IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **Civil Case No. 4577/08**

In the matter between:

Augustine Ndlela	**Applicant**
And	
Ruth Ndzinisa	**First Respondent**
Sandile Dlamini	**Second Respondent**
In re:	
Ruth Ndzinisa	Applicant
And	
Simon Man ana	First Respondent
Zama Dlamini	Second Respondent
Augustine Ndlela	Third Respondent
Jabulani Lukhele ,	Forth Respondent
Mefika Lukhele	Fifth Respondent
CORAM	MCB MAPHALALA, J
For Applicant	Mr. S. Magongo
For Second Respondent	Mr.O. Nzima

JUDGMENT
22nd February 2011

[1] The Applicant brought an urgent application seeking the following order:

1. Dispensing with the usual forms and procedures relating to service, time limits and allowing the matter to be heard as one of urgency.

2. Condoning the applicant's non-compliance with the Rules of this Court.

3. Pending finalization of this application, the Kombi attached by the Second Respondent to wit a Toyota Hiace registered SD 520 WN be released to the applicant forthwith.

4. The judgment by default granted against the First Respondent on the 29th May 2007 be set aside.

5. The attachment of the Applicant's Kombi a Toyota Hiace registered SD 520 WN be set aside.

6. Granting applicant leave to oppose the main application filed by the First Respondent.

7. A Rule Nisi do hereby issue with immediate effect as an interim order calling upon the Respondents to show cause, if any, on a date to be determined by this Honourable Court why:

7.1. Prayers 3, 4, 5 and 6 should not be made final.

7.2. They should not be ordered to pay costs of this application.

8. Any such further and/or alternative relief.

[2] On the 21st July 2009 the Second Respondent attached a Kombi registered SD 520 WN belonging to the Applicant pursuant to a judgment by default issued by this court on the 25th May 2007. The applicant was personally served with a Rule Nisi on the 17th April 2007 and which was issued on the 13th April 2007. The Rule which was returnable on the 27th April 2007 are calling upon the Applicant and four others to show cause why they should not be interdicted and restrained from collecting rentals from the tenants occupying apartments belonging to the First Respondent. On the 20th April 2007 Attorneys Masina Mazibuko & Company filed a Notice of Intention To Oppose on behalf of the Applicant and the four others cited with him.

[3] The Rule Nisi was subsequently confirmed on the 25th May 2007, and, a Writ of Execution was issued on the 18th May 2009 in respect of the judgment by default.

[4] Notwithstanding the confirmation of the Rule, the applicant did nothing until the present proceedings were instituted for rescission of the Order.

[5] The Applicant denies instructing Attorneys Masina Mazibuko & Company to represent him in the main application; however, he does not attach a confirmatory affidavit from the said Attorneys. He tells the Court that after receiving the Rule Nisi in 2007; he gave it to the Inner Council of Logoba Royal Kraal which undertook to attend to the matter. The Applicant did not bother to make a follow-up on the matter until his Kombi was attached on the 21st July 2009 pursuant to the Writ.

[6] The Applicant does not state in his application whether the rescission is in terms of Rule 31 or Rule 42 or the Common Law. Rule 42 (1) provides as follows:

> **"The Court may in addition to any other powers it may have *mero motu* or upon the application of on any party affected, rescind or vary:**
>
> **(a) an order or judgment erroneously granted in the absence of any party affected thereby;**
>
> **(b) an order or judgment in which there in an ambiguity, or a patent error or omission, but only to the extent of such ambiguity error or omission;**
> **(c) an order or judgment granted as the result of a mistake common to the parties."**

[7] The Applicant argues that the order should not have been issued, in his personal capacity if the court had known that he was acting in his official capacity as the Secretary of the Inner Council of Logoba Royal Residence. It is common cause that when the order was issued, the applicant was absent in court even though he had been served with the Rule which specifically mentioned the return day. The order issued "restrained and interdicted the Applicant and the four others from collecting rentals from the tenants of the First Respondent"; the

applicant does not deny that he and four others collected the rentals, but* he argues that he did so as an official of the Logoba Royal Residence. In the circumstances, the order was not erroneously granted. The applicant was duly served with the Rule; however, he chose not to contest it in Court until it was confirmed a month later.

