



**IN THE HIGH COURT OF SWAZILAND**

**Held at Mbabane**

Case NO. 1446/2005

In the matter between:-

**INKHULULEKO YEMADVODZA  
FAMERS ASSOCIATION**

**Applicant**

**AND**

**VISA-TECH INVESTMENTS (PTY) LTD  
SWAZILAND DEVELOPMENT AND  
SAVINGS BANK**

**1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent**

**MDUDUZI COMFORT MHLONGO**

**3<sup>rd</sup> Respondent**

**INRE:**

**VISA-TECH INVESTMENTS (PTY) LTD**

**Plaintiff**

**AND**

**INKHULULEKO YEMADVODZA**

**1<sup>st</sup> Defendant**

**FAMERS ASSOCIATION**

**MDUDUZI COMFORT MHLONGO**

**2<sup>nd</sup> Defendant**

**Neutral citation:**

*Inkhululeko Yemadvodza Farmers Association v Visa  
Tech Investments (PTY) Ltd & Other (1446/2005)  
[2013] SZHC261 (10<sup>th</sup> October 2013)*

**Coram:**

**HLOPHE J**

**For the Applicant:**

**Mr. Dlamini**

**For the Respondent**

**Mr. L. R. Mamba**

**Date heard:**

**7<sup>TH</sup> October 2013**

**Date delivered:**

**10<sup>th</sup> October 2013**

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JUDGMENT

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[1] The applicant instituted these proceedings under a certificate of urgency, seeking inter alia the issuing of a rule nisi calling upon the respondents to show cause why an order rescinding and or setting aside the one granted by this court on the 24<sup>th</sup> January 2013 as well as interdicting the second respondent from paying out or effecting any deductions of amounts from the applicant's account held with the second respondent's bank, cannot be confirmed.

There was also sought an order of court setting aside the Acknowledgement Of Debt and Agreement To Pay allegedly concluded by and between the parties. The order sought with regards the rescission of judgment and that concerning the interdiction of the second respondent from paying to the first respondent the amounts deducted from its account held with the second respondent bank were sought to operate with immediate and interim effect.

[2] The application is founded on the founding affidavit of one Ben Mhlongo, who describes himself as an adult male of Nyakatfo area in the Hhohho region; the chairman of the applicant Famers Association. The thrust of the founding affidavit is to the effect that on the 24<sup>th</sup> January 2013, this court

(The High Court) granted *an ex parte* application brought by the 1<sup>st</sup> respondent where he sought to have an Acknowledgement Of Debt And Agreement To Pay, allegedly concluded between the first respondent and the applicant made an order of court.

[3] I say this acknowledgement of debt was allegedly concluded between the said parties because the applicant, through its chairman, Ben Mhlongo, denies ever concluding such an agreement or even knowledge of the application seeking to have same registered and made an order of court. There does not seem to be a dispute in this regard when considering that indeed the said application, which is an annexure to this one indicates no proof of service either *ex facie* itself or by means of a return of service by a deputy sheriff. In fact there was not even a provision on the application itself for the recipient of such papers to sign Acknowledging receipt of service, as is normally the case, which is an indicator that the non-service of same upon the applicant was intended or was not a mistake.

[4] The applicant also avers in its papers not to have given any authority to anyone to conclude and sign such an Acknowledgement Of Debt And Agreement To Pay on its behalf. In fact its position is that there was no debt to acknowledge, as it was not indebted to the first respondent or to anyone for the amounts claimed. This is because it says whereas the basis for the amounts acknowledged as owing in terms of the Acknowledgement Of Debt is goods sold and delivered in the form of fertilizers allegedly sold and delivered to it there was no such sale and delivery of the said goods and the amount of fertilizers allegedly owed by applicant was too much for it to have

used as the land it tilled or ploughed could not consume such a number or amount of fertilizers as it was very small in size.

[5] The applicant contended therefore that the person who signed the acknowledgement of debt allegedly on behalf of the applicant Association, who was also its treasurer; one Mduduzi Comfort Mhlongo, did not only lack authority to conduct purchases on its behalf and to sign the acknowledgement of debt, but he was actually fraudulent in his alleged purchases and in even signing the acknowledgement of debt concerned on behalf of the applicant.

