IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2280/96(B)

In the matter between

DABUKA PROPERTIES (PTY) LTD	APPLICANT
And	
SWAZILAND BUILDING SOCIETY	1st RESPONDENT
THE DEPUTY SHERIFF – HHOHHO DISTRICT	2nd RESPONDENT
ZACHEUS ZULU	3rd RESPONDENT
THE REGISTRAR OF DEEDS	4th RESPONDENT
Coram	S.B. MAPHALALA – J
For Applicant	MR. N. HLOPHE
For 1st Respondent	MR. SIMELANE
For 2nd to 4th Respondent	NO APPEARANCE

JUDGEMENT

(21/05/99)

Maphalala J:

The matter came before court with a certificate of urgency for an order inter alia staying and/or suspending transfer of certain Lot No. 2156 Mbabane Township, Extension No. 19 Mbabane, Hhohho District from the applicant to the 3rd respondent pending the outcome of this application, setting aside the sale in execution of the property fully mentioned in prayer 2, rescinding and/or varying the default judgement by this court in favour of the 1st respondent against the applicant, that a rule nisi with immediate and interim effect pending the outcome of this application be put in place, etc.

The application is supported by the founding affidavit of one Tobhi Dlamini who is the director of the applicant with a number of annexures.

The application is opposed by the 1st respondent who filed a notice of intention to oppose and subsequently an answering affidavit of one Nhlanhla Simon Khumalo who is employed by the first respondent as its Chief Accountant. The answering affidavit is also supported by various annexures.

The applicant in turn filed a replying affidavit of the said Tobhi Dlamini.

The facts of the matter are that sometime in March 1995, The applicant obtained a loan from the first respondent, for the sum of El54, 277-00 and security for the said loan, the applicant passed a mortgage bond over its property being Lot No. 1256, Mbabane Township, Extension No. 19 situated at Mbabane. The said mortgage bond was registered by the 4th respondent on the 7th April 1995. The applicant further passed a second surety mortgage bond on the 7th April 1995 over the property in favour of the Swaziland Development and Savings Bank to secure a loan applicant had already obtained in her personal capacity for as sum of E46,000-00 to finance the purchase of the property by the applicant. The applicant continued to service its loan with the first respondent by making the

stipulated monthly installments in terms of the mortgage bond. According to the applicant during the month of May 1998, it decided to obtain a loan from the Swaziland Development and Savings Bank for purposes of redeeming applicants mortgage bond with the first respondent. On the 12th May with her husband Walter Mhlanga who is also another Director duly authorized by the applicant, spoke to Norman Msibi, the first respondent's Mortgage Manager and informed him that the applicant intended redeeming its mortgage bond with the first respondent, and requested Mr. Msibi to advise of the settlement figure. Mr. Msibi advised that applicant should make a written request. Indeed on the 12th May 1998, applicant wrote a letter to the first respondent requesting it to advise the Swaziland Development and Savings Bank of the balance of outstanding on the applicant's loan account.

On the 28th May 1998, the first respondent's Mortgage Manager, Mr. Msibi wrote a letter to the Manger of Swaziland Development and Savings Bank and advised him that the amount required to redeem the mortgage bond was El69, 582-30 which was to remain so until the 20th August 1998, after which date an interest at 17% per annum would accrue. Applicant was assured by the Swaziland Development and Savings Bank that in principle its housing loan had been granted and was to await formal communication of such decision as well as signing the necessary instruments. The first respondent also confirmed that applicant could pay the sum to redeem their mortgage bond as soon as applicant got it since Swazi Bank has assured them it would be paying the said amount. Indeed on the 23rd September 1998, applicant received a telephone call from the Manager of Swazi Bank who advised applicant that its application for the housing loan has been formally approved and applicant should come to their offices for purposes of signing their letter of offer.

