IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 6/2016

In the matter between:

IDAH HILL **Appellant**

And

SWAZILAND DEVELOPMENT FINANCE CORPORATION **1st Respondent**

JOSEPH SWANE DLAMINI **2nd Respondent**

Neutral Citation: *Idah Hill vs Swaziland Development Finance Corporation and Another. (6/2016)* [2016] SZSC 37 (30th June 2016)

Coram: B. J. ODOKI JA; S. P. DLAMINI JA AND Z. W. MAGAGULA AJA

Date Heard: 9th MAY 2016

Date Handed Down: 30th JUNE 2016

Summary: **Civil Procedure – Appeal from judgment of the High Court – Rescission of judgment – Citation of**

Defendant on summon – Effect of wrong citation – Service of summons at *domicillium citandi* – Authority of Deputy Sheriff to serve – In an appeal against the refusal to grant rescission of judgment by the High Court.

Held: **An error in the name under which the Defendant is cited in a summon will not necessarily constitute a ground for the rescission of judgment.**

Held further: **Where the Defendant acquiesce to a judgment, he cannot at a later stage seek to have it set aside.**

Held further: **That service of process at a *domicillium citandi* chosen by the Defendant is "good service" even if it is known that Defendant does not live there.**

Accordingly judgment of the Court *a quo* upheld.

JUDGMENT

MAGAGULA AJA.

[1] Litigation between the parties was launched on the 18th March 2013 when the 1st Respondent, as Plaintiff caused combined summons to be issued against the Appellant as

Defendant claiming payment of the sum of the sum of E275 124.36. In the particulars of claim, to which was

annexed a mortgage bond passed by the Appellant in favour of the 1st Respondent over certain Lot 864 Nhlangano Township, situated in the Shiselweni District and a loan agreement between the parties, the Plaintiff alleged that the parties had entered into two loan agreements, the first on the 27th February 2009 and the second on the 9th December 2011.

[2] The summons were allegedly served on the Appellant by the Deputy Sheriff on the 19th March 2013 and on failure by the Appellant to enter notice to defend, default judgment was applied for and granted on the 12th April 2013 for the sum claimed in the summons.

[3] On the 13th August 2013 on Notice of Motion with a certificate of Urgency, Appellant brought an application before the High Court in which he sought an order *inter alia* staying the Execution and/or sale of Lot No. 864 Nhlangano Township, District of Shiselweni pending the final determination of the application, staying the sale in execution and/or sale of Appellants movable property,

finally, that an order be issued rescinding the judgment of this Honourable Court granted on the 12th April 2013 and of course, an order for costs.

[4] The application was brought in terms of rule 42 (1) of the rules of the High Court; the Appellant alleging that there existed facts which the court was not aware of, that had the court been aware of those facts default judgment would not have been entered against it.

[5] The application was opposed by the Respondent. **S. B. Maphalala P. J.** heard argument in the matter and after analysis and consideration of the facts dismissed the application with costs. It is against that order that the present appeal has been brought. Rule 42 (1) of the rules of the High Court provides;

> ***42 (1) "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;***

(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.

(c) An order or judgment granted as a result of mistake common to the parties".

In her Founding Affidavit the Appellant did not make any averments that would warrant a consideration of Subrule (1) (b) or (c) of Rule 42 (1), that places the matter squarely within the four corners of Rule 42 (1) (a). An Applicant for a rescission of a judgment though may elect to make his/her application in terms of rule 31 (3) (b) which provides:

> ***31 (3) (b) "A Defendant may, within twenty-one days after he has knowledge of such judgment apply to court upon notice to the Plaintiff to set aside such judgment and the court may, upon good cause shown, …set aside the default judgment on such terms as to it seem fit".***

[6] The application for rescission was instituted almost one hundred and twenty days later, therefore this rule would

be unhelpful to the Appellant, more so as will be seen later in this judgment, the Appellant may have known of the judgment on the day it was granted. The Applicant could still launch her application in terms of the common law, but that is of no consequence for purpose of the matter before us.

