



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 134/2012

In the matter between

JAPHET PHASKANI MSIMUKO

Applicant

and

**SIBONGILE LYDIA PEFILE N.O.
DEPUTY SHERIFF, DISTRICT OF HHOHHO**

**1st Respondent
2nd Respondent**

In re;

SIBONGILE LYDIA PEFILE N.O.

Applicant

and

JAPHET PHASKANI MSIMUKO

Respondent

Neutral citation: *Japhet Phaskani Msimuko v Sibongile Lydia Pefile N.O. & Another* (134/12) [2013] SZHC 192 (22nd August 2013)

Coram: Mamba J

Heard: 05 July, 2013

Delivered: 22 August, 2013

[1] Civil Law – Law of Contract – Sale of Land – Agreement not signed by either Seller or Purchaser or their Agents. This is contrary to section 31 of The Transfer Duty Act 8 of 1902 which requires such agreement to be in writing and signed by both parties or their agents duly authorized do so in writing. Agreement null and void.

[2] Civil Law – Law of Contract – Verbal Agreement of sale of fixed property – Purchaser having paid full purchase price and taken occupation thereof – Seller applying for ejectment or eviction of buyer. Application granted.

[3] Civil Law – Application for rescission of judgment on allegation that it was erroneously sought or erroneously granted per rule 42 (1) (a) of the Rules of Court. Applicant to satisfy the Court that judgment or order erroneously sought or erroneously granted and need not show good cause or a bona fide defence.

[4] Practice and Procedure – Attorney conceding that issue raised by his client affords him no defence to the application. This may not be said to be contrary to his client’s instructions or unethical. Attorney as an officer of the court within his rights to make such concession and is duty bound to do so. Matter therefore not erroneously sought or erroneously granted where this occurs.

[1] After hearing argument on 05th July 2013, I dismissed this application for rescission and indicated that my written reasons for doing so shall follow in due course. I do mention though that I indicated then that I did not believe that the applicant had, in law, satisfied the court that the judgment complained of had been erroneously sought and granted as per the terms of rule 42 of the rules of this court. What follows herein are my reasons for so holding.

- [2] The applicant herein is an adult male person from the Republic of Zambia whilst the first respondent is Sibongile Lydia Pefile in her capacity as the *curator ad litem* and *curator bonis* for Simon Pefile who, inter alia, because of his age, is unable to manage his affairs.
- [3] It is common ground that sometime around 1999, the applicant and the said Simon Pefile entered into an agreement whereby the applicant bought from Mr. Pefile certain fixed or immovable property described as:
- CERTAIN: Remaining extent of Portion 38 of farm number 75 (Waterford Park) situate in the District of Hhohho, Swaziland.
- Measuring: 5972 square metres
- for the sum of E310, 000-00
- [4] The parties also agreed that a sum of E100,000.00 would be paid as a deposit and the balance of the purchase price would be paid in instalments on or before certain stated times. It is common ground also that the applicant was given and did take occupation of the property upon payment of the deposit and he subsequently complied with the terms of the agreement in relation to or in respect of the payment of the purchase price.

- [5] I observe herein that although it is common cause that the said agreement of sale was verbal, the applicant has, rather curiously I think, not specifically said so in his papers. He has, however, by implication admitted as much as he has stated that the said deed of sale was “unfortunately and unwittingly not signed by both of us.” This deed of sale or agreement remains unsigned unto this day.
- [6] Early 2012, the first respondent successfully filed an application before this court, under the above case number, for the eviction and or ejection of the applicant from the property in question. She basically founded her application on two grounds; namely
- (a) that the sale was null and void as the agreement was not in writing and signed by both parties, contrary to the provisions of section 31 of the Transfer Duty Act 8 of 1902 and
 - (b) the agreement was null and void as the applicant failed to obtain the consent of the Land Control Board to purchase the property, contrary to section 2 and section 8 of the Land Speculation Control Act of 1972.
- [7] Section 31 of the Transfer Duty Act provides that

‘No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorized in writing.’

And, section 8 of the Land Speculation Control Act 8 of 1972 states that

‘8 (1) A controlled transaction shall be void unless the Land Control Board has granted its consent in respect of that transaction in accordance with this Act.’

In terms of this Act a controlled transaction includes the sale of fixed property to a person who is not a citizen of Swaziland.

