THE HIGH COURT OF SWAZILAND

SWAZILAND BUILDING SOCIETY

Applicant

And

MUSA PATRICK NDZIMANDZE

Respondent

Civil Case No. 2007/2000

Coram S .B. MAPHALALA - J

For the Applicant MR. L. MAMBA

For the Respondent MR. T. MAGAGULA

JUDGMENT

(05/12/2003)

This is an application brought in terms of Rule 42 (1) of the Rule; of the High Court for rescission of judgement which was granted against the Applicant by default.

According to the averments contained in the founding affidavit of the Applicant the said judgment sought and granted against the Applicant was in error in that there was no proper service of the summons. Annexure "B" of the summons being a Deed of Suretyship, reflects that the chosen domicilum citandi et executandi to be "the mortgaged property". The Applicant contends that ex facie the said surety there is no

description of the so-called "mortgaged property" and accordingly there is no chosen domidlum citandi et executandi. The Applicant further contends that even if one could assume on reading the summons as a whole that the "mortgaged property" referred to is the property mortgaged in terms of the mortgage bond annexed to the summons (which is denied) such assumption becomes untenable because that property was bonded on the 4th October 1995, whereas the surety was entered into on the 20th September 1995. Accordingly there was no "mortgaged property" on the date the surety was signed.

Furthermore, the Applicant contends that according to paragraph 2 of the Particulars of Claim and the Deputy Sheriff's return marked "MN2" the summons was served at Portion 1 of Lot 220 Matsapha Township which is neither his residence, place of employment, or place of business.

In any event, even if one were to assume that Portion 1 of Lot 220 Matsapha was his chosen domicilum citandi et executandi, it was unfair for the Respondent to serve at such address because the Respondent had caused that property to b sold in execution and had itself purchased such property and placed somebody else in occupation of the premises.

The Applicant further makes an allegation in the founding affidavit that the Respondent knew very well that Applicant would not receive the summons. The Respondent was a deliberately contriving to obtain judgement against him by default.

The Respondent answers to these allegations at paragraphs 8, 9, 10, 11 and 12 of its answering affidavit. The answer thereto is essentially that the "mortgaged property" is as a result of the chosen domicilum citandi et executandi as stated in the Deed of Suretyship as entered into by the Applicant duly signed by him. The Applicant chose this address as his domicilim citandi et executandi. It was not incumbent on the Respondent to serve on any other address, if it was not officially advised of such change of domicilum citandi et executandi. No knowledge can be attributed to the Respondent with regards to the whereabouts of the Applicant. ' "he Respondent is obliged to serve on the address so chosen.

As to the property being sold in execution the Respondent avers that the said sale in execution was subsequent to the default judgment being obtained. It is clear that the Applicant is trying to misrepresent the factual situation to the court. It was only after the summons was served, which the Applicant had been made aware of, and after the judgement was obtained, that the Respondent had sold the property in execution of the judgment.

The Respondent further contends that at a meeting at the offices of the erstwhile attorney of the Respondent, a Mr. E.J. Henwood, a copy of the summons which had been served on the domicilum citandi et executandi, was shown to the Applicant, one day prior to judgment being obtained. Notwithstanding having been informed of summons having been issued against him, the Applicant was in default at the hearing of the matter on the 9th September 2000.
The judgment was executed upon and the mortgaged property was sold in execution after a sale in auction had failed to achieve a market related price.

This application for rescission falls under Rule 42 (1) which provides as follows:

"The court may, in addition to any other powers it may have, men motu or upon application of any party affected, rescind or vary.

a) An order or judgment erroneously granted in the absence of any party affected thereby".

Therefore by the words "in addition to any other powers it may have" it is clear that the powers of the court are not limited to the instances set out in the rule and the fact that the application is brought under this sub-rule does not preclude the court from granting the order for rescission in terms of the common 1aw (see Mutebwa vs Mutebwa 2001 (2) S.A. 193 at 198 C - E).

On the facts of this matter it is clear that the judgment was granted in the absence of the Applicant. It is also clear that in terms of the application or default judgement that such judgment was granted on the basis of summons having been served at Portion 1 of Lot No. 220 Matsapha Town. The question therefore in this case is

whether or not there is any legal basis for the summons to be served at such an address in terms of the Deed of Suretyship.

The clause whereby the domicillum citandi is allegedly chosen provides that:

"We hereby choose domicillum citandi et executandi for all purposes hereunder at the premises of the mortgaged property"

The Applicant argues that no property is described in the papers and no property was as that date mortgaged and if the parties intended to state that it Was a property to be thereafter mortgaged by either Senderwood or the Applicant the parties would have so

stated. In any event in terms of the contra proferentum rule, the clause ought to be

interpreted against its author, the Respondent. Accordingly no domicillum citandi was chosen by the Applicant and he ought to have been served personally.

The Respondent states that it was common cause that Portion 1 of Lot 220 Matsapha Town would be mortgaged and that such property must be taken to be the domicillum citandi and service thereat was sufficient in terms of the rules of court. Rule 4 provides that it is competent to serve process at the domicillum citandi.

It would appear to me that reference to the "mortgage property" is as a result of the chosen domicillum citandi as stated in the Deed of Suretyship as entered into by the Applicant and duly signed by him. The suretyship was entered into with regards to a specific property which was to be mortgaged. The Applicant chose this address as his domicillum citandi. It was not incumbent for the Respondent to serve on any other address, if it was not officially advised of such change of domicillum citandi.

According to the dicta in the case of Van Der Merve vs Bonaero Park (EDMS) BPK 1998 (1) S.A. 697 (T) fat 700 - 701c in fin E/F) where an acknowledgement of debt, makes provision for the debtor's domicillum citandi et executandi, but does not make provision for a change of the domicillum, the debtor has to ensure that notice of a change of address actually comes to the creditor's attention. In the absence of such notice there will be proper service of a summons at the debtor's chosen domicillum citandi et executandi.

Further, it would appear on the facts that the Applicant was aware of the summons in this matter. There is evidence that Mr. E. J. Kenwood, who was then attorney for the Respondent showed a copy of the summons to the Applicant, one day prior to the judgment being obtained.

In casu on the facts I am unable to find that there was an irregularity in the proceedings or that it was not legally competent for the court to have made such an order. Further, I am unable to find that there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if it had been aware of it, not to grant the judgment.

In the result, the application for rescission of the judgment ought to fail and costs to follow the event.

S.B. MAPHALALA

JUDGE