IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 30/2022

HELD AT MBABANE
In the matter between:

JABUSISA INVESTMENTS (PTY) LTD	**Appellant**
And	
ESWATINI DEVELOPMENT AND SAVINGS BANK	**1st Respondent**
THE SHERIFF OF THE HIGH COURT OF ESWATINI	**2nd Respondent**

Neutral citation: *Jabusisa Investments (Pty) Ltd v Eswatini Development and Savings Bank & Another* (30/2021) [2022] *SZSC* 29 (19/07/2022)

Coram: **R.J. CLOETE JA, S.J.K. MATSEBULA JA AND M.M. VILAKATI AJA.**

Date of Hearing: 16 May, 2022.

Date of Delivery: 19 July, 2022.

SUMMARY: *Contract – Misrepresentation – Definition – Forms of misrepresentation – Fraudulent misrepresentation – Misrepresentation and non-disclosure is not misrepresentation – Consequences of misrepresentation – Fraudulent misrepresentation not established.*

Application Proceedings – Application for rescission of final order of agreement made an order of Court – Types of rescission applications – Application for rescission in terms of common law – Requirements – Reasonable and proper explanation for failure to oppose – Good defence which carries some prospects of success – Grounds for rescission – Fraud by bank – Not established.

Practice and Procedure – Costs on punitive scale awarded for unjustified allegations of fraud – Practice and Procedure – Late delivery of Heads of Argument – Respondent filing not conditional on Appellant first – Successful party deprived of costs in part.

Valuation of Property – Regulated by rules of valuation not rules of law – Finite by nature – Dependent on purpose for which they are done.

JUDGMENT

M.M. VILAKATI – AJA

Introduction

[1] The appellant, Jabusisa Investments (Pty) Ltd, is a company incorporated under the law of Eswatini. For convenience I shall refer to the appellant as "Jabusisa". In the events leading to the litigation Jabusisa acted mainly through its director Jabulani Bhembe.

[2] The first respondent is the Eswatini Development and Savings Bank. The first respondent is incorporated by the Eswatini Development and Savings Bank Order, 1973. The first respondent is licensed under the Financial Institutions Act, 2005 to conduct banking business. I shall refer to the first respondent as "the bank". The bank acted mainly through Mr Mazibuse Khumalo who at the material time was employed by the bank as Agribusiness manager.

[3] Another actor in this case is the sheriff. The sheriff is appointed in terms of the Sheriff's Act, 1904. In practice the sheriff is the registrar of the High

Court. The sheriff is the second respondent in this appeal. The sheriff played no part in the proceedings both in the High Court and in this court.

[4] On 28 May 2021 the High Court dismissed with costs, in favour of the bank, at attorney and client scale, an application brought by Jabusisa against the bank and the sheriff. The application in the High Court was three-pronged:

4.1 Setting aside an agreement concluded by Jabusisa and the bank on the basis that it was induced by misrepresentation.

4.2 Rescission of judgment obtained by the bank pursuant to the above-mentioned agreement on the ground that the judgment was contaminated by the bank's unlawful conduct.

4.3 Reviewing and setting aside a decision of the sheriff setting a reserve price for the sale in execution of Jabusisa's immovable property.

[5] Jabusisa has appealed as of right to the Supreme Court against the whole of the order of the High Court.

The Facts

[6] On 6 January 2020 the bank sued out of the High Court a simple summons against Jabusisa and two of its directors in their capacities as sureties and co-principal debtors of the company. The summons joined two causes of action:

6.1 The first claim was for, among other things, the payment of the sum of E 3 023 241.65 (Three Million Twenty Three Thousand Two Hundred and Forty One Emalangeni Sixty Five Cents) being money lent to Jabusisa on an agricultural loan in March 2016, interest on the sum of E 3 023 241-65 at the rate of prime plus 3.5% per annum from date of issue of summons to date of final payment, costs of suit and declaring two immovable properties held by the bank as security for the loan executable.

