IN THE HIGH COURT OF SWAZILAND

In the matter between:

E.J. & H. Property and Investment Consultants Plaintiff

vs

Tisuka Properties (Pty) Limited Defendant

Civ. Trial No. 1788/1995

Coram: S.W. Sapire, ACJ

For Plaintiff: Adv. Flynn

For Defendant: Adv. Kades

Judgment

(21/03/97)

The applicant seeks an order staying the execution of a writ issued pursuant to a judgment granted by this Court on Friday 13 October 1995 and also the setting aside of default judgment granted by this Court in this matter in favour of the Plaintiff on Friday the 13th of October, 1995.

The case for the relief claimed is made in a finding Affidavit attested to by one Musa Patric Ndzimandze who describes himself as a Financial Controller of Tisuka Taka Ngwane a controlling body of the applicant, which was the defendant in the main action. I gather from this description that the deponent is not in fact an officer of the applicant. For the purposes of this application I accept that the facts in the affidavit to which he attests are within his own knowledge. As has often been observed previously no one requires to occupy any position or be duly authorised to depose to an affidavit in which facts of the deponent's knowledge are resulted.

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The deponent in the first instance deals with the question of wilful default. He says that on Monday 18th September 1995, he, personally, received the summons from the Deputy Sheriff for the District of Manzini who had come to serve the summons on the defendant company.

Two days later on the 20th September the Deponent telephoned the Plaintiffs Attorney Bheki Simelane to inform him that the summons had been received and that the matter would be referred to the Board of Directors of the Defendant on their meeting of the 3rd of October 1995. The Deponent also requested Simelane to hold the matter over, which Simelane agreed to do. There seems to be some disagreement as to the date to which the matter was to be deferred.

Simelane confirmed the telephone conversation by letter. Annexure A is a copy of such letter.

Although the matter was placed before the Board of Directors of the Applicant on the 3rd of October the directors did not consider the matter at their meeting and deferred it for the meeting of the 17th October 1995. The failure of the directors to deal with the matter is unexplained.

Simelane wrote to the Deponent of the founding affidavit on the 3rd October. The letter was received on the 4th. In the letter it was drawn to the Defendant's attention that the agreed deferment of further action was now at an end, and the Defendant was called upon to file a notice of intention to defend on not later than the 6th of October.

This letter was handed to Mr. Walter Bennet who is chairman of Board of Directors. The letter was subsequently handed to Attorneys Robinson, Bertram and Keyter with instructions to give notice of intention to defend. Why the summons was not handed to the Attorneys at the same time is not explained.

On the 4th of October the deponent received a telephone call from the attorney s advising that an instruction has been received, to enter an appearance to defend and requesting that the summons be delivered to them to enable them to do so. The deponent then goes on to say:

"I understood Mr. Nxumalo to be saying that he would in the interim be entering the appearance to defend whilst I was despatching the summons to him."

These allegations following one on the other do not make sense. If it is true that Nxumalo informed the deponent that he required the summons to enable him to give notice of intention to defend it is difficult to understand how the deponent understood that Nxumalo would in the interim be entering the appearance to defend before the summons had reached him..

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Apparently the summons did not reach the offices of Robinson, Bertram and Keyte.r On the 12 October Nxumalo informed the deponent that he had not received the summons and was awaiting receipt of the summons before he could enter the appearance to defend. The delay from the 4th of October to the 12th of October is unexplained.

The summons only reached the defendant's Attorneys on the 13th October which was a Friday and by the time Nxumalo was in a position to give notice of intentioin to defend default judgment had been entered against the defendant which is the applicant on Friday 13th October.

The deponent submits that on this evidence the applicant/defendant was not in wilful default. This submission is made on flimsy grounds. The applicant certainly did not give proper attention to the summons which had been served on it.

In the first place it did not consider it at its meeting on the 3rd of October and did not take the necessary steps to ensure that notice of intention to defend was served either within the time mentioned in the summons or within the extended time allowed by the Plaintiffs Attorney. The applicant's treatment with the summons can only be described as fumbling incompetence No regard for the exigency of the matter was demonstrated. The explanations given for the failure to give notice of intention to defend are weak and unconvincing. As defecient as they may be, had the Applicant been able to demonstrate that there was a maintainable defence to the claim, these deficiencies could have been overlooked. The stronger the merits, the more benevolently will procedural defaults be viewed.

The application is however just as weak on the question of the applicant having a defence to the action.

The plaintiffs claim was set forth in the summons with some particularity and the agreements upon which it relied were in writing. The agreements were concluded in 1992 and it is quite clear that from that time until 1994 the plaintiff rendered services as described in the summons by providing maintenance management and consultative services in respect of two properties of which the defendant was the owner. No credence can be given to allegations that the agreements in terms of which these services were rendered were not binding because of lack of authority of Applicant's agent to concludee the agreements on Applicant's behalf

The defences raised to these claims are in the first place that the Murdoch Green Partnership had no authority to represent the defendant entering into the agreements. The defendant also denies that the agreements were extended from time to time as alleged by the plaintiff. A second defence relates to a number of the items specified by the plaintiff in the summons. These items are a minor portion of the claim and the strength of the defence on these issues is questionable to say the least.

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The affidavit as far as the merits is concerned ends with a curious allegation. This allegation is that in any event the Chairman of the Board of Directors of the defendant Mr. Walter Bennett terminated the agreements allegedly entered into between the parties in August 1994. It is difficult to understand why Mr. Bennett would want to terminate agreements into which the defendant had not entered. In any event this affidavit in support of this allegation is vague in the extreme so that little attention can be paid thereto.

The application must therefore fail both because the defendant has not shown that it was not in wilful default and also because it has failed to demonstrate a defence which has any prospect of success.

The application is therefore dismissed with costs.

S. W. SAPIRE

ACTING CHIEF JUSTICE