



IN THE HIGH

COURT OF ESWATINI

JUDGMENT

CASE NO.901/2021

In the matter between:

SIPHO MKHOMBE

Applicant

And

PURPLE RAIN (PTY) LTD

Respondent

In Re:

PURPLE RAIN (PTY) LTD

Applicant

And

**SIPHO MKHOMBE
THE NATIONAL COMMISSIONER OF THE
ROYAL ESWATINI POLICE SERVICE
THE COMMISSIONER GENERAL OF HIS MAJESTY'S
CORRECTIONAL SERVICES
KOSELTRONICS INVESTMENTS (PTY) LTD
ATTORNEY GENERAL**

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

In Re:

PURPLE RAIN (PTY) LTD

Applicant

And

**KOSEL-CCTV (PTY) LTD t/a KOSEL SYSTEM
KOSELTRONICS INVESTMENTS (PTY) LTD**

1st Respondent

2nd Respondent

**SIPHO MKHOMBE
STANDARD BANK SWAZILAND LIMITED
ABEDNEGO M. MKHOMBE**

**3rd Respondent
4th Respondent
5th Respondent**

Neutral citation: *Sipho Mkhombe v Purple Rain (Pty) Ltd In re: Purple Rain (Pty) Ltd v Sipho Mkhombe & 4 Others In re: Purple Rain (Pty) Ltd v KOSSEL-CCTV (Pty) Ltd t/a Kosel System & 4 Others (901/2021) [2021] SZHC 165 (27 September 2021)*

Coram : **T. Dlamini J**
Heard : 21 September 2021
Delivered : 27 September 2021

[1] Civil law and procedure – rescission application – rule 42 and common law requirements considered

Summary: *A rule nisi was first issued against the applicant for freezing an account for his business held with standard bank of Eswatini – the rule was also for piercing the corporate veil of two companies in which the applicant is allegedly a director – the rule further called upon the applicant to show cause why he should not be held to be in contempt for his failure to comply with a settlement agreement which was made an order of court – despite extended periods of filing opposing affidavits the applicant did not file any and the rule was accordingly confirmed – an interlocutory application was then filed seeking enforcement of the apprehension of the applicant – the application was granted – applicant then filed another interlocutory application seeking a stay and rescission of the order.*

Held: *That the rescission application fails the test it should pass in terms of rule 42 and/or the common law – application dismissed with costs.*

JUDGMENT

[1] On 27 August 2021 the applicant filed an interlocutory application under a certificate of urgency wherein the following orders were sought:

1. *Dispensing with the normal time limits and manner of service provided for in the Rules of the above Honourable Court and granting leave for this application to be heard as one of urgency.*
2. *Condoning Applicant's non-compliance with the Rules of this Honourable Court.*
3. *Staying the execution of the order of the 26th August 2021 in this matter pending finalization of this application.*
4. *That a rule nisi do hereby issue calling upon the Respondent to show cause on the day to be determined by the above Honourable Court why:*
 - 4.1 *The order made by the above Honourable Court under Case No. 901/2021 on the 26th August 2021 should be and is hereby rescinded and/ or set aside.*
5. *That prayers 1, 2, 3 and 4 hereof be granted as an interim relief to operate with immediate effect pending the return date to be determined by the court.*
6. *Costs of suit in an event of opposition.*
7. *Granting further and/ or alternative relief.*

[2] The application is premised on another interlocutory application which this court heard yesterday (26 August 2021) and in which the applicant was a first respondent. The court granted the following orders:

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing the matter to be heard and enrolled as one of urgency.
2. Directing and authorizing the Second Respondent (The National Commissioner of the Royal Eswatini Police Service) through his officers to search, pursue and apprehend the First Respondent (Sipho Mkhombe) forthwith and hand him over to the Deputy Sheriff of the district of Hhohho pursuant to being in contempt of Court.
 - 2.1 ...
3. Authorizing the Second respondent to locate, seize and attach motor vehicles to wit:-

Make: BMW X5
Registration number: JJ 49 MK GP
Engine number: 21601215
Chassis number: WBSKT620600C90272
Colour: Blue

And

Make: Mercedes Benz
Registration number: HM 76 GW GP
Model: A 45 AMG 4MATIC
Colour: White
Chassis number: WDD 17605 22 J34 1935

4. Authorizing the Second Respondent to break-in and enter, if necessary, with force, any premises to apprehend the First Respondent (Sipho Mkhombe) and also for the attachment and removal of the motor vehicles in prayer 3 above.
5. ...
6. Costs of suit at the attorney and client scale.

