IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 1196/19

In The Application Of:

T.S.M.L. CRANE FEEDS & ELECTRICAL (PTY) LTD **1ST APPLICANT**

NAGOORA SUBRAMONEY **2ND APPLICANT**

AND

SILENCE GAMEDZE **1ST RESPONDENT**

STANDARD BANK (SWAZILAND) **2ND RESPONDENT**

IN RE:

STANDARD BANK (SWAZILAND) **PLAINTIFF**

AND

T.S.M.L. CRANE FEEDS & ELECTRICAL **1ST DEFENDANT**

NAGOORA SUBRAMONEY **2ND DEFENDANT**

Neutral Citation: *T.S.M.L. Crane Feeds & Electrical (Pty) Ltd and Another* vs *Silence Gamedze and Another (1196/19) [2020] (231) 5th November 2020*

Coram: **MLANGENI J.**

Heard: **25th September 2020**

Judgment Delivered: **5th November 2020**

Summary: Civil procedure – application for rescission of judgment granted in the absence of the defendants. There were also prayers for stay of execution and other unrelated relief.

Defendants were served with summons and a notice to defend was filed on their behalf by an attorney. Thereafter, the plaintiff filed a declaration together with an application for summary judgment which was granted unopposed.

Summary judgment was entered on the 29th October 2019; this application for rescission was launched on the 2nd April 2020 but erroneously dated 2nd April 2019 by the applicant's attorney. It therefore came some five (5) months after the judgment was entered.

In their papers applicants did not state the legal regime under which rescission is sought – i.e. whether in terms of High Court Rule 31 (3) (b) or Rule 42 or the Common Law. In terms of established practice the application was evaluated in respect of all three legal routes.

Requirements for rescission discussed.

Application dismissed with costs.

JUDGMENT

[1] To delay an opponent could well be part of civil litigation, in this jurisdiction and elsewhere. But for a litigant to attempt to appeal against a postponement order that it has sought and obtained is nothing short of drama or, shall I say, circus. Such is the story of this matter.

[2] The applicant seeks rescission of judgment. The matter was on my court roll for the umpteenth time on the 7th August 2020, scheduled to proceed. Mr. Msibi for the applicant was unavailable. The court was shown a note of even date, written by Mr. Msibi, in which he explained that he was double-booked and was proposing that the matter be postponed to the 14th August 2020 at 9:00 am. Mr. Sithole for the respondents, despite that he, like the court, had no prior notice of this, was agreeable to the date proposed by his opponent. On the 13th August 2020, a day prior to the date to which the matter was postponed upon Mr. Msibi's request, the respondents were served with a notice of appeal **"against a postponement enrolment order for August 2020 at 9:00 am issued by Justice T.M. Mlangeni in High Court Case No. 1196/2019 (being an interlocutory application) on the 7th August 2020."**

[3] In absolute reluctance I reproduce some of the grounds of appeal below:-

i) **"The court *a quo* erred in fact and in law to enroll this matter at all as the sale of execution forming the**

subject matter is long passed and this matter is now of academic importance".

(Fact of the matter is that the sale in execution never proceeded)

ii) ----------

iii) **"The court *a quo* erred in fact and in law to enroll this matter as the issue as to whether Judge Mlangeni must hear the matter or not was ordered by Justice J.M. Mavuso to be administratively resolved, and same has not been done, yet it is still relevant".**

(Fact of the matter is that if Mavuso J. did make this suggestion, it by no means qualifies to be an order of court.)

iv) **"The court *a quo* erred in fact and in law to enroll this matter before the incumbent Judge as he is the one that issued an order in the main that is sought to be stayed. As such he is called upon to stay his own judgment**".

(Fact of the matter is that there is nothing wrong with this.)

v) ----------

vi) ----------

[4] I have reproduced some of the grounds of appeal in order to demonstrate the depressing quality of service delivery that is endured by some litigants, for good money, and by the courts. I need not go on about the established rule of procedure that an interlocutory order is not appellable without the leave of court sought and obtained. Thankfully, sanity or whatever, prevailed in the end because the

appeal appears to have been abandoned. I say so because applicant's attorney proceeded with this matter to the end, without raising the issue of a pending **"appeal".**

[5] The application for rescission is dated 2nd April 2020. The judgment sought to be rescinded, which is sounding in money, was granted on the 29th October 2019. The application for rescission has come more than five (5) months after the summary judgment was granted. It is worth noting that although the applicant was defended by attorneys and was served with the summary judgment application, his attorney at the time did not oppose the application.

[6] The applicant's prayers are as follows:-

i) ----------

ii) Staying the sale in execution advertised for Friday, 3 April 2020, pending finalization of prayers 3 and 4 below, and pending final determination of a complaint filed before the Ombudsman by applicant (whichever come first).

iii) Rescinding or setting aside the court order in the main (sic) forming the basis of the execution dated 29th October 2019….

iv) Ordering and directing second respondent to account to applicant for monies deposited by applicant in the consolidated account.

v) Cost of suit.

