THE HIGH COURT OF SWAZILAND

D.D.M. ESTATES (PTY) LIMITED

1st Applicant

DANIEL DIKA MAMBA

2nd Applicant

And

STANDARD BANK SWAZILAND LIMITED

1st Respondent

ROBINSON BERTRAM

2nd Respondent

Civil Case No. 3151/2001

Coram	S.B. MAPHALALA – J
For the Applicants	MR. A. SHABANGU
For the Respondents	MR. K. MOTSA

JUDGMENT

(26/11/2002)

Introduction

This is an application for a rescission of a judgment granted by default by this court. The applicant prays for an order *inter alia* that the default judgment granted on January, 2002 be rescinded or set-aside; that the respondent pays the costs of this application; and further and/or alternative relief.

The founding affidavit of the 2nd applicant is filed in support thereto with pertinent other supporting documents.

The respondents oppose this application and the answering affidavit of one Hezron Veli Dlamini who is the acting Recovery Manager of the 1st respondent is filed in opposition. The respondents also annexes pertinent documents.

The Applicant's Case.

The applicants avers that on or about 20th March 2002, the Board of Directors became aware of the fact that a default judgment was obtained against the applicant when writs of execution and a Notice of attachment issued by the Registrar of this court were brought to their attention by the second applicant. The Directors of the first applicant had previously been unaware of any proceedings against the applicant.

The Directors of the first applicant as reflected at the office of the Registrar of Companies are as at 30th June 1997:

i) Busisiwe M. Makhubu
ii) Gugu Mamba
iii) Masebenza Mamba
iv) Mduduzi Mamba
v) Daniel D. Mamba.

The Directors of the 1st applicant are also shareholders of the 1st applicant with Busisiwe Makhubu being at present the majority shareholder holding one hundred

shares and all the other shareholders holding one share each except for the 2nd applicant who holds ten shares.

The Board of Directors decided on the 26th March 2002 to institute the present proceedings for the rescission and/or setting aside of the judgment dated 25th January 2002.

The 1st applicant's present attorney has advised the Board of Directors that he has discovered from a perusal of the court file in the main action that the return of the Deputy Sheriff shows that service of the combined summons was effected on one Busisiwe Mamba at an alleged *domicilium citandi et executandi* of the first applicant on the 5th December 2001.

The second applicant avers that he has ascertained this himself, that a perusal of the document which is annexure "A" of the combined summons does not reflect the address at which the Deputy Sheriff allegedly served the summons (that is, portion 116 (a Portion of Portion 86 of Farm No. 1117 Mbabane, district of Hhohho) as the chosen *domicilium citandi et executandi* of the first applicant. Further annexure "A" to the combined summons does not reflect the aforementioned address described by the Deputy Sheriff as the *domicilium citandi et executandi* as the principal place of business of the first applicant. Indeed the principal place of business of the first applicant is that which is stated by the respondent in annexure "A" of the combined summons and not that upon which the Deputy Sheriff served the combined summons.

The second applicant avers further that as far as he is concerned he was never served with the combined summons and there is no return of service reflecting that he was served with the combined summons.

The first applicant avers that it has a good and *bona fide* defence to the respondent's claim in that:

14.1 the first applicant denies the allegation made by the respondent at paragraph 5.2 of the Particulars of Claim, namely, that:

"the loan would be repayable on demand over a thirty six (36) months at the rate of E2, 778 (two thousand seven hundred and seventy eight)".

14.2 Indeed the provisions of annexure "A" reflect only that the first applicant had thirty six (36) months to pay the instalments in thirty six (36) equal monthly instalment of E2, 778-00 (two thousand seven hundred and seventy eight emalangeni) with effect from the first month following draw down of the facility.

14.3 However, it was a further term of the agreement embodied in annexure "A" that in the event of any of the occurrences listed in Clause eleven (11) thereof, including *inter alia* default in payment on due date of amounts due under the loan agreement and if remedial action to the satisfaction of the respondent is not undertaken within fourteen (14) days of written notice, the loan facility would at the sole option and discretion of respondent be repayable on demand.

14.4 The respondent's Particulars of Claim do not allege the said written notice referred to above and in paragraph eleven (11) of the loan agreement.

14.5 I am advised and verily belief that the resolution annexed to the respondents' Particulars of Claim purportedly authorizing me to accept the loan facility on behalf of the first applicant company and purportedly as a resolution of the first applicant authorizing the arranging of the loan is invalid and not in accordance with the Articles of Association paragraph 78 which provide;

" a resolution in writing signed by every member of the Board of Directors shall have the same effect and validity as a resolution of the Board duly passed at a meeting of the Board properly convened and constituted".

