IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 1101/23**

In the matter between:

MUSA MAGONGO **APPLICANT**

And

NEDBANK (ESWATINI) LIMITED **1ST RESPONDENT**

THE DEPUTY SHERIFF FOR THE DISTRICT

OF HHOHHO N.O **2ND RESPONDENT**

In re:

NEDBANK (ESWATINI) LIMITED **PLAINTIFF**

And

PHANGOTHI INVESTMENTS (PTY) LIMITED **1ST DEFENDANT**

MUSA MAGONGO **2ND DEFENDANT**

NEUTRAL CITATION: **MUSA MAGONGO V NEDBANK (ESWATINI) LIMITED AND ANOTHER (1101/23) [2024] SZHC - 51 (21/03/2024)**

CORAM:	**BW MAGAGULA J**
DATE HEARD:	**20/11/2023**
DATE DELIVERED:	**21/03/2024**
Summary:	*Civil Law – Rescission of judgments in terms of Rule 31 (3) (b) and Rule 42 (1) (a) requirements thereof.*
Held:	*The application for rescission has no merits – The Application is dismissed with costs.*

JUDGMENT

BW MAGAGULA J

[1] The court granted default judgment in this matter on the 22nd June 2023. The Applicant has instituted an application whereby an order is sought that the judgment that was granted by this court on the 22nd of June 2023, be rescinded and set aside, and that the Applicant be granted leave to defend the action proceedings in the above matter.

[2] The Applicant also seeks that execution of the aforesaid judgment be stayed pending finalization of the application.

[3] The Applicant's application for rescission is premised on Rule 31 (3) (b) as well as Rule 42 (1) (a) of the High Court Rules.

The Applicant's Basis for the Rescission Application

[4] The Applicant has stated the following in the founding affidavit as forming the basis for the application before court;

[5] On around the 25th May 2023, he was served with summons for the main action by the 2nd Respondent at his place of residence, Thembelihle, Mbabane, District of Hhohho.

[6] On the following day, the 26th May 2023 he instructed the offices of Mkhabela Attorneys which are situated at Christel Building, Mbabane, to defend the action proceedings. He was then advised by his attorneys that as a first step, they will file a notice of intention to defend.

[7] He was then shocked when he was served by the 2nd Respondent with a writ of execution against the movable goods of PHANGOTHI INVESTMENTS (PTY) LIMITED **(the "Company")** and his name is cited as 2nd Defendant therein. This is said to have occurred on the 4th August 2023.

[8] On learning about such developments the Applicant is said to have approached his present attorneys of record, who advised him to move the current proceedings. On consulting the court record, he was advised by his attorneys that the matter indeed appeared on the court's roll of the 22nd June 2023, wherein the default judgment was granted.

[9] After having instructed by his former attorneys to file opposing papers, the Applicant states that he confidently believed that they would file the same within the timelines which are envisaged in the Rules of the Honourable Court. Applicant contends that he approached his attorneys within the ten (10) days as he has been advised is the *dies* upon which he was expected to file his notice of intention to defend.

First Respondents Grounds for Opposition

[10] The 1st Respondent is strenuously opposed to the rescission being granted. The 1st Respondent submits that the order was not erroneously sought or granted.

[11] The Respondent further contend that the existence of a defence to a claim is irrelevant under Rule 42, as the errors mentioned by the Applicant in his founding affidavit cannot be in any event be the basis for rescission due to the following as stated by the Respondents.

[12] In addition to the above contention that the existence of a defence to a claim is irrelevant under Rule 42, the 1st Respondent argue that the errors mentioned by the Applicant in paragraph 15.9 and 15.10 cannot in any event be the basis for the rescission sought. The following reasons have been advanced by the 1st Respondent in their answering affidavit[1];

12.1 The fact that the loan agreement expired, is irrelevant as the lease (in clause 11.3) makes it clear that any obligation which the lessee may owe to the lessor at termination by effluxion of time shall survive the date of such termination. Simply put, the 1st

[1] The reasons appear form the 1st Respondent's answering affidavit from paragraph 19.1 – 19.2.2.2

Respondent contend that the fact that the lease and the loan expired in 2017 is of no moment as the obligations of both Phangothi and the Applicant continued.

