IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 4009/2021

In Matter between :

Gift Gama — **Plaintiff**

And

Muzikayise Ishmael Dube — **1st Defendant**

Augustine Mnisi — **2nd Defendant**

JUDGMENT

Neutral citation : *Gift Gama v Muzikayise Ishmael Dube and another (4009/21)SZHC 212(2021) (29th October,2022)*

CORUM: Z. Magagula

Dates heard: 08.03.22, 24.03.22, 30.03.22

Date delivered: 29.09.22

[1] Serving before court is an application for rescission of Judgement grunted by this court on the 10th March 2022.

By combined summons sued out of this court, the 1st respondent, to whom I shall refer to throughout-this Judgement as the "Respondent" claimed from the applicant payment of the sum of E 620 000.00 being, according to the respondent the difference between the purchase price paid and the actual value of a portion of land sold by applicant to the respondent. [this is the short and simple version of the facts, which are actually convoluted]

[2] On or about the 14th day of May 2019, the parties entered into a written agreement of sale, in term of which respondent sold applicant the property fully described as:

Certain: portion 18 [a portion of portions 3] of farm no 1212 situate in the Hhohho district, ESwatini.

Measuring: 12,5000 [one two comma five zero zero zero] hectares

[hereinafter called the first portion]

The agreed purchase price was the sum of E 1 700 000.00 [one million seven hundred thousand Emalangeni]. The purchase price was to be secured by bank a Building Society guarantee within 30 days of the deed of sale.

[3] Apparently applicant could not provide the guarantee within the agreed period. The parties then entered into a series of agreements in an effort to see the transaction through. Eventually the parties entered in agreement in terms of which the applicant was to sell to the respondent his own property and respondent would only pay the difference between the balance owing by the applicant and the agreed purchase price for applicants' property.

The applicant's property was described as:

Certain: Portion 820 (a portion of portion 370) of farm no:188 situate in the Hhohho District, eswatini

Measuring: 4297 [four two, nine seven] square meters

[hereinafter called the second portion]

[4] It would appear that there was then a disagreement between the parties relating to the valuation of the second portion and that misunderstanding has led to institution in the situation of the main proceedings between the parties.

Present matter

[5] The combined- summons were issued out on the 1st day of December 2021. According to the return of service the summons were served on the applicant on the 29th November 2021. The respondent's attorney's were to later realise what must have been an obvious mistake and filed an affidavit in which the deputy sheriff acknowledges the error and filed a corrected return of service. The correct Date of service, according to the deputy sheriff, is the 29th December 2021.

When no appearance to defendant was filed on behalf of the applicant/ defendant, the respondent applied for and was granted default judgement on the 10th March 2022.

[6] In terms of the return Service, the summons was served on the applicant in terms of rule 4 (2) (a), of the Rules of court that is, it was delivered on the applicant personally at his place of residence. In his application moved in terms of Rule 31 (3) (b) of the Rules of court, the applicant denied service of the summons on him. He avers in his founding affidavit that on the 28th December 2022 at around 10:00 am he received a telephone call from a person who identified himself as the deputy sheriff. The deputy sheriff said he had some process to serve to him. At the time the applicant was not at his residence, but was on his way to Siteki: The applicant was home the following, the 29th December, but had no contact from the deputy sheriff, and certainly he never come to serve any process upon him.

[7] The applicant heard nothing further about the matter of the summons until the 16th June 2022 when he was called by his wife who informed him that the deputy sheriff was around to execute a writ of no execution. Not knowing what this was all about, the applicant instructed his attorney's whose search found that summons had allegedly been served on him on the 29th December 2021 and Judgement default entered on the

10th March 2022. The summons were apparently delivered to applicant personally while at his place of residence.

[8] The applicant stated that he was not aware of the summons, had he been aware, he would have entered appearance to defend the matter. He denies being indebted to the respondent in the sum of E 620 000.00 and or that he inflated the value of his property. The applicant annexed copies of the valuations of the property in question to his founding affidavit. The first valuation pegged a fair value of the property at E 645 000.00 and was dated the 8th September 2016. The second valuation dated 4th February 2020 stated that the market value of the property was sum of E 967 000.00.

