IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 258/17

HELD IN MBABANE

In the matter between:

ROBERT LOBI ZWANE **APPLICANT**

And

DUPS PROPERTIES (PTY) LTD **RESPONDENT**

IN RE:

DUPS PROPERTIES (PTY) LTD PLAINTIFF

And

ROBERT LOBI ZWANE DEFENDANT

Neutral Citation: *Robert Lobi Zwane and Dups Properties (Pty) Ltd [258/17] SZHC 180 [2018] (3 August 2018)*

Coram: **LANGWENYA J.**

Heard: 15 December 2017

Delivered: 03 August 2018

Summary: *Civil Procedure-application for rescission of default judgment granted on 9 June 2017-Application for rescission filed on 9 October 2017, four months after default judgment was granted.*

Applicant was served with summons on 21March 2017 but did not enter appearance to defend-Applicant cited reasons of non-service of summons-return of service signed by deputy sheriff prima facie proof of service in accordance with Rule 4(2)-onus on the applicant to disprove service and to demonstrate that reasons exist that would have made it impossible for him to have been served.

Default judgment was granted on 9 June 2017-applicant was served with warrant of execution on 4 August 2017 and he instructed his attorneys on the same day to act on his behalf-His attorneys say so much in a letter they wrote to the respondent's attorneys on 4 August 2017-Applicant says he was served with warrant of execution in September-Applicant failed to institute application for rescission of judgment within twenty-one days after he had knowledge of such default judgment.

Applicant failed to comply with Rule 31 (3) (b) and Rule 42 of the High Court Rules.

Application for rescission of judgment dismissed with costs.

JUDGMENT

Introduction

[1] This is an application for rescission of a default judgment granted by the Court on 9 June 2017.

[2] In an action commenced by way of summons issued out of the High Court on 22 February 2017, the respondent claimed from the applicant damages in the sum of E278, 460.00 (two hundred and seventy eight thousand four hundred and sixty Emalangeni) for loss of income that the respondent would have generated but for the applicant's unlawful occupation of respondent's property; interest on that sum at the rate of nine percent per annum and costs of suit.

[3] Mr. Ndlovu and Mr. Du Pont represent the applicant and the respondent respectively. It is necessary to firstly set out the history of the matter as well as the grounds advanced by the applicant in support of the rescission sought.

Background

[4] The brief background of the matter is this: The respondent is the registered owner of certain property to wit: Lot No. 72 situate in Matsapha, district of Manzini, measuring five zero nine (509) square metres (the property). The respondent bought the property from Andries Stephanus Du Plessis. The respondent signed a lease agreement with Michael Soko who carried on a car-wash business on the property. In terms of the lease agreement, Michael Soko would pay a monthly sum of five thousand Emalangeni (E5,000.00) being rental for the car-wash business for the period starting from 19 February 2013 to February 2017.

[5] When Michael Soko took occupation of the property, he was locked out by the applicant. This, the applicant did without the knowledge and consent of the respondent and without an order of the Court. The applicant's action was therefore unlawful and wrongful.

[6] The respondent moved an application under case No. 597/2013 for the ejectment of the applicant from the property. The applicant opposed the application. The Court ruled in favour of the respondent on 8 August 2014. Notwithstanding the order of the Court, the applicant did not/ refused to vacate the respondent's property. It was only when the Court ordered the

police to assist the deputy sheriff to execute the judgment granted on 8 August that the applicant complied with the order to vacate the respondent's property.

[7] Consequently, the respondent commenced action by way of summons to claim damages for income that would have been generated from leasing the premises to tenants.

Service of Summons

[8] The applicant did not enter an appearance to defend even though, according to the respondent, he had been served.

According to the respondent, the summons was duly served on the applicant in terms of Rule 4 (2) of the High Court Rules. Rule 4 (2) states as follows:

> '[2] service under sub-rule (1) shall be effected in one or other of the following manner:
>
> (a) By delivering a copy thereof to such person personally…
>
> (b) By leaving a copy thereof at the place of residence or business of such person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age…'

[9] The applicant argues that the summons was not served on himself or on his lawyer or agent[1]. The applicant's version is that the summons was not signed (to acknowledge receipt) by the person who purportedly received it on his behalf. The applicant avers that it was only in September 2017, when he was

[1] Paragraph 7 of the Applicant's Founding Affidavit

served with a writ of execution that he sprang into action, searched and found the court record which had unsigned summons and a return of service stating that summons were served on make Gama who identified herself as the defendant's wife (the applicant herein) and a receptionist at the defendant's place of business.

