THE HIGH COURT OF SWAZILAND

GABRIEL DLAMINI

Applicant

And

PETROS NTSHINGILA

Respondent

Civil Case No. 1333/2005

Coram: S.B. MAPHALALA-J

For the Applicant: MR. J. MASEKO

For the Respondent: MR. M. SIMELANE

JUDGMENT

(9th February 2006)

[1] Before court is an application for rescission of a judgment of this court dated 6th August 2005, in favour of the Respondent. The application is made under the common law. Subsequent to the said judgment a Garnishee Notice in terms of Rule 45 (13) I was served upon the Applicant.

[2] The Founding affidavit of the Applicant outlined the salient points in support of the application. In turn the Respondent has filed an opposing affidavit in answer thereto. Following that a Replying affidavit has been filed and annexures pertinent to

the Applicant's case. The Respondent then filed an application to strike out in terms of Rule 6 (2) which Counsel for Respondent later corrected to be Rule 23. A number of paragraphs in the Replying affidavit are being attacked as being argumentative, scandalous and that they introduce new matters. These paragraphs being paragraphs 8 and 12 thereof.

[3] When the matter came for arguments the application to strike out was argued together with the merits of rescission application. Starting with the application to strike out paragraph 8 of the said affidavit reads as follows:

> **"AD paragraph 6 and 7**
>
> 8.1. **I acknowledged having signed annexure B and this was after one Hunter Shongwe who threatened to shoot, as he was a police officer and Private Investigator. This was to get him away as he was now causing a scene and embarrassment in the presence of my colleagues.**
>
> 8.2. **8.2. It is for this reason that I never honoured the settlement per the signed agreement"**

[4] Paragraph 12 thereof reads as follows:

> **"AD paragraph 11**
>
> **I deny the contents of this paragraph and put the Respondent to strict proof thereof. I was influenced to sign annexure "B" by Mr. Hunster Shongwe who misrepresented himself to me that he was a police officer and would arrest and shoot me if I did not sign there and then.**

[5] In argument on the application to strike out Counsel for the Respondent in his Heads of Argument referred to many decided cases both here and in South Africa including that of *Royal Swaziland Sugar Corporation Limited t/a Simunye vs Swaziland Agricultural Plantation and others _ High Court Case No. 2959/97* at page *3* and the textbook by *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *500* and the cases cited thereat. The general proposition enuancited in these legal authorities is that in Replying affidavits an Applicant is not allowed to set forth details of allegations which should have appeared in the original affidavit supporting the application.

[6] On reading the affidavits filed of record, it appears to me that the offending paragraphs *viz* paragraph 8 and 12 of the Applicant's Replying affidavit are direct answers to paragraphs 6, 7 and 11 of the Respondent's Answering affidavit. The issue of annexure "B" being the Acknowledgement of Debt was introduced by the Respondent in the opposing affidavit. Therefore, I find that the application to strike out has no merit.

[7] I now turn to consider the application for rescission of the judgment of this court dated 6th August 2004. This application is brought under the common law.

[8] An Applicant who seeks to set aside a default judgment in terms of the common law or in

terms of Rule 31 must establish "good cause" or "sufficient cause", this would entail furnishing a reasonable and acceptable explanation for his default and satisfying the court that on the merits he has a *bona fide* defence which, *prima facie,* carries some prospect of success (see *Herbstein et al (supra)* at page *696* and the cases cited thereat). In *Grant vs Plumbers (Pty) Ltd 1949 (2) S.A. 470 (O)* it was held that a Defendant applying for a rescission of judgment need not deal fully with the -merits of his case but must set out averments which, if established at the trial, would entitle him to the relief asked for. A terse statement of a defence, uncorroborated by other evidence, will not, however, suffice to satisfy the court that the Defendant has a *bona fide* defence.

[9] It remains to be seen therefore in *casu* whether the above-stated requirements have been met. I shall consider the two requirements that of "good cause" and *bona fide* defence *ad seriatim* hereinunder thusly,

i) Whether "good cause" has been shown.

