IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 3501/2007

WILLIE NTSHANGASE Applicant

And

SWAZILAND DEVELOPMENT & SAVINGS

BANK 1st Respondent

JOSEPH DLAMINI 2nd

Respondent

Coram S.B. MAPHALALA - J

For the Applicant For MR. Z. MAGAGULA MR.

the Respondent S. MDLADLA

JUDGMENT 12th
March 2009

[1] The Applicant has brought an application before court for an C mter r **a*** seeking a stay of the sale of property scheduled for the 7th December 2007. Further a rescission ^ vK<^ ^ o £ of the judgment entered against him on the 2nd November 2007. Furthermore, Applicant also seeks leave to file his plea to the summons, should such rescission be granted.

[2] On the 23rd November 2007 an order was granted in terms of prayer 2 thereof directing that the sale in execution advertised for the 7th December 2007, be stayed and/or cancelled. To this effect a rule *nisi* was issued until the matter came for arguments before me last year. I wish to first of all apologise for the delay in issuing a judgment on account of other matters which clamoured for my attention.

[3] The Founding Affidavit of the Applicant is filed where the material facts are related. That on the 5th November 2007, Applicant was served with a Notice of attachment by the Deputy Sheriff for the Shiselweni District, the 2nd Respondent herein. A copy of the Notice of Attachment is annexed and marked "WMN1".

[4] In terms of Annexure "WMN1" the 2nd Respondent had attached in execution his farm known as "Clifton no. 444" situate in the Shiselweni District pursuant to a judgment entered against him on the 2nd November 2007. He was surprised by this turn of events since

he had not received any summons and when he stated as much to the 2nd Respondent he then said summons had been served on him by his assistant. He then instructed his attorney Mr. Zonke Magagula to investigate the circumstances that led to judgment being entered against him without his knowledge.

[5] It emerged that the summons were served on Dorothy Ntshangase who is his wife on the 6th October 2007. The Applicant contends that he was not in wilful default of filing a Notice of Intention to defend the summons. He was not aware that summons had been issued against him. His wife's name is Zwakele Ntshangase and when he asked her whether summons had been served upon her she denied ever receiving such.

[6] The 1st Respondent opposes the granting of this application and has filed an Answering Affidavit on the 16th November 2007. In the said affidavit a point of law is raised at paragraph 3 that this application is fraught with disputes, which are so material as to render incapable of resolution on the affidavits.

[7] It would appear to me that Respondent has failed to disclose to this court what the disputed facts are and/or what material facts have been omitted from the Founding Affidavit. Therefore the point of law in *limine* is accordingly-dismissed.

[8] In my assessment of the facts adduced by the parties I have come to the considered view that the judgment of the court was granted in

error in the absence of the Applicant. The summons were not served on the Applicant personally but to a certain Dorothy Ntshangase who is alleged to be Applicant's wife. Applicant alleges that he never had sight of the summons and that Dorothy Ntshangase is unknown to him and she is not his wife. In these circumstances the

Applicant cannot be in wilful default of filing a Notice of intention to defend the summons.

[9] On the issue of a *bona fide* defence I am inclined to agree with the Applicant that he has canvassed one on the affidavits. The Respondent's claim is based on Mortgage No. 163/1984 and 283/1991. Applicant alleges that both mortgage bonds were cancelled by consent of the Respondent. The purchase price for a portion of Applicant farm sold to Lontinga Investments (Pty) Ltd in the sum of E400, 000-00 was paid to Respondent. The Applicant denies that it is indebted to Respondent in the sum of El 18, 442-32 or any sum at all.

[10] I am also in total agreement with the Applicant that the court was not made aware that the bonds relied on by the Respondent had been cancelled and therefore of no force or effect. Had the court been aware that the bonds relied on had been cancelled then it would not have granted judgments against Applicant. In this regard the *dictum* in

Nyingwa vs Moolman NO 1993 (2) SA 508 at *509* is apposite where the learned Judge said:

"It therefore seems that a judgement has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have induced the Judge, if he had been aware of it, not to grant the judgment".

PRINCIPAL JUDGE

[11] In the result, for these reasons the application is granted in terms of prayer 1, 2, 3, 4 and 5 of the Notice of Motion.

S.B. MAPHALALA