec, which in terms of established procedure is obtained exparte and served together with the application on the Respondents disclosed therein. Of course such service should be as provided for in Rule 4 of the Rules of this Court.

[8] It was alleged per the Founding Affidavit that the Applicants in the current application had a *bona fide* defence to the first Respondents claim as expressed in the summons and particulars of claim. It was refuted that the Applicants were indebted to the first Respondent. It was contended that although the application proceedings resulting in the attachment of the first Applicant's movable assets had not been finalized, the attached goods were nonetheless sold in a public auction.

[9] It was contended further that despite the said sale, no account on how the proceeds were applied has been given to the Applicants contrary to the provisions of the rules of Court, particularly Rule 46. It is further averred that the first Respondent had issued two proceedings claiming the same relief against the same parties.

[10] It was contended as well that a further defence was the fact that at the commencement of the lease relationship, the 3rd Applicant had paid as a deposit a sum of E40 000.00 to first Respondent who has allegedly not accounted for the said sum to date.

[11] It was further alleged that the 3rd Applicant had been ejected from the premises in question before the lapse of the period for the lease agreed upon. Closely linked to this point, was the contention that in allegedly unlawfully ejecting the Applicants from the premises, the 3rd Applicant had suffered damages in the sum of E240 000.00, which was the income Applicants would have made over six months and was a counter claim the Applicants were having against the first Respondent.

[12] It was contended as well that the Deputy Sheriff who conducted the attachment in execution, was not a Deputy Sheriff for the District of Manzini and was therefore not entitled to execute the writ in Manzini.

[13] A further defence alleged was that there were no averments on the papers as they stood why the first and 2nd Applicants had been cited since the lease agreement was only between the 3rd Applicant and 1st Respondent.

[14] The matter was allegedly urgent because there had already issued a writ of execution to be executed against the Applicants any time which was allegedly to cause Applicants irrepairable harm after their assets would have been sold in execution.

[15] In response to the case set out by the Applicants, the first Respondent filed an opposing affidavit in which it *inter alia* raised certain points *in limine* over and above the issues raised in the merits. *In limine* it was contended that the matter was not urgent and that the application as it stood was more an abuse of the Court process. To substantiate this point, a brief chronology of the facts of the matter was set out. It was for instance contended as set out herein below that:-

15.1 The summons were allegedly issued on the 20th May 2011 and were simultaneously served on the Defendants, current Applicants, together with the application for the perfection of the Landlord's hypothec on the same day aforesaid. Such service was allegedly effected at their place of business and upon the person in charge of the Defendant's place of business. There is, as proof of the said service, annexed to the application copies of returns of service confirming the said contention.

15.2 A default judgment was granted by this Court per the Principal Judge on the 11 June 2011. By means of a letter dated the 11 July 2011, written Applicants then attorneys they were advised that a default Judgment had

been obtained and invited them to indicate how they proposed to pay the debt. The Applicants' attorneys of the time were S. C. Simelane Attorneys. The letter aforesaid was allegedly followed up by a reminder dated the 19th July 2011. These letters were annexed to the application. The reminder aforesaid was itself followed by another one dated 18th August 2011 still addressed to the Applicant's Attorneys aforesaid. This latest reminder also allegedly advised the Applicant's aforesaid attorneys that there was then to issue a writ of execution in view of their client's failure to pay. There having been no positive response thereto, the execution of the writ of execution was put into effect on the 16th September 2011, which resulted in the inventory referred to as annexure "CJ 8" being prepared by the Deputy Sheriff.

15.3 A notice of sale of the attached items was advertised in the local newspaper. This however is said to have been averted after the Applicant's through their said attorneys of record, approached the current Respondents' attorneys and negotiated a settlement of the matter amicably. This sale had been meant for the 18th November 2011. These negotiations however failed to yield fruits which prompted the Respondent's Counsel, in view of the fact that the attached assets constituted mainly alcoholic beverages which had gone bad, to write a letter dated the 28th November 2011, informing the

Applicants of these developments. Of significance in the letter is that after advising the Applicant of these developments, the Respondents Counsel stated the following in their said letter marked annexure "CJ 11":-

"2. Owing to passage of time and as a result of length (sic) negotiations between the parties we advise that the alcoholic beverages have long expired and are therefore we (sic) totally unsellable at the auction.

3. The writ therefore remains unsatisfied. We again seek your cooperation in having your clients pay its extent even if it be in terms, say of E 10 000.00 (Ten Thousand Emalangeni) per month.

4. We are now under extreme pressure from client to find closure in the matter and remit to him such sums as are due to him.

5. We have very strict instructions to resume execution against all defendants, collectively and individually if nothing concrete is forthcoming by the 5th December 2011.

15.4 Notwithstanding the clear terms of the above extract from the concerned letter, there was made no arrangement by the Applicants to pay the judgment

debt. Instead, the Respondents aver, the Applicants disappeared and played hard to get until another Deputy Sheriff than the initial one was given instructions to pursue the Applicants and execute the writ of execution. This writ was therefore only executed on or about the 12th July 2012 when the assets belonging to the 3rd Applicant were attached.

