



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1082/2009

In the matter between:

**ROBERT LOBI ZWANE
BONGANI ZWANE
EMANGWENI (PTY) LTD**

**1st Applicant
2nd Applicant
3rd Applicant**

And

**ANDRIES STEPHENUS DUPLESSIS
REGISTRAR OF DEEDS
ATTORNEY GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent**

Neutral citation: *Bongani Zwane & 2 Others v Andries Stephenus Duplessis & 2 Others (1082/2009) [2014] SZHC 118(13th June 2014)*

Coram: M. Dlamini J.

Heard: 27th March, 2014

Delivered: 13th June, 2014

Rescission application – applicant to establish “reasonable and acceptable explanation for default, and a bona fide defence which prima facie carries some prospect of success”.

Where there is failure to file a plea despite reminders, court to construe that the defendant had no plea. Liquidated demand should be construed to include specific performance.

Summary: This is an opposed application for rescission on grounds, *inter alia*, that the default judgment was obtained while negotiations were pending and that there is a *bona fide* defence. An interdict order is also sought for the transfer of Lot 117 Extension No.1 Township District of Manzini against respondent under default judgment. The applicant contends that it was erroneous to grant an order transferring title to the 1st respondent in the absence of evidence.

Parties' contention

Applicants'

[1] The founding affidavit as deposed by attorney for applicants informs as follows:

“2.7 This is accordingly an application in terms of common law for rescission of judgments and orders of this Court and or in terms of Rule 42 of the Rules of this Honourable Court.

2.9 The Defendants do have a bona fide defence to the action instituted against them by the Plaintiff and the default judgment was granted against them not as a result of any fault of their own as there is a justifiable reason why they defaulted in filing their defence to the claim. Furthermore, the default judgment was granted in error in that:-

[2] The learned Counsel expatiates the above as follows:

“2.9.1 the relief sought in the Default Judgment Application was an order of specific performance. In the absence of evidence that the Plaintiff had

performed its own obligations in terms of the contract, or at least had tendered to so perform the said obligation, it was erroneous to grant the Default Judgment and had the Court been made aware of this fact it would have not granted the Default Judgment.

2.9.2 *the immovables in respect of which the Plaintiff sought to have ownership transferred are registered in the name of the 4th Defendant yet in the Summons no prayer was made against the 4th Defendant to transfer ownership of the said property. It was therefore erroneous to grant Default Judgment compelling the 1st to 3rd Defendants to transfer ownership of property belonging to the 4th Defendant without a specific Order compelling the 4th Defendant itself to transfer ownership of the said immovable.”*

[3] The next paragraphs set out how the 1st respondent has failed to perform his obligations as per the terms of the contract viz. that he failed to obtain a court order for purposes of evicting the occupants of Nyetane farm. This has hindered the applicants from occupying the said piece of land.

The applicants further deposed:

“3.8 *It was therefore the Defendants’ instructions to me, not only to file a Plea to the Plaintiff’s particulars of claim stating the defence already outlined above, but simultaneously therewith to file a counter claim wherein the Defendants intended inter alia to ask for the following relief:*

3.8.1 *The Plaintiff be ordered specifically to comply with all the provisions of the Agreement of Sale and more specifically to ensure that the squatters are removed from the farm which is the subject matter of the purchase;*

3.8.2 *to claim damages from the plaintiff for his breach of the Agreement;*

3.8.3 *to tender full performance by the Defendants of their obligations in terms of the Agreement and the addendum thereto against due compliance by the Plaintiff of his obligations in terms of the Deed of Sale.”*

Explaining failure to defend respondent's action, applicants aver:

- “4.1 On the 28th June 2012 the Plaintiff's Attorneys caused an ‘APPLICATION FOR JUDGMENT BY DEFAULT’ to be served on my offices. This was at 10h49, indicating that judgment by default would be sought on Friday, 29th June 2012.
- 4.2 Again on the 4th July and at 15h10 the Plaintiff's Attorneys again served an ‘APPLICATION FOR JUDGMENT BY DEFAULT’ on my offices, indicating that application for judgment by default would be made on the 6th July 2012 at 09:30 am.
- 4.3 On both occasions I personally telephonically spoke to Mr. Magagula and on both occasions it was agreed that the applications for judgment by default would not be proceeded with and that he and I would arrange a meeting between our clients as soon as possible to try and settle all the remaining disputes in the matter without having to incur further legal expenses.
- 4.4 As is evident from the facts aforesaid, the application for default was not proceeded with on 29th June 2012, but was proceeded with on 6th July 2012.”

