IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 1734/16

In the matter between:

EUGENE ROCHAT **APPLICANT**

And

FERNANDO JULIUS MANJEIA **RESPONDENT**

In re:

FERNANDO JULIUS MANJEIA **PLAINTIFF**

And

EUGENE ROCHAT **DEFENDANT**

Neutral Citation: *Eugene Rochat vs. Fernando Julius Manjela (1734/16) [2018] SZHC (184) 10th August 2018*

Coram: **MLANGENI J.**

Heard: **26th July 2018**

Delivered: **10th August 2018**

Summary: *Civil procedure – Rescission of judgments and orders.*

In opposing an application for rescission of a judgment granted by default the Respondent raised a point of law that the application was fatally defective for the reason that the Applicant had not specified in its papers the legal regime under which it sought rescission - i.e. whether in terms of rule 31, rule 42 or the Common Law.

On the merits, Respondent argued that the common law requirements of a reasonable explanation for the default and the existence of a bona fide defence were not met.

The default being due entirely to the ineptitude of Applicant's attorney who did not file notice to defend, one issue for determination was whether the harsh consequences of the attorney's omission should be visited upon the Applicant.

Whether, on the facts, a bona fide defence was established, and whether the non-filing of a reply by the Applicant had adverse consequences upon his case.

Held: *It is prudent and convenient that the Applicant must specify the legal regime upon which it seeks rescission, so as to make it easy for the Respondent to test the Applicant's case for compliance with the relevant requirements. But there is no legal requirement that this must be done, hence the point of law cannot stand.*

Held, further: *A litigant who fully and timeously instructs his attorney to defend a matter cannot reasonably be expected to do anything more than that, and the failure by an attorney to*

do what needs to be done does not, in the absence of a degree of culpability on the part of the litigant, make the explanation for the default unreasonable and unacceptable.

Held, further: *On the facts, the Respondent did establish a prima facie defence which has prospects of success.*

Held, further: *The purpose of a reply in application proceedings is to elucidate upon the material averments. Where disputes between the parties are clear from the first two sets of pleadings there might be no useful purpose in the Applicant filing a reply, and the position at common law that averments that have not been controverted stand is, under such circumstances, academic.*

Orders:

1. Application granted.

2. Costs to be in the cause of the main matter.

3. Applicant granted leave to defend the matter, to file his plea within a period of ten (10) days from date of this judgment.

JUDGMENT

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[1] This is an application for rescission of default judgment that was entered against the Applicant on the 4th November 2016. The rescission application was launched on an unspecified date in December 2016. It is a matter of grave concern that the matter, involving as it does a substantial amount of money, came for legal arguments only on the 26th July 2017 – more than eighteen months

later. I believe that the machinery of justice and those that operate it should do much better.

[2] It is settled and well-documented in this jurisdiction that applications for rescission can be based on any one or more of three legal regimes – Rule 31, Rule 42 and the Common Law. It is therefore desirable that the Applicant must specify the regime upon which it seeks rescission. This places the Respondent in a position to respond to the application in an informed and effective manner, and possibly to make concessions if so advised, and in the process unnecessary legal costs can be avoided or minimised.

[3] There is, of course, a risk attendant to a restrictive and specific approach to the undoubtedly wide subject of rescission of judgments and orders. It is that, in very simple terms, the Applicant may be placing all his eggs in one basket. This is amply illustrated by the case of PHAKAMA MAFUCULA v THEMBI KHANYISILE MAZIYA (BHIYA)[1] where the Applicant declared in its founding papers that it was approaching the court on the basis of Rule 42 (1) (a) or (b) which relates to error. The facts and circumstances of the matter did not establish error as defined by legal authorities, and the court came to the conclusion that it was enjoined to **"confine itself to the Application for rescission in terms of Rule 42 ……"**[2]**.** In the result, the application was dismissed. It is history that the judgment was upheld on appeal to the Supreme Court[3], albeit in the context of an application for condonation for the late noting of an appeal, where the Applicant had lost valuable time in pursuit of review proceedings, the court coming to the conclusion that not only was the Applicant culpable in respect of the

[1] (258/2015)[2016] SZHC 227.

[2] At para 29 of the judgment of His Lordship S.B. Maphalala P.J.