14.6 In the premises what purports to be a resolution of the first applicant is in fact not a resolution of the first applicant and I am therefore advised and verily believe that the applicant never incurred any liability for a debt due to the respondent at all from the first applicant.

14.7 I am further advised and verily believe that in terms of Clause 43 and 70 (f) of the Articles of Association that the applicant's powers to borrow or raise money for the purposes of the company can only be exercised on behalf of the applicant company by the Board of Directors.

14.8 I am further advised that even though in terms of Clauses 71 and 72 of the Articles of Association "... the directors may from time to time entrust to or confer upon a Managing Director of Manager for the time being such of the powers and authorities vested in them as they may think fit", such powers and authorities as they may delegate in terms of these Clauses do not include the power to borrow money. I humbly refer the Honourable Court to Clause 72 of the Articles of Association".

The physical address given in the suretyship agreement to the respondent bank as in its records as my address is Portion 296 (a Portion of portion B) of Farm Dalriach, number 188 Hhohho, Mbabane, and not the address at which the Deputy Sheriff allegedly served the Combined Summons.

Further, and in any event the continuing Covering Mortgage Board number 614/97 is for a total amount of E87, 500-00 (eight seven thousand five hundred emalangeni).

It was a term of the Covering Bond which is annexed to the respondent's Combined Summons contained in Clause 17 (seventeen) thereof.

> "If the whole or any portion of the property is expropriated or taken for road widening purposes or any other purpose whatsoever under the provisions of any law, or bye law by any competent authority, the Mortgagor appoints the bank irrevocably and in *rem suam* to receive all compensation monies payable in respect thereof and also to make all claims and sign all such documents in regard thereto as may be necessary or desirable and the bank shall account to the mortgagor in respect of each such amount received after deduction of all sums secured in respect of this bond and the costs incurred by the bank in regard to such expropriation or other deprivation".

The land which is the subject of the continuing Covering Bond has been expropriated by Government for road widening purposes under the law and the respondent is aware of this fact from a communication I sent to them.

A portion of property has indeed been expropriated by Government and the respondent has its rights in terms of Clause 17 (seventeen) of the Mortgage Bond.

In the premises the applicants requests the court to rescind the judgment obtained against the two applicant's on the basis that the judgment was erroneously sought and granted as contemplated in Rule 42, alternatively in terms of Rule 31 of the rules of this court on the basis that sufficient cause has been shown for the rescission thereof. No prejudice will be suffered by the respondent if the court would grant an order staying the process of execution pending the final determination of this application for rescission.

The Respondent's Case

The respondent's opposition is on a number of points. These are outlined in the answering affidavit of Hezron Veli Dlamini who is its acting Recovery Manager. The first point taken is that the first respondent was entitled to obtain default judgment since it served on the *domicilium citandi.* Applicants' response is that the Deputy Sheriff should have served at the principal place of business not *domicilium citandi.* Respondent contended that this has no merits as:

a) In terms of Clause 4 of annexure "C" of first respondent was entitled to serve on the *domicilium citandi* being property not the principal place of business;
b) The court is also referred to the summons where the issue of *domicilium citandi* is raised;
c) In law if a person has chosen or by agreement particular premises the question of residence or principal business does not arise and service at that place will be good. (see ***Gerber vs Stolze and others 1951 (2) S.A. 166 (1)***);
d) The service of domicilium is not left just on open veld, but was left with second applicant's wife Busisiwe Mamba (nee Makhubu);
e) The same service for first applicant was left with Busisiwe Mamba (nee Makhubu) who the second applicant is on oath to say that she holds 100% share in the company, hence she knew the objective of the summons;
f) Applicants have not stated in their founding papers that the said Busisiwe Mamba never received the summons nor has she put an affidavit to deny such.

Therefore, the respondents submitted that no reasonable explanation has been offered by the applicants. The applicants were aware of the process and for two months decided not to do anything.

The second ground for the respondents' opposition is that the applicants have no defence. Applicant failed to service the loan. The applicants in reply at page 55 of the Book of Pleadings have failed to repay its monthly instalments and annexure "S2" confirms same. Therefore, in terms of Clause 11 of annexure "A" (loan facility) the respondent was entitled to call up the loan. Besides it is trite law that an overdraft is payable on demand (see ***Will's Nigel Banking in South African Law 1981 Juta*** at page ***141*** and ***Trust Bank of Africa Ltd vs Senekal 1977 (2) S.A. 582 (A) at 601***).