Furthermore,- he did not challenge the order until two years had lapsed; this shows that he did not consider the Order to have been erroneously granted. It was only after the bill had been taxed, and, the writ issued in respect of the bill on the 21st July 2009 that he filed the rescission application. It is apparent that the failure by the Applicant to defend the matter was both deliberate and intentional. In addition he has failed to set out in detail his defence; he merely alleges that he has a *bona fide* defence.

[8] Rule 31 (3) ,{b) is certainly not applicable in this matter on the basis that it places a time limit when the application could be made after the defendant has had knowledge of the judgment. The Rule provides that:

> **"A defendant may, within twenty-one days after he has had knowledge of such judgment, apply to court upon notice to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the default judgment and of such application to a**

> **maximum of E200.00 (Two Hundred Emalangeni), set aside the default judgment on such terms as to it seems fit."**

[9] It is commori cause that the Applicant had knowledge of the judgment on the 17th April 2007 when he was served with the Rule Nisi; the rule was subsequently confirmed by the court on the 27th April 2007. However, the Applicant waited for two years before bringing to court the rescission application. **His Lordship Chief Justice Nathan** dealt with Rule 31 (3) (b) in the cases of **Msibi v Mlawula Estates (PTY) Ltd, Msibi v G.M. Kalla and Company** 1970-1976 SLR 345 (HC) at 348:

> "It is to be noted that the Court has a discretion in the matter and that "good cause" must be shown. The requirements which must be satisfied before the Court will grant a rescission of a default judgment has been dealt in a number of cases....
>
> The tendency of the Court is to grant such an application where (a) the applicant has given a reasonable explanation of his delay; (b) the application is *bona fide* and not made with the object of delaying the other parties claim; (c) there has not been a reckless or intentional disregard of the Rules of Court; (d) the applicant's action is clearly not ill-founded; and (e) any prejudice to the opposite party could be compensated for by an appropriate order as to costs."

[10] **His Lordship Chief Justice Nathan** further applied the same principles in the cases of **Shongwe v Simelane, Msibi v Simelane**

1977-1978 SLR 183 at 185 (HC). The Applicant has dismally failed to show "good cause for rescission" as envisaged by Rule 31 (3) (b); he did not only fail to justify that his delay was in the circumstances reasonable, but he failed to show that it was not wilful or due to gross negligence on his part. Furthermore, he failed to show that the application is *bona fide* or that he has a *prima facie* defence to the main application.

[11] **His Lordship Chief Justice Nathan** in the cases of **Msibi v Mlawula Estates (PTY) Ltd, Msibi v G.M. Kalla and Company** (supra) at 348 - 349 had this to say:

> "It seems clear that by introducing the words 'and if good cause be shown', the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence.... In addition to having to establish a *prima facie* defence an applicant for rescission must furnish good reasons for his default....
>
> The explanation must be reasonable... namely that it must not show that his default was wilful or was due to gross negligence on his part."

[12] The reason given by the applicant for the delay was that he gave the Rule Nisi to the Inner Council of Logoba Royal Kraal to attend; after that he folded his arms and did nothing hoping the matter was being attended by the Inner Council. However, he concedes that he was obliged to ensure that something was being done to defend the matter. The lapse of two years clearly indicates a reckless disregard of

the Rules of Court; the explanation he has given is not reasonable. The delay is due to his gross negligence. In addition the applicant has not established a prima facie defence to the main action; he merely asserts that he acted in his capacity as the Secretary of the Inner Council, however, this does not constitute a *bona fide* defence.

[13] In the circumstances the application is dismissed. Each party to pay his costs of suit.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT