IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 627/2017

In the matter between

MANGALISO DLAMINI **APPLICANT**

And

SIKHATSI DLAMINI
RESPONDENT

In re

SIKHATSI DLAMINI N.O **APPLICANT**

And

MANGALISO DLAMINI **1ST RESPONDENT**

MASTER OF THE HIGH COURT **2ND RESPONDENT**

NATIONAL COMMISSIONER OF POLICE **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

Neutral citation: *Sikhatsi Dlamini N.O. v Mangaliso Dlamini* (627/2017) [2017] SZHC 287 (12 December 2017)

CORAM **MASEKO J**

FOR APPLICANT: **MR. X. MTHETHWA**

FOR RESPONDENT: **MR. SIKHATSI DLAMINI N.O. (IN PERSON)**

DATE OF HEARING: **26 SEPTEMBER 2017**

DATE OF DELIVERY: **12 DECEMBER 2017**

Preamble

[1] Civil Procedure – Rescission of Judgment in terms of Rule 42 (1) (a) – Whether a Judgment can be rescinded where a matter has been enrolled by the Registrar on Motion Court Roll duly served on all attorneys simply because the matter had not been set down – Whether there is a procedural error in the circumstances – Attorney in default of appearance before court.

Held: That a matter duly enrolled on the Motion Court Roll by the Registrar is lawfully before a Judge and that the Judge is procedurally correct to hear that matter and pass judgment.

INTRODUCTION

[1] On the 11th August 2017 His Lordship Hlophe J granted judgment in favour of the Respondent Sikhatsi Dlamini N.O., the Applicant in the main application in the following terms:-

> '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 title under him are to be given a full calendar month from the day of this Judgment, 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 Judgment, the Applicant be

and is hereby entitled to eject the First Respondent and those holding title under him from the premises knows as Plot 14 38 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.'

[2] On the 25th August 2017 the Applicant being the 1st Respondent in the main Application launched these Rescission Proceedings in terms of Rule 42 (1) (a) on a certificate of urgency basically seeking to rescind the judgment handed down by Hlophe J on the 11th August 2017 and pending the finalization of the Rescission Application, staying the execution of the judgment ejecting the First Respondent from the premises.

[3] On the 25th August 2017 Hlophe J granted the order for a stay of the execution of the order and postponed the rest of the prayers to the 15th September 2017.

[4] On the 15th September 2017 this court was seized with contested matters and this matter was one of them. The matter was postponed to the 19th September 2017, and further postponed to the 26th September 2017 whereupon the matter was eventually argued by the Executor Dative Mr. Sikhatsi Dlamini in person and Mr X Mthethwa for the Applicant.

[5] It is important that I set out the Applicant's prayers as they appear in the Notice of Motion in terms of Rule 42 (1) (a) :-

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.
6. Further and/or alternative relief.

[6] As stated above on the 25th August 2017 the matter came before Hlophe J and he granted Prayer 4 being the Stay of Execution and postponed the other prayers to the 15th September 2017.

HISTORY

[7] It is common cause that the late Vusi Jeremiah Dlamini and the Applicant Mangaliso Dlamini are brothers, being the sons of the late Samson T. Dlamini.

[8] During his lifetime the said Samson T. Dlamini, by means of a Will bequeathed the property forming the subject matter of these proceedings, being Plot No. 1483, Extension 2, Msunduza Location, Mbabane, Hhohho District to the Late Vusi Dlamini.

[9] As a result the property concerned was duly leased to the said Vusie Jeremiah Dlamini under a ninety-nine (99) year lease, issued by the Swaziland Government.

[10] It is common cause that the said Vusi Dlamini and First Respondent stayed in those premises together with Vusie's children. It appears that after the death of Vusie Dlamini there developed enmity between the children of the late Vusie Dlamini and the First Applicant resulting in the said children moving out of the said homestead.

[11] I must point out that on the 26th June 2014 the Master of the High Court duly appointed the Respondent as Executor in the Estate of the Late Vusie Jeremiah Dlamini under Estate No. EH 14/2013. He was therefore issued with letters of Administration.

[12] On the 9th June 2017 the Respondent in his capacity as Executor instituted Motion Proceedings against the Applicant, Master of the High Court, Attorney General and the National Commissioner, for the following prayers:

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. Costs of suit in the event the Application is opposed;
5. Further and/or alternative relief.

[13] It is these main proceedings that came before Hlophe J on the 28th July 2017 and he subsequently handed down judgment on the 11th

August 2017 ejecting the Applicant – Mangaliso Dlamini – from the premises which form the subject matter of these proceedings.

[14] It is common cause that this matter was set down by the Applicant – Sikhatsi Dlamini – for hearing on the 21st July 2017. This notice of set down for the hearing of the matter on 21st July 2017 was served on the First Respondent's Attorneys on the 10th July 2017 and filed in court on the same date. It must be noted that on the 21st July 2017, the matter as set down by the Notice of Set Down dated the 10th July 2017 was not on the Motion Court roll.

