IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.560/2013

In the matter between:

THULANI RICHARD NKHABINDZE	**Applicant**
And	
SWAZILAND DEVELOPMENT AND SAVINGS BANK	**1st Respondent**
BADENHORST AND SONS IRRIGATION (PTY) LTD	**2nd Respondent**
CHRISTO BADENHORST	**3rd Respondent**
DERRICK BADENHORST	**4th Respondent**
In re:	
SWAZILAND DEVELOPMENT AND SAVINGS BANK	**Plaintiff**
And	
BADENHORST AND SONS IRRIGATION (PTY) LTD	**1st Respondent**
CHRISTO BADENHORST	**2nd Respondent**
DERRICK BADENHORST	**3rd Respondent**
JABULANI NKHABINDZE	**4th Respondent**

Neutral citation: *Jabulani Richard Nkhabindze vs Swaziland Development and Savings Bank & 3 Others (560/2013) [2014] [SZHC 213] (08th September 2014)*

Coram: Hlophe J

For Applicant: Mr. S. Madzinane

For the 1st Respondent: Mr. T. Mlangeni

For the 2nd to 4th Respondents: Miss. Dlamini

Summary

Rescission of Judgment – Summons issued around April 2013 and served on Applicant together with 2nd to 4th Respondents round about the same time – Applicant as one of the Defendants, whilst aware of the summons issued, chose not to defend same – Default Judgment eventually entered against the Applicant whose property had been mortgaged as security for the entire debt – Applicant becoming aware of the existence of Judgment but does not challenge its existence in court other than indicate it might do so – Settlement negotiations between the Applicant and the First Respondent ensued but is not successful – After months of non-settlement of the matter and without challenge to default Judgment, first Respondent advertises property for a sale in execution in terms

of the rules of court – Applicant moving urgent application seeking inter alia an order rescinding the default judgment – Whether requirements of the reliefs sought met in the circumstances – Basis for rescission neither rule 42 nor rule 31 (3) (b) leaving out the common law as the basis for same such relief – Applicant should establish good course to succeed – This consists of a reasonable and acceptable explanation of the default as well as a bona fide defence carrying prospects – Failure to defend matter willful and/or reckless in the circumstances – No reasonable and acceptable explanation in such circumstances – Rescission not competent therefore as the two components must co-exist for a party seeking rescission to succeed.

Variation of judgments or orders – From the facts judgment granted with Applicant's full awareness of proceedings' existence and after his deliberate choice not to defend same – Even after grant of default judgment, Applicant engaging First Respondent on settlement of judgment through paying the judgment debt and not instituting rescission proceedings – Applicant actually offering to pay more than amount claimed – Notwithstanding such background, Applicant claiming variation of judgment or order after about seven months of its existence with his full knowledge – Even factual basis for variation not sound as it is based on a challenge of the judgment debt being allegedly more than the cover of the mortgage bond – No proof figure not covered by mortgage bond when considered mathematically – Furthermore proof in abundance that

judgment debt acquiesced to or accepted by Applicant – Variation should be made within a reasonable time as reckoned from that of awareness of judgment's existence – This not the case herein – Requirements of relief sought (variation) not met in the circumstances.

JUDGMENT

[1] The Applicant instituted these proceedings under a certificate of urgency seeking the following orders:-

1. Dispensing with the normal time limits, forms of service and hearing the matter as an urgent one.
2. A Rule Nisi do hereby issue calling upon the Respondents to show cause on a date to be determined by the Honourable court why prayers 3, 4, 5, 6, 7 and 8 should not be made final.
3. Pending finalization of this matter, the auction sale set for the 15th August 2014 at 12 Noon should not (Sic) be stayed.
4. Rescinding, setting aside and/or varying the order of the Honourable court granted on the 8th August 2013 directing that the mortgaged property being Portion 245 of Farm Dalriach No. 188, Hhohho district be executable for the sum of E2 681 819.72 (Two

Million Six Hundred and Eighty one Thousand Eight Hundred and Nineteen Emalangeni Seventy Two Cents).

