IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. APPL. NO 3289/08

In the matter between:

JIKA NDLANGAMANDLA

Applicant

And

ZEISS INVESTMENTS (PTY) LTD T/A ZEISS BEARINGS

1st Respondent

JOSEPH DLAMINI N.O.

2nd Respondent

In re:

ZEISS INVESTMENTS (PTY) LTD T/A ZEISS BEARINGS

Plaintiff

And

JIKA NDLANGAMANDLA **Defendant**

Date of hearing: 5 February, 2009.
Date of judgment: 11 February, 2009.

Mr. Attorney B.S. Dlamini for the Applicant Mr. G. Langa for the 1st Respondent

J U D G M E N T

MASUKU J.

On 12 September, 2008, this Court granted a judgment sounding in money in favour of the 1st Respondent against the Applicant by default. The judgment was for the payment of an amount of El6, 805-20, in respect of goods sold and delivered to the Applicant by the 1st Respondent, interest thereon and costs.

Serving before Court presently is an application for the rescission of that judgment. The Notice of Motion filed in respect of that application bears repeating verbatim for I am compelled to comment thereon later in this judgment. It reads as follows:

2.1. That an order be and is hereby issued dispensing with the normal forms of service and time limits and hear this matter on an urgent basis.

2.2. That a *rule nisi* be and is hereby issued staying execution of the warrant of attachment issued out against the applicant on the 24th November, 2008.

2.3. That a *rule nisi* be and is hereby issued rescinding the default judgment granted by this above Honourable Court on the 12th September, 2008.

2.4. That a *rule nisi* be and is hereby issued directing the respondent to pay costs of this application on an attorney and own client scale.

2.5. That the *rule nisi* issued in terms of the prayers (b), (c) and (d) above be returnable on the 5th December, 2008.

[3] In his papers, the Applicant states that the application is brought pursuant to the provisions of Rule 31 (3) (b) of the Rules of this Court and in the alternative, in terms of the common law. In particular, the

pith of the Applicant's case is that his attorneys, at the time that the said judgment was entered, had filed both the notice to defend and the plea. It is his contention that both had been filed timeously and that in the circumstances, the Court ought not to have entered the default judgment against him that it did.

[4] The explanation given on the Applicant's behalf is that upon receipt of the combined summons, his attorneys of record proceeded to serve the notice of intention to defend at the address appointed by the 1st Respondent in the summons. Lo and behold, they discovered that at the address given, no such office existed. They resorted to file the said notice with the Court and placed a copy thereof in the pigeon hole allocated to the 1st Respondent's attorneys at the High Court. A similar situation is alleged to have happened at the time when the Applicant had to serve his plea, resulting in the plea also being placed in the 1st Respondent's attorney's pigeon hole as aforesaid.

The allegations made by the deponents stated in the immediately aforegoing paragraph were not challenged by the 1st Respondent in the answering affidavits filed. For that reason, they remain uncontroverted and therefore should stand. It must be mentioned that to the Applicant's papers are annexed copies of both the notice to defend and the plea, which bear the Registrar of this Court's official stamps, dated 2 and 17 September, 2008, respectively. It is not contested by the 1st Respondent that these papers were filed with the Registrar's office on the dates appearing thereon either. It must therefor be accepted that the said papers were indeed filed with the Court on the dates appearing thereon and that all things being

normal, the said processes should have been placed before the Court at the time when the judgment by default was entered.

Speaking as I do at the time when I read this file, I can state that there is the original notice to defend in the Judges' file and it bears the same date alleged by the Applicant in his papers. The original plea, is however, not in the file. It must mentioned in this regard though that regard being had to the date when the default judgment was granted i.e. on 12 September, 2008, the plea, which was filed later i.e. on 17 September, would not have been before the Court at the entering of the said judgment. That being the case, the question to be determined is whether the Court was nonetheless correct in entering the judgment it did when at the least, the notice to defend had been properly filed with the Registrar. This question

it must be stated, will have primarily to be considered in the context of the provisions of Rule 31 (3) (b) and the common law as indicated in the Applicant's affidavit.

