IN THE HIGH COURT OF SWAZILAND

CASE NO. 1124/99

IN THE MATTER BETWEEN:

MICHAEL MABUNDZA : PLAINTIFF

VS VINAH MAMBA : DEFENDANT

CORAM : MASUKU J.

FOR PLANTIFF : MR M. MABILA

FOR DEFENDANT : MR L. N. M. KHUMALO

JUDGEMENT

6/8/1999

This is an application in terms of the provisions of Rule 27 of the High Court Rules, as amended, for the removal of a Notice of Bar, issued by the Plaintiff.

By a Combined Summons, dated 17th April, 1999, the Plaintiff instituted action proceedings against the Defendant for the payment of damages arising out of a motor vehicle collision between the Plaintiffs motor vehicle and the Defendant's vehicle.

The Defendant, on receipt of the Summons, instructed Messrs Robinson Bertram, who filed a Notice to Defend on the 12th May, 1999. In terms of the Rules, the Defendant was to file its Plea within twenty-one days from the date of the filing of the Notice to Defend but she did not. Consequently, the Plaintiff issued and served on the

Defendant's attorneys a Notice of Bar on the 6th July, 1999 This is the bar that the Defendant seeks to have the Court remove to enable her to file the Plea,

Rule 27 under which this application has been made reads as follows;-" Extension of time and removal of Bar and Condonation

27(1) In the absence of agreement between the parties, the Court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seem fit. "

This Rule confers upon the Court a wide discretion to grant or refuse the application. This discretion must however be judicially exercised, having due regard to the attendant circumstances of the case.

One of the main requirements to be satisfied by an Applicant under this Rule is "good cause". In the case of SMITH N.O. Vs BRUMMER N.O. AND ANOTHER, 1954

(3) SA 352 AT 357, good cause was explained in the following terms;-

"It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of COTTON J. (In re Manchester Economic Building Society, 24 ChD 488 at page 488), something which entitles him to ask for indulgence of the Court: what that something is must be decided upon the circumstances of each particular application. "

In the case of ROSE AND ANOTHER Vs ALPHA SECRETARIAL LTD 1947

(4) SA 511 AT PAGE 517, TINDALL J stated as follows, regarding the question of good cause:

"For the expression used COTTON L.J. , / should prefer to substitute something which the Court considers sufficient to justify its granting indulgence. "

In their work entitled "The Civil Practice of the Supreme Court of South Africa", 4th Edition, at page 555, Herbstein and Van Winsen enumerate the considerations which influence the Court in granting an application for a removal of bar.

These are:-

(a) a reasonable explanation for the Applicant's delay:
(b) the application is bona fide;
(c) it appears that there has not been a reckless or intentional disregard of the Rules of Court;
(d) the applicant's case is not obviously without foundation; and
(e) the other party is not prejudiced to an extent which cannot be balmed by an appropriate order as to costs.

It remains for me to now examine the contents of the Applicant's founding Affidavit in order to establish whether there is something therein advanced to justify this Court granting the indulgence required.

In her Founding Affidavit, the Defendant states she was advised by her attorney that he was unable to see and become aware of the Notice of Bar because he was sick and away during the time of service of the Notice. This allegation is also confirmed by Mr Khumalo in a supporting Affidavit, to which he annexed a certificate from The Clinic which states that Mr Khumalo suffered from fever/broncho pneumonia and was thereby rendered unfit for work from the 5th to the 11th July, 1999.

It is worthy of note from the papers filed that the Notice was served at Mr Khumalo's offices on the 6th July, 1999. On his return, on the 12th July, 1999 Mr Khumalo, prepared the plea and caused it to be served on the 13th July, 1999.

I shall now, from the facts alleged in the papers deal seriatim with the requirements to be satisfied by the Applicant.

(a) Reasonable explanation for the delay

Mr Mabila, argued that there was no reasonable explanation for the delay before the issue of the Notice. In my view, the document which puts the Defendant to terms regarding filing his Plea is the Notice of Bar. in the absence of which, no judgement can be entered against the Defendant. There is therefore, in my view, no need to furnish any explanation for any delay caused before the issue of the Notice of Bar.

In this case, Mr Khumalo has fully given an explanation, namely, that he was admitted at The Clinic and was rendered unfit to be on duty due to sickness and that the Notice of Bar was issued during the period when he was indisposed. I find that this explanation is convincing because no one applies to be sick. When sickness has struck, it may even be difficult to take contingency measures, especially with the Notice of Bar which has no fixed time within which it must be issued. It is issued by the Plaintiff whenever he is in a position to do so.

