



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2364/2010

In the matter between:

**SWAZILAND DEVELOPMENT AND SAVINGS
BANK (SWAZI BANK)**

Applicant

And

**SIDVUKANE PROPERTIES (PTY) LIMITED
HEZEKIEL SIPHO MAMBA**

1st Respondent

2nd Respondent

Neutral citation: *Swaziland Development and Savings Bank (Swazi Bank) v Sidvukane Properties (Pty) Ltd and Another (2364/2010) [2013] SZHC 250 (12th November 2013)*

Coram: **M. Dlamini J.**

Heard: **13th August 2013**

Delivered: **12th November 2013**

Rescission application – where applicant alleges that application is brought in terms of Rule 32 (2) (b), applicant to show inter alia that it was “legally incompetent for court to make such an order” –order for debatement not competent where judgment has already been entered as it vitiates the judgment already entered - where party has

filed notice to defend, the other party duty bound to move application in terms of procedural mechanism under the Rules of Court before an application for default judgment – the notice to defend cannot be ignored even though filed late – audi alteram principle take precedent.

Summary: Before me is a rescission application for an order granted in favour of respondent by means of default judgment by this Court.

Chronology of events

- [1] About May 1991 the applicant and 1st respondent entered into a loan agreement. The 2nd respondent stood as surety for the sum of E232,291 plus E26,500 the capital loan.
- [2] However, the applicant having obtained judgment in its favour on the 23rd January 1998 and in execution of the same, duly sold the 2nd respondent's property in order to realise the sum owing under the loan agreement of 1991. The sale in execution was in May 2010.
- [3] In June 2010 the respondents instituted action proceedings calling for the 1991 loan agreement account to be debated. Although the applicant, through its erstwhile attorney M. P. Simelane filed notice to defend, it did so out of time. Subsequently, judgment by default was entered in favour of the respondent.
- [4] Applicant has now filed an application for rescission of the judgment by default entered in favour of respondents.

Parties' contention

[5] The applicant bases its application for rescission on human error and that it has a *bona fide* defence to the main action.

[6] Expatriating on the error, the applicant on its founding affidavit states:

“11. *In an effort to get to the bottom of the matter, I was advised by applicant’s Attorneys that they missed / did not see this particular instruction as it came in a bundle with other instructions and was underneath.*

12. *Upon having dispatched summons against the applicant to its Attorneys, the applicant is usually well at ease that the matter is at that point receiving the proper attention necessary to protect the interest of the applicant. This was no exception. The applicant has had every confidence in the capabilities of the attorneys of record and would not have anticipated that such a mishap could occur. But as they say it, to error is human. The summons escaped the attention of the attorneys until the dies expired.”*

[7] Addressing its *bona fide* defence the applicants avers:

“16. *I am advised and verily believe that this application is capable of being dealt with on a two prone approach. That is in terms of Rule 31 (3) (b) as well as under Rule 42 (1) (a). The above Honourable Court erred in granting the relief sought without hearing evidence as required by Rule 31 (3) (a) as some of the claims by the*

Respondents are not for “a debt or liquidated demand” to warrant the default judgment being granted against the Applicant.

17. *The Applicant has a bona fide defense to the Respondent’s claim in the summons, as it would appear more fully hereunder.”*

[8] *Au contraire* the respondent depose:

“6.5 *Judgment was then obtained by the Applicant on the 23rd of January 1998.*

6.6 *The amount of the judgment was E290,973.57 (Two Hundred and Ninety Thousand Nine Hundred and Seventy Three Emalangeni Fifty Seven cents) plus interest at the rate of 5% per annum and costs.*

6.7 *Thereafter, the applicant made various attempts at executing upon the judgment and only succeeded in having the immovable property, which was then declared executable in terms of the Court Order, sold on the 16th October 2009. Eleven years later.*

6.8 *In all that period, the Applicant was applying interest to the loan account.*

6.9 *Thereafter, the property was transferred into the name of the purchaser Lubombo Oral Health Services and registered on the 21st of May 2010. I annex hereto marked “A” a copy of the Deed of Transfer.*

6.10 *The Applicant after having sold the property, did not file a plan of distribution in accordance with Rule 46 of the Rules of Court setting out how the proceeds of the funds were distributed.*

6.11 *Instead, it simply applied the entire proceeds of the sale which, according to the Deed of Transfer (annexure “A”) was the sum of E1,100,000.00 (One Million One Hundred Thousand Emalangeni), into its debt.*

6.12 *The Applicant failed in all this time to account to the Respondents for the proceedings of that sale, and further failed to furnish a full statement of the account from the time that judgment was granted to date.*

6.13 *As a result thereof the 1st and 2nd Respondent then sought an Order of this Honourable Court seeking to compel the Applicant to debate the account.”*

Adjudication

[9] The applicant has referred this court to Rule 31 (3) (b) and Rule 42 (1) (a) as basis for its rescission application.

