IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 3973/2004

In the matter between

TERBLANCHE TRANSPORT (PTY) LTD Applicant

And

BHEKIZWE DELANO DLAMINI 1st Respondent

DEPUTY SHERIFF FOR THE DISTRICT OF HHOHHO 2nd Respondent

Coram J.P. ANNANDALE, ACJ

Mr. Mkhatshwa (Mthembu Mabuza Attorneys) 1st Respondent

Mr. Maziya (Elvis M. Maziya Attorneys) 2nd Respondent

JUDGMENT

24 March, 2005

[1] The application before Court was brought under the provisions of Rule 42, seeking (under a certificate of urgency), a stay of execution of a judgment of this Court, granted on the 1st October 2004 in favour of the first respondent, pending finalisation of an application to rescind and set aside the judgment which was granted against the present applicant. The applicant thereafter seeks leave to defend the main action and to file its plea within 21 days thereafter. Costs are sought against the respondent in the event that unsuccessful opposition to the above is brought.

[2] Although the original court file on which proceedings prior to the hearing of this matter was lost, due to unknown reasons, it is common cause that a rule nisi was granted on the 13th December 2004 to effectively put the matter on hold until the final outcome. Although it lapsed by default due to a non-extention of the interim relief caused by the missing court file, attorney Maziya followed the time honoured and exemplary tradition and abided by the interim order. He did not cause an execution in the time being and the spirit he displayed is commendable.

[3] At the hearing of the matter, the parties were ad idem that the interim relief should in fact still have been applicable and it was agreed to revive the rule nisi until the outcome of this application.

[4] The essence of the application is that a judgment was obtained against the applicant (Terblanche), by default of appearance to defend which was caused by a lack of timeous and proper notification of the claim against it and not through indifference, laxity or acquiescence. It is that judgment which is sought to be set aside on the grounds I will revert to hereunder.

[5] The second respondent wisely decided to enter no appearance with the result that he will have to abide with the decision on the application, largely caused to be brought to court, at great expense, due to the non-compliance with the rules of court by the deputy sheriff.

[6] I pause here and deviate to address an issue that is not only relevant to this matter but to the entirety of enforcement of civil jurisdiction of the High Court in general.

[7] It is trite that the court has by necessity to be able to rely on the sheriff or deputy sheriffs to serve processes of court, over and above the enforcement of the orders of the court. Generally, the police do not have a role in this, save to give assistance to the sheriff or deputy sheriff where it is required.

[8] By implication, as officers of the court, deputy sheriffs have to be presumed to have sufficient knowledge of the law and procedures insofar as their own duties are concerned. It requires that the deputy sheriff be cm fait with at least the rules of court, pertaining to the service of processes which initiate proceedings, since the courts have to rely on the word of a deputy sheriff, substantiating the bringing to the knowledge of a defendant of an action instituted against him, her or it, when a judgment is considered by default of an appearance to defend. The same applies to attorneys or their clerks, when applications of an urgent nature is brought to court.

[9] If the deputy sheriff who certifies a process to have been properly and duly served makes a mistake, it could very well result in the derailing of the judicial process and a negation of the audi alteram partem principle which is a conditio sine qua non to preserve the right to be heard and to a fair trial.

[10] It is the absence of this knowledge and a proper application of the rules of court which the applicant contends to be the cause of its complaint.

[11] In paragraph eight of the applicant's director's founding affidavit, he alleges that Terblanche not only wished to defend the action brought against it but also filed a plea as soon as it could. However, the plea was filed out of time and it resulted in a judgment taken against it, through no fault of its own but due to the non-observance of the rules by the deputy sheriff who purported to serve the summons.

[12] He states that a "wanton disregard for court of process (sic) and the time limits applicable thereto" is the cause of its dilemma. In paragraph 8.2 he says:-

"I am advised and verily believe that summons issued launching the first respondent's action, were served on one Peter Molefe on the 5lh August 2004. This said person is employed by the applicant as one of its truck drivers and was at the time temporarily in Swaziland on delivery assignment.

8.3 I am also advised that as the applicant neither has its registered office or place of business anywhere in Swaziland, it is a peregrinus of this honourable court....

8.4 I am further advised and believe that the rules of this honourable court make no provision for the manner in which service of the summons was affected.

