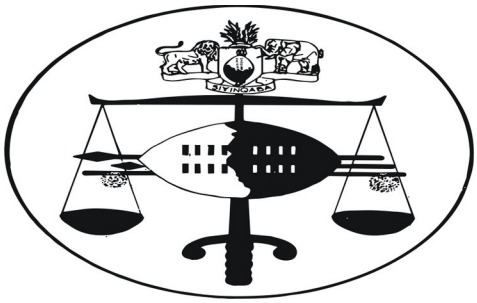

IN THE HIGH COURT OF SWAZILAND

RULING

Case No. 2929/10

In the matter between:

EUNICE PHITHIZILE ZWAME **Plaintiff**

And

SHODI DLAMINI AND 3 OTHERS **Defendant**

Neutral citation: **Eunice Phithizile Zwane v Shodi Dlamini and 3 Others 2929/10 [2012] SZHC 54(21st March2012)**

CORAM: **M. Dlamini**

Heard: **15th March 2012**

Delivered: **21st March 2012**

For the Plaintiff: **M. Manana**

For the Defendant: **B. Ngcamphalala**

Summary: The application before court is one for rescission in terms of *Rule 42 (1) (a)*. The respondent, plaintiff then, was granted judgment by default, applicants having failed to file notice to defend.

[1] The respondent initiated proceeding by way of combined summons. It is important from the onset to quote verbatim the particulars of claim as averred by respondent because it is in the determination of their nature that will direct the court to the appropriate decision.

Particulars of Claim.

> *"7. Sometime on the 13th December 2008, the 1st and 2nd defendants arrived at the homestead of the plaintiff and ordered the husband of the plaintiff to take her to appear before a group of men [vigilantes] that very evening.*
>
> *8. When the plaintiff appeared before the group of men, the 3rd defendant ordered the 4th defendant to tell her why she had been called.*
>
> *9. The plaintiff's husband was ordered to return back home without the plaintiff as the defendants wanted to deal with her. Fearing for his life, the husband returned home.*
>
> *10. The plaintiff was ordered to roll on the ground by the defendants who were my leaders of the vigilantes and further forced to do push up exercises for the whole night.*
>
> *11. The actions of the defendants were both wrongful, illegal and unjustified because if the plaintiff had committed any crime, the defendants should have handed her over to the police.*
>
> *12. As a result of the unlawful acts of the defendants and their agents, the plaintiff suffered damages in the sum of E50,000.00 broken down thus:*
>
> *12.1 Defamation of character E20,000.00*

12.2	*Loss of dignity*	*E15,000.00*
12.3	*Emotional stress and discomfort*	*E15,000.00*
	Total	*E50,000.00*

13. The plaintiff had been operated upon and the doctor had instructed her not to perform any strenuous activities.

14. Despite due and unlawful demand, the defendants have failed, refused and / or ignored to compensate the plaintiff.

***WHEREFORE** plaintiff's prayers for an order:*

a) Directing the defendants to pay the sum of E50,000.00jointly and severally the one paying to absolve the other.

b) Costs of suit.

c) Such further and / or alternative relief".

[2] The applicant contend that their application for rescission is brought under *Rule 42 (1) (a)* strict *sensu*. The rule reads:

> *"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 erroneously granted in the absence of any party affected thereby";*

[3] It was applicant's further contention that all the court has to determine in terms of this rule was whether the order was granted erroneously. Once the court determines that question, the court has to rescind the judgment without any further ado. Applicants submitted on what the rule envisage as

erroneous. The court was referred to Erasmus *"Superior Court Practice" page B1 – 308* where it is stated

> *"An order or judgment is erroneously granted if there was an irregularity in the proceedings"*

[4] According to applicant, the court in issuing judgment by default on an unliquidated claim as can be adduced from respondents' particulars of claim, without calling for oral evidence committed an irregularity. In support of this submission, the court was referred to *Marais v Mdowen 1919* **…….***page 34 at page 36* it was held by obiter dictum held:

> *"Now, this court would never dream of giving judgment in a matter of damages for an assault without hearing some evidence to show what was the nature of the assault. Whether a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub rule 5 for the default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, oral or documentary and in the case of any other claim, after hearing such evidence as the court may direct, whether oral or documentary, grant judgment against the defendant or make such order as it seems fit".*

[5] It is against the back drop of these arguments that I now determine the issues.

