IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 1188/98

IN THE MATTER NETWEEN:

THEMBI GLORY NGCAMPHALALA	APPLICANT
vs	
FIRST NATIONAL BANK OF SWAZILAND	RESPONDENT
t/a WESBANK	
CORAM:	MASUKU A J
FOR THE APPLICANT:	ADVOCATE L.M. MAZIYA
FOR THE RESPONDENT:	MR. T.M. MLANGENI

JUDGEMENT

This is an opposed application for rescission of a Summary Judgement granted on the 30th March 1999, in favour of the Respondent herein.

The brief history of this matter is that on or about May 1998, the Respondent herein issued a combined summons for payment of El24 700.63 together with alternative prayers which include the return of a motor vehicle which was the subject of a disputed lease agreement between the parties.

After the Applicant filed its notice to defend, the Respondent as it was advised, filed an application for summary judgement, which was opposed by the Applicant, who filed an

affidavit in opposition thereto. The Respondent filed a replying affidavit and the matter became ripe for hearing.

Thereafter, the matter was postponed on numerous occasions, the last one being on the 5th March 1999, where the matter was postponed to a date to be arranged with the Registrar. It however appears from the papers that there was a difficulty in obtaining a date suitable to all the parties and as a result, the Respondent's attorney approached a member of the Registrar's staff and obtained a date for hearing the contested summary judgement hearing.

The Respondent's attorney accordingly set the matter down on Notice to the Applicant's attorneys for the 30th March 1999. On receipt of the Notice of Setdown on the 25th March 1999 the Applicant's attorneys drafted and sent a letter to the Respondent's attorneys, bearing the same date.

In the said letter which was annexed and marked TGN1, the Applicant's attorneys stated as follows:

"1. We refer to the above matter.

2. We are in receipt of a Notice of setdown for 30th March 1999.

3. You have set the matter down without any consultation with us whatsoever.

4. Your office is well aware that the client has engaged counsel in this matter and a date was to be arranged with him.

5. Counsel has prior commitments and will not be available on that date.

6. We suggest that we approach the Registrar to arrange a date suitable to all parties."

On the 26th March 1999, the Respondent's attorney replied to annexure TGN1, which appears to have been received by the Applicant's attorneys on the same day as evidenced by a stamp indicating receipt of the same.

For the sake of completeness, I shall quote the full text of the letter hereunder:

"FIRST NATIONAL BANK OF SWAZILAND LTD t/a WESBANK/THEMBI GLORY NGCAMPHALALA: CASE NO. 1188/98

1. We acknowledge receipt of your letter dated 25th instant which came through to us via fax.

2. It is disturbing to note that despite the difficulty in obtaining a date of hearing at the High Court due to the backlog of cases, and despite the extra effort being made by the High Court to deal with the situation, you are prepared to lose an allocated date on the feeble ground that your Counsel was not involved in arranging the date and that he is, in any event, engaged elsewhere on the date in question.

3. The issues involved in this matter are so simple and straight forward that your article Clerk could argue them; if your client can afford the luxury of Counsel, surely alternative arrangements can be made to instruct another local Counsel or, indeed, as so often is the case with your other matters, to instruct Counsel from South Africa. The matter is so simple that Counsel would be ready to deal with it in a matter of hours.

4. We make the inescapable conclusion that this is a delaying tactic which obviously suits your client who continues to have her cake and eat it - she has the use of our client's vehicle and refuses to pay for it.

5. You need hardly be reminded of the facts of WESBANK VS MIKE TEMPLE which dragged on for a long time, and the motor vehicle was eventually stolen at gun point somewhere in South Africa, which case your office is defending. In this way our client lost the only security that it could look to in order to recoup something from your client.

6. No serious investor can be expected to live with this kind of frustration.

7. If your Counsel is engaged in the Magistrate's Court in this date, there is a long - standing practise which is accepted in the Magistrates' Courts whereby matters are stood down to enable us to appear at the High Court, especially since legal arguments in this matter cannot be expected to be more than one and a half hours. If he is engaged at the High Court similar arrangements can be made.