[15] The matter was therefore not heard on the 21st July 2017. 1st Respondent states that he went to court on the 21st July 2017 but for some unknown reason the matter was not on the roll.

[16] The matter was then enrolled by the Registrar on the contested roll of the following week the 27th July 2017 before Hlophe J. The Respondent states that, the matter was stood down till the end of roll to accommodate Applicant's Attorneys who were not before court when the matter was initially recalled. When the matter was eventually called at the end of the roll, Applicant's Attorneys were still not before court. The matter then was argued by the Respondent and judgment was reserved and eventually handed down on the 11th August 2017. It is therefore this Judgment that has

culminated to these current Rescission of Judgment Proceedings in terms of Rule 42 (1) (a).

[17] Mr. Mthethwa for the Applicant argued strenuously that the Respondent had not set down the matter for hearing on the 28th July 2017 and that even though the matter was on the Contested Roll before Hlophe J on the 28th July 2017 the circumstances did not justify the hearing of the matter without the Notice of Set Down. He argued that the matter was therefore improperly before court in the absence of a Notice of Set Down and thus judgment was erroneously granted.

[18] It is common cause that the Motion Court Roll of every week is dispatched to all the law firms in the country through the email. It was Mr. Mthethwa's argument that they did not check the Motion Court Roll of the 28th July 2017 because no Notice of Set Down had been served on their offices. However, he confirmed that the Motion Court Roll of the 28th July 2017 was emailed to his office on Thursday the 27th July 2017 as is the normal procedure with regard to all Motion Court Rolls which are emailed to attorneys' offices every Thursdays afternoon by the office of the Registrar.

[19] The whole idea of sending the Motion Court Roll on Thursday via email is to alert attorneys of matters that are on the roll on the following day, the Friday. Every attorney is expected to go through

the Motion Roll to see if there are no matters that affect his/her office. In fact starting from the previous Friday 21st July 2017 when the matter was duly set down but was not on the roll, the duty fell on Counsel to verify with the Registrar as to the status of the matter, i.e. why the matter was not on the roll and when it could be enrolled. In his submissions Mr. Mthethwa confirmed that since the matter was not on the roll although a Notice of Set Down had been duly served he did not attend to the matter.

[20] I point out that on the 28th July 2017 this matter was on the Contested Motion Roll before Hlophe J and was item No. 2 on the roll. I do not appreciate that simply because the matter was not set down but although it was on the roll published to all attorneys' firms the previous day that justifies the Applicant's attorneys in not attending to this matter.

[21] I point out that the most prudent thing to do in the circumstances was for the Applicant's Attorney to appear in court and advise the court that even though the matter was on the roll but it had not been set down by the Applicant, and hear what the court would say instead of not attending to the matter because it was not set down.

[22] It must be appreciated that a matter appearing on the court roll having been allocated a date of hearing by the Registrar is duly enrolled and attorneys are duty bound to attend to those matters in

court, and if necessary then make whatever arrangements with the judge allocated those matters. For an attorney to say he did not see the court roll because the matter had not been set down is not acceptable. A matter that appears on the roll even though it had not been set down by either party demands of those parties to appear before court and deal with the matter. The matter could not be removed from the roll or be allocated a date of hearing or whatever, but what is important is that the parties must and should attend to it before court.

[23] This application is brought in terms of RULE 42 (1) (a) which 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;

I point out that a matter appearing on the court roll duly allocated by the Registrar who is the ultimate authority in the allocation of dates of hearing of matters before this Honourable Court is sufficient notice to any attorney of this Honourable that such matter is lawfully before that court in which the matter is enrolled.

[24] It is thus inconceivable that counsel will not appear before court for whatever reason to attend to a matter that had been enrolled for

hearing and when judgment is granted in that matter he/she turns around to apply for rescission of judgment on the basis of Rule 42 (1) (a) i.e. rescind an order or judgment erroneously granted in the absence of any party affected thereby.

[25] I point out that a matter of this nature can never be said to have been heard in the absence of the Applicant, simply because his attorneys were informed through the normal procedure of issuing the Motion Court Roll through the email system. If the matter was not on the roll it would be understandable or appreciated, but where the matter was on the roll even though it had not been set down by the Respondent, I reiterate that the duty was upon counsel to appear on the 28th July 2017 before Hlophe J, and raise whatever issue there.

[26] This is the same matter which had been set down for hearing on the 21st July 2017 and the Registrar did not enrol it. When Mr. Mthethwa was asked what he did on the 21st July 2017, his response was that he did nothing because the matter though it had been set down was not on the roll.

[27] I point out that in any matter where the rights of an attorney's client are concerned, the duty is upon counsel to ensure that the client's rights are protected throughout court proceedings. It does not matter on which side you are on, be it for the Applicant/Plaintiff or

Respondent/Defendant – it is a duty of every counsel seized with a matter to ensure that he/she attends to it as when it appears on the roll, and similarly if a matter has been set down but for some reason doesn't appear on the roll still the duty is on counsel to approach the Registrar and find out the status of the matter.