5. Declaring that the Applicant's property described above be only executable for the sum of E1 500, 000.00 (One Million Five Hundred Thousand Emalangeni) plus interest and legal costs only not E2 681 819.72.
6. Setting aside the notice of sale scheduling the auction sale for the 15th August 2014 at 12 Noon for failure to properly and accurately describe the property and also for understating the reserve price of the property.
7. Declaring the interest in the amount determined by the Honourable Court to be the correct amount and to be only 13% per annum not 13.5% from July 2012 in terms of the regulation of same by the Central Bank of Swaziland.
8. Granting Applicant costs of this application at attorney client scale.
9. Granting Applicant further and/or alternative relief.

[2] It is not in dispute that on the 17th April 2013, the current Applicant, as one of the four Defendants in the main matter, was served with a summons where the prayers eventually granted as part of the default judgment on the 8th August 2013 were contained.

[3] Notwithstanding his having been served with the summons the Applicant did not enter an appearance to defend the matter nor did he file any plea or opposing papers. There is a slight inconsequential dispute in my view on why this was the case. He says he did not defend the matter because, as a surety of the first to third Defendants in the matter, he had been assured by the said Defendants, who were the principal debtors that they were going to defend the matter and as such he did not have to bother about it. The Applicant seeks to suggest that because of this, he was not in willful default or as he puts it, his failure to defend was neither deliberate nor reckless. The first respondent is of a different view. It is contended on its behalf that the failure to defend the matter by the Plaintiff was deliberate and that in any event the Applicant consented to the judgment when considering that soon after being served with the summons, the Applicant engaged the first Respondent on how best he could settle the amounts claimed from him. In that regard he is said to have approached both the first Respondent's attorney Mr. Mlangeni as well as the first respondent's Senior Legal Advisor – Litigation, Mr. Sifiso Mdluli. Both of these representatives of the first respondent, confirm that the Applicant at the time leading to the subsequent grant of the Default judgment, was not challenging the amount claimed or any of the reliefs sought but was pleading for cooperation as another or other financial institutions intended paying off the amount claimed on his

behalf. Secondly the reason put forth by the Applicant justifying why he did not defend the matter, can be rejected with ease when considering that he is a Doctor who would not fail to defend a matter claiming millions of Emalangeni because a fellow Defendant who he stood surety for, told him not to bother defending. This is neither logical nor sound because even if his co-defendants defended the matter, it means a judgment would still be lawfully granted against him if he chose not to defend.

[4] It is clear from the papers filed of record that the Applicant's liability for the debt in question stemed from his having signed a surety mortgage bond in favour of the first to third Defendants (now second to fourth Respondents) binding himself as a surety and co-principal debtor to the debt owed first Respondent herein by the second to fourth Respondents. To that end, the Applicant passed a mortgage bond over his property aforesaid in favour of the first respondent. It was in this regard that when the default judgment was entered against the Applicant on the 8th August 2013, the property was also declared executable.

[5] Claiming not to have been aware that Judgment was eventually granted against him on the date stated above (8th August 2013); the Applicant states that he only became aware of the existence of the default Judgment in November 2013. This he says was after the mortgaged property which

had been declared executable was advertised for a sale in execution. This discovery he says prompted him to engage the assistance of attorneys who wrote a letter to the first Respondent's attorneys. Contained in this letter was the seeking of clarity on certain issues the Applicant claimed could lead to his having to approach court for rescission of judgment among others if they were not addressed. These included allegation that the quantum claimed, and now forming the judgment debt, was not correct or that it was overstated. The manner in which the interest was calculated was said to have been wrong as it was allegedly calculated on more than what it allegedly should have been, particularly because it allegedly did not take into account the fluctuations in interest rates as set by the Central Bank. There was also an issue taken with regards the description of the property on the Notice of Sale advertised. It was contended that the description was not fully and sufficiently descriptive of the property and it was alleged it would not attract the appropriate potential buyers. By far the most contested issue in terms of the letter concerned and the subsequent developments therefrom, was that of the reserve price affixed to the property as reflected on the Notice of Sale. It was contended that the appropriate reserve price was that reflected per a certain valuation report conducted at the Applicant's instance which placed the value at around E24 Million odd.

