IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.4398/05

In the matter between:

N G STEERS (PTY) LTD **APPLICANT**

and

RMS TIBIYO (PTY) LTD **RESPONDENT**

CORAM: Q.M. MABUZA
FOR APPLICANT: MR. L. MAMBA
FOR RESPONDENT: MS KUNENE

JUDGMENT 10/2/06

This matter came before me on the 30th January 2006. Both counsel made submissions on behalf of their respective clients. I propose to deal with each submission in the order it was presented to me. For convenience I shall refer to the parties as indicated above.

According to the return of service, the summons were served at Aida offices, Somhlolo Street, Mbabane being the place of some other business belonging to the director of the applicant a Mr. Ning. The summons were

affixed on the office door of the said Mr. Ning. Rule 4 (2) (e) inter alia states: "*In the case of a corporation or company by delivering a copy 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 a copy to the main door of such office or place of business or in any manner provided by law.*"

The applicants principal place of business had closed down and this fact was known to the respondents. An investigation at the Registrar of Companies would have yielded the applicant's registered office as being c/o Kobla Quashi and Associates, Plot 137 Mallya House, Esser Street Manzini.

I must therefore reject Ms Kunene's submission that service was proper because the purpose of service is to make sure that the document is brought to the attention of the other party. In other instances perhaps but not in this particular instance I find that the service was defective.

I was also referred to Rule 30 (1) by Ms Kunene that the applicant could have approached the court under this Rule. My understanding of this Rule is that it presumes that both parties are already parties to the action and the irregular step arises therein. In **Petterson vs Burnside 1940 NDP 406** Broom J held that "*In my opinion a step in the proceedings is some act which advances the proceedings one step nearer completion.*" He was referring to a similar section in Natal to ours.

With regard to the failure to file a notice of intention to defend. I find that the attorneys for the applicant were negligent. Mr. Ning instructed Mr. Mamba timeously and had he filed the papers default judgment would not have been taken against the applicant. Mr. Mamba submitted that as the service was defective the applicant was not obliged to file a notice of intention to defend. This is a false notion which I must reject. Mr. Ning must have seen the huge amount the applicant was being sued for that is why he instructed the said attorneys to act for him. Contrary to Ms. Kunene's submissions I will not punish the applicant for his attorney's negligent behaviour. Instead I shall punish his attorneys as a mark of the courts disapproval.

Turning to the default judgement itself I shall deal first with claim (a) of the notice of application for default judgment. Claim (a) is in respect of payment of the sum of E34,259.20 being in respect of rental arrears for the month of

June 2005.

The applicant gave notice to the respondent that it would vacate the leased premises by the end of June 2005. Indeed the applicant did vacate the said premises. The applicant does not deny that it owes this amount of money. Instead the applicant has stated that it paid a deposit equivalent to one month's rental and wishes to have this amount off-set against the amount of E34,259.20 claimed by the respondent. The respondent has not denied this assertion nor did it disclose this fact in its summons. To me this is good cause for me to allow the applicant to defend the matter.

I turn now to claim (b) of the notice of application for default judgment. This claim is for payment of the sum of E897,858.70 being in respect of rental for the remainder of the lease agreement reckoned from July 2005 to March 2008.

On the 19/5/05 the applicant gave the respondent notice that it would vacate the respondent's premises at the end of June 2005. The respondent rejected this notice. The notice seems valid to me. At the time it was given the parties did not have a formal written lease agreement between them. The applicant paid rent on a month to month basis and this arrangement was terminable at a month's notice. The notice given was sufficiently clear and unequivocal. The applicant did vacate premises at the end of June 2005. The issue whether the respondent is entitled to rent from July 2005 up to March 2008 involves a huge amount and the court must decide whether or not the respondent is entitled to all this money notwithstanding the notice given. This is also good reason for me to allow the applicant to defend the matter.

By operation of the law, the nature and cause of action of claim (b) is and ought to have been that of damages.

Damages are by their nature unliquidated and must consequently be proved by oral evidence or by the filing of an affidavit. When the respondent applied and was granted default judgement on the 15th December 2005 it did not lead any oral evidence nor did it file an affidavit with regard thereto. In fact it "snatched" a default judgment from this honourable court while knowing that it had withheld vital information precedent to granting default judgement.

For this reason as well I must allow the applicant to defend the matter.

I was addressed at length by Mr. Mamba about the Lease Agreement being invalid because it did not comply with Section 30 of the Transfer Duty Act No. 8/1902. I do not think I need to go into the details of this submission as there are enough grounds upon which to set aside the default judgment complained of.

Ms Kunene also raised the issue of security for costs. It is a valid argument. I do not know why the attorney for the applicant overlooked this issue. I must attribute it to his apparent negligence as displayed in his failure to act for his client timeously. As the issue of security for costs is purely within the discretion of the court I shall disallow same. My reasons for my decision follow.

I order that the default judgment granted on the 15th December 2005 is hereby rescinded and set aside. The applicant is granted leave to defend and should file its notice to defend within 7 days hereof.

I am now left to decide the issue of costs. Both counsel have not acted in a proper and upright manner in this matter and as a sign of the court's disapproval I order that costs be costs in the cause.

Q.M. MABUZA

ACTING JUDGE