[4] The applicants explains also that the 1st respondent prayed for an order compelling applicants to sign all necessary documents in order to effect transfer of Lot 72, alternatively, the Registrar of the High Court in her capacity as Sheriff. Firstly, the respondents ought to have served the applicants with the order and upon failure to transfer, approach the Registrar to endorse the transfers. Secondly as this was not a liquidated claim, evidence ought to have been led.

[5] Further, as 1st respondent's claim was based on a contract with a clause to the effect that a breach of the contract would not lead to cancellation thereof, it was necessary that evidence be led on whether 1st respondent had fulfilled his part of the bargain under the contract before the court could

grant the orders sought in the amended combined summons, the applicants aver. They state in support hereof:

“5.5 Most certainly no affidavit was attached to the two applications for default judgment referred to above, and my enquiries have indicated that no evidence was led by the Plaintiff before Default Judgment was granted in the form appearing in the Court Order.

[6] Lot 72 was registered in the name of 4th applicant. The prayers in the amended combined summons were silent as against 4th applicant viz. that ordering 4th applicant to transfer the said property. On this note, applicant state:

“5.7 Had the court been aware that such prayer was not made in the Summons it would not have granted the Default Judgment.”

It was also contended in as follows:

“8.2 Being personally seized with the matter, as already demonstrated in the preceding paragraphs that the non filing of the Plea was a result of an agreement I and Mr. Zonke Magagula reached, it became ethically awkward for me to draft the papers and move the Application myself moreso because in the application emanates facts personally connected to myself. It was therefore prudent that I brief Counsel to draft the papers for me;

8.3 Counsel returned to me with the papers very late whereupon I then instructed the current Attorneys, Nkomondze Attorneys, appearing in this Application for the applicants, to proceed with the application. However, a further challenge was encountered as Mr. Nkomondze was also engaged in preparation for the Supreme Court appearance on the 20th May 2013. We have only been able to settle the papers after Mr. Nkomondze’s appearance in the Supreme Court.

8.4 It is for this reason that there has been an inordinate delay in bringing the application and I humbly seek the Court’s indulgence in this regard and ask the Court to condone, as far as it may be necessary, the filing of this application at this time.

8.5 *I humbly state that there will be no prejudice that will be occasioned to the Respondents, in particular the 1st Respondents, because the property remaining and forming the subject of dispute between them is still registered in the 4th Applicant's name."*

Respondents'

[7] 1st respondent's attorney deposed to the answering affidavit as follows:

"14. *Ad paragraph 3.6*

I state that the Plaintiff did cause the squatters to be removed from the farm. Some of the squatters later returned but by that time the farm was in the possession of the 1st Defendant and it was now his duty to deal with them.

15. *Ad paragraph 3.7*

I state that the squatters were evicted. If they did return it was under 1st Defendant's watch. The Plaintiff gave vacant possession of the farm to the 1st Defendant.

18.2 *I state that the deponent informed me, in passing that his clients had vaguely mentioned to him that they were not happy with the extent of the Plaintiff's performance of his obligations in terms of the agreement and we agreed that in order to save both our clients costs, more so because it appears that the dispute was more of a personal nature between our respective clients than a breach of the agreement then a meeting be arranged.*

18.2.1 *The meeting was to be between the 1st Defendant, Mr. Zwane and Mr. Du Plessis.*

18.3 *Mr. Du Plessis indicated to me that his personal relationship with Mr. Zwane had depreciated so much that it would not be goof for his ill-health for him to start an argument with First Defendant. He gave me the mandate to meet with Mr. Zwane and try to have the matter settled.*

18.4 *I communicated this position to deponent and he indicated that because he did not have full instructions, he would prefer that his client, Mr. Zwane personally attend the meeting.*