The third prong in respondent opposition is reflected in paragraph 12.1, 12.1.1, 12.1.2, and 12.1.3. It is contended that by operation of the rule of estoppel the second applicant represented to the first respondent that he was the Managing Director of the first applicant and presented a resolution of the company to this effect. Therefore, applicants are estopped from denying that second applicant was not authorised as first respondent acted.

On this representation and to its prejudice (see ***Rabire P.J. The Law of Estoppel in South Africa (1992)*** page ***18*** and ***Freeman vs Lockeyern Buckhurst Park Property (Maga) Ltd 1964 (1) ALL.E.R.630 CCA***). Furthermore, first respondent submitted that on the basis of the Turquand Rule, there was no obligation on it to enquire that the internal formalities of the first applicant had been complied with hence, paragraph 14.4 to 14.8 of the applicant's founding affidavit have no substance and merit (see ***Royal British Bank vs Turquand 1956 (6) ESB*** page ***326*** and ***Cilliers H.S. Corporate Law (2nd ED)***.

The fourth point in opposition concerns the suretyship clause. That the surety and the mortgagor is the same person. So to allege that the address in the suretyship is different from the mortgage bond is insignificant. In terms of Clause 4 of annexure "C" page 88 of the summons, service of process may be served on the property and this was done correctly and left with responsible persons being 2nd applicant's wife.

Further, it is contended that what the applicant refers to is the first CCMB for E70, 000-00 but the loan agreement refers to another second CCMB over the same property and cession of a policy. Therefore this does not take the applicants case any further.

The fifth point put forth by the respondent is that of expropriation that failure to exercise its right to the purported benefits of expropriation does not operate as a waiver.

Lastly, the respondent contended that on the grounds stated in Rule 42 are not applicable in this case. The application be dismissed with costs at attorney and client scale.

I have considered the issues in this case. I shall proceed to consider the matter under a number of heads, firstly, under which head does the application for rescission fall, secondly, whether applicants have advanced a reasonable explanation, thirdly, whether applicants have a defence, fourthly, the effect of the *turquad* rule and estoppel on this matter, fifthly, the suretyship clause and sixthly, the issue of expropriation.

I shall proceed to determine the issues listed above *ad seriatim.*

1. Under which head does the present application fall under?

The applicants purport to apply for rescission of the default judgement under Rule 31 (3) (b); the common law, and also under Rule 42 of the High Court rules. It appears to me though that the applicant has not satisfied any requirement under these heads.

Rescission under Rule 31 (3) (b) and the common law

Rescission under Rule 31 (3) (B) and the common law has not been met. According to the *dicta* in the case of ***Leornard Dlamini vs Lucky Dlamini*** – Civil Case No.

1644/1997 (unreported) it was held that an applicant under the common law must: a) present a reasonable and acceptable explanation for his defence; and b) show that he has, on the merits, a bona fide defence which *prima facie* carries some prospects of success. These requirements also apply even in Rule 31 (3) (b).

My considered view, in the circumstances is that the applicant has no reasonable explanation. The 1st respondent was entitled to obtain default judgement since it served on the *domicilium citandi* being the property. The applicants contention was that the Deputy Sheriff should have served at the principal place of business not *domicilium citandi* has no merit on a number of grounds. Firstly, in terms of Clause 4 of annexure "C". The first respondent was entitled to serve process on the *domicilium citandi* being the property not the principal place of business. Annexure "C" being a continuing covering mortgage bond between the 2nd applicant and the 1st respondent reads as follows:

4. ***Domicilium Citandi et Executandi***

For the purpose of this Bond and for any proceedings which may be instituted in respect of this Bond, and of the service of any notice, *domicilium citandi et executandi* is hereby chosen by the Mortgagor at the address recorded in the Bank's records as the Mortgagor's last postal address, or at the option of the Bank or failing the recording of any address, at the property and if more than one property is mortgaged, at any one of them. Any notice given by the Bank in respect of this Bond may, at the Bank's option be addressed to the Mortgagor at the domicilium referred to in this clause or the Mortgagor's last postal address recorded with the Bank and may be served by prepaid post. Notices so posted shall be deemed to have been received by the Mortgagor 3 (three) days after posting. A certificate signed on behalf of the Bank, stating that a notice has been given, shall be sufficient and satisfactory proof thereof, and the authority of the signatory and validity of the signature need not be proved.

