THE HIGH COURT OF SWAZILAND

RULING

Case No. 4334/10

In the matter between:

VUSI DLAMINI **Plaintiff**

And

SIKELELA MABUZA **Defendant**

Neutral citation:	**Vusi Dlamini v Sikelela Mamba 4334/10 [2012] SZHC 55 (23rd March 2012)**
CORAM:	**M. Dlamini**
Heard:	**19th March 2012**
Delivered:	**2nd March 2012**
For the Plaintiff:	**B. C. Dlamini**
For the Defendant:	**W. Maseko**

Pleadings – rescission – common law - service of summons – place of residence – defence

Summary

The respondent in this application instituted action before this court by combined summons based on a breach of an oral contract. Applicant, having failed to file a notice of intention to defend, a default judgment was entered in favour of respondent. Resisting attachment, applicant filed an application for rescission on the basis that there was no proper service of summons. Respondent disputes this assertion.

[1] It is trite law that a court should not easily set aside a final judgment as it is *res judicata.* However, there are various circumstances which may compel a court to set aside a judgment. ***Herbstein and Winsen, The Civil Practice of the Supreme Court of South Africa at page 690*** point at fraud, discovery of new documents, error or procedural irregularity as some of the instances where a court may set aside a judgment.

[2] In the case in *casu* the applicant, as already stated, informed the court that he was not aware that there was an action instituted against him. He never received the summons. It was his contention that if ever there was service of court process instituting action, it was not proper. The respondent however, strenuously disputes this position. It is respondent's case that there was service and that it was proper in the circumstances.

[3] From the above contention therefore, it is the duty of this court to enquire as to whether there was any proper service of summons upon the applicant.

[4] Rule 4 of the High Court Rules reads:

"(2) Service under sub-rule (1) shall be effected in one or other of the following manners.

a) by delivering a copy thereof to such person personally: provided ……..…

b) by leaving a copy thereof at the place of residence or business of such person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen (16) years of age. For the purpose of the paragraph when a building other than a hotel, boarding house, hostel or similar residential building, is occupied by more than one person or family, "residence" or "place of business means that portion of the building occupied by the persons upon whom service is to be effected".

[5] I now turn to the depositions of the applicant and respondent with the view to enquire on the circumstance of service in this case.

[6] In support of his application for rescission, applicant avers in relation to non-service of process at page 10 of the book of pleadings:

"6. On or about the 24th July 2011. I received the court order herein directing me to pay a sum of E13,000.00 (Thirteen Thousand Emalangeni) to the 1st respondent/plaintiff

7. Immediately I telephoned 1st respondent/plaintiff about such and he denied knowledge of the said court order and / or the proceedings in the main action herein.

8. Subsequently I referred the matter to my attorneys of record herein who then perused the court file. May I humbly submit that I never received the summons commencing the main action herein. Had I been served with summons I would have defended the action.

9. The return of service states that the summons was served on one G. Mabuza at Mbangweni, Nhlangano on the 22nd February, 2011. I humbly submit that though

my parental homestead is at Mbangweni, Nhlangano, I however, do not stay there. I stay at Ekuthuleni teachers' quarters outside Nhlangano with my family hence I never received the summons.

[7] Respondent traverses at page 23 of the book of pleadings as follows:

"3. Ad Paragraph 8 and 9

3.1 The allegations contained herein are denied and the applicant / defendant is put to strict proof thereof of each and every allegation.

3.2 Upon receipt of the summons from the respondent / plaintiff's attorneys I went to Ekuthuleni to serve same. Unfortunately, upon enquiry I was informed by one of the teacher at the school, whose further particulars are unknown to me, that the applicant / defendant and her wife are no more residing at the school quarters but they were reside at the parental homestead of the applicant / defendant at Mbangweni in the Shiselweni region. As a result thereof, the latter's wife commutes daily to school from Mbangweni.

3.*3 Thereafter I went to the said parental homestead of the applicant / defendant. Upon arrival I duly introduced myself. I was attended by the applicant / defendant's sister and mother. They informed me how they are related to the applicant / defendant.*

3.*4 I explained my purpose of being there, namely to serve summons upon the applicant / defendant. I duly asked whether applicant / respondent reside there. I was informed by them that the applicant / defendant resides there and always come back in the evening and he no more resides at Ekuthuleni school. They even went to the extent of pointing the exact house in which the applicant / defendant and his wife were occupying at the time. On the basis of the above I saw it fit to serve the summons there as it was a rightful place to do so".*

[8] In terms of the averments deposed to by applicant, he did not reside at his parental home, *Mbangweni.* He resided at the outskirts of *Nhlangano, Ekuthuleni.*

[9] It is clear that Rule 4 anticipates service upon the person. In the ***Deputy Sheriff for Witwatersrand District v Goldberg and Others, 1905 T.S. 680, Solomon J.*** (as then was) stated:

> *"the summons must be served either upon the defendant personally or on some person authorized to accept service on his behalf or else must be left at a dwelling house or place of business".*

[10] On the same note, ***Herbstein and van Winsen 4th Edition at page 284*** point:

> *"Although it does not say so explicitly, Rule 4 appears to contemplate that, if possible, service should be personal, and that only if the defendant or respondent cannot after diligent search be found may some other authorized form of service be adopted".*

[11] ***Kannemeyer, J. in O' Donoglue 1969 (4) S.A. 35*** in support of the above principle at page 39 says:

> *"The whole purpose is to take the most effective steps possible to ensure that the summons comes to the defendant's notice. This is most surely achieved by personal service and, if this is not possible, one of the alternative authorized methods is employed".*

[13] Without necessarily propounding a general rule, it would seem to me that a Sheriff or his deputy tasked with service of court process, moreso those commencing court action should attempt personal service. I am alive to the fact that there may be circumstances where service is best served upon another person other than the defendant himself.