[6] It is unclear what the fate of all the above mentioned concerns was as we can see no where what it really was except as concerns the issue of the reserve price of the property which seems to have become a focal point of the negotiations or discussions if the correspondence annexed to the papers and the evaluation reports disclosed therein can be taken to be a yard stick. The Applicant suggests that all the issues referred to above remained alive between the parties between the 29th November 2013 (When they were raised) and the 23rd July 2014 (when the current proceedings were instituted). The first respondent on the other hand contends that the other issues other than the issue of the reserve price were never really pursued. Even this issue (Reserve Price) was not so much given consideration because of any legal obligation on the first Respondent's part than it was because of its magnanimity, it was alleged.

[7] Whereas the Applicant had made it look like there was only one valuation report reflecting an alleged value of E24, 900, 000.00, the first Respondent disclosed that there were infact four evaluation reports in all. The first one fixing the value at E24, 905, 710.00 and prepared by Ngwenya Wonfor in March 2013, followed by another one from the same firm which markedly reduced the value mentioned above to E6, 500, 000.00 later in the same month. This latter one was followed by one from Jeff Lowe's firm which fixed the value of the same property at E2, 200,

000.00, prepared in April 2014. The last one was revealed later and after alleged numerous requests, prepared by Christian Amoako and Associates' Firm. It was prepared in December 2011 however, before all the others. It depicted a value of E24, 900, 000.00.

[8] According to Mr. Mlangeni who deposed to the answering affidavit on behalf of the first Respondent, it was when the Applicant could not produce the evaluation report he had undertaken to produce, eleven months after the grant of the judgment, which was not challenged in court that it was decided the property be re-advertised for a sale in execution. This was done with the reserve price being fixed at E11 000, 000.00 which according to Mr. Mlangeni was a mean or average of the three initial evaluation reports. The other one from Christian Amoako he said he did not consider firstly because it came in too late and further because it was considered a carbon copy of the one from Ngwenya Wonfor dated March 2013, which the same firm had acknowledged was overstated when it prepared and presented one depicting a much lower sum.

[9] It was as a result of the said Notice of Sale that the Applicant instituted these proceedings under a Certificate of Urgency seeking the reliefs set out at the beginning of this judgment. Primary to this application in my view are the reliefs for the rescission of the default judgment granted by

this court on the 8th August 2014, or the variation of the said judgment in so far as it concerned the judgment debt; a declaration that the property can only be executable for a sum of E 1, 5000, 000.00 plus interest and legal costs and not the amount reflected on the judgment debt; setting aside the Notice of Sale in execution of the property on account of its alleged failure to properly describe the property concerned together with a declaration that the interest claimed was irregular and that the proper one was one calculated at 13% per annum as opposed to 13.5% per annum.

[10] The matter was heard a week before the date of the intended sale in execution which was the 15th August 2014. Although I had reserved judgment in the matter hoping that I was going to be able to produce a fully reasoned judgment before the said date so as to give direction on whether or not same could be proceeded with, this turned out to be impossible owing to the fact that I was duty judge that work and ended up having to hear and decide several other matters alongside hearing trials I had set. Accordingly I was forced to consider the matter including all the related authorities closely and thereafter pronounce my judgment, with reasons to follow in due course. Indeed on or about the 12th August 2014, I handed down my decision in terms of which I dismissed the application

with costs whilst undertaking to hand down my written reasons in due course. This judgment should therefore be seen in that light.

[11] Rescission of Judgment

The Applicant's application does not reveal what the bases of the rescission of judgment sought are. That is to say, we are not told whether same is based on rule 31 (3) (b), the common law or rule 42. Given that this application has been moved eleven months of the judgment and some seven months of the time the applicant in his own words, claims to have become aware of the judgment, I have no hesitation in concluding that it cannot be moved on the basis of rule 31 (3) (b) of the rules of this court. This is because the said rule requires that such proceedings be instituted within 21 days of the applicant's having become aware of the existence of the judgment over and above the establishment of good course.