[28] It can hardly be accepted that this matter which was on the Contested Roll before Hlophe J on the 28th July 2017 and he thereafter delivered Judgment on the 11th August 2017 is not the subject of a rescission proceedings in terms of Rule 42 (1) (a). There is no substantial reason advanced by the Applicant why he says the judgment was erroneously granted by Hlophe J. in their absence when that matter was on the roll duly enrolled by the Registrar. Applicant's Counsel chose not to attend court because the matter had not been set down, this is unacceptable.

[29] In the circumstances it is therefore extremely difficult to appreciate how the Applicant perceives the Judgment of Hlophe J handed down on 11th August 2017 could be said to be -

> *'an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby'*

The reason being that on the 28th July 2017 the matter was properly on the roll having been allocated that date by the Registrar. There is therefore no error on the part of Hlophe J in hearing the matter and ultimately handing down judgment, even in the absence of the

Applicant and his attorneys because the matter was duly enrolled by the Registrar after it could not be enrolled on the 21st July 2017.

[30] The court has been referred to the Judgment of Nkambule J, as he then was, in the case of *Amos Mathalaza Vilakati Sandza Sijabulile Vilakati v Boy Leicester Vilakati & Others, High Court Case No. 1406/2002.* In this case default judgment was granted prematurely because a Notice of Withdrawal of attorneys had been filed and the Judge was not aware of the Notice of Withdrawal. This case is therefore distinguishable from the case in *casu*. The facts and circumstances are totally different from each other. It is trite law that each case must be decided on its own circumstances.

[31] 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.'*

[32] 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.'

[33] Regarding the circumstances of this case it has not been shown by the Applicant which circumstances would have induced Hlophe J not to hear the matter if he was aware of those circumstances except to say that the matter had not been set down by the Respondent.

[34] I am of the view that Hlophe J proceeded to hear the matter on the 28th July 2017 rightfully so because the matter was on the Court Roll, which roll had been served on the attorneys through the email on the 27th July 2017, a fact confirmed by Mr. Mthethwa during the hearing of this matter. I have pointed out a number of times in *casu* that the appearance of this matter on the Motion Court Roll for the 28th July 2017 was sufficient notification to all parties and the Applicant's attorneys had to attend to deal with it. It must be appreciated that here we are dealing with a matter that was active on the Motion Court Roll, it having not proceeded on the 21st July 2017. These are motion proceedings not action proceedings. These matters are dealt with by the courts even Friday during the session. Counsel should therefore ensure that the Motion Court Roll is perused thoroughly to ensure whether any matter or matters that affect their office are on the roll or not on the roll. If they are on the

roll but not having been se, ethics demand that the attorney attends court and explain to the Judge dealing with the matter its circumstances. This was a matter ripe for argument and was dealing with a sensitive issue of winding up of a deceased estate where the Applicant clearly has no defence or merit to avoid being ejected from the premises which he was in unlawful occupation thereof.

[35] The Applicant has no right or legal title to remain in the said premises knowing very well that the said house belongs to his late brother and that the transfer of the property into his brother's name was done by their father during his lifetime.

[36] The Applicant is well aware that the deceased Vusie Dlamini's are the beneficiaries to this estate and not him. Therefore applying for the rescission of the Judgment of Hlophe J is mainly to frustrate the winding up of the estate by the Respondent and also to frustrate the beneficiaries to the estate. The actions of the Applicant therefore amount to an abuse of the process of this Honourable Court, and this cannot be allowed and/or condoned.

[37] I point out that when a litigant wants to invoke Rule 42, Rule 32 or even the Common Law to rescind a Judgment, the primary onus that he or she must discharge is whether he/she has bona fide claim or defence to issues for determination by the court. A litigant should

not hide behind legal technicalities to frustrate the execution of a lawful order/Judgment duly granted by the court after having given full consideration of the pleadings that have been *Swazi Roof Masters Swazi Roof Masters Swazi Roof Masters* filed in the matter.

[38] I point out that Hlophe J considered all the issues and came to the only reasonable and justifiable conclusion that the Applicant be ejected from the premises. The Learned Judge was also very generous owing to the peculiar circumstances of the matter not to award costs against the Applicant and also most importantly allowed him a calendar months' notice to vacate the premised, in order to allow the Respondent to continue with winding up of the estate.

[39] There is no error of procedure that can be attributed to the court where an attorney is in default of appearance before that court to attend to a matter that appears on the roll which has been issued by the Registrar, who is the lawful authority.

[40] In the circumstance I had down the following order:

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. Tue rule nisi granted by Hlophe J on the 25th August 2017 as regards Prayer 4 of the Notice of Motion for the Rescission Proceedings is hereby discharged.

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

So I hand down this judgment.