Applicant duly signed the said letter of offer, a copy of which annexed marked "TD5" is attached to applicant's papers. On the 28th September 1998 applicant was advised by Mr. Mkhumbi Dlamini of the Swazi Bank that they had received a letter from the first respondent's attorney Robison Bertram advising them that applicant's property aforesaid had been sold by the 2nd respondent to the 3rd respondent. Before the said date, that is the 28th September 1998, the applicant was unaware that 1st respondent

had instituted proceedings and obtained judgement against it, pursuant to which the applicant's property had been sold to the 3rd respondent.

With the help of their attorneys, Samuel S. Earnshaw and Partners established that:

19.1 On the 12th September 1996, the first respondent had issued summons against the applicant under High Court Case No. 2280/96 claiming, payment of the sum of E6,716-57 in respect of the balance due under mortgage bond no. 274/95; interest on the above at the rate of 18.5% per annum calculated from the date of service of summons to date of payment; an order declaring the property mortgaged under mortgage bond no. 274/95 to be executable; and costs of the suit on the scale as between attorney and own client including collection;

19.2 The said summons had allegedly been served on the applicant on the 4th October 1996 at Lot No. 2156 Mbabane Township, Extension No. 19, Hhohho District by the Deputy Sheriff for the district of Hhohho. A copy of the Deputy Sheriffs return of service is annexed to the papers marked "TD7".

19.3 The 1st respondent obtained a judgement by default against the applicant on the 1st November 1996, for an order as prayed for in its summons.

19.4 Applicant's property was sold by the 2nd respondent at a public auction on the 24th July 1998, to the 3rd respondent and;

19.5 Applicant's property had not yet been transferred to the 3rd respondent.

Applicant alleges in its papers that it never received a copy of the 1st respondent's summons. At the domicilim citandi et executandi referred to in annexure "TD7" hereto is a residential house occupied by the deponent, her husband Walter Mhlanga, their children and their housekeeper. There is always someone present at the resident on a 24-hour basis and summons was neither seen nor received by

any of them. If the applicant had received the said summons it would have taken all necessary steps to protect its interest.

After the 1st respondent had obtained judgement against the applicant on the 1st November 1996, the 1st respondent did not bring this to the attention of the applicant and the applicant continued to make its monthly repayments in terms of the mortgage bond and where the applicant fell in arrears, the 1st respondent would issue the relevant arrears notice advising the applicant to update its repayments. The 1st respondent also failed to make the applicant aware of the judgement during the month of May 1998, when applicant advised the 1st respondent of its intention to redeem the mortgage bond.

The applicant denies that it was in arrears of the sum of E6, 716-97 which is the subject matter of the default judgement in favour of the 1st respondent. Applicant denies that it was ever in arrears with the repayment of the loan. The applicant has arranged a stop order with its bank Barclays Bank, Manzini which would deposit the

monies agreed upon into the 1st respondent's account which the latter held with the then Standard Bank, Mbabane. Normally when the 1st respondent had not received any installment through its bank, Standard Bank, it used to contact applicant whereupon applicant normally found same had been delayed between the two banks and the problem would be amicable sorted out. Applicant went further at paragraphs 24, 25, 25.1, 25.2, 25.3 and 25.4 to show how alleged arrears might have accrued showing that the whole fault lay with bank remitting the monthly installment in time.

Applicant alleges that it is worthy to note that by this time the 1st respondent had already obtained a judgement of the court which applicant submits by such conduct and by necessary inference, it novated and/or compromised. Further that the attachment of the property was irregular in so far as it did not comply with Rule 46 (3) of the High Court rules in that the occupier of the property was never served with the notice of attachment as required.

These are the facts founding the applicant's case.

