IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1014/97

In the matter between

LIVINGSTONE MAZIBUKO	PLAINTIFF
And	
SWAZILAND DEVELOPMENT & SAVINGS BANK	1st DEFENDANT
JOHN MANDLA SHONGWE	2nd DEFENDANT
Coram	S.B. MAPHALALA – J
For Plaintiff	MR D. MAZIBUKO
For 1st Defendant	MR L. KHUMALO
For 2nd Defendant	IN ABSENTIA

JUDGEMENT (29/01/99)

Maphalala J:

The first defendant made an application for rescission of judgment in terms of Rule 42 (1) of the High Court Rules with a certificate of urgency of an order that the rules of this court pertaining to service of court processes be dispensed with, that the judgment granted against the 1st defendant on the 1st July 1998 be rescinded on the grounds of mistake common to the parties, that the costs of the application be paid by the plaintiff in the event that it is opposed and further and/or alternative relief.

The application is opposed by the plaintiff who raised two points in limine in his answering papers. These two points are the subject for determination in this judgement. Before reverting on the points raised it is imperative to outline the background facts of this case.

The plaintiff's claim is based on a tripartite agreement attached to the plaintiff's summons. In terms of the agreement the plaintiff purchased some property from the 2nd defendant for the stated amount of E60,000-00. Rather than pay to the 2nd defendant as the seller, the plaintiff was to pay the purchase price to the 1st defendant to be credited into the 2nd defendant's account with the 1st defendant. Upon full payment of the purchase price in this manner, the 1st defendant was to cancel a mortgage bond which was registered over the property sold and in favour of the 1st defendant and further, the 1st defendant was to deliver the deed of transfer in respect

of the said property to the plaintiff. The assumption was that the 1st defendant was a mortgage bond holder in respect of the property and it is also had in its possession the title deed for the property. The plaintiffs case in terms of the summons was therefore that the lst defendant breached the tripartite agreement in that the 1st defendant neither cancelled the mortgage bond nor delivered the title deed to the plaintiff when payment of the purchase price was made in full. The 1st defendant avers in its founding affidavit that upon the order of the court being granted on the 1st July 1998, the 1st defendant attorneys and the deponent set out to comply with it as regards the cancellation of the bond and the delivery of the title deed. That was believed to be in custody of the 1st defendant. It is when a further search was done, including a search at the Registrar of Deeds, that is was discovered that:

13.1 The 1st defendant never had a mortgage bond registered in its favour over the property in question;

13.2 The only mortgage bond registered over the property was at all times, even presently, in favour of Barclays Bank of Swaziland;

13.3 Consequently, the 1st defendant never had in its possession the deed of transfer No. 485.1992, which as well has at all times been in the custody of the Barclays Bank of Swaziland.

In the circumstances the 1st defendant was never in a position to discharge the obligation imposed on it in terms of the tripartite agreement and is not in a position to comply with the order made by this court on the 1st July 1998. The plaintiffs attorney was advised of this position in a letter dated 7th July 1998 written by the 1st defendant's attorneys marked "SPSA".

The 1st defendant submit that in the circumstances both parties to the action were mistaken and the proceedings were instituted and the judgement of this court was granted in the mistaken belief that there was a mortgage bond in favour of the 1st defendant which the 1st defendant had a obligation to cancel and that the 1st defendant had a custody the title deeds which it had an obligation to deliver to the plaintiff. The 1st defendant further avers that if the order attached marked "SPSC" is a reflection or a record of the orders actually made by this court then such orders were erroneous andmay be rescinded in terms of Rule 42,

Now I come back to the gist of the matter under examination being the two points raised by the plaintiff to the application brought by 1st defendant in terms of Rule 42 (1). The plaintiff firstly raises the point that the application is out of time. Rule 31 of the High Court Rules allows the defendant twenty-one (21) days from the time he has knowledge of the judgement by default to apply for rescission. In this case judgement was granted on the merits and in the presence of a legal representative of the 1st defendant who consented to such judgment on the 1st July 1998. The application for rescission was brought to court on the 26th August 1998, after the 21 days had expired.

