IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1023/2013

In the matter between:

ELLEN MAGAGULA	**Applicant**
AND	
THEMBA MAGAGULA N.O.	**1st Respondent**
ESTATE LATE JOHN MAHHELANE MAGAGULA	**2nd Respondent**
ESTATE EM 232/2011	
THE MASTER OF THE HIGH COURT	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**

In re:

ELLEN MAGAGULA (NEE NENE)	**Applicant**
AND	

THEMBA MAGAGULA N.O.	**1st Respondent**
NGCEBASE MAGAGULA (NEE DLAMINI)	**2nd Respondent**
ZODWA MAGAGULA (NEE HLETA)	**3rd Respondent**
NOMTHANDAZO MAGAGULA	**4th Respondent**
NOMAGUGU MAGAGULA	**5th Respondent**
NOMALUNGELO MAGAGULA	**6th Respondent**
KHONTAPHI MANZINI (NEE MAGAULA)	**7th Respondent**
DAISY ATLEE (NEE MAGAGULA)	**8th Respondent**
THE MASTER OF THE HIGH COURT N.O.	**9th Respondent**
THE REGISTRAR OF DEEDS N.O.	**10th Respondent**
THE COMMISSIONER OF POLICE N.O.	**11th Respondent**
THE ATTORNEY GENERAL N.O.	**12th Respondent**
THE ANIMAL HEALTH INSPECTOR N.O.	**13th Respondent**

Neutral citation: *Ellen Magagula and Themba Magagula & 13 Others (1023/2013) [2018] SZHC 212 (1st October, 2018)*

Coram: FAKUDZE, J

Heard: 5th July, 2018

Delivered: 1st October, 2018

Summary: *Civil Procedure – Application for rescission in terms of Rule 42 (1) – dispute arising from fact that court ordered that matter be*

referred to oral evidence – matter revived by 1st Respondent without giving Notice to Applicant – Applicant has failed to prosecute the rescission Application timeously – also in terms of Rule 16(4)(b) once a party fails to furnish an address of a newly appointed Attorney, the other party is not obliged to serve subsequent processes. Application dismissed with costs.

BACKGROUND

[1] The late Samson John Mahelane Magagula owned a certain immovable property situated at lot 707, Extension 4, Mbabane, held under Crown Grant No 51/1997 (the property). The deceased, during his lifetime, executed a will wherein his property and other assets were bequeathed to several heirs. The 1st Respondent was nominated as an executor.

[2] On the 22nd August, 2013, the Applicant filed an Application to the Honourable Court wherein the Applicant challenged, inter alia, the distribution of assets from the estate of her late husband Samson John

Mahelane Magagula and declaring the Will of her late husband to be null and void in so far as the Applicant's half share is concerned.

[3] The Honourable Court granted an Interim Order on the 22nd August, 2013 in favour of the Applicant. Subsequent to that and while the Main Application was pending before the court, the court issued a Ruling that the matter should go to trial on certain issues which the court wanted to determine. This was on the 30th October, 2013.

PRESENT APPLICATION

[4] Before dealing with the issues in the present Application, it is worth noting that the 1st Respondent has raised four points in *limine.* These pertain to urgency, abuse of court process, doctrine of effectiveness and non-citation and non-joinder of heirs. When the matter appeared for argument, the 1st Respondent indicated that he is no longer pursuing them. They therefore remain abandoned.

Applicant's case

[5] The Applicant's case is that sometime in 2016, the 1st Respondent reinstated the matter not withstanding that the court had ruled that the matter be referred to oral evidence. In so reinstating it, the 1st Respondent did not give

any notice to the Applicant. The court then granted a final order on the 16th September, 2016 dismissing the referred matter without affording the Applicant any hearing. The Applicant further contend that it was wrong for the 1st Respondent's Attorney to revive the matter leading to the matter being finally dismissed by the court. The 1st Respondent's Attorneys have failed to produce any notice or whatsoever court document which proves that they served the Applicant. In the absence of Attorneys of Record as 1st Respondent seems to suggest, service of the Notice to revive the Application should have been effected personally on the Applicant.

[6] It is Applicant's further contention that the final Order of Court granted on the 16th September, 2016 was granted erroneously. If same is executed by the 1st Respondent, the Applicant will be left with no remedy. This is because all the assets of the joint estate between her deceased husband and the Applicant would have been depleted by the 1st Respondent.

[7] The Applicant married the late Samson John Mahelane Magagula on the 10th December, 1960, and their marriage was in community of property. She remained married to him until he was deceased. The consequence is that their estates were merged and a joint estate was formed. Accordingly, if the

Court Order is not rescinded, the Applicant will be left with nothing because the 1st Respondent is now selling the immovable property belonging to the joint estate. The 1st Respondent is acting in terms of the Will which was executed by the deceased before his death. The Will was being challenged by the Applicant in the Main Application because it contained certain clauses which purported to disinherit the Applicant from her late husband's estate.

[8] The Applicant finally submits that the final Court Order was erroneously granted by the Honourable Court. It omitted and/or overlooked important issues which the same court had reserved for trial before the matter could be decided. The purpose of the current proceedings is to rescind the said Court Order in terms of Rule 42(1)(a) of the High Court Rules.