6.2 The other claim was for the payment of E 430 230.25 (Four Hundred and Thirty Thousand Two Hundred and Thirty Emalangeni Twenty Five Cents) for money the bank lent to Jabusisa on an agricultural loan in April 2017, plus interest on the sum of E 430 230.25 at the rate of prime plus 4.5% per annum from date of issue of summons to date of final payment and costs of suit.

[7] Jabusisa did not file an intention to defend the action. What happened instead was that on or about 27 January 2020 Jabusisa and the bank concluded a contract which they named a 'consent to judgement and agreement to pay'. The parties agreed that all the terms of the agreement were material. However for the purposes of this judgment I highlight the following terms:

7.1 Jabusisa acknowledged its indebtedness to the bank for both claims, interest, costs and collection commission.

7.2 Jabusisa undertook to pay the amount of the claims, interest and costs in full by 30 May 2020 and the collection commission by 31 January 2020. Costs were fixed in the amount of E 4 250.00 (Four Thousand Two Hundred and Fifty Emalangeni).

7.3 In the event Jabusisa did not pay the bank by the due date, the full balance would become due and payable, the bank would be entitled to enforce the agreement by issuing a writ of attachment over the mortgaged properties.

7.4 The bank would make the agreement an order of court.

[8] The 'consent to judgment and agreement to pay' was made an order of court on 31 January 2020.

[9] On 14 February 2020 Jabusisa partially performed the agreement by paying costs in the amount of E 4 000.00. Jabusisa made no other payment. Subsequently on 24 July 2020 the bank issued a writ attaching and taking into execution the two landed properties which were used to secure the repayment of the loans.

[10] A notice of sale by public auction of the two immovable properties was published in the print media on 15 August and 19 September 2020. The notice sets the reserve price at E 2 600 000.00 (Two Million Six Hundred Thousand Emalangeni).

[11] The notice published on 19 September advertised the sale by public auction for 25 September. It was this notice which prompted Jabusisa to approach the High Court on an urgent basis seeking an order setting aside the "consent to

judgement and agreement to pay contract", rescission of the order of 31 January 2020 and reviewing and setting aside the decision of the sheriff to set the reserve price at E 2 600 000.00 (Two Million Six Hundred Thousand Emalangeni).

The High Court Proceedings

[12] Jabusisa's founding affidavit canvassed much factual material about the commercial relationship between the parties going back to 2001. The court below found that these averments were not material to the 2016 and 2017 loans on which the bank's legal action was founded. I agree with the High Court's finding in this regard. The history of the commercial relationship between the parties was not relevant to the issue of whether the settlement agreement concluded by the parties on 27 January 2020 was induced by misrepresentation and that the consent judgment obtained by the bank on 31 January 2020 was tainted by illegality.

[13] In connection with the application for the rescission of the 'consent to judgment and agreement to pay contract' of 27 January 2020 the court below

concluded that Jabusisa had failed to prove that its consent to the agreement was vitiated by fraudulent misrepresentation by the bank or its attorneys.

[14] With regard to the application for the rescission of the order of 31 January 2020 the court found that Jabusisa had failed to prove that it had a *bona fide* defence to the action instituted by the bank. Furthermore Jabusisa had accepted the order of 31 January 2020 by paying part of the agreed costs and negotiating an extension of time within which to liquidate its indebtedness to the bank. Consequently Jabusisa could not rescind a judgment it had acquiesced to.

[15] In connection with the prayer for the reviewing and setting aside the reserve price set by the sheriff; the court found that there was no reviewable irregularity. The court accepted the valuation report prepared by the bank's valuer on the basis that the report was based on facts which obtained on the ground in July 2020.

[16] Lastly the High Court awarded costs in favour of the bank on the attorney-client scale because the allegation of fraud made against the bank was entirely baseless.