18.5 *A date was set for the meeting and cancelled because Mr. Zwane could not attend. Another date was set and on this last occasion, I drove to Mbabane for the meeting and deponent informed me that his client, who had agreed to attend, was now held up in Parliamentary business.*

18.5.1 *It was after this last failed occasion that I then asked deponent to file a plea on behalf of his clients so the matter may proceed to trial. The Defendants failed to file their plea.”*

He also states:

“19.2.1 *The matter did not proceed on the 29th June 2012 because the file was not brought before the presiding judge, which made it necessary for my office to file another application for Default Judgment on the 4th July, 2012.*

19.3 *It is correct that deponent phoned me after his office had been served with the 1st application for Default Judgment, but it not correct that we agreed not to proceed with the application.*

19.3.1 *The deponent did not ask that default Judgment should not be applied for but conceded that in the face of the failed meetings, the Notice of Bar, the extension of the Bar, at his instance, he had run out of excuses to have the matter postponed, but he still did not have instructions from his clients on which he can formulate a plea.*

19.3.2 *I stated to deponent that my client was concerned by the lack of progress in the matter and had insisted on applying for judgment.*

19.3.3 *That was the last tele-conversation between deponent and I and I wish to add that as is apparent hereinabove, at that stage the attempts to have an amicable settlement had long been abandoned.”*

He proceeds:

“20.1 *Why else would he not file a plea, after he had been asked by letter dated 22nd February 2012 and by letter dated 4th May 2012, when he was*

served with Notice of Bar or when the bar extended or even when he was notified that the indulgence to extend the bar had come to an end by letter dated the 08th June 2012, even as a last resort when they were served with the second application for default judgment. He could still have sought condonation and filed the plea.

[8] On the averments that evidence ought to have tendered, he answers:

“25. I state that the prayer was for the delivery of certain piece of land and as such it was a liquidated demand and the Court did not require evidence, in the absence of opposition to determine Plaintiff’s claim.”

[9] On applicant’s contention that an order ought to have been taken against 4th respondent, he states:

“28.1 I admit that the immovable properties, the subject matter of Plaintiff’s claim were registered in the name of the 4th Defendant but I deny that it was necessary that a specific prayer be made against the 4th Defendant.

28.2 In terms of the addendum to the agreement between Plaintiff and 1st to 3rd Defendants, it was the said Defendants who were to produce the transfer of the properties from the 4th Defendant to Lot 117 (Pty) Ltd and Lot 72 (Pty) Ltd then transfer or cause to be transferred the entire issued shares in both entities to Plaintiff.

28.3.1 Further more, the agreement and addendum on which the Plaintiff’s claim is based is annexed to the Summons. I believe that the Honourable Judge was aware of all the facts in the matter and granted the prayers because she was convinced that Plaintiff had a good claim.”

[10] On non service of the order to applicant and Registrar’s amendment of the order he avers:

“30.2 However for the record, I wish to state that the Order granted by this Honourable Court compels the Defendants to cause to be transferred to Plaintiff the properties in issue alternatively that

the Registrar of the High Court sign all documents ... to my understanding “alternatively” does not mean “falling which” therefore it was not necessary to await the Defendant’s non-compliance before activating the alternative to the main order.

30.5 *An order of Court is issued by the Registrar based on the Court Record. The Registrar amended the order because it was not consistent with the record that is, the order as granted by the Court.”*

[11] On the question of delay in instituting the present proceedings, he contends:

“32.1 *I state that the defendants were aware of the order as early as the month of March 2013.*

32.1.1 *On the 14th March 2013 Defendants’ attorneys wrote us a letter, annexure “RL3” to the founding affidavit, but then waits three (3) full months before instituting these proceedings without giving an explanation why such a lengthy delay.*

32.3 *I reiterate that according to deponent’s own admission, he became aware of the order in March 2013, but failed to take the necessary action until three full months later. The defendants or the deponent has created a situation wherein they can come to court at very short notice and to Plaintiff and seek interdicts in circumstances where they may not be entitled.*

34.2 *I state that Mr. Nkomondze is not the only attorney in Swaziland, surely, if deponent or defendants deem the matter to be urgent enough they would have approached any of the other attorneys who were not engaged in the Supreme Court.”*

Issues

[12] There are three broad issues raised in the present matter viz. firstly and foremost, have the applicants established a reasonably acceptable

explanation for their default? Secondly, have applicants established a *bona fide* defence to enable one to find reason prospect of success? Thirdly, is the urgency justified? I shall deal with them *ad seriatim*.