The starting point though, is to acknowledge with approval the statement made by Dunn J. in *Leonard Dlamini v Lucky Dlamini* Case No. 1644/ 1997 (H.C.) unreported, where His Lordship stated and correctly so in my view, that an application for rescission in this jurisdiction may be brought via any one or more of the following: (i) Rule 31 (3) (b) for default judgments; (ii) Rule 32 (11) for summary judgments; (iii) Rule 42 and (iv) the common law.

I now turn specifically to the provisions of Rule 31 (3) (b) above. The said Rule reads as follows:

> "A defendant may, within twenty-one days after he has had 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 security to the plaintiff for the payment of the costs of the default judgment and of such application to a maximum of E200.00, set aside the default judgment on such terms as to it seems fit."

It is clear from a reading of the above sub-rule that it has a connection to the previous one, being Rule 31 (3) (a). That sub-rule deals with the circumstances in which a Court may grant judgment by default. That may be done where the party has defaulted in filing either a notice to defend, or having done so, defaults in filing a plea in respect of claims for a liquidated debt or demand, or in other cases, after hearing or considering evidence adduced in proof of the quantum.

[9] It is apparent from the wording of Rule 31 (3) (b) that the applicant for rescission under this Rule has to bring the application within twenty one days, not of the granting of the judgment but from the date he or she becomes aware of the granting of the default judgment. In the present circumstances, the Applicant does not say when he became aware of the judgment, yet this is a jurisdictional fact that brings the application within the rubric of the sub-rule. This, I must stress, is an important averment that must necessarily appear whenever it is contended that the rescission is brought under Rule 31 (3) (b).

[10] Having dealt with that initial requirement above, I am of the considered opinion that in terms of the balance of the requirements of the sub-rule, the applicant must (i) apply to Court on notice, in terms of Rule 6 (1) to the plaintiff, for an order setting aside the said default judgment; (ii) show good cause for his default in serving and

filing either the notice to defend or the plea, as the case may be; and (iii) furnish security to the plaintiff for costs of the default judgment and the rescission application to the maximum of E200.00. If satisfied, the Court will then grant the application. According to the learned authors Herb stein and van Winsen, The Civil Practice of the Supreme Court of South Africa. 4th ed, Juta, 1997, at p 691, when the Court grants relief under this sub-rule, it exercises a discretion, which I add, must, as usual, be exercised judicially and judiciously.

[11] The question to determine is whether the Applicant has satisfied the requirements of the said sub-rule. I come to the conclusion that he has not. I say so for the reason that in the first place, he has not shown, as indicated above, when exactly he became aware of the default judgment. That not having been disclosed, yet it is a mandatory requirement in order for the application to be properly brought in terms of the sub-rule, one cannot say for certain that the matter is correctly brought in terms of the said sub-Rule. Secondly, it is clear from the Applicant's own averments in the affidavits filed that the Applicant was not in default at all. According to his papers, allegations of which are not controverted, the Applicant had, at the time of the granting of the default judgment, already filed the notice to defend. It must be recalled, as I stated earlier, that the default mu st be in relation to either the delivery of the notice to defend or the plea, having filed the former. On this score, the Applicant fails. This sub-rule has no application in the circumstances of this case.

[12] According to Herbstein and van Winsen, (op *cit)* at p 691, the words 'sufficient cause' or simply 'good cause' employed in the sub-rule,

> require the applicant to satisfy the Court of the existence of two essential requirements (i) that the applicant should present a reasonable and acceptable explanation for his default; and (ii) show that on the merits, he has a *bona fide* defence, which *prima facie* carries a prospect of success. The above are also the requisites to be satisfied by an applicant for rescission in terms of the common law, which it must be recalled the Applicant has had resort to in the alternative. It bears repeating that it is clear on the facts that the Applicant was not in default at all in the present case as he had filed the documents regarding which an explanation for default needs be given. This reinforces my conclusion that by embarking on an expedition in terms of Rule 31 (3) (b) and the common law, as it now appears above, the Applicant is barking the wrong tree and his application in terms of both Rule 31 (3) (b) and the common law should fail and I so hold.

