IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1761/2011

In the matter between:

STANLEY MCHEPA BANDA	**1st**	**Applicant**
ROSALIND KATONGO BANDA	**2nd**	**Applicant**

And

SWAZILAND DEVELOPMENT & SAVINGS BANK	**1st**	**Respondent**
SILENCE GAMEDZE	**2nd**	**Respondent**

In Re:

SWAZILAND DEVELOPMENT & SAVINGS BANK		**Plaintiff**

And

MCHEPA CHEMICAL INDUSTRIES (PTY) LTD	**1st**	**Respondent**
STANLEY MCHEPA BANDA	**2nd**	**Respondent**
ROSALIND KATONGO BANDA	**3rd**	**Respondent**

Neutral citation: ***Stanley Mchepa Banda & Another v Swaziland Development and Savings Bank & Another (1611/2011) [2016] SZHC50(14th March 2016)***

Coram: **M. Dlamini J**

Heard: **17thFebruary, 2016**

Delivered: **14thMarch, 2016**

- *To demand a fresh service of process every time a sale in execution fails, in the circumstances where the terms and conditions of sale has not changed materially, would put the creditor unnecessarily out of pocket, a procedure which does not augur well with the dictates of commercial transactions. A creditor or debtor has a right to mitigate its litigation costs.*

Summary: Under various case numbers, applicants by means of motion proceedings and under a certificate of urgency, applied for stay of execution and rescission of the court orders giving rise to execution. The first respondent strenuously opposed all the applicants' applications.

Chronicle

[1] On 24th May 2011 by combined summons, the first respondent sought for payment of the sum of E2,215,637-55 together with interest against the third applicant and payment of the sum of E500,000-00 against the first and second applicants. The respondents also claimed costs of suit. This was under case No.1661/11. This action was never defended. While the action was pending before court, the parties engaged in negotiations. The result was a document titled "*Acknowledgment of Debt*" concluded on 12th July 2011. This agreement was entered as an order of court (consent order) on 15th July, 2011. This acknowledgment of debt consolidated applicants' accounts with first respondent.

[2] On the 16th December, 2011, first responded successfully moved an application for default judgment. On the 14thOctober, 2013, the applicants, having been served with a writ of execution, filed an application for a rescission, stay of execution and costs of suit. The basis was that the first respondent could not rely on the action proceedings. First respondent ought to have resorted to the consent order and not revert to the combined summons by reason that the claim under action proceedings was substituted by the order under acknowledgment of debt.

[3] It appears that when the acknowledgment of debt was concluded, the parties agreed to consolidate all applicants' accounts held by first respondent. The total amount owing and due was therefore E7,335,498-08. It further appears from applicants and first respondent's pleadings that by this time of the acknowledgment of debt, first respondent had already instituted three action proceedings against the applicants as there were three accounts which were for loans and overdraft. The case numbers were 1761/11, 1762/11 and 1662/11. Under case No.1761/11 the first defendant was Starros Import and Export (Pty) Ltd, a sister company to third applicant.

Case No. 1761/11

[4] The applicants joined as first applicant,Starros Import and Export (Pty) Ltd. This was defined as sister company with Mchepa Chemical Industries (Pty) Ltd. Under this case, the applicants moved a similar rescission application together with an interdict application,stopping a sale in execution which was scheduled for 30th August 2013 in respect of property situate at Mantenga Falls Township. The ground for the application was that the first respondent had failed to comply with "*a number of mandatory rules in terms of Rule 46 pertaining to the sale of the property.*"[1]

[5] The applicants proceeded to depose:[2]

> "*The basis for the rescission are well articulated in my founding affidavit attached to the Application. The 1st Respondent and ourselves reached a compromise and in terms thereof, the 1st Respondent has to proceed against the 1st Defendant if there is a breach of the agreement. This is the gist of the question to be determined in the rescission application."*

[1] See page 8 paragraph 8 of the Book of Pleadings.
[2] Para 9 page 8 of Book of Pleadings.