(b) Bona Fides of application

The Defendant in her Founding Affidavit also set out the history of the matter and from which it appears that the Defendant issued a summons against the Plaintiff for damages arising out of the very motor vehicle collision in issue. No papers were filed on the present Plaintiffs behalf and a default judgement was entered in favour of the Plaintiff. Thereafter, the execution procedures were followed which resulted in the Plaintiff undertaking to liquidate the amount of judgement in instalments.

The Plaintiff, on eliciting legal advice, was informed that he could not obtain rescission of the Court Judgement in the circumstances of his case but that he could

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only seek solace in filing a fresh action against the Defendant, which is the one before Court, In view of the aforegoing, I entertain no doubt that the application is bona fide and is not used as machination to delay the Plaintiff or frustrate his claim. What I have said in respect of this aspect applies with equal force to the requirement (d), namely that the Applicant's case is not without foundation. For that reason, I find it unnecessary to discuss that requirement.

(c) No reckless or intentional disregard of the Rules of Court

Under (a), I discussed the reason why the Applicant did not file its Plea timeously. The reasons, therefor were genuine and cogent and are applicable here. I will therefor not repeat them here. I wish to add however, that I noted that on recovery from the sickness and on his return to the office, Mr Khumalo filed the Plea without any delay i.e. the following day. He acted with the requisite promptitude, negativing any remissness on his part, thereby showing that the failure to file the Plea was neither due to reckless nor intentional disregard of the Rules of Court.

Mr Mabila argued that there are more than five admitted attorneys in Mr Khumalo's firm, who could and should have dealt with the Notice of Bar in Mr Khumalo's absence. Their failure to do so, argued Mr Mabila, was reckless and binds the Defendant. In contra, Mr Khumalo argued that this case is handled personally by him and none of the other attorneys could have been in a position to file the Plea within the time stipulated as they did not have the instructions. He further argued that the Defendant instructed him as her attorney and not necessarily the firm of Robinson Bertram.

I will accept Mr Khumalo's submissions in this regard and find that there was no recklessness on the part of the Defendant nor do I find such sustained against the Defendant's attorney.

(d) Prejudice

Mr Mabila failed to point out any real prejudice which could be occasioned to his client as a result of the Defendant being granted this indulgence. The Respondent, in

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such cases, must show such prejudice as would not be compensible with an appropriate order as to costs. I do not find that any such prejudice exists in this case.

I therefore come to the conclusion that the Defendant has satisfied all the requirements and I hold that this is an apposite case for exercising my discretion in the Applicant's favour. I also take it to the Defendant's credit that she, through her attorneys, attempted to have the issue settled without recourse to litigation. In this regard, a letter from the Defendant's attorney dated 12th July, 1999 was transmitted by facsimile to the Plaintiff's attorneys informing the latter that Mr Khumalo was indisposed for two weeks. Furthermore, it sought to find out the Plaintiff's view regarding whether the bar would be abandoned without need to resort to litigation. There appears to have been no response to this letter by the Plaintiff's attorneys.

I am fortified in coming to this conclusion by the remarks of SOLOMON J. in SILVERTHONE v SIMON 1907 T.S. 123 which I find apposite in this case. The Learned Judge stated as follows;-

"Whenever therefore, there is any satisfactory explanation of the delay on the part of the Defendant, if the Court comes to the conclusion that defendant's application is bona fide, that he is really anxious to

contest the case and believes he has a good defence to the action, and if in the circumstances, the order can be made without any damage or injury to the plaintiff other than can be remedied by an order as to payment of costs, I think when these conditions are present in any application, the Court should as far as possible assist the defendant and allow him to file a plea in the action. "

I accordingly grant the Defendant the indulgence and hereby remove the Notice of Bar and allow the Defendant to file its plea.

The general rule with regard to issue of costs in these matters is that the party craving the Court's indulgence must be mulcted with the costs. I am disinclined to follow that general rule in this case due to the cause of the delay, namely Mr Khumalo's sickness. I also consider adversely to the Plaintiff, the failure by the Plaintiff's attorneys to reply to the letter seeking to have Plaintiff's view regarding whether Notice of Bar

will be abandoned or not. In my view, there was no need to oppose the application, given the totality of the attendant circumstances of the case. I will accordingly make no order as to costs.

T.S. MASUKU

JUDGE