[17] As stated in paragraph 5 above Jabusisa has appealed against the whole of the High Court's order. Consequently, the following issues arise on appeal:

17.1 Whether Jabusisa's consent to the settlement agreement of 27 January 2020 is voidable for fraudulent misrepresentation by the bank and its attorneys.

17.1.1 Jabusisa on the one hand contends that the bank did not disclose details of its loan accounts and this amounted to misrepresentation. Secondly the bank falsely represented to Jabusisa that it was indebted to the bank when the bank knew or ought to have known that this was false. Thirdly the bank induced the signing of the settlement agreement by falsing representing that signing was a precondition for the bank to

facilitate the taking over of Jabusisa's loans by the Eswatini Industrial Development Company (EIDC).

17.1.2 The bank on the other hand argued that Jabusisa failed to satisfy the requirements of fraudulent misrepresentation as against the bank's attorneys. In connection with misrepresentation by the bank itself, it was argued that non-disclosure does not amount to misrepresentation, secondly that there was at any rate disclosure by the bank and lastly that Jabusisa was indebted to the bank.

17.2 Whether Jabusisa made out a case for rescission of the order of 31 January 2020.

17.2.1 Jabusisa's case was that it had a genuine defence to the actions instituted by the bank on 6 January 2020. The defence advanced was that the bank was precluded from enforcing the loan agreement because it failed to account for the administration of the farms during for the period in which the bank had control over the farms. Secondly it was argued that Jabusisa was not indebted to the bank in the amounts claimed in the summons or

in any amount.

17.2.2 The bank argued that Jabusisa's conduct after the judgment was indicative of a party which accepted the judgment of 31 January 2020. This acquiescence in the judgment disentitled Jabusisa from applying for rescission of the judgment.

17.3 Whether the reserve price set by the sheriff was below the market value of Jabusisa's farms.

17.3.1 Jabusisa argued that the reserve price was below the market value of its farms. In this regard Jabusisa placed reliance on valuations which were done in 2012 and 2019.

17.3.2 The bank's case was that the reserve price set by the sheriff reflected the current market value of the properties in 2020. Furthermore the bank contended that Jabusisa had failed to demonstrate that the valuation method used by the bank's valuer was unsound.

The Applicable Law

Issue 1

[18] The meaning of misrepresentation is settled in our law. Simply put misrepresentation is a false statement of fact made by one party to the other, which induces the other party to enter into the contract.

[19] The statement must be false to be actionable. At common law the general rule is that non-disclosure of material facts does not amount to misrepresentation by silence (See **R H Christie *the Law of Contract in South Africa* 3ed at page 308**). A duty of disclosure does arise where it is imposed by operation of law. For example in a contract of sale the seller has a duty to disclose to the buyer latent defects of which he or she is aware (See **E Khan (Ed) *Principles of the Law of Sale & Lease* at page 24**). I accept in the appellant's favour that a commercial lender does have a duty to disclose to a borrower the borrower's loan account statement.

[20] The statement will only amount to misrepresentation where it is one of fact. A statement of law or opinion or future intention is not misrepresentation.

[21] A misrepresentation is fraudulent where the false statement is made knowingly or without belief in its truth (***R v Myers* 1948 (1) SA 375 (A)**). The party alleging the misrepresentation bears the onus of proving it on a balance of probabilities.

[22] Mr Motsa for the bank referred the court to the Namibian case of ***R N I v J P I* [2019] NAHCMD 468**. In that case the parties entered into a settlement agreement which was made part of a court order for divorce. Subsequent to the court order, the applicant applied for its rescission on the basis that the respondent had made a fraudulent misrepresentation to her and committed a fraud on the court. The basis of the fraud was that the respondent had not disclosed his adultery to her and to the court. Had the adultery been disclosed she would not entered into the settlement agreement. The court held that the applicant was conflating non-disclosure with misrepresentation. While non-disclosure may be actionable, it was not proof that the respondent had conveyed a falsity knowing it to be falsity or without an honest belief in its truth.