[3] The notice of motion included prayers 2.1 and 5 which however, were withdrawn by the applicant's attorney. Prayer 2.1 sought an order declaring that prayer 2 operate with interim and immediate effect. Prayer 5 sought that a *rule nisi* be issued calling upon the first to fifth respondents to show cause why prayers 1 to 6 should not be made final on a date to be determined by this court.

[4] In the present application the applicant seeks an order rescinding and setting aside the judgment of 26 August 2021 set out in paragraph [2] above.

[5] The background of the matter is that on 13 May 2021 the respondent herein [Purple Rain (Pty) Ltd] moved an application on an *ex-parte* and urgency basis and sought the following prayers on an interim basis:

1. *Dispensing with the usual forms and procedures relating to the institution of the proceedings and allowing the matter to be heard and enrolled as one of urgency.*
2. *Directing and authorizing the Fourth Respondent to forthwith freeze the funds/monies held in the First Respondent's bank account held by Fourth respondent as follows:*

Bank: **Standard Bank Eswatini Limited**

Account number: **911 000 5113388**

Branch code: **663-134**

and be payable to a neutral account or Applicant's attorneys Trust Account pending finalisation of this matter.

2.1 *That **prayer 2 and 3** operate with immediate interim effect.*

3. *The Court pierces the corporate veil and to hold the First and Second Respondents as alter egos of the Third Respondent.*
4. *The Third Respondent be and hereby be held to be in contempt of Court for failure to disclose payments received by First Respondent and Second Respondents to Applicant as and when received and he be committed to goal for thirty (30) days or as the Court may deem fit.*
5. *That a Rule Nisi do hereby issue calling upon the First, Second and Third Respondents to show cause why prayers 1 to 6 should not be made final on a date to be determined by the above Honourable Court.*
6. *Costs of suit against First, Second and Third Respondents in the event of unsuccessful opposition.*
7. *Any further and/or alternative relief.*

[6] The parties in these proceedings were cited as listed below:

PURPLE RAIN (PTY) LTD

Applicant

And

KOSEL-CCTV (PTY) LTD t/a KOSEL SYSTEM **1st Respondent**

KOSELTRONICS INVESTMENTS (PTY) LTD	2nd Respondent
SIPHO MKHOMBE	3rd Respondent
STANDARD BANK SWAZILAND LIMITED	4th Respondent
ABEDNEGO M. MKHOMBE	5th Respondent

- [7] After hearing counsel for the applicant the court issued a *Rule Nisi* and ordered prayers 2 and 3 to operate with immediate interim effect. A return date of 27 May 2021 was ordered by the court and respondents were permitted to anticipate the return date on notice of not less than 24 hours.
- [8] The applicant averred that it has a long history of breached agreements which resulted in the institution of a lawsuit in July 2018 against the second and third Respondents for monies loaned and advanced. The court was referred to an attached copy of a summons under case number 1058/2018 marked as Annexure “PR1”. The applicant obtained judgment in the sum of **One Million Four Hundred and Twenty Thousand Four Hundred and Seventy-Five Emalangenzi Five Cents (E1, 420, 475.05)** in those proceedings.
- [9] The applicant also averred that the Second and Third Respondents would make empty promises and undertakings to settle the amount due and owing but did not fulfill the promises. The applicant then exercised its right to execute which resulted in the parties entering into a Final Settlement Agreement on the 2nd July 2020 (Annexure “PR3”). Under clause 2 of the settlement agreement, the following is provided:

2.3 In the event that any of the Judgment Debtors are due to receive substantial amounts of payments, they shall report to Judgement Creditor and further make such payment to the Judgement Creditor as payment of the debt owing.