12.2 The argument sought to be advanced in paragraph 15.10 is of no assistance to the Applicant for the following;

12.3 The Applicant signed the suretyship as a surety and co-principal debtor. The effect of this in law I am advised is that if the Applicant is contending that Phangothi does on exist as a debtor, he is liable for Phangothi's debt. This is factually put beyond doubt in clause 5 of the suretyship document; and

12.4 In any event the contention that Phangothi does not exist is not informed by the following;

12.4.1 The company is still registered in the Registrar of Companies' office and has not been deregistered. The Court was referred to an uplifted Form C (annexure **"N17")** which show that the company is still registered;

12.4.2 It also seems the Applicant has been litigating on behalf of the 1st Respondent stating under oath that the company is still in existence. The Court was referred to a copy of the excerpts of the affidavit signed by the Applicant (annexure **"N18"**).

[13] The 1st Respondent also contends that the Applicant has also not made out a case even under Rule 31 (2) (b) where the Applicant is enjoined to show a reasonable explanation and also a *bona fide* defence.

[14] The 1st Respondent further contends that the only explanation which the Applicant has given is that he gave the summons to his attorney to defend and the attorney did not do so. It is contended on behalf of the 1st Respondent that this is not an adequate explanation due to the fact that the negligence of an attorney is not a reasonable explanation.

[15] It has further been argued by the 1st Respondent that even if the Applicant's attorney had been negligent the attorney was not obliged to set out in detail the factors which led to her not defending the matter. The affidavit filed is so succinct and it constitute as no affidavit at all, as the Applicant's attorney states that she discovered the summons on the 30th of June. However, she does not explain why she could not apply for condonotion or rescission of judgment from that date. The attorney only filed the affidavit on the 30th August 2023, two months later.

[16] The 1st Respondent also contends that even the defences that the Applicant has adduced before court, as constituting a defence in the main claim are not *bona fide*.

[17] The first defence is to the effect that the loan advanced by the bank was fully paid. The 1st Respondent in response thereto contend that if payment is raised as a defence, the onus of proof would be on the Applicant. In the matter at hand, the statement which the Applicant has attached as annexure "MM4", appears to reflect that Phangothi last paid in October 2016. Therefore, as it is argued, if the Applicant was contending that further payments were made, the onus was on him to attach that proof. Having failed to do so, the court is urged that this defence cannot succeed; and

[18] The second defence that has been advanced by the Applicant is that the 1st Respondent waited for four years before it could write-off the loan and did not engage the Applicant. The 1st Respondent contends that this is disingenuous and has adduced the following reasons to support that contention;

18.1 The Applicant had verbally agreed with the bank officials that he was going to pay the loan in full when he sold his property. When the funds came through he demanded the funds back; and

18.2 Thereafter, a letter of the 19th of August 2014 was sent to the Applicant and he ignored it. After the court order had been obtained in August 2014 his attorney asked for arrears and he was told that the full amount was payable by his client, and he never bothered to pay; and

18.3 When the Deputy Sheriff told him about the court order in South Africa he told him that he did not recognize same in South Africa, and should be served with his attorney but he never surrendered the vehicle to ensure that the debt did not increase; and

18.4 The 1st Respondent argues therefore that the Applicant cannot be heard to be saying that the debt should have been stopped earlier, as he was the cause of the increase in the debt amount.

[19] The last defence which is sought to be advanced by the Applicant as a defence to the claim is that the debt cannot be in the amount of E616, 184-25 in light of the bank having loaned the company E260, 203-65. In response, the 1st Respondent submits that this is misconceived for the following reasons;

19.1 The company agreed to pay interest, costs and other charges, hence the bank was entitled to levy those charges as set out in the facility and the lease; and

19.2 The Applicant has been the major cause of the increase in the amount owed by the company as he reneged from the agreement to settle the debt through the proceeds of the sale of immovable property, ignored the demand of the 19th August 2014 and further ensured that the vehicle was not repossessed since 2014 to-date to mitigate the loses, hence the amount increased over the years; and

19.3 The company and the Applicant contractually agreed to pay the legal costs at attorney and own client scale on breach of the agreements, hence the costs paid to Robinson

Bertram and Frank Bother attorneys in the various court matters to try and repossess the vehicle.