The second point raised in limine is that this being a final judgment, the court may not re-open the case and hear fresh evidence. The matter is res judicata and a party aggrieved may only appeal to a higher court. Mr. Mazibuko also introduced a third

point in limine when the matter came for arguments on the 30th October 1998 that Rule 42 does not permit a litigant to apply for rescission of an order which that litigant consented to (vide Harms on Civil Practice in Superior Court at page 412 where the case of Schimidlin vs Multisound (PTY) Ltd 1992 (2) S.A. 150 is cited in support of this proposition).

As I have pointed out earlier in the course of this judgement that the matter came before me in the contested motion of the 30th October 1998, and the court after hearing arguments from both sides reserved judgement.

Mr. Mazibuko's contention is that the 1st defendant has brought this application in terms of Rule 42 and not 31. They are dealing with the technical defects of the judgement not its merits. To this effect he referred the court to Erasmus on Superior Court Practice at B1 - 306. If one is challenging the entire judgment Rule 42 does not apply one has to go on appeal. If a party makes a mistake it is not common mistake. Plaintiff denies any mistake on his part. The 1st defendant has not filed a replying affidavit. The bank refers the court to Rule 42 (1) © that a mistake common to parties. This means that both parties are mistaken as to the correctness of certain facts; this occurs where both parties are of the one mind and share the same mistake.

Mr. Khumalo for the bank in reply contends that the first defendant submits of the first point in limine that as from the notice of motion itself, the first defendant clearly is applying in terms of Rule 42 (1) and the supporting affidavit states that reliance is on Rule 42 (1) (2). No reference has been made at any stage or part of the application to Rule 31. This rule is irrelevant in this application. The judgement sought to be rescinded is not one by default and no suggestion is made in the application. The objection by plaintiff in this respect is ill - advised and without merit. Mr. Khumalo argued that the case cited by Mr. Mazibuko that of Schimidlin (supra) is irrelevant to the issue it is not based on Rule 42 91)

©. He referred to the case of De Wet vs
Western Bank Limited 1979 (2) S.A. 1031 (A) which is in point. Mr. Khumalo argued further as reflected in the 1st defendant Heads of Argument that rescission in terms of Rule 31 and 42 is to be distinguished because Rule 31 refers to judgement obtained against a defendant who fails to deliver a notice of intention to defend or a plea and where the judgement is granted without hearing any kind of evidence. Rule 42 on the other hand refers to an order or judgement;

i) erroneously sought or erroneously granted in the absence of a party; or ii) in which there is ambiquity, a patent error or omission; or iii) granted as a result of a mistake common to the parties (see Rule 42 (1) (a)-(c)).

Mr. Khumalo further submits that it is important to note that in both the order or judgement is final that is why it has to be set aside it obtained under the circumstances listed; nowhere is reference made to "interim", "provisional" or "interlocutory" order of judgement. In Rule 42 that is obtained in the absence of a party is only one of the circumstances, whereas in Rule 31 the absence of a party is the whole point. In Rule 42 (1) (b) and (c) no difference whether there was a party absent or not at the time the order/judgement was granted. The circumstances for rescission are ambiquity, error, omission or mistake common to the parties. In terms of Rule 42 the court may

rescind or vary the order or judgement. In Rule 31 however, the court would only rescind and that is another essential distinction between the two rules.

Since the 1st defendant's application is clearly for rescission reference to variation is irrelevant (and so are authorities introduced by the plaintiff dealing with circumstances of variation). To suggest, as the plaintiff does, that rescission in terms of Rule 42 (1) © is appropriate when there are technical defects, not the merits of judgement in issue is to fail to read a simply-worded rule and confuse appeal and rescission of judgement with review proceedings.

Mr. Khumalo argued further that the establishment of a mistake for purposes of Rule 42 (1) © one should produce evidence to "establish some facts" is borne by the examples of the following cases - and the introduction of fact establishes the mistake rather than re-open the case. He referred the court to Tshivhase and another vs Tshivhase and another 1992 (4) S.A. 852 (A) where the head note of this case states as follows:

"The situation for which Rule 42 (1) © provides is where the subsequent evidence (his emphasis) is aimed at showing that the factual material which led the court to make its original order was, contrary to the parties assumption as to the correctness, incorrect".

Mr. Khumalo cited numerous cases where the principle in Tshivhise was applied and followed.

