IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 414/2013

In the matter between:

JIMSON JEKE TFWALA **Applicant**

And

SWAZILAND DEVELOPMENT FINANCE CORPORATION **Respondent**

In re:-

SWAZILAND DEVELOPMENT FINANCE CORPORATION **Applicant**

And

JIMSON JEKE TFWALA **Respondent**

Neutral citation: ***Jimson Jeke Tfwala v Swaziland Development Finance Corporation (414/2013) [2015] SZHC 168 (9th October 2015)***

Coram: **M. Dlamini J.**

Heard: **21st May 2015**

Delivered: **9th October, 2015**

- *as per Sizabantu above ... the applicant in a judgment sought to be rescinded in terms of Rule 42 (1) (a) need not show any good cause except that it was erroneously granted.*

Summary: The applicant seeks for a rescission order against a judgment obtained by default.

Plaintiff's reasons for rescission

[1] The plaintiff contestation of the order obtained by default is as follows:

a) He was never advanced the sum of E741,000-00 but only E400,000.

b) He did file a Notice to Defend but the court inadvertently ignored it and therefore Rule 42 (1) (a) of the High Court Rules favours a grant of rescission as the judgment was obtained in error.

c) He did subsequently file a plea but could not attach a copy as it was misplaced.

d) The defendant consolidated and rescheduled the two respective loans without his consent.

e) The interest levied is not provided for in the agreement of loan entered between him and the defendant.

f) The plaintiff's particulars of claim does not disclose any consolidation and rescheduling.

g) The sum claimed in the summons violate the *in duplum* rule considering the amounts already paid by him.

Adjudication

Issues 1:

[2] The question for determination is whether the judgment obtained by default was erroneously obtained?

Principles of law

[3] Rule 42 (1) (a) reads:

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

[4] In **Sizabantu Electrical Construction v Guma & Others (1999) 20 ILJ 673 (LC) [1999] 4 BLLR 387 (LC)** the court held in interpreting a similar rule:

> *"In short, good cause is not required to be shown if a judgment or order was erroneously granted in the absence of a party."*

[5] *In casu* therefore the first enquiry is whether the judgment sought to be set aside was granted erroneously and as per **Sizabantu** above, the applicant in a judgment sought to be rescinded in terms of Rule 42 (1) (a) need not show any good cause except that it was erroneously granted.

Determination on issue

[6] The applicant, in support of this ground averred:

> *"..... I sent one, Zweli Themba, to deliver my notice of intention to defend to the Registrar of this Honourale Court."*

[7] The applicant then attached a copy of his notice to defend which reads:

> *"Jimson Jeke Tfwala*
> *41 Tubungu Township*
> *Matsapha, Swaziland.*
>
> *Monday, 08 April 2013*
> *The Registrar*
> *The High Court of Swaziland*

Mbabane.

Re: Notice of Intention to Defend – Case No.414/2013

I, Jimson Jeke Tfwala, do hereby wish to file with the High Court of Swaziland of my intention to defend against case 414/13 as detailed in the summon served to me on 26th March 2013.

Yours sincerely
Jimson Jeke Tfwala"

[8] Glaringly, this notice to defend is flawed in a number of ways:

Ex facie:

- It does not conform to the form provided by the Rules;

- It lacks an important factor being the address upon which services of further court processes shall be served by defendant. In fact no specific physical address is shown on the face of it. The address "*41 Tubungu township*" even if one were to consider it, is of no assistance as it lacks necessary details. "*41 Tubungu Township*" is too wide an area to effect any services let alone that it does not comply with the Rules of service in that the address thereto does not fall within five kilometres of the seat of court.

- Although it bears the Registrar's stamp of 12 April 2013 at its reverse side, which on its own is very strange, it does not show that it was served upon the respondent. One notes that the reverse side of this document purported to be notice to defend is scribbled with a number of hand writings whose contents are not for the court's consumption. One wonders why such an important document could be treated as a scrape paper.