Adjudication

[13] **Erasmus, “Superior Court Practice” page 131-308 highlights:**

“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 this sub-rule (i) 42 (1) (a), (ii) Rule 31 (2) (b) or (iii) common law.”

Applicants’ application is based on all three.

[14] **Promedia Drukkers and Uitgewers (EDMS) BPK v Kainowitz and Others 1996 (4) SA 411 at 412 held:**

“In terms of common law a court has a discretion to grant rescission of a judgment where sufficient or good cause has been shown. The two essential elements of sufficient cause in our courts are: (i) That the party seeking relief must present a reasonable and acceptable explanation for his default and; (ii) that on merits such a party has a bona fide defence which prima facie carries some prospect of success. It is not essential if only one of the elements is established.”(my emphasis)

[15] *In casu*, the applicant does not dispute that:

- (i) The respondents having filed amended combined summons, filed an application for summary judgment. This summary judgment applicant was later withdrawn upon applicants’ filing affidavit resisting the same. The matter was to take its normal course. This was according to the court file on 14th February 2012. On 22nd

February 2012, the 1st respondent by fax to applicants, dispatched correspondence advising applicants of the withdrawal and further stated:

“Kindly advise if your client is willing to have this matter settled alternatively file your client’s plea within 21 days of the 14th February 2012.”

From ZM3, it appears that no response was forthcoming as 1st respondent’s attorney scribed:

“2. In our letter of the 22nd February 2013, we asked you to either indicate whether your client was willing to settle this matter or file your clients’ plea within Twenty One (21) days of the 14th February 2012.

3. You have found it not appropriate to respond to our letter aforesaid or to file your client’s plea.

4. We are now serving you with a notice of bar because our client desires to have this matter finalized.”

In our letter of the 22nd February 2013, we asked you to either indicate whether your client was willing to settle this matter or file your clients’ plea within Twenty One (21) days of the 14th February 2012.

(ii) Subsequently, applicant, as per the Rules, was expected to file his plea within twenty one days. He ought to have filed on or about 14th March 2014. This did not happen. It necessitate a Notice of Bar which according to annexure “ZM1” was served upon 1st applicant’s attorneys on 8th May, 2012, about 38 court days after 14th March 2014, the last day of filing his plea.

(iii) In this Notice of Bar, as per dictates of the Rules, applicants were given 3 days to file a plea. The three days lapsed without a plea. A further correspondence under ZM4 reflects:

2. *Your Mr. Mamba had undertaken to file your client's plea(s) not later than 14th May 2012.*
3. *We have not received your client's plea (s) to date and we herewith advise that the extension of the bar has come to an end."*

(iv) As appears from all parties affidavits, an application for default judgment was served upon the applicants' attorney on 4th July 2012. This as contended by all the parties was a second application for default judgment, the first one having failed to be presented before court although served to the applicant on 28th June, 2012. This application notified the applicants that judgment would be entered against them on basis of default. The applicants did not do anything and on 6th July 2012, the respondents were granted default judgment in their favour.

[16] As pointed out from the onset, the above are matters of common cause between the parties herein. The applicants explain away this laxity in defending the 1st respondent's action proceedings by the following on their reply:

"16.2 I wish the court to note that in paragraph 4 of my Founding Affidavit I did state that even after filing of the Application for Default Judgment, in particular the one set-down for 6th July 2012, I personally telephoned the deponent and we agreed to further explore negotiations.

