



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No: 1595/15

In the matter between:

BONGANI BHEMBE : APPLICANT

And

BROOKLYN INVESTMENT (PTY) LTD : 1ST RESPONDENT

SIBONISILE FRANCIHAH NKAMBULE : 2ND RESPONDENT

In Re:

SIBONISILE FRANCIHAH NKAMBULE : 1ST APPLICANT

ERIC SKHOSANA : 2ND APPLICANT

BROOKLYN INVESTMENT (PTY) LTD : 3RD APPPLICANT

AND

BONGANI BHEMBE 1ST RESPONDENT

CHARLES TFWALA (DEPUTY SHERIFF) MANZINI 2ND RESPONDENT

Neutral Citation : Bongani Bhembe vs. Brooklyn Investment (Pty) Ltd and Sibonisile Francinah Nkambule (1595/15) [2016] SZHC 132 (29 JULY 2015)

Coram : JUDGE Q.M. MABUZA

Heard : 29/04/2016

Delivered : 29/07/2016

SUMMARY

Practice – Pleadings – Application for rescission – On basis that court committed error – Court did not commit error – For application to succeed – Applicant to prove that he/she was not in willful default – and that he/she has a bona fide defence with reasonable prospects of success – Application fails and stands to be dismissed.

MABUZA J

[1] This is an application for rescission of judgment launched by Sibongile Francinah Nkambule (hereinafter referred to as Sibongile). In her notice of motion dated 16th November 2015 she seeks the following prayers:

- (1) **Dispensing with the usual forms and procedures and manner relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.**

- (2) Condoning the Applicant for the non-compliance with the said rules and procedures of this Court and time limits relating to proceedings.**
- (3) Pending finalization of this Application, the operation, implementation and execution of the Writ of Execution of this Honourable Court handed down on 4 November 2013, be and is hereby stayed;**
- (4) That Prayer 3 is to operate with immediate effect, pending the determination of the application for rescission of the judgment of the above honourable court where it handed down its interim order on the 22 October 2015 which was later made final on the 30 October 2015.**
- (5) Rescinding and setting aside the Judgment of this Court of 22 October 2015.**
- (6) Costs of suit in the event the Respondents oppose this Application.**
- (7) That the above Honourable Court grant such further and/or alternate relief as it may deem fit.**

[2] The application for rescission is opposed by Bongane Bhembe (hereinafter referred to as Bongane) Bongane filed his notice to oppose on the 17th November 2015.

[3] The interim order of 22 October 2015 was granted by Mlangeni J and is between Bongani Bhembe (Applicant) vs. Francinah Nkambule (1st Respondent) Eric Sikhosana (2nd Respondent) Brooklyn Investments (Pty) Ltd (3rd Respondent).

[4] The order reads as follows:

“WHEREUPON: Having heard Counsels for Applicant and Respondent’s it is hereby ORDERED as follows:

- 1. Directing and ordering the First and Second Respondent to forthwith restore to the Applicant possession, access, occupation and control of the Third Respondent company’s main offices and business premises situate at Office S3A, Hatzins Centre, Tenbergen Street, Manzini in the Manzini District.**
- 2. Directing the First Respondent to pay costs of suit hereof at attorney and own client scale jointly and severally.**

[5] The order of 22 October 2015 was confirmed on the 30 October 2015.

[6] Thereafter a writ of execution was issued on the 6 November 2015. The writ was for costs in the amount of E18,430.67 (Eighteen thousand four hundred and thirty Emalangeni sixty seven cents) incurred in an earlier *ex parte* application between the same parties in the matter sought to be rescinded.

[7] The Applicants in the application for rescission are Sibongile Sikhosana and Brooklyn Investments (Pty) Ltd. Even though Sikhosana and Brooklyn

Investments (Pty) Ltd have not filed any affidavits nor has Sibongile indicated that she is representing them.

[8] Sibongile and Bongani are Directors and Shareholders of Brooklyn Investments (Pty) Ltd. They no longer get along and now have an acrimonious relationship. Eric Sikhosana is described as a major businessman and resident of Siphofaneni.

[9] Brooklyn Investments (Pty) Ltd is a Company which has its business offices at No. 53A Hatzin Centre, Tenbergen Street, Manzini.

[11] It is well known that in an application for rescission, an applicant should show two things:

- (a) that he or she was not in willful default.
- (b) that he or she has a bona fide defence which has reasonable prospects of success.

[10] In her founding affidavit Sibongile says that the application which culminated in the court order of 22 October 2015 in Case No. 1595/2015 which was confirmed on the 30 October 2015 was never served on her. The

writ was served on her on the 10 November 2015. It is the service of the writ that made her aware of the judgment against her. Hence the present application for rescission.

Wilful default

[13] As a result of the non-service she could not defend the proceedings and consequently pleads that she was not in willful default.

[14] The response by Bongani is found at paragraph 25 of his opposing affidavit which states:

“Contents hereof are denied. I am advised and verily believe that during the hearing of the main matter the court duly enquired about service of my application upon the First Respondent in particular and the court was duly furnished with proof of service. The court having been satisfied with the service upon the First Applicant in particular it duly granted the order against the First Applicant. Reference is also made to the initial application which was duly received for and signed on behalf of First Applicant by the, Second Applicant in the latter’s capacity as husband of the former at the parties matrimonial home at Siphofaneni.”

[15] I have examined the return of service signed by Charles Thwala on the 23/10/2015. It is headed: “Return of service: Court Order.” In the body thereof Mr. Thwala says that he served the “above court processes.” He

states that “I exhibited the original and explained the nature and exigency of the said process Rule 4 (2) (b)”.

[17] Miss Nompumelelo Mnisi, the receptionist for Brooklyn Investments (Pty) Ltd filed a confirmatory affidavit. She has this to say:

“4. In particular I do confirm that on the 23rd October 2015 and at about 1245 hrs at my workplace, at Brooklyn Investments I was served with a copy of the court order in annexure “A” herein by a deputy sheriff who introduced himself as a Mr. Thwala which I duly received on behalf of SIBONISILE NKAMBULE (First Applicant) who was temporarily absent at the time of service.

5. I further confirm that soon thereafter on the same day (23rd October 2015) the Applicant attended at the workplace offices, Brooklyn Investment wherein I handed over to her the said court order.”

[18] In view of the foregoing I would hold that there was no error of judgment by the Court. The service of the process was not flawed.

A bona fide defence

[20] Has Sibongile shown that she has a *bona fide* defence? I think not.

- [21] I have perused her affidavit and nowhere has she disclosed a bona fide defence to Bongani's allegations in his founding affidavit deposited on the 21 October 2015 especially from paragraph 9 onwards.
- [22] Even if an applicant bases the application on Rule 42 a *bona fide* defence has to be stated so that the court before whom an application for rescission is made is in a better position to assess whether to grant the application or not.
- [23] Sadly Sibongile has not canvassed any defence in her founding affidavit.
- [24] The application for rescission fails to comply with Rule 31 (3) (b) and the common law as well as Rule 42 (1) (a). The parties should opt for an alternative conflict resolution to their matter.
- [25] In view of the foregoing the application for stay of execution (prayer 3) and application for rescission (prayer 5) be and are hereby dismissed with costs

on the ordinary scale.

Q.M. MABUZA
JUDGE OF THE SUPREME COURT

For the Applicant : Miss N. Kunene

For the Respondent : Mr. Manyatsi