[7] It is hardly surprising that the applicant does not, in its papers, state the legal regime he is pursuing the application under – whether the common law, Rule 31(3) (b) or Rule 42. At the hearing of legal argument I raised this with Mr. Msibi for the applicants and realized that I was speaking esoteric language. His response demonstrated that he had no idea what I was talking about. The failure to specify the legal route adopted by the applicant, while not *per se* fatal to the application, occasions much embarrassment to the respondent who is placed in a position of uncertainty in terms of how to respond.

[8] By notice dated 17th December 2019 the respondents raised several points of law in *limine*, inclusive of lack of urgency, and did not plead over. In view of the long and chequered history of the matter, which includes an earlier application dated 17th December 2019 which was dismissed in its entirety on the 18th February 2020, I directed the respondents to plead to the merits of the matter so that the issues could be resolved once and for all. Pursuant to this the respondents filed their answering affidavit and when the matter was finally argued the points of law were overlooked, hence there is no need for me to rule on them.

APPLICANT'S CASE

[9] Under a sub-heading styled **'cause of action'** the applicant's deponent alleges that the bank refused to account to him **"as to how they distribute the income in the consolidated account[1], and that [they] kept on issuing monthly statements according to the old agreements, something I disagreed with"**.[2] He further

[1] At para 13 of Founding Affidavit (FA).
[2] At para 14 of Founding Affidavit (FA).

states that on or about October 2019, **"without prior notification of legal proceedings when I was away in South Africa, I heard that on that Friday, there was to be a case against me."**[3] Notably, he does not say how he heard this and who from. He states that it is on that same day that the court issued an order that is now sought to be executed. He further avers that he **"did not get an opportunity to oppose the order, as I was not served with papers, and I was away in South Africa."** He has not bothered to avail any proof that he was indeed out of the country. In a verbose and circuitous way the applicants are saying that they were not served with the summons, and the summary judgment came as a complete surprise. He further states that he later realized that papers had been served at his previous premises in Manzini and the new occupant just kept them. He does not attach a confirmatory affidavit of the new tenant that papers were served on him or her. This is an applicant who seeks a discretionary remedy but does nothing more than make a passing reference to matters that matter.

[10] In the context of rescission, the deponent alleges that if he had an opportunity to defend, he **"would have had prospects of success."**[4] The averments that follow are a potpourri of sorts, a hotch-potch, including that he has **"cash at hand with which to redeem my property."** Earlier on, he averred that there **"was no justification to dispossess the house, as it was duly paid for"**[5] There is a cursory reference to mistake **"common to both parties,"** and that the writ of execution **"was erroneously issued**

[3] At para 15 of FA.
[4] At para 25 of FA.
[5] At para 25(1) FA.

for lack of founding statement"[6] In my considered view, pleading a case cannot come in a worse form.

THE LAW ON RESCISSION

[11] The approach of our courts to rescission applications is that they **"consider the facts pleaded closely to see if any of the grounds are met as was expressed in such judgments as NYINGWA v MOOLMAN 1993 (2) SA 508 AT 510 C-D"**, per Hlophe J. in THULANI RICHARD NKHABIDZE v SWAZILAND DEVELOPMENT AND SAVINGS BANK AND THREE OTHERS[7]. I proceed to do so below:-

[12] In terms of Rule 31 (3) (b) the rescission application must be brought within twenty-one (21) days of becoming aware of the judgment. The applicants have come to court long after the twenty one days' period expired. On the 17th December 2019 the applicants moved an application with two-and-a-half pages of prayers seeking, among other things, to stay a sale in execution in respect of immovable property that was attached pursuant to the judgment sought to be rescinded in this present application. So clearly, the applicants were aware of the judgment as at December 2019 and did not approach the court for rescission and opted to go on a wild goose chase. The unavoidable conclusion is that the Rule 31 (3) (b) door is closed to the applicants.

[13] In terms of the Common Law the applicant seeking rescission must show good cause in order to benefit from the discretionary[8] relief of

[6] At para 29 of FA.
[7] (560/2013) [2014] SZHC 213.
[8] MSIBI v MLAWULA ESTATES (Pty) Ltd; MSIBI v GM KALLA AND Co., 1970 – 1976 SLR 345 at p348, para D.

rescission. It has consistently been held that good cause has two main components. First, the applicant must present a reasonable explanation for the non-appearance. Secondly, the applicant must establish a *prima facie* defence to the plaintiff's claim alleging facts which, if proved at the trial, would constitute a valid defence. In the case of MSIBI v MLAWULA ESTATES (PTY) LTD[9] Nathan C.J. put the position in the following manner: -

"…….it is not sufficient for an applicant to establish a *prima facie* defence. He must in addition fully explain his default and establish good cause for the relief which he seeks,"

and further pointed out that an attitude of disregard of the process of court was not to be countenanced.