[10] Good cause shown means that the Applicant for a rescission must:

> **a) Give a reasonable explanation of his default. Wilful default is normally fatal but gross negligence may be condoned.**
> **b) The application must be *bona fide* and not made with the sole intention to delay the Plaintiffs claim.**
> **c) Applicant for a rescission must show that he has a *bona fide* defence to the Plaintiffs claim and the defence must have existed at the time of the judgment.**

[11] In respect of requirement (a) *(supra)* the Applicant offers the following explanation in paragraph 9 of his Founding affidavit:

> **"9.1 After a while again I then received a summon from one of my seniors Musa Justice Nsibandze the Respondent being the Plaintiff.**
> **9.2 I received the summons way after the time within which I was supposed to file my Notice to Defend my response in my defence (plea).**
> **9.3 When I received the summons judgment had already been entered against me".**

[12] In reply thereto the Respondent in his opposing affidavit in paragraph 8 thereof states the following:

> **"AD paragraph 9**
> **Contents herein are denied and the Applicant is put to strict proof.**
>
> **As a soldier I know that summons are served at our base at Nokwane Army Headquarters and not at Phocweni. You get them at the very least a day after. The Applicant is not taking the court**

into his confidence as he has not stated the date upon which he received the summons".

[13] It appears from the summons themselves that they were served at St George's Barracks on the 15th July 2004 by Deputy Sheriff Maswazi Nsibandze *(per* annexure "GDI"). In this regard I am inclined to agree with the Applicant's contention as stated in his Founding affidavit that he has advanced a reasonable explanation for his default.

[14] I now turn to the second requirement *viz* (b) that the Applicant must be *bona fide* and not made with the sole intention to delay the Plaintiffs claim. In this regard it is argued for the Respondent that the application is not made *bona fide.* However, in weighing the two arguments I am unable to say on the facts presented that Applicant is not *bona fide.*

[15] Turning to the third requirement (c) that of a *bona fide* defence. The trite principle in such matters is that it is not sufficient for the Applicant to content himself with saying that he has a *bona fide* defence. In order to establish a *bona fide* defence, the Defendant must set out averments which if established at the trial, would entitle him to the relief he asks for, he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour, (see *Herbstein (supra)* at page *540 in fin* and the cases cited thereat). It remains to be seen whether Applicant has met this requirement on the affidavits.

[16] The Applicant's defence is averred in paragraph 10 thereof as follows:

"10.1 I wish to state that I have a good and bona fide defence to proceedings instituted against me.

10.2. I never borrowed any money from the Respondent save from Timele Cash Loans.

10.3. I am advised and verily believe that even if I had borrowed money from the Plaintiff in terms of the "duplum rule" the Respondent was not entitled to claim more than four times the principal amount advanced.

10.4. Pertaining garnishee notice in terms of Rule 45 (13) (A) I was never served with same and over and above the deduction is in excess of one third of my net earnings".

[17] The Respondent has answered to the above stating, *inter alia,* that Applicant borrowed the sum of E10, 000-00 from him. On the issue of the "induplum rule" that if it were to apply the Applicant would have owed him a sum of E20, 000-00. Further, that he has charged Applicant interest in the sum of E500-00 yet they had agreed that interest was to accumulate at the rate of 30% per month.

[18] On the totality of the affidavit evidence, it appears to me that Applicant has not advanced a *bona fide* defence to the claim. I say so because it is clear from annexure "A" of the Opposing affidavit that the capital debt was E10, 000-00. The said annexure "A" is a loan agreement between the Applicant and Timele Cash Loans (Pty) Ltd signed on the 1st January

2000, by the Applicant and the company represented by the Respondent. It has also been established in the evidence that the Respondent traded as Timele Cash Loans, for convenience sake. Further, it would appear to me that Applicant is not telling the truth in that he has failed to disclose to the court about annexure "B" being the Acknowledgement of Debt.

[19] In the result, for the afore-going reasons the application for rescission of the judgment of court dated 6th August 2005, is refused and that costs to follow the event.

S.B. MAPHALALA

JUDGE