THE HIGH COURT OF SWAZILAND

JAMES BRYNE

Applicant

And

RMS TIBIYO (PTY) LTD

Respondent

Civil Case No. 1220/2002

Coram	S.B. MAPHALALA - J
For the Plaintiff	MR. MATSEBULA
For the Defendant Advocate	P. FLYNN (Instructed
	By Rodrigues and Associates)

JUDGMENT

(On application for rescission of a judgement granted by default)

(04/04/2003)

The Relief sought

In this matter the Applicant seeks an order inter alia that the Respondent should restore to the Applicant the motor vehicle registered SD 697 FN Opel Corsa bakki approximately E60, 000-00 which was by consent released to the Applicant; staying the execution,

condoning the late filing of the Defendant's notice to defend; setting aside the default judgement granted in favour of 1st Respondent/Plaintiff on the 11th October 2002; and cost of suit at attorney and/or client's scale as the default judgement application was not necessary because the parties were still negotiating settlement.

Background.

The summons in this matter was served on the Applicant on the 10th May 2002. A notice of Intention to Defend was filed on the 7th August 2002. The Applicant contends that negotiations were in progress. The Respondent filed a Rule 30 notice in respect of the late filing of Intention to Defend. According to annexure "B" being a letter dated the 21st August 2002, from the 1st Respondent to the Applicant's attorneys, the former agreed to hold the proceedings in abeyance for a further two weeks with a view to settlement including costs.

According to the Respondent the Applicant was granted several postponement of the matter. The matter was postponed to the 27th September 2002, by consent and on that date the Rule 30 notice was disposed of. According to the Respondent further the Applicant made no application for condonation thereafter and did nothing until default judgement was granted.

The Applicant has filed a founding affidavit in which it alleges inter alia that the default judgement granted

in favour of the 1st Respondent by this court on the 11th October 2002, be set aside in terms of Rule 31 (3) (b) and Rule 42 (1) (a) of the Rules of this court as well as further and/or alternative relief.

On the other hand the Respondent contends that the Applicant has not made out a case in terms of Rule 31 (3) (b). Rule 42 is not applicable in the circumstances of the case. Further, that the Applicant does not have a bona fide defence to the action.

The applicant's submissions.

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The Applicant contends that it has satisfied the requirements of Rule 31 and 42 of the Rules of court in establishing a prima facie case warranting a rescission and/or setting aside of the judgment of this court dated the 10th October 2002, for the following reasons:
Rule 31 (3) (b).

It is contended under this head that the Applicant has within a period of 21 days as set out in the above-mentioned rules launched the present application and showed a good cause for setting aside the same after having given reasonable explanation why default judgement should not have been granted in this matter in that the Applicant was not in wilful default as envisaged by this particular rule. The Applicant has demonstrated that the delay in filing the notice to defend has always been on account of the wish of both parties to settle the matter out of court to minimise the unnecessary escalation of costs as more fully set out in the parties' respective papers filed in respect of this particular application in so far as the period before and after the issuance of summons and before the granting of the default judgement is or are concerned. This is also confirmed by the Respondent in his answering affidavit with particular reference to page 67 of the Book of Pleadings namely paragraphs 6.2, 6.3 and paragraph 6.8.

The Applicant submitted further that the application is bona fide without the intention of delaying the Plaintiff's claim. To this end Mr. Matsebula directed the court's attention to correspondence which exchanged between the parties prior to the judgment being granted.

It is contended further that the Respondent's allegation that Applicant filed the notice to defend late due to wilful disregard of the rules of court overlook important factors. Firstly, at page 67 of the Book of Pleadings, the Respondent at paragraph 6.2 stated the following:

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"It has always the intention of the Plaintiff to keep this matter out of the courts. I beg to refer to the confirmatory affidavit of the Respondent".

Secondly, that the delays were due to that and that it was not a two-way negotiations but it involved more than three parties, namely, the Applicant, the Broker and the Insurer. In this regard the court was referred to annexure JB1 to 5 on pages 78 and 84 to the effect that all these parties had to do investigations and consultations to make informed opinions on the settlement agreement.