16.3 The picture being painted to the Court that I failed to file a Plea despite numerous correspondence and notices calling me upon to do so is not entirely correct. I insist on negotiations for two reasons:

16.3.1 It would be costly for the parties to proceed with litigation because the contract could not be resiled from and there were a lot of factual disputes regarding the performance of Plaintiff's obligations; and

16.3.2 *Even if the Plaintiff insisted on proceeding with litigation he would have faced the challenge of failing to establish that he had performed his obligations hence not entitled to specific performance.*

16.4 *As such, as instructed by my clients, I insist that the parties negotiate an amicable settlement to curtail legal costs.*

16.5 *Indeed the Plaintiff failed to establish that he had performed his obligations in terms of the contract, hence the Default Judgment ought to be rescinded.”*

[17] In all fairness, the explanation advanced on behalf of applicants is untenable in law. In the light of the various application filed and the time lapse before the default judgment was granted, one wonders why applicants failed to approach the court for an application to have the matter postponed pending negotiations as is the usual procedure in many matters that come before this court. Further, the respondents have produced two correspondences inviting applicants for negotiations, failing which filing of a plea. Applicants on the other hand maintain in their reply that the matter was at all material times pending negotiations but not a single correspondence addressing negotiations is filed on their behalf. What exacerbates their position in this regard is the second correspondence by respondents that, *“In our letter of the 22nd February 2013, we asked you to either indicate whether your client was willing to settle this matter or file your clients’ plea within Twenty One (21) days of the 14th February 2012. You have found it not appropriate to respond to our letter aforesaid or to file your client’s plea.”* It is not clear as to why, in the face of a letter inviting applicants to indicate their attitude towards negotiations, applicants failed to respond to such a correspondence while at the same time maintain that they were at all material times desirous to negotiate a settlement on the matter.

[18] Of glaring note is that whenever the matter had to be defended by pleadings of technical nature, the applicants usurp that opportunity by filing the necessary processes. This can be deduced from applicants filing a notice to oppose the amended summons. This application was fully adjudicated upon before his **Lordship Masuku J.** Again when respondents moved an application for summary judgment, the applicants filed an affidavit resisting summary judgment. Of note again, *“Because of the drastic nature of summary judgment, the Court has a discretion ...to grant the defendant leave to defend the action, even where he has failed to disclose fully the nature and grounds of a bona fide defence and the material facts relied upon by him,...”*. (**First National Bank of SA CTD in Myburgh and Another 2002 (4) SA 176 at 177**). One wonders what prevented applicant to file his plea which he attested to as having one and which was *bona fide* under affidavit resisting summary judgment. One reasonable conclusion that can be drawn in the face of all this, is that there were never any negotiations as evident from annexure “ZM3” cited above and confirmed by 1st respondent’s attorney that proceedings towards negotiation failed to materialise and further that, *“..in our many conversations with deponent concerning this matter, he always decried the lack of instructions from his clients in order to prepare and file a plea,”* as per respondents averments, are to be accepted as correct.

Irregularity

[19] Applicants contend that respondents ought to have adduced evidence on two grounds, *viz.* firstly, as there was a clause that a breach of any term of contract shall not lead to cancellation, and as respondents claimed performance, they ought to have adduced evidence that they performed

their bargain. Secondly, as respondents sought an order for transfer, they ought to have led evidence as this was not a liquidated claim.

[20] This leads me to explain what a ‘*liquidated*’ demand as envisaged by Rule 31 (3). **Boshof J in Fattis Engineering Co. (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736** at 737 had this to say:

“ ... ‘*liquidated demand*’ as used therein must be understood to mean a claim for a fixed or definite thing, as for instance, a claim for transfer or ejection, for delivery of goods, for the tendering of an account by a partner, for the cancellation of a contract or the like.”

[21] The learned judge at page 738 -739 states with precision in drawing a demarcation:

“...a claim for damages was unliquidated because the amount of the damages was to be determined by a Judge, and until he has given his award, the amount of damages due is not determined. When the amount is due upon a contract and the exact amount due is simply a matter for calculation from figures in books, the claim is a liquidated one and can operate as a set-off, but its existence and character have not yet been proved to the satisfaction of the court.”

[22] 1st respondent both in his default judgment and his amended combined summons claimed:

“Application for Judgment by default
Plaintiff’s claim:

1. That the 1st, 2nd and 3rd Defendant sign all documents to transfer Lot 177 Extension to Lot 117 (Pty) Ltd within 7 days of service upon them of the order of this Honourable Court;
2. That 1st, 2nd and 3rd Defendants sign all documents to transfer Lot 72 Matsapha Township to Lot 72 (Pty) Ltd.
3. That 1st, 2nd and 3rd Defendants transfer the entire issued shares in Lot 117 (Pty) Ltd and Lot 72 (Pty) Ltd to Plaintiff forthwith.