[9] The respondent *per contra* maintained that the summons had been served on the applicant on the 29th December 2021 who failed to take the necessary action to prevent judgement being entered against him.

Now Rule 31 (3) (b) of the Rules of this court provides:

> *" A defendant may, within twenty- one days after he has knowledge such Judgement , apply to court upon notice to the plaintiff to set aside such Judgement and the court upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of cost of the default judgement and of such application to a maximum of E 200.00 set onside the default judgement"*

[10] This rule suggests that an applicant is entitled to the rescission of a judgement granted by default if he makes application for such within 21 days of becoming aware of the judgement. It has been held that a party who seeks to benefit from the provisions of this sub-rule has to meet the following requirements:

(i) That he has a reasonable explanation for his default.
(ii) His application is *bona fide* and not as a dilatory stratagem geared to frustrate the successful party in the enjoyment of the fruits of it judgement ; and
(iii) Show that he has a *bona fide* defence to the plaintiff's claim

See **THE AFRICAN ECHO (PTY) LTD t/a THE TIMES OF SWAZILAND AND ANOTHER V THULANI MAU MAU DLAMINI CIVIL CASE 3526/100 (unreported)**

Reasonable Explanation

[11] The applicant avers That he received a telephone call from the Deputy Sheriff on the 28th December- 2021, while he was away from home. On the 29th December he was home but the Deputy Sheriff never arrived to serve the summons. This is the day the Deputy Sheriff says he delivered the summons in the return of service.

[12] The applicant specifically denies service of the summons. The return of service states that the service on applicant was at his residence. In the face of this denial, the deputy sheriff in his confirmatory affidavit ought to have said more than simply re-iterate what is in the return of service. In the circumstance I am not convinced that the applicant was in willful default. The author ERASMUS in "the superior court practice", *Juta* 1995 at B1- 202 states what may be proved to show "willful Default"

> *" before a person can be, said to be in willful default the following elements must be shown;*
>
> *(a) Knowledge that the action is being brought against him*
> *(b) A deliberate refraining from entering appearance, though free to do so; and*
> *(c) A certain mental attitude toward the consequences of the default."*

It is my considered view that the applicant or his conduct does not fall into this category.

APPLICANTS BONA FIDES.

[13] I do not doubt that the applicant brought this application because he has a genuine or *bone fide* desire to have the default judgement set aside. It can not be in his interest to have a Judgement of such a huge amount remain unchallenged if he believes it is not due.

BONNA FIDE DEFENCE

[14] The applicant is required to demonstrate that he has a *bona fide* defence to the plaintiff's claim. It was stated by Masuku J. in the Africa Echo (pty) LTD (supra) that;

"...it is sufficient if makes Prima facie defence in the sense of setting out averments which if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

See also **GRANT V PLUMBERS (1949) (2) SA 470 AT 476 - 477**

Erusmus at page B1-203-4 states as follows of the requirements of establishing a bona fide defence."

" the requirement that the applicant for rescission must show the existence of a substantial defence, does not mean that he must show a probability of success; it suffices if he shows a prima facie case on the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defense must be set forth with sufficient detail to enable the court to conclude that the application is not made merely for the purpose of harassing the respondent ..."

[15] The bone of contention between the parties is that the respondent alleges that the applicant over stated the value of his property, "the second portion". The applicant denies this. The applicant has annexed copies of two separate valuations from professional practioners. I am satisfied that the applicant has set out sufficient facts in his defence which, if established at trial would be a defence to the plaintiff's claim.

I therefore order as follows:

1. The Judgement granted on the 10th March 2022 is hereby set aside.
2. The applicant is granted leave to defend the action herein in accordance with the Rules of court.
3. No order as to costs.

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Z.Magagula
Judge of the High Court

For the Applicant : Mr Linda Dlamini

For the Respondent: Mr S. Kunene