[12] The legal position is now trite that a judgment can also be rescinded based on an error by the court as provided for under rule 42 of the rules of court. There has however been no mention whatsoever of an error as having been committed by the court that granted the judgment being challenged. One cannot construe such error as well from the facts. For starters, the Applicant is shown as having been aware of the summons since April 2013 and that instead of filing a Notice of Intention to defend

as required of him, he engaged the first Respondent on settlement of the matter. It naturally follows that he had known that the natural consequence of his conduct was a judgment and he was reckless whether or not such was the case. There was therefore no error committed by the court to justify a rescission of the judgment and as observed above, none was suggested by the Applicant himself.

[13] In view of the approach of the courts in rescission matters, which is that the court has an obligation to consider the facts pleaded closely to see if any of the grounds are met as was expressed in such judgments as ***Nyingwa vs Moolman 1993 (2) SA 508 at 510 C-D,*** I must now consider whether the requirements of the common law as regards rescission are themselves met.

[14] The requirements under this head, which an Applicant has to meet to succeed in a rescission application are good course which is made of a reasonable and acceptable explanation for the default taken together with a bona fide defence carrying prospects of success.

[15] In ***Silber v Ozen Wholesalers (PTY) LTD 1954 (2) SA 345***, the position was expressed that these two requirements of good cause and therefore rescission, should coexist at a given point in order for a rescission

application to succeed. This means that if there has not been established a reasonable explanation, then the matter must end there without a need to consider the defence, particularly where the failure to defend the matter was willful, reckless or grossly unreasonable in the circumstances. See in this regard ***Cash N'Carry Swaziland vs Intercon Construction (PTY) LTD Appeal Court Case No. 01/2002 (Unreported)*** as well as ***Thomas Mashesha Dlamini v Swaziland Development and savings Bank and Others High Court Case NO.558/2008 (Unreported).***

[16] From the facts of the matter it is not in dispute that the Applicant was aware of the summons issued against him and he did nothing to defend same which depicts willfulness or gross negligence or recklessness on his part. Clearly, the explanation of the default in these circumstances cannot be reasonable. If such an explanation is not reasonable, not even a discretion can be exercised in his favour in such circumstances. The ***Thomas Mashesha Dlamini v Swaziland Development and Savings Bank (Supra)*** is instructive herein. Consequently I am convinced that the first hurdle which an Applicant for rescission based on common law has to cross has not been so crossed. This means that the Applicant's application for rescission cannot succeed on this ground alone. I therefore do not need to consider the requirement of a bona fide defence

carrying prospects of success; that is its existence or otherwise owing to the conclusion I have come to on this point.

[18] Variation

This takes me to the next basis for the application, namely that the judgment be varied to reflect lesser amounts on the judgment debt after debatement than those that are reflected on the current judgment itself. The Applicant contends this be the case because according to him, the interest claimed and forming part of the judgment debt was above the interest as regulated by the Central Bank and was even beyond the rate agreed upon. He also claimed variation on the ground that the amount claimed was more than that covered by the mortgage bond he signed. He contended that the amount claimed and forming part of the judgment debt included an amount of E500, 000.00 which should not have formed part of the said judgment debt as it was not covered in the bond he signed.

[19] Although the Applicant does not say in his papers when he noted all these anomalies which he claimed should lead to the variation of the judgment debt, it is obvious from a closer scrutiny of the papers that this must have been at the time of receipt by him, or service upon him of the summons. This is because the judgment debt is made of the figure allegedly claimed in terms of the particulars of claim. The question becomes can it be

opened at this stage to the Applicant to challenge such amounts now, particularly after so many months from the grant of the judgment, which he knew of well before the judgment and even afterwards without approaching court for the appropriate relief? Particularly where he had instead negotiated to pay an even higher amount? I think not. This therefore suggests that the Applicant accepted the claims and later the judgment.

