SWAZILAND HIGH COURT

MASEKO, Hleziphi

Plaintiff

Vs

DLAMINI, Thulani

Defendant

Civ. Trial No. 1847/2000

Coram SAPIRE, CJ

For Plaintiff Mr. T, Dlamini

For Defendant Mr. C. Ntiwane

JUDGMENT

(21/03/2002)

This is an application for rescission of judgment. The applicant originally came to court by way of urgency seeking that the execution of the judgment granted on the 16th June 2000 be stayed pending formalisation of the application. The further relief which was sought is that the judgment granted in favour of the respondent to be rescinded and set aside.

Consequent upon that the applicant sought leave to file his notice of intention to defend and plea in the main action and the applicant somewhat surprisingly asked for an order for costs in the event of the respondent opposing the application. The matter

came before court on a number of occasions and initially a stay of execution pending the outcome of the application was granted and the only question remaining before the court was whether rescission of the judgment should be granted. The applicant claimed that he was never served with the summons. There was a return by the Sheriff to the contrary and in view of the conflict on this point I directed that evidence ought to be heard.

The question also arose as to when the applicant acquired knowledge of the judgment or knew about it. This was important because there was a long delay between the granting of the judgment and this application.

As far as service is concerned the deputy sheriff who claimed to have effected service gave his evidence in a direct manner and confirmed what he had said in his return. The applicant also testified on this point and claimed not to have been at the place where service is said to have taken place, on the day in question and said that he was otherwise engaged elsewhere and could not have received service. The vital potion of the evidence was not put to the sheriff.

I have drawn the inference that the applicant's evidence has been manufactured to meet the case. I am satisfied that he was served with the summons in this matter and that he did not pay any attention thereto until his property was in the danger of being sold in execution The deputy sheriff testified in a perfectly satisfactory manner and was untouched in cross examination. The same cannot be said for the applicant and his story is more than unlikely. His credibility is also adversely affected by the other issue.

As far as knowledge of the judgment is concerned there was the testimony of the Plaintiff's attorney testifying that after judgment had been taken he fortuitously met the applicant outside the attorney's office and mentioned that there had been a judgment. He asked the applicant what he is going to do about it. Apparently nothing much transpired apart from the fact that according to Mr. Ntiwane the applicant handed him E900.00 which was deposited to the credit of the attorneys account for safe keeping or in custody probably for the respondent, that is the plaintiff in the action. The applicant denies any such contact. A copy of the receipt was produced and the attorney's books were tendered for inspection.

When it comes to a test of credibility one has to bear in mind that the applicant places himself four squarely against two very credible witnesses and his account is plainly, on the probabilities, a fabrication merely to avoid payment.

The application therefore is refused with costs and the interim interdict is discharged.

SAPIRE, CJ