IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 257/09**

In the matter between:

JOHANNES MANGULUZA TSABEDZE Applicant

And

SWAZILAND DEVELOPMENT AND SAVINGS BANK1st Respondent
JOSEPH SWANE DLAMINI 2nd Respondent
SABELO MAZIYA3rd Respondent

In re:

SWAZILAND DEVELOPMENT AND SAVINGS

BANK Plaintiff

And

JOHANNES MANGULUZA TSABEDZE Defendant

Date heard: 25 August, 2009

Date of judgment: 20 October, 2009

Mr. Attorney M. T. Ndlovu for the Applicant

Mr. Attorney N.V. Mabuza for the 1st

Respondent

J U D G M E N T

MASUKU J.

[1] Serving before Court is an application in terms of Rule 31 (3) (b) of the Rules of this Court for the rescission of a judgment granted by default by this Court on 6 March, 2009. The grounds upon which the said judgment is sought to be impugned will be examined in greater detail in the course of this judgment.

[2] The setting in which this application arises can be summarized as follows: The 1st Respondent, by simple summons dated 23 January, 2009, sued the Applicant for the payment of the sum of E78, 644.49 in respect of monies lent and advanced by the 1st Respondent to the Applicant. The 1st Respondent further sought interest on the said amount at the rate of 17% per annum; costs of suit and the perfection of certain items listed in a deed of hypothecation. The 1st Respondent further sought what is referred to as a declaration that the group guarantee from Khulumelakwenta Vegetable Growers Association is perfected.

[3] When the matter served before Court on 6 March, aforesaid, the Applicant had not filed a notice of intention to defend, which would have required the 1st Respondent, in terms of the Court Rules, to file a declaration. In the absence of the notice of intention to defend, the Court thereupon entered judgment in the amount claimed, with interest at the rate of 9% per annum. It is this judgment that is sought to be impugned by the present proceedings.

[4] In his founding affidavit, filed in support of the instant application, the Applicant contends in the main that he was not served with the simple summons on the date reflected by the Deputy Sheriff, as indicated in his return of service. He accordingly contests very strongly the correctness of the return of service upon which the Court relied in finding that he had not at the appropriate time, filed the requisite pleading. The 1st Respondent, it must be said, insists that service was effected on the Applicant on the date reflected in the return of service filed of record. There is, it will be obvious, a dispute on this issue.

[5] I should, before dealing with the application on its merits, first attend to a procedural issue raised by the Respondents and by which it is sought to have the Applicant non-suited. It is contended that the Applicant did not fully comply with the provisions of Rule 31 (3) (b) of the Rules of this Court for the reason that he did not,

as required by the said sub-Rule, furnish security. In order to place this issue in proper perspective, it is necessary that I quote the relevant provisions *in extenso.*

[6] They read as follows:

> "A defendant may, within twenty-one days after he has had knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum amount of E200, set aside the default judgment on such terms as to it seems fit."

It would seem to me, from a reading of the above provision that for an applicant to be entitled to the rescission of a judgment granted by default under this sub-Rule, he or she must within twenty-one days after becoming aware-of the said judgment, satisfy the Court that (i) he or she has shown good cause for the default and (ii) he or she has furnished to the plaintiff the amount of security i.e. E200. I shall deal specifically with the question of good cause later in the judgment.

[7] It is the Respondents' contention that in the instant case, the Applicant did not furnish such security and if he did, that was not before the launch of the application. This is so, as the argument runs, for the reason that no mention is made in the

founding affidavit of the furnishing of the security as required by the Rules of Court. It was further contended that the Applicant should have annexed a copy of the evidence of his having furnished the requisite security to the founding affidavit. Is there any merit in this contention?

[8] It is common cause, from a reading of the papers in their entirety, that in, the instant case, the Applicant made no mention in his founding affidavit of the furnishing of the security for costs. What can also not be denied however, is the fact that the Applicant did in fact furnish the security required. It is also a fact that this was actually done before the launch of the application. In support of this, the Applicant annexed to his replying affidavit a letter dated 27 April, 2009, addressed to the Registrar of the Court. A copy of the said letter was made to the 1st Respondent's attorneys of record. Also attached to the papers, is a copy of the cheque issued in favour of the Government in respect of the said costs, which is also of even date.