8. We are going to such length in an effort to implore you to make yourselves available in Court on the 30th instant. Should you fail to do so we will raise these concerns and proceed to make submissions for relief on behalf of our client.

9. You are also reminded that on the 5th March 1999 this same matter was postponed because your same Counsel was not prepared to argue the matter, the reason being that your office had failed to alert him timeously that the matter was to proceed on that date. The Court bent over backwards in sympathy with Advocate Maziya, our only solace being an order for wasted costs on an attorney-client scale."

Although it does not appear on the Court file, it is common cause that the matter proceeded on the 30th March 1999 before the Chief Justice but in the absence of the

Applicant's attorneys. The learned Chief Justice proceeded to grant summary judgement in favour of the Respondent. It is this summary judgement that the Applicant seeks to rescind and set aside.

A judgement of a Court may be rescinded under one or more of the following heads, namely -

(i) Rule 31(3) (b);

(ii) Rule 32 (11);

(iii) Rule 42; and

(iv) the common law.

(See LEONARD DLAMEVI VS LUCKY DLAMEVI CASE NO.1644/93

(unreported)).

In this application, the Applicant failed to state under which of the above heads the rescission application was made and on enquiry at the hearing, Mr. Maziya informed the Court that the application was in terms of Rule 42(1) (a). I will pause and emphasize the importance of stating under which head the application for rescission is made in order to place the Court and the other side in a position to know whether or not the requirements for the relief sought have been traversed therein. Failure to do so will often result in the Court and the other side being ambushed and will hamper good preparation and argument.

Rule 42(1) (a) states as follows: -

"The Court may, in addition to any powers it may have, mero motu or upon the application of any party affected, rescind or vary."

(a) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby,...."

Mr. Maziya argued that the error in this matter which justifies the rescission of the summary judgement was that when the matter was before Court on the 5th March 1999, it was referred to the Registrar of this Court to state a date on which it was to be argued. The Court was urged to find that the action by the Respondent's attorney in unilaterally

finding a date for hearing the matter from the Registrar's office was an error, which if the Court had been aware of, would not have granted the summary judgement.

The submissions by Mr. Maziya cannot stand, as there is no patent or even latent error alleged. A party who is dominis litis is at liberty to approach the Court to find a date, as it appears in the papers that no date suitable could be obtained. In fact, early hearing dates become ideal in matters involving summary judgement where it is alleged that the Defendant has no bona flde defence but has filed papers for no purpose than to delay the action. In obtaining a date without consulting the other side, it must be stated that the party setting down the matter must do so on sufficient notice to the other side.

In order to succeed under Rule 42(1) (a), a party must show that there existed at the time of issue a fact of which the Judge was not aware, which would have precluded the granting of the judgement and which

would have induced the Judge, if he had been aware of it, not to grant the judgement. See LEONARD DLAMINI VS LUCKY DLAMINI supra at page 2. See also NYINGWA VS MOOLMAN N.O. 1993(2) SA508 @510. In casu, there is no such error which if the Chief Justice had been aware of, would have precluded him from granting the summary judgement. Obtaining a hearing date without consulting the other side, but on notice cannot constitute an error as envisaged in the above-cited cases. I thus find that the application for rescission must fail under Rule 42(1) (a).

During argument, I stated that in my view, the proper head under which the application should have been made is Rule 32(11) of the Rules of the High Court as amended and which reads as follows: -

"Any judgement given against a party who does not appear at the hearing of an application under sub-rule (1) or sub-rule (2) may be set aside or varied by the Court on such terms as it thinks just."

