



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Held at Mbabane

Case No. 1821/2021

In the matter between:

**LUNGILE DLAMINI**

**APPLICANT**

**AND**

**SYDNEY VULINDLELA SHONGWE**

**1<sup>ST</sup> RESPONDENT**

**ROAD TRANSPORTATION BOARD**

**2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**IN RE:**

**SYDNEY VULINDLELA SHONGWE**

**APPLICANT**

**AND**

**THE ROAD TRANSPORTATION BOARD**

**1<sup>ST</sup> RESPONDENT**

**LUNGILE K. DLAMINI**

**2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Lungile Dlamini vs Sydney Vulindlela Shongwe & 2 Others*  
*[1821/2021 [2022] SZHC 128 (17 June, 2022)]*

**Coram:** FAKUDZE, J

**Heard:** 13<sup>th</sup> June, 2022

**Delivered:** 17<sup>th</sup> June, 2022

## JUDGMENT

### BACKGROUND

[1] The Applicant filed a Notice of Motion on the 17<sup>th</sup> December, 2021 seeking the following:

1. Dispensing with the manner of service and time limits prescribed in the Rules of this Honourable court and hearing this matter as one of urgency.
2. Condoning the Applicant's non-compliance with the said Rules of Court.
3. That a *Rule Nisi* do issue operating with immediate and interim effect and returnable on a date to be specified by the court, calling upon the Respondents to show cause why the following orders should not be made final;
  - 3.1 Reviewing and/or setting aside the order of the court granted on the 20<sup>th</sup> October, 2021 as well as the order granted on the 9<sup>th</sup> December, 2021;
  - 3.2 That pending finalisation of the matter the execution of the orders granted on the 20<sup>th</sup> October, 2021 and the 9<sup>th</sup> December, 2021 be stayed.

4. Costs of suit.

5. Further and/or alternative relief.

[2] The 1<sup>st</sup> Respondent filed a Notice of Intention to Oppose and later filed an Answering Affidavit.

### **The Parties' Contention**

#### **Applicant**

[3] The main contention by the Applicant is that at all material times she was never made aware of the court processes that led to the granting of the court order of the 20<sup>th</sup> October, 2021 as well as that of the 9<sup>th</sup> December, 2021. The Applicant was never served with both of these processes.

[4] The Applicant further contends that she learnt through the Secretary of the 2<sup>nd</sup> Respondent that there is an order of the above Honourable Court that was granted on the 20<sup>th</sup> October, 2021 against herself. She then instructed her attorneys to investigate same and it transpired that the order was indeed granted by the court as well as another one on the 9<sup>th</sup> December, 2021 relating to the same matter. The 20<sup>th</sup> December, 2021 order resulted from an Application that was filed by the 1<sup>st</sup> Respondent on the 13<sup>th</sup> October, 2021 and was served on the 3<sup>rd</sup> Respondent on the same day. All these processes were done behind the Applicant's back notwithstanding that she was cited and had a vested and substantial interest in the outcome of the proceedings.

[5] To prove that she was not made aware of the legal process as no return of service was exhibited in court. This amounts to an error in terms of Rule and therefore the Applicant is entitled to a rescission of the orders.

[6] The Applicant finally contends that for purposes of common law rescission, she has a reasonable explanation for failing to defend the matter. The explanation is that she was never served notwithstanding that the 1<sup>st</sup> Respondent alleges that he was personally there when service was effected. Furthermore, she has a valid defence in that she deposited an amount of One Hundred and Eighty Thousand Emalangenzi (E180.000.00) in exchange for the permits that are the subject matter of the litigation. She is therefore entitled to rescission, not only in terms of Rule 42 but also under common law.

