IN THE HIGH COURT OF SWAZILAND

STANLEY MBOVANE FAKUDZE APPLICANT

V

JAMES DLAMINI RESPONDENT
& DEPUTY SHERIFF RESPONDENT

CASE # 51/97

The Applicant seeks an order

"that the warrant of ejectment issued on 27th November 1996 under case number 492/96 be stayed pending an application for rescission of judgment obtained by the First Respondent against the applicant on the 25th November 1996"

There was a second prayer reading as follows

"That Rule Nisi do issue with interim relief returnable on 31st January 1997 for the First and Second Respondents to show cause why prayer 1 (one) should not be made final." (sic)

The second prayer is meaningless, but serves only to illustrate the misconceptions which are rife in this jurisdiction regarding the purpose of the issue of a rule nisi and the circumstances in which the use of the procedure is appropriate,. No rule however was granted but the Applicant has not been ejected from the

premises.

The Application was originally set down to be heard on 14th February 1997.The matter has however been postponed from time to time while a replying affidavit was filed by the First Respondent and answer thereto was made by the Applicant. The contents of these affidavits are largely irrelevant, as the Applicant has not made a case for the relief claimed in the founding affidavit.

The facts of the matter as set out in the founding affidavit are relatively simple. The applicant had been the owner of the property, described as Lot 2509 Mbabane Extension 11 (Thembelihle Township) in the District of Hhohho. He failed to pay instalments in repayment of the Building Society loan which was secured by a Mortgage Bond registered over the property in favour of the lender. The result of this was, that the Mortgagee took action against the Applicant, obtained judgment against him, and the property was sold in execution. The present respondent was the purchaser, and he is now the owner of the property, transfer having been registered some time ago.

The Applicant has tried to reverse what has taken place and alleges that in interviews he has had with the Respondent he was given the impression by the Respondent that the latter would be prepared to return the property to him against payment of the amount for which the Respondent bought the property on the sale in execution. In this connection the allegations in paragraphs 5.9 and 5.10, which I will not repeat here, make it quite clear that Respondent did not come to any agreement with the Applicant in this regard. In paragraph 14 of the Founding Affidavit the following is said,

" I further submit that the First Respondent is in breach of a verbal contract that I entered with him that of abandoning the sale conducted on the 5th July 1996"

Particulars of this agreement are nowhere to be found in the founding Affidavit. Such an agreement, if it did exist, not having been reduced to writing, and providing for the alienation of fixed property, would not bind the parties because of the provisions of Sec 30 of the Transfer Duty Act It is not necessary to have reference to the respondent's denial that there was any contact by him with the Applicant in connection with the purchase of the property was any a contract to abandon the purchase, (whatever that phrase may mean).

Respondent's denial of there being any contract is in accord with Applicant's averments in paragraph 11 of the founding affidavit which contradict the allegation of there being any contract and read as follows

"11 I wish to now state that the First Respondent has been less than honest in

handling this matter. He has always make (sic) me believe that he will negotiate with me to have the sale to (sic) my house to him cancelled; only to go behind my back to have a judgment taken against me and subsequent a writ of ejectment issued on 27th November 1996, I did not file an opposing affidavit as I honestly believed the matter would be settled"

It is a matter for interesting speculation as to what defence Applicant would have alleged in the affidavit, as in the light of the paragraph quoted he could not claim that any agreement existed. Lack of honesty , if any, is not on the part of the Respondent. It is unacceptable impudence for such an allegation to have been made.

There is no answer to the Respondent's claim to be in possession of the property of which he is the owner. It is of little more than academic interest as to whether or not the Applicant was in wilful default of appearance at the hearing of the application for summary judgment

When Applicant's. Attorney, Mr Simelane, received the notice of application for summary judgment, he wrote to the plaintiff's attorney and after informing plaintiff's attorney that consequent on a meeting with Respondent at which the question of the property was discussed ,he had contacted his client, the Applicant who was " to set up a meeting with your client early next week to discuss this matter". He then went on to say

"6. As this matter is now opposed, we assume that it will not proceed on Monday, and it will be struck off the Roll and we hope to revert to you in due course and report to you about the outcome of this meeting."

This, in the absence of prior arrangement with the Respondent's attorney is presumption of the highest order. As it happened although this letter was faxed to Robinson Bertram it did not come to the attention of Mr Henwood who was handling the matter on Respondent's behalf, until after the summary judgment hearing, where applicant was in default not only of appearance but of the filing of the affidavit disclosing a defence.. That Henwood personally did not receive Mr Simelane's communication may not be surprising as 21 st November 1996 was a Thursday and the application was due to be heard immediately after the week end at nine thirty a.m

Mr Henwood made no secret of his intention to proceed with the Application as he saw and spoke to a

member of Mr Simelane's office who practices in association with him., who informed Mr Henwood that he had no instructions in the matter. Surely if Mr Simelane had someone at court that day he could have ensured that the Applicant was represented. To deal with the application for summary judgment. It was poor practice to rely on Respondent's attorney not only having come to

knowledge of his letter, but reacting favourably thereto. There is no suggestion that the Respondent himself had ever agreed to the deferment of the application or that he was ever asked so to do.

There can accordingly be no prospect of the Applicant succeeding in an application for rescission, which does not yet appear to have been launched. It follows that the Applicant is not entitled to the relief claimed.

The application is dismissed with costs.

S. W Sapire

Acting Chief Justice