It was contended further that had it not been for the crafty manner in which the default judgement was secured by the Plaintiff, the Applicant had high prospects of succeeding in its intended application for condonation of the late filing of the notice to defend, notwithstanding that it had been filed out of time since the Respondent had not yet applied for default judgement and as such, no prejudice would have been suffered by the Respondent at that stage. To buttress this point Mr. Matsebula cited the cases of Washaya vs Washaya 1990 (4) S.A. 41 and Foster vs Carlis and another 1924 T. P. D. 47.

Lastly, under this head Mr. Matsebula argued that courts have afforded Defendants the opportunity to defend claims launched against them even in instances where default judgment has already been granted unlike in the present case where nothing had been done by Plaintiff after issuing the summons. The court was referred to the case of Msibi vs Mlaula Estates Ltd 1970 - 76 S. L. R. 34 to support this proposition.

Rule 42.

Under this head it is contended on behalf of the Applicant that the default judgement itself was granted in error within the provision of Rule 42 in that the affidavit in proof of damages was signed by the Respondent himself yet in damages action the usual mode of proving damages is by means of medical expert evidence on affidavit or orally. In casu the Respondent has an interest in the case and cannot be taken as an independent witness

and cannot impartially assess the fair and reasonable damages to be awarded in his own case. To support this point the court's attention was directed to the dictum in the case of Schimper vs Monastery Corporation and another 1982 (1) S.A. 612 at 615 C to E.

It was argued that in the present case Plaintiff failed to place prima facie evidence before court justifying the award as the courts have recognised that the mere placing of documents and medical before them is not enough proof of reasonable damages and placed the court in an anomalous position in assessing the fair award to be made in a given case. That at the most, the alleged Doctor Jere's medico - legal report annexed to Plaintiff's affidavit in proof of damages, amounts to a medical document placed before court without oral or sworn medical evidence being led. The court was referred to the case of Sekgota vs South African Railways and Harbours 1974 (3) S.A. 310 at 311 E that this procedure creates extreme difficulties for the Judge to make a proper assessment of an adequate award of damages, notwithstanding that in that case the document had been placed before court by consent.

In consequence, it is contended that Plaintiff's failure to produce adequate and prima facie proof of its damages the court erroneously awarded him the full amount claimed without giving due affect to all the factors which should properly have been entered into the assessment of what is due to him in respect of special and general damages. Mr. Matsebula cited the case of Madzinane MS vs Swaziland Guards (Pty) Ltd and another (unreported) H.C. Civil Case No. 2909/2000 wherein no notice to defend had been filed at all by defendants but Sapire CJ stated that this being a damages claim, oral evidence had to be led to ascertain how much was due to the Plaintiff.

Lastly, it was submitted on behalf of the defendant that the court should exercise its wide discretion in terms of the rules and the common law and grant the application for rescission to enable defendant to defend the action both on the merits and quatum or at least on quatum only.
6 The Respondent's submissions.

It was contended on behalf of the Respondent that the route in terms of Rule 30 was taken up with the court after the Respondent had afforded the Applicants an opportunity to enter into real and concerted settlement negotiations. The Applicant was afforded a period of two weeks from the 21st August 2002, referred to as annexure "B" of the Applicant's founding affidavit. The Applicant was granted several postponements of the matter. The matter was postponed to the 27th September 2002, by consent and on that day the Rule 30 notice was disposed of. The Applicant made no application for condonation thereafter and did nothing until default judgment was granted.

Mr. Flynn in the main argued that the Applicant has not made out a case in terms of Rule 31 (3) (b). Rule 42 is not applicable in the circumstances. The court was referred to Herbstein and Van Winsen (supra) in support of the Respondent's case.

The above are the issues in this matter.

I have considered the arguments advanced by counsel for both parties. I have to decide whether the Applicant is entitled to a rescission of the default judgement either in terms of Rule 31 (3) or Rule 42 of the High Court Rules. I shall proceed to examine the issues sequentially, viz a) Rule 31 (3) and Rule 42, thus:

a) Whether Rule 31 (3) is applicable in casu. Rule 31 (3) (b) of the High Court Rules reads as follows:

"A Defendant may, within twenty-one days after he has knowledge of such judgment, apply to court upon notice to the Plaintiff to set aside such judgment and the court may upon good cause shown and upon the Defendant furnishing to the Plaintiff security for the payment of the costs of the default judgement and of such application to a maximum of E200-00, set aside the default judgement on such terms as to it seems fit".