[9] That as it may, the question still remains, "*Was this document served at all?"*. The applicant deposed:

> *"However, Zweli Themba informed me that a copy was made for him in the office of the Registrar of this Honourable court which copy he was advised to deliver at Respondent's attorneys...."*

[10] Respondent on the other side avers:

> *"33. No notice to defend was ever received by respondent or the respondent's attorneys and the applicant is put to strict proof thereof."*

[11] In strict proof thereof applicant chose to depose:

> "*I add further that it is significant that there is no affidavit filed by the receptionist in the Respondent's attorney's firm confirming that no such notice of intention to defend was served on the Respondent..."*

[12] Surely, the *onus* lies with the applicant to establish that respondent was served with the notice. It is erroneous on the part of the applicant to expect respondent to prove the negative. He who assert must prove is the trite principle of our law.

[13] What confounds applicant's assertion further in regards to service is that he dismally failed to attach an affidavit of service or confirmatory affidavit by Zweli Themba that he duly served the respondent's attorneys. Applicant opted to state that the said Themba was out of the country at time of preparing the founding affidavit. However, in the light of respondent challenging applicant to prove service, no such affidavit was filed despite that the matter was actually enrolled after six months from the date of the founding affidavit.

[14] None of the parties including applicant applied that the question of service be referred to oral evidence. This was correctly so because as I will fully demonstrate the probabilities of this case as can be assessed from the

pleadings following the Plascon Evans Rule, show that there was never such service.

[15] This court takes judicial notice that the clerks at the Registrar's office do not accept for filing any document which is not served on the other party. Where a litigant would attempt to file a document in the nature of the one *in casu*, the clerks do advise the party to first serve his opponent and later file. From this practice, one would reasonably infer that when the said Themba was advised to first serve the respondent's attorney, he never came back to file the notice with the Registrar. There is no averment by applicant that in fact at the time of hearing the default judgment application, the notice of intention to defend was serving in the file.

[16] Further, applicant's subsequent conduct speaks volumes on the question of whether there was service of the notice of intention to defend.

[17] Before I deal with applicant's subsequent conduct, I must point out that applicant also stated: "*As I recall I even filed a plea*". He then quickly points out: "*I am however unable to trace a copy*."

[18] Throughout the hearing of his application, applicant did not show the court any copy of his plea. Respondent had vehemently denied ever receiving a plea and the court file does not contain any plea. No further details such as date when plea was filed and by who. Clearly the presiding judge could not have missed both applicant's notice to defend and his plea if ever both pleadings were filed. The only reasonable inference is that these documents were never in the court's file or filed at all. I note that in his reply, applicant deposes that the "*plea has been found and it bears the Registrar's stamp of 29 April 2013*". However, no such document was

tendered during hearing and neither was it in the book of pleadings, nor attached in the replying affidavit.

Applicant's subsequent conduct

[19] The default judgment was obtained on 26 April 2013. He was served on 23 July 2013. Applicant, through his attorneys, *viz.* Madzinane Attorneys, made an offer of settlement for the said judgment debt. The letter dated November 2013 reads:

"*Madzinane Attorneys*

Robinson Bertram
P. O. Box 24
MBABANE.

Dear Sir,

RE: FINCORP/ JIMSON TFWALA – HIGH COURT CASE No. 414/2013

2. *Our Client has instructed us that he was served with a writ of execution by a sheriff in the name of Sivesonkhe Masuku on the 23rd July 2013. The sheriff demanded the whole amount to which our client advised him that he does not have the whole amount. Our client was advised by the deputy sheriff to make payment to the sheriff's bank account at least 10% within (7) seven days, thereafter make monthly payments to him and he will remit to yourselves.*

3. *Acting on that instructions, our client made payments to the bank account of Sivesonkhe Masuku at Standard Bank as follows:*

23/7/2013	-	*E5,000.00*
02/08/2013	-	*E50,000.00*
05/08/2013	-	*E15,000.00*
08/08/2013	-	*E15,570.00*
13/09/2013	-	*E7,000.00*
11/10/2013	-	*E12,000.00*
TOTAL		*E104,570.00*"

[20] The letter then tabulates the subsequent payments by applicant in compliance with the proposal between him and the deputy sheriff. This payment is confirmed by applicant in his founding affidavit as he states at paragraph 36:

> "*Read together with the Deputy Sheriff's distribution account which reflects that I have been credited with a sum of E74,140-00....*" Obviously the deputy sheriff came into the picture following the default judgment.