[3] Phakama Mafucula v Thembi Khanyisile Maziya (born BHIYA) (16/2017) [2017] SZSC 50.

delay in noting the appeal, but prospects of success on appeal were also not good.

[4] It is acceptable and prudent practice to approach the court in the alternatives of Rule 31, Rule 42 and the Common Law, so long as averments are made by the Applicant that support either one or all of the three legal regimes. It is, in my view, a paradox of sorts that the Applicant who does not specify the regime but makes averments that support rescission on either of the three grounds, is in a better position to succeed. The present application is one such case. This is the effect of legal authorities, as will become apparent later in this judgment.

[5] In the present case the Applicant has not, in its founding papers, specified the legal regime or rule upon which it seeks rescission. The relevant paragraphs of the founding affidavit are 4 and 5, and I quote them, to the necessary extent:-

> **"4. When summons were served upon me, sometime in October, I immediately instructed my attorneys L.R. Mamba & Associates, to defend the action.**
>
> **5. I state that I have a good and *bona fide* defence to action. The defence is set out herein below:**
> **5.1………..**
> **5.2………..**
> **5.3………..**
>
> **6. I state that I have always wanted to defend this matter and duly instructed my attorneys to file the necessary papers after giving them full instructions."**

[6] Unavoidably, the Respondent has had to make inferences from the above averments in respect of the legal basis upon which the application is brought. Inferences, by their nature, can be like a wild goose chase. At paragraph 5 of its opposing affidavit the Respondent raised a point of law in the following terms:-

> **"The Applicant's application is seriously misdirected, ill-informed and defective…..It is not clear *ex facie* the Applicant's founding affidavit whether the present application is based and/or founded in Rule 31 (3) (b) or Rule 42 of the High Court Rules, or whether it is founded on Common Law."**

The deponent then sets out the reasons, according to advice that he has received, why the application does not satisfy the requirements in respect of either of the three regimes.

[7] The point of law, as raised, was argued together with the merits. The issue that is raised by the point of law can be put in the form of very simple question: is it a requirement of our law that Applicants for rescission must specify, with mathematical precision, the rule or regime under which they seek rescission of a judgment or order? If the answer is affirmative, then the Respondent would succeed in its point of law. Having not come across legal authority that support the strict compartmentalization argued for by the Respondent, I asked Mr. Sibandze (for the Respondent) to direct me to such authority. With unmistakable conviction, he referred me to the cases of PHAKAMA MAFUCULA v THEMBI KHANYISILE MAZIYA (born BHIYA)[4], a recent High Court judgment that was confirmed on appeal to the Supreme Court.

[4] See notes 1 and 3 above.

8. Without ado, I mention that those cases do not support Mr. Sibandze's submissions on this important point. In the High Court matter the applicant had specifically confined its application to Rule 42 - that the order sought to be rescinded had been obtained erroneously, in the absence of the Applicant who was said to have not been aware that her attorneys had withdrawn from the matter. It was only in reply and in legal arguments that the Applicant attempted to widen the net to include grounds in terms of Rule 31 and the Common Law. Relying on the principle that an Applicant stands or falls by its founding averments, and that ordinarily a party is not allowed to fortify its case in reply, the court per S.B. Maphalala P.J as he then was, came to the conclusion that the Applicant was confined to the grounds that it set out in its founding papers, and that since the averments made therein did not sustain the application in terms of rule 42, the application was liable to be dismissed and it was dismissed on that basis. A portion of paragraph 29 of His Lordship's judgment is apposite and to the point:-

> **"Therefore, Applicant has not addressed any averments regarding rescission in terms of Rule 31 and the common law. The court will only confine itself to the Application for rescission in terms of Rule 42 as contended by the Applicant's attorney."**

[9] The Supreme Court hearing of the matter was in the context of an application for condonation of the late filing of an appeal from the judgment of His Lordship Maphalala P.J. in the *court-a-quo*. Dismissing the application for condonation, the court found that the Applicant was partly to blame for not having timeously received the notice of withdrawal from its former attorneys, was complicit in the delay to lodge the appeal, and that in any event there were no prospects of success on appeal.