8.4.1 The aforesaid person is not an agent of the applicant nor was he duly authorised in writing to accept service.

8.4.2 The aforesaid person was, neither a responsible person found at applicant's registered office nor

was he a responsible employee at applicant's principal place of business.

8.5 As a consequence of the aforegoing, I only became aware of the summons during October 2004, after same had been delivered at our offices.

9. I am advised and verily believe that the judgment in the action was granted in error in the circumstances as set out hereinbefore." it is based on damages, which had to be proven by an expert and that expertise was not proven. This aspect remains co-incidental to the present application and does not require to be decided, though trite.

[14] Rule 4(2)(e) which the applicant refers to reads as follows:-

"4(1) Service on the person to be served of any process of the court directed to the sheriff... shall be effected by the sheriff or deputy sheriff...

(2) .....

(e) In the case of a corporation or company, by delivering to a responsible person at its registered office or a responsible employee thereof at its principal place of business within Swaziland, or if there is no such person willing to accept service, by affixing as copy to the main door of such office or place of business, or in any manner provided by law;

(f) By delivering a copy thereof to an agent who is duly authorised in writing to accept service on behalf of the person upon whom service is to be effected;"

[15] I again need to pause and deviate in order to remark on the manner in which the matter was brought before court.

[16] According to the papers, the initial action was brought under case number 1604/2004. It would have been cited as "Bhekizwe Delano Dlamini versus Terblanche Transport (Pty) Limited". The present case number is 3973/2004, with an inverse citation.

[17] A substantial part of the confusion and inaccuracies that prevailed number and citation of the present application. It seeks to set aside the granting of an application under rule 31(3)(a) for a judgment by default of appearance to defend, under a different case number. The result is that the initial matter is not before this court, that the return of service by the deputy sheriff and the summons and the (late) plea is likewise not available. The applicant furthermore did not incorporate the initial pleadings as annexures in the present application.

[18] For purposes of clarity and practise, it yet again needs to be stated that in the event that the setting aside or rescission of an order in an existing case is sought, such application is to be brought under the same case number, cited as "In re..... ". It is not only salutary, but logical. I also find support for this view in the judgment by Tebbutt, J.A. (Leon J.P. and Steyn J.A. concurring) in the unreported Appeal Case No. 43/1999 of Reckson Mawelela versus M.B. Association of Money Lenders and Another, where at page 8, with reference to a point taken that a new case number had to be used where an application for rescission is made, the following was said:

"The application for rescission was clearly interlocutory in nature (see Pretoria Garrison Institutes v

Danish Variety Products (Pty) Ltd 1948(1) SA 839(A) at 870. Herbstein and Van Winsen op cit pp 880 and 881 refer to the refusal of an application to rescind a default judgment as being "interlocutory in form." It is clear that in interlocutory proceedings no new proceedings are initiated (See e.g. Hendricks v Santam Insurance Company Ltd 1973(1) SA 45(C) thus requiring a new case number.)"

[19] Returning to the present issue, the first respondent relies on a point of law only. No papers were filed to oppose the merits or demerits of the application to set aside the judgment obtained by default.

[20] Following on the heels of the judgment, Terblanche apparently filed a plea in the action. It resulted in a letter sent to it by attorney Maziya, acting for the then plaintiff, and dated the 2nd November 2004. Itreads:-

"Kindly note that your Notice to Defend ar,d Plea are improperly filed since judgment was entered against the defendant herein on the 1st October 2004 and I am working on a writ to attach at this moment."

[21] As said above, the conduct of attorney Maziya typifies the respected traditions of the legal profession in that he clearly conveyed that victory is not sought to be brought about by ambush. He did not need to nor sought the plea to be set aside as an irregular step, being filed out of time, as he could have done and thereby incurring further costs to himself. By writing as he did, and obtaining a receipt of his letter on the following day by the then defendants attorneys, it established the commencement of dies, which for the present situation, he relies upon in that a period of 21 days is prescribed under rule 31(3)(b).

[22] By way of a Notice to oppose the defendant's application for rescission, the plaintiff states that:

"Defendants application for rescission is out of time in terms of the High court Rule 31 (b) since it has been filed long after 21 days from the date of knowledge by plaintiff of the knowledge of the judgment being the 3rd November 2004 as per copy of plaintiffs letter to defendant hereto attached."