In setting out the requirements for succeeding in an application under this sub-rule, Dunn J, in the case of LEONARD DLAMINI VS LUCKY DLAMINI (supra) at page 2 to 3 states as follows: -

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"For a proper application of Rule 32(11) an applicant must give notice of his application to all parties affected thereby. He must, in his application satisfy the requirement of showing "good" or "sufficient" cause, that is, present a reasonable and satisfactory explanation for his failure to appear at the hearing of the application and satisfy the Court that on the merits, he has a bona fide defence which, prima facie carries some prospect of success."

I am in respectful agreement with Dunn J's enunciation of the law in this regard. I however, find that there is no need in this case to show that the Applicant had a good and bona fide defence to the claim as in casu, the Applicant had filed its affidavit resisting summary judgement and which the Court considered on the 30th March 1999. In the LEONARD DLAMINI case, no affidavits resisting summary judgement had been filed hence the requirement that a case for bona fide defence must be made out.

I will now mero motu decide whether the Applicant made out a case under Rule 32(11). In the Founding Affidavit, the Applicant states as follows:

"4.7 Mr. Maziya was advised by the Deputy Registrar that she was still to consult with Justice S. Maphalala with the view of finding a date and then confirm same if it was suitable to both Mr. Mlangeni and Mr. Maziya. Mr. Maziya advised Mr. Mlangeni about this and both parties then awaited to hear from the Deputy Registrar.

4.8 On the 25th March 1999 my attorney BHEKI G. SIMELANE & COMPANY received a notice of set down from Mlangeni & Company for the 30th March 1999. The notice of set down was made without consultation whatsoever whether with Mr. Maziya or BHEKI G. SIMELANE & COMPANY.

4.9 I am reliably informed that this date was never arranged with the Registrar and was not suitable to both parties but only to Respondent's attorneys.

4.10 Mlangeni & Company was advised on the 25th March 1999 that Mr. Maziya who I had retained was not available on the 30th March 1999 because of prior commitments and my instructions were strictly that this matter be handled by Mr. Maziya. A copy advising Mlangeni & Company of the position is annexed hereto marked "TGN1."

4.11 Mlangeni & Company responded on 26th March 1999 in a very sarcastic and uncalled for manner in this letter annexed hereto marked "TGN2."

4.12 The Deputy Registrar was required to draw the attention of the above Honour Court to the fact that no one was available to handle this matter and it was my belief that the matter will not proceed on that date.

5. I submit that I was not in wilful default by not appearing in court on the 30th March 1999 as I was under the reasonable impression that the matter will not proceed.

In paragraphs 4.12 and 5, the Applicant shows that she was personally aware that the matter was proceeding but did not appear in Court because "I was under the reasonable impression that the matter will not proceed."

This does not constitute good or sufficient cause. Further, the Applicant's attorneys do not state the reasons why they did not appear in Court on the 30th March 1999, having contented themselves with filing a confirmatory affidavit without explaining the reason for the non-appearance. The Applicant's attorneys knew that the matter would proceed on the 30th March 1999 but did not appear in Court even if to ask for a postponement if the reason was that Counsel briefed in the matter was not available. The Applicant herself was aware of the date as it appears in paragraph 5 and the Court would probably have been sympathetic to the Applicant if she had appeared in person.

Attorneys must take the Court seriously. It is not enough for Attorneys or litigants to draft letters to the Registrar and hope that the Court will postpone matters on the strength of such letters. This is inexcusable and borders on denigrating the authority of this Court.

I accordingly, find that the Applicant has also failed to make out a case for relief in terms of the provisions of Rule 32(11). No good or sufficient cause has been shown for the non-appearance on the 30th March 1999 and it cannot be said that a reasonable and satisfactory explanation for failure has been made out.

The application is dismissed with costs on the normal scale as I can find no sufficient grounds for awarding the Applicant with costs on the punitive scale and no such grounds were suggested to me. I order that the stay of execution granted on the 9th April 1999 in terms of prayer 2 be and is hereby discharged.

T.S. MASUKU

ACTING JUDGE