2.4 The payments are to be made to the offices of the Judgement Creditor’s attorneys.

[10] The settlement agreement was made an order of Court on 2nd July 2020. It however was not complied with as the respondents continued to be in default and also did not make any payment on the signature date as agreed. The applicant then executed and attached a Ford Ranger with registration “AYALI SD”. The third respondent however resisted its surrender. This resulted in applicant instituting interlocutory contempt proceedings for the failure to surrender the attached *merx* and was successful in those proceedings. This was despite a plea made by the third respondent that the motor vehicle does not belong to him nor to the second respondent but to a Trust known as Ayali Trust.

[11] The applicant now contends that it came to its knowledge on 12 May 2021 that the Third Respondent had deregistered the Second Respondent and did not disclose this fact. It also contended that at the time of deregistration, the second respondent was operational and having business interests under the directorship of the third respondent who is also a surety and co-principal debtor with the second respondent. It is contended by the applicant further that the deregistration of the second respondent was pursuant to the contempt proceedings and was technically intended to repel any execution against his properties and those of the second respondent.

[12] It is averred by the applicant that the third respondent then registered a new company, *viz.*, the first respondent. In registering the new company, the third respondent appointed and registered, as the new company’s sole director and shareholder, one Abednego M. Mkhombe who is the third respondent’s father. The applicant contends that at his advanced age of 86 years, the registered sole director and shareholder (Abednego M. Mkhombe) plays no active role in the running, management and control of the first respondent but

same remained under the third respondent. All transactions, including bank accounts, are executed by the third respondent for his own personal benefit.

[13] It has also been contended by the applicant that on or about the 30 November 2020 the third respondent, using the First Respondent as his conduit, entered into a proposal which has been approved by the Eswatini Government for the supply and installation of wall mounted temperature scanners. The contract value of this work is the total sum of **Seventeen Million Seven Hundred and Forty-Two Thousand Nine Hundred Emalangi (E17, 742, 900)**. Copies of the approved proposal with its quotation and payment schedule are attached as Annexures “PR8” and “PR9” respectively.

[14] The applicant contended that it has been advised and verily so believe that the first payment has been made by the first respondent’s client (the Eswatini Government). These funds are in the first respondent’s account held with the fourth respondent. These are some of the alleged facts on which the application is premised.

[15] On the return date (27 May 2021) no opposing affidavit had been filed by the respondents. Instead, a notice to oppose was filed from the bar by FAKUDZE ATTORNEYS as attorneys of record representing the First, Third and Fifth Respondents. Attorney Mr T. Fakudze is the attorney from FAKUDZE ATTORNEYS who appeared on behalf of the above named three respondents.

[16] Having been served with the notice to oppose, the court issued fresh timelines for filing papers. I say the court issued ‘*fresh timelines*’ because a party who wishes to oppose must file and serve an answering affidavit in which his defence is set out and the applicant becomes entitled to file a replying

affidavit. **See: Bader & another v Weston & another 1967 (1) SA 134.** If the application is opposed, the matter is for argument on the return date.

[17] The legal authors **Herbstein & Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed., Vol.1 at p.457,** state what is quoted below:

“On the return day of the rule, the applicant moves to have the rule made final or absolute, and the matter, if opposed, is then argued. The court may then make the rule absolute or discharge it.”

[18] In terms of the new filing timelines, the respondents were ordered to have filed opposing affidavits by 2nd June 2021. The applicant was ordered to have filed a reply by 8th June 2021. The matter was then postponed to 17 June 2021 and the rule was extended accordingly.

[19] Due to reasons beyond control, I was unable to be in court on this new date and I requested my brother Fakudze J. to extend the rule and postpone the matter to 28 June 2021. When the matter was called on 28 June 2021, Mr S. V. Mdladla appeared on behalf of the applicant and Mr T. Fakudze appeared on behalf of the first, third and fifth respondents as per the notice to oppose filed by him personally on the 27 May 2021. It turned out that none of the respondents filed an opposing affidavit. It also turned out that no opposing affidavit which was accompanied by an application for condonation of late filing was ever filed. Mr Mdladla correctly applied for confirmation of the *rule nisi* and the court did not have any justification for a refusal to grant that prayer. A period of a full month and two weeks had elapsed without the respondents filing any affidavit in opposition. The court accordingly confirmed the *rule nisi* issued on 13 May 2021.