Now coming to the 1st respondent's version. The facts supporting the 1st respondent case are fully canvassed in the answering affidavit of Nhlanhla Simon Khumalo who is 1st respondent's Chief Accountant. For the sake of proxility I am not going to repeat them in extenso save to highlight the salient points which relates to the issues in dispute. The respondent alleges that it is not true that the applicant serviced its loan in a satisfactory manner and in that regard it annexed hereto marked "SNK 3A" to "SNK 31" which are copies of various letters which were transmitted to the applicant by the first respondent informing the applicant that it was in arrears and that it should take steps to bring its account with the first respondent up to date. That the applicant was constantly informed by the first respondent of the respondent's intention to execute on the mortgage bond as a result of the applicant's failure to conduct its account in a satisfactory manner. As a result of applicant's failure to conduct its account in a satisfactory manner the first respondent issued summons out of the High Court of Swaziland under case no. 2280/96 for inter alia declaring the property mortgaged by mortgage bond no. 274/95 to be executable. The summons was served on the domicilim citandi et executandi address appointed by the applicant itself in terms of Clause 16 of the bond. Judgement was duly obtained on the 1st November 1996, in the following terms:

1. Payment of the sum of E157, 326-36
2. Interest on the aforesaid sum of El 52, 326-36 at the rate of 18.50% per annum a tempore morae.
3. An order declaring the property mortgaged by mortgage bond no. 274/95 to be executable.
4. Costs of suit on the scale as between attorney and own client including collection commission.

First respondent further alleges that the onus, if at all such existed, was not upon it to inform the applicant that a judgement had been entered against it. That the judgement, which the first respondent obtained against applicant, was neither a

novation or a compromise of the first respondent's rights in terms of the bond and the first respondent, as it was entitled to do took all necessary steps to protect its interest. The intention by the first respondent to sell the applicant'' property in execution was advertised extensively in The Times of Swaziland on Wednesday 1st July, 1998 and in the Government Gazette on Friday 3rd July 1999. The applicant is not candid with the court in that it does not advise this court whether or not it saw such advertisements and if it did what steps were taken to protect the applicant's interest. The price for which the property was purchased by Zacheaus Zulu in the sum of E237, 000-00 is sufficient not only to cover the applicant's indebtedness to the first respondent, but also its indebtedness to Swaziland Development and Savings Bank, The applicant had failed to point out to the court what irreparable damage it will suffer. First respondent submit that the balance of convenience favours the first respondent as the applicant's indebtedness to both the first respondent and Swaziland Development and Savings Bank will be satisfied in full should the transfer take place. The first respondent deny that the applicant was entitled to move this court to obtain an ex parte order behind the first respondent's back without its knowledge. The first respondent further aver that the proceedings launched by the applicant were not served nor brought to the attention of the first respondent or any of the other respondents for that matter. The first respondent became aware of this application only because its legal representatives were at court on the day that the applicant's attorneys attempted to move this application and it only by their (the respondent's attorneys) insistence that an order was not granted in the absence of the first respondent. It is admitted that Walter Mhlanga approached the first respondent's mortgage Manager Mr. Norman Msibi and requested what the amount required to redeem the applicant's mortgage bond was. But it is denied that the said Mhlanga advised Mr. Msibi that Tobhi Dlamini had obtained a loan from Swaziland Development and Savings Bank with which she would settle the applicant's full indebtedness with the first respondent. The said Mhlanga only indicated to Norman Msibi that he required the amount necessary to redeem the applicant's bond with the first respondent.

This is the case for the first respondent.

The matter came for arguments on the 16th March 1999. Mr. Hlophe directed the court's attention to paragraph 24 and 25 of the applicant's founding affidavit which showed that the amount of E2402-00 which was supposed to be applicant's first instalment had not been remitted by the applicants bank supposedly because the said stop order had been arranged mid-month May 1995, with the effect that the 1st respondent only started receiving the instalments of the subsequently months instantly and timeously. It was discovered that the balance of El792-97 was made up of insurance premiums for which Walter Mhlanga explained to him that applicant had not been made aware it had to pay for same as property was already being insured as well as what Mr. Dlamini termed to have been shortfalls. On this regard it was explained to him that the said shortfall had not brought to the attention of applicant so as to up date the stop order. However, it was finally agreed that all such monies be paid by cheque whereupon applicant's husband drew one which was finally deposited. To this effect applicant referred the court to annexure "TD7A" and "TD8", viz copy of the deposit slip and calculations done by Mr. Dlamini of the 1st respondent in his own handwriting respectively. Mr. Hlophe's point is that the supposed arrears were not in fact arrears. The sum of E6, 000-00 was the amount on which the judgement

was obtained. The property was subsequently sold by public auction on the 28th July 1998, at the time negotiations with the 1st respondent were taking place. At that time Swazi Bank was processing the guarantee on the basis of this background the property was sold to the 3 rd respondent who is employed by the 1st respondent. Mr. Hlophe pointed out that it is noteworthy that the 3rd respondent has withdrawn in this matter.