[20] In light of the above, the 1st Respondent submits that no *bona fide* defence has been set out by the Applicant. This application is *mala fide* and is done to frustrate the 1st Respondent as the Applicant has done so since 2014 by hiding the vehicle so that it is not repossessed by the 1st Respondent.

THE LAW

[21] **Rule 31 (3) (b)** provides that:-

> **"(b) A Defendant may, within twenty-one days after he has had knowledge of such judgment, apply to court upon notice to the Plaintiff to set aside such judgment and the court may upon good cause shown and upon the Defendant furnishing to the Plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of E200, set aside the default judgment on such terms as to it seems fit".**

[22] The Rule emphasize that the principle relating to rescission applications is that of good cause. The test for good cause involves the consideration of two factors; firstly the explanation for the default and secondly, whether the

Applicant for rescission has a *prima facie* defence which has prospects of success.[2]

REASONABLE EXPLANATION FOR DEFAULT

[23] A reasonable explanation must show that the default was not wilful or due to gross negligence on the part of the Applicant[3].

[24] It was observed in **Eugene Rochat v Fernando Julius Manjela**[4] that *"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".*

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[2] See: **Eugene Rochat v Fernando Julius Manjela (1734/16) [2018] SZHC 184 (10th August 2018) at para 13.**

See also: **Paul Ivan Groening v Sipho Matse Attorneys & Another (supra) at para 12**

[3] See: **Paul Ivan Groening v Sipho Matse Attorneys & Another (*supra*) at para 12**

[4] **(supra at para 16)**

[25] In **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape**[5] Jones AJA (as he was) stated as follows;

> *"I have reservations about accepting that the Defendant's explanation of the default is satisfactory.* ***I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys…"***

[26] Rule 42 (1) (a) of the High Court Rules;

> (1) The Court may, in addition to any other powers it may have, *mero mutu* or upon the application of any party affected, rescind or vary:

[5] See: [2003] 2 ALL SA 113 (SCA)

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.

(2) Any party desiring any relief under this Rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.

(3) The Court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

(Amended L.N.38/1990)

ANALYSIS AND CONCLUSION

[27] The Applicant is entitled to apply for rescission under Rule 31 and the common law, but must furnish a reasonable explanation as well as a *bona fide* defence[6]

[6] See; T.S.M. L Crane Feeds & Electrical (Pty) Ltd & Another (supra), para 12

[28] The main explanation for the failure to defend the matter as stated by the Applicant is that he gave the summons to his attorney to defend, but the attorney was negligent. Maseko J, recently in the matter of **Bhekimpi Ndwandwe vs Steffen Holdings (Pty) Ltd and Another (592/2022) [2024] SZHC 44 (13th March 2024)** had the occasion to state the following where a similar reason had been advanced;

> *"...I find it difficult to accept the Applicant's version that he was let down by his erstwhile attorney which resulted to the judgment by default being granted because he was aware of the dies from the time he was served with the summons".*

[29] Similarly in the matter at hand there is no explanation from the Applicant what enquiries he did concerning his attorney since the 26th of May 2023, which is the date he claims he gave the summons to his attorney until the 4th of August 2023 when he was served with the writ.

[30] The Applicant confirms that he was dully served with the summons. In turn, instructed his attorney to defend, who then failed to file a notice of intention to defend. Hence, the reason that the order was erroneously granted is not open

to the Applicant. The Applicant does not quality for such a relief under Rule 42 (1) (a).