[6] At paragraphs 20, 21, 22 and 23 of the founding affidavit the following is stated:-

*“20. The third respondent signed the acknowledgement of debt in Mbabane, and misrepresented to the first respondent that he had been duly authorized to conclude the agreement on behalf of the applicant. No such authority was ever given to the third respondent.*

*21. We have good cause for setting aside of the order because for all intents and purposes, we have not incurred the debt with the first respondent. We have a bona fide defence to the claim by the first respondent, in that we have not had any dealings with the first respondent, we never ordered any fertilizers from them, we never received any fertilizers from them, we never authorized the third respondents to purchase any fertilizers from them and never authorized the third respondent to sign the acknowledgement of debt.*

22. *As treasurer of the organization, the third respondent does not have authority to make orders and/or acquire any goods on behalf of the applicant. Such is the prerogative of the applicant and will only be effected under the auspices of the chairman.*

23. *I further submit from a totality of the facts, it is apparent that if we were given leave to oppose the order, we would have demonstrated that there has been a fraud carried out by the third respondent”*

[7] The applicant alleges that after the order registering the acknowledgement of debt had been made or issued, it was never served on it nor was any execution effected so as to determine whether or not the judgment debt could not be realized from its movables but instead there was issued a Garnishee Notice which on the face of it claims to have been issued in terms of Rule 45 (13) (A). This Garnishee Notice had in summary sought to record that the judgment debtor was indebted to the judgment creditor in the sum claimed and that whereas the Bank had in its possession monies belonging to the judgment debtor, such monies were by means of the said garnishee notice being attached with the Bank being ordered or directed to pay same to the judgment creditor.

[8] The applicant further makes an issue of the writ having been issued on the 25<sup>th</sup> September 2013 whilst the garnishee notice was issued on the 26<sup>th</sup> September 2013.

- [9] Based on the foregoing allegations, the applicant asked for an order inter alia interdicting and restraining the second respondent from paying out or deducting any monies from the applicant's account held with the second Respondent as well as another order rescinding the order by this court registering and making the acknowledgement of debt an order of this court, which was the one being enforced through the Garnishee Notice complained of.
- [10] I must state from the onset that under normal circumstances, there would be nothing untoward with the issuing of a Garnishee Notice in terms of Rule 45 (13) (A) even if no writ of execution had first been executed. The issuance and execution of such a Garnishee Notice is but another way of executing a judgment, which is independent of a writ of execution, where the judgment creditor happens to be aware of some monies held by a third party, such as a bank, on behalf of or in favour of the judgment debtor. This means that there is no merit on this particular point.
- [11] It is also alleged by the applicant that its attempts to engage the third respondent, its Treasurer, have been unsuccessful as the latter has disappeared without trace yet the garnishee is meant to be effected anytime.
- [12] With the application having been served on the respondents, only the first among the respondents attended court on the day meant for its hearing as set out *ex facie* the notice of motion; through its attorneys. In fact through Mr. L.R. Mamba, there was on the morning of the date meant for the hearing of the matter, filed a notice to raise points of law. Mr. Mamba made it clear that his client was not prepared to make any undertaking vis-à-vis the execution

or otherwise of the garnishee notice in question pending the filing of the papers and finalization of the matter.

[13] This necessitated that the matter be argued on the points *in limine* raised. Of course Mr. Mamba clarified that should the points *in limine* or points of law raised not be successful, the first respondent was going to file his client's opposing papers. It did not become necessary to determine if strictly speaking the first respondent was realistically entitled to that approach in terms of the rules. It not being made an issue, it was taken to be possible and we proceeded with the matter on that understanding.

[14] There were two points raised *ex facie* the first respondent's notice to raise *points of law in limine*. They were couched as follows:-

“1. This being an application for rescission and an interdict, the application for rescission being on the ground of fraud, application proceedings are not competent.

2. In any event the applicant has failed to set out a case for rescission either under common law or under the rules of the above honorable court”.

[15] In his argument Mr. Mamba submitted that although not specifically so stated, it was clear that the thrust of the application was the rescission of the judgment or order of court. The interdict sought, he submitted was merely to

preserve the status quo in the interim and while the rescission application was being dealt with.

[16] Mr. Mamba went on to submit that in terms of the law, a rescission, of judgment or order, sought on the basis of fraud ought to be done by means of action proceedings and not application proceedings. As the current proceedings were application proceedings, same was incompetent. If therefore there were no proper rescission proceedings, then there was no room for the interim interdict as well as it cannot maintain the status quo to obtain an impossible remedy. Consequently it was argued that the application fell to dismissed on this point alone.

[17] On the second point it was argued that the applicant has failed to make out a case for rescission either on the basis of the common law, Rule 31 or those of Rule 42. It was allegedly inconceivable in terms of Rule 42 because there was no irregularity as conceived in terms of the rules relied upon on the part of the court that granted the order. As regards rule 31 (2) (b) and the common law, there was allegedly no good cause shown in so far as there was no valid defence established or set out by the applicant against the first respondent's claim in the main matter.