In the premises, the question to ask is whether having approached the Court on the wrong basis, as I have held, must the Applicant then be non-suited in circumstances where it can be shown that his application can otherwise succeed if regard is had to the circumstances and facts of the case *in tandem* with the other requirements for rescission than Rule 31 (3) (b) and the common law? The answer to this question is to be found in the remarks of White J. in *Nyingwa v Moolman N.O.* 1993 (2) S.A. 508 (Tk. G.D.) at 510 C, where the learned Judge, having found that the applicant had failed to bring an application for rescission under the provisions of Rule 31 (2) (b) said:

> "Although I agree with Mr. Locke's submission that the application cannot be brought under Rule 31 (2) (b), I do not

believe that this is the end of the matter. That would be too formalistic an approach. This Court must also decide whether the application can succeed under the provisions of either Rule 42 (1) (a) or the common law."

[14] I am of the view that that is the proper approach even in respect of the present matter. The Court must, in the interests of justice avoid sterile formalism, particularly where there is a prospect *prima facie* that a case may be made under one other and not necessarily the Rule or other provision avowedly identified by an applicant in his papers. In the instant case, it would appear to me that the proper Rule under which this application ought to have been brought is Rule 42 (1) (a) and I intimated this even during the hearing of this application. Happily, although the Applicant did not allege that he was bringing the application in terms of this Rule, relevant allegations were however, made in paragraph 11 of the Founding Affidavit, namely that the judgment was granted in error.

[15] Rule 42 (1) (a) provides the following:

"The Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind, or vary-

(a) an order or judgment erroneously sought or granted in the absence of the other party affected thereby:"

This Rule, which is *in pari materia* with that contained in the Uniform Rules of Court of the Republic of South Africa, has been the subject of a number of decisions in that jurisdiction and these decisions have been accepted as accurately reflective of the proper interpretation to be accorded to the Rule in question by our Courts. See *Polo Dlamini v Martha Siphiwe Nsibande* ***In***

Re: *Martha Siphiwe Nsibande v Polo Dlamini* Civ . Case No. 1581/00 (H.C.) (unreported);

One of the leading cases on this Rule in South Africa is *Bakoven v G.J. Howes (Pty) Ltd* 1992 (S.A.) 466 at 471 E-G, where Erasmus J. said of the relevant Rule:

> "Rule 42 (1) (a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a mistake in a matter of law appearing on the proceedings of the Court record. . . It follows that a Court, in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a *bona fide* defence. . . Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."

In yet another case, *Nyingwa v Moolman N.O. (op cit)* at 510 C, the learned Judge commented on this sub-Rule as follows:

> "It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment."

It is abundantly clear, particularly from my analysis of the applicability of the provisions of Rule 31 (3) (b) that in the instant case, there was an error in the sense mentioned in the two cases cited above. The Court committed an error by granting a judgment by default when the Applicant, who was the defendant in those proceedings, had already filed his notice to defend, which on all accounts should have been in the Court file at the relevant time. Had the learned Judge's attention been timeously drawn to that fact, I

have no scintilla of doubt that he would not have granted that judgment. In the premises, I come to what I consider the inexorable conclusion that the Applicant has, on the papers but not necessarily in his arguments, made out a clear and unanswerable case for the grant of a rescission under the provisions of Rule 42 (1) (a) aforesaid.

I now turn to the issue of costs. Mr. Dlamini has applied for an order for costs on the punitive scale on the grounds that the address of service of process given by the 1st Respondent's attorneys was evidently wrong and misleading. He also attributed in the papers some unethical conduct on the part of Mr. Langa, which has apparently been reported to the Law Society. I shall not take this issue any further but will leave it in the hands of the appropriate professional body to deal with all the allegations at the appropriate time.

