IN THE HIGH COURT OF SWAZILAND
(HELD AT MBABANE)

CASE NO.: 1564/05

In the matter between

THEMBA MAMBA AND 84 OTHERS Applicants

and

SWAZILAND NATIONAL PROVIDENT FUND First Respondent

DEPUTY SHERIFF MANZINI Second Respondent

CORAM: EBERSOHN J

JUDGMENT HANDED DOWN ON 3RD NOVEMBER 2006

FOR APPLICANT: ATT. M.M. TWALA
FOR 1ST RESPONDENT: ADV. M. VAN DER WALT
INSTRUCTED BY ROBINSON BERTRAM
(MR. MADAU)

JUDGMENT

EBERSOHN J:

[1] In this matter which was brought before me as an urgent application the prayers read as follows:

> **"1. That the normal time limits and forms of service prescribed by the Rules of this Honourable Court be dispensed with and have the Matter enrolled as an urgent one;**
>
> **2. That execution of the default judgment granted by this Honourable Court on the 3rd August 2005 be stayed pending the finalisation of the Applicant's prayer 3 below;**
>
> **3. That the judgment of this Honourable Court granted by default on the 3rd August 2005 be rescinded and set aside and that the Applicants be granted leave to file their pleas.**
>
> **4. Costs of suit.**
>
> **5. Further and/or alternative relief."**

[2] On the 28th April 2005 the plaintiff issued out of this court a summons wherein the defendants are described as follows:

a) "The First Defendant is Malangeni Dlamini, an adult male of Manzini who holds himself to be the chief or authority of an area on Plaintiff's property whose full and further particulars are to the Plaintiff unknown but in occupancy of Plaintiff's property.

b) The Second Defendant is Ben Simelane, an adult male of Manzini who holds himself as the Indvuna of an area on Plaintiff's property whose full and further particulars are to Plaintiff unknown but in occupancy of Plaintiff's property.

c) The Third Defendant is the inner counsel (sic) of the traditional authority "umphakatsi" at Madonso area. The description and the identities of the members of the inner counsel (sic) are presently unknown to the Plaintiff."

[3] In the particulars of claim the plaintiff alleged that it was the owner of certain fixed properties and that on these properties certain "other people whose particulars are to the Plaintiff unknown" have settled. The plaintiff also alleged that these people refused

and/or failed and/or neglected to vacate the fixed properties.

[4] The plaintiff in the prayers to the particulars of claim prayed for an order ejecting these people and the defendants who allegedly allocated stands on the fixed properties to these illegal occupiers.

[5] According to three returns of service which were found in the court file service of the summons took place as follows:

a) on the 17th May 2005 on the 1st defendant Malangeni Dlamini personally;

b) on the 5th May 2005 on the 2nd defendant Ben Simelane personally; and

c) on 5th May 2005 on the Inner Counsel (sic) of Traditional Authority **"Umphakatsi"** at Madonsa Area (3rd defendant) by leaving a copy with Indvuna of the area Ben Simelane (2nd defendant) at his place of residence at Manzini.

[6] One is immediately faced with the problem that there is no proof of service of the summons on the 85 families who occupy the fixed properties. Service did not take place on them but on 2nd defendant at his place of residence at Manzini which apparently is not any of the fixed properties of the plaintiff as the properties are at Madonsa.

[7] Default judgment was granted on the 3rd August 2005 on the strength of an allegation in the notice of application for default judgment that the service upon the Inner Counsel was in terms of rule 4(2)(b) which was, however, not so indicated by the Sheriff in his return of service. On which basis the attorney could state that the service was in terms of rule 4(2)(b) is not clear.

[8] On the 12th August 2005 a notice to defend on behalf of the 1st and 2nd defendants and on behalf of 85 other people whose names appeared on a list attached to the notice

to defend, was served on the plaintiffs attorneys.

[9] It apparently becoming known that judgment was entered by default and that the warrant to eject them was issued Themba Mamba and 84 others approached this court with the urgent application.

[10] The founding affidavit was deposed to by the said Themba Mamba who stated that he resided on the property at Madonso and that he was affected by the Court Order. A supporting affidavit deposed to by one Mbongwa Dlamini was attached to his founding affidavit.