[14] The applicants' explanation for non-appearance when summary judgment was entered against them is that the deponent was out of the country, in South

Africa, on the day summary judgment was entered. I observed above that he has made no attempt to furnish proof of this important allegation. But the applicant's insurmountable hurdle is at paragraph 7.1 of the opposing affidavit where it is alleged that not only was the deponent aware of the proceedings but actually instructed attorneys to defend the action. As a result, a declaration **"was filed simultaneously with an application for summary judgment on his attorneys of record. The application for summary judgment was not resisted hence judgment was granted in favour of the bank."** Applicant's deponent has not given an account of who, other

[9] See note 9 above, at para 349 D.

than him, gave instructions to the attorneys who filed notice to defend and upon whom the declaration and application for summary judgment was served. These averments have not been denied, as no replying affidavit was filed by the applicants.

[15] I have no hesitation that the applicant's deponent is telling an untruth that he was not aware of the court process, in as much as he does not elaborate on how he became aware of it on the day that summary judgment was entered.

[16] Where the explanation does not meet the objective standard of reasonableness the matter must end there. In other words, there is no need to make the further enquiry on a *prima facie* defence. The reason for this is that the applicant is taken to have abandoned his rights in not complying with the rules of court, and therefore that he does not deserve the discretion in his favour.

[17] I do, nonetheless, evaluate the applicants' averments in search of a possible defence. On the facts before me, the applicants have done nothing to show what their defence is to the bank's claim. The deponent briefly states that the house was paid for in full; in the same breath he says that there is money in hand to settle the debt, and elsewhere he proposes to pay E40, 000.00 per month, which he never got around to do. In his own peculiar way the closest he gets to alleging a defence is that he has taken the matter up with the Ombudsman, where he has raised concerns regarding their business relationship with the bank, leading up to this litigation. The purported report to the Ombusman was attached to the unsuccessful application

of the applicants dated 17th December 2019, as annexure **"F".** At the front of the report form there is space for date received, time received, received by whom and reference. All these spaces are blank. At the hearing I asked if the applicants had any indication from the Ombudsman on progress made in investigating the matter, and there was no such indication. The inference I make is that no such report was actually submitted to the Ombudsman, that the copy is nothing but a ruse.

[18] The applicants have hopelessly failed to make out a case for rescission either under Rule 31(3) (b) or under common law.

[19] It remains to consider whether they have made out a case under Rule 42, on the basis of error. Applicants' averments relevant to error are as follows:-

19.1 The sub-heading to paragraph 28 of the founding affidavit appears below:-

"MISTAKE COMMON TO BOTH PARTIES"

The substantive paragraph 28, verbatim is what follows: -

"I humbly submit that the bank viewing the novation as an indulgence and myself correctly viewing the novation means that the minds of the parties were at cross purposes……"

19.2 The sub-heading to paragraph 29 of the founding affidavit is **"ERROR".** The substance is as follows:-

"I humbly submit that annexure "A" was erroneously issued for lack of founding statement."

[20] Paragraph 18 above epitomizes how cryptic pleadings can be in this jurisdiction. If the applicants intended to establish error within the rubric of Rule 42, they have not succeeded in doing so. Error, within Rule 42, depicts a situation where the court was not aware of relevant information which, had it been aware of, it would not have granted the order. If, for instance, a notice to defend was timeously issued and served on the plaintiff but it was not in the court file and the court proceeded to enter default judgment, those facts would qualify for error. Another example, in matrimonial proceedings, would be an egregious case where the court grants a final decree of divorce by default of appearance, without hearing evidence. These are errors that would ground rescission under Rule 42. The **"error"** that the applicants are invoking appears to be conjured from the law of contract, that if there is a mistake common to the parties then there is no binding contract that ensues.

[21] For purposes of Rule 42 the applicants have not established a legal basis for rescission.

STAY OF THE SALE IN EXECUTION

[22] The respondents have not proceeded with the sale in execution, despite that no order was entered for stay. This is a commendable reflection upon an institution of the stature of Standard Bank (Swaziland) Ltd. In view of the orders that I will make in this matter, the prayer for stay is of no relevance.

ORDER DIRECTING SECOND RESPONDENT TO ACCOUNT TO THE APPLICANT FOR MONIES DEPOSITED BY APPLICANT IN THE CONSOLIDITED ACCOUNT.

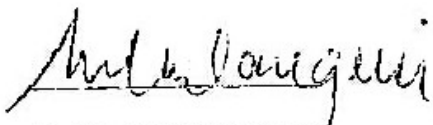
[23] Nowhere in the founding affidavit do the applicants state how much was deposited in the alleged consolidated account and during what period of time. They do not furnish an account number in respect of the consolidation. The result is that I am unable to establish whether a consolidated account was in fact established and, if so, how much was paid into it by the applicants. The result of this is that the order that I might make would be unenforceable for lack of specificity. This prayer must also fail.

[24] In the conspectus of this depressing matter I make the following orders:-

24.1 The application is dismissed.

24.2 The applicants are to pay the costs, at the ordinary scale.

[25] I am of the firm view that the applicants are resolute in delaying the Judgment Creditor from benefitting from the court's judgment. The history of the matter says that much. I therefore make the unusual order that the respondents' costs for this application be and are hereby payable forthwith, irrespective of whether the applicants appeal this judgment or not.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the applicants: **Mr. P.D. Msibi**

For the respondents: **Mr. M. Sithole**