[8] The applicant opposed the application on the grounds that he had paid for the property in full and had also been given occupation thereof and therefore the non-signing of the deed of sale by the parties was a mere formality and thus legally inconsequential. He argued in his opposing affidavit that:

‘7.9 The written sale agreement was only to be made as a record to confirm the option which I had duly exercised and Dr Pefile had duly accepted.’

[9] When the matter, the original application by 1st respondent, appeared before Maphalala PJ, Mr M. Simelane, Counsel for the applicant, conceded that the defence raised by the applicant was bad in law – meaning, that it was not a

good defence to the application. Inevitably, the learned judge granted the application and ordered the eviction of the applicant from the property.

[10] It is noted herein that the said Mr M. Simelane appeared on behalf of Mr S.P. Mamba who was the attorney actually instructed by the applicant.

[11] The applicant argues in this rescission application that he never instructed Mr S.P. Mamba or Mr M. Simelane to consent to the order by Maphalala PJ referred to above. He argues that

‘20. I submit that the fact that I had not instructed and/or authorized my erstwhile attorneys to consent to the order ejecting me from the property the said judgment was granted in error and had the above Honourable court been aware of the lack of authority on the part of my attorneys to consent to the said order, it would not have granted the same.

Furthermore, having regard to the facts of the matter as aforesaid there is sufficient cause to have the said judgment rescinded and set aside in terms of the common law particularly because the same was entered without my consent as a result of a miscarriage of instructions

by my erstwhile attorneys and the above Honourable court is enjoined in such matters to ensure justice to all litigants’.

[12] The jurisdiction or powers of this court to rescind or vary its own final judgments and orders under rule 42 is in addition to its powers to do so under the common law and under rule 31(2)(b) of the rules of court. The court has a discretion in the matter. Rule 42 (1) (a) states that

‘The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby’.

The judgment complained of need not be a default judgment or one given in the absence of the applicant as is the case under rule 31(2) (b) of the rules.

[13] In order to succeed under this rule ie. 42(1)(a), an applicant must show that the judgment or order complained of or attacked was erroneously sought or erroneously granted’. It is trite law that once the court holds that indeed the judgment or order was erroneously sought or erroneously granted, it must,

without any further enquiry, grant the application. It stands to reason that once such a conclusion is reached, the court need not enquire as to whether or not the applicant has a defence to the action or he has shown or established good cause. The reason is in my judgment, plain. A judgment that is erroneously sought or erroneously granted is not a true and legal judgment or order. It is a mistake or error that does not reflect the true intention of the court as it was not fully aware of all the pertinent factors in the case.

- [14] There are, unfortunately certain judgments in this court that seem to suggest otherwise; ie even if an applicant has established that a judgment was erroneously sought or erroneously granted, he still has to satisfy the court and establish good cause. These judgments are in my judgment clearly *per incuriam* and I am with due deference unable to follow them. See *Motsa, Mgobodze v Khumalo, Sam; In Re Khumalo Sam v Motsa Mgobodze, 2000-2005 (1) SLR 74, Dlamini, Polo v Nsibande Martha; In Re Nsibande Martha v Dlamini Polo and Others 2000-2005 (1) SLR 13* and the cases therein cited.

- [15] According to H.J. Erasmus, *Superior Court Practice*, (1994 ed) at B1-308,

“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 an order, or if there existed at the time of its issue a fact 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. Though in most cases such an error would be apparent on the record of the proceedings, it is submitted, that in deciding whether a judgment was erroneously granted a court is not confined to the record of the proceedings.”

(Footnotes have been omitted by me).

I entirely agree with this general statement of the law. Vide *Reckson Mawelega v M.B. Association of Money Lenders and Another, Appeal Case 43/99* (unreported) and the cases therein cited.

[16] In the instant case, the applicant is clearly or plainly mistaken that Mr. Simelane, his attorney in the application wherein the order complained of was granted, consented to the grant thereof. Counsel, according to the judgment by Maphalala PJ, conceded that the applicant's defence was bad in law, ie it afforded him no defence at all. Counsel was of course within his

rights to make this concession. He was infact duty bound to do so as an officer of the court.