[23] In ***Deslauriers & Another v Guardian Asset Management Limited*** **[2017] UKPC 34**, a Privy Council appeal from Trinidad & Tobago, the appellants were property developers who obtained a loan from the respondents who were not a bank but an asset manager. The appellants defaulted on the loan and the respondents sued for repayment. The appellants did not dispute non-payment but alleged that the respondent had failed to disclose the lending limits they were subject to as an asset manager. The appellants argued that the non-disclosure of the lending limits was a misrepresentation and that had the respondent disclosed its lending limits, the appellants would have sought the loan from a commercial bank. The judgment of the Board was given by all five Law Lords who heard the appeal. On the contention that non-disclosure amounted to misrepresentation the Board stated that:

> "***Without more, a failure to say something is not a misrepresentation. But it may become such if a partial statement is made, which, because it omits something material, is misleading. This is a separate principle from the proposition that if, pre-contract, a party says black, which either is true or which he believes on reasonable grounds to be true (and is thus not a misrepresentation), he is under a duty to correct his statement if he subsequently learns prior to the contract being made that the true position is white.***" (own underlining for emphasis)

[24] A contract entered into as a result of misrepresentation is voidable. The innocent party can either stand by the contract or rescind it. Rescission terminates the contract and aims to put the contracting parties in the position they were in before entering into the contract (***Mcebo Mbhuti Dlamini v Nedbank Swaziland Limited* [2018] SZHC 28**). Where the misrepresentation was fraudulent the innocent party has in addition to rescission the right to sue for damages in delict.

Issue 2

[25] In High Court proceedings an order made by the court may be rescinded by dint of an application made in terms of rules 31(3)(b), 32 (11) and 42(1) or in terms of the common law (See ***Jika Ndlangamandla v Zeiss Investments (Pty) Ltd t/a Zeiss Bearings* [2009] SZHC 65**). Rule 31(3) applies where the court has granted default judgment against a defendant because he or she failed to file a notice of intention to defend or a plea. The application for rescission of the default judgment must be made within twenty one days of the date the defendant becomes aware of the judgment. In addition the

defendant must provide the plaintiff with security for the costs of the default judgment and the rescission in the maximum amount of E200.00. Rule 32(11) applies in cases where summary judgment was granted against a defendant who failed to appear at the hearing of the summary judgment application. At common law the court has a discretion to grant rescission of an order obtained in default of appearance.

[26] Under both rule 31(3)(b) and the common law the court has a discretion to grant rescission of judgment where good or sufficient cause has been shown. Good cause for rescission of default judgment has two elements: the party applying for rescission must have a reasonable and acceptable explanation for his or her default and that on the merits the party *has* a good defence which on the face of it carries some prospect of success ***(Paul Ivan Groening v Sipho Matse Attorneys & Another* [2013] SZHC 35; *Msibi v Mlauwla Estates; Msibi v G M Kalla & Company* 1970-1976 SLR 345 (HC))**. An application for rescission will only succeed where both elements have been established.

[27] An application for rescission of judgment in terms of rule 42(1) is initiated where the judgment was erroneously granted in the absence of the party

affected thereby. In a rule 42 application the applicant does not have to show good cause. Once the court finds that the judgment was erroneously granted it must grant the rescission application. A judgment is erroneously granted where the court commits a mistake in a matter of law which appears on the proceedings of a court record. Consequently in a rule 42 application the court is in a similar position to an Appellate Court in the sense that it is confined to the record of the proceedings (see ***Groening Op cit*** and the cases cited in the judgment).

[28] The principles governing preemption are well-established. In ***Dabner v South African Railways & Harbours*** **1920 AD 583** Innes CJ said:

> ***"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging***

it. In doubtful cases acquiescence, like waiver, must be held non-proven. "

[29] In our jurisdiction ***Dabner*** has been followed in multiple cases including ***Mphetseni Co-Operative Society Limited v L R Mamba & Associates*** **[2016] SZSC 2 and** ***Jimson Jeke Tfwala v Swaziland Development Finance Corporation*** **[2016] SZSC 72**. The principle laid down in *Dabner* is therefore part of the law of Eswatini.

