IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 3819/2000

In the matter between

SIZA MOTSA	APPLICANT
And	
PHILLIP MKHONTA	1ST RESPONDENT
JOSEPH SWANEPOEL	2nd RESPONDENT
Coram	S.B. MAPHALALA - J
For Applicant	MR. M. MAMBA
For Respondents	MR. THWALA

JUDGEMENT

(17/07/2001)

This is an application for rescission of judgement for an order as follows:

a) Rescinding and/or setting aside the order granted by this court in favour of the respondent on the 30th March 2001.
b) Ordering the respondent to pay costs hereof (only in the event of her opposing this application).
c) Granting the applicants such further and/or alternative relief as this court deems just.

This matter is brought by way of application. When the matter was called in the contested motion of the 25th May 2001, Mr. Thwala submitted that the order, which is sought to be rescinded was executed by the Deputy Sheriff of the Shiselweni District

on the 27th March 2001. The matter had come to an end thereafter and as such his instructions to act for the respondents also came to an end. For this reason he requested Mr. Mamba for the applicant o re-set the matter and serve the respondent as the present application was served on his correspondent. He told the court that he has no duty to go after the respondents. In short Mr. Thwala's argument is that his office is no longer representing the respondents in this matter.

Mr. Mamba for the applicant held the view that if that was so, respondents attorney should have filed an affidavit in this regard. He further submitted that they have furnished security in the sum of E200-00 in terms of the rules. That the respondent's attorney accepted the security and that it is rather strange at this point for them to rum around that they are not involved in this matter. It is Mr. Mamba's view that they are still representing the respondent. To support this proposition he cited the case of Muller vs Paulsen 1977 (3) S.A. 206 where a defendant (applicant) had applied to set aside a judgment, given by default, after the plaintiff had twice attempted to execute a writ of execution thereon and had instituted proceedings in terms of Rule 45 (12) (i). The plaintiff (respondent) had filed a notice of objection in limine to the application on the grounds that (1) no security had been furnished

for the payment of the costs of the default judgment and (2) the application did not comply with the provisions of Rule of Court 6 (5) (a). It was held, that the proceedings were still pending for purposes of Rule 6 (11) and had not been finally determined: it was competent and proper to utilise the provisions of Rule 6(11). Stewart J had this to say:

"What the final determination of a case actually is, will, in my view depend upon the circumstances of each case and upon the litigation concerned. Theoretically, at any rate, it is always possible to re-open a case but practical considerations must, of course, apply. In this particular matter I consider that the case is still pending for purposes of Rule 6 (11) and has not been finally determined. From a practical point of view, it is quite obvious that the parties are still represented by the same attorneys and the time lapse since the default judgement was granted is not such as to cause the parties or attorneys concerned any embarrassment if they are regarded still as being attorneys of record".

The crisp issue to be determined in this matter is where the service by the applicant of the notice of application on the respondent's attorney is proper or competent in view of their contention that they no longer represent the respondents. I am inclined to

agree with Mr. Mamba that the service was proper in view of the dicta in Muller vs Paulsen (supra), I rule that the matter proceed to the merit for the determination of the main application.

S.B. MAPHALALA

JUDGE