[23] The rule referred to reads that:

"31(3)(a) Whenever a defendant is in default of delivery of intention to defend or of a plea, the plaintiff may set down the action....for default judgment and the court may.... After hearing such evidence as the court may direct, whether oral or documentary (i.r.o. damages, my insert) grant judgment against the defendant...

(b) A defendant may. within twenty one days after he has had knowledge of such judgment, apply to the court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown ... set aside the default judgment on such terms as it deems fit."

Without further ado, the defendant/applicant falls outside the mandatory time limits imposed on it by this rule. It cannot now seek to have the judgment rescinded under rule 31(3)(b).

The applicant's attorney argues that it does not mean to be the end of the matter as there are three different avenues to the applicant -over and above rule 31(3)(b), there is also the common law under

which an improperly obtained judgment could be set aside, and also the provisions of rule 42, the modality of its choice herein. The application at hand is indeed exclusively brought for adjudication under rule 42, not rule 31(3)(a) or the common law.

-Rule 42 is headed to deal with variation and rescission of orders.
It reads that:

"R42(l) The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary:

(a) an order or judgment erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties."

[26] It is common cause that the further provisions of this rule have been complied with - it requires notice to the other parties.

[27] The essence of the opposition to the application is that it should have been brought under rule 31(3)(b) and not rule 42. If rule 31(3)(b) is the one and only option available to the applicant, it would have been out of time and it would be the end of the matter.

[28] The application does however not stand to be considered under rule 31(3)(b) but under rule 42. It

requires to be decided whether rule 42 could salvage the position of the applicant.

[29] Equity, fairness and the opportunity to be heard militate against a strict application of rule 31 to the exclusion of the common law remedy as well as the statutory provisions of rule 42.

[30] Fact of the matter is that the applicant contends that it did not know about the action until it received the summons, whereafter it filed notice to defend as well as its plea. It is not in issue whether it was filed or not, only that it was after the stipulated time. The alleged cause of being informed late about the action is that the deputy sheriff did not serve the process (summons) in accordance with the mandatory requirements of rule 4(2)(e) (or (f)). Since the return of service is not before this court it cannot be verified ex facie the document but the allegations of the director of the applicant stands uncontroverted and susceptible of being accepted as correct.

[31] The legal point raised by the first respondent exclusively relies on the lapse of time since the applicant was made aware of the judgment. If rule 31(3)(b) is the only bastion on which it could rely, the judgment will remain, since the lapse of time eradicated the foundation of reliance on that rule.

[32] Mr. Maziya argues that in the event the court holds against him insofar as rule 31(3)(b) goes, and finds rule 42 to be acceptable, it would nevertheless require that the time limits in the former rule be interpolated to the latter. Thus, if rule 42 is found to be applicable, it would still require the necessary steps to be taken within 21 days after knowledge of the judgment. Rule 42 is tacit insofar as time limits go.

[33] The question remaining to be decided is whether rule 42 empowers Terblanche to seek a rescission of the default judgment, or not.

[34] Rule 31 requires the applicant to show good cause for rescission, within the prescribed time, and also security to be furnished. Rule 42 has none of these requirements but it stands to reason that at minimum a cut-off point must be had. It was argued that such point be when execution of the judgment or order is being effected. In the present situation it has not become an issue and does not need to be decided. A reasonable time depends on other circumstances as well - See First National Bank of South Africa vs Van Rensburg NO: In re FNB of SA v Jurgens 1994(1) SA 677 T at 681 B - G, Eloff JP held that three years is not a reasonable time, despite the absence of a time limit in the rule. "...even if the applicant proved that Rule 42(1) applied, it should not be heard to complain after the lapse of a reasonable time. " This is because "it is in the interest of justice that there should be reasonable certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken in the subject."

[35] In casu the application was served on the first respondent on the 10th December 2004, one calendar week after the letter by the then plaintiff's attorney to inform it that judgment was already taken.

[36] What needs to be decided is whether rule 42 could be applied to remedy a situation where it prima facie is shown that the defendant did not know about the action against it, through no fault of its own, (it did give notice to defend and file a plea, albeit just too late), but due to a ineptitude of the deputy

sheriff to properly serve it with the summons. The alleged fact is not controverted, the only issue being taken is the legal point of rule 42 being inapplicable.

[37] In Maujean t/a Audiovideo Agencies vs Standard Bank of South Africa Ltd 1994(3) SA 801(C), King J held (at 805 and referring with approval to Gardiner J in Chedburn vs Barlett 1931 CPD, 423 and Newman vs Ayten 1931 CPD 456) that "The true test, to my mind, is whether the default is a deliberate one - i.e. when a defendant with full knowledge (my emphasis) of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing."