[14] In *casu* therefore, the question should be were there attempts by the deputy sheriff to effect service upon the person of the defendant or rather the correct position as **Herbstein** *op cit* suggest, was there a diligent search conducted by the deputy sheriff for the defendant before service to another person. The answer lies in the averment by the deputy sheriff. At page 23 of the book of pleadings he highlights:

> *"3.2 Upon receipt of the summons from the respondent / plaintiff's attorneys I went to Ekuthuleni to serve same. Unfortunately, upon enquiry I was informed by one of the teacher at the school, whose further particulars are unknown to me, that the applicant / defendant and her wife are no more residing at the school quarters but they were residing at the parental homestead of the applicant / defendant at Mbangweni in the Shiselweni region. As a result thereof, the latter's wife commutes daily to school from Mbangweni.*
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> 3.*3 Thereafter I went to the said parental homestead of the applicant / defendant. Upon arrival I duly introduced myself. I was attended by the applicant / defendant's sister and mother. They informed me how they are related to the applicant / defendant.*
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> 3.*4 I explained my purpose of being there, namely to serve summons upon the applicant / defendant. I duly asked whether applicant / respondent reside there. I was informed by them that the applicant / defendant resides there and always come back in the evening and he no more resides at Ekuthuleni school. They even went to the extent of pointing the exact house in which the applicant / defendant and his wife were occupying at the time. On the basis of the above I saw it fit to serve the summons there as it was a rightful place to do so".*

[15] It would seem to me that the above is a clear indication that the deputy sheriff was aware that service ought to be effected to the person of the

defendant as he went to defendant's place of residence, *Ekuthuleni* and upon the information that defendant no longer resided at *Ekuthuleni* but at his parental home, proceeded there. At the parental home of the applicant, the respondent assured himself by conducting enquiries as to where the defendant resided. It was upon being informed by the defendant's mother and sister that defendant came home every evening and no longer resided at *Ekuthuleni* that he served the summons. This assertion is in line with what he had been informed while he was at *Ekuthuleni* by one of the teachers.

[16] The above version of the deputy sheriff stands uncontroverted by the applicant and therefore the court is bound to accept it.

[17] There is an interesting aspect on the question of service raised by the applicant during submission in court which however does not appear in his founding affidavit. As it borders on the question of law, I allowed it.

[18] Based on respondent's averment at page 24 paragraph 3.4 lines 5-7 of the book of pleadings:

> *"They even went to the extent of pointing the exact house in which the applicant / defendant and his wife were occupying at that time".*

the applicant contends that even if it were to be accepted that he resided at his parental home, the service was irregular in that rule 4 (2) (b) partly reads:

> *"For the purpose of this paragraph* ***when a building*** *other than a hotel, boarding house, hostel or similar residential building****, is occupied by more than one person or family,*** *"residence" or place of business" means that portion of the building occupied by the persons upon which service is to be effected".*

[19] The conclusion, applicant submitted, is that the deputy sheriff ought to have left the summons at his house because within the family homestead, there

were a number of families, he, being one of them, occupying his own house. The deputy sheriff should not therefore have left the court process with his sister as reflected in the return of service.

[20] In addressing the above contention. I turn to the wise words of Williamson J. (as then was) in ***Harry Jedeiken (Pty) Ltd v Dippenar 1960 (4) S.A.*** *740 (T)* at page 741.

> "*What the court requires in regard to service of summons is that it be served in the best possible manner likely to bring the summons to the notice of the defendant ……**A service on a member of the household or a member of the family would in all probability come to the defendant's notice**. But a service on a casual visitor or on the plumber who may happen to be there at the time or on a tradesman calling there might possibly not result in the defendant receiving the summons".* (bold and underlined my emphasis).

[21] It would seem to me that the above observation by Williamson J. find support from the very wording of Rule 4 (2) (a) in that:

> *"by leaving a copy thereof **at the place of residence** or business of such person ……**with the person apparently in charge of the premises** at the time of delivery……"* (my extraction)

should be the first step in instances where service on the person of the defendant has failed. The wording "***that portion of the building occupied by the person***" envisages an instance where no-one or a passer-by is found at the larger homestead and certainly not when those in charge of the homestead are present at the time of delivery. I also accept as another instance, applicant's submission that "***a potion of the building***" refers to a block of flats with various families or occupants. It must always be borne in mind that persons are the best conduits in service of summons as for example where in a block of flat, defendant occupies flat number 1, the sheriff would best serve the summons upon the person in charge of flat number 1even though at the time of service he would be at flat number 2, since this gives the sheriff an opportunity to explain the nature and exigencies of the summons.

[22] In this regard I am unable to accept that the service was irregular and therefore rescission should follow. The application by applicant is further confounded by the entry in the return of service by the deputy sheriff Mr. K. J. Van Vurren who states as remarks that defendant's "*sister is staying with him and she will give the papers to him*".

[23] In the circumstances, I need not deal with the other aspect of whether applicant has a bona fide defence.

I therefore, order as follows:

i) Applicant's application is dismissed with costs.

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M. DLAMINI

JUDGE