[9] The only question that requires to be answered is whether this application ought to be dismissed only for the reason, as it now appears, that the Applicant never made mention of the

security in the founding affidavit, although it is clear and it is not controverted, that he did in fact furnish the said security? I am of the considered opinion that to follow the stance advocated for by the Respondents would be tantamount to adopting a highly fastidious approach that may not serve the interests of justice and one which would unduly put form ahead of substance.

[10] In my view, although it is prudent for an applicant for rescission in terms of the said sub-Rule, to indicate that he or she has furnished security for costs, in the founding affidavit, it is, however, not fatal for him or her to do so at some later stage. In my opinion, in so far as this requirement is concerned, what the Court must be satisfied with, is that at the time of considering the application for rescission, the applicant for rescission has in fact furnished the security for costs. This may be elicited, if need be, during argument. It is not in all cases that one can say that that issue necessarily has to be canvassed on the papers although that should generally be the position.

[11] In point of fact, a close reading of the relevant provision does not support the conclusion that the applicant for rescission must as of necessity have furnished the security for costs at

the time that the application for rescission of judgment is being moved. I say so because if that had been the case or the intention of the lawgiver, the word "having furnished to the plaintiff," would in all probability have been employed. It is clear however, that the words used are "upon the defendant furnishing to the plaintiff security. . ." This would suggest to me that a tender for security at the hearing would also suffice. I must, however, mention that the latter position is not to be favoured and that the best practice would invariably require the applicant to state the position regarding the security at the time the application is made on notice as required by the said sub-Rule.

[12] I find, in the peculiar circumstances of this case that the 1st Respondent does not, in the face of the documentary evidence deny, even in argument, that it did receive the notice furnishing security neither does it deny that security was furnished. It would be clear therefor that although the Applicant did not, as he admittedly should have stated in his founding affidavit, that he has furnished the security required, he has, however, satisfied the Court on the totality of the papers filed of record that he did in fact furnish the security for costs required by the Rules. There would, in the circumstances, be no point in dismissing the application on

this point as there is no prejudice enuring to the 1st Respondent as a result of the issue not having been canvassed in the founding affidavit.

[13] The admonition forcefully expressed by the Court of Appeal in the now celebrated case of *Shell Oil (Swaziland) Ltd v Motor World (Pty) Ltd t/a* Case No. 23/2006 (yet unreported), at page 23, that this Court should, as far as possible, avoid deciding cases on technical points and in the process, eschewing dealing with important substantive matters on their real merits resonates. This would exactly be the result if I adhered to Mr. Mabuza's importuning and dismissed the application on this technical point.

[14] The remarks that fell from the lips of van den Heever J.A. in the case of *Andile Nkosi v The Attorney-General* Appeal Case No. 51/99, at page 7 would not be out of place in this connection and therefor are worth repeating. There, the learned Judge of Appeal said:

> "Rules governing procedure, such as rules of court, are not made to enable lawyers representing the parties to a dispute without advancing the resolution of the dispute in any way. They are guidelines aimed at obliging the litigants to define the issues to be determined,

> within a reasonable time, and enabling the courts, as a consequence, to organize their administration as quickly, effectively and as fairly as possible."

I accordingly dismiss this point and proceed to determine the application on the merits.

[15] A party who seeks to benefit from the provisions of the said sub-Rule has to meet the following requirements:

(a) that he has a reasonable explanation for his default;

(b)his application is *bona fide* and not launched as a dilatory stratagem geared to frustrate the successful party in the early enjoyment of the fruits of its judgment; and

(c) show that he has a *bona fide* defence to the plaintiffs claim. See in this regard, van Winsen *et al* The Civil Practice of the Supreme Court of South Africa, Juta, 2th ed. 201-202. See also *The African Echo (Pty) Ltd t/ a The Times of Swaziland and Another v Thulani Mau Mau Dlamini* Civ. Case No. 3526/00 (H.C.) *Regadas v Martins* [2004] 2 B.L.R. 404 at 407 E.