[18] This it was argued was because *ex facie* the papers, the applicant was not alleging collusion between the applicant and the first respondent, in the conclusion of the acknowledgment of debt concerned. Instead *ex facie* the papers whatever fraud was complained of was allegedly perpetrated by the third respondent. Otherwise, so the argument went, the first respondent had delivered the goods purchased from it allegedly by applicant through its



Treasurer Mduduzi Mhlongo. If it happened that the said Mduduzi Mhlongo was committing a fraud, then such cannot extend to the first respondent who dealt with the Treasurer of the applicant in that capacity and in good faith and would therefore not or was not expected to know or understand the internal intricacies or policies of the applicant vis-a-vis purchase and signing of contracts as decreed in what has come to be known as the *Turquand Rule*, which is a rule that exonerates third parties who deal with an entity In good faith from not being able to rely on the said agreement or transaction.

[19] In as much as the *turquand rule* favoured the first respondent, so the argument went, the applicant had no defence against the first respondent who was entitled to be paid and even to execute the judgment it had against the applicant. Further still, Mr. Mamba continued, the applicant had itself not contended that the first respondent was part of any fraud perpetrated against it. In fact the applicant's papers suggested that the first respondent was itself a victim of the fraud. This means that the applicant has no defence to the Acknowledgment Of Debt, he submitted.

[20] Furthermore, it was contended if fraud was sought to be relied upon as a basis for the rescission, same had to be specifically pleaded and in so far as none was pleaded as regards the first respondent, there was then no defence pleaded at all and that being the case no rescission on the basis of the common law or rule 31 of the high court rules was conceivable.

[21] Before I deal at length with the contention made on behalf of the first respondent, I need to mention that there are some aspects of Mr. Mamba's submissions which cannot hold because as the matter stands they amount to

conjecture or speculation given that the respondent has not yet filed any papers, on the basis of which certain specific allegations would be made thus entitling the first respondent to make such allegations. The allegations I am referring to in this regard are those to the effect that the first respondent was also a victim of fraud and that he had delivered the goods to the applicant or its Treasurer. It also cannot, in the absence of its having stated its position on how it contends it was bona fide in its dealings with the third respondent, insist on an inference being drawn to the effect that it was bona fide in its dealings with the third respondent so as to have the applicant, who alleges never to have authorized the purchases concerned nor did he receive any such goods from the first respondent, compelled to pay the amount claimed.

[22] Whereas Mr. Mamba contended that rescission proceedings on the basis of the fraud ought to be instituted by way of summons as opposed to being instituted by notice of motion, I was not referred to any authority in that regard. Whereas Mr. Mamba had undertaken to avail me such authority, he ended up not doing so. I therefore find myself constrained not to accept correctness of this statement. Whether or not to proceed by way of motion or action proceedings it seems to me is dependent on whether there is in place a statute providing for that or there is inexistence a rule of court so providing, unless it is inappropriate to so proceed because there exists a dispute of fact. In the present circumstances I have not been shown a statute nor rule of court so providing, nor have I been shown any dispute of fact as being in existence. In fact none of the respondents have entered or filed the papers in opposition to the application hence no disputes of fact are conceivable just as there is also neither statute nor rule of court that prescribes how one proceeds in such instances.

[23] For these reasons it seems to me that the first point *in limine* cannot succeed in as much as the determining factors are the existence or otherwise of disputes of fact which are as yet inconceivable as no papers have been filed raising such, just as there is neither statutory provision nor rule of court disallowing the institution of proceedings in this manner.

[24] On the ground that the requirements of a rescission are not met because the applicant has failed to establish a valid defence, I will start by restating the legal position which is that a judgment can be rescinded either in terms of Rule 31 (2) (b) or Rule 42 of the High Court Rules or in terms of the common law.

[25] In terms of Rule 31(2) (b) and the common law, good cause has to be established before a rescission of judgment can succeed, which is not the case with rescission of judgment sought under Rule 42. Good cause is not necessary under Rule 42 and a rescission of judgment will succeed once it is shown that there was an error or irregularity by the court that granted the judgment complained of, which is not the same thing with rescission under Rule 31(2) (b) and the common law. See the case of **TSHABALALA AND ANOTHER VS PEER 1979 (4) SA 27 AT30.**

[26] Under Rule 31 (2) (b) and the common law, a party who seeks to rescind a judgment must establish good cause. See in this regard Habbstien and Van Winsen's *The Civil Practice Of The Supreme Court Of South Africa, 4<sup>th</sup> Edition at page 696.* Good cause has been interpreted to mean that for the applicant to succeed he needs to give a reasonable and acceptable explanation

for the default together with a valid defence which must coexist with the said explanation. The case of *Chetty vs. Law Society, Transvaal 1985(2) SA 756 at 765 B-C as well as Nyingwa vs. Mooiman NO. 1993 (2) SA 508 at 512 C-E* are supportive of this point.

