Civil Appeal No.36/01

In the matter between:

E.J.& H PROPERTY MANAGEMENT Appellant

CONSULTANTS SWAZILAND LIMITED

And

MICHAEL SEALY COMPTON Respondent

CORAM : BROWDE J.A.

BECK J.A.

ZIETSMAN J.A.

JUDGMENT

Zietsman J.A.

On 14th November 1995 the respondent issued summons against the appellant in which he claimed payment of the sum of E28 801,50 as damages allegedly sustained by respondent as a result of the appellant's failure to carry out his obligations in terms of a verbal contract entered into between the parties. The action was opposed by the appellant and the pleadings were closed.

On 15th May 1996 the respondent served a notice (dated 14th May 1996) on the appellant in which he stated that it was his belief that the appellant still had, or had had, in his possession documents or tape recordings relevant to the case and which had not been disclosed by the

appellant. The appellant was, in terms of the notice, given 14 days within which to deliver a statement on oath setting out which of the documents in question he still had in his possession, and in the case of the documents no longer in his possession the present whereabouts of such documents.

The appellant failed to respond to the said notice and on 13th August 1996 the respondent served a further notice (dated 8th August 1996) on the appellant advising the appellant that application would be made to the High Court on 16th August for an order compelling the appellant to comply with the 14th May 1996 Notice within a period of 10 days. On 18th August 1996 the following order was issued by Dunn J:

"IT IS ORDERED THAT: -

Defendant (the present appellant) to inform Plaintiff (the respondent) within fourteen days of todays date, of a date on which the Plaintiff can inspect the documents or file an affidavit stating that the Defendant does not have the documents in its possession.

On 29th September 1998 appellant's attorney wrote a letter to the respondent's attorney in which he stated, "We advise that we are unable to accede to your request because our client's former attorneys have not given us the file pertaining to the above matter. As soon as we receive it we shall revert to you."

On 8th October 1998 the respondent's attorney wrote a letter to the appellant's attorney in the following terms:

"We refer to the above matter and to your letter dated 29th September. We would be grateful if we could have an indication with regard to when you expect to be seized of the file in the above matter. We look forward to hearing from you."

On 11th August 1999 the appellant's attorney wrote the following letter to the respondent's attorney:

"We refer to this matter.. .we confirm that you have undertaken to serve us with a copy of the Court Order referred to in your telefax dated 9th August 1999, and that you have

undertaken to give us a seven (7) day period after such service within which to take necessary steps thereto."

On 9th September 1999 a copy of the Order in question was filed with the registrar and served on the appellant's attorney.

On 25th November 1999 a Notice dated 24th November was served on the appellant's attorney by the respondent's attorney. The Notice reads as follows:

"NOTICE OF SET DOWN - UNCONTESTED ROLL. RULE 35 (11)

TAKE NOTICE that the above matter has been set down for hearing at 09h30 on Friday the 26th day of November 1999 or as soon thereafter as the matter can be heard for an Order striking out Defendants defence and for Default Judgement to be entered against Defendant on the grounds set out below.

1. That Defendant was served with a Notice in Terms of Rule 35 (4) on the 13th August 1996 requesting discovery of the documents set out therein;

2. The Defendant failed to comply with the said notice, whereupon the Plaintiff on the 18th October 1996 obtained an Order compelling compliance with the said notice. A copy of the Order is attached hereto marked "MSC.1".

3. The Court Order was issued and duly delivered upon and received by the Defendant on the 3rd September 1999. The Defendant has not complied with the said Order.

BE PLEASED TO TAKE NOTICE FURTHER that Application will be made for the costs of this action to be awarded to Plaintiff."

On the date upon which this Notice was served upon the Appellant's attorney, i.e. on 25th November 1999, the appellant's attorney gave notice to the registrar and to the respondent's attorney of the appellant's intention to oppose the application.

On 1st December 1999 the appellant's attorney filed an opposing affidavit signed by the appellant's managing director stating that the appellant was not in possession of the documents in question.

However, on 26th November 1999, before the said opposing affidavit was filed, the matter came before the Chief Justice in the High Court at Mbabane. There was no appearance by or on behalf of the appellant, and despite the appellant's notice of intention to oppose the application, and despite the fact that no evidence was led, default judgment was granted by the Chief Justice against the appellant for payment to the respondent of damages in the sum of E28 801.50. Thereafter a writ was issued against the appellant.

On 2nd February 2000 an application was brought by appellant for an order interdicting the respondent from levying execution against the appellant's property, and for a further order rescinding the default judgment. This application was opposed by the respondent.

The matter came before Masuku J. who correctly found that the Chief Justice had erred in giving judgment for the payment of damages where no evidence had been led to prove the damages, and he set aside the writ of execution. He however held that the Chief Justice was correct in granting judgment by default against the appellant. He accordingly refused the application to rescind the judgment, but amended the judgment granted by the Chief Justice by setting aside the award of damages and giving the respondent the opportunity to prove his damages. The effect of this judgment is not clear. It is not clear whether the appellant would be permitted to dispute any evidence adduced by the respondent, and to himself lead evidence, on the question of the respondent's alleged damages. What is also not clear from the judgment is what the position would be if the respondent failed to prove any damages.

Masuku J. was clearly not correct in confirming the default judgment and in granting costs against the appellant where the damages allegedly sustained by the respondent had not been proved. He should have upheld the application to rescind the judgment and he should have awarded costs against the respondent.

There is a further problem concerning Masuku J's judgment.

Rule 6 (4) of the High Court Rules deals with ex parte applications and provides that such applications may be set down not later than midday on the court day preceding the day on which the application is to be heard. Rule 6 (24) deals, inter alia, with interlocutory applications and provides that they may be set down at a time assigned by the registrar or as directed by a judge. Masuku J. concluded that the application before him was an interlocutory application and he held that it could be set down for hearing on the following day. In this respect Masuku J. erred. The application before him was neither an ex parte nor an interlocutory application. It was an application for the grant of a final order in an opposed matter. Such applications are governed by sub-rules 6 (9) and 6 (10) which provide the following:-

"6 (9) Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form 3 of the First Schedule and true copies of the notice, the supporting affidavits and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

6 (10) In such notice the applicant shall appoint an address within five kilometres of the office of the registrar at which he will accept notice and service of all documents in such proceedings, and

shall set forth a day not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant in writing whether he intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than seven days after service on the respondent of the notice."

Sub-rules 6 (9) and 6(10) were not complied with and, on this ground too, the order which Masuku J should have granted was an order rescinding the judgment granted by the Chief Justice.

In the result the appeal is upheld with costs. The order granted by Masuku J is set aside and is substituted by the following order.

1. The application for rescission of the order granted by Sapire C.J. is granted with costs.

2. The respondent is given leave if he so wishes, on due notice to the appellant, to

again set down for hearing his application for default judgment in conformity with sub-rules 6 (9) and 6 (10) of the High Court Rules.

3. The warrant of execution issued pursuant to the judgment granted by Sapire C. J. is set aside.

N.W. ZIETSMAN J.A.

I agree

J BROWDE J.A.

I agree

C.E.L.BECK J.A.

Delivered on this 21th. ..day of November 2002