

THE HIGH COURT OF SWAZILAND

SURETY SERVICES (PTY) LTD

Applicant

And

MAJAZI ABNER DLAMINI

Respondent

Civil Case No. 2688/2005

Coram: S.B. MAPHALALA-J

For the Applicant: MR. K. MOTSA

For the Respondent: MR. M. SHABANGU

JUDGMENT
(9th June 2006)

[1] The Applicant seeks rescission of a default judgment obtained on 7th July 2005 under Rule 3 1 (2) and the common law.

[2] It is a trite principle of our law that the first requirement which an Applicant must show is good cause or reasonable explanation for not filing the Notice to defend timeously. (see *De Witts Auto Body Repairs (Pty) Ltd vs Fedgem Insurance Company 1994 S.A. 705*) where the failure to deliver the intention to defend has been the oversight of an attorney the court will usually exercise the discretion and open the case (see *De Witts (supra)* at page 714). The Defendant must also show that he has a *bona fide* defence to the action, (see *Msibi vs Simelane 1977 S.L.R. at 184*).

[3] It remains to be seen in *casu* whether the above-cited legal authorities have been met on the facts in the present dispute. On the aspect of a reasonable explanation Applicant avers that it was served summons on the 23rd August 2004 and Respondent confirms same. Applicant avers that it handed summons to Sibusiso Shongwe attorneys to defend. The Applicant having given the instruction to its attorneys to defend were not aware that the intention to defend was not entered and could not be expected to inquire such. In view of the fact that its attorneys were in contact with it and the Applicant could not possibly think that the intention to defend was not filed by its attorneys. Further that since August 2004 to July 2005 the Respondent's attorneys also never took judgment. There are no reasons given by the Respondent's attorneys why they waited for eight (8) months before taking judgment.

[4] On the other hand, it was contended for the Respondent that the Applicant was clearly aware of the action pending in court against him. That inspite of the knowledge the Applicant wilfully and/or negligently or recklessly allowed the matter to proceed undefended, regard being had to the period from the date he discovered that his erstwhile attorneys are not fulfilling his instructions - that is, 16 November 2004, to date when the default judgment was granted on the 7th July 2005.

[5] It appears to me that on the basis of averments filed for the Applicant the only inference to be drawn thereof is that Applicant's erstwhile attorneys having engaged in negotiations without Applicant's mandate, the Respondent's

attorneys were content and hence Applicant cannot be said to have been wilful. The Applicant also explains that it only learnt about the fact that no intention had been filed when its present attorneys went to uplift the file on the 8 July 2005. As a consequence of this it took expeditious steps to rescind this judgment on the 20th July 2005. (see *De Witts (supra)*).

[6] I now proceed to deal with the second aspect of the matter being whether Applicant has advanced a *bona fide* defence. Such defence is found in paragraphs 6.1 to 11 of the Founding affidavit of the Applicant as follows:

6. Defence.

6.1. I submit that Applicant has a defence on this matter and Respondent was aware of it.

6.2. The Respondent was instructed along with certain family members as follows.

6.3. In terms of one of the conditions of the Applicant's Prosperity Family Funeral Plan (annexure "A"), the insurer on any claim may require a marriage certificate.

6.4. In this particular case, the Respondent on the 16th November 2004 presented a claim along with a birth certificate marked "S7".

6.4.1. On the basis of the documents presented the Applicant calculated the due payout at around E2367-00.

6.4.2. This was done on the basis that Respondent's birth certificate showed that his mother was born in 1928.

6.5. On the basis of "S7" the Applicant calculated the late Annie Tsabedze's to be the amount of E2367-00 as fully appears in a copy of a cheque marked "S8".

6.6. The Respondent refused to accept the afore-said amount and advised Applicant that he was going to correct the birth certificate a copy of which is annexed marked "S9".

6.6.1. I wish to submit that in terms of this certificate the Respondent was now born on the 14th September 1940. This meant that the deceased married when she was 5 years old.

6.7. The Respondent was called upon to explain the discrepancy in the certificate but failed to do so.

6.8. The Applicant reached a conclusion of fraud and hence decided to repudiate the policy by addressing a letter to the Respondent a copy which is annexed hereto marked "S10".

