THE HIGH COURT OF SWAZILAND

AMKA PRODUCTS (PTY) LTD

Plaintiff

EVUKUZENZELE WHOLESALERS

Defendant

Civil Case No. 2090/2001

Coram	S.B. MAPHALALA – J
For the Plaintiff	Advocate P. Flynn (Instructed by Robinson Bertram)
For the Defendant	Mr. O. Ndzima

JUDGMENT

(17/09/2002)

The Application

The application before me is in terms of Rule 30 (1) of the Rules of this court where the defendant seeks for an order in the following terms:

"a) Setting aside as an irregular step for proceedings, plaintiff's following pleadings:

i) Notice to discover

ii) Discovery affidavit

iii) Notice to compel discovery and

iv) Notice of bar

The basis of the application is that the plaintiff made an application for summary judgment which application was left hanging after an affidavit resisting same was filed. Thereafter plaintiff sought to file the other pleadings without following proper procedure and steps in terms of the rules of the court.

b) Awarding defendant costs of suit at the scale as between attorney and own client.

c) Any further and/or alternative relief.

Plaintiff's Submissions.

The matter was set-down as a contested matter by the plaintiff before me on the 28th August 2002, at 2.15 pm. It appears from page 2 of the Notice of Set-down that defendant's attorneys (Maphalala & Company) were served with the Notice of Set-down the previous day the 27th August 2002, at 11.47am as attested by a signature after the following words:

"Received copy hereof this 27th day of August 2002
.....11.47
Signature"

When the matter was called at 2.15pm on the 28th August 2002 there was no representative for the defendant and the matter proceeded in his absence. I allowed Mr Flynn to argue the matter on behalf of the plaintiff.

It was contended on behalf of the plaintiff that the defendant has failed to comply with Rule 30 (1) in that it has failed to bring the Notice within fourteen (14) days of becoming aware of the irregularities complained of. To buttress this point the court's attention was drawn to the case of ***Uitenhage Municipality vs Uys 1974 (3) S.A. 800 (E)***. Defendant has failed to show that it has or will suffer prejudice (see ***Foster vs Carlis & Houthakkes 1924 T.P.D. 247***). It was further contended that a party should not wait until the trial to invoke the provisions of Rule 30 as this amounts to an abuse of the court process (see ***Hanson Tomkin of Finkelstein vs DBN Investments (Pty) Ltd 1951 (3) S.A. 765 (U)***).

The court has a discretion and it is not intended that a breach of the rules should necessarily be visited with a nullity (see ***Northern Assurance Co. Ltd vs Somdaka 1960 (1) S.A. 588 (AD)***; and ***Trans Africa Insurance Co. Ltd vs Maluleka 1956 (2) S.A. 273***). It was argued further in this regard that in any event the present trend of the decisions is to condone irregularities (see ***Northern Assurance Co. Ltd vs Somdaka (supra)***).

Lastly, Mr. Flynn applied that in the event the court dismisses the application in terms of Rule 30 (1) to grant the plaintiff default judgment in terms of Rule 31 (2) as prayed for by the plaintiff in its notice of application for default judgement dated the 6th August 2002.

The History of the matter

The plaintiff prepared a Practice Directive in its notice of set-down of the 22nd August 2002, where the history of the action is outlined in the chronological order of the events. The events are as follows: On the 3rd August 2001 the plaintiff issued summons against the defendant. The defendant filed a Notice of Intention to Defend on the 22nd August 2001. On the 11th September 2001, defendant served a Notice to Furnish Security in terms of Rule 47. On the 25th September 2001, plaintiff filed a notice in terms of Rule 42 (2). On the 30th October 2001, defendant requested for further particulars to enable it to plead.

On the 22nd October 2001, plaintiff served and filed its declaration. On the 14th November 2001, further particulars were supplied to the defendant by the plaintiff. On the 6th December 2001, plaintiff filed an application for summary judgment. The defendant served and filed an affidavit resisting summary judgment on the 21st January 2002. The defendant was granted leave to defend the action by the court on the 25th January 2002.

