



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.55/12

In the matter between:

**SWAZILAND DEVELOPMENT AND
SAVINGS BANK**

Appellant

vs

BHOKILE ELLIOTT SHIBA

Respondent

Neutral citation: *Swaziland Development & Savings Bank vs Bhokile Elliott Shiba*
(55/12) [2013] [SZSC 10] (31 May 2013)

Coram: A.M. Ebrahim JA
E.A. Ota JA
B.J. Odoki JA

For the Appellant: D.A. Smith SC

For the Respondent: S. Madzinane

Heard: 08 May 2013

Delivered: 31 May 2013

Summary: *Civil Appeal – allowed – cross appeal dismissed – Application for rescission of judgment rightly refused by the High Court – Judgment obtained by fraud may be set aside – case law referred*

to – requirement not satisfied in this matter – court erred in embarking into considering in duplum rule.

EBRAHIM JA

- [1] The Respondent signed an acknowledgement of debt in favour of the Appellant bank on 15 March 2007 in the sum of E1 145.86. This seems to have arisen out of various loans made to the Respondent by the bank over a period of many years, going back to the 1980s.
- [2] The acknowledgement of debt had followed the service of a summons on the Respondent, on behalf of the bank, in the sum of E1 169 107.51. Around the same time, default judgment was granted in favour of another bank against the Respondent and a writ of execution obtained. To prevent attachment of the Respondent's immovable property, the Respondent and the Appellant agreed that the Appellant would settle that debt on the Respondent's behalf.
- [3] One of the terms of the acknowledgement was that the Respondent would be given the opportunity to sell the property currently bonded to the bank within 5 months of the date of signature. If he did not do so, the bank was entitled to sell the property in payment of the debt.

- [4] The acknowledgement was, by consent, made an order of court the day following its signature.
- [5] The Respondent failed to sell the property as stipulated and a sale in execution was conducted on 16 January 2009.
- [6] The Respondent sought rescission of the order on the grounds that his erstwhile attorney had misrepresented certain facts to him and that his consent was thereby obtained fraudulently. As a consequence, he also sought an order setting aside the sale in execution.
- [7] A judgment that is obtained by fraud may, of course, be set aside. The learned judge a quo made the following observations in her judgment.

“[53] It would be remiss of me however, not to highlight the position of the law as propounded by decided cases in application for rescission based on misrepresentation or fraud as common law ground.

[54] De Villiers J.A. in Schienerhout v Union Government 1927 A.D. 94 at 98 stated in this regard:

*‘Now a final judgment of a court of law being **res judicata** is not to be lightly set aside. On the other hand, it stands to reason that a judgment procured by the fraud of one of the parties whether by*

forgery, perjury or in any other way such as fraudulently withholding material documents cannot be allowed to stand”.

[55] *At page 345 the learned Judge postulates:*

‘the wrongdoer should not be allowed to hold ill-gotten judgment’.

[56] **Wunsh J.** in **Simon N.O. & Others** *supra*, eloquently summarises as follows:

- (2) *The successful party must have been a party to the fraud – **Makings v Makings 1958 (1) S.A. 338 (A)**;*
- (3) *It must be shown that but for the fraud, the court would not have granted the judgment – **Robinson v Kingswell 1915 A.D. 277 at 285**;*
- (4) *There must have been a casual connection between the fraud and the judgment (I refer in this respect to **Smart v Wessels 1924 OPD 187 at 190**);*
- (5) *The fraud can consist of withholding material information from the court with fraudulent intent;*
- (6) *The fact the judgment was obtained by consent is not a bar to an action to having set aside on the ground of fraud – **Rossouw v Haumann 1949 (4) S.A. 796 (C) at 800**.*

[57] *All the above cited authorities point to one direction that the party against whom the application for rescission is sought must have been a party to the fraud. In casu, the case is quickly dispensed with because it is common cause that none of the Respondents herein are alleged to have been a party to the fraud.*

[58] On the above premises Applicant's ground for rescission based on fraud, misrepresentation and coercion must fail". (my emphasis added)

[8] The Respondent claimed that his attorney did not explain the acknowledgement of debt, and that he was misled by his attorney as to the effect of the acknowledgement. He claimed that he actually had a good defence to the Appellant's claims. His affidavit sets out numerous other grounds on which he claims he was misled by his attorney.

[9] The bank pointed out that the acknowledgement of debt was signed in March 2007 but that the Respondent did nothing about having it set aside until the sale in execution took place. The bank disputed the Respondent's assertions that there was no basis for the figures that appeared in the acknowledgement of debt, stating that these had all been ventilated and agreed with the Respondent's accountants.

[10] The learned judge considered the conduct of the Respondent's attorney and concluded that there was no basis for holding that the attorney had misled the Respondent. Indeed, the attorney had discharged his duties professionally and exhibited a standard beyond reproach.