[10] The learned author **Erasmus** in **Superior Court Practice** at page **B1-308** neatly sums as follows in relation to rescission applications:

“There are three ways in which a judgment taken in the absence of one of the parties may be set aside, namely in terms of (i) this sub-rule (Rule 42 (1) (a) or (ii) 31 (2) (b) or (iii) at common law. In order to obtain a rescission under this sub-rule (42 (1) (a)) the applicant must show that the prior the order was ‘erroneously sought or erroneously granted’. Once the court holds that an order or judgment was erroneously sought or

granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the sub-rule to apply.”

[11] On the question as to when an order could be said to have been erroneously granted, the learned author highlights:

“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 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.” (underlining my emphasis)

[12] **Leveson J in First National Bank of South Africa Ltd v Jurgeus and Others 1993 (1) SA 245 at 247** describing the word erroneously stated:

“The ordinary meaning of ‘erroneous’ is ‘mistaken’ or ‘incorrect’.”

[13] To demonstrate that the order was erroneously sought, the applicant has referred this court to Rule (31) (3) (b) and submitted that the respondents flouted the said Rule.

[14] This Rule stipulates:

“A defendant may, within twenty one days after he has had knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for he payment of the costs of the default judgment and of such application to a maximum of E200, set aside the default judgment on such terms as to it seems fit.”

[15] The applicant has contended that it was granted judgment on the loan account in 1998. A sale in execution was carried out and in 2010 the mortgaged property was transferred from 2nd respondent. In June 2010, the respondents instituted action proceedings praying for orders for debatement of the loan account. The period from the date of the judgment in favour of applicant and the date of action proceedings by respondent was twelve years. This was contrary to Rule 31 (3) (b) which calls for the respondent to have filed a rescission of the judgment in favour of applicant (i.e.1998 judgment) within thirty –one days after serving of such judgment.

[16] It is applicant’s contention that had the court been aware of the circumstances defined above, it would not have granted the judgment.

Issue:

[17] The issue therefore before me is whether in the circumstances described by applicant, it was “*legally incompetent for the court*” to grant the judgment sought to be set aside in the present application as per **Erasmus** (*supra*).

[18] From the answering affidavit, the averments by the applicant of failure to comply with Rule 31 (3) (b) stand unchallenged. This court is bound to accept the version of the appellant.

[19] From the reading of the Rule, the respondent ought to have applied for a rescission within a specified period of the judgment granted by default in 1998. They failed to do so. They only approached the court twelve years later. Clearly this was contrary to Rule 31(3) (b). In this way, it was incompetent for the court to grant the order sought to be set aside *in casu*.

[20] There is another approach to the present application. The respondents were granted the following orders:

“(a) *An order directing the Defendant to render a full account of all transactions on the 1st Plaintiff’s account number 1L5141/03 from 20 May 1991 to the date of the grant of this order, duly supported by proper vouchers;*

(b) *A debatement of such account;*

(c) *Judgment in favour of the 1st and/or 2nd Plaintiff against the Defendant for the amount which may be found, after the debatement to be due by the Defendant to the Plaintiffs.*

[21] This case, as correctly pointed out by learned Counsel for applicant, is akin to the case of **Swaziland Development and Savings Bank. v Bhokile Shiba (55/12) [2013] [SZSC 10]** which I presided over in the court *a quo*.

[22] The facts of the matter in **Swaziland Development and Savings Bank. v Bhokile Shiba** (*supra*) are briefly that by consent, a judgment was entered by the *court a quo* in favour of respondent (**Swazi Bank**) and property mortgaged was subsequently sold in execution. Years later, the respondent filed an application for rescission and prayed for debatement of the account on similar lines as in *casu*. Although I dismissed the application for rescission, I granted the prayers on debatement. On Appeal their Lordships articulating the effect of debatement of an account after judgment has been entered stated as follows:

“18. *In duplum rule*

The court a quo upon reaching the conclusion in paragraph [58] of its decision that Applicant’s grounds for rescission based on fraud, misrepresentation and coercion must fail, thereafter clearly misdirected itself, by embarking upon a perfidious adventure into the in duplum rule and its effect on the settlement agreement. Consequently the court ordered the parties to debate 5 accounts only and solely to address the in duplum rule.