[31] In as much as in the matter before court, the erstwhile attorney filed an affidavit unlike in the matter of **Bhekimpi Ndwandwe vs Steffen Holdings (Pty) Ltd**[7] the attorney alleges that she discovered the summons on the 30th of June 2023[8], but she does not explain why she did not alert the Applicant, if this is indeed true. The court also agrees with the 1st Respondent's observation that there had to be a condonation application done in terms of Rule 31 (3) (b) within the twenty-one days from that date as the attorney should have been aware that judgment had already been taken with the summons having been served in May 2023. See the comments of Marais J **in Ephron Bros. Holdings (Pty) Ltd v Madisa, page 30,** *"His affidavit is so succinct, if not perfunctory, that I feel it should be regarded in the same light as if no affidavit at all had been put before the court to explain his failure,"* are apposite here, as the Applicant's attorney affidavit is also short and lacks detail to the extent that it should be considered as irrelevant.

[7] Supra
[8] See; para 4, page 16 of the bundle

[32] The Court is in agreement with the submissions made on behalf of the 1st Respondent that it would not be appropriate to follow that decision in light of the various and celebrated legal authorities dealing with the negligence of the attorney in rescission applications, as this will contrary to settled legal principles as stated in the matter of **Superb Meat Supplies CC v Maritz**[9], the court held that; "*It has never been law that invariably a litigant will be excused if the blame lies with the attorney.* ***To hold otherwise would have a disastrous effect on the observance of the rules of this Court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners.***"

[33] In the matter at hand, it is not only the attorney who was lax, but also the Applicant who equally failed to follow upon on the matter from May 2023 until served with writs of execution in August 2023, when he brought the rescission application on the 31st August 2023.

[34] The Court also agrees with the 1st Respondent's submission that the defences raised cannot succeed. This is due to the following reasons:-

[9] See: 2004 25 ILI 96 (LAC)

34.1 The first defence raised is that the default judgment was granted against a non-existing company, hence the writ is not enforceable. This defence lacks merit due to the following;

34.2 The Applicant signed as a surety and co-principal debtor. Consequently, in law even if the 1st Defendant in the main matter is not trading, the Applicant is liable for the debts both in law[10] and infact[11]; and

34.3 Phangothi Investements (Pty) Ltd is still registered at the Registrar of Companies as shown in annexure "N17".[12] Therefore, it is not deregistered it is an existing company and the Applicant has not shown any evidence is reply to demonstrate that it has been deregistered. The fact that the Form C was last filed in 2015 is of no significance in law, as the Registrar of Companies has still not deregistered it; and

34.4 The 1st Respondent has shown that the Applicant has as recently as of 2021 been litigating on behalf of the 1st Defendant in the

[10] See: Grofin SGB (South Africa) (Pty) Ltd v Nectavision (Pty) Ltd (40053/2019) [2021] ZAGPJHC 705 (19 November 2021), para 27
[11] See: Annexure N3, page 68 of the bundle
[12] See: Pages 143 – 146 of the bundle

[36] The Court is equally persuaded that the Applicant's position is inconsistent when he argues that the amount cannot be E616, 184-25 and also the legal costs cannot be claimed.

36.1 It appears that the aforesaid amount increased because the Applicant and Phangothi failed to rectify the arrears when they were demanded in August 2014, and furthermore because he avoided surrendering the car from 2014 to date[17]; and

36.2 The Court also observes as correct that the denials of the Applicant in the replying affidavit are of no assistance to him as there is enough documentary evidence showing the demand and also the various attempts made to repossess the vehicle, hence the final decision to then issue the summons; and

[37] It therefore makes sense that the Applicant having agreed in the agreement to pay the interest, charges and costs and the increases on the balances in respect of the above are foreseeable consequences of breach.

[17] See: paras 24.2.1 – 24.2.4, pages 44 – 45 of the bundle.

[38] Due to the aforegoing reasons, the Applicant's application ought to be dismissed, it is unmeritorious. Costs to follow the event at an attorney client scale, as that was part of the contract between the parties.

ORDER

1) The Applicant's application is hereby dismissed.

2) The Applicant to pay costs of suit at an attorney and client scale.

B.W. MAGAGULA J

THE HIGH COURT OF ESWATINI

For the Applicant: A. Dlamini (B.S Dlamini & Associates)
For the Respondents: E.Shabangu (Robinson Bertram Attorneys)