In the ordinary circumstances, a party such as the Applicant, who applies for the rescission of a judgment craves an indulgence from the Court. Ordinarily, that party is ordered to pay the costs of the default judgment and those of the application for rescission. In the instant case, it would be unconscionable for me to do so, regard had to the fact that the 1st Respondent, if it acted in a reasonable manner, ought to have realised that the default judgment ought for the reasons advanced in the Applicant's affidavit, not to stand and should have properly consented to the rescission which it did not. Its opposition was clearly ill-advised. That notwithstanding, I am not convinced that this is a proper case for mulcting the 1st Respondent with costs on the higher scale. I say so for the reason that the main trump card for supporting the grant of costs at the punitive scale related more to the conduct alleged against the 1st Respondent's attorneys

and which as I have said, must be dealt with by the appropriate forum. This Court would be acting precipitately in relying on the *ipse dixit* of the Applicant's attorney in the regard, in the absence of an investigation of this serious allegation. I am of the considered view that it would not be just or fair to let the 1st Respondent suffer financially in the particular circumstances of this case, for any ethical wrongdoing (if proved) by its attorneys.

There is, before I conclude this judgment, an issue that I must comment on and it relates to an application in terms of Rule 30, which was filed by the 1st Respondent's attorneys. The cause of complaint, as I read the said notice was that the Applicant, though being the actual *dominis litis* in these proceedings did not himself file an affidavit, even if it be a supplementary one, so the argument ran. I dismissed the argument without much ceremony during the hearing and I feel compelled to say a few words concerning the said application.

In the first place, it is my view that Rule 30 ordinarily applies in relation to procedural matters and is generally not applied in relation to matters of substantive law. In relation to the latter, the party alleging that defective papers have been filed on grounds of substantive law would ordinarily have to raise a preliminary point of law in that regard on the papers. The point raised by the 1st Respondent in this matter, if he is correct on it, would have had to be raised as a point of law and not in terms of the provisions of Rule 30.

Secondly, Rule 30 provides that a party to a cause in which an irregular step or proceeding has been taken by any other party may, within 14 days after becoming aware of the irregularity, apply to the Court to have such

step or proceeding set aside as irregular. The proviso thereto however, precludes a party who has taken a further step with the knowledge of the irregularity from making such an application. The word "may" in the Rule, which is couched in permissive terms, relates to the decision by a party whether or not to make the application. If the party does so choose, then the application must be brought within the 14 days stipulated therein.

In the instant case, it is clear that the 1st Respondent filed answering affidavits in response to the Applicant's "irregular" founding and confirmatory affidavits. I have put the word irregular in parenthesis for the reason that I still have to decide whether the contention by the 1st Respondent regarding the irregularity alleged is in any event correct. It is therefore clear that with the knowledge of the irregularity, which should have immediately been gained on reading the said affidavits, the 1st Respondent, took the step of filing answering affidavits, in which in my opinion, it would have been appropriate to raise the complaint he raised through the Rule 30 notice. On this ground, the Rule 30 application was bound to fail.

Regarding the substance of the 1st Respondent's complaint, I am of the view that the concerns raised regarding the propriety of the affidavits filed on the Applicant's behalf is totally misplaced. The argument is that the Applicant did not himself file any affidavit in this application and that affects the validity of the affidavits. I cannot agree with that proposition for the reason that it must be remembered that affidavits constitute evidence and the person who deposes to an affidavit must be a witness and state issues peculiarly within his personal knowledge. There are cases where an applicant may not be privy to facts upon which the relief he seeks are predicated.

This, it must further be recalled, is an interlocutory application regarding the preparation, service and filing of Court process, culminating in the granting of a default judgment which are all issues not within the Applicant's knowledge but within that of his attorney. For that reason, I find nothing untoward, in the peculiar circumstances of this case, particularly considering the interlocutory nature of the application, with the Applicant himself not filing any affidavit as the facts upon which the relief sought is predicated are not within his personal knowledge. Had he filed an affidavit, he would have had to state matters, the most pertinent of which are within the knowledge of his attorney and members of his staff.