[10] Again, in the case of PAUL IVAN GROENING v SIPHO MATSE[5] it is clear why the court came to the conclusion that it did. The Applicant had approached the court specifically on the basis of Rule 42 and the court was satisfied that the requirements of error were satisfied. Per Maphalala MCB as he then was:-

> **"This application should succeed in terms of Rule 42 on the basis that the court would not have granted judgment if it was aware that there was a dispute whether or not the Applicant was served with summons. Similarly, the court was not aware that the fees were disputed on the basis that no statement of account was given to the Applicant. In addition, the fees were not agreed between the parties or taxed ………."**

[11] There is no doubt in my mind that the Applicant's point of law is ill – conceived and cannot stand. And I add that, as a matter of fact, our case law is replete with judgments wherein the court was prepared to test the Applicant's averments in respect of the different rules of court and the common law, to see if a case for rescission was made out under one or the other of them. In this regard I make reference to the case of THULANI NKABINDZE v SWAZILAND DEVELOPMENT AND SAVINGS BANK AND OTHERS[6], wherein Hlophe J. said the following:-

> **"In view of the approach of the courts in rescission matters, which is that the court has an obligation to consider the facts pleaded closely to see if any of the grounds are met as was expressed in such judgments as Nyingwa v Moolman 1993 (3) SA 508 at 510 C-D, I must**

[5] (1379/12) [2013] SZHC 35.
[6] (560/2013) [2014] SZHC 213.

now consider whether the requirements of the common law as regards rescission are themselves met."[7]

[12] I mention, for the avoidance of doubt, that in the cases such as those referred to by Hlophe J., the applicant had not expressly and specifically restricted its application to one or the other of the different regimes upon which rescission can be sought.

THE LAW

[13] Coming to the merits of the matter, it is settled that an applicant for rescission must, in its founding papers, establish good cause. It is equally settled that good cause comprises two elements which must co-exist. One is that there must be a reasonable and acceptable explanation for the default; the other one is that the Applicant must have a *bona fide* defence which has prospects of success. In the celebrated case of CHETTY v LAW SOCIETY, TRANSVAAL[8] Miller J.A. eloquently put the position in this manner:-

> **"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail……no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand a party who could offer no explanation of his default……was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."**[9]

[7] At para 13 of the judgment.
[8] 1985(2) SA 750.
[9] At para D-F, page 765.

[14] The Applicant does not need to establish its defence in an exhaustive manner. It is sufficient to allege facts which, if proved at the trial, would constitute a defence. From established principles of civil procedure, the Applicant is required to make all necessary averments in its founding papers, and is ordinarily not allowed to introduce new matter in reply[10].

[15] The Applicant states that upon being served with summons **"sometime in October, I immediately instructed my attorney, L.R. Mamba & Associates, to defend the action."[11]** He further states that when a writ of execution was sought to be executed against him around the 16th November 2016, this was a **"total surprise"** to him, and he immediately called Mr. Mamba to enquire how judgment had been entered against him when he had given full instructions for purposes of his defence.

[16] Is the Applicant's explanation reasonable and acceptable? In the words of Nathan C.J., as he then was and as quoted with approval by MCB Maphalala J.[12], **"a reasonable explanation is one that shows that the default was not willful or due to gross negligence on the part of the Applicant".** I am satisfied that the explanation in this particular case meets the test. Once a litigant has given full instructions to his attorney, he is entitled to assume that all that needs to be done will be done as and when required by the rules of the court. He cannot be expected to be contacting his attorney on every other day to find out if all that needs to be done has been done.

[17] It is clear from the supporting affidavit of attorney L.R. Mamba that the default is wholly attributable to him in that a notice to defend was not

[10] Royal Swaziland Sugar Corporation Limited t/a Simunye v Swaziland Agricultural and Plantation Workers Union, Civil Case No. 2959/1997.
[11] At para 4 of the founding affidavit, p5 of the book of pleadings.
[12] In Paul Ivan Groening v Sipho Matse Attorneys and Another (1379/12) [2013] SZHC 35, at para 12.

filed as required by the rules. The critical question, therefore, is whether the harsh consequences of an attorney's ineptitude should be visited upon a litigant who, by all accounts, has acted conscientiously at all relevant times. The effect of legal authorities is that it should not be so, and indeed common sense suggests that it should not be so. The circumstances where this may be so is where the default is, to an extent, also attributable to the litigant, as was the case in Chetty[13]. The observations of Miller J.A. in that case, are very instructive. He had this to say:-