[16] The point being expressed in terms of the above chronology is that the Applicants who had become aware of the summons in May 2011 and of the default Judgment in July 2011, failed to have the Judgment satisfied by July 2012. It in fact took more than a year of the Applicants having become aware of the existence of the Judgment that the Applicants moved the current application under a certificate of urgency. The point being made is that the application is not urgent.

[17] The other point taken *in limine* was that whilst applying for rescission in terms of Rule 31 (3) (b) of the Rules of this Court, the Applicants had failed to comply with the said Rule in that they had not moved the rescission application within 21 days of their knowing about its existence. This is because despite their knowing about the existence of the judgment in July 2011, they had not moved the application until thirteen months later. Even when this was done, there was no condonation sought with regards the non compliance with what was described as a peremptory rule. In short the explanation for the delay in filing the application was unreasonable.

[18] Dealing with another aspect of the matter, the Applicants contended that they did not know about the existence of the Judgment. They however cannot realistically deny that there was communication between the Respondents attorneys and their own attorneys as borne by the correspondence written by the Respondent's council to their own counsel. Their claiming not to have been aware of the said correspondence cannot avail them as a defence. In other words the negligence by their own attorney in the circumstances of this matter can never be a justification for a rescission to be granted. Furtherstill, their own failure to liase with their own attorney for over a year cannot work in their favour. It was argued that there are several judgments of this Court where these principles have repeatedly been asserted.

[19] From the facts stated above, it seems to me that there can never be a doubt that the urgency pleaded by the Applicant is no less than a smokescreen embarked upon to delay as much as possible the finalization of the matter. Clearly whatever leniency one could think of in Applicant's favour such cannot avail them, when considering the numerous correspondences addressed to the Applicants previous attorneys of record, S. C. Simelane. It cannot avail the Applicants to suddenly describe the application for rescission they make to be one of urgency when considering that it had to take them more than thirteen (13) months to move the application. Certainly the basis for urgency should not be fanciful and should properly be supported by the facts of the matter, which is not the case herein as the basis pleaded by the Applicant are fanciful and are not supported by the facts.

[20] I would have no hesitation in upholding this point *in limine*, but in view of the fact that it does not necessarily bring about finalization of the matter as it suggests that the Applicants would have to be given more time to deal with the matter on the normal basis, which would however not be desirable when considering that the matter has already taken a long time awaiting allocation and was in any event argued in full. It is therefore not necessary to deal with the matter piece meal. Accordingly the matter should be dealt with on its merits notwithstanding my upholding this point.

[21] As indicated above, it is clear from the facts that the Applicants seek to rely on the negligence of their own attorney as well as their own failure to liase with their attorneys of record to justify their failure to know about the existence of the judgment against them. The legal position is clear that neither of these grounds can avail them. As concerns relying on the negligence of their own attorneys, the position was stated in the following words in ***Saloojee vs The Minister of Community Development 1965 (2) SA 135 at 141***, meaning that such cannot be done:-

> *"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered."*

[22] Still on the same principle, the Supreme Court stated as follows in *Johannes Hlatjwayo v Swaziland Development and Savings Bank and Others, Civil Appeal Case No.2/2010*:-

"…Matters may well be struck from the roll where there is a flagrant disregard of the Rules even though this may be due exclusively to the negligence of the Legal Practitioner concerned. It follows therefore that if clients engage the services of Practitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves not suited."

[23] Commenting on a similar position, the Court stated the following in ***Nyingwa vs Moolman N.O. 1993 (2) SA 508 at 510 I -511B***.

"The court would have to be satisfied that the defendant is absolved from blame for his ignorance of the application, and that the Attorneys were solely to blame for not having informed him of the application, and for their late withdrawal from the case. There is no evidence on the papers to substantiate such findings, but to the contrary, as is set out later in this judgment, that the defendant was grossly negligent in not keeping in contact with his attorneys and also not advising them fully of the nature of his defence."

This extract is in my view more opposite in this matter.

[24] Commenting on the failure of an attorney to get in touch with his attorney of record and then trying to use it to justify his own position, the Court confirmed in ***Leornard Dlamini vs Lucky Dlamini High Court Civil Case No. 1644/1997*** that such conduct should be construed against the Applicant himself. As it is apparent that the Applicants

failed to get in touch with their attorneys of record to get an update on their matter resulting in an adverse judgment being entered against them; they cannot rely on their own shortcomings.

[25] It is therefore very clear that despite the application being moved in terms of the particular rule, there has been failure to meet the requirements of the said rule – that is rule 31 (3) (b). The question is what is the effect of such failure in law? In other words does it or can it signal the end of the matter?

[26] The legal position is now settled that if a matter is brought seeking rescission of a judgment, the Court dealing with the matter is not confined to the particular ground on which it is brought. In other words bearing in mind that a judgment can be rescinded on such grounds as Rule 31 (3) (b); Rule 42 and the common law, it does not mean that if the Applicant cannot succeed on one particular ground; then the application should be dismissed without further questions. Instead the position is settled now that the Court must go further and establish if the Application cannot succeed on the other grounds. The case of ***Nyingwa vs Moolman N.O. 1993 (2) SA 508*** is instructive in this regard. The relevant extract therefrom was expressed as follows by White J in the said case at page 510 C-D:-

> *"Although I agree with Mr. Locke's submission that the application cannot be brought under Rule 31 (2) (b), I do not believe that it is the end of the matter. That would be too formalistic an approach. This Court must also decide whether*

the application can succeed under the provisions of either rule 42 (1) (a) or the common law."

