THE HIGH COURT OF SWAZILAND

THE ATTORNEY GENERAL

Applicant

And

PROFESSOR DLAMINI

Respondent

Civil Case No. 778/2004

Coram: S.B. MAPHALALA-J

For the Applicant : MR. S. KHUMALO

For the Respondent: MR. P. SHILUBANE

JUDGMENT

(9th February 2006)

The relief sought

[1] This matter has earned itself a chequered history and in almost all its twists and turns I have presided. The last time the matter appeared before me I had granted a default judgment in favour of the Respondent on the 4th June 2004, for malicious prosecution for a sum of E75,

000-00 being damages for *contumelia,* deprivation of freedom and discomfort suffered by him. For present purposes the Applicant has filed an application setting aside and rescission of the said judgment by default. The Applicant relies on the provisions of Rule 31 (3) of the Rules of Court.

The background.

[2] In order to fully understand the present application, it is imperative to recount the history of the matter as follows: Plaintiff issued summons against the Defendant on 19th March 2004 for malicious prosecution and claimed payment of the sum of El50, 000-00 being damages suffered by the Plaintiff. The Defendant failed to enter Notice of Intention to Defend and when Plaintiff applied for judgment by default, Defendant opposed the application on the ground that summons had not been served on the Attorney-General as required by the Rules of Court. The court *(per* Maphalala J) held that the summons had been properly served on the Defendant and granted default judgment on 4th June 2004, and ordered that submissions be made on the *quantum* of damages claimed by the Plaintiff.

[3] Thereafter Applicant filed a Notice of Appeal against the judgment granted on the 4th June 2004. The Respondent then filed a Rule 30 application against the appeal on the ground that the default judgment was not a final judgment and therefore not appealable. The court upheld the Rule 30 application with costs and set aside the Notice of Appeal.

[4] Subsequent thereto the Respondent filed an affidavit dated 30th April 2004, in proof of damages as directed in the order of the court dated 4th June 2004. Thereafter the court granted the Respondent damages in the sum of E75, 000-00 for special and general damages with costs on the 23rd February 2005.

The relevant Rule.

[5] Rule 31 (3) (b) thereof provides the following:

"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 costs of the default judgment and such application to a maximum of E200-00, set aside the default judgment on such terms as to it seems fit".

The arguments for and against.

[6] The Respondent had raised a point *in limine* that Applicant is out of time to apply for rescission as required by the Rule but later conceded in argument that Applicant was within the time limit regard to be had to the fact that final judgment was granted on the 23 rd February 2005.

[7] On the merits in support of the application for rescission under Rule 31 (3) (b) the Applicant has averred in paragraphs 4 to 9 of the Founding affidavit of Sifiso Khumalo, a Crown Counsel under the employ of the Applicant, as follows:

4.

On the 10th December 2003, the Respondent served on the Applicant a letter of demand claiming a sum of (Two Hundred and Fifty Thousand Emalangeni (E250, 000-00) being damages for alleged unlawful prosecution.

5.

On the 6th May 2004, the matter appeared on the motion court, enrolled for the next day. As I was the one handling the matter I was shocked because no summons had been served at our offices, the matter was still at the demand stage. I immediately telephoned the offices of Mr. Shilubane and Associates who were and/or are the legal representatives of the Respondent whereupon I found Mr. Masango who advised that the matter was handled by Mr. Shilubane and was reportedly out of the country.

6.

On motion court day I was advised by one Mr. Penuel Gwebu who was then with the offices of Shilubane and Associates that the matter was set down for default judgment since no Notice of Intention

to Defend has been filed to which I replied that the summons had not been served at our offices otherwise a Notice to Defend would have been filed since the claim is opposed.

When the matter was finally called it was argued from the Bar on behalf of the Applicant (Defendant) that the application for default judgment was opposed since no summons had been served on the Attorney General. It was further argued that the return of service in possession of the Applicant was only ***prima facie*** proof of service not conclusive. Every incoming mail and court process is usually stamped upon service at the offices of the Attorney General.

8.

I submit that by not filing the Notice of Defend Applicant was not in wilful disregard of the Rules of the Honourable Court but the summons had not been served on the Attorney General. It is further submitted that the Respondent (Plaintiff) merely prepared a return of service without having effected the service of the summons. It is customary procedure that every court process is stamped upon receipt at the Attorney General's chambers, however the summons produced by the Respondent and those in the court file do not bear the stamp. It is clear on the above premises that there was an oversight on the part of the Respondent's attorneys with regard to the service of the summons which resulted in the Attorney General's failure to deliver the Notice of Intention to Defend.

9.

It is my humble submission that the Government had at no time renounced its defence and at all material times hereto had a serious intention of proceeding with the defence to the claim. This is evidenced by the Applicant's vigorous opposition to the granting of default judgment from the Bar, albeit unsuccessful, when the matter was called for default judgment. The Applicant then appealed against order of the court, however the court advised that the proper route to take was to apply for rescission.

[8] It is contended for the Applicant that the above averments prove good cause to satisfy the requirements of the Rule.

The applicable law.

[9] In this matter, the Applicant has applied for the rescission of a judgment of this court granted on 4^{lh} June 2004, in terms of Rule 31 (2) (b) of the Rules as outlined in paragraph [5] *(supra).* It is trite law that the Applicant bears the *onus* to show **"sufficient cause"** in order to

succeed (see *Motor Marine (EDMS) BPK vs*

Thermotron 1983 (2) S.A. 127 (SE)). In order to show "sufficient cause", Applicant must:

i) Give a reasonable explanation of his default;

ii) The application must be *bona fide* and not made with the sole intention to delay Respondent's claim;

iii) The Applicant must show that he has a *bona fide* defence to the Respondent's (Plaintiffs) claim. It is sufficient to set out facts which, if established at trial, would constitute a good defence.

