

**THE HIGH COURT OF SWAZILAND**

**MARINA CLARENCE HENWOOD**

Applicant

And

**SWAZILAND BUILDING SOCIETY**

1<sup>st</sup> Respondent

**THANDI MAZIYA N.O.**

2<sup>nd</sup> Respondent

**MELUSI QWABE N.O.**

3<sup>rd</sup> Respondent

Civil Case No. 2080/2006

Coram: S.B. MAPHALALA – J

For the Applicant: MR. S. MASUKU

For the Respondent: MR. Z JELE

JUDGMENT  
(1<sup>st</sup> September 2006)

[1] This application is for a stay of sale in execution by 1<sup>st</sup> Respondent set to proceed at 11.00am today. The Applicant brought an urgent application on the

14<sup>th</sup> August 2006 seeking amongst other orders that the court issue an order to stay the sale in execution advertised by the 2 Respondent for the 1<sup>st</sup> September 2006, as well as an order that the judgment obtained by the 1<sup>st</sup> Respondent on the 14<sup>th</sup> July 2006 be rescinded.

[2] The 1<sup>st</sup> Respondent opposed the application and raised preliminary points of law to the effect that the Applicant has failed to satisfy the requirements for the granting of a rescission. The Respondent also raised the contention that the Applicant did not have a *bona fide* defence to the claim in the summons and furthermore that the prospects of success on the rescission application were remote.

[3] According to the Applicant prior to the hearing date being the 18<sup>th</sup> August 2006, the parties were already discussing settlement of the matter outside court. On the strength of the outcome of negotiations for a stay of a sale in execution and upon agreement by 1<sup>st</sup> Respondent's decision to suspend the sale in execution on conditions of proposed settlement, the matter was postponed to 25<sup>th</sup> August 2006. Seeing that the parties had not concluded negotiated settlement and on account of 1<sup>st</sup> Respondent's attorneys refusing to agree on an order being taken for a stay pending the application for rescission and negotiations and that the matter was on an uncontested roll, it was then removed from the roll on the 25<sup>th</sup> August 2006 to further give a chance of settlement.

[4] In argument before me it was contended for Applicant that the court has discretionary powers to grant a stay pending the outcome of the negotiations which have not at this stage fallen through. In this regard the court was referred to the case of *Hajcraft v Filmer* cited by *Herbstein and Van Vuuren* at page

807 where execution has been stayed on a judgment where it appeared that there was no proper service. The argument in this regard is that although the summons was served on a chosen *domicilium* it was not good service because Applicant was never aware of it. The court was referred to the South African case of *Lindup vs Lowe 1935 NPD 189* to the legal proposition that where service is effected at the *domicilium citandi* chosen by the Defendant which is not in the occupation of the Defendant or any person who can be regarded as representing him, a copy of the summons should be left at that place, or where the place is vacant affixed to the door or wall of that place and a copy should be affixed to the door of the court.

[5] The Applicant further outlined facts to support her contention that all the requirements of an interim interdict have been met.

[6] On the other hand the 1<sup>st</sup> Respondent has filed an answering affidavit spelling out in great detail its position. *Mr. Jele* for the 1<sup>st</sup> Respondent also filed very comprehensive Heads of Argument outlining the contentions in the matter.

[7] It appears to me after hearing the arguments of the parties yesterday that the Applicant's only contention relates to service in that the process was served at a *domicilium* chosen by the Applicant rather than upon her personally. The Applicant relies on the legal authority in the case I have cited at paragraph [4] of this judgment that of *Hajcraft vs Filmer*.

[8] In arguments against the above proposition *Mr. Jele* contended that in accordance with the provisions of Rule 4 (1) (d) of the Rules

of court service may be effected at a chosen *domicilium citandi*. In this regard he cited what is stated in *Lawsa Vol 3* at page 54 that **"service at such domicilium will be good, even if it is apparent that the process could not have come to the Defendant's notice, because the domicilium so chosen is regarded as his place of residence within the meaning of the rule"**. The Applicant chose a *domicilium citandi* in accordance with clause 20 of the mortgage bond as being the mortgage property, being Lot 691 situate in Manzini Township Extension No. 7, District of Manzini.

[9] It would appear to me after weighing the two arguments on service that *Mr. Jele's* position is the correct one that service at the *domicilium* was both lawful and proper in the circumstances.

[10] On the contention that the stay of the sale in execution should be granted pending the finalisation of the application for rescission the Applicant must demonstrate that it has prospects of success on the rescission application. It would appear to me and in this connection I am in agreement with the contentions advanced by the 1<sup>st</sup> Respondent that in the present case it does not have such prospects for the following reasons. Firstly, the Applicant has failed to satisfy the requirements for any rescission application, that is, it has a valid and *bona fide* defence to the claim. In the present matter, the Applicant acknowledges that she is indebted to the 1<sup>st</sup> Respondent and that she was in arrears at the time of the institution of proceedings. Secondly, the Applicant does not dispute the fact that she was in breach of the conditions of the loan agreement and that therefore the 1<sup>st</sup> Respondent was entitled to institute the proceedings.

[11] The only attack as it has been stated earlier on in this judgment is based on the mode of service which I have ruled was in accordance with the rules of this court. Clearly, on the papers filed of record the Applicant has failed to demonstrate that she had good cause for rescission of the judgment as required by Rule 31 (3) (b) of the rules of court.

[12] In the result, for the afore-going reasons the Applicant has not made out a case for the stay of sale in execution and I also rule that costs to follow the event.

**S.B. MAPHALALA  
JUDGE**