[10] In deciding this question, I amongst others perused the court's file whereupon I found amongst the papers filed therein; a return of service signed by Bongani Ndwandwe. The return of service reflects that on 21 March 2017 Bongani Ndwandwe served Make Gama who identified herself as defendant's wife and a receptionist at defendant's place of business office No 9 at Old Mutual Building, Manzini. This, in my opinion is *ex facie* proof of service on the applicant. The applicant denies that he was served and avers that as a result he was not willful in his failure to defend his case. Yet the honourable judge who granted the default judgment did so because he was convinced that the applicant had been duly served.

[11] In my view, the *onus* was on the applicant to disprove service and to demonstrate two things, firstly, that reasons did exist that would have made it impossible for him to have been served and secondly, that the lapse of two months period since the writ of execution was served on him was attributable to those factors. Further, the applicant should have gone a step further to tell the court when exactly it was when he first got to know of the writ in execution against him from the respondent. Instead, the applicant avers in paragraph five of his founding affidavit that:

> ‘On or about September 2017 a certain man who identified himself as a deputy sheriff for the Court came to my place of business situated at Grand Valley in the district of Manzini armed with a writ of execution…’

[12] On the other hand, the applicant’s attorneys in a letter dated 4 August 2017 and marked ‘DP4’ in paragraph one write as follows:

> ‘We act on Mr Zwane’s behalf who has handed to us a writ presented to his family members in the above matter’

The averment in the applicant’s founding affidavit is vaguely put as it does not state the date on which the deputy sheriff served him with the writ of execution in September. On the one hand, the applicant’s attorneys say they received instructions from the applicant concerning the writ of execution on 4 August 2017. I am at a loss in trying to determine the actual time when the applicant first got to know of the judgment against him. The importance of this information cannot be overemphasized, especially in the light of the exact wording of Rule 31 (3) (b) of the High Court Rules. The Rule does not say within twenty-one days of judgment. The Rule states as follows:

> ‘a defendant may *within twenty-one days after he has knowledge of such judgment*, apply to court…to set aside such judgment…’

[13] Curiously, the applicant does not dispute that make Gama is his employee stationed at office No 9 at Old Mutual building in Manzini. The applicant’s denial is based on the fact that he does not have a wife who works for him as a receptionist. The said Make Gama states as follows in her confirmatory affidavit:

> *‘I have read both the Founding affidavit and Replying affidavit of the applicant and I confirm them in so far as they relate to me, regarding the service so claimed to have been effected by the*

Deputy Sheriff and that it is said that I received same on behalf of Mr. Zwane. I humbly submit that as an accountant I have my duties so defined at the office and they do not include receiving Court papers on behalf of the office. I further state that my employer (Mr. Zwane) gave strict orders to the effect that he personally shall receive all Court related papers. It is upon such basis that I find the averments to the effect that I received Court papers to be devoid of the truth as that would have been disobeying a direct order from my employer'.

[14] The issue concerning service is important, so I will dispose of it now. From the affidavit filed by the applicant, I have no doubt that the applicant has offices in Manzini and that Make Gama, who is over sixteen years old, is one of the employees in the applicant's office and therefore applicant's representative and as such she was at all material times in control of the office when the summons were served. How else would the deputy sheriff have known that she was Make Gama?

[15] From the contents of Zandile Gama's confirmatory affidavit and the applicant's founding affidavit the inference is overwhelming that both affidavits are deliberately drafted in ambiguous terms so as to conceal the truth about the service of the summons in the applicant's place of business. The affidavits are equivocatory and calculated to mislead. Consequently, I conclude as was submitted by Mr. Du Pont, that the summons was duly served on the applicant within the meaning of Rule 4 (2) (b).

[16] The applicant failed to enter appearance to defend the action within the time prescribed therefore by the summons. Pursuant to the Rules, the respondent applied for and obtained, a default judgment on 9 June 2017. A warrant of execution was duly issued thereafter and the warrant of execution was served on the applicant personally on 4 August 2017.

Applicant's non-compliance with Rule 31 (3) (b)

[17] In terms of Rule 31 (3)(b) of the High Court Rules an application for rescission of a judgment entered in default of a notice of intention to defend must be made within twenty-one days after the applicant has knowledge of the default judgment and on notice to the other party. The rule also provides that the applicant must furnish security to the respondent for the payment of the costs of the default judgment and the application for rescission of such judgment to the maximum of E200.00.

[18] The respondent herein avers that the application for rescission was not made within the prescribed number of days nor was the application for condonation for non-compliance with the Rules made; also, no security was furnished.