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According to Erasmus, Superior Court Practice (Juta) at B1 - 201. The sub-rule does not require that the conduct of the Applicant for rescission of a default judgement be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that an element of wilfulness is absent (see Maujean T/A Audio Video Agencies vs Standard Bank of S.A. Ltd 1994 (3) S.A. 801 (c) at 803 J). Hence the element of wilfulness is one of the factors to be considered in deciding whether or not an Applicant has shown good cause. The requirements for an application for rescission under this sub-rule have been stated to be as follows (see Grant vs Plumbers (Pty) Ltd 1949 (2) S.A. 470 (o) at 476 -7):

a) He (i.e the Applicant) must give a reasonable explanation of his default if it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance;

b) His application must be bona fide and not made with the intention of merely delaying Plaintiff's claim.

c) He must show that he has a bona fide defence to Plaintiff's claim. It is sufficient if he makes a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour".

The above therefore is the premise within which the instant case is ought to be decided. It appears to me that the Applicant has in casu demonstrated that the delay in filing the notice to defend has always been on account of the wish of both parties to settle the matter out of court to minimise legal costs. There is a plethora of correspondence between the parties before and after the issuance of summons up to when the default judgement was granted which bears that out. The Respondent in its answering affidavit confirms this state of affair at page 67 of the Book of Pleadings at paragraph 6.2, 6.3 and paragraph 6.8, the said paragraphs read as follows:

AD Paragraph 6.2.

It was always the intention of the Plaintiff to keep this matter out of the courts. I
beg to refer to the confirmatory affidavit of the Respondent.

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6.3. Several letters were sent to the Defendant's as early as 21st October 2001 regarding the Plaintiff's claim with a hope that the claim would be referred to Defendant's insurers under its Public Liability Insurance Policy.

Enclosed herewith is batch of the letters referred to marked "JB1" to "JB6". Further on,
"6.8 Despite summons being issued there was still an attempt to keep the matter out of the court in the hope of settlement. I beg to refer to annexure "JB6"."

It appears to me further that the Applicant 's application is bona fide and I cannot detect any intention of delaying the Plaintiff's claim. There is ample correspondence between the parties which attest to this fact

viz, the Applicant's attorneys fax dated 20th August 2002 addressed to Respondent's attorneys which demonstrate its willingness to have the matter settled out of court. Applicant's attorney further addressed a letter dated 11th September 2002, stating that it had prevailed upon his client to ignore the issue of the merits of the matter and just concentrate on the quatum thereof to get the matter out of the way as soon as possible. This showed Applicant's bona fides in settling the matter as possible.

From the papers before me, it cannot be said that Applicant filed the notice to defend late due to wilful disregard of the rules of court. This is so for the following reasons: Firstly, at page 67 of the Book of Pleadings, the Respondents concedes that the parties intended to keep the matter out of the courts and were to try to settle it amicably. Secondly, the delays, it would appear to me were as a result of the fact that the negotiations in this matter were involved where more than two people were participating, viz the Applicant, the Broker and the Insurer. This fact is evidenced by annexures "JB1 to 5".

It appears to me, from the totality of the facts presented before me, that despite the facts that default judgement was secured by the Respondent the Applicant had a high prospects of succeeding in its intended application for condonation of the late filing of the notice to defend, notwithstanding that it had been filed out of time since the Respondent had not yet applied for default judgement and as such, no prejudice would have been suffered by

the Respondent at that stage (see Washaya vs Washaya 1990 (4) S.A. 41 and Foster vs Carlis and another 1924 T. P. D. 47).

For the above-mentioned reasons I would allow the application for rescission in terms of Rule 31 (3) (b).

b) Whether Rule 42 is applicable in casu.

In view of the finding I have made above viz, under Section 31 (3) (b) I am of the considered opinion that proceeding further with an examination whether the Applicant satisfies the requirements of Rule 42 would be an academic exercise, though I would express my reservations whether Applicant would have succeeded under this Head.

c) The court order.

The following order is therefore recorded:

i) The judgement granted in favour of the 1st Respondent/Plaintiff on the 11th

October 2002 is set aside; and ii) The costs to follow the event. Costs to be levied on the ordinary scale.

S.B. MAPHALALA

JUDGE