On the 20th March 2002, plaintiff filed a Notice to Discover but erroneously served it on wrong attorneys. On the 29th April 2002, defendant filed a Notice to Compel Security for Costs in terms of Rule 47 (3) which was never argued. The plaintiff filed

a Notice of Intention to Oppose the application in terms of Rule 47 (3) advancing reasons that the matter was already pending with the Registrar.

On the 2nd May 2002, the plaintiff filed a Notice to Compel Discovery and the matter was removed from the court's roll on the 3rd May 2002. On the 6th May 2002, the plaintiff notified the defendant that security for costs was already in the trust account.

On the 23rd May 2002 the defendant served and filed a Notice of Set-down without any explanation.

On the 3rd June 2002, the plaintiff served and filed Notice to Discover. On the 8th July 2002, the plaintiff made an application to compel the defendant in terms of Rule 35 (11). On the 31st July 2002, the plaintiff filed a Notice of Bar. On the 6th August 2002, defendant filed a Notice of Appearance for default judgment. On the 8th August 2002, the defendant filed a Notice in terms of Rule 30 (1). On the same date the plaintiff filed a Notice of Intention to Oppose the application in terms of Rule 30. The matter was struck off the roll on the 16th August 2002, for lack of Practice Directive.

The plaintiff set the matter for argument on the 28th August 2002.

The Applicable Law *vis a vis* the facts of this matter

Rule 30 (1) of the High Court Rules reads as follows:

> "A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside".

The basis of the application by the defendant to set aside as an irregular step or proceedings, plaintiff's are the following pleadings:

i) Notice to discover
ii) Discovery affidavit
iii) Notice to compel discovery and

iv) Notice of bar.

That the plaintiff made an application for summary judgment which application was left hanging after an affidavit resisting same was filed. However, this allegation is not borne out by what is reflected in the Practice Directive dated 22nd April 2002, where in item 10 the plaintiff submitted that on the 25th January 2002, the defendant was granted leave to defend the action. Mr. Flynn who was instructed to argue the matter contended on this point that there is correspondence between the parties to confirm this point.

In my view, it cannot be said therefor on the face of the above mentioned that the issue of the summary judgment was left hanging as that issue was disposed of in the sense that the defendant was allowed to defend the action. All the pleadings by the plaintiff after the summary judgment was disposed of were therefore not irregular.

Further, the plaintiff filed a Notice of Bar calling upon the defendant to file its plea to the plaintiff's summons within three (3) days of receipt thereof, failing which it will be *ipso facto* barred from doing so and the plaintiff will apply to court for a judgment by default. The said notice was dated the 31st July 2002, and was served on the defendant 's attorneys on the same date. Defendant did not file the plea as required and therefore it was *ipso facto* barred. I wish to re-emphasise that there was nothing irregular about the notice of bar in the light of the fact that the summary judgment application had been disposed of after defendant was granted leave to defend the action.

In any event, the defendant has failed to comply with Rule 30 (1) in that it has failed to bring the notice within 14 days of becoming aware of the irregularities complained of (see ***Uitenhage Municipality vs Uys (supra)***. The defendant has failed to show that it has or will suffer prejudice (see ***Foster vs Carlis & Houthakkes (supra)***. A party should not wait until the trial to invoke the provisions of Rule 30 as this amounts to an abuse of the court process (see ***Hanson Tomkin of Finkelstein vs DBN Investments (Pty) Ltd (supra)***).

For the above-mentioned reasons I would dismiss the application in terms of Rule 30 (1) and grant plaintiff default judgement in terms of Rule 31 (2).

In the result, the application in terms of Rule 30 (1) is dismissed and default judgment in favour of the plaintiff is granted in terms of Rule 31 (2) of the rules with costs.

S.B. MAPHALALA

JUDGE