[20] I agree with Mr. Mlangeni that a party who, with full knowledge of the facts, selects a particular position, is not allowed in law to alter that position, particularly if by so doing he engenders prejudice to the others or the other side. See also the case of ***Administrator Orange Free and Others vs Makopanele and Another 1990 (3) SA 780 at Paragraphs E-H***

[21] I am of the view that having accepted the amount claimed resulting in the judgment being entered against him, the Applicant had waived his rights to defend the matter. He therefore cannot now seek to challenge the position he had initially accepted. His challenge of the judgment debt was further complicated by his failure to institute the proceedings within a reasonable time after having allegedly become aware of the decision or judgment. Assuming that he was entitled to know about the existence of

the judgment in November of 2013, (with which situation I do not agree when considering his unreasonableness in that regard, which is to say he could not have lawfully left a matter where he was being sued for months without ascertaining regularly what the developments in it were. This was found to be the position by this court in ***Leonard Dlamini vs Lucky Dlamini High Court Case No. 1644/1997 (Unreported)***. Would it be proper for him to move the variation application after seven months then? The position on application for a variation of judgment was set as follows in Herbstein and Van Winsen's **The Civil Practice of The Supreme Court of South Africa; fourth edition, Juta and Company page 687:-**

> *"The court will, however, require that the application be made within a reasonable time after the granting of the order sought to be varied". See also* ***First National Bank of Southern Africa Ltd v Van Rensberg NO & Others***. *In re* ***First National Bank of Southern Africa Ltd v Jurgens & Others 1994 (1) SA 677 (T) Act 681 B-H.***

[22] This position merely illustrates that a variation should be sought within a reasonable time. Implicit in this is the question whether the period at which the alteration of the judgment referred to above is sought is reasonable in the circumstances. I think not, when considering that the issue of altering the judgment debt does not appear to have remained an issue after it was raised by the letter of the 29th November 2013. Clearly

the facts indicate that the issue that remained between the parties was more that of the reserve price for the property at the sale in execution.

[23] I am therefore convinced that the variation was itself an afterthought and in any event was an attempt to revisit waived rights and it was further done out of a reasonable time and for amounts that had previously been accepted. To this extent the judgment cannot be lawfully varied and the application is accordingly dismissed.

[24] So much was said about the amount being claimed and forming the subject matter of the judgment; being beyond the scope of the mortgage bond including being extended to cover debts it should never have covered. In contrast a lot was also said on why the issue of what the mortgage bond provides and does not provide cannot lawfully be raised. Whatever the merits or demerits of the arguments on these points, I have no doubt that they all relate to the question of the defence the Applicant allegedly has in the merits of the matter. I have already stated in the view I have taken of the matter that I need not enquire into the merits of the defence as it simply does not matter. I am therefore not going to decide the question on who is correct between the parties as regards the contents of the mortgage bond on the one hand and its applicability on the other. It suffices to record that it is no longer legally open to the Applicant to

challenge the judgment debt after all that happened herein as includes waiver among other issues.

[25] A lot was said about the reserve price attached to the property in terms of the Notice of Sale being on the low side when considering that fixed at E24, 900, 000.00 by valuers Christian Amoako and Company (PTY) LTD. I agree that the judgment creditor is only required to set a reasonable reserve price. I cannot say that the amount fixed as a reserve price is unreasonable when considering the varying amounts fixed as depicting its value. I also agree that the approach on fixing the reserve price by Mr. Mlangeni makes sense in the circumstances of the matter as it was clearly not arbitrary, something that cannot be said of the value fixed on the property by the said Christian Amoako and Company, when that is viewed against that of the same amount determined by the firm of valuers; Ngwenya Wonfor and Associates which was later downgraded to E6 500, 000.00. In any event it does not lie with the judgment debtor to say how much he wants executed property to be sold for and I was referred to no authority contending differently.

[26] I further do not see how the property can be said not to have been fully defined. I am convinced it is sufficiently described in the Notice of Sale so as to notify an interested market on what the property entails.

[27] I take note of the fact that the reliefs sought by the Applicant are also opposed by the other respondents who claim they would be prejudised by them yet certain assurances had been made by the Applicant to them. Whatever the merits of these assertions, it is clear to me that no prejudice would be occasioned the Applicant by the position I have taken on each one of the reliefs sought as set out above. This is because it will always be opened to the Applicant to recover whatever amounts he claims the second to fourth Respondents were unjustly enriched by him.

[28] Consequently, I am of the considered view that for the reasons stated above, the Applicant's application cannot succeed and it is dismissed with costs on the ordinary scale.

Delivered in open Court on this the……. day of ……2014.

N. J. HLOPHE

HIGH COURT JUDGE