### **The 1<sup>st</sup> Respondent**

[7] The 1<sup>st</sup> Respondent argues that:

- (a) In terms of the Road Transportation Act No. 5 of 2007, a permit holder cannot transfer or lease out a permit;
- (b) The Applicant alleges that the 1<sup>st</sup> Respondent sold the permits to her late husband yet she has not approached the court as an executive of his estate;
- (c) The Applicant has no direct or substantial interest as a permit holder because her late husband was involved in the transaction;
- (d) There is a material dispute of fact in the matter which the Applicant ought to have foreseen and should have instituted this matter by way of action proceedings.

[8] On the issue of service, the 1<sup>st</sup> Respondent contends that the Applicant was duly and timeously served with both the Applications in which she was the

2<sup>nd</sup> Respondent and she elected not to oppose them. She was subsequently served with the Court Orders.

[9] The 1<sup>st</sup> Respondent further contends that the December, 2021 Application was to give effect to the October, 2021 Order. It is also worth noting that the October, 2021 Order was challenging the powers of the secretary of the Road Transportation Board based on the fact that what he did was *ultra vires* because the Board was no longer in existence when the secretary issued the directive.

[10] The 1<sup>st</sup> Respondent finally submits that he had never accepted any money from the Applicant in exchange for the permits. The Applicant's late husband and the 1<sup>st</sup> Respondent entered into a gentleman's agreement for the usage of the permits and the agreement was not for the sale of the permits. The Applicant has failed to state what her defence is even if the rescission application can be granted. She has not shown that there are reasonable prospects of success should the rescission be granted.

### **The Applicable law**

[11] **In Ellen Magagula v Themba Magagula N.O and 13 Others Appeal Case No. 85/2018** at paragraph [12] the court observed as follows:

“[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; (ii) Rule 31 (2) (b) or (iii) at common law. In order to obtain rescission in terms of Rule 42 (i) (a) the Applicant must show that the prior order was erroneously sought or erroneously granted. The Learned 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 the 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] The court further observed in paragraph [13] as follows:

*“[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] As far as Rule 31 (2) (b) is concerned the Applicant must, within 21 days of being aware of the order granted in default, file a rescission Application giving a reasonable explanation for the default and his defence thereof on a *prima facie* basis or an existence of an issue which is fit for trial. The defence must be clear and concise and should enable the court to determine that it is not made merely to harass the Respondent.


[15] The same considerations with respect to rescission in terms of Rule 31 (2) (b) apply to rescission under common law except for the 21 days prescribed in Rule 31 (2) (b).

### **Courts observation and conclusion**

[16] The court is inclined to agree with the Applicant that she is entitled to rescission in terms of Rule 42 (1) (a). She has successfully proven that she was not served with the October, 2021 Application notwithstanding that she had a vested interest in the outcome of the decision. If the court was aware that she had not been served, notwithstanding that she had been cited, it would not have granted the Order. See *Ellen Magagula v Themba Magagula* (Supra). The 1<sup>st</sup> Respondent has not shown or exhibited any return of service which is *prima facie* proof of service and no Affidavit of Service has also been exhibited. The 1<sup>st</sup> Respondent merely alleges that the Applicant was served with the Application on October, 2021 without any proof thereof. It is therefore this court's humble view that the default judgment was granted in error and therefore should be without further enquiry, be rescinded.

[17] The default judgment of October, 2021 also stands to be rescinded on the grounds of common law. In its Founding Affidavit, the Applicant has established that she was not served with the Application and this amounts to a reasonable explanation. She has further established her defence when she states that her husband deposited with the 1<sup>st</sup> Respondent an amount of One Hundred and Eighty Thousand Emalangenani (E180,000.00) which had to do with the issue of the permits. The Applicant must therefore be given an opportunity to ventilate its defence. The December, 2021 Order sought to enforce or ensure compliance with the October, 2021 Order. It is therefore consequential in nature. It is also rescinded for completeness's sake.

[18] In light of the foregoing, the Applicant's application is upheld with costs.



FAKUDZE J.  
JUDGE OF THE HIGH COURT

Applicant: M.S. Dlamini

Respondent: Advocate M. Mabila