[7] In terms of rule 42 (1) (a) "a judgment may be set aside on the ground that it was erroneously granted if the court has made a mistake in a matter of law appearing on the proceedings of a court record". See **Herbstein and Van Winsen's the Civil Practice of the High Courts of South Africa 5th Edition Vol.** 1 at page 932. See also **Bakoven LTD v G.J. Howes (PTY) LTD 1992 (2) SA 460**

In **President of RSA vs Eisenberg & Associates 2005 (1) SA 247 at (C) H. J Erasmus J.** stated**:**

> ***"The order was sought and granted in the absence of the President who, as head of the executive, was clearly affected thereby.***

The order was erroneously sought and erroneously granted because the making of regulations under Section 7 of the Act is a matter of collective responsibility of the Executive and Cabinet approval is necessary for the making of regulations.

Though the error is not apparent on the record of proceedings, the court is not confined to the record of proceedings in deciding whether a judgment was erroneously granted".

[8] Maphalala P. J., with this principle in mind dismissed the application. In her Founding Affidavit the Appellant had relied on a number of errors or facts that she alleges the court in granting default judgment was unaware of:

"(12) On the first point, namely the error in the granting of the default judgment by the above Honourable Court, the error appears ex facie on the summons and writs of execution issued at the behest of the Plaintiff, [Respondent]… I am advised that either an entity is cited as a natural person or a legal person. In the summons filed on behalf of the Plaintiff, this distinction is not made. A party in legal proceedings cannot be a natural

and a legal persona at the same time which is what is reflected in the summons.

(14) I am further advised and verily believe that the second error which, if the Honourable Court had been aware of, would not have granted the default judgment relates to the service of the summons by the second Respondent who is not an appointed and legal Sheriff for the District of Shiselweni. A list of the gazetted and authorized Deputy Sheriffs as duly appointed by the Registrar of the above Honourable Court is attached and marked as "ID3". As may be clearly seen from the list, Joseph Swane Dlamini is not in the list nor was on ad hoc application for appointment made by the plaintiff attorneys prior to using this person.

(16) The third error which if the Honourable Court had been aware of is the actual service of the summons by the alleged Deputy Sheriff. As the Return of Service indicates, the summon was a affixed on plot No. 864 in Nhlangano Township. This is a vacant piece of land with absolutely no

one living there. There is no way therefore that I could become aware of the summons”

[9] The Appellant further denied that Plot No. 864 Nhlangano Township was her chosen *domicillium citandi;* alleging that her *domicillium* was at Ndubazi area and that it was not correct that the summons were further served at Ndubazi as alleged in the return of service. For the reasons set out in the preceeding paragraphs, so the Appellant alleged in her affidavit she was not aware of the summons and the failure on her part to enter appearance to defend was therefore neither willful nor deliberate. She only learnt of the action against her on the 12th April 2013 at Respondent’s premises. The Applicant further alleged in her Founding Affidavit that she had a “good and valid defence to the main action” in that she was engaged with the Respondent in discussion which may lead to the recapitalization of her business; it was therefore wrong and unlawful for the Respondent to use the waiting period against her.

[10] Now to deal with the allegations raised by the Appellant ad seretiam;

<u>Citation of the Appellant</u>: The Appellant was cited as Idah Hill t/a Hill Investments (PTY) LTD and she contends that this was an error, and had the Honourable Judge who granted default judgment been aware of, he would have declined the application for default. It seem to me that in the first place the learned judge was aware of the summons, he was aware of the citation of the parties and it is clear in the summons that the Defendant is Idah Hill and nothing turns on the trade name. This ground must accordingly fail.

It has been held that if the court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order on the application of such party. However the court retains a discretion whether to rescind or vary the order. Circumstances such as an inordinate delay in bringing the application or if the Applicant sets out the merits of the defence and it is obvious that it could never pass Muster.

