



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2585/2011

In the matter between:

MAPHUMZANE LUCKY DLAMINI

Applicant

And

SIKELELA VILAKATI

Respondent

Neutral Citation: *Maphumzane Lucky Dlamini v Sikelela Vilakati 2585/2011 [2013] SZHC 103 (03 May 2013)*

Coram: Dlamini J.

Heard: 15th November 2012

Delivered: 3rd May 2013

- *rescission application - basis that erstwhile attorney lacked instructions to consent to an order against applicant - consideration by court - two requirements for rescission application to succeed – good ground on the reason for default and bona fide defence showing prospect of success on the matter.*

Summary: A judgment by consent was entered against applicant. Applicant seeks for rescission of that judgment on the basis that his erstwhile attorney who represented him on the date of the order acted contrary to his mandate. He had instructed his attorney to defend the matter. He tenders wasted costs.

[1] The respondent has raised a number of grounds resisting applicant's application. As the application was brought on a certificate of urgency, the respondent attacks urgency. The application was instituted on 29th August 2012 and matter set for adjudication on 15th November 2012. I would conclude from the protracted period that the question on urgency is now academic.

[2] The applicant has also disclosed his defence on the merits as follows:

“4. During or about the month of September 2010 I bought from Respondent who sold me a motor vehicle SD 419 MH for the sum of E80,000.00.

5. The sum was payable in regular monthly instalments which I had to deposit into Respondent's FNB account no.62029796325 which was given to me by him.

6. I paid into Respondent's account a sum of E16,500.00, on 30th November 2010 I deposited E10,000.00 but I have misplaced the deposit slip. The other deposits are as reflected in annexure “A” attached and comprise three deposit slips totaling to E5,000.00. I have also misplaced another deposit slip of E1,500.00.

7. *On 14th February 2012 I was approached and served with a combined summons in this matter by a Deputy Sheriff for Manzini District who did not identify himself to me.*
8. *I immediately instructed Lloyd Mzizi to defend this matter and give copies of the deposit slips and full instructions to do so.*
9. *I honestly believed that Mr. Mzizi was defending the matter only to be surprised on Wednesday 22nd August 2012 when Silence Gamedze approached me with a Writ of Attachment with the intention of attaching my assets to satisfy a judgment debt of E80,000.00. Silence Gamedze did not give a copy of the Writ but only advised me of its consequences hence I do not have a copy thereof.*
10. *My basis for defending the action was that respondent failed to make delivery of the motor vehicle in that delivery was defective, the motor vehicle and the registration were not in **tandem**.*
11. *The blue book reflected the particulars of the motor vehicle as follows:
Chassis no. 485 166
Engine no. 543 674
I attach a copy thereof and mark it "B".*
12. *The particulars on the motor vehicles were as follows:

Chassis no. 381 005 24500095
Engine no. filed off*

13. *When I raised the fact that there was a difference on the particulars of the motor vehicle as reflected on itself and as reflected in the papers, Respondent stated that we should reduce the price to E60,000.00. I was discontent with the situation and told Respondent so because it meant that I did not have a motor vehicle as I could be dispossessed of the motor vehicle by the police since possession of a motor vehicle with numbers filed off is ex facie a criminal act in terms of the Theft of Motor Vehicle Act of 1991, Respondent did not respond.*
14. *Besides, the fact that there was no delivery as I would be evicted from the motor vehicle and dispossessed by the police on discovery, I instructed Mr. Mzizi that I had actually paid the sum of E16,500.00 as shown by the deposit slips attached hereto and marked "B".*
15. *It means therefore that had the delivery been a proper one, I would be owing E60,000.00 less deposits I made into Respondent's account. I therefore do not owe Respondent the sum of E80,000.00 which my erstwhile attorney consented."*

[3] The respondent strenuously opposes the application.

[4] The respondent has also raised a number of technical defences which in the spirit of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors 23/06**. I consider them immaterial. I shall deal with the merits herein.

[5] It is apposite to refer to the legal principles governing rescission application before dealing with the merits of this case.

[6] The general principle of our law is that once a court has pronounced a final order on the matter, the court is *functus officio* and the matter is *res judicata*. However, as common in general principle, there are exceptions.

[7] **Chetty v Law Society Transvaal 1985 (2) S. A. 756** the honourable court held on the exception to the general rule on rescission:

“Consist of two elements viz. reasonable and acceptable explanation for the default and bona fide defence which prima facie carries some prospect of success.”

[8] I am further alive to the *dictum* by **De Villiers J. A. in Schierhout v Union Government 1927 AD 94** at 98 that:

“Now a final judgment of a Court of law being res judicata is not to be lightly set aside.”

[9] The applicant has stated in *casu* that he did not give his erstwhile attorney instructions to consent to the order.

[10] In order to come to a justifiable reason, this court ordered **Mr. Mzizi** to respond to the damning allegations by applicant. He duly complied. He outlined the position with clarity and this court commends him for that.

[11] The applicant in turn filed an affidavit in answer to **Mr. Mzizi**'s affidavit. It is unnecessary to consider in detail the averments in this affidavit. However, what appears to be common cause between the two affidavits is that both **Mr. Mzizi** and applicant aver that applicant had more than two

matters on instruction before **Mr. Mzizi**. Applicant has been his client for over a relatively long period of time with a number of matters.