[11] In the founding affidavit he stated that he and the other 84 families were interested parties in the proceedings yet they were neither cited as defendants nor was the summons served upon them. He stated that since 2004 the plaintiff knew of the fact that he and the 84 others were residing on the properties and that even on the 20th January 2004 they addressed a letter to him there.

[12] With regard to the merits of the matter he stated that he and the 84 other families were unaware thereof that the land belonged to the plaintiff and that he paid the usual consideration of one cow for his stand whereupon he constructed his home on the property believing in good faith that it was on Swazi Nation Land.

[13] He stated that when the plaintiff's interest became known they approached an attorney Q. Mabuza who approached the plaintiff's attorney a Mr. Jele and thereafter negotiations were conducted and a solution was arrived at in that the 85 families offered to purchase the land which solution was in principle accepted by attorney Jele of the plaintiff and which was subject to confirmation by Umphakatsi at Madonsa and the plaintiff.

[14] He stated that they believed that a solution was arrived at and was shocked to read in a newspaper that the plaintiff reneged on the understanding and obtained judgment

against them to vacate the properties and that the plaintiff acted in an underhand manner.
[15] The urgent application to the court then followed.

[16] One Mathokoza Mthethwa deposed to the answering affidavit on behalf of the 1st respondent.

[17] In the affidavit he denied that the matter was urgent.

[18] The 1st respondent also took the point that the founding affidavit was defective in that it was not properly stamped in terms of the Stamp Duties Act No. 37/1970. He also took the point that the Form as prescribed by the rules was not used.

[19] He then stated that the default judgment was already granted in May 2005 and in this regard he erred in that the default judgment was only granted on the 3rd August 2005 as per the note appended by the Judge who granted the default judgment.

[20] With regard to the merits he then developed an argument to the effect that it was not necessary to serve the summons on the people occupying the properties and that serviced on Ben Simelane was sufficient.

[21] The matter came before me and upon reading the papers I was of the opinion that in order to resolve the dispute once and for all and as expeditiously as possible that the matter should be referred for the hearing of oral evidence on the merits and even prepared a draft order in that regard. When the parties arrived at court for the hearing of the matter the 1st respondent's counsel indicated that the referral of the matter for the hearing of oral evidence was not acceptable and they insisted on arguing the matter and after the necessary stamps were affixed to the affidavits contained in the applicants' papers the matter was argued and I reserved judgment. Due to some clerical error and apparently under the impression that the order referring the matter for the hearing of oral evidence was granted the file was taken to the Registrar's office where

it was found on the 2nd November 2006.

[22] The onus with regard to the rescission of a default judgment is rather light and all that is necessary is the existence of a matter which is fit for trial. In this instance there was no offer on behalf of the plaintiff to reimburse the 85 families who apparently were bona fide possessors of the land after the plaintiff failed to inform them that it in fact was the plaintiff's land and they built on the properties to their detriment. There certainly may be an appropriate counterclaim in that regard. The plaintiff has the further problem in that there clearly was no and at least no proper service on the 85 families who are now the applicants before this court. They all have an interest in the matter and should in any case have been joined from the outset by the plaintiff in the action. In this regard the allegation was made to the effect that the plaintiff acted in an underhand manner in issuing summons and obtaining default judgment. I express no comment in this regard.

[23] This court can condone the failure on the part of the applicants to use the correct form and the 1st respondent suffered no prejudice in this regard and the failure will be condoned. It is in nay case clear that the matter was urgent.

[24] It is not necessary to deal in detail with the various allegations and counter allegations and the default judgment will be set aside and leave will be granted to the applicants to defend the main action as soon as they have been properly joined as defendants in the main action.

[24] I accordingly make the following order:

1. The failure of the applicant to employ the correct Form as prescribed by the Court Rule is condoned.

2. The matter be dealt with as an urgent matter and the failure of the applicants to comply with the normal time limits and form of service be condoned.

3. The default judgment is set aside and leave is granted to the applicants to defend the matter as soon as they have been joined as defendants in the main action.

4. The costs of the application are reserved for determination at

P.Z. EBERSOHN

JUDGE OF THE HIGH COURT