See: ***Topol vs LS Group Management Services (PTY) LTD 1998 (1) SA 639 at 650***

Sheriff Pretoria North-East vs Ferik (2005)3 All SA 492 at 503

[11] Service of summons by a Deputy Sheriff who is not authorized and not duly appointed. At the hearing of argument by this court, the Respondent's counsel submitted, without contradiction by Appellant's counsel, that this point was abandoned in the Court *a quo*, and this seems to be borne out by the judgment of Maphalala P. J. which does not address this matter at all. In its Notice of Appeal, the Appellant did not insist on this contention, it cannot therefore, be considered by this court.

[12] Service of Summon on Plot No. 864 Nhlangano, the Appellant denies that it chose Plot No, 864 Nhlangano Township as its *domicillium citandi* for purposes of service of summons in terms of the loan agreement. This seems to be correct when regard is had to the loan agreement annexed to the Summons. In fact the loan agreement state that the Appellants *domicillium citandi et executandi* is P. O. Box 859 Nhlangano.

The Appellant, however passed a *mortgage bond* in favour of the Respondent, against Plot No. 864 Nhlangano

Township, situate in the Shiselweni District and in said mortgage bond, Appellant chose at paragraph 20 thereof, the mortgaged property as its *domicillium citandi et executandi*

Paragraph 20 of the bond executed by the Registrar of Deeds provides as follows:

> ***[20] "For purposes of this bond and of any proceedings which may be instituted by virtue hereof, and of the service of any notice, domicillium citandi et executandi is hereby chosen by the mortgage <u>at the mortgaged property</u>, and if more than one property is mortgaged then at any one of them" [Emphasis added].***

[13] In terms of Rule 4 (1) (e) of the High Court Rules;

> ***"If the person to be served has chosen a domicillium citandi, by delivering or leaving a copy thereof at the domicillium so chosen".***

Where a *domicillium citandi* has been chosen, service will be good even though the Defendant is known not to be living there. See ***Prudential Building Society v Botha 1953 (3) SA 857 at (W).***

[14] In her Replying Affidavit the Appellant had also raised the issue that she had caused a Notice of Intention to Defend to be filed and had the Honorable Judge been aware of the Notice to Defend, it would have been precluded from granting default judgment. According to the Respondents Notice of Application for Default Judgment was filed two days before the date judgment was sought, that is the 12th April 2013. The Notice of Intention to defend delivered by Appellant's attorney on the 11th April 2013, and most probably the Appellants Notice did not make it into the court record consequently judgment was granted. There followed a series of correspondence between the attorneys which led to protracted negotiations between the parties in an effort to settle the matter, more will be said of the correspondences later in this judgment.

[15] The fact of the filing of the Notice of Intention to Defend cannot be taken in isolation. In her founding Affidavit the Appellant stated on oath that she only become aware of the summons on the 12th April 2013 when she was advised by officers of the Respondent. It then transpires that

Notice of Intention to Defend was filed on the 11th April 2013. This indicates that Appellant may not have taken the Court *a quo* into her confidence and renders the veracity of her averment suspect.

[16] Upon learning of the summons and that default judgment had been applied for, Appellant could have made application to have the judgment set aside immediately and in fact she was invited to do so by respondent. Appellant opted not to do so but expressly indicated that she would rather negotiate for settlement; this by letter dated 30th April 2013. When negotiations failed to produce meaningful result, almost four months to the day judgment was entered against her, Appellant moved application for rescission of judgment.

[17] Mr. Bhembe, who appeared for the Appellant, submitted that the correspondence between the parties, directed as it was to effect a settlement, should have been regarded by Maphalala P. J. in the court *a quo* as having been written "without prejudice" and consequently inadmissible

in the proceedings. It is not apparent in the judgment whether this point was argued in the court *a quo*.

[18] It is clear law that statements which are made "expressly or impliedly without prejudice in the cause of bona fide negotiation for settlement of a dispute cannot be disclosed in evidence without the consent of both parties" per Browde J. A. in ***Matsapha Town Board v Anka (PTY) LTD (unreported) Appel Case No. 26/2003.*** See also Hoffman and Zeffert **The South African Law of Evidence 4th Edition at page 196:**

There must be a dispute which the parties are negotiating to settle. It does not appear to me that the letters written by the Appellant were intended to be without prejudice. There was no dispute as the letter of the 30th April 2013, although marked "without prejudice", to all intents and purposes admits the Appellants liability. The words "without prejudice" mean without prejudice to the rights of the person making the offer if it should be refused…" Hofman and Zeffert (supra).