> **"It appears to me that the most likely explanation of the Appellant's otherwise inexplicable failure from April to September to offer any opposition to the Respondent's application is that he was not constant in his resolve to oppose it….Reviewing his verbal undertakings and his acts and omissions throughout that period, together with his *ex post facto* explanations, one gets the impression of moods fluctuating between a desire to achieve a particular goal and total indifference to its achievement – of a person now engaged in a flurry of activity, then supine and apathetic"[14]**

[18] In that matter the Applicant, Chetty, was an attorney, and therefore well-aware of the importance of time limits for purposes of filing court papers. In the circumstances his application for rescission could not possibly succeed and it was in fact dismissed. Although the court briefly considered whether a defence was disclosed or not, it did not need to go that far.

[13] See Note 8 above.
[14] At para C-D, p767.

[19] In the case of SAPHILA v NEDCOR BANK LTD[15], which was cited by the Applicant, the application for rescission was not opposed, but it was nonetheless dismissed. The default judgment was entered on the 20th June 1995 and the application lodged in September 1998, almost three years later. There was no reasonable explanation for the inordinate delay in bringing the application and the defence was not sufficiently particularized. It also came to light that at the time the application was moved the judgment debt had already been paid, and the Applicant's only concern was that the judgment would affect his creditworthiness.

BONA FIDE DEFENCE

[20] Applicant's alleged defence is elaborately stated in paragraph 5 of his founding affidavit. The transaction which is the basis of the suit was a sale of firearms by the Respondent to the Applicant. Applicant states that the schedule of the goods that were sold, as annexed to the summons by the Respondent as Plaintiff, is not a correct copy of the true schedule, that it was **"fraudulently prepared and presented to the above Honourable Court".** He further states that certain amounts of money were paid to the Respondent on the 18th April 2016, which had the effect of reducing the amount that was due to the Respondent. He further states at paragraph 5.6 and 5.7:-

> **"It was also brought to my attention (and this was confirmed by the defendant) that they had previously sold the same items to a certain Mr. Sharavan Rajdeo Sewpersadh for a sum of E175, 000.00……and had received various amounts from him around September/October 2015.**

[15] 1999 (2) SA 76.

Mr. Sewpersadh accordingly wanted to stop the sale and the transfer of these items from the Respondent to myself".

[21] Applicant further states at paragraph 5.8 that at a meeting of the 27th April 2016 it was agreed that he (Applicant) was to pay an amount of E96, 250.00 to the said Mr. Sewpersadh and E46, 250.00 to the Respondent. He annexes a copy of minutes of the alleged meeting, purportedly signed by himself, the Respondent and the said Sewpersadh.

[22] He states that subsequent to the minuted agreement, he paid the agreed amount of E46, 250.00 to the Respondent.

[23] The allegation of fraud aside, the Applicant is saying that he paid to the Respondent all that was due to him. These averments, if proved, would constitute a defence. Over and above that, it requires no emphasis that allegations of fraud by one litigant against another cannot be taken lightly by a court, and where they arise in the context of an application for rescission this must surely be a relevant consideration in the exercise of discretion by the court.

[24] The Applicant's version of events is vehemently denied by the Respondent in its opposing affidavit, and in some instances the **"Applicant is put to strict proof thereof"[16]** Well, if not in a trial, where else can the Applicant provide the required strict proof? This manner of pleading is a concession that there must be a further opportunity to furnish proof – at the trial.

[16] See paragraph 8 of the answering affidavit at page 23 of the Book.

[25] The Applicant did not file a reply, and Mr. Sibandze urged to the court that the Respondent's version of events are uncontroverted and therefore stand. It is not as simple as that. A reply might serve no useful purpose if it is clear from the two sets of papers that the parties' positions are polarised. If, for instance, the Applicant had been advised to file a reply, it is likely that it would do no more than re-iterate the version rendered in the founding affidavit, and the result would be a futile and costly see-saw.

[26] Having come to the conclusion that the Applicant's averments, if proved, would constitute a defence, I must grant the application for rescission and I hereby do so. Costs of the rescission application will be costs in the main matter.

[27] Leave is hereby granted to the Applicant to file a plea, and must do so within a period of ten (10) days from date of this judgment.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicant: **Attorney L.R. Mamba**

For the Respondent: **Attorney T. Sibandze**