Secondly, in law if a person has chosen or by agreement particular premises the question of residence or principal business does not arise and service at that place will be good (see ***Gerber vs Stolze and others (supra)***). In the instant case the service of the *domicilium citandi* was not left just on open veld but was left with second applicant's wife Busisiwe Mamba (nee Makhubu) who also happens to be a majority

shareholder of the 1st applicant holding a hundred shares. Thirdly, the applicants have not stated in their founding papers that the said Busisiwe Mamba never received the summons nor has she placed before court an affidavit denying such. Therefore no reasonable explanation has been offered by the applicants.

2. Whether Applicants have a Defence.

My considered view, based on the facts presented by the applicants have failed to prove a defence. Applicants failed to service the loan. As stated in paragraph 9 of reply (at page 55 of the Book of Pleadings) the applicants have failed to repay its monthly instalments and annexure "S2" confirms this state of affairs. Therefore in terms of Clause 11 of annexure "A" (loan facility) the respondent was entitled to call up the loan. Clause 11 reads in part as follows:

> "11. Default conditions.
> The loan facility shall, at our sole option and discretion, be repayable on demand, or we shall be entitled to re-negotiate its terms if, in the bank's opinion, any of the following events occur, and if remedial action to our satisfaction is not undertaken within 14 days of such written notice from ourselves..."

Besides the above it is trite law that an overdraft is payable on demand (see ***Will's Nigel Banking in South African Law 1981 Juta*** at page ***141*** and the case of ***Trust Bank of Africa Ltd vs Senekal 1977 (2) S.A. 582 (A)*** at page ***601***).

For the afore-going reasons it is clear that applicant have no defence.

Rescission under Rule 42

Rule 42 of the High Court Rules provides as follows:

> (1) The court may, in addition to nay other powers it may have, *mero motu* or upon the application of any party affected, rescind, or vary:
>
> a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

c) An order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this Rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

There is a plethora of legal authorities as to the circumstances under which the said Rule is to operate. (see ***Bakovan G.J. Howes (Pty) Ltd 1992 (2) S.A. 466*** at page ***471; Hans C. Weinard vs Michelle Sheilla*** –Civil Case No. 3032/2000 page 4 – 5; and Herbstein *et al*, ***The Civil Practice of the Supreme Court of South Africa, (4th ED)*** at *697*).

After considering the facts of the present application I have come to a conclusion that the grounds stated in Rule 42 and the established *dicta* extracted from the above-mentioned legal authorities do not exist in the case *in casu*.

3. The Effect of the *Turquad* Rule and estoppel on this matter.

In paragraphs 14.5 and 14.8 of the founding papers at page 6 the second applicant avers that he had no authority to seek loans. In this regard I am in total agreement with the submissions made by Mr. Motsa that the second applicant represented to the first respondent that he was the Managing Director of the first respondent and he presented a resolution of the company to this effect (see annexure "A"). Therefore, applicants are estopped from denying that second applicant was not authorised as first respondent acted on this representation and to its prejudice. (see ***Rabire P.J. The Law of Estoppel in South Africa, 1992 Butterworths*** at page *18* and also the case of ***Freeman vs Lockeyern Buckhurst Park Property (MAGA) Ltd 1964 (1) E.R.620 CCA***).

My considered view is that, first respondent on the basis of the *turquad* rule, there was no obligation on it to enquire that the internal formalities of first applicant had been complied with (see ***Royal British Bank vs Turquad 1956*** ***E*** and B page ***326; Cilliers H.S. Corporate Law 2nd Butterworths*** page ***185 – 186*** and ***Gibson, Merchantile and Company Law (6th ED)*** at page ***326, 346***). According to the rule all acts of internal management or organization on which the exercise of such authority is dependent may, in terms of same, be assumed by a boa fide third party to have been properly and duly performed.

4. **The Suretyship Clause.**

The surety and the mortgage is the same person. The allegation by the applicants that the address in the suretyship is different from the mortgage bond is insignificant. In terms of Clause 4 of annexure "C" at page 88, service of the process may be served on the property and this was done correctly, in my view and left with responsible persons being 2nd applicant's wife who happened to be a majority shareholder of the 1st applicant.

5. **Expropriation.**

The applicants have not appointed the 1st respondent to receive all monies payable to it in terms of Clause 17. Applicants were in any event receiving the expropriation compensation but not paying it with 1st respondent. The 1st respondent is in terms of Clause 18 entitled to fore-clause the bond, and as such was not obliged to wait for expropriation payments.

In the result, this application is dismissed with costs on the ordinary scale.

S.B. MAPHALALA

JUDGE