[20] Confirmation of the *rule nisi* on 28 June 2021 lifted the corporate veil and effectively declared the first and second respondents to be ‘alter egos’ of third respondent.

[21] The applicant now contends that the third respondent caused to be deregistered the second respondent from the register of companies and then registered the first respondent on purpose. This was done in order to repel attempts to execute against property owned by the second and third respondents. He did so because His Lordship Hlophe J. (under case 1058/2018) authorized execution against the Ford Ranger motor vehicle which the fifth respondent denied to be owned by him or by first respondent and deposed that it belongs to a Trust called Ayali Trust.

[22] The court, per Hlophe J., (as he then was) held that this is one instance where it would disregard the veneer of the trust or even treat the trust as the ‘alter ego’ of the trustees. The court so held because the third respondent is the founder and trustee of the Trust. The court therefore authorized that the motor vehicle be attached for the debts of the second and third respondents. The lifting of the corporate veil on the 28 June 2021 permitted the applicant to execute against property of the first respondent as well. This has however been resisted and repelled by the first respondent by acting violently towards the instructed Deputy Sheriff.

[23] On 16 August 2021 the applicant filed an interlocutory application on an *ex-parte* and urgent basis. The matter was however enrolled and called on 26 August 2021 on account of time constraints. The parties in this interlocutory application were cited as shown below:

PURPLE RAIN (PTY) LTD

Applicant

And

SIPHO MKHOMBE	1st Respondent
THE NATIONAL COMMISSIONER OF THE ROYAL ESWATINI POLICE SERVICE	2nd Respondent
THE COMMISSINER GENERAL OF HIS MAJESTY’S CORRECTIONAL SERVICES	3rd Respondent
KOSELTRONICS INVESTMENTS (PTY) LTD	4th respondent
THE ATTORNEY GENERAL	5th Respondent

[24] The applicant sought the prayers set out in paragraph [2] above. Attorney Mr H. Mdladla appeared on behalf of the applicant. He informed the court that prayers 2.1 and 5 of the notice of motion are being withdrawn and that he applies for a final order. He submitted that the first respondent is fully aware that he was found guilty of contempt of court in terms of the order issued on 28 June 2021. This order was issued in the presence of his attorney Mr T. Fakudze.

[25] Being privy of the facts and circumstances of this matter, I granted the orders prayed for in terms of prayers 1, 2, 3, 4 and 6 of the notice of motion. In terms of prayer 2, the Second Respondent was ordered, directed and authorized, through its officers, to search, pursue and apprehend the First Respondent forthwith and hand him over to the Deputy Sheriff of the District of Hhohho pursuant to being in contempt of court. He had not yet purged the contempt he was found guilty of in terms of the *rule* confirmed on 28 June 2021 but continued to act contemptuously.

[26] On the following day (27 August 2021) the first respondent filed another interlocutory application on an urgency basis seeking an order staying

execution, and rescinding and/ or setting aside the order issued on 26 August 2021. The prayers sought are set out in paragraph [1] above. On this day I only granted an interim order staying execution of the order directing the police to apprehend the applicant and hand him over to the Deputy Sheriff pursuant to the contempt finding against him.

[27] Mr Mdladla for the respondent then filed a notice to anticipate and discharge the *rule nisi* staying execution of the order for the apprehension of the applicant by the police and handing him over to the Deputy Sheriff. This was on Friday the 3rd September 2021 and the matter was to be heard on Tuesday 7th September 2021. It however turned out that the notice to anticipate and discharge the *rule* was served upon the applicant on the very same morning of 7th September 2021 at 0845 hours. The matter was then postponed to 14 September 2021 for arguments.

[28] Mr Mdladla submitted that the applicant has approached this court with ‘*dirty hands*’ in that to-date, he has willfully failed, neglected and/or refused to comply with the Settlement Agreement dated 2nd July 2020 and which was made an order of this court. The applicant also failed to comply with the conditions of the Settlement Agreement and the court accordingly held him to be in contempt. He therefore argued that the applicant cannot be afforded redress and benefit from his unlawful conduct.

