

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE No. 43/93

IN THE MATTER BETWEEN

ALBERT LOBHENI MASUKU

APPLICANT

And

SWAZILAND BUILDING SOCIETY

RESPONDENT

CORAM :

DUNN J.

FOR THE APPLICANT :

MR. T. SIMELANE.

FOR THE RESPONDENT :

MR. P. FLYNN

JUDGMENT

15TH AUGUST 1997.

This is an application under Rule 42 (1) (a), for the rescission of a judgment granted on the 12th January 1993 under the same case number as the present application .The applicant was then the defendant and respondent was the plaintiff. The application was filed on the 18th December 1996.

The summons in the main action was issued through the office of the registrar on the 21st January 1993 The action arose from an alleged failure by the applicant to comply with the terms and conditions of a Mortgage Bond which was registered as ongoing security for a loan granted to the applicant by the respondent. In terms of the Bond the applicant chose as his domicilium citandi et executandi, Lot No. 1314 Extension No. 13 Madonsa Township.

The applicant did not file a notice of intention to defend and the matter was set down for default judgment which was granted on the 12th February 1993.

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The applicant states the following at paragraphs 9 and 10 of his founding affidavit –

However during January 1993 the respondent issued summons against me , served it on a vacant piece of land and obtained default judgment against me alleging that I was in arrears with my payments. I could not defend the action since I did not have actual notice thereof.

It is my humble submission that the default judgment was erroneously sought and erroneously granted as I clearly was not in arrears with my payments. In fact I was way in advance with my repayments

The return of service which was before the court on the day the default judgment was granted sets out the domicilium citandi et executandi as described in the Bond The fact that it consisted of a vacant piece of ground is immaterial for that is the place which the applicant chose for service. Reference was made on behalf of the applicant , to a copy of a return of service which the respondent attached

to its answering affidavit This return reflects that it was in respect of the same case between the parties and is identical in all respects to the one that was before the court on the 12th February 1993 , with the exception that it does not have a description of the domicilium citandi et executandi. There is no explanation as to this return of service It is clear from the papers before me that the court had a proper return of service before it on the 12th February 1993 . There was no error in the granting of the default judgment The applicant had simply failed to comply with the time limits set out in the summons .

The contention that the respondent had a defence to the main action is, for purposes of an application under Rule 42 (1) (a) , totally misconceived The applicant's remedy was to proceed under Rule 31(3)(b) to have the default judgment set aside.

The application to rescind the judgment of the 12th February 1993 is dismissed with costs .

B . DUNN.

JUDGE.