[19] The applicant has not filed an application for condonation for the late launching of the application for rescission, neither has he furnished the

Court with reason(s) for this omission. The Court is no less-wiser about the reason(s) the application for rescission was allowed to lie fallow for four months before action was taken on 9 October 2017.

[20] This means that even if the applicant's claim that he was not served with the summons were to be believed, if he seeks to have the default judgment granted against him on the basis of that return of service to be set aside, he at least had to satisfy the requirements of Rule 31 (3) (b)[2]. This, he failed to do.

For these reasons, the present application has failed to comply with the requirements of Rule 31 (3) (b).

Return of service-writ of execution

[21] There is also the small matter of how, if the applicant was served with the writ of execution in September he was able to instruct his attorneys concerning the writ of execution on 4 August 2017.

[22] The return of service for the writ of execution was signed by Mathews Potgieter and states that the writ of execution was served on the applicant personally on 4 August 2017. This, in my opinion is *ex facie* proof of service and a basis that the applicant got to know of the writ in execution on 4 August 2017 and not in September 2017.

[2] See also *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576; *Roopprarian v Kalma Lapathy* 1971 (3) SA 578.

[23] It appears from the above explanation that once the applicant's attorneys exchanged correspondence with the respondent's attorneys between August 4 and August 9, 2017, the matter lay fallow. In my view, the applicant appeared unconcerned or insouciant after instructing his attorneys to take up the matter on his behalf on 4 August 2017. There is no proper explanation for the applicant's inaction from 4 August 2017 until 9 October 2017 when the application for rescission was lodged. The applicant ought to have been more proactive or have a clear explanation for failing to be proactive.

Requirements for Rescission

[24] The requirements for rescission are trite, the decisions legion[3]. The requirements are summed up as follows:

a) the application for rescission must be *bona fide*;

b) The applicant must have a *bona fide* defence to the respondent's claim which *prima facie* carries some prospects of success on the merits;

c) The applicant must give a reasonable explanation of his default and if it appears that his default was willful or was due to gross negligence, the court should not come to his assistance.

A reasonable explanation

[3] See *Du Preez v Hughes NO* 1957 R & N 706 (SR); (1958 1 PH F 17); *Chetty v Law Society, Tvl* 1985 (2) SA 756 (A) at 765A-G; *Jika Ndlangamandla and Zeiss Investments (Pty) Ltd t/a A Zeiss Bearings Joseph Dlamini NO In re: Zeiss Investments (Pty) Ltd t/a A Zeiss Bearings and Jika Ndlangamandla* Civil appeal No. 3289/2008

[25] On the meaning of a reasonable explanation in this context, *De Witts Auto Body (Pty) Ltd v Fegden Insurance Co Ltd*[4] is instructive. Here, the court stated as follows:

> 'An application for rescission is never simply an enquiry whether or not to penalize a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence, and hence the application for rescission is not bona fide'.

[26] If the application for rescission is made under common law, the applicant is required to show sufficient cause. In common law, the court's discretion goes beyond the grounds provided for in Rule 31 and Rule 42. Trengrove AJA (as he then was) stated as follows:

> 'Broadly speaking, the exercise of the court's discretionary power [under the common law] appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default[5]'.

Although the term 'sufficient cause' cannot be precisely defined, it can broadly be crystalized into two essential elements namely:

a) That the party seeking relief must present a reasonable and acceptable explanation for default; and

b) That on the merits that party has a *bona fide* defence which *prima facie* carries some prospects or probability of success[6].

[4] 1994 (4) SA 705 (E) at 711E

[5] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042H.

[6] See Herbstein & Van Winsen, 'The Civil Practice of the High Court of South Africa', 5th edition Vol 1 at page 938.

Rescission under common law

[27] It remains for me to determine whether or not the applicant has made out a case for rescission under the common law. In this regard, I am to determine *inter alia* whether the applicant has shown good or sufficient cause, and whether the applicant has put up sufficient facts to warrant the exercise of the court's discretion in his favour in line with the principles stated above. I am also alive to the principle that an applicant is enjoined to place a clear and proper explanation of the reasons for his default before the court, the absence of which would reflect on the *bona fides* of the application.

[28] The applicant avers that he has a *bona fide* defence against the main action for damages. It is the applicant's defence that the property that is a subject of the dispute *in casu* is registered in the name of Emangweni (Pty) Ltd and that he is one of the Directors of the said company. Emangweni (Pty) Ltd has a family Trust which acquires and holds property in trust for the applicant's family. The property which is the subject of this proceeding is held by the family Trust. The family Trust has legal standing as it can sue and be sued. The applicant says he represents the family Trust. It was therefore misplaced for the respondent (the plaintiff in the main action) to issue summons against the applicant in his personal capacity-so the argument goes.