[30] The doctrine of peremption applies to judgments or orders of court and the equivalent of judgments or orders. The case in point is ***President of the Republic of South Africa v Office of the Public Protector*** **2018 (2) SA 100 (GP); [2018] 1 SA 800 (GP)** in which the court held that remedial action of the Public Protector had all the attributes of a judgment and can be acquiesced in thus attracting the application of the doctrine of peremption. An arbitration award for example bears all the attributes of a judgment. It is binding and enforceable until it is set aside by a competent court. Therefore the doctrine applies to an arbitration award made by a private arbitrator appointed in terms

of the Arbitration Act, 1904 or an arbitrator exercising powers under the Industrial Relations Act, 2000.

[31] In ***President of the Republic of South Africa (Op cit)*** the court held that peremption will not be lightly presumed and the party alleging peremption must show conduct which clearly and unequivocally demonstrates acquiescence in an order of court.

Issue 3

[32] A valuer provides an independent opinion on the market value of land as well as the market conditions which inform the valuation. The valuation of land is governed by rules of valuation and not by rules of law (see **W J du Plessis *Valuation in the Constitutional Era* (Vol 18 No 5) [2015] PER 63**). There are two rules of valuation which are relevant to this appeal

32.1 Valuation reports are time bound. Valuation reports have a valuation date and are accurate for a fixed period of time. Thus the value reflected in a valuation report is often referred to as the present price or the present value.

32.2 Secondly a property can have multiple values simultaneously, it depends on, among other things, type of value the person requesting the valuation wants and the purpose of the valuation. Types of value include asset value, book value and market value. A valuation may be required for buying or selling property, insurance purposes or to obtain a loan.

Applying the law to the facts

[33] The central plank of Jabusisa's case is that the bank failed to make disclosure of its loan account. Non-disclosure is not misrepresentation much less fraudulent misrepresentation. Jabusisa has not alleged that the bank made a partial disclosure which omitted material facts and was therefore misleading. I conclude that the settlement agreement of 27 January 2020 was not induced by a fraudulent misrepresentation and is therefore valid and enforceable.

[34] Furthermore the events preceding the conclusion of the settlement agreement demonstrate that the bank did make disclosure of Jabusisa's indebtedness.

34.1 On 10 September 2019 the bank through its employee Mr Christopher Nkambule orally informed Mr Jabulani Bhembe of Jabusisa that the bank was foreclosing the loans.

34.2 Thereafter Jabusisa wrote two letters to the bank, both of which are dated 12 September 2019. The one letter requests a three months extension to find a purchaser for the farm or to get assistance in settling the loan. It is implicit in this letter that Jabusisa was requesting the bank to stay instituting legal proceedings for three months. The other letter requested the bank to inform Jabusisa of the amounts owing on the loans.

34.3 The bank responded through a letter dated 12 November 2019 disclosing the amount owed by Jabusisa as at that date.

34.4 Jabusisa did not find a purchaser for its farms or settle the amounts outstanding within the three months extension it had sought. Instead by a letter dated 17 December 2019 Jabusisa sought a further three months extension.

[35] The bank did not make a false representation to the bank knowing it to be false and Jabusisa did not contest its indebtedness to the bank at any state prior to the institution of the recovery proceedings and the conclusion of the compromise agreement. Jabusisa was aware that it was indebted to the bank.

