IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 41/2015

In the matter between:

JABULANI RICHARD NKHABINDZE	Applicant
VS	
SWAZILAND DEVELOPMENT AND SAVINGS BANK	1st Respondent
BADEN HOST & SONS IRRIGATION (Pty) Ltd	2nd Respondent
CHRISTO BADENHOST	3rd Respondent
DERRICK BADENHOST	4th Respondent

Neutral citation: *Swaziland Development& Savings Bank V Badenhost & Sons Irrigation (Pty) Ltd & Others (41/2015) [2015] SZSC 05(November2015)*

Coram: FAKUDZE, A.J.A

Heard: 13 November**,** 2015

Delivered: 19 November, 2015

Summary: ***Civil Procedure – stay of execution- a party seeking the stay of execution must prove that real and substantial justice requires the stay- although in principle sureties are entitled to the benefit of excussion, the creditor is not obliged to proceed first against the principal debtor unless the surety avails himself of the benefit; it is a dilatory defence which the surety may elect to set up if the creditor first sues him. The surety must raise the defence in initio litis and it cannot be raised after litis contestatio. It certainly cannot be raised for the first time on appeal. Applicant has failed to show that real and substantial justice favors the stay of execution because the defence of excussion was raised on appeal and not in the court – a – quo. The application is dismissed with costs.***

JUDGMENT

APPLICATION

[1] On the 11th November 2015, the Applicant filed an application on a certificate of urgency seeking the following:

1. That the rules of court be dispensed within so far as they relate to forms, service and time limits and the matter be heard as one of urgency.

2. Declaring that the Applicant is entitled to the benefit of excussion in so far as its liability to the First Respondent pertains and to that extent, First Respondent be ordered and directed to prosecute and finalise its claim against the Second, Third and Fourth Respondents prior to execution against the Applicant.

3. That the execution of the judgment of this honorable court granted by consent of the parties on the 7th July, 2015 be stayed pending finalisation of the action between the First and Second to Fourth Respondents.

Alternatively,

4. That the execution of the judgment of the honorable court be stayed pending finalization of the action between the First and Second to Fourth Respondents and to that extent, that the sale in execution of the Applicant's property scheduled for the 13th November, 2015 be suspended and/or postponed.

5. That the Respondents pay the costs of this Application jointly and severally the one paying the other to be absolved.

5.1 Further and/or alternative relief.

[2] On the 12th November, 2015, the 1st, 2nd to 4th Respondents filed the Notice of Intention to Oppose the Application and went further to file Answering Affidavits. In the Answering Affidavits, the Respondents raised two points **in limine.** The first point pertained to the urgency of the Application and the second one pertained to the matter being heard by a single Judge of the Supreme Court. The argument was that three Judges should hear the matter in accordance with Section 149 of the Constitution. The Respondents argument was that the Application before this Court "involves the determination of the cause or matter before the Supreme Court."

[3] I must point out that when the matter was brought before this Court, the Honourable Chief Justice, in consultation with the Judicial Service Commission, appointed me as an acting Judge of the Supreme Court to hear this matter. The appointment is in terms of Section 153 (5) of the Constitution. My appointment is what prompted the Respondents to raise the issue of a single Judge of the Supreme Court hearing the matter.

[4] The parties met me in my chambers on the 12th November, 2015 where the two issues mentioned above were raised. Due to the urgency of the Application, the parties agreed that the two issues raised **in limine** be abandoned as to enable the Court to deal with the merits of the case. It was further agreed that the matter be heard on the 13th November, 2015 and the Applicant be given an opportunity to file a Replying Affidavit. On the day the matter was argued, Applicant's Counsel indicated that there was no need for him to file the Replying Affidavit and the matter proceeded. I further indicated to the parties that an *ex-tempore* judgment would deliver immediately after counsel for the parties have finished addressing the Court. On the 13th November 2015, I accordingly delivered the *ex-tempore* judgment. The Application was dismissed with costs and the reasons for dismissing it are contained in this judgment.