[27] There is no allegation that there was any irregularity or error on the part of the Court at the time it granted the judgment or order complained of. This means that Rule 42 is out of the reckoning in these particular proceedings.

[28] The case is contended to be based on Rule 31 (3) (b) yet there has been no compliance with the rule. I have already stated that under this rule and the common law, a rescission of judgment application calls for the establishment of good cause by the Applicant in order to succeed. Good cause has been described as entailing two requirements which must be established, being a reasonable and acceptable explanation taken together with a *bona fide* defence which must co – exist at the time judgment was granted. See the case of ***Cash and Carry Swaziland vs Intercon Civil Appeal Court Case No.1/2001*** as well as ***Leornard Dlamini vs Lucky Dlamini High Court Civil Case No. 1644/1997***.

[29] I have already stated that the requirements of Rule 31 (3) (b) were not met in this matter considering that the application was moved out of the period contemplated and provided for in terms of the Rule concerned, which is twenty one days from the date the Applicant became aware of the existence of its order. Furthermore the facts have established that the default was neither acceptable nor reasonable.

[30] Having discounted the Rule 42 and Rule 31 (3) (b), does the application meet, the requirements of the common law? Clearly the position is settled that such an application does not require a specific period within which same has to be moved. All that it requires is the disclosure of good cause as defined above – that as entailing a reasonable and acceptable explanation for the default and a *bona fide* defence in the merits. Of course as it calls for exercise of a discretion the application should be made within a reasonable time.

[31] The facts in the present matter reveal that contrary to the contention by the Applicants that they were not aware of the order made against them, there exists proof that the summons alone were actually served at their place of business and later there exists correspondence on the basis of which the Applicants' own attorneys of choice in the matter were notified of the judgment. In fact when they failed to pay the judgment debt or to make arrangements for its payment, there was advertised a sale in execution after the goods were attached. This notice of sale attracted settlement negotiations on the part of the Applicants attorneys aforesaid, who were acting on behalf of their said clients; the Applicants.

[32] Clearly it cannot be said that the Applicants were not aware of the judgment until June 2012, when a further execution in satisfaction of the judgment was effected prompting this application. In the circumstances, there can be no doubt that the Applicants were aware of the summons in view of their having been served therewith. The position of our law is that a party cannot escape consequences of the negligence by his attorneys chosen by him. See in this regard ***De Wits***

Auto Body Repairs (PTY) Ltd v Fedgen Insurance Co. Ltd 1994 (4) SA 705 at 713.

[33] I am convinced that the facts do indicate that the Applicants have failed to show why they failed to defend the proceedings after they had been served with same and gone on to handover same to their attorneys. Just on this finding alone I have no hesitation that the application cannot succeed on this ground alone, given that both the reasonable and acceptable explanation for the default must co – exist with the valid and *bona fide* defence as set out in the judgments referred to above –***Cash and Carry Swaziland v Intercon Construction*** (supra).

[34] On the requirement of a *bona fide* defence, I have not found any that suggests a total exoneration of the Applicants from liability as they have raised mainly the defence of a counter claim. It is a settled position that such a form of defence does not necessarily have to result on the setting aside of the judgment already obtained. The Applicants are always at liability to institute proceeding for the recovery of that which they claim. That remains real and open to the Applicants at all times to pursue, particularly if it is shrouded in disputes. The other defences raised I am convinced also have no merit in them. For instance there is no merit in the contention that the first and second Applicants were being sued when considering the revelation that they are being sued on the basis of their being sureties as well as when considering they did not move timeous enough to rescind such judgment as they stayed for over a year knowing there existed a judgment against them. In fact they are shown as having engaged Respondent in settlement negotiations through their attorneys before they disappeared only to be

found after a year. In such a situation no rescission would avail them even if they had prospects of succeess. See in this regard ***Siphamandla Ginindza v Mangaliso Clinton Msibi and Others Supreme Court Case No. 29/2013***.

[35] As indicated above rescission proceedings cannot succeed where a *bona fide* defence has not been established. I am convinced that from the papers filed of record as well as on the submissions made in Court it cannot be contended realistically that there exists a *bona fide* defence. If a *bona fide* defence has not been established then a case for rescission of judgment has not been made.

[36] Since a case for the rescission of judgment has not been made, it follows that the application cannot succeed. Accordingly I make the following order:-

36.1 The Applicant's application be and is hereby dismissed.

36.2 The Applicants are ordered to pay the costs of these proceedings.

Delivered in open Court on this the …..day of November 2013.

N. J. HLOPHE

JUDGE – HIGH COURT

For the Applicants: Mr. Dupont

For the Respondents: Mr. M. Ndlovu