1st Respondent's case

[9] The 1st Respondent states that there was no error on the part of the presiding Judge in granting the Order dated the 16th September, 2016 in that it is the discretion of the presiding Judge to decide whether there is a dispute of fact in a matter or not. An opinion of one Judge that there is a dispute of fact in a matter is not cast in stone. The Applicant was served with the Notice of

withdrawal of attorney and she failed to appoint an attorney within the 10 day period prescribed in Rule 16.

[10] In the present case, the alleged disputes of fact have not been particularised. Moreover, this matter was dealt with in terms of Rules 16 and 39 of the High Court Rules. It was within the trial Court's discretion whether evidence should be led or not. This is buttressed by the use of the word may in Rule 39. The Court properly exercised its discretion; it would be unfortunate for this court to interfere with that discretion.

[11] In a rescission application the Applicant must establish good cause which entails giving a reasonable and acceptable explanation for the default together with a bona fide defence. The explanation should not be couched as a dilatory stratagem geared to frustrate the successful party in the early enjoyment of the fruits of the judgment.

The Law

[12] There are three (3) ways in which a judgment taken in the absence of one of the parties may be set aside, namely in terms of (i) Rule 42 (1);(ii) Rule 31(2) (b) or (iii) at common law. In order to obtain a rescission in terms of

Rule 42(1)(a) the Applicant must show that the prior order was erroneously sought or erroneously granted. The Learned Author **Erasmus on Superior Court Practice, Juta Co** states at B1-308 as follows:-

> *"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 order, or 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."*

[13] Likewise in **Allen Magongo v Edmund Alexander Hamilton [2014] SZHC 28**, Hlophe J observed that *"…… Applicant under this rule must show the court that an Order was granted in his or her absence that affects him or her was granted in error; if this is proven……. the order without further enquiry must be rescinded."*

[14] On the lapsing and revival of an interim order Mabuza J observed in **Trevor Sibusiso Dlamini v KDG Logistics case No. (351/16) [2016] SZHC** as follows:-

"[13] On the day the matter came before court, the issue of the Interim Order in favour of the Applicant was never addressed and therefore it lapsed and was never revived.

[14] There is no application before me to revive the interim order referred to in paragraph 10 herein above.

[15] The difficulty that this court faces is that the interim order which had incorporated the order as to costs lapsed and was never revived nor was it confirmed. The debate for costs was appropriate at revival or confirmation."

COURT'S ANALYSIS AND CONCLUSION

[15] The Applicant claims that the rescission application in terms of Rule 42(1)(a) arises from the fact that the court had on two occasions ordered that the matter be referred to oral evidence. This was in 2013. In 2016 the 1st Respondent reinstated the matter without giving the Applicant any notice of reinstatement. The court then granted a final order on the 16th September, 2016 without affording the Applicant any hearing. The Order was therefore erroneously granted.

[16] The 1st Respondent contends that there was no need for the Applicant to be served with any legal process because the initial attorneys of the Applicant withdrew their services sometime in 2013. After the notice of withdrawal had been served, the Applicant failed to appoint a new attorney within 10 days as prescribed by Rule 16(4)(b) which states that:-

> "16(4)(b) *After such notice, unless the party formerly represented within ten days after the notice, himself notifies all other parties of new address for service as required under sub-rule (2), it shall not be necessary to serve any documents upon such party unless the court otherwise orders."*

[17] The 1st Respondent further contends that the Notice of Withdrawal dated 24th November, 2016 was properly served on the Applicant on the 13th April, 2016. There is a Return of Service by the then Deputy Sheriff of the above Honourable Court, Bongani Magagula. The Notice of Withdrawal was also posted into the Applicant's address. The Applicant knew about the Order sometime in 2016 and the Application for rescission has been launched in 2018. The liquidation process was completed in 2016 as well. The

Applicant also failed to ensure that the aspect that was a subject of the oral evidence is dealt with speedily not withstanding that the Applicant was the *dominus litis*.

[18] The court is in agreement with the 1st Respondent contention in that the Applicant was properly served with the withdrawal notice on the 13th April, 2016. Two years lapsed between the service of the Notice and the Application for rescission. Rule 16 entails that where a Notice withdrawing the services of an attorney has been served, the affected party must appoint another attorney within ten (10) days after such service. There is no proof that the Applicant complied with this requirement. The Applicant only complied in 2018. Although an application for rescission under Rule 42(1)(a) does not require that a party should offer a reasonable explanation for instituting the proceedings in this particular case the Applicant should have offered one. A two year period is rather a bit unreasonable in the circumstances.

[19] It is the court's further observation that Rule 16(4)(b) clearly states that if a new address of service of the newly appointed attorney is not supplied, it shall not be necessary for the other party to serve any documents upon such

party, unless the court orders otherwise. In the case before court, it was therefore not necessary for the 1st Respondent to serve the Applicant with the Notice of set down when the matter was reinstated. The court has noted that the Applicant has failed to establish if the Judge who granted the subsequent Application in favour of the 1st Respondent was aware of the earlier Rulings of the Court that certain aspects of the matter are to be referred to oral evidence.

[20] It is in my view for the above reasons that the Applicant's prayer for rescission must fail. The Applicant shall bear the costs of this Application.

FAKUDZE J.

JUDGE OF THE HIGH COURT