IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 4417/2007

SABELO ZULU Applicant

And

BONGANI NHLABATSI 1st Respondent

MAVELA MOTSA 2nd Respondent

Coram S.B. MAPHALALA - J

For the Applicant MR. S. DLAMINI

For the Respondent MR. G. REID

JUDGMENT 12th
February 2009

[1] Before court is an application for rescission of a default judgment granted by this court on the 28th February 2008, under the common law. The said judgment is for payment of the amount of E38, 000-00 interest thereon at the rate of 9% per annum calculated from the date of issue of summons to date of final payment and costs of suit.

[2] It is common cause between the parties that:

(d) The parties' respective motor vehicles were involved in a motor vehicle collision at Matsanjeni area on the 29/09/07.

(e) The Respondent's motor vehicles was driven by himself, while the Applicant's motor vehicle was driven by one Bongani Nhlabatsi.

(f) The Respondent (Plaintiff) issued summons for recovery of the sum of E38, 000-00 (thirty Eight Thousand Emalangeni) plus interest and costs as damages suffered by the latter as a result of the collision.

(g) The Applicant (Defendant) did not enter an appearance to defend but Mr. Bongani Nhlabatsi (cited as 1st Defendant) entered an appearance to defend and filed his plea.

(h) The 2nd Defendant (Applicant) did not and a default judgment was granted against him.

(i) It is that default judgment that the Applicant seeks to set aside.

[3] The Applicant contends that this court was misled into

granting the default judgment and that had the following facts brought to the court's attention it would not have granted the default judgment.

(a) That the said Bongani Nhlabatsi is not an employee and/or relative of the Applicant; there is no relationship between the two of them - the former took the latter's motor vehicle without his authority and/or consent as such the Applicant is not vicariously liable.

See: paragraph 13.1.1 of the Founding Affidavit.

See also: Paragraph 3 of annexure "MM2" of the Founding Affidavit.

(b) In granting the default judgment this Honourable Court was made to believe that the said Bongani Nhlabatsi was an employee and was during the collision within the scope of the employment by the Applicant.

See: Paragraph 5.2.1 of annexure "MM3" being a copy of the summons.

(c) To found vicarious liability in an action for damages evidence that the driver who caused the collision was employed by the Defendant is a prerequisite.

See: *Swaziland United Transport Limited v Young's Farm Butchery (Pty) Ltd and Another 1987-1995 (3) SLR* at page *228.* Otherwise the court may grant absolution from the instance without even considering the cause of the collision.

(d) Even in an undefended action proof of damages should be led. See: *Dennis Mokgokong v Ellerines Furnishers 1987 - 1995 SLR (3)* at *253.*

(e) The Applicant submitted that it has explained to this Honourable Court its

failure to respond to the summons and has stated his defence.

See: Paragraph 10 and 11 of the Founding Affidavit and also paragraph 13.1.1, 13.1.2, 13.2.1 and 13.2.2.

(f) Applicant submits that this being an action based on an illiquid claim the Plaintiff had to lead oral evidence to succeed in the default judgment.

See: Rule 31 (3) (a).

(g) Applicant submits that it has established good cause to enable this Honourable Court to set aside the default judgment.

[4] Before I proceed with the judgment I must mention that the point about urgency was mentioned in the proceedings but when the matter came for argument both Counsel stated that this was no longer an issue.

[5] The Respondents in their opposition argue that the application fall short of the requirements for rescission at common law and Rule 31 (3) (b) of the High Court Rules which govern the rescission of default judgments.

[6] The Respondents contend that the reasons advanced by the Applicant for his default show that he was in willful default and therefore fall short of the first requirement for a "good cause". The reason advanced by the Applicant for his failure to file his Notice of Intention to Defend, in that he had seen the 1st Respondent's plea which allegedly absolved him from liability to the Respondent herein is illogical.

[7] After assessing the parties' contentions as stated above it would appear to me that the Respondents' arguments are correct on the facts of the matter. I say so because the 1st Respondent's plea was issued out on the 12th March, 2008 whereas the *dies induciae* for the filing of the Notice to defend expired on the 5th February 2008. Therefore, by the time that the 1st Respondent had filed his Application the Applicant was already in gross default of filing his Notice to defend.

[8] It would appear to me also that the defence sought to be advanced by the Applicant has no prospects of success vindicating him from his vicarious liability as stated by the learned author *Cooper W.E. "Delictual Liability in Motor Law" (1996) Juta* at page *403* that:

> "... Where a servant employed to drive a motor vehicle has without his master's consent or contrary to his instructions, delegated his duty to another, the master will be liable for the substitute driver if... delegation was an improper method or mode of what the servant was employed to do".

[9] It would also appear to me that the Respondent is correct that the application has been made with the sole intention to delay the claim. Such an intention can be inferred from the

Applicant's paragraph 14.2 of his affidavit wherein he states that he had instructed his attorneys to negotiate on his behalf terms

for settling the Respondent's claim. Such instructions show that Applicant's appreciation that he is vicariously liable to the Respondent.

[10] In the result, for the afore-going reasons the application is dismissed with costs. The Applicant must immediately furnish the Respondent with the costs of the default judgment and in particular those of the Deputy Sheriff, in light of his willful default in filing his Notice to Defend.

S.B. MAPHALALA PRINCIPAL JUDGE