IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.54/99

In the matter between:

STANLEY MATSEBULA		**APPELLANT**
AND		
AARON MAVIMBELA		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**TEBBUTT JA**
FOR APPELLANT	**:**	**MR. MDLADLA**
FOR RESPONDENT	**:**	**MR. MABILA**

JUDGMENT

Tebbutt JA:

In the High Court the respondent obtained default judgment against the appellant. In his submissions and particulars of claim respondent alleged that appellant defamed him by calling him a witch and claimed damages in the sum of E80, 000.00 together with interest and costs. He obtained default judgment when appellant failed to enter appearance to defend. Appellant thereupon immediately applied for a rescission of the judgment. That application came before Matsebula J who refused it. The appellant now comes on appeal to this Court against that decision.

In his application, the appellant says that default judgment was granted against him on 6th August 1999 and that he only became aware of this when he read of it in a local newspaper on 7th August 1999. He said that on 30th July 1999 he was given a brown envelope containing a document by the Deputy Headmistress of Mbabane Central Primary School, a Mrs. Kunene. Appellant is himself a school teacher. She informed him that the document had been handed to her by a lady with the surname Matsebula. Appellant said he telephoned this lady who advised him that the document was a summons. When default judgment was granted on 6th August 1999 only five days had elapsed since he received the summons and as, according to the summons, he had ten days to enter appearance, he was shocked to find that default judgment had been entered against him before the ten days had elapsed. He therefore based his application on three grounds; (a) that there had not been proper service of the summons on him; (b) that Ms. Matsebula was not authorised to serve the summons as she was not the Deputy Sheriff who is the person who had to serve it; and (c) that the granting of default judgment was premature as the time within which he had to enter appearance to defend had not elapsed. He also denied having uttered the defamatory words complained of and averred that he had a good defence to the respondent's action.

In opposing the application, the respondent filed an affidavit by the Deputy Sheriff for the District of Hhohho, one Ted Rowberry who averred that he had served the summons personally on the appellant on 19th July 1999. Ms. Matsebula, he said, merely accompanied him when serving summonses to advise persons of what he is saying when explaining the nature and exigency of the summons. Ms. Matsebula confirmed Rowberry's averments. This provoked a reply by the appellant who denied that Rowberry had served the summons on him personally either on 19th July 1999 or at all. He filed an affidavit by Mrs. Kunene who said that Ms. Matsebula gave her the brown envelope on 30th July 1999, at a time when appellant was out of town, and did not explain the contents of the document contained in the envelope to her. The appellant also filed an affidavit by his attorney, Mr. Sidumo Mdladla that at the Mbabane Magistrate's Court on 27th September 1999, Rowberry told him that he had gone to appellant's school to serve the summons on him but that appellant was out of town. He had then sent Ms. Matsebula to serve the summons which he placed in an envelope so as not to embarrass the appellant.

In his judgment Matsebula J referred to the return of service and to Rowberry's affidavit and held that the summons had been correctly served and that he had been unable to find any error which could have led the Court to grant default judgment incorrectly.

Surprisingly the learned Judge did not refer to the averments by Mrs. Kunene or Mr. Mdladla and the conflict of facts raised by them or to the further conflict of fact between the appellant and Rowberry as to whether service had been effected personally. It is, in my view, clear that these conflicts on the papers, between the appellant's version of events and that of the respondent, required that they should have been resolved by the hearing of oral evidence for if the version of the appellant is correct then it is obvious that default judgment may have been granted erroneously.

Appellant brought his application in terms of Rule of Court 42(1)(a) which provides as follows:

> ***"(1) 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 granted in the absence of any party affected thereby."***

In **NYINGWA V MOOLMAN NO. 1993(2) SA508 (TK) AT 510F**, dealing with the South African Rule of Court 42(1), White J said:

> ***"It therefore seems that a judgment has been erroneously granted if there existed at the time an issue of 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."***

That statement makes good sense and is equally applicable to the Swaziland Rule of Court 42(1) which is couched in similar terms to the South African one. Moreover it has been held, in respect of the South African Rule, that where a party to proceedings has not been properly served or where the service is defective, an application to rescind a judgment falls under Rule 42 (See **CUSTOM CREDIT CORPORATION (PTY) LTD V. BRUWER 1969(4) SA564 (N))**.

If, after hearing oral evidence, the court had found that there was no personal service and that the summons had been handed to Mrs. Kunene, for handing on to appellant, only on 30th July 1996,

these would clearly have been facts which would, had the Judge hearing the application for default judgment known of them, have influenced him not to grant the judgment.

In my view, the learned ***Judge a quo*** incorrectly dismissed the application. He should have referred the matter for oral evidence in order to resolve the conflicting versions. It follows that his decision should be set aside and the matter should be referred back to the High Court to hear such evidence. The court accordingly makes the following order:

1. The judgment of the High Court dated 29th October 1999 is set aside.
2. The matter is referred back to the High Court to hear oral evidence on the issues raised in the affidavits in the proceedings in the High Court, relating to the service of the summons.
3. The costs of the appeal, as well as the costs of the proceedings in the High Court, both on the original application for rescission and the resumed hearing on that application, are reserved for determination by the High Court.

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P.H. TEBBUTT JA

I agree :

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J. BROWDE JA

I agree :

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J.H. STEYN JA

Delivered in open Court on this ……. day of May 2000.