THE BACKGROUND FACTS

[5] Before I embark on the reasons why the Application was dismissed, I will consider the background facts. I will then deal with the law pertaining to the stay of execution, the application of the law to the facts and my conclusion thereof.

[6] Summons were served on the Applicant on the 17th July, 2013. They were also served on the 2nd, 3rd and 4th Respondents. The Applicant did not file the Notice of Intention to Defend whilst the other Respondents filed it. After the Applicant had been served, he engaged the 1st Respondent and 1st Respondent's Attorneys with a view to settling the matter out of court. The settlement negotiations did not bear fruit and 1st Respondent then applied for default judgment on the 8th August 2013.

[7] The First Respondent then applied for a writ of execution against the Applicant's property and the writ was accordingly granted. A Notice of Sale was issued and the Applicant queried the reserve price which 1st Respondent wanted to sell Applicant's property for. Several valuations were obtained and the reserve price was fixed at E6, 500.000.00 and the first sale in execution was advertised for the 6th December, 2013. That sale was postponed because the reserve price was still being queried by the Applicant. It is worth noting that the Applicant did not

dispute the liability. The Applicant instructed Messrs Magagula Attorneys to handle his case. Several correspondences were exchanged between the parties' attorneys. These correspondences are part of the Record of Proceedings.

[8] The Applicant changed attorneys and instructed attorneys Messrs Madzinane to apply for the rescission of the judgment that was granted by default. The Application for rescission was moved on or about the 23rd July 2014. At that stage the 1st Respondent had advertised another sale of the property to take place on the 15th day of August 2014. The Application for rescission was opposed by the 1st Respondent and the **court-a-quo** dismissed the application. The Applicant then appealed to the Supreme Court under the same case number. The grounds of appeal are contained in the Record of proceedings. I will refer to the grounds of appeal later in this judgment.

[9] Suffice to say that after filing the Notice of Appeal, the Applicant abandoned the Appeal when the Supreme Court was about to hear it. He personally signed an out of court settlement agreement whose terms can be summarised as follows:-

9.1 That the Applicant is abandoning the appeal and is tendering the 1st Respondent's wasted costs.

9.2 That the Applicant personally agrees to pay the sum of E3,884, 101.13 being the capital amount, interest, legal costs and the collection commission. All these amounts were payable to the 1st Respondent's attorneys Messrs Mlangeni and Company on or before the 25th day of September, 2015.

9.3 That in the event of default in complying with the agreement, the Applicant's property in question shall be sold in execution to recover the amount owed.

[10] The agreement is part of the Record of proceedings of the **court a quo**. The agreement was duly endorsed and made an Order of court by the Supreme Court on the 7th July, 2015. The Applicant did not comply with the agreement as of the

25th September 2015. Even during the launching of the present Application in this Court, there had been no compliance and no application for condonation for non compliance. The Applicant is not disputing that. Messrs Mlangeni and Company then engaged Applicant's attorneys with a view to persuading them to honour the agreement. The engagement did not yield anything. As a result, the 1st Respondent then placed an advertisement in the Times of Swaziland for the sale of Applicant's property. The advertisement was done on the 7th October, 2015. The advertisement was also placed in the Government Gazette of the 9th October, 2015. The date of sale was the 13th November, 2015. The Applicant launched the present Application for the stay of the aforesaid execution on the 11th November, 2015. This proves that the Applicant was fully aware of the sale.

WHEN CAN A COURT GRANT AN ORDER FOR THE STAY OF EXECUTION?

[11] The principles guiding the granting of an order for a stay of execution have been sufficiently dealt with in the matter between NUR AND SAME (PTY) LTD T/A BIG TREE FILLING STATION V GALP SWAZILAND APPEAL CASE NO: 13/ 2015 and in the matter between SWAZI MTN LTD V M.V. TEL COMMUNICATIONS (PTY) LTD AND E TOP – UP (PTY) LTD CIVIL CASE NO 7 OF 2006.