I now turn to consider the relevant requirements *ad seriatim.*

Reasonable explanation for default

[16] In his papers, the Applicant contends that on 7 April, 2009, he received a telephone call from his mobile telephone from the

Deputy Sheriff, the 3rd Respondent, who advised that he was coming to serve certain Court process on the Applicant. They met at Siphofaneni and where he was served with the papers on that day. He therefore denies that he was served with the process on 10 February, 2009, as the return of service indicates.

[17] The version deposed to by the Deputy Sheriff is a horse of a different colour. He contends that he served the papers on the Applicant on 10 February, 2009 at his homestead. It is his contention that he has no reason to lie about the service he effected as he was meeting the Applicant for the first time. I must say, however, that the version deposed to by the 3rd Respondent is in my view deficient. When juxtaposed with that of the Applicant, there are some allegations of fact which the 3rd Respondent did not deal with directly in his confirmatory affidavit. He left these to be dealt with by Mr. Zakhele Lukhele, an employee of the 1st Respondent, the deponent to the founding affidavit, who was not present when the service was allegedly effected.

[18] I am of the view that in cases such as the present, when the course of a matter may turn on allegations of witnesses,

notwithstanding the convenience afforded by the filing of a standard "empty" confirmatory affidavit by the actual witness, it may be necessary to deal with the allegations to be responded to pound for pound. In this case, the Applicant gives a version on oath and which the 3rd Respondent did not directly deal with, contenting himself, as he did, with leaving the contentious issues to be dealt with by a person who knew nothing about the service. The Applicant specifically chronicled the place and the circumstances in which he was served but these allegations of fact were specifically left unchallenged by the 3rd Respondent and should ordinarily stand.

[19] If one has regard to the answering affidavit of Mr. Lukhele, who did not witness the service in question, it becomes clear that no information is furnished on the 1st Respondent's behalf as to how service on the Applicant was effected; how he was identified if his identity is unknown to the 3rd Respondent; where exactly and in whose presence and whether the Applicant, as is normally the case, was asked to sign the papers, including the original in acknowledgment of receipt. These are issues peculiarly within the knowledge of the 3rd Respondent and who, for that reason, ought to have filed a comprehensive affidavit from which the Court could be fortified that there is indeed a genuine dispute of fact. Where the responses to the Applicant's direct depositions are inadequate or

remain answered in some vague terms, this leaves the Court in doubt as to the veracity of the version of the 1st and 3rd Respondents in this case and consequently throws a doubt regarding the genuineness of the dispute of fact.

[20] It has been submitted on the 1st Respondent's behalf that there is a material dispute of fact in this matter and which was foreseeable. For that reason, this Court is moved to exercise its discretion by dismissing this application outright, without referring the contentious issues to oral evidence or if found fit, to convert the matter to trial. Various cases were cited in support of this proposition including the celebrated case of *Roomhire Company Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) S.A. and *Elmon Masilela v Wrenning Investments (Pty) Ltd and Another* Civ. Case No. 1768/03.

[21] I should mention in this connection, that the application of the reasoning in the above cases must be carefully applied and in appropriate cases. In cases for instance, which are brought on urgency and where imminent harm is sought to be forestalled, it would be preposterous to expect the applicant to resort to action proceedings, considering the time limits that normally attach to such type of proceedings. If the situation were

otherwise, it may result in the deterioration of the *status quo* sought to be preserved or the harm intended to be forestalled eventuating, so that by the time the action is heard, there is really no point in proceeding with the same as the stable would effectively be locked after the horses have already bolted. It is in such cases that the Court may be correctly moved to exercise its discretion in favour of directing oral evidence to be led.

[22] In the instant case, I have concluded, on account of the deficiencies in the answering and supporting affidavits, that the dispute of fact is not clearly crystallized so as to require this Court to consider the options available to it. There are some unanswered questions on the depositions of the Applicant which remain and dissuade me from either dismissing the matter or taking any of the courses available under the Rules of Court. It has been necessary to adopt a robust common sense approach to the dispute as stated in *Soffiantini v Mould* 1956 (4) 150 at 154 G-H.