[6] As correctly submitted by applicants, our *Rule 42 (1) (a)* is peri material with *Rule 42 (1) (a)* of South Africa. In other words an interpretation of the rule in South Africa will not vary in any way with that of our courts.

[7] Erasmus in "*Superior Court Practice"* at page B1 – 308 states in relation to rescission of the court's judgment where judgment was entered in terms of default of the opposite party:

> *"There are three ways in which a judgment taken in the absence of one of the parties may be set aside namely in terms of (i) this subtitle, or (ii) Rule 31 (2) (b) or (iii) at common law, a rescission under this sub rule the applicant must show that the order was erroneously sought prior or erroneously granted. Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry to rescind or vary the order and it is not necessary for a party to show good cause for the sub rule to apply In order to obtain ……..*

[8] The respondents asserted that Rule 31 (2) gave the court a discretion on the procedure to be adopted as evident by the use of "may". It was not obligatory for the court to call for viva voce or documentary evidence in default judgment application and that the decided case of Marais supra could not be authority as it dates way back as 1919 whereas in essence the law has developed beyond the dictum. The respondent on the other hand drew the court's attention to rule 31 (3) (a) which reads:

> *"Whenever a defendant is in default of delivery of notice of intention to defend or a plea, the plaintiff may set the action down as provided in* ***subrule 5*** *for the default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, oral or ……*

[9] Erasmus supra continues to explain as the circumstance where a judgment can be said to be erroneously granted or sought.

> *"an order or judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order, or 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".*

[10] Respondent the assertion by applicants confirms that when the default judgment was granted, no viva voce or documentary evidence was tendered. This court will commend respondents' counsel for exhibiting good ethical standards in this regard. The silence of the record also adds weight to applicant's submission on the non compliance of the procedure.

[11] The duty of this court therefore is to determine whether the failure to call for viva voce or documentary evidence in a claim arising from assault is tantamount to an irregularity narrating rescission.

[12] As can be deduced from the particulars of claim outlined above, it is not in issue that respondents' cause of action arises from assault and that therefore such action is classified as an unliquidated claim.

[13] It is further clear that when the applicant failed to file a notice to defend and a subsequent plea, the respondent moved an application in terms of *Rule 31 (3) (a)* of the High Court Rules. This rule does not only set out the procedure to be followed in the event the opposite party fails to deliver a notice to defend or a plea but also the procedure to be taken before delivery of the judgment by default.

[14] The subsection reads:

> *"Whenever a defendant is in default of delivery of a notice to intention to defend or of a plea, the plaintiff may set the action down as provided in Subrule (5) for default judgment and the court may, where the claim i.e. for a debt or liquidated demand, without hearing evidence, oral or documentary and* ***in the case of any other claim****, after hearing such evidence as the court may direct, whether oral or*

documentary, grant judgment against the defendant or make such order as to it seems fit".

[15] ***Abraham v City Cape Town 1995 (2)*** S. A. is authority for the position that where the claim is for an unliquidated demand the practice is that the court will not only require oral evidence or what is commonly referred to as damages affidavits for proof of the *quautu*….. but also one supporting the cause of action and this should be led or submitted in court as the case may be. This is in line with the general practice that a court should satisfy itself that the party before court has shown good cause before granting any judgment irrespective of whether the opposite party is before court.

[16] On the above premise , it is therefore clear that the failure not to tender evidence either *viva voce* or documentary before the default judgment was granted resulted to an irregularity which could be construed in the face of the court as an "*error" in the ex-facie* proceedings.

[17] In *Bakoven v G. J. Howes (Pty) Ltd 1992 S.A. 466 at 471* E – G Erasmus J. stated in:

"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 bona fide defence … Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission.

[18] In the result the following orders are entered.

1. Application for rescission is granted.
2. Default judgment dated 25 February, 2011 is hereby set aside.

_____

M. DLAMINI

JUDGE