[6] Applicants further attested that the first respondent failed to particularize as to how much was collected from them. They then attest:

> *"14. I have a prima facie right to the stay, in that after the compromised was reached, 1 and 2nd Applicant ceased to be parties to the suit as fully set out in the agreement annexed to the Application for rescission.*
>
> *15. The balance of convenience favours the grant of the interim relief in that from well over 2 years, the 1st Respondent has not bothered to execute the writ, and the only inconvenience they would suffer is a delay should the rescission to in their favour which I have reasonable belief it would not given the binding nature of the compromise agreement reached. Yet if the interim relief is not granted, am immediately feeling the adverse effects of the execution of an order that is subject to contestation, and those effects cannot be reversed."*

[7] They further challenge the selling price of a property under Madonsa Township for the sum of E1.5 million. They contend that the property was valued in 2008 at E3,800,000. Lastly, applicants make it an issue that they were never served with the writ of execution.

[8] In answer the first respondent pointed out that following the consent order and applicants' failure to honour it, first respondent filed a notice of abandonment. The property which was the subject of interdict and rescission was one of the properties which was mortgaged in favour of first respondent by first applicant against the loan. Further the amount upon which the judgment was sought to be rescinded was part of the E7,335,498-08 which was acknowledged as owing. It is not clear how applicants seek to have same rescinded when an order of court was entered by consent in respect of the said debt.

[9] The applicants under case No.1661/2011 were sureties for the sum of E500,000-00. The total debt was E1.5 million. The first respondent instituted combined summons. Before judgment, the parties signed the acknowledgment of debt. By agreement of all the parties, the acknowledgment was entered as a court order.

[10] Applicants failed to honour their side of the bargain. First respondent filed a notice of abandonment of the consent order. It then obtained a default judgment of the sum due. A writ was served and the property was advertised for sale. As a reason for the stay of execution and interdict, applicants pointed out:

> *"The first respondent and ourselves reached a compromise and in terms thereof, the first respondent has to proceed against the first defendant if there is a breach of the agreement*."

[11] The agreement reflects the parties as first respondent (plaintiff) and Starros Import and Export (Pty) Ltd (defendant). The preamble reads:

> "*Whereas the bank has instituted proceedings against Starros under Case No. 1761/11, 1762/11 and 1661/11 for recovery of various amounts the total of which, at inception of the proceedings is E7,335,498.08."*

[12] It is true that the original summons under case No.1661/11 reflected as parties, first respondent (plaintiff) and first defendant as Mchepa Chemical Industries (Pty) Ltd while first and second applicants as second and third defendants. From reading the applicants' founding affidavit and the acknowledgment, one would *ex facie* think that applicants were now released as debtors. However, it is upon reading the answering affidavit

that one learns of the true state of affairs. The first respondent deposed that it served upon the applicants a notice of abandonment. This evidence is not disputed by the applicants except to state that the first respondent had no right to do so. I do not think so. First respondent had all the right to abandon the consent order in its favouron the face applicants' failure to comply with the consent order.

[13] This procedure is well provided for by the Rules of this Court under Rule 41 (2):

> ***"Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment."***

[14] Applicants do not dispute that they received service of abandonment in this matter. First responded acted in terms of the law therefore.

[15] I must hasten though to point out that even if first respondent had not abandoned the acknowledgment, it would be entitled to revert to the action proceedings because there were no orders taken in regard to them. They were at all times pending before court. First respondent was entitled to exercise its option in the circumstances of the case. This was so because applicants or Mchepa Chemical Industries (Pty) Ltd a company where applicants were directors orStarros Import and Export (Pty) Ltd failed to comply with the consent order.**Henning J**expounding on this position of the law once wrote:

> "***Where a plaintiff and a defendant arrived at a settlement of a disputed claim, and the defendant has failed to carry out such settlement, <u>the plaintiff may at</u>***

his option sue either on the original claim or on the subsequent terms of settlement."[3]

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[16] The applicants therein somehow call for debatement of the account. Surprisingly, they then deposed immediately below:

> *"There was an attempt to sell the very property in early 2012. It was unsuccessful. The property has since again been put up for sale with a reserved price of E1.5 million."*

[17] That the property was once put up for sale early 2012, had been confirmed by the first respondent. It stated that the property was for sale in March 2012. The property could not be sold for lack of purchasers.

