THE HIGH COURT OF SWAZILAND

QUICK MAMBA (PTY) LIMITED

Applicant

And

TOOLROOM SERVICES (PTY) LIMITED

Respondent

In Re:

TOOLROOM SERVICES (PTY) LIMITED

Plaintiff

And

QUICK MAMBA (PTY) LIMITED

Defendant

Civil Case No. 2752/03B

Coram S.B. MAPHALALA – J

For the Applicant In Absentia

For the Respondent Miss L. Kunene

JUDGMENT

(05/03/2004)

On the 4th December 2003, an application for summary judgment was served on the Applicant's attorney and was set down for the 23rd January 2004.

The application was for an order as follows:

1.1 Payment of the sum of Ell, 238-05;
1.2 Interest of the aforesaid amount at the rate of 9% per annum a tempora morae from date of invoices to date of final payment;
1.3 Costs of suit.

The applicant served a notice in terms of Rule 47 (i) for security for costs on the 19th January 2003.

On the 23rd January 2004, the Respondent proceeded to court for the hearing of the summary judgment, the Applicants had not filed their opposing affidavit and summary judgment was granted. Consequently, the Respondent issued and served a writ of execution on the Applicants.

By notice of application dated the 27th January 2004, the Applicant applied that the writ of execution issued by the court on the 23rd January 2004, be stayed pending the finalisation of the matter. Further that the summary judgment granted by the court on the 23rd January 2004, against the Applicant be rescinded and set aside.

The Respondent in answer to the application for rescission of the summary judgment advanced the

following defence found at paragraphs 7 to 9 of the affidavit of Miss L. Kunene thus:

7. Save to admit that a Notice in terms of Rule 47 (1) was received by my offices, the remainder of the allegations contained in this paragraph are unknown to me and I do not admit or deny same. The Applicant is put to proof thereof.

8. 1 may however state that upon receipt of the Notice in terms of Rule 47 (1), I promptly transmitted same to my clients and we are awaiting instructions from them. The ten (10) days referred to in the notice has not yet lapsed.

9. I also wish to state that to the best of my knowledge and according to my understanding of the law relating to matters of this nature, the mere issuing of a Notice in terms of Rule

47 (1) does not have the effect of staying proceedings and as such the Respondent was perfectly entitled to proceed and obtain the summary judgment on the 23rd January 2004.

The point of law raised therefore, is that a notice in terms of Rule 47 (1) does not automatically stay the proceedings. A party must apply to court on notice for an order that proceedings be stayed and this can only be done if the other party has failed to furnish security in the amount fixed by the Registrar per Rule 47 (3).

It was contended for the Respondent in casu that the Applicant is not entitled to a stay of proceedings. First and foremost the Respondent has not failed to furnish the security and the dies for furnishing same only expires on the 2nd February 2003.

The matter appeared before Annandale ACJ on the 6th February 2004, who postponed it to the 9th February 2004 for arguments and the Applicants were to file their replying affidavit by 4pm of the same day.

When the matter was called on the return date being the 9th February 2004, the Respondent was represented by Miss Kunene and there was no appearance on behalf of the Respondent nor was any replying affidavit filed as directed by the Acting Chief Justice. Miss Kunene pressed that the matter proceeds in the circumstances. I allowed her to argue the merits of the matter.

Reverting to point in dispute Miss Kunene premised her arguments on the cases E.LS. Marketing (PTY) LTD vs Millemium Oil Mills (Pty) Ltd and another High Court Case No. 1069/2003; First National Bank of South Africa Ltd vs Paul Zondikhaya Shabangu - Civil Case No. 1956/98 (unreported) (per Sapire CJ - as he then was); and Ranbaxy (SA) (Pty) Limited t/a Ranbaxy Laboratories vs Swazi Pharm Wholesale (Pty) Ltd-Civil Case No. 1878/2003 (unreported).

The principle applied in the above-cited cases was elegantly outlined by Sapire CJ (as he then was) in the Zondikhaya Shabangu case (supra) at page 3 in fin 4, thus:

"The question which arises today is whether in terms of Rule 47 (1) the proceedings are stayed merely by the demand for security and whether this court is debarred from granting anyof the relief claimed in the notice of motion while the question of security remains undecided.

Section 47 (1) gives the right to any party entitled and desiring to demand security for costs, as soon as practicable of the commencement of the proceedings, to deliver a notice setting forth the grounds upon which such security is claimed and the amount demanded. The rule in sub-rule (2) provides further that if the amount of security is contested the Registrar shall determine the amount given.

This is the stage we have reached. The amount of security only, is contested. As yet the Registrar has not been called upon to determine the amount of security to be given not has he in fact determined such amount.

The rule then provides that if the party from whom security is demanded contests his liability to give security, or if he fails or refuses to give security in the amount demanded or the amount fixed by the Registrar within tern (10) days of demand, or the Registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

That is the relief given to the person demanding security. In must be noticed that such an application to court may only be made if the person upon whom the demand is made to furnish the security refuses to furnish security in the amount demanded or the amount fixed by the Registrar. Until the Registrar has fitted the amount therefore and the amount has not been paid, no application may be made in terms of that Rule. There is nothing in the Rule, which stays proceedings pending the decision of the Registrar on the amount of security to be furnished. The Rule goes on to provide that if security is not given within a reasonable time the court may dismiss any proceedings instituted or strike any pleadings filed by the party in default.

The remaining provisions of the Rule regarding the form of security are not relevant. On this reading of the Rule there is no basis for the Respondent to come to court today and say that the application in terms of the original notice of motion is incompetent or should not be acceded to and in view of the absence of any replying affidavit I intend to deal with the application on that basis".

In light of the above dictum, the Applicant has no grounds to rely on the Rule 47 notice for the default as well as not filing the opposing affidavit thereof.

Coming to rescission of the summary judgement in law such a remedy is available only in respect of judgement given where the party was in default of appearance Common law empowers the court to rescind a judgement obtained on default of ' appearance, provided sufficient cause therefore has been shown. In the case of Cairn's Executor vs Gaarn 1912 and 181 at 186 Innes JA stated the following:

"But is clear in principle that the long standing practice of our costs two essential elements of sufficient cause of rescission of judgement by default are:

(i) That the party seeking relief must present a reasonable and acceptable explanation of his default; and
(ii) That on the merits such party has a bona fide defence which, prima facie, carries some prospects of success.

It is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospects of success on the merits will fail in an application of rescission of default judgement against him, no matter how reasonable and convincing the explanation of his default"

In the present case the applicant deposes in the founding affidavit in paragraph 10 wherein it is stated that;

"I need not even state our defence to the above Honourable Court as the nature of our application is such that the defence is Hot material"

I agree with the submissions made by Miss Kunene that in light of the above the application for rescission is defective in that the application have failed to show the common law essential of sufficient cause. Further, Miss Kunene is correct that any party who contests the decision on the ground that it has erroneously granted would have to appeal the judgement. In the case of the Kingdom of Swaziland vs Atlas Investments (Pty)Ltd - Civil Case No. 1955/99 the following was said:

"In this case if there was an error in granting of the Summary Judgement the applicant's remedy would lie in an appeal, if not and if there is still any reason why judgement should not be observed or obeyed , then it is open to the Applicant to institute fresh proceedings probably by way of action proceedings to seek restitutio in intergrum on the grounds of mistake of fraud"

In the result, the application for Rescission is dismissed with costs. Costs to levied at the ordinary scale.

JUDGE