[29] In dealing with issues that concern the two companies, I wish to mention that on account of the more than one interlocutory application moved in this matter, I will refer to KOSEL-CCTV (PTY) LTD t/a KOSEL SYSTEM as the “*newly registered company*”, and to KOSELTRONICS INVESTMENTS (PTY) LTD, as the “*first registered company*”.

[30] It was submitted on behalf of the applicant that the Settlement Agreement on which the finding of contempt is based was between the respondent (Purple Rain (Pty) Ltd and himself with the ‘*first registered company*’ as defendants. The ‘*first registered company*’ unfortunately did not perform well and was therefore deregistered on 4th September 2020. The deponent (applicant) states in his affidavit that no payment was received by the ‘*first registered company*’ after the agreement was made an order of court on 2nd July 2020. The last payment received by it was on 31 March 2020 for the sum of **E57, 902.88** from Eswatini Electricity Company. The ‘*newly registered company*’ got involved when the court granted the order piecing the corporate veil and declared both the ‘*first registered company*’ and the ‘*newly registered company*’ alter egos of the applicant.

[31] In paragraph 9 of the founding affidavit, the applicant states what is quoted below:

“I am advised and verily believe that KOSEL-CCTV t/a KOSEL SYSTEMS (the ‘newly registered company’) instructed its attorneys to oppose the Application of the 13th May 2021, unfortunately the Attorney was not able to file an answering affidavit as the sole director of KOSEL-CCTV t/a KOSEL SYSTEMS by the name of Abednigo M. Mkhombe was indisposed and unfortunately he has since passed on due to the illness that he was suffering from at the time when he was needed to give full instructions as well as depose to the answering affidavit. The Respondent was made aware of the ailing condition (of the Director) of KOSEL-CCTV t/a KOSEL SYSTEMS. Herewith annexed is a letter informing Respondent of the health condition of KOSEL-CCTV t/a KOSEL SYSTEMS’s Director marked “B” and (herewith find annexed is Abednigo M. Mkhombe’s death certificate marked “C”).”

[32] The applicant therefore states in paragraph 10 of the founding affidavit that he is “*not in a position to disclose payments received by KOSEL-CCTV t/a*

KOSEL SYSTEMS because I am not its director so therefore the order that the applicant alleges I am in contempt of is impossible to perform.”

[33] The applicant’s attorney correctly pointed out that KOSEL-CCTV t/a KOSEL SYSTEM, together with the deponent of this founding affidavit Mr Siphon Mkhombe, and the late Mr Abednego Mkhombe were all represented by the same attorneys, viz., FAKUDZE ATTORNEYS. This is supported by the notice of intention to oppose filed on 27 May 2021 by attorney Mr T. Fakudze of the appointed law firm, FAKUDZE ATTORNEYS. He personally filed this notice from the bar as he was personally in court on 27 May 2021. He was also in court on 16 June 2021, and on 28 June 2021 when the *rule* was confirmed. He never mentioned to the court anything about Mr Abednego M. Mkhombe’s health condition. In any event, the deponent was cited as a party to the proceedings and the allegations made in all the affidavits filed specifically pointed towards him and not Mr Abednego M. Mkhombe. The deponent ought to have therefore filed an affidavit explaining all the facts he now alleges.

[34] The applicant’s attorney came to court on the return date (27 May 2021) to file a notice to oppose when the matter ought to have come to court for arguments. The court nonetheless extended the time for filing and hearing arguments and the extended time became a month but still, the respondents, including the applicant, did not bother to file any affidavit in opposition. This failure resulted in confirmation of the *rule* on 28 June 2021.

[35] Confirmation of the *rule* was not obtained in the absence of the applicant. It was also not granted erroneously by this court. It was confirmed in

circumstances where the applicant was fully aware of the orders sought. It was in circumstances where the applicant was allowed extended periods for filing his opposing affidavit. He however elected not to file any court papers in opposition. In such circumstances, the rescission remedy is not available to the applicant, either in terms of Rule 42 of the Rules of this Court or in terms of the common law.