[10] See also *Lawsa, First Re-issue 3 Part 1 Civil Procedure* at paragraph *266* and the authorities there cited.

[11] The court has a wide discretion in evaluating "good cause" in order to ensure that justice is done. For this reason the courts have refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence for any attempt to do so would hamper the exercise of the discretion, (see *Erasmus, Superior Court Practice, Juta* at *Bl - 204* and the cases cited thereat).

[12] In the case of *Scoty vs Trustee, Insolvent Estate Comerma 1938 WLD 129* at *136,* it was held that the court will be slow to refuse a Defendant leave where he has never acquiesced in the Plaintiffs claim but actually persisted in disputing it.

Applying the law to the present case.

[13] I shall address this topic under three headings being the requirements for "sufficient cause" namely, i) explanation for default; ii) application must be *bona fide* and not made with the sole intention to delay Respondent's claim, and iii) *bona fide* defence. These will be addressed *ad seriatim* hereinunder, thusly:

i) <u>Reasonable explanation default.</u>.

[14] The Applicant avers that he never received the summons as alleged by the Respondent. The Applicant made numerous efforts in alerting the Plaintiff that summons have not been served before the hearing of the default judgment. Further that the summons produced by Respondent does not bear the office stamps yet every incoming mail or court process is stamped upon receipt at the Chambers. Furthermore, that although a return of service was filed before court by the Respondent, the return of service is not conclusive proof of service but only *prima facie* proof thereof. The return not being conclusive but merely *prima facie* evidence of service, the clearest and most satisfactory evidence would be required to rebut this presumption and to impeach the return (see *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *303* and the cases cited thereat). The fact that the summons were not stamped upon as is the procedure with all court processes and the incoming mail at the Chambers is clear enough evidence to impeach the return. It was further averred by the Applicant that there was no wilful disregard of the Rules of this court as regards non-filing of Notice to Defend and that non-delivery of the Notice to Defend was occasioned by reasons beyond his control.

[14] On the other hand, it was contended for the Respondent that Applicant knew of Respondent's claim as long ago as 4lh June 2004. Applicant should have at that stage applied to court for leave to file a Notice of Intention to Defend in terms of Rule 27 of the Rules of Court. There is no explanation why this has not been done. Therefore, Applicant was in wilful default of entering an appearance to defend timeously. In this regard the Respondent referred the court to the case of *Kouligas and Spanoudis Properties (Pty) Ltd vs Boland Bank BPK J987 (2) S.A. 414 (O).* The Applicant has failed to give a reasonable explanation of his default and in fact is in wilful default because he deliberately refrained from entering appearance or applying for leave to do so as he was entitled to do in terms of the Rules of Court.

[15] It would appear to me on the facts that Applicant cannot be said to have been in wilful default regard to be had to the explanation advanced in paragraph 6 to 10 of the Applicant's Founding affidavit. In this regard I find what is stated by the writer *Erasmus (supra)* at page *Bl - 203* to be apposite, where he wrote the following:

> "An Applicant will, therefore, be held not to be in wilful default if he acted on a mistaken belief, or where his default is due to a mistake, or non-compliance with the Rules, on his own part or of his attorney, or where the summons had not been property served".

[16] See also *Peter's October vs Isaacs 1931 CPD 450 and Fraind vs Nothmann 1991 (3) S.A. 837 (W).*

[17] For the above-mentioned reasons, I find that the Applicant has proffered a reasonable explanation of his default to satisfy this aspect of the Rule.

ii) The application must be *bona fide.*

[18] Although there is no allegation in Applicant's Founding affidavit that **"the application is *bona fide* and not made with the sole intention to delay Respondent's claim".** I am unable to say on the affidavits that the Applicant is not *bona fide* in launching this application. I also find this omission in the Applicant's affidavit not fatal to the Applicant's case.

iii) The Applicant has a *bona fide* defence.

[19] The Applicant avers that he has a *bona fide* defence to the Respondent's claim as stated in paragraph **1**1 and 11.2 of his Founding affidavit. That the claim for malicious prosecution is baseless since the acquittal of the Respondent is not an indication of his innocence and/or that there was no case against him. The Applicant was acquitted as a result of a mere technicality. At paragraph 11.2 thereof that at all material times there was a *prima facie* case against the Respondent, however, accomplice witnesses changed their evidence in court resulting in the acquittal of the Respondent and one of them was charged with perjury.

[20] In my assessment of the above-mentioned averments and those found in the Applicant's Replying affidavit I have come to the conclusion that the Applicant has satisfied this requirement of the Rule. It is a trite requirement under this Rule that the application for rescission must show the existence of a substantial defence does not mean he must show a probability of success; it suffices if he shows a *prima facie* case, or the existence of an issue

which is fit for trial. The Applicant need not deal fully with the merits of the defence, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a *bona fide* defence, and that the application is not made merely for purposes of harassing the Respondent (see *Erasmus (supra)* at *Bl - 204* and the cases cited thereat).

[21] In the result, after evaluating all the affidavit evidence I come to the considered view that "good cause" has been shown, and in order to ensure that justice is done I exercise my discretion in favour of granting the application for rescission. In this regard I agree in *toto* in what is stated by the writers *Herbstein et al (supra)* that the court will be slow to refuse a Defendant leave to re-open a case where he has never acquiesced in the Plaintiffs claim but actually persisted in disputing it. In the present case, I find this to be the position.

[22] Accordingly, the application is granted in terms of prayer 1, 2 and 3 of the Notice of Application. As regards the issue of costs that they be costs in the course.

S.B. MAPHALALA
JUDGE