[23] The question I will have to answer in the circumstances, is whether I am satisfied that the Applicant can properly be said to have been in willful default, thereby necessitating, apart from the other considerations, that the application for rescission be dismissed. The learned author Erasmus, The

Superior Court Practice, Juta 1995 at B1-202, states the following, as being the elements needed to be proved in relation to willful default:

> "Before a person can be said to be in willful default, the following elements must be shown:
>
> (a) knowledge that the action is being brought against him;
> (b) a deliberate refraining from entering appearance, though free to do so; and
> (c) a certain mental attitude towards the consequences of the default."

[24] I am of the considered view that the Applicant's conduct, as gleaned from his depositions, particularly considered in juxtaposition to the apparent lack of particularity by the 1st Respondent, in responding to the Applicant's pointed depositions, as stated above, leads me to what appears is the inexorable conclusion that on the balance, regard had to the Applicant's version, it cannot be said that he was in willful default, particularly considering the test advocated for by the learned author above.

[25] I am of the view that in the instant case, the explanation advanced by the Applicant meets the standard. I say so for the reason that his depositions are not dealt with in full by the 3rd Respondent so as to require the Court to sanction an enquiry

into the service as alleged by the 3rd Respondent, by the instrumentality of *viva voce* evidence. It is accordingly my conclusion that the Applicant has, subject to what I say below, advanced a reasonable explanation for his default.

Applicant's *bona fides* in launching this application

[26] I am of the view that it cannot be contested on the facts that the Applicant brought this application in a genuine attempt to set aside a judgment that is clearly prejudicial to his interests.

It cannot be controverted either that the amount of the judgment is not trifling by any standards and that the Applicant has not sought to use the Court's processes in an effort to delay unreasonably the 1st Respondent's right to enjoy the fruits of its judgment. I did not understand Mr. Mabuza to argue to the contrary regarding this aspect of the matter. I am accordingly fortified in finding that the Applicant has met the litmus test in this regard as well.

***Bona fides* of the defence**

[27] The test to be met in this regard, it would appear to me, is akin to that required of a defendant faced with the calamitous

possibility of an application for summary judgment being granted against him. The test was couched in the following terms by Brink J. in *Grant v Plumbers (Pty) Ltd* 1949 (2) S.A. 470 (O) at 478, " . . . i.e. he has made sufficient allegations in his petition which if established at the trial would entitle him to succeed in his defence." See also my remarks in the *African Echo (Pty) Ltd* case *(op cit).*

[28] The learned author Erasmus *(op cit)* states the following regarding this requirement at B1-203-4:

> "The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he must show the probability of success: it suffices if he shows a *prima facie* case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient detail to enable the Court to conclude that the application is not made merely for the purpose of harassing the respondent".

[29] I now turn to the Applicant's depositions regarding this aspect of the application. In his founding affidavit, the Applicant states that the 1st Respondent undertook to loan him an amount of E74, 926-00 but failed to honour its promise in full. Instead, he was advanced a loan of E48, 697-25, which he paid back in part. The Applicant claims further that he never received the amount in question and as a result of the 1st Respondent's

failure to honour its obligations, he suffered damages as his project, which was reliant on the loan promised, collapsed and he intends to sue the 1st Respondent therefor.

[30] The 1st Respondent, of course denies these allegations. The question to be decided, it must be remembered, is not whether the defence raised by the applicant for decision is iron cast. The test is whether it raises triable issues that would require to be ventilated at a trial in due course. This Court would not be properly placed in application proceedings, to try to weigh the probabilities of the case of one party as against those of the other.

[31] What should not sink into oblivion is that the 1st Respondent did at some earlier stage move an application before this Court seeking substantially the same relief. The response of this Court to that application was telling. This Court dismissed the application as it found that the application was afflicted by numerous disputes of fact, incapable of resolution on the papers. The Court accordingly held that the issues be decided in a trial. The issues included the question whether the 1st Respondent was entitled to claim the entire amount of the loan and whether the Applicant was actually indebted to the 1st Respondent.