[36] In terms of Rule 42, a rescission is granted because of an error of some kind. **See: De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 at 1039-1040.** The rule provides as quoted below:

Variation and Rescission of Orders

42. (1) *The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary:*
- (a) *an order or judgment erroneously granted in the absence of any party affected thereby;*
 - (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
 - (c) *an order or judgment granted as the result of a mistake common to the parties.*

[37] At common law the rescission of a judgment by default is granted where ‘*sufficient cause*’ for the rescission is shown. ‘*Sufficient cause*’ means that the party who seeks the rescission relief must present a reasonable and acceptable explanation for his failure to appear, and that he must also show that he has a *bona fide* defence which, *prima facie*, carries some prospects of success. **See: De Wet and Others v Western Bank Ltd (supra) and Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 at 528-531 and 532.**

[38] In my view, nothing in the papers filed warrants a rescission of the order issued on 26 August 2021. The applicant seems to be determined, in my

opinion, to even mislead this court. This is clear from the depositions made by him in paragraph 9 of the founding affidavit which I quote in paragraph [31] above. He disassociates himself with the ‘*newly registered company*’ yet documents of the company reflect him as the Managing Director.

[39] The proposal letter and document which the ‘*newly registered company*’ prepared and submitted to the government of Eswatini for the supply and installation of wall mounted temperature scanners in all schools were both signed by the first respondent on 30 November 2020. These documents were attached as annexure “PR7”. *Ex facie* the letter, it was signed by the first respondent in his capacity as the Managing Director. This is also the case with the schedule of payment which the first respondent signed on the same date of 30 November 2020. He signed in the capacity of Managing Director.

[40] Attached to the notice to anticipate is a copy of a document with company letterheads showing banking details for the ‘*newly registered company*’. The attachment is marked annexure “SV3”. *Ex facie* the document, it is dated 26 January 2021 and was signed by the applicant in his capacity as the Chief Executive Officer (CEO) of the ‘*newly registered company*’.

[41] Mr Mdladla is correct that the applicant is now before this court with dirty hands and ought not to be allowed to drink from the fountains of justice. He has not complied with the Settlement Agreement which was made an order of this court on 2nd July 2020. He proceeds to inform the court that he is not in a position to disclose payments received by the ‘*newly registered company*’ because he is not its director. He asserts that the now late Abednego M. Mkhombe is its ‘*sole*’ director. The applicant has also repeatedly denied in his


replying affidavit that he is a Managing Director. He now, and for the first time, asserts that he is an employee of the ‘*newly registered company*’. On the evidence before court, I am satisfied that the applicant is willfully misleading the court by denying his relationship with and involvement in the ‘*newly registered company*’. It is apposite to note that the court lifted the company veil on this company. I have already mentioned above that documents prepared by this company were signed by the applicant in his capacity as the Managing Director. *Ex facie* these documents, he is both the Managing Director and CEO, and the court so finds.

[42] The applicant does not end by denying the relationship he has with the ‘*newly registered company*’ but has also denied that the same attorneys represent him together with this ‘*newly registered company*’ and the now late Abednego M. Mkhombe. The notice to oppose (attached as annexure “SV4”) which was filed personally by attorney Mr T. Fakudze of FAKUDZE ATTORNEYS on 27 May 2021 flies in the face of this denial.

[43] I am in agreement with the respondent’s attorney that the applicant is in contempt and has approached this court with ‘*unclean hands*’. The order for apprehension of the applicant made on 26 August 2021 is ancillary to the committal order granted on 28 June 2021. The point of ‘*unclean hands*’ was raised by the respondent as a point *in limine* which this court upholds.

[44] On the basis of the above finding, the entire application fails. I accordingly discharge the *rule* staying execution of the order directing the police to apprehend the applicant and hand him over to the Deputy Sheriff pursuant to

the contempt finding against him. The application is therefore dismissed with costs.



T. DLAMINI
JUDGE

For the Applicant : Mr. T. Fakudze
For the Respondent : Mr. S.V. Mdladla