[21] How then applicant is expecting the court to rescind a judgment that he partly complied with, is not clear.

[22] I am alive to the denial by applicant ever giving Madzinane Attorneys the instruction to acknowledge the debt. But that denial does not take his case any further in light of applicant admitting paying certain sums of money to the deputy sheriff. This conduct on its own correlate with the respondent's case that there was never any intention to defend or filling of a plea by applicant.

[23] Then there is another acknowledgment of debt filed on behalf of applicant by different lawyers, namely C. Z. Dlamini. Respondent had decided not to dispute this acknowledgement in his reply. The court is compelled to accept it.

[24] The applicant was served by the deputy sheriff on 23 July 2013 but only challenged the judgment in November 2013. This delay in challenging the judgment on itself speaks volumes on the applicant's intention to defend the initial summons. Clearly applicant never did challenge the same.

[25] The totality of the above demonstrates that there was no error made by the court when it entered default judgment against applicant. For this reason alone rescission application stands to be refused.

Issue 2

[26] Does the capital claim by respondent violate the *in duplum* rule?

Principle of the law

[27] **In Bhokile Elliot Shiba v Swaziland Development and Savings Bank 1716/06** the question of *in duplum* rule was raised. I considered the matter and referred the matter to debatement of the account to ascertain whether the *in duplum* rule had not been violated. The respondent appealed. Their Lordships in **Appeal No.55/12** held:

> *"[18] In duplum rule*
> *The court a quo upon reaching the conclusion in paragraph [58] of its decision that Applicant's ground for rescission based on fraud, misrepresentation and coercion must fail, thereafter clearly misdirected itself, by embarking upon a perfidious adventure into the in duplum rule and its effect on the settlement agreement. Consequently the court ordered the parties to debate 5 accounts only solely to address the in duplum rule.*
>
> *[20] I am firmly convinced that the consent judgment was all inclusive of all these issues, in duplum rule and otherwise, by consent settlement reached after several meetings between the Appellant and professional accountants (SAMKHO) hired by the Respondent for just this purpose, as well as his attorneys. This fact is certainly borne out of the several documents urged in casu and was recognized by the court a quo in paragraphs [29] and [30] of the assailed decision amongst others.*
>
> *[21] The terms of the agreement were taken to court and judgment entered into. The Respondent cannot turn around and set aside the judgment on this ground. He cannot approbate and reprobate, shifting goal posts to suit his own purposes."*

[28] Applying the above *dictum in casu*, it is my considered view that applicant having acknowledged his debt and partly complied with the default judgment, cannot *"approbate and reprobate shifting goal posts to suit his own, purposes*".

[30] As it was decided in **Appeal No.55/12** *supra*, there is no need for me to embark on the query of *in duplum*. Similarly there is no need to enquire on the interest levied.

[31] I must end by pointing out that from the founding affidavit, applicant has not disputed that he was in violation of the loan agreement. In fact, from the very on set when narrating the background history of the matter, he points out that he failed to comply with the contract. When one gleans at the reasons advanced for his failure to comply with the agreement, they are all not attributed to respondent. It is not clear how applicant expects the court to protect him in the light of such circumstances revealed by him.

[32] For the aforegoing, I enter the following orders:

1. Applicant's rescission application is dismissed.
2. Default judgment granted by this court on 26 April 2013 stands.
3. Applicant is ordered to pay defendant's costs of suit.

M. DLAMINI
JUDGE

For Applicant: **S. Dlamini of Magagula Hlophe Attorneys**

For Respondent: **Z. Jele of Robinson Bertram**