[29] The plaintiff avers in one breath that the bone of contention is between the respondent and Emangweni (Pty) Ltd and on the one hand, that the dispute is between Emangweni (Pty) Ltd and Andries Stephenus Du Plessis.

From the above explanation, I see a textbook example of conflation and obfuscation of issues by the applicant. The papers in the Court file reflect that the respondent is the registered owner of the property in issue[7]. It is also incorrect to say in law a Trust has a separate legal personality from the trustees[8]. The applicant has also not attached a copy of the Trust deed to prove its existence.

[30] The dispute is between the respondent and Emangweni (Pty) Ltd; and between Andries Stephenus Du Plessis and Emangweni (Pty) Ltd on the other is, in my view not a defence to respondent's claim in as much as it may be a defence to an action against Du Plessis.

[31] I have considered the applicant's explanation for the default. I do not accept the applicant has provided the court with a reasonable explanation regarding his inaction subsequent to the receipt of the summons of 22 February 2017 on 4 March 2017. As pointed out above, there is also no explanation for the applicant's inaction after he had been served with the writ of execution. Except for the letter that was written by the applicant's attorneys asking that the respondent's attorneys should abandon the judgment, there is no

[7] See Deed of Transfer No 123/2013, Book of Pleadings dated 7 October 2013 at page 14; see also paragraphs 16 and paragraph 17 of the respondent's answering affidavit at pages 27-28 of the Book of Pleading dated 17 November 2017.

[8] See: *Sikhumbuzo R. Mabila NO & Another v Syzo Investments (Pty) Ltd and three Others* unreported High Court Case No. 304/2013.

explanation why action was not taken after the communication from the respondent's attorney declining to abandon judgment dated 9 August 2017.

[32] In my view, the applicant was aware of the suit when he received the summons on 4 March 2017 through Ms. Gama. I take the view that the applicant appeared unconcerned or insouciant after becoming aware of the default judgment through service of the writ of execution on 4 August 2017. After receipt of the writ of execution the applicant was fully aware of what awaited him should he not take action, but there is no proper explanation for the inaction. It appears that on 4 August 2017, the applicant consulted his attorneys who in turn wrote to the respondent's attorneys. It is not clear why the matter lay fallow after the respondent's attorneys had given their response on 9 August 2017.

[33] A person who is determined to defend a claim against him should be significantly more proactive after receiving the writ of execution or have a clear explanation for failing to be proactive. None was forthcoming from the applicant.

[34] The application for rescission of judgment was delivered on 9 October 2017 some four months after default judgment was granted on 9 June 2017 and two months after a writ of execution was served on 4 August 2017. It may very well be that a period of two months does not constitute an inordinate delay

in certain cases, however, that does not exempt the applicant from applying for condonation.

Judgment Granted in Error

[35] The issue which must be determined and which is dispositive is whether the default judgment had been erroneously sought and granted within the prescripts of Rule 42 (1) (a).

Rule 42(1)(a) provides that 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 an order of judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[36] It is well established that an order or judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order[9]. Unless an applicant for rescission can prove an error or irregularity the requirement of the Rule will not be satisfied and rescission cannot be granted under this Rule[10].

[37] It was argued on behalf of the applicant that the judgment was granted in error because evidence to prove damages was not led. Thus, so it was argued, the failure to lead oral evidence in proof of damages is an irregularity in terms of Rule 42 (1) (a).

[9] *Bakoven Ltd v J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 472H.
[10] *Tom v Minister of Safety and Security* 1998 (1) All SA 629 (E).

[38] Herbstein & Van Winsen[11] outline what constitutes an error for purposes of Rule 42 (1) (a) in the following terms:

> 'The question of what constitutes an error for purposes of Rule 42 has been the matter of a number of decided cases. It seems that a judgment is 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 would have induced the judge, if aware of it, not to grant the judgment'.

[39] I am of the view that the error that the applicant is relying on is not contemplated in Rule 42[12]. Consequently, the application must fail under Rule 42.

In light of the above, the application for rescission fails and I make the following order:

The application for rescission of judgment is dismissed with costs.

M. LANGWENYA J.

For the Applicant: Mr. T.S. Ndlovu

For the Respondent: Mr. I. Du Pont

[11] 'The Civil Practice of the High Courts of South Africa' 5 ed, Vol 1 at page 931; see also *Nyingwa v Mollman N.O.* 1993 (2) SA 508.

[12] *Matsapha Town Board v Anka*