In the matter between **NUR & Same (Pty) Ltd T/A Big Tree filling Station V Galp Swaziland (Pty) Ltd Case No: 13/2015, His Lordship M.C.B. Maphalala CJ, quoted Tebbut J in Strime and Strime1983(4)S.A. 850 CPD.** His Lordship Tebbut J. had this to say on the inherent powers of the court to stay execution of a court order:

> "***Execution is a process of the court, and the court has an inherent power to control its own process subject to the Rules of the court. It accordingly has a discretion to set aside or stay a writ of execution….. The court will generally speaking grant a stay of execution where real and substantial justice requires such a stay or put otherwise, where injustice would otherwise be done….. Execution should therefore***

generally be allowed unless the applicant for a stay shows that real and substantial justice requires that such a stay should be granted."

[12] The common law inherent powers of the court to stay execution where real and substantial justice requires that such stay be allowed, were made mention of by His Lordship Mamba J. in the matter between **Swazi MTN Ltd V M.V. Tel Communications (Pty) Ltd and E Top-Up (Pty) Ltd Civil Case No. 7 of 2006.** At paragraph 10 His Lordship said-

> ***"In terms of the Common law, this court has an inherent jurisdiction to order the suspension of its own orders or orders of the other lower courts and or tribunals. In exercising such powers the court has discretion and such discretion, as usual, has to be exercised judicially and judiciously. An injudicious discretion is after all no discretion at all."***

What can be deduced from these two judgments is that courts have inherent power to stay execution and the exercise of this power is left to the discretion of the Judge that is called upon to grant or refuse the grant of the stay. The determining factor is whether real and substantial justice requires such grant. The Applicant must state in his application sufficient facts so as to enable the court to make such determination.

BORNE OF CONTENTION

[13] When the matter was argued on the 13th November, 2015 Applicant's counsel declared the purpose of launching the Application and this purpose is clearly stated in paragraphs 14, 15, 16, 17 and 18 of the Founding Affidavit. The Applicant states that -

> ***"14. I am further advised and humbly submit that the failure by the bank to prosecute their claim against second to fourth Respondents under the circumstances of the case amount to waiver by the bank against the enforcement of its rights against***

those parties. Alternatively it amounts to granting of an indulgence with regards to the enforcement of those rights.

15. ***I am advised and humbly submit that the bank may not legally proceed against me as a surety where the bank has given an indulgence to my principal debtor. This is more so since my liability as surety is mostly dependent upon the liability of my principals.***

16. I am further advised and humbly submit that even though I may be said to have renounced the benefit of excussion that would still not entitle the bank to simply proceed against me only when the bank has failed to obtain judgment against the principal debtor by reason of his defence to the claim. The same applies where the bank has granted an indulgence against my principal.

17. I humbly submit that the renunciation of the benefit of excussion was meant to protect the creditor from having to proceed against someone who is obviously not in a position to settle his or her obligations or could not be found prior to pursuing the surety. The principle was never meant to enable a creditor to simply ignore the principal debtor if he defends the matter and instead pursue the surety who happened not to defend the matter. To advocate that proposition would be to render the principle liable to abuse and further render it very nugatory.

18. I am further mindful of the fact that this is not a rescission application as that has already been dealt with by this honorable court. I am however advised that the same principles are applicable even at this stage of the proceedings and that I may rightfully demand that the bank proves its case against the second respondent prior to executing the judgment against me.

It would be highly undesirable that the bank would fail to obtain a judgment against the principal because he defended the matter (which defence has not been proven to be without substance), but still be able to obtain and execute against the surety for the simple reason that the surety did not defend."

[14] The long and short of Applicant's argument is that the 1st Respondent should have first proceeded against the 2nd Respondent, reason being that the 2nd Respondent is the principal debtor. It is only where there are not enough assets to satisfy the debt that the1st Respondent can then sue or proceed against the Applicant. Applicant submits that the benefit of excussion was never meant to enable a creditor to simply ignore the principal debtor if he defends the matter and instead pursue the surety who happened not to have defended the matter.

Applicant's counsel referred the court to the case of *KILROE DALEY V Barclays National Bank 1984 (4)* at 609 in support of his argument.