Mr. Hlophe further argued that the application for rescission ought to be granted for two reasons. Firstly, the 1st respondent failed to serve the summons effectively on the applicant. It is common cause that the service was to be effected at the domicilim citandi et executandi the service was defective. To support this proposition he referred the court to the work by Nathan et at Uniform Rules of Court (3rd ED) at page 26 where the learned author stated that although the sub-rule to Rule 4 does not specifically say so; the court has a discretion, should the circumstances demand it, to order

that some further steps are taken to bring the matter to the notice of the defendant (see Lindup V Lowe 1935 NPD 189). Secondly, Mr. Hlophe further contended that the judgement that is sought to be rescinded was based on arrears the applicant was alleged to have with the 1st respondent when in point of fact there was no such arrears. Mr. Hlophe the court to set the judgement aside on this basis of the common law.

Furthermore, Mr. Hlophe submitted that the principle propounded in the case of Trust Bank of Africa Ltd vs Dhooma 1970 (3) S.A. 304 (NPD) is at all four with the facts in the case in casu. In that case it was held that where the only purpose of a judgement is to enable the plaintiff to enforce certain rights, by means of execution if need be, without in any way affecting other rights out of the contract, the judgement should be regarded not as novating the former, but as strengthening or reinforcing them. The right of action will be replaced by a right to execute, but the enforceable right remains the same.

Where, however, subsequent to the obtaining of such order, the parties entered into an agreement in such terms as to give rise to the inference that they intended the only source of the debtor's obligation to make payment was, as from that date, to be the agreement which they then made and that therefore, they intended that the judgement, as well as any other rights derivable from the original contract, should be novated. Mr. Hlophe contends that in the present case novation operated impliedly if one take into consideration annexure "SK3A" and "TD4" viz, a registered letter dated the 5th March 1997, from the 1st respondent to the applicant which alerted the latter that in the event it does make repayments towards arrears which had accumulated to a sum of El3, 061-28. The 1st respondent was going to institute legal proceedings, the second annexure being "TD4" which is a letter dated the 28th May 1998 from the mortgage Manager of the 1st respondent to the Manager of the Swazi Bank which stated the figure to redeem 1st respondent's bond was E169, 582-30 which figure maintained until the 26th August 1998, after which date interest at 17% per annum will accrue.

Mr. Simelane on the other hand opposed the application and gave lengthy submissions to support 1st respondent's opposition. In a nutshell Mr. Simelane submissions are four-pronged. On the first prong he argues that the applicant has not shown under what head it was applying for rescission. That it is trite law that rescission as a form of relief may be sought under four heads viz, I) under the common law, ii) Rule 31 (3) (B), iii) Rule 32 (ii) and iv) under Rule 42 of the High

Court Rules. It does not appear at all from the applicant's papers which head is being relied upon. To this effect he directed the court's attention to the case of Leonard Dlamini vs Lucky Dlamini Civil Case No. 644/97 (unreported) by Dunn J, where a party does not state under which head that would be irregular in itself. He went further to say in respect of this issue that if a party in proceeding in terms of the common law the authorities are clear that when one approaches the court for rescission he has to proceed by way of action. To support he cited the cases of Chardaty Estate Stores vs Standard Bank of South Africa 1924 OPD 163, De Wet vs Western Bank (Ltd) 1979 (2) S.A. 103 (AD).

The second prong of the 1st respondent's opposition is that in this case there is a dispute of fact. The manner of service of the summons is in doubt. The court in determining this aspect should be guided by the case of Room Hire Co. (Pty) vs Jeppe Street mansions (Pty) 1949 S.A. 61 which is regarded as a locus classicus on this point.