[19] The requirements for an application for rescission of a judgment of the High Court have already been dealt with in the preceeding paragraphs. The Appellant having opted to bring its application in terms of Rule 42 on the grounds stated hereinabove had to show that the judgment was erroneously sought and erroneously granted. See: ***Bakovan LTD v G.I Howes 1992 (2) SA 467 [E] at 4719*** Maphalala PJ held that the erroneous citation of the Appellant in the Summons was not material and would not have, as it were, precluded the court from granting judgment.

[20] The question what constitute an error for purposes of the Rule have often been considered and no clear principle has been established.

> ***"An error in the name under which the Defendant is cited in a summons will not necessarily constitute ground for the rescission of a judgment obtained against the Defendant under that name, for if it is clear that the correct party has been sued, the court will rectify the name of the Defendant in the summons and uphold the validity of the judgment granted against it"***

See **Herbstein and Van Winsen, the Civil Practice of the High Courts of South Africa (5th ed.) vol.1 at page 931**. See also **Dawson & Fraser (PTY) LTD v Havenga Construction (PTY) LTD 1993 (3) SA 397 at 402-403.**

[21] What is a settled principle though, is that a party seeking rescission must act expeditiously after the judgment has come to its notice. In ***Theron N. O. v United Democratic Front & Others 1984 (2) SA 537 (c) at 536*** the court held:

> ***"The court has a discretion whether or not to grant an application for rescission under Rule 42 (1). In my view the court will normally exercise that discretion in favour of an Applicant, where, as in the present case he was, through no fault of his own, not afforded an opportunity to oppose the order granted against him and when, on ascertaining that an order has been granted in his absence he takes expeditious steps to have the position rectified"*** **[emphasis added].**

[22] The Appellant knew of the action against her on a date prior to the 12th April 2013 contrary to the allegations in the Founding Affidavit. If she intended to raise the issue of "defective citation", defective service and lack of authority of the process server she ought to have done so then or

immediately after learning that judgment had been taken against her. But not only did the Appellant not act expeditiously but her conduct was consistent with an acceptance of the judgment as binding upon her and an apparent desire to negotiate less onerous consequences than was pronounced by the Court in the default judgment. This conduct clearly leads to the inference that the Appellant acquiesced in the "improper" citation, the mode of service of the summons and the judgment.

[23] In my view the conduct of the Appellant clearly demonstrated her acquiescence in the judgment and Mr. Jele, who appeared for the Respondent in this court, was correct in his submissions that the Appellant had waived her right to apply for rescission. Generally speaking, one right is waived when a party chooses to exercise another right which is inconsistent with the former. See: **Administrator, *Orange Free State v Mokoponele 1990 (3) SA 780 A;***

Xenopoulos v Standard Bank of South Africa LTD 2001 (3) SA 498.

[24] The Appellant clearly chose to settle the Respondent's claim and the judgment in respect of it and not to rely on what it now alleges, that is, that the judgment was

erroneously given. In so doing she waived its right to rescission on any ground.

[25] In any event, as I referred to above, the court a quo had a discretion in regard to the grant or refuse of rescission. The exercise of that discretion will only be interfered with on appeal if we were to decide it was not exercised judicially. I agree with the decision of Maphalala P.J.

[26] For the reasons set out hereinabove, the appeal is dismissed with costs.

____

Z. W. MAGAGULA
ACTING JUSTICE OF APPEAL

I Agree

____

DR. B. J. ODOKI
JUSTICE OF APPEAL

I also Agree

____

S. P. DLAMINI
JUSTICE OF APPEAL

For the Appellant: Mr. S. Bhembe

For the Respondent: Mr. Z. Jele