7. I therefore respectfully submit that the Applicant (as an administrator for an insurer) was in law entitled to repudiate the policy due to the inconsistencies of information given, with particular reference to the Respondent's mother's birth dates.

8. In fact, the information relating to Annie Siququ Tsabedze differed in the following respects.

a) In the application form Respondent had stated that she was born in 1928, and

b) In the Respondent's birth certificate of 8th April 2004 she was born on the 14th September 1940.

c) According to her death certificate she was born on the 6th July 1940. A copy of the death certificate is annexed hereto marked "S 11".

9. I submit that the above shows that the Respondent failed to answer material questions in the Applicant Prosperity Funeral Plan form.

10. Due to the fact that inconsistent answers were furnished the Applicant was entitled to repudiate the policy.

11. I therefore submit that the Applicant has a *bona fide* defence to the matter.

[7] On the other hand, it is contended for the Respondent that the Applicant has failed to show that he has a *bona fide* defence on the merits and/or that his defence *prima facie* carries some prospects of success. According to the Respondent the argument by the Applicant that because the Respondent furnished him with birth certificates that indicate or show different birth dates of the deceased, the Respondent has committed fraud and thus the Applicant has got a duty in law to repudiate the claim and therefore there is no merit in this argument.

[8] According to the Respondent a written contract of insurance was entered into and concluded between the parties on the 9th July 2002 and 9th September 2002 respectively. An offer was made by the Applicant to the Respondent on the 9th July 2002 when the Applicant's agent approached the Respondent and sold him the Applicant's funeral policy.

[9] On the very same day, the Respondent indicated an intention to accept and did accept the offer by filing all the requisite forms as provided by the Applicant through its agent, i.e by selecting and listing all those people the Respondent wanted their lives to be insured, also stipulating their dates of birth with or without documentary proof thereof without differentiation.

[10] The whole contract was concluded on the 9th September 2002, when the Applicant wrote the Respondent a letter informing him that all the people he selected and listed had been registered and insured accordingly, also printing their dates of birth, proposed or exact, as provided by the Respondent and without demanding any evidential proof thereof

[11] It is submitted that if the exact date of birth was a material requirement for the validity of the contract, the Applicant could not have registered and

hence insured all the people listed by the Respondent in the letter of offer before demanding from the Respondent evidential proof of their exact dates of birth in the form of birth certificates.

[12] It appears to me after considering the contending views as reproduced above in paragraph [6] for the Applicant and paragraphs [8] to [11] for the Respondent that the Applicant has advanced a *bona fide* defence as required by the legal authorities cited at paragraph [2] *supra*. This case is similar to that of *Jordan vs New Zealand Insurance Company Ltd 1968 (2) S.A. 2360* where in that case in the proposal form for the insurance of a motorcar the Plaintiff had stated his age next birthday as 22. The proposal form contained a declaration that "**the above particulars are true and correct ... and that (I) accept the insurance and the terms and conditions set out in the policy**". The policy in its preamble recited that the proposal and the declaration "shall be the basis of this contract and it is deemed to be incorporated herein", and "that the truths of the statements and answers in the proposal will be conditions precedent to any liability of the company to make any payment under this policy". In an action claiming amounts for which the Defendant was alleged to be liable, the Defendant had pleaded that the Plaintiffs statement about his age was untrue because his age next birthday was 23 years. It was held, *inter alia*, that in regard to the answers to the proposal from the Plaintiff had given a warrant and the parties had intended the answers to the Plaintiffs age to be subject to the warranty.

[13] It would appear to me also that Respondent judgment was for an unliquidated claim. If it is correct that the deceased Annie was born in 1928 or 1938 then she was over 65 years. According to the proposal form she should have been paid E3, 000-00 not E5, 000-00. To show that she was entitled to E5, 000-00 not the cheque shown in annexure "S8".

[14] In the result, for the afore-going reasons the application is granted in terms of prayers 2, 3 and 4 of the Notice of Motion.

S.B. MAPHALALA

JUDGE