[27] On the papers before court the applicant has established that it was not aware of the existence of the proceedings that resulted in the Acknowledgment Of Debt And Agreement To Pay being made an order of court as it was not served with same which is indisputable. It has also been alleged that the third respondent, the Treasurer of the applicant who signed the Acknowledgment Of Debt and agreement to pay concerned, had not been authorized to do so nor had he been authorized to make any purchases from the 1<sup>st</sup> respondent. Furtherstill it was alleged that the applicant has not received any such goods.

[28] It was argued on behalf of the first respondent that the above could be a defence against the third respondent but not against the first respondent, who is said to be an innocent party.

[29] The problem with this contention is that it is made by counsel as a submission in court and from the bar and there is no evidence establishing it. For instance the first respondent does not itself say that it was a bona fide seller nor does it explain how it came to sign the acknowledgment of debt with the third respondent and even how it sold applicant goods including eventually where it delivered the said goods in light of applicant's contention he never received same.

[30] This court is further being asked to speculate that *the Turquand rule* applies in this matter and that because it applies the applicant has no valid defence. This conclusion should, in my view be drawn from the facts that are properly alleged which establish it. It should not be a mere conjecture as it currently is.

[31] I am further not convinced that realistically speaking it can be argued that the rescission sought is sought on the basis of fraud. From what I am seeing so far there are allegations that the applicant did not know about the proceedings resulting in the order sought to be set aside, and further that if he had known about it he would have defended same and shown that the plaintiff did not owe the first respondent the monies claimed because the respondent had no mandate to purchase the goods concerned and that such goods were never delivered. This to me depicts a rescission sought on the basis of Common Law, whose requirements I am enjoined to consider even where the pleadings do not specifically say so. See in this regard the **Nyingwa vs Moolman N.O.** (Supra) judgment.

[32] On the basis of one of the judgments of the Supreme Court I came across during my preparation for this judgment, I must say that the points *in limine* taken by Mr. Mamba cannot succeed for a different reason as well. This is the point that the garnishee sought to be executed stems from a judgment or order of this court making an Acknowledgment Of Debt And Agreement To Pay an order of this court. There was at the time the Acknowledgment of Debt was concluded, no court proceedings instituted to necessitate the conclusion of the said Acknowledgment Of Debt And Agreement To Pay. In fact the applicant does emphasize, and his position is not disputed, that there were no court proceedings giving rise to the Acknowledgment Of Debt

concerned. It was none the less prepared and signed supposedly on behalf of the applicant and subsequently registered and made an order of court without applicant being served with it let alone being aware of its existence. It was contended this was the case because the acknowledgment of debt itself allowed such to be done *ex facie* itself.

[33] *In Longrum Investments (pty) ltd vs. Ingula Commercial Finance (pty) ltd Civil Appeal Case NO. 11/2008*, The Supreme Court of appeal, whilst commenting on this practice, (the registration and making into court orders Acknowledgment Of Debt and Agreement To Pay in instances where there was in existence no legal proceedings pending in court), said it should cease putting it in the following words; at paragraph 6 of the said judgment:

*“In argument Mr. Mdladla informed us that it is a local practice to have agreements, such as the document in this case, made orders of court. When litigation is settled that often happens, but in the absence of pre existing litigation, the only case I can think of in which a document is made an order of court is when an award in an arbitration is made an order of court to enable the successful party to execute thereon. Moreover in a case like the present, making the agreement an order of court would seem to be pointless because the respondent will well sue for payment of whatever amount may be due and owing. I do not think that if a document such as that in the instant case were, contrary to the view expressed above, to be “ made an order of court” it would, without more, justify the issue of a writ of execution as happened in this matter. I therefore consider that if*

indeed, there is such a local practice, it ought to cease (emphasis by this court).

[34] If this practice had to cease as of the 20<sup>th</sup> November 2008 when the Longrun Investments (pty) LTD (supra) judgment was handed down, it then means that it was erroneous, and was against Rule 42 of the High Court Rules, which authorizes the rescission of a judgment granted erroneously in the absence of the other party, for the court to have made such a document an order of court years later. If it was erroneously made an order of court then the application cannot at this stage be said to be ill conceived as it could be set aside on the basis of Rule 42 on this ground alone

[35] I therefore cannot agree that a case for rescission has not been made on these papers, and that therefore the point of law raised can be upheld with the application being dismissed.

[36] For the foregoing reasons I have come to the conclusion that the points *in limine* raised by the first respondent cannot succeed and I have to dismiss same with costs, which I hereby do.

Delivered in open court on this \_\_\_\_\_day of October 2013.

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**N. J. HLOPHE**

**JUDGE OF THE HIGH COURT**