(Vide Blumental & another vs Thomson No. and another 1994 (2) S.A. 118 (a); Theon vs AA Life Assurance Association LTD 1995 (4) S.A. 361 (A); Van Der Merwe vs Bonaro Park 1998 (1) S.A. 697 (T); Promedia Drukkers & Witgerers (EDMS) BK vs Kaimowitz and another 1996 (4) S.A. 411 (c))

Mr. Khumalo furthermore contented that a typical case "would be where the parties had agreed upon a statement of facts which afterwards found to be incorrectly" (see Erasmus & Superior Court Practice 1997 p B1 — 310 where the case of Exparte Kruger 1982 (4) S.A. 411 was cited).

Lastly Mr. Khumalo argued that apart from the clarity of the Rules (both 31 and 42), there is abundant authority that the court does set aside its own judgement in certain stated circumstances, (see Promedia (supra) where the head note states that;

"The Rule (referring to Rule 42 (1) set out exception to the general principle that a final order correctly expressing the true decision of the court, cannot be altered by that court.

In the circumstances there is no merit to the points raised in limine. The application by first defendant is well founded in the operation and application of Rule 42 (1) ©. The points in limine be dismissed.

These are the issues before the court.

5

I have perused through the papers filed of record and considered the arguments by both counsel. I have also availed myself to the legal authorities cited on both sides. I shall proceed to consider the first point raised in limine that the application is out of time in terms of Rule 31 the application should have been made in 21 days time from date of judgement and the "rescission is limited to judgement by default". My view is in line with that of Mr. Khumalo that as from the notice of motion itself, the first defendant clearly is applying in terms of Rule 42 (1) and the supporting affidavit states that reliance is on Rule 42 (1) ©, no reference has been made at any stage or part of the application to Rule 31, this Rule is irrelevant in that the judgement being sought to be rescinded is not one by default and no suggestion is made in the application. My view on the matter is that the objection by the plaintiff in this respect is ill- conceived and without any merit.

On the other side whether Rule 42 is appropriate I again align myself with the submissions made by Mr. Khumalo. In the present case the parties entered into a tripartite agreement the essence of which was to believe that firstly defendant was a mortgage bond holder keeping the original title deed and bond in their custody. The contract was performed on the same basis that one of the price to first defendant in order for the latter to subsequently cancel the bond and release the original title deed. The proceedings was instituted by the plaintiff to obtain an order compelling defendant to perform, because it was believed by all the parties that the first defendant was capable of performing by canceling the bond and furnishing the original title deed. It is not relevant what led the parties to make the assumptions or what made them have that belief, they had it. When subsequently, it is shown by fresh evidence that first defendant never had the title deed and never was a bond holder, there can only have been a mistake of all the parties. I agree in toto that the case of Tshivhase (supra) is at all fours with the present case. In Tshivhase (supra) case in a chieftaincy dispute the respondent ® had been placed in the position of chief temporarily pending the coming of age of the rightful hereditary chief (A) of the tribe. When the rightful chief attained maturity, R refused to step down; he wanted to finally and permanently installed as chief. There were court applications and interdict, etc. When one application before court was pending reference was made to Section 4 of a statute (Vhuhosi Administration Act 14 of 1986) which could decide who should be installed as chief. Subsequent to the referral of the matter to the khoro it was reported to the parties that the khoro had resolved that R be chief.

On the basis of this report of the decision of the khoro the court dismissed A's claim to chieftaincy and his court application. Later, after dismissal of A's application, the khoro met and it turned out that they had not resolved that R (or anyone of the contestants) was to be chief. Instead the khoro had decided that the royal family was to settle the problem of who should be chief. It was an untruth that the khoro made any decision.

It was held that the mistake occurred and was common between the parties in that both had believed that the khoro had resolved that R be chief. They had both assumed a state of affairs, which turned out to be a wrong assumption. The mistake was established as a result of the fresh evidence concerning the khoro's true decision.

6

The court in that case which was subsequently followed and applied in a bevy of decisions held that the matter fell within Rule 42 (1) © and the facts and events met the requirements.

It is my considered conclusion that the case in casu also meets the requirement enunciated in the case of Tshivhage (supra). I thus dismiss the second point in limine and rule that the matter goes to the merits.

Costs to be costs in the course.

S. B. MAPHALALA

JUDGE