[12] In fact the entire reading of **Mr. Mzizi's** report indicates that the applicant intended his matter to be defended, although he was advised otherwise. For that reason I accept that applicant has always intended that the matter be defended.

[13] Having found the above, does our law allow for a party to have a judgment rescinded or set aside on the basis as alleged by applicant.

[14] In **Ras v Liquor Licensing Board, Area No.11 Kimberly 1966 (2) S.A. 232** at 237 the court held:

“From the authorities cited to the court it is clear that a client is not bound by the actions of his legal representative – attorney or counsel – where such representative has exceeded the mandate given him and he has achieved an object that had not been intended by his principal. An order made by any court or quasi-judicial tribunal under these circumstances is upso jure void and can be set aside upon review.”

[15] In **Minister of Agriculture, Economic and Marketing v Virginia Cheese and Food Co. (1914) (Pty) Ltd 1961 (4) S.A. 415** at 422 the court propounded:

“An attorney appointed to sue cannot compromise; nor can he bring into judicial proceedings another action than that which was comprised in his mandate, unless it is bound up with the mandate action as a kind of accessory.”

[16] Twenty years or so later the court still held the same view as can be deduced from **Bikitsha v Eastern Cape Development board & Another 1988 (3) S.A. 522** at 528 as follows:

“general mandate does not authorize an attorney to act in a manner adverse to his client’s interests.”

[17] I say this much alive to the case of **Christopher Dlamini v Sebenzile Malinga (34/2012) [2012] SZSC 53** where a rescission was sought on the grounds that the erstwhile attorney had failed to carry out instructions of his client thereby allowing court to enter default judgment, the learned **Chief Justice, Ramodibedi C. J.** dismissing the appeal held that the defendant embarked on a scathing attack against his attorney by accusing him of dereliction of duty. The learned Chief Justice wisely cites **Saloojee and Another NNO v Minister of Communication 1965 (2) 135 (A)** at 144.

“In Regal v African Sperslate (Pty) Ltd., 1962 (3) S. A. 18 (A.D.) at p. 23 also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant’s attorney, and held that the attorney’s neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in

which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all is the representative whom litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.

[18] It is my considered view that in *casu*, the circumstances of the case can be differentiated from the **Christopher Dlamini's** case *supra*. Unlike in **Christopher Dlamini**, in *casu*, the applicant instituted proceedings within a short space of time after the order was granted against him. Applicant has not attempted to settle or negotiate or advance any payments after the order as was the case in **Christopher Dlamini's** case.

[19] On the basis of the authorities cited above, I see no reason why applicant should fail on the first ground of good cause shown.

[20] I now interrogate the second ground on whether applicant has raised any *bona fide* defence in order to show prospect of success.

[21] Applicant's summary of his defence is that he cannot be expected in law to pay for a merx which is a subject of a criminal matter. He states that the numbers in the chassis and engine were in variance with those reflected in the blue book.

[22] Respondent highly refutes these allegations by applicant. He avers that had the numbers in the motor vehicle and the blue book been inconsistent, the motor vehicle would not have been registered into the new number plates.

[23] In reply, applicant disputes that the motor vehicle was registered anew.

[24] I must state that this court takes judicial notice that recently the government introduced a legislation compelling all owners of motor vehicles to register them again. Dubious or suspected motor vehicles could not be registered.

[25] Had the pleadings between the parties ended here, this court would be compelled to grant applicant his application.

[26] However, the applicant avers in his reply at page 36:

“The initial agreement between myself and respondent is that respondent was selling to me SD 419 HM for E80,000.00. The said amount was later changed to E60,000.00 after I had pointed out to the respondent the discrepancies that were attendant between registration papers and the motor vehicle itself.”

[27] Surely it defeats all logic how on one hand respondent alleges that there was no effective delivery because the *merx* was subject to police impounding it by virtue of its contradictory numbers and at the same time inform the court that he negotiated a reduction in the purchase price by virtue of the numbers not corresponding. One understands respondent to be saying as long as the price remains at E80,000.00 the *merx* was not delivered for want of authenticity but at E60,000.00 it was delivered, the authenticity was not in issue. This is totally untenable. Applicant is approbating and reprobating.

[28] Another interesting feature about applicant's defence is that although the motor vehicle is a subject of a criminal offence, he is not willing to surrender it to the respondent. He is willing to keep, as it were, "*the hot potatoe*". One would expect that applicant would surrender the motor vehicle and then sue for any damage or refund of the purchase price instead of clinging onto this "*hot potatoe*".

[29] In the premises, his defence cannot be held to be *bona fide*. It stands to be dismissed on pleadings.

[30] As already demonstrated that for applicant to succeed in a rescission applicant, he should satisfy the court on two grounds; viz. good cause on the default and a bona fide defence showing prospect of success.

[31] The case of **Chetty** *op. cit.* holds that: *it is "not sufficient if only one of these requirements are met."*

[32] The applicant's application stands to fall on the second ground.

[33] For the foregoing I enter the following orders:

1. Applicant's application is dismissed.

2. Applicant is ordered to pay respondent costs.

M. DLAMINI
JUDGE

For Applicant : **Mr. B. J. Simelane**

For Respondent : **Mr. S. P. Mamba**