On this point he further contended that in terms of Rule 4 (2) of the amended rules of this court, the Deputy Sheriff when serving the summons is not obliged to look for people it suffices that he/she has served on the agreed domicilim citandi et executandi. The applicant has failed to explain that the summons were not served.

On the third leg of his argument Mr. Simelane contended that the applicant has failed to establish a bona fide defence to these proceedings. The agreement between the mortgage and the mortgagee reigns supreme. The judgment which is sought to be rescinded was properly obtained.

On the last leg of his arguments on the issue of novation. His view is that how can one novate something one is not aware of. To buttress this point he referred the court to the cases of Trust Bank of South Africa (supra) Scarf vs Jardin 1882 (7) A.C. 345, and Tauter vs Von Abo 198 (4) S.A. 482 and also Ronald Barrows "Words and Phrase Judicially defined Vol III at page 518.

In reply Mr. Hlophe referred the court to paragraph 28 of the applicant's founding affidavit which states that it is worthy to note that by the time the 1st respondent had already obtained a judgement of the court such conduct by the 1st respondent and by necessary inference, it novated and/or compromised. Further Mr. Simelane for the 1st respondent agreed that there was compromise.

Further that applicant has made a bona fide defence as reflected at paragraph 25 of the applicant's founding affidavit and further what is reflected in page 33 of the Book of Pleadings.
These are the issues for determination. I shall now attempt to address the points raised by the 1st respondent in seriatim.

The first contention that the application is defective in so far as the applicant has not indicated in its papers under what head it was bringing this application for rescission. It is clear to me and on my reading of applicant's papers that it is not mentioned under what head the application is brought. The question that I have to answer is whether such omission renders the application defective. In answering this question I have

taken recourse to the case cited by Mr. Simelane that Leonard Dlamini vs Lucky Dlamini (supra) where the learned judge Dunn had this to say:

"A judgement of a court may be rescinded under one or more of the following heads:

i) Rule 31 (3) (B)
ii) Rule 32 (ii)
iii) Rule 42 and
iv) The Common Law".

In this application, the applicant failed to state under which of the above heads the rescission application was made. It only emerged in the course of argument by Mr. Simelane that Mr. Hlophe in their discussions had indicated that he was proceeding in terms of the common law. I wish to emphasize the importance of stating under which head the application for rescission is made in order to place the court and the other side in a position to know whether or not the requirements for the relief sought have been traversed therein. Failure to do so will often result in the court and the other side being taken by surprise and will hamper good preparation and argument. However, I do not think that an omission to indicate under which head a rescission application is made renders the application irregular. Moreso Mr. Simelane was aware under which head the matter was to proceed it was only the court which was not privy to such knowledge. Having dealt with this aspect I proceed to consider the other points.

On the question of whether there was novation or compromise. I need not go deeper on the matter counsel for the 1st respondent conceded here in court that there was compromise on the part of his client. After the 1st respondent had obtained judgement against the applicant on the 1st November 1996, the 1st respondent did not bring this to the attention of the applicant and the applicant continued to make its monthly repayments in terms of the mortgage bond and where the applicant fell in arrears, the 1st respondent would issue the relevant arrears notice advising the applicant to update its repayments. The 1st respondent also failed to make the applicant aware of the judgement during the month of May 1998, when applicant advised the 1st respondent of its intention to redeem the mortgage bond.

On the point that the applicant has not advanced a bona fide defence my view is that it has. The 1st respondent went behind the applicant back and obtained a judgement in the meantime dealing with the applicant in the normal way. The applicant has advanced facts that the interest being sought and/or the figure is subject to some dispute. I find that the applicant has proven a bona fide defence in this case.

In sum, I agree with the submissions made by Mr. Hlophe and grant the application in terms of prayers 1,2, 3,4, 5, and 6 of the applicant's notice of motion.

S. B. MAPHALALA

JUDGE