[15] The Respondents contend that Applicant's case is without merit. All that the Applicant is saying is that the 1st Respondent was wrong in pursuing the Applicant to the exclusion of the other Respondents just because the Applicant did not file the Notice of Intention to Defend. The Respondents go on to say that the 1st Respondent is not bound to pursue the principal debtor before it pursues the other co-principal debtors. The basis for this proposition is Caney's: The Law of Suretyship Sixth Edition, authored by C.F. Forysth. The learned author states in page 127 that -

"Although sureties have the benefit of excussion (save where one of the exceptions to be mentioned later operates) the creditor is not obliged to proceed first against the principal debtor unless the surety avails himself of the benefit."

[16] The Respondents further alleges that even if the defence of the benefit of excussion is available to a surety, what matters most is when the defence raised. It cannot be raised for the first time on appeal as it has happened in the present Application. The Respondents argue that there is no proof in the Record of

proceedings in the **court–a–quo** that the Applicant availed himself of the benefit of excussion because the Applicant opted not to defend the matter. The Respondents made reference to C.F. Forysth on the Law of surety ship *(Supra*) where the learned author confirms this proposition . In page 127, the learned author says -

> ***"If the surety intends to raise the defence, he must do so in initio litis; it is too late to raise it after litis contestatio. It certainly cannot be raised for the first time on appeal."***

[17] It is Respondents contention that there is nothing in the Record of Proceedings in the **court-a-quo** that shows that the defence was ever raised. It is therefore being raised for the first time on appeal. Respondents finally submit that the Applicant filed a Notice of Appeal challenging the refusal of the granting of the rescission by the **court-a-quo**. When the time came for the Appeal to be prosecuted, the Applicant abandoned the appeal and opted for a settlement. A Settlement Agreement was entered into on the 7th July, 2015 where the Applicant undertook to pay the Capital amount of E2,681,819.72, interest at 9% per annum amounting to E924,557.57, legal costs in respect of Default judgment amounting to E45,000.00, legal costs in respect of the application for rescission of judgment plus costs of the abandoned appeal amounting to E45,296.44 and the collection commission amounting to E187,727.38. The Appellant bound himself to pay the aforementioned amounts on or before the 25th September, 2015.

[18] The Respondents contend that as of the 25th September 2015, no payment had been made and the non payment prompted the 1st Respondent to pursue the issue of the sale of Applicant's property. The Respondents aver that the agreement of the 7th July, 2015 became an Order of the Supreme Court and therefore Applicant's conduct in not honoring the Order is contemptuous of the court.

It is Respondents submission that paragraph 5 of the Settlement Agreement specifically states that:-

"In the event of default by the Appellant the mortgaged property shall automatically become executable to recover the agreed amount of E3, 884,101.13."

The 1st Respondent has therefore invoked the provisions of paragraph 5 of the Settlement Agreement in continuing with the sale of Applicant's property.

COURT'S FINDINGS AND CONCLUSION

[19] It is the Court's considered view that the Applicant has failed to establish a case in his favor. In the Notice of Motion, the Applicant states in paragraphs 3 and 4 of the Notice the basis for the application for the stay of execution. He says that -

"3 That the execution of the judgment of this honorable granted by consent of the parties on the 7th July, 2015 be stayed pending finalization of the action between the 1st ,2nd to 4th Respondent."

Alternatively;

"4 That execution of the judgment of the above honorable court be stayed pending finalization of the action between the first and second to fourth respondents and to that extent the sale in execution of the Applicant's property scheduled for the 13th November 2015 be suspended and or postponed."

[20] The Applicant's assertion on a pending action between 1st, 2nd to 4th Respondents is unclear. There is nothing in the papers before this Court that proves that there is a pending action between the1st, 2nd to 4th Respondents. The Applicant has not stated what the pending action is all about and how it will assist the Applicant with respect to the stay of execution proceedings that are before this honorable Court. The use of the term "action" suggests or presupposes a claim for damages. It would have been otherwise if the Applicant used the term **"proceedings."** In any event the Supreme Court has pronounced itself on the principle that illiquid damages cannot set off against a liquid claim. See **Justice Sibusiso Dlamini V David Themba Dlamini Appeal case No. 28 of 2015.**

[21] The Court is also in full agreement with the Respondents argument that you can only raise the defence of excussion **initio litis**; it cannot be raised at a later stage.

