IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 5/99

In the matter between

RHINO HOLDINGS (PTY) LTD	APPLICANT
And LEO WILSON MCABANGO MAZIYA	RESPONDENT
Coram	S.B. MAPHALALA – J
For the Applicant	MR. SHILUBANE
For the Respondent	MR. MDLADLA

JUDGEMENT

(21/04/99)

Maphalala J:

This is an application brought on a certificate of urgency for a rule nisi, inter alia for an order that execution of the order granted under case no. 5/99 on the 5th February 1999, be stayed pending the outcome of the application for rescission of judgement, that the judgment granted by this court on the 5th February 1999, under case no. 5/99 be rescinded and set aside, etc. The application is fully motivated by the founding affidavit of one Paulo Patrico who is a director of the applicant and is accompanied by a number of annexures.

The application is opposed by the respondent who in turn filed an opposing affidavit of one Leo Wilson Maziya and a confirmatory affidavit of S'dumo V, Mdladla together with annexures. The respondent is his opposing papers raised a point in limine. That the application is highly defective in that the Deputy Sheriff who is to execute the writ ought to have been joined as a party to these proceedings in terms of the rules of this court and as such the application ought to be dismissed with costs.

The nub of the applicants case is that the summons which resulted with the respondent to obtain judgment is that the summons were served on his wife and co-director of applicant. At the relevant time he was away in Mozambique and his co-director only went to see their attorney of record on Thursday the 4th February 1999 at 4.30pm. His co-director informs him that she could not immediately instruct their attorney of record to file opposing papers in his absence thus resulting in the court granting judgement by default. The applicant submits in his papers that the non filing of an

appearance to defend was not willful but came as a result of his co-directors mistaken but bona fide belief that she could do anything about the matter in his absence.

The matter was enrolled in the contested motion of the 12th March 1999, for arguments. At the commencement of submission counsel for the respondent informed the court that they are not pursuing the point in limine. The matter then proceeded to be argued on the merits.

Mr. Shilubane directed the court to the case of Shongwe vs Msibi 1972 - 78 S. L. R, 183 and that of Msibi vs Mlawula Estates 1970 - 76 S. L. R 345 in the principles ought to apply in this case Msibi vs G M Kalla & Co. The applicant has made a reasonable explanation why the matter was delayed. The summons were served on his wife when he was in Maputo. Further that there are two matters before court on the same subject matter. That the applicant has been paying the required rentals. The bringing of the matter to court by the respondent was an abuse of the court and thus an appropriate order as to costs ought to be put in place.
Mr. Mdladla argued in contra. He submits that the reason for the applicant for not filing opposing

papers is that summons were served on his wife who is also the director of the company at the company's domicilim citandi et executandi and thus the service was good. He referred to the case of Msibi vs Mlawula Estates (supra) at page 348 - 349 to buttress his point.

The second leg of Mr. Mdladla's submissions is that the applicant in its papers has not outlined its defence and this is only advanced by their counsel from the bar.

Thirdly, he argued that applicant relies on annexure "H3". The court should take cognizance of paragraph 23 of the lease agreement attached to respondent's answering affidavit. The court should also consider Cooper on the South African Law of Landlord and Tenant at page 69. The explanation from the bar is a bare denial and there is no defence as regards the variation clause. To this effect he directed the court's attention to the case of the Congress of South African Trade Union vs Minister of Justice and another 1987 (2) S.A. 178-179.

In reply on points of law Mr. Shilubane contended that clause 23 does not preclude the parties from entering a completely new agreement. There is nothing wrong with the applicant from setting off the amount owing from the rent it is owing. The respondent should either amend or withdraw his earlier summons.

These are the issues before me. On the first point raised by Mr. Mdladla I tend to agree with Mr. Shilubane that the applicant has offered a reasonable explanation for the delay as propounded in the case of Shongwe vs Msibi (supra). On the second point raised, my view is that it is not entirely correct that the applicants papers has not outlined its defence and that this is only advanced by their counsel from the bar. On perusal of the applicant's founding affidavit at paragraphs 9, 9.1, 9.2, 9.3, 9.4, and 9.5 the applicant advances a defence to the respondent's claim. On the third leg of the respondent's arguments I agree with Mr. Shilubane that clause 23 does not preclude the parties from entering a completely new agreement. There is nothing wrong with the applicant from setting off the amount owing from the rent it is owing. The respondent should either amend or withdraw his earlier summons.

My considered view is that the non -filing of an appearance to defend on the part of the applicant was not willful but came as a result of applicant's co-director's mistaken but bone fide belief that she could do nothing about the matter in applicant's absence.

In the result I grant the applicant an order in terms of prayers 3, 4 and on prayer 5 that respondent pays ordinary costs as opposed to costs on an attorney/client scale as applied for by the applicant.

S. B maphalala

JUDGE