[11] The learned judge, in respect of setting aside a default judgment allegedly obtained by fraud, pointed out that that party against whom the application for rescission is sought must have been a party to the fraud. There was no allegation of fraud on the part of the bank.

[12] The learned judge's conclusions in this regard cannot be faulted. It is patently apparent that the tenor of her judgment amounts to a refusal to grant the Respondent the rescission of judgment he sought.

[13] It was at this stage that the learned judge *a quo* should have ended with the conclusion that the application for rescission of judgment was dismissed. It is implicit in her judgment that is what she had concluded.

[14] The learned judge *a quo*, however, went in to raise the issue of the *in duplum* rule and whether there had been any breach of it in the acknowledgement of debt. She correctly set out the applicable law. She then considered five specific sums included in the amount claimed by the Appellant. She considered that she could not make a finding on whether there had been a breach of the *in duplum* rule and concluded by ordering that the parties debate five accounts only, to address the *in duplum* rule. The question of costs was reserved.

[15] In my view this requirement was not necessary and not called for. It was surplus to requirements in dealing with the issue she was seized with, namely, whether or not the rescission of judgment simply should be granted.

[16] It is implicit in her judgment that that she was satisfied that there was no basis for granting the rescission, that she did not state this categorically does not detract from her clear findings in her judgment that there was no basis for granting the rescission sought by the Respondent.

[17] The bank noted an appeal on the grounds that the sum set out in the acknowledgement of debt had been debated and agreed between the parties' representatives, due regard having been given to the *in duplum* rule.

The Respondent filed a notice of objection to the appeal, on the following grounds:

- The debatement of the five accounts had not yet taken place;
- The appellant did not seek leave to appeal, such leave being necessary as the matter was not yet concluded in the court *a quo*.

Alternatively, the Respondent noted a cross-appeal, on the grounds that the court erred in holding that the accounts had been debated, when in fact certain sums that should have been credited to the Respondent had not been taken into

account. Other allegations of errors were made; these are set out on pages 7 – 10 of the record.

[18] *In duplum* rule

The court *a quo* upon reaching the conclusion in paragraph [58] of its decision that Applicant's ground for rescission based on fraud, misrepresentation and coercion must fail, thereafter clearly misdirected itself, by embarking upon a perfidious adventure into the *in duplum* rule and its effect on the settlement agreement. Consequently the court ordered the parties to debate 5 accounts only and solely to address the *in duplum* rule.

[19] The question here is the propriety of such an order. I will not belabour this issue for it is to my mind a straight forward one.

[20] I am firmly convinced that the consent judgment was all inclusive of all these issues, *in duplum* rule and otherwise, by consent settlement reached after several meetings between the Appellant and professional accountants (SAMKHO) hired by the Respondent for just this purpose, as well as his attorneys. This fact is certainly borne out of the several documents urged *in casu* and was recognised by the court *a quo* in paragraphs [29] and [30] of the assailed decision amongst others.

[21] The terms of the agreement were taken to court and judgment entered into. The Respondent cannot turn around and set aside the judgment on this ground. He cannot approbate and reprobate, shifting goal posts to suit his own purposes.

[22] What he has embarked upon is to use the court to evade an obligation he willingly entered into. That is a disingenuous and malicious use of the judicial process, which cannot be allowed! It will be against public interest for judicial process to be used in such a manner.

[23] Having said that the rescission application cannot succeed on the grounds of fraud, misrepresentation etc, there was no basis for the court to turn around and take a step that has the effect of granting the very rescission it had effectively refused. That is exactly the implication of investigating the possibility of the *in duplum* rule vitiating the consent judgment. 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.

[24] Of paramountcy to my mind is that it is indisputable from the orders made by the court, that the illegality as contemplated by the *in duplum* rule was not established on the papers before the court. This precisely informed the order of

the court. The court, in my respectful view, cannot become an avant-garde for the Respondent who was not able to prove that there was illegality to make a case for him that he had been unable to make. Where a party brings a case before the court and is unable to establish it, the proper thing to do is to dismiss it.

[25] The result is that there is merit in this appeal and it succeeds. I hereby set aside the orders of the court *a quo* to wit –

- “1. The parties debate the 5 accounts only and solely to address the *in duplum* rule.
2. Question of costs is reserved.”

In their place I substitute the following:-

“Applicant’s application be and is hereby dismissed with costs”.

[26] Accordingly the appeal is allowed with costs including the costs of counsel and the Respondents “objection” and cross appeal is dismissed with costs.

A.M. EBRAHIM
JUSTICE OF APPEAL

E.A. OTA
JUSTICE OF APPEAL

B.J. ODOKI
JUSTICE OF APPEAL