[32] In view of the foregoing findings, I am of the considered view that the Applicant has met the requisite test. He has, in his papers, raised issues, which if canvassed at trial may afford him a defence to the entire claim or at least to part thereof. There are certainly substantial issues raised by the 1st Respondent in relation to the Applicant's depositions in relation to the defence raised but these would, as I have stated, not be properly resolved on the papers, requiring in my considered view, trial proceedings to cut the Gordian knot as it were.

[33] The Applicant has, in his heads of argument raised a further basis upon which the rescission should be granted. He claims that the simple summons served upon him was not in keeping with the provisions of Rule 18 (6) of this Court's Rules. That sub-Rule requires a party who relies on an agreement which is written, to attach a copy thereof to the summons. It is clear that this was not done and there is no dispute in that regard. The question is whether the Court committed an error by granting the judgment it did notwithstanding that the said annexures had not been attached to the summons.

[34] This argument brings the application within the realms of Rule 42 (1) (a), which empowers this Court *mero motu* or upon application by an interested party, to rescind or vary an order or

judgment granted in error. The word error, as used above has been the subject of judicial decisions. In *Nyingwa v Moolman N.O.* 1993 (2) S.A. 508 (TkG.D.) at 510 F, White J. discussed the issue and concluded as follows:

> "It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge if he had been aware of it, not to grant the judgment."

[35] I have no hesitation, in the circumstances of this case, in concluding as I do that the non-attachment of the relevant agreements to the summons, contrary to the provisions of Rule 18 (6) constitutes an error within the meaning of the Rule 42 as enunciated in the above judgment. I am also confident that the learned Judge's attention was not drawn to the said provisions at the time the judgment was issued. It would also seem to me that if his attention had indeed been drawn to the absence of the said documents, he would in all probability not have granted the judgment by default when he did.

[36] In the case of *Volkskas Bank Ltd v Wilkinson* 1992 (2) S.A. 388 (C.P.D.), at 395 B-D, it was held as follows:

> "Where a defendant fails, as in the case under consideration here, to deliver a notice of intention to defend, a plaintiffs application for default

> judgment on a claim for payment of a debt falls to be dealt with under Uniform rule 31 (2) (a), which provides that the court may . . . without hearing evidence . . . grant judgment against the defendant, i.e. on the allegations contained in the simple summons. Indeed, once there is set out in the summons the relief claimed and a cause of action, there is no more that a plaintiff need allege in the summons or place before court in order to obtain judgment, save where the cause of action is based on a document in which event a copy must be annexed to the summons and the original handed in from the bar when default judgment is applied for. . (Emphasis added).

[37] It would seem clear to me, from the foregoing, that the instant case is one in which the documents on which the claim was predicated ought to have been attached to the simple summons even at the stage when service was effected. The failure to do so rendered the grant of the judgment erroneous; for the Court has to look at the agreement and ensure, particularly considering that the defendant, at that instance, is not before Court, that the plaintiff has complied with the material and other terms of the contract or other document. For instance, where a hypothec is sought to be perfected, the Court is entitled to read the deed of hypothecation which should be annexed to the summons.

[38] In the premises, I am of the view that this is a proper case in which to grant the relief prayed for by the Applicant. On the question of costs, the ordinary rule is that an applicant for rescission normally bears the costs for he is in essence, seeking an indulgence from the

Court. In the instant case, the probabilities on the question of costs appear to be evenly poised. I consider it a proper case in which each party should be ordered to pay its own costs and I so order.

[39] In the result, I issue the following Order:

[39.1] The judgment granted by default on 6 March, 2009 in favour of the 1st Respondent herein be and is hereby set aside.

[39.2] The Applicant be and is hereby granted leave to defend the proceedings and is to that end ordered to file its notice to defend within seven (7) days from the date of this judgment, after which the ordinary provisions of the Rules relating to filing of further pleadings shall apply.

[39.3] Each party be and is hereby ordered to pay its own costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 20th DAY OF OCTOBER, 2009.

T.S. MASUKU
JUDGE

Messrs. Masina Mazibuko Attorneys for the Applicant
Messrs. S.V. Mdladla & Associates for the 1st Respondent