[36] The bank obtained judgment against Jabusisa on 31 January 2020. The bank did not obtain the judgment because of Jabusisa's failure to enter a notice of intention to defend. The bank obtained the order by consent because it was agreed between the parties that the settlement agreement of 27 January 2020 would be made an order of court. Consequently the rescission application could not be made in terms of rule 31(3)(b) because that rule only applies to rescission of judgments obtained by consent. There was no summary judgment application hence rule 32(11) is also inapplicable. There was no allegation in the application for rescission that the court made a mistake on a matter of law which appeared in the record of the proceedings. Therefore rule 42(1) was inapplicable. The application for rescission in the present instance could only have been made in terms of the common law.

[37] Jabusisa presented its case on rescission as if default judgment was obtained against it because it was in default of entering an intention to defend. Jabusisa was in default of appearance in court when the settlement agreement was made an order of court. Jabusisa's case on rescission, properly understood, is that the court order does not exist independently of the settlement agreement. If the settlement agreement is voidable for misrepresentation then the order of court must fall away. I found that the settlement agreement is not voidable. Jabusisa has failed to establish good cause for rescinding the order of 31 January 2020. The reason Jabusisa did not oppose the application for the settlement agreement to be made an order of court was because it had consented to the order sought by the bank.

[38] In the light of the finding that there is no good cause for rescinding the order of 31 January 2020 it is not necessary to pronounce on whether the Jabusisa acquiesced in the order.

[39] I turn now to consider whether the reserve price accepted by the sheriff was below the market value of Jabusisa's farms. Jabusisa's case here overlooks the finite nature of a valuation and the purpose for which a client commissions

a valuation. Jabusisa relies on valuations from September 2010 and October 2019 for the proposition that the land has a market value above the reserve price accepted by the sheriff. Both valuations expressly state that they represent the market value as at the time of valuation.

[40] The valuation which was used to set the reserve price was done on 30 July 2020 by a valuer engaged by the bank. There was no other valuation from the same time which demonstrates that the bank had under evaluated the land. Jabusisa filed an affidavit deposed to by Mr Roy Masina. Mr Masina asserts that the property is valued at E 5 000 000.00 (Five Million Emalangeni). Mr Masina did not say that he conducted a valuation of the property in July 2020, the purpose for which he conducted the valuation and his valuation report for July 2020, if any, was not attached to the papers. The court below cannot be faulted for accepting the bank's valuation of the land and dismissal of Jabusisa's application to review the sheriff decision setting the reserve price of the land to be sold in execution.

[41] In the light of the aforegoing the appeal falls to be dismissed.

Costs

[42] The High Court granted costs against Jabusisa on the punitive scale because it had made unwarranted allegations of fraud against the bank. On appeal Jabusisa persisted in accusing the bank of fraud. This attack was on the facts of this case completely unjustified. Consequently there is no reason why Jabusisa should not be ordered to pay costs of the appeal on the attorney and client scale which the 1st Respondent in any event applied for.

[43] Both parties were late in filing their heads of argument and applied for condonation for the late filing. The court reluctantly agreed to grant the condonation applications. The bank's reason for late filing in essence was that it was waiting for Jabusisa to file its heads. Rule 31(3) of the rules of this court enjoins a respondent in an appeal to file its heads at least 18 days before the hearing of the appeal. Rule 31(3) does not make the respondent's filing of heads conditional on the appellant filing its heads. The court will therefore deprive the bank of the costs occasioned by its application for condonation of late delivery of heads of argument.

Order

[44] In the result the following order is made:

1. The appeal is dismissed with costs on the attorney and client scale excluding the costs occasioned by the first respondent's application for condonation for late delivery of heads of argument.

Dated at Mbabane on 13th July, 2022.

13 JULY 2022

M.M. VILAKATI
ACTING JUSTICE OF APPEAL

I agree

R.J. CLOETE
JUSTICE OF APPEAL

I agree

S.J.K MATSEBULA
JUSTICE OF APPEAL

For the Appellant: MR M. NKOMONDZE OF NKOMONDZE ATTORNEYS.

For the 1st Respondent: MR K.J. MOTSA OF ROBINSON BERTRAM ATTORNEYS.