19. *The question here is the propriety of such an order. I will not belabour this issue for it is to my mind a straight forward one.*

21. *The terms of the agreement were taken to court and judgment entered into. The Respondent cannot turn around and set aside the judgment on this ground. He cannot approbate and reprobate, shifting goal posts to suit his own purposes.*

22. *What he has embarked upon is to use the court to evade an obligation he willingly entered into. That is a disingenuous and malicious use of the judicial process, which cannot be allowed! It will be against public interest for judicial process to be used in such a manner.*

23. *Having said that the rescission application cannot succeed on the grounds of fraud, misrepresentation etc. there were no basis for the court to turn around and take a step that has the effect of granting the very rescission it had effectively refused. That is exactly the implication of investigating the possibility of the in duplum rule vitiating the consent judgment. So long as the Respondent voluntarily entered into the settlement of the claim by the Appellant against him and both parties have acted in*

pursuance of that acceptance, he cannot be heard to resile from that.”(underlining my emphasis)

[23] The court concluded:

“25. *The result is that there is merit in this appeal and it succeeds. I hereby set aside the orders of the court a quo to wit -*

“1. *The parties debate the 5 accounts only and solely to address the in duplum rule.*

2. *Question of costs is reserved.*”

In their place I substitute the following:

“*Applicant’s application be and is hereby dismissed with costs.*” ”

[24] *Fortiori, in casu* granting the order of debatement in favour of respondent was not “*legally competent*” as it had the effect of setting aside the very judgment granted in favour of applicant in 1998. The Respondents, having failed to challenge the judgment granted in 1998 in favour of the applicants, within the stipulated period of twenty one days as per Rule 31 (3) (b), it was “*legally incompetent*” to grant respondent the judgment of debatement of the very same account which was the subject matter of the judgment granted in 1998.

[25] Lastly, *in casu*, the judgment in favour of respondent was entered after a notice to defend had been filed. I accept that it is not in issue that it was filed late. However, what is of significance is that by the time the

respondent's application was heard, the notice to defend had already been presented to the respondent and the court. That it was belated, did not detract from the fact that the applicant was defending the matter. Its right to defend was paramount and had to be recognized. Procedurally and in law, what ought to have followed therefore on behalf of respondent was an application under Rule 30 to the effect that the applicant ought to have filed an application for condonation for late filing and leave to file its notice to defend. This Rule 30 application would have been served upon the applicant. It was again not "*legally competent*" for the court to grant the impugned judgment against the applicant without respondent first moving a Rule 30 application wherein the reasons for the delay in filing the notice to defend would be considered and weighed against the principle of *audi alteram partem*. I must point out that it is a miscarriage of justice to grant a default judgment in the face of a notice to defend without prior resorting to the various procedural mechanism provided under the Rules of this court. It is for this reason, for instance, that where one has filed a notice to defend and has subsequently failed to file a plea, the legislature provides for the procedure under Rule 26, which calls upon the party instituting action to serve a notice of bar whose effect is to remind the defaulting party to file a plea or replication as the case may be. It is only after failing to heed to the notice of bar that the other party may apply for default judgment. *In casu*, neither a Rule 30 nor a Rule 26 application was filed before the challenged judgment was entered. The Rules of this court as **Schriene JA** correctly observed:

"...are an important element in the machinery for the administration of justice".
(see **Trans-African Insurance Co. Ltd v Maluleka 1956 (2) S.A. 273 (A.D.)** at 278 (underling my emphasis))

[26] Before I close the chapter on non-observance of the Rules of this court by attorneys, it is apposite to refer to the wise observation and words of his Lordship **Ramodibedi JA** (as he then was) in **Johannes Hlatshwayo v Swaziland Development and Savings Bank and Others, Civil Appeal case No.21/2006** which are as follows:

[14] *This Court has on diverse occasions warned that flagrant disregard of the rules will not be tolerated. Thus, for examples, in **Simon Musa Matsebula v Swaziland Building Society, Civil case No.11 of 1998**, the Court expressed itself, per **Steyn JA** in the following terms:*

“It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the rule rather than the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery for speedy efficient justice. The disregard of the rules of Court and of good practice have so often and so clearly been disapproved by this Court that non-compliance of a serious kind will henceforth result in appropriate case either in the appropriate procedural orders being made ...” (underlining my emphasis).

[27] The court appreciates that the respondents are lamenting applicant’s action of failure to account for the excess money received after the sale of the surety property. Respondents claim that the capital debt was for the sum of E290,973.52 whereas the proceeds of sale was E1,100,000.00 and yet applicant failed to account for the residue. However, that as it may, the orders sought in their action of June 2010 had the effect of rescinding the orders granted against them in 1998. This, as per the unanimous decision of **Swaziland Development and Savings Bank v Bhokile Shiba** (*supra*)

which I have cited with great approval, cannot stand. Their remedy in the circumstances they have described lies under different prayers and certainly not under debatement of the very account judgment was entered against them. The reason is that an order for debatement vitiates the judgment taken in 1998 by applicant.

[28] In the result, I enter the following orders:

- (1) Applicant's application succeeds.
- (2) The order of this court granted on the 21st July 2010 in favour of respondent is hereby set aside.
- (3) Costs to follow the event.

M. DLAMINI
JUDGE

For the Plaintiffs : T. Mlangeni
For the Defendant : J. Henwood

