IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 612/18

In the matter between

LUBULAWU INVESTMENTS (PTY) Ltd	**FIRST PLAINTIFF**
FIKILE MTHEMBU	**SECOND APPLICANT**
AND	
NGWANE MILLS (PTY) LTA T/A	
FEEDMASTER	**FIRST RESPONDENT**
MUSA MAVUSO N.O.	**SECOND RESPONDENT**
In Re	
NGWANE MILLS (PTY) LTD T/A	
FEEDMASTER	**PLAINTIFF**
AND	
LUBULAWU INVESTMENTS	
(PTY) LTD	**FIRST DEFENDANT**
FIKILE MTHEMBU	**SECOND DEFENDANT**

Neutral citation: *Lobulawu Investments (Pty) Ltd & Another vs Ngwane Mills (Pty) Ltd & Another [612/18] [2019] SZHC 202 (25th October 2019)*

Coram: FAKUDZE, J

Heard: 1st October, 2019

Delivered: 25th October, 2019

Summary: *Civil Procedure – rescission under Rule 42(1) (a) – No error shown – application dismissed with costs.*

JUDGMENT

BACKGROUND

[1] The Respondent issued out summons on the 12th April, 2018 based on a written Credit Agreement between the Respondent and the Applicants. The Applicants filed their Notice of Intention to Defend on the 4th May, 2018 through their former Attorneys.

[2] The Respondent then filed a Notice of Application for Summary Judgment on the 29th May, 2018. The Applicants filed an Affidavit Resisting Summary Judgment in terms of which they admitted that the Agreement for the supply of chicken feed between the parties is not an issue nor is the quantum an issue, but only had an issue which according to them they had allegedly been given a discount of Four Hundred Thousand Emalangeni

(E400,000.00) and as such there was a dispute which would necessitate the Summary Judgment Application being dismissed. This also meant that they did not dispute the amount of Six Hundred and Twenty Six Thousand Nine Hundred and Fifty Six Emalangeni (E626 956.00) on the 5th February, 2019 which transaction was paid to the account of Ngwane Mills yet the Deed of Settlement stated otherwise.

[3] On the 13th February, 2019, the Respondent's attorneys caused to be issued a warrant of execution against the Applicants through which they discovered as the Applicants alleged that payment of the Six Hundred and Twenty Six Thousand Nine Hundred and Fifty Six Emalangeni (E626 956.00) had been paid already yet no proof of payment had been given to Respondent's Attorneys nor were they informed of such payment either telephonically or by way of a letter. Furthermore in respect of the Deed of Settlement, the Applicants confirmed to be accountable for all the interest that was payable on this amount as from date debt arose which interest amount is in the region of Fifty Nine Thousand Six Hundred and Seventy Two Emalangeni Forty Seven Cents (E59,672.47).

Rescission

[4] The Applicants then filed a Rescission Application dated 4th March, 2019 seeking the following:

> *"3 Rescinding varying and/or setting aside in part of the judgment granted in favour of the Respondent against the Applicant on the 18th December, 2018, in particular, clauses 5.2 of the Deed of Settlement on the ground that it was granted in error.*

4. That a Rule Nisi returnable on a date to be fixed by the above court, hereby issue calling upon the Respondent to show cause why, on such date as the court may direct, an order in terms of prayer 3 should not be made final.

5. Staying further execution of the warrant of execution in possession of the 2nd Respondent bearing the court stamp dated the 14th February, 2019 pending finalisation of this Application.

6. Costs of suit.

[5] The Respondent has opposed the Rescission Application on the basis that the requirement for rescission based on Rule 42(1) have not been met.

The parties' submission

[6] Before dealing with the merits of the Rescission the Respondent has raised four points of law. These points pertain to urgency, improper application of Rule 42, abuse of court process and the fact that the Applicant is in contempt of court. During Argument, the Respondent only pursued the issue of improper Application of Rule 42. If the court finds merit in the Respondents Argument on Rule 42, the matter will come to an end, but if it dismisses the point, the merits will be dealt with.

The Respondent

[7] The Respondent argues that the Applicants are relying solely on Rule 42 (1) (b) which states that an order or judgment can be rescinded where there is an ambiguity or patent error or omission but only to the extent of such ambiguity, error or omission. Case law has described a patent error or

omission as an error or omission as a result of which judgment or order does not reflect the intention of a judicial officer pronouncing it. Relief will only be accorded where the terms of the judgment do not reflect the true intention of the presiding judge. In the present application the founding papers do not disclose what the Learned Judge expressed himself ambiguously or committed an error.

The Applicant

[8] The Applicants states that it mistakenly referred to Rule 42(1)(b) when laying a base for the rescission. The intention was to rely on Rule 42(1)(a).