[17] From the foregoing, I am unable to hold that the applicant has succeeded in proving that the judgment complained of was erroneously sought or erroneously granted. This application fails on this front.

[18] I now briefly, examine whether or not this application could succeed under the common law or under rule 31 (2) (b) of the Rules of this Court.

[19] Rule 31 (2) (b) governs judgments or orders given wherein the defendant is in default of filing of a notice of intention to defend or where, having done so, he has failed to file a plea. This is trite. Clearly, this is not the case in the instant case. The applicant filed both his notice of intention to defend and also his affidavit in opposition to the summary judgment application. He had judgment granted against him simply because he had, in law, no defence to the matter. His case therefore is not one that is regulated or governed by this rule.

[20] I have referred above to the circumstances that led to the grant of the judgment that is under the spotlight in this application and I do not find it necessary to plough the same ground twice herein. Suffice to say that, an applicant for rescission under the common law must show both good cause for his default or why the judgment ought to be rescinded and also establish that he has a bona fide defence to the action.

See Dlamini Polo (*supra*) and the cases therein cited.

[21] The applicant vaguely submits that it would be unfair and an injustice not to order the 1st respondent to transfer the property to him since he, the applicant, has paid for it in full (as per their verbal agreement). This argument, is in my judgment bad in law inasmuch it ignores the fact that the 1st respondent has offered to refund the applicant the full amount paid plus interest as ordered by the court. Further, this argument is legally unsound inasmuch as it totally ignores the clear requirements of the law that such transactions must be in writing and must be signed by both parties or their duly appointed representatives. Section 31 of the Transfer Duty Act makes this unambiguously and absolutely clear. It is not enough that the parties to an agreement of sale of immovable property must agree on the terms thereof or that the terms of such agreement be embodied in a certain document.

They must go further and sign the said document for the said agreement to have any force of law or binding effect.

[22] In *Ephraim Toya Thwala v Abel Mkhonta and another*, civil case 957/1990, a judgment of this court delivered on 18 February, 1994, Hull CJ had this to say:

‘The first defendant excepts on the ground that the agreement on which the plaintiff relies is contrary to the provisions of section 31 of the Transfer Duty Act 8 of 1902 because it is not in writing and signed by both parties or their agents.

The exception must in my view succeed . The section requires that both parties must sign the contract for sale if it is to have any force or effect : *ROYKE v MEDICINE*, 1962 (4) SA 281 (C)...

It is nowhere alleged that the plaintiff’s cause of action is based on a written agreement for sale that has been signed by or on behalf of both parties.’

The plaintiff’s claim was accordingly dismissed. The application herein must suffer the same fate and accordingly it cannot succeed under the common law. The cause upon which it is based is fatally defective; it is based (illegitimate).

[23] A provision similar to the said section 31 was considered by the court in *Potchefsroom Dairies and Industries Co. Ltd v Standard Fresh Milk Supply Company*, 1913 TPD 506. There De Villiers JP at 510 said:

‘The only question that remains to be considered is whether s30 of the Transfer Duty Proclamation is applicable to the present case. The section reads as follows: “No contract of sale of fixed property shall be of any force or effect, unless it be in writing and signed by the parties or by their agents duly authorized in writing”. It seems to me clear what the intention of the legislature was. In matters of the sale of fixed property – which are very important transactions – the legislature wished to render quite certain that the terms of such an agreement should be reduced to writing, as also who are the parties bound by the terms of the agreement: and that, if the parties to the agreement did not themselves sign the agreement, there should be no doubt as to the authority of the agent who signed it on their behalf, for the authority of the agent should equally be contained in a written document. It is a maxim of our law that everybody must know the condition of the person with whom he contracts, and it seems to me that this section, in so far as it deals with agents, is directed towards that end.’

See also *Brandt v Spies*, 1960 (4) SA 14 (E)

[24] There is merit in the 1st respondent's assertion that, even if the court were to have recourse to the unsigned agreement, this application must fail because the applicant has not stated that he received or obtained the necessary consent from the Land Control Board as required by the relevant legislation. However, it is not necessary for me to consider this point in the circumstances of this case. This point would only have been relevant had the agreement been duly executed.

[24] These then are my reasons for dismissing the application with costs.

MAMBA J

For the Applicant : Mr M. Mabila

For the 1st Respondent : Mr S.V. Mdladla