IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1175/2013

In the matter between:

THE LUTHERAN DEVELOPMENT SERVICES (PTY) LTD		**Applicant**
And		
BOBBY MKHONTA	**1st**	**Respondent**
MACHAWE MAVUSO	**2nd**	**Respondent**
MXOLISI MDLULI N.O.	**3rd**	**Respondent**
THE COMMISSIONER OF POLICE	**4th**	**Respondent**
THE STATION COMMANDER NHLANGANO POLICE STATION	**5th**	**Respondent**
THE ATTORNEY GENERAL	**6th**	**Respondent**

Neutral citation: ***The Lutheran Development Services (Pty) Ltd v Bobby Mkhonta & 5 Others (1175/2013) [2015] SZHC 180 (23rd October 2015)***

Coram: **M. Dlamini J.**

Heard: **12th October, 2015**

Delivered: ***23rd*** **October, 2015**

- *where there is a dispute of fact or where the question is whether a court process was brought to the attention of a party, the court should also examine that party's subsequent conduct in search for an answer*.

Summary: An application for rescission based on irregular service is serving before me. The respondents have filed their opposing papers.

Applicant's pleadings

[1] As reasons for the rescission of the default judgment obtained against it, the applicant deposed:

> *"21. Mr. Ceda Dlamini is neither an employee of the Applicant or a person in authority over the Applicant and under the premises I have been advised that service upon Mr. Dlamini did not qualify as proper service in terms of the Rules of the above Honourable Court. Furthermore, the summons never even reached the attention of the Applicant."*

Respondent's answer

> *"8.1 I am advised and verily believe by the 3rd Respondent herein that the Applicant was properly served with the combined Summons commencing action and they elected to ignore the legal process and a default judgment was later granted.*
>
> *8.2 A writ of execution was issued and again served upon the Applicant by the 3rd Respondent. I am further advised and verily believe that the writ was served on the very same person who has deposed to the Applicant's affidavit, Mr. Sibusiso Dlamini. The Motor vehicle which was attached was attached in his presence on the 19th November 2013 after having satisfied himself that indeed summons were served on Applicant.*
>
> *8.3 There is nothing he did after that notwithstanding that there was judgment against the Applicant. I am advised and verily believe that the auction sale was conducted in terms of the rules of this Court hence there is no justifiable reason to have it cancelled."*

Adjudication

[2] The question for determination is simple. Was the applicant served with the court process?

[3] As can be gleaned from the applicant's founding affidavit, the applicant deposed that the said Ceda Dlamini who is reflected in the deputy Sheriff's return of service as the person who received the summons was not its employee but its tenant. The said Ceda Dlamini never forwarded the summons to it. Well and good. One may accept that for a second. However, what throws applicant's application out of the window is its subsequent conduct, and I think where there is a dispute of fact or where the question is whether a court process was brought to the attention of a party, the court should also examine that party's subsequent conduct in search for an answer.

Applicant's subsequent conduct

[4] As already highlighted above, first respondent averred that the applicant was, after default judgment was granted, served with a notice of attachment. The said copy of the notice is attached at page 64 of the book of pleadings. It was signed for as received by the deponent to the applicant's founding affidavit on the 9th November 2013. In the application, applicant, as the deponent, is described as the director of applicant. This deposition is not disputed by the applicant.

[5] Glaring from the totality of the pleadings juxtaposed with the above, is that since 19th November 2013, the applicant allowed the respondents to attach the said motor vehicle; advertise it for sale as advertisement document is attached to the pleadings; conduct an auction sale which took place on 19th December 2013, a month later; and only on 12th March 2014 did applicant jump up under a certificate of urgency as an attempt undo a judgment obtained way back and it became aware of in November 2013.

[6] Surely, from this conduct by applicant, the only reasonable inference that can be drawn is that applicant never intended to challenge first respondent's action. To say now, after four month's protraction that it was not aware of the summons is nothing but a sham, with due respect to applicant. It is for these reasons that I dismissed the application when it was argued before me on the 12th of August 2015.

Costs

[7] The merits of the case indicate that the applicant sold a motor vehicle to the first respondent. The first respondent duly paid for the full purchase price of the said motor vehicle. In 2010 the government introduced new types of registration plates and called for all motor vehicle owners to change their number plates. When this motor vehicle in the hands of first respondent was taken for change, it was discovered that its chassis and engine numbers had been tampered with. The fourth respondent impounded the said motor vehicle on the grounds that it was a stolen vehicle. First respondent instituted summons, claiming unjust enrichment against applicant. The result was the default judgment sought to be rescinded.

[8] Following that in its answer, the applicant on merits averred that the first respondent is the one that tempered with the chassis and engine numbers, the court enquired from applicant's Counsel as to what would be the reason for first respondent to temper with the same as the motor vehicle was lawfully acquired by him and therefore enjoyed ownership of the same. The honourable Counsel advised the court that his client learnt later that the said motor vehicle was once stolen from the hands of applicant before he purchased it. It was however, subsequently recovered. In essence, the reason for the fourth respondent to impound the motor vehicle is not attributed to the applicant. Obviously if these circumstances coming from

the first respondent are anything to go by, and on the basis of Mr. Maseko, learned Counsel for applicant, pleas not to be meted with costs of the present application, justice dictates that each party must pay its costs. I am very grateful to Mr. H. Mdluli, learned Counsel for first to third respondents who did not object to such prayer by applicant and who also indicated that his client, first respondent, would understand the circumstances as well.

[9] For the above, I enter the following orders:

1. Applicant's application is dismissed.
2. No order as to costs.

M. DLAMINI
JUDGE

For Applicant : **W Maseko of Waring Attorneys**

For 1st to 3rd respondents: **H. Mdluli of M. H. Mdluli Attorneys**