IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 331/03

LAZARUS NHLANGANISO KHUMALO	APPLICANT
AND	
HEZEKIEL MASHOVANE KHUMALO	1st RESPONDENT
K.J. VAN VUUREN N.O.	2nd RESPONDENT
IN RE:	
HEZEKIEL MASHOVANE KHUMALO	PLAINTIFF
AND	
LAZARUS NHLANGANISO KHUMALO	DEFENDANT
CORAM	K.P. NKAMBULE –J
FOR APPLICANT	MR. T.M. MLANGENI
FOR RESPONDENT	MR. Z. MAGAGULA

JUDGEMENT 29/10/2004

In this application filed under a certificate of urgency, the applicant prays for the following relief;

1. That the normal rules of court as to the time limits, notice and procedure be dispersed with and the matter heard as an urgent one;
2. That the judgement of theabove honourable court which was entered by default against the applicant on the 20th September 2004 be rescinded and set aside;
3. That the respondent be directed and ordered to release to the applicant the goods that were attached from the applicant on the 4th October 2004;
4. That the orders in terms of prayers (2) and (3) above operate with immediate and interim effect pending finalisation of this application;
5. Granting costs of suit.

Brief background

I shall refer to the parties as they appear in the above citation for purposes of convenience. The respondent, by combined summons, dated 18th February 2003, sued the applicant for the return of the following farm implements;

1. One tractor - Massey Ferguson 135.
2. One tractor-pulled plough; and
3. One oxen-pulled planter.

Alternatively payment of the sum of E3,500- being the value of the tractor pulled plough, E60,000- being the value of the Massey Ferguson

135, tractor; and payment of E500- being the value of oxen pulled planter).

There is also claim 'B' where the respondent claimed a sum of E2000- as market value of an ox belonging to him (respondent) which was kept at the applicant's residence. This ox was sold by the applicant without the respondent's consent.

On both A and B defendant further claims interest and costs of the suits,

A judgement by default was entered in the respondent's favour on the 20th September 2004 followed by an execution process on the 4thOctober 2004 which resulted in the attachment of goods listed on the inventory on the notice of application.

The application before court therefore, is for rescission of the default judgement of the 20th of September 2004.

In an application of this nature the court has a wide discretion which it will exercise in ccordance with the circumstances of each case. Courts have granted such application where the following circumstances exist:]

a) The applicant has given a reasonable explanation of his default or delay;
b) The application is bona fide and not made with the object of delaying the opposing party's claim;
c) There has not been a reckless and intentional disregard of the rules of court;
d) The applicant's action is clearly not ill-founded;
e) Any prejudice to the opposing party could be compensated for by an appropriate order as to costs.

Regarding a) above - has the applicant given a reasonable explanation for his default? From the affidavit it is clear that the matter was set down three times and the applicant failed to appear in all occasions. The applicant representative at some point never knew the whereabouts of the applicant and he communicated with respondents attorneys to postpone the matter. This clearly shows a reckless and intentional disregard of the court process by the applicant.

Can it be said that the application is bona-fide and not made with the object of delaying the opposite party's claim? The applicant has disappeared until the execution of the writ. The only thing that has brought him to court is the fact that he wants the items listed on the inventory returned to him, otherwise he would not bother coming to court. Litigation should come to an end. It is clear from the history- of this matter that the applicant is not prepared to see this matter to its logical conclusion. The applicant states in his affidavit that at one instance he went to the Industrial Court instead of the High Court. What makes this to be unbelievable is that at the Industrial Court there are pplice officers and the staff who man that court, It would be strange for a person to come there and never enquire from the staff as to which court would his matter be heard. The explanation is unbelievable and as such rejected. It is clear that the applicant did not come to court on this occasion. From the foregoing it is clear that there has been a reckless and intentional disregard of the rules of this court by the applicant.
The next point is that of prejudice. From the history of this matter there is no guarantee that the applicant will attend court hearings after he has failed to do so in three occasions. It is clear that the applicant is not serious about this matter. It is the opinion of this court that if an order for rescission would be granted the applicant would turn to his old ways

and not attend court hearings. This will be prejudicial to the defendant who has all along awaited his day in court. Such prejudice cannot possibly be compensated by an order as to costs, because here

we are dealing with goods whose value depreciate. By the time the defendant receives the goods in case judgement is finally granted in his favour these goods will have been rendered valueless. Such prejudice cannot be compensated by an order for costs.

Mr. Mlangeni for the applicant stated that he has established a prima facie defence. The defence by itself is not sufficient. Applicant must go a step further and furnish good reasons for his default. See the case of KAJEE AND OTHERS VS G AND G INVESTMENTS AND FINANCE CORPORATION (PTY) LTD 1962 (1) 575 (D) at page 577 E-F per FANNIN

"It seems to me that what is required in a case such as this is that the applicant must explain his default. He cannot simply claim the court's indulgence without giving an explanation. The explanation must be reasonable in the sense that ... it must not show that his default was willful or was due to gross negligence on his part. If the explanation passes that test, then the court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of the indulgence".

I may also refer to the decision in VINCOLETTE VS CALVERT 1974 (4) SA 275 per KOTZE J, at page 277 B, in which he stated that:

"An attitude of disregard of the process of the court is one upon which the court cannot place its stamp of approval".

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For the foregoing reasons and conclusions the applicant is not entitled to succeed in this application. The application is dismissed with costs.

K.P. NKAMBULE

JUDGE

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