[38] The applicant's version is that it did not know in time that it was faced with the action by the plaintiff. When it eventually receive the process, when it as well could have lawfully ignored it because service was not properly effected under rule 4(e), it nevertheless filed its notice of intention to defend as well as its plea to the claim.

[39] In Schmidlin vs Multisound (Pty) Ltd 1991(2) SA 151(C), which was concerned with an application for rescission under rule 42, Van den Heever J (as her Ladyship then was) held that:

"Acquiescence in the execution of a judgment must surely in logic normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment would."

[40] The present applicant states unequivocally that it did not acquiesce to any judgment at all - it did what it could and as soon as it could, but it was out of time and the nett result was the judgment against it that it now seeks to be rescinded under rule 42.

[41]---In--terms of this rule, once the-court holds that the judgment was erroneously sought or granted, it should rescind it without further enquiry. It is not necessary for a party to show good cause for the rule to apply. See Promedia Drukkers & Uitgewers (EDMS) BPK vs Kaimovvitz & others 1996(4) SA 411(C), where van Reenen J extensively set out the applicability of rules 31(2)(b) (being the equivalent of our local rule 31(3)(b) and of rule 42(1) as well as the common law, insofar as rescission under the present circumstances go. Therein, he held inter alia that rule 42(1)(a), which is essentially exactly the same as the evenly numbered rule in Swaziland and which judgment has persuasive value, provides that the (Supreme Court) may rescind or vary an order or judgment erroneously granted in the absence of any party affected thereby. It is a procedural step designed to correct expeditiously an obviously wrong judgment or order.

[42] For the present purposes, the uncontroverted allegation is that service was effected upon a driver of the applicant, who happened to be within Swaziland at the time, whereas the applicant (defendant in the main matter) neither has its principal or any place of business in Swaziland, nor a registered office. It is aperegrinus. Prima facie, service of the summons commencing an action was not served on it in accordance with the rules of court, especially so where a legal entity is involved and where there is no close relationship between the person of a truck driver and the management of a company, being the person or persons responsible to decide what to do about a summons once it comes to their attention.

[43] The end result was that the management of the defendant company was not aware of the summons, since it was incorrectly served, but once the defendant became aware of it, it filed the necessary papers, albeit out of time.

[44] It is this error which the applicant holds out as materially affecting it right to defend a claim, taken away by a default judgment, erroneously granted. Should the court have been aware that the defendant company could not be deemed under the provisions of rule 4(2)(e) or even (f) to have been appraised of the matter, it would not have granted the application for judgment by default.

[45] The rule expressly and by necessity requires that a company or corporation, being a legal entity, be served with a process of court in the prescribed manner, for obvious reasons. In the present matter, it was not properly served and it could not have been deemed to have been informed of the action.

[46] The result was that the judgment was erroneously entered against the applicant, based on the assumption that it had been properly served and that it was in default of filing notice to defend and pleading to the claim.

[47] This falls squarely within the ambit of rule 42(a) which regulates an order or judgment erroneously granted in the absence of a party affected thereby.

[48] Of course the respondent is correct in saying that rule 31(3)(b) enables such a party to seek a rescission, and to do so within 21 days after knowledge of the judgment. It cannot however preclude a party to rely on either rule 42 or the common law from seeking the same result, as the respondent contends. Objectively, the applicant cannot be said to have wasted time or that the delay to seek a rescission was unduly long. It acted expeditiously enough.

[49] It is for these reasons that the objection de iure by the respondent cannot be sustained. The respondent relies exclusively on the legal point and does not oppose the merits. It is therefore that it be ordered that the judgment entered against the applicant/defendant be rescinded and set aside, with the result that the plea which wasfiled is hereby ordered to be admitted in the matter which is to take its normal course, thereafter as prayed in prayer 3 of the Notice of Motion in terms of Rule 42, dated the 10th December 2004. No execution shall be proceeded with unless it follows the further outcome of the matter.

[50] Costs of this application follows the event.

[51] The Registrar shall cause a copy of this judgment to be brought to the attention of the Association of Sheriffs and Deputy Sheriffs, to stress the importance of complying with the letter of the law.

ANNANDALE, ACJ