The Court

[9] The Court's view on this point of law is that same should be dismissed. It is a mere technicality. The substance of the Application is based on Rule 42 (1)(a). The Applicants can be pardoned for making reference to a wrong Rule. The point of law is therefore dismissed.

Merits

[10] The Applicants state that when the Deed of Settlement was signed on the 18th December, 2018, there was agreement on the capital sum. The query pertains to the payment of interest and the costs. The Applicants allege that the Attorney who signed the Deed did not have instructions to enter into same. The questionable part imposes obligations on the Applicants which were not part of the initial agreement between the parties. The agreement in its current form is ambiguous and incapable of enforcement. It does not state the date on which interest is to run yet that is placed in dispute in the papers before court. The consent order based on the proposed settlement is

liable to be set aside in terms of Rule 42. The Applicants finally contend that if the court was aware that the former Attorney representing the Applicant had no instructions, it would not have endorsed the consent order. It supports its proposition with the case of **Joseph Lokotfwako V Langatile Lokotfwako and 2 Others, High Court Case 3391/08**.

[11] The Respondent argues to the contrary when it says that as a procedural step, Rule 42(1)(a) is invoked where 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 record. A court in deciding whether a judgment is erroneously granted is, like a court of appeal, confined to the record of proceedings. Once the Applicant can point to an error in the proceedings, he is without further ado entitled to rescission.

[12] The Respondent further contends that the Deed of Settlement was consensual. That being the case, unless there is an error that is patent *ex facie* the order sought, it cannot be conceived how such order could be erroneously granted. This is so by reason of both the form and content of such an order having been placed consensually before court by both parties in an opposed application to be made an order of court.

<u>The Applicable law</u>

[13] Rule 42(1)(a) of the High Court Rules state 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

> (*a*) *An order or judgment erroneously granted in the absence of any party affected thereby."*

[14] In **Mafucula V Thembi Khanyisile Maziya (Bhiya) High Court Case 258/2015 SZHC 227**, His Lordship Maphalala, PJ as He then was, had the following to say:

> *"In my assessment of the papers and arguments of the attorneys of the parties, rescission Application under Rule 42 stands to be set aside for failure to establish an error committed by the court. In the present case this purported error if it is one was committed by the Applicants erstwhile attorneys and the Applicant has itself complicit in its commission. In this regard I agree with the arguments of the attorney of the Respondent that the Applicant cannot reasonably rely on the omission of its lawyers to found an error under Rule 42. The error in terms of this Rule must have been committed by the court.*

[15] Maphanga J. had an opportunity to do an exposition of Rule 42(1) (a) in **Ramashka Investments V Abambisane Construction (Pty) Ltd and 3 Others (193/2017) SZHC 228 (2018)** (13th December, 2018) in the following manner:

> *"[22] Rule 42(1)(a) refers to orders or judgments erroneously sought or erroneously granted in the absence of any party affected thereby. That rule is problematic for the Applicant in two respects – firstly it explicitly applies to and is intended for default judgment or orders granted in the absence of the affected party or aggrieved party. Secondly, it provides for variation of rescission of judgments sought or granted in error."*

[16] His Lordship continued to observe as follows in paragraph 23:

"[23] It is my considered view particularly as pertains to consensual orders that unless the error is patent ex facie the order sought, I cannot conceive of how such orders could conceivably been erroneously granted in these circumstances. This is so by reason of both form and content of such order having been placed consensually before court by both parties in an opposed application to be made an order of the court. The orders were not erroneously entered or granted."

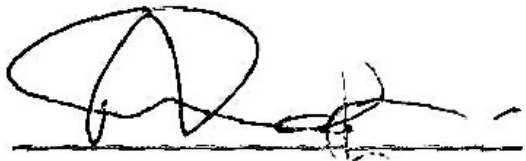
Conclusion

[17] Case law clearly states that for an error to fall within Rule 42(1)(a), it must be *ex facie* the court record. This means that the error must have been committed by the court. The party that is applying for rescission must show what error exists *ex facie* the orders.

[18] It is this court's view that an error that is not by the court does not meet the rescission requirements under Rule 42 (1)(a). In the present case the Applicants have not alleged an error which was committed by the court, but have referred to errors allegedly committed by its former attorneys. The court further holds the view that the Order being sought to be rescinded was a judgment made consensually between the parties through their legal representatives. There is no error that is patent *ex facie* the order that the Applicants have pointed out.

[19] When one goes through the correspondence between the parties there is nothing to suggest that the issue of interest and costs were an issue at all. This was the case before and after the signing of the Deed of Settlement.

[20] I therefore come to the conclusion that the Application for rescission should be dismissed with costs at an ordinary scale.



FAKUDZE J.

JUDGE OF THE HIGH COURT

Applicant: S.C. Simelane

Respondent: Boxshall Smith