[26] Herbstein and van Winsen *(op cit)* at p 369, say the following:

> "As a general rule, subject to the provisions of the Law of Evidence Amendment Act 1988, hearsay evidence is not permitted in affidavits. It may accordingly be necessary to file affidavits of persons other than the applicant who can depose to the facts. Indeed, this is often done."

In this case, it is clear that the Applicant proceeded on the above basis. The learned authors do, however, state the alternative approach of a deponent stating the matters not within his knowledge and thereafter filing supporting affidavits of those persons who do have the knowledge of the relevant facts. See also Peter van Blerk, Legal Drafting - Civil Proceedings, Juta, 2007 at p 55, regarding the alternative approach referred to above. I am therefore fortified that the point raised by the 1st Respondent was correctly dismissed. Speaking for myself though, I would prefer that drafters of Court process follow the latter approach as it is less hazardous.

[27] Finally, I return to the Notice of Motion as intimated in paragraph [2] of this judgment. It will be seen from a reading of the Notice of Motion quoted in full above that the Applicant applied for a multiplicity of rules *nisi* to be granted by the Court and for certain prayers to operate with interim effect. It is my opinion that the said notice was not properly drafted as there was no need to issue the five rules *nisi* applied for by the Applicant. Furthermore, regard had to the relief sought, I am of the view that the only portion of the relief which necessarily had to have interim effect in order to protect the interests of the Applicant was that relating to the stay of execution. There is ordinarily nothing urgent about a rescission application so as to require that some relief with interim effect be granted in relation thereto.

It is my considered view that there is generally an abuse of the rule *nisi* procedure by many practitioners in this Court and that there is a very rash and ready resort to apply for interim relief even when that is not necessarily called for. As a result, there are instances in which interim effect of a rule nisi is applied for and granted and which, however, prejudices the rights of the respondents in the interim and when there is strictly speaking, no necessity so to do. Extreme care should be taken in drafting notices of motion in urgent matters and where it is necessary to protect an applicant's immediate interests in the interim. At the same time, the rights of a respondent must be given adequate attention and protection, particularly in *ex parte* applications.

In the case of *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) S.A. 654 at 674 H-675 A, Corbett J.A. (as he then was) said the following:

> "The procedure of a rule *nisi* is usually resorted to in matters of urgency and where the applicant seeks relief in order to adequately protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show *prima facie,* that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of motion or summons."

Having regard to the above quotation, there was nothing that could be said to have been likely to herald real loss or disadvantage to the Applicant regarding the rescission application. The issue of immediate interest to the Applicant and which could have affected his rights related more to the execution of the judgment as a writ of execution had already been issued than the rescission application. In this regard, nothing more than what is strictly necessary to protect an applicant's interests must be applied for and granted, considering that at that stage and on the urgent basis on which such applications are invariably brought, the respondent will not have had sufficient time to place his full matter before the Court. The diminution, to some extent, of a respondent's full right to be heard and to place all material facts before a decision is made must, as stated above, relate to interim relief strictly necessary to protect the applicant's immediate interests and no more. See *Swaziland Financial Corporation vs Long Run Investments (Pty) Ltd* Case No.2 and No.3of2008.

In the circumstances, I grant the following Order:

30.1 The warrant of execution against the property of the Applicant issued on 24 November, 2008, be and is hereby set aside.

30.2 The judgment by default granted by this Court on 12 September, 2008, be and is hereby rescinded.

30.3 The 1st Respondent be and is hereby ordered to pay the costs of both the default judgment and the rescission application on the scale between party and party.

30.4 The pleadings already filed by the Applicant, namely the notice to defend and the plea are ordered to stand as filed.

30.5 The 1st Respondent is ordered, if so advised, to file its replication within the time allowed in the Rules of Court, which is to be reckoned to run from the date of this judgment.

30.6 The action shall thereafter proceed in terms of the ordinary provisions of the Rules of this Court.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 1 1th DAY OF FEBRUARY, 2009.

TS MASUKU

JUDGE

Messrs. B.S. Dlamini & Associates for the Applicant Messrs. George Langa Attorneys for the 1st Respondent