4. *Costs of suit against the Defendants on the scale between Attorneys and own client, jointly and severally, the one paying the other to be absolved.*

ALTERNATIVELY

1. *That the Registrar of the High Court in her capacity as the Sheriff of Swaziland be and is hereby authorised to sign all documents necessary to transfer Lot 117 Extension and Lot 72 Matsapha to the Plaintiff.*
2. *That the Defendants pay the costs of suit on the scale as between attorneys and own client, jointly and severally the one paying the other or other to absolve.”*

[23] Applicants contend that the respondents ought to have produced evidence before they could be granted the orders prayed because, “*the relief sought in Default Judgment was an order of specific performance,*” as per applicants. From the definition of liquidated demand, as can be gleaned from the learned judge **Boshof J’s** definition *supra*, the very “*order of specific performance,*” complained about is in our law a liquidated demand which does not need evidence beyond what is contained in the pleadings presented before court, should the court find that the plaintiff has an answerable case. In the premise, the submission that evidence ought to have been led stands to fall.

[24] Similarly, the submission by applicants that evidence ought to have been adduced showing that the respondents did perform their obligation under the contract as they were seeking an order for compliance with the terms of the contract against applicants stands to fall on the basis that the amended combined summons which form part of the proceedings in court reads:

- “10. *The Plaintiff as seller performed all his obligations in terms of the written agreement annexure “ASD1” hereto and transferred all the issued share capital in Nyetane Estate (Pty) Ltd to the 1st, 2nd and 3rd Defendants.”*

[25] I appreciate that applicants have informed the court that the 1st respondent failed to obtain a court order to evict the squatters. However, in the light of the above evidence in the combined summons, the Notice of Bar together with evidence that default judgment was entered against applicants eighty seven days after notice of bar which was thirty eight days late calculating from the last day a plea ought to have been filed, the court was bound to accept the evidence before it.

[26] The applicants have also taken issue that the default judgment orders them to transfer a property whose title deed is held by another *legal persona* whereas there is no order against that person (4th defendant). As correctly pointed by respondents, the addendum reads:

“The Purchase hereby agrees to procure the transfer of Lot 72 Matsapha Township from Emangweni (Proprietary)Limited and that they will there after transfer the entire issued shares in Lot 72 (Proprietary)Limited to the Seller for E2000 000.00.”

Clearly, from the reading of the above clause, it is clear that the contract was between the applicants and the respondents and not Emangweni (PTY) Ltd. No obligation was expected from Emangweni (PTY) Ltd who happened to be 4th defendant in the summons. Emangweni (PTY) Ltd was merely cited in the event it was inclined to oppose the application as it was going to be affected by that its right over the property would be transferred to the 1st respondent. It was therefore in prudent not to seek an order against it as it was the obligation of the applicants to obtain the title deed from Emangweni (Pty) Ltd and cause transfer to 1st respondent. In this regard respondents cannot be faulted.

[27] It is trite that the word “*alternatively*” is not synonymous with the words “*failing which*” as advanced by Counsel for respondents and therefore respondents were not bound to serve the orders for purposes of applicants to effect a transfer. I further accept that the Registrar is expected to scrutinize a draft order by Counsel and only sign where it is in the same wording as those endorsed by the presiding officer. Where it is different, it is the Registrar’s duty to amend it accordingly before appending his/her signature. There is therefore nothing amiss from what the Registrar of the High Court did *in casu*.

[28] In view of the *ratio decidendi* in **Promedia Drukkers’** case *supra* that a rescission judgment ought to be entered where applicant establishes “*a reasonable and acceptable explanation...*” and “*...a bona fide defence...*” and mainly that “*It is not essential if only one element is established*”, and that none of the elements laid down in **Promedia’s** case has been established *in casu*, I do not wish to burden the judgment on urgency.

[29] In the foregoing, the following orders are entered:

1. The applicants’ application is dismissed;
2. Applicants are ordered to pay costs.

**M. DLAMINI
JUDGE**

For Applicants : M. Nkomondze

For Respondents : Z. Magagula