[18] It is of note that the applicants challenged the sale only for August 2013. Applicants did not challenge the sale for March 2012. In essence but for want of buyers, this property would have been sold in March 2012. In other words, applicants were not ready to challenge the sale in March 2012 on the ground of debatement, but suddenly woke up a year later to do so. One wonders if the question of debatement was not present in 2012 but only in 2013. All this, points to one plausible inference and that is, applicants are raising the ground for debatement only to frustrate the first respondent in recovering its debt. Worse still, this part of debatement goes to the root of the debt itself. It is not related to the regularity or otherwise of the sale. One would have expected applicants therefore to defend the action proceedings themselves if the ground on debatement was genuine. However, applicants were prepared to have respondents obtain a default judgment and advertise for the sale. It is surprising why applicants are now springing to action after the bolting of the horse.

[3] Trust Bank of Africa Ltd v Eksteen 1968 (3) SA 529 at 532

[19] Further, as correctly pointed out by first respondent's Counsel, first applicant as represented by second applicant, acknowledged in July 2011 that the first applicant is indebted to the first respondent for the same amount they now want debatement on. Debatement is presumed to have taken place or considered before the settlement. The ratio decidendi in **Swaziland Development and Savings Bank v BhokileShiba (55/12) [2013] SZSC [10] at page 9 para [23]** is apposite:

> ***"So long as the Respondent voluntarily entered into the settlement of the claim by the Appellant against him and both parties have acted in pursuance of that acceptance, he cannot be heard to resile from that."***

[20] Applicants further raised two other grounds for rescission, that is, sale below reserve price and non service of notice of attachment.

[21] As correctly pointed out again on behalf of first respondent, the applicants failed to demonstrate the basis for holding that the market value was much higher than the price sold. In fact, applicants gave various figures as market value of the property. This became uncertain and the court could not rely on such averments.

[22] Applicants further contended that they were never served with the notice of attachment or writ of execution. They deposed however, without hesitation,that the property was first put up for sale early 2012. The first respondent's attorney, a person fully seized with this matter deposed that the applicants were served with the necessary papers. They became aware of the sale in early 2012. They did not challenge it. There was no duty upon first respondent to serve applicants again upon failure of the auction sale by reason that it would have served no purpose. It was sufficient that it was re-advertised in order to attract more purchasers, including applicants if

they were so inclined. This procedure of not reserving the processes where there was no prior objection, is sound practice, unless the applicants can show that the conditions of the sale have material changes which were prejudicial to it. Even then, the notice of re-advertisement is sufficient.

[23] To demand a fresh service of process every time a sale in execution fails, in the circumstances where the terms and conditions of sale has not changed materially, would put the creditor unnecessarily out of pocket, a procedure which does not augur well with the dictates of commercial transactions. A creditor or debtor has a right to mitigate its litigation costs.

[24] In the totality of the above, the application by applicants for stay of execution, rescission and return of BMW X5 registered USD 461 AM are totally devoid of merits.

[25] I therefore enter the following orders:

1. The applicants' application under Case No. 1661/11 and 1761/11 are hereby dismissed;

2. The rule nisi issued on 30th August 2013 is hereby discharged;

3. The default judgment granted by this court on 16th December 2011 is hereby confirmed;

4. Applicants *viz.*Starros Import and Export (Pty) Ltd, Mchepa Chemical Industries, Stanley Mchepa Banda and Rosalind Katanga Banda are hereby each and severally ordered to pay costs of suit; one paying the other to be absolved.

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M. DLAMINI
JUDGE

For Applicants: **N. Ndlangamandla of Mabila Attorneys in Association with N. Ndlangamandla and S. Jele.**

For Respondents: **W. Ali of Mlangeni Attorneys**