Nowhere in the Record of proceedings is the defence of excussion raised. Likewise, in the Notice of Appeal, there is nothing on excussion. The Record of proceedings clearly spells out the issues that were raised by the Applicant in his application for rescission of judgment.

The Judge in the **court-a-quo** has ably summarized these issues in page 287 of the Record of proceedings and these are–

(a) That the quantum claimed and now forming the judgment debt, was not correct or that it was overstated.

(b) That 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.

(c) That the description of the property was not fully and sufficiently descriptive of the property and it was alleged it would not attract the appropriate potential buyers.

(d) That the reserve price affixed to the property as reflected on the Notice of Sale should be placed at around E24 Million, as per the Applicant's valuation report.

[22] The Notice of Appeal also bears witness to the fact that at no point in time did the Applicant raise the defence of the benefit of excussion. The two grounds of appeal were that -

(a) The learned Judge erred in law and in fact in dismissing the application for rescission and or variation yet the interest levied on the amount claimed by 1st Respondent exceed the interest as fixed by the Central Bank of Swaziland;

(b) The learned Judge erred in law and in fact in dismissing the application on the aspect of variation in as much as appellant executed a surety mortgage bond as security for E1, 500,000.00.

[23] This Court further agrees with the Respondents that a creditor is not obliged to proceed first against the principal debtor. That can only happen where the surety avails himself of the benefit. C. F.Forysth validates this point in His book on the Law of Suretyship (*supra*) when the learned author says in page 127 -

> ***"Although sureties have the benefit of excussion (save where one of the exceptions to be mentioned later operated) the creditor is not obliged to proceed first against the principal debtor unless the surety avails himself of the benefits; it is a dilatory defence which the surety may elect to set up if the creditor first sues him."***

In the present case, the Applicant did not avail himself of the defence in the **court-a-quo.** After all, the Applicant opted not to defend the proceedings that were initiated against him. He therefore missed the chance to avail himself of this defence.

[24] After the dismissal by the **court-a-quo** of the application for rescission, the Applicant filed a Notice of Appeal. When the matter was about to be prosecuted, the Applicant abandoned the Appeal and tendered the 1st Respondent's wasted costs. The Applicant also made an undertaking to settle the Capital amount, interest and the legal costs. The Settlement Agreement became an Order of this Court. The Applicant is therefore bound by the terms of the Settlement Agreement. The Applicant also bound himself in paragraph 5 of the Settlement Agreement that in the event of default, the mortgaged property shall automatically become executable to recover the agreed amount.

[25] As indicated earlier, the Learned **Justice M.C.B Maphalala C.J. stated in NUR & SAME (Pty) Ltd/TA BIGG TREE FILLING STATION V GALP SWAZILAND (Pty) Ltd Case No 13/2015** stated the main consideration in the granting of an application for stay of execution. The consideration is that after considering all the relevant evidence and facts brought before Court, the Court must be in a position to conclude that "real and substantial justice requires a stay of an order."

[26] The Applicant has failed to persuade this Court that real and substantial justice requires the stay. The Applicant argues that if the stay is not granted he will suffer irreparable harm and that he has no alternative remedy. The Court's view is that the Applicant can sue the Respondents for damages. He does have a remedy. The Applicant's case cannot even find support in the NUR AND SAME case (supra). In that case, the Court granted the stay of execution because the Applicant had filed a Review application in the Supreme Court which was pending. The stay was allowed pending the determination of that Review. In the present case, the Applicant abandoned the appeal. The totality of evidence does not justify the stay of the execution and the application is therefore dismissed with costs.

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FAKUDZE A.J.A

ACTING JUDGE OF THE SUPREME COURT

For Applicant: **Mr. S.C. Simelane**

1st Respondent: **D. Jele**

2nd – 4th Respondent: **B. Dlamini**