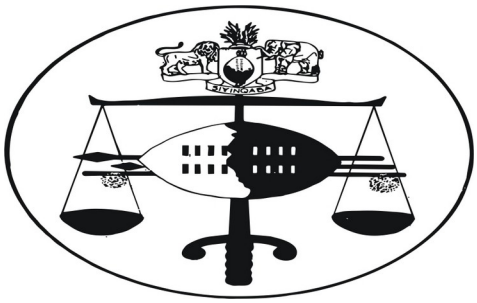

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 34/12

In the matter between

CHRISTOPHER DLAMINI **Appellant**

and

SEBENZILE MALINGA **Respondent**

Neutral citation:	Christopher Dlamini *v Sebenzile Malinga* (34/12) [2012] SZSC 53 (30 November 2012)
Coram:	RAMODIBEDI CJ, MOORE JA, and MCB MAPHALALA JA
Heard:	**14 NOVEMBER 2012**
Delivered:	**30 NOVEMBER 2012**

Summary: **Civil Appeal – The appellant appealing against a dismissal by the High Court of his application for rescission of default judgment entered against him in a claim for damages arising from assault – No bona fide defence shown – Application for rescission made in bad faith – Appeal dismissed with costs de bonis propriis.**

RAMODIBEDI CJ

[1] This is an appeal against a dismissal by the High Court (Dlamini J) of the appellant's application for rescission of default judgment.

[2] By summons filed in the High Court the present respondent, as plaintiff, claimed damages from the appellant, as defendant, in the sum of E140, 500.00 for assault. For the sake of convenience I shall continue to refer to the parties as plaintiff and defendant respectively, as the case may be.

[3] It was alleged in the particulars of claim that on 28 April 2005, the defendant wrongfully, unlawfully and intentionally assaulted the plaintiff who was visiting a friend. The latter in turn resided near the defendant's homestead. The plaintiff alleged that she sustained severe injuries to her head and the right arm. These injuries caused her to suffer extreme pain and persistent headaches. She particularised her damages as follows:-

Medical and hospital expenses: E500.00

Pain and suffering:	E20, 000.00
Permanent disability:	E100, 000.00
Disfigurement:	E20, 000.00
Total	E140, 500.00.

[4] On 3 March 2009, and after duly tendering all the evidence required in the matter, the plaintiff obtained default judgment against the defendant in the reduced sum of E50, 000.00.

[5] In January 2011, an incredible period spanning more than 21 months after the default judgment in question, the defendant filed an application on a notice of motion for rescission of default judgment. The application was heard on 28 March 2012. It was dismissed with costs on 11 April 2012. Hence this appeal.

[6] It is trite in this jurisdiction, as indeed it is in many jurisdictions, that in order to succeed in an application for rescission of default judgment the defendant must make the running and satisfy two requirements, namely:-

(1) that he/she was not in wilful default in failing to appear in court when default judgment was granted and (2) that he/she has a bona fide defence to the plaintiff's claim. See, for example, **Cash & Carry Swaziland (Pty) Ltd v Intercon Construction Swaziland, Appeal**

Case No. 1/2001; also available on line under SWAZILII **[2001] SZSC 12.**

[7] It is a remarkable feature of this case that after the default judgment in question, the defendant actually negotiated a settlement of the judgment debt through his attorney of record, **Mr. Mabila**. Not only did the defendant accept the judgment, and therefore his liability in the matter, but he also paid a sum of E13, 000.00 towards settling the judgment debt. In his own words, he said the following in paragraph 7 of his founding affidavit in support of his application for rescission of default judgment:-

> "*7. As he (Mr. Mabila) was my attorney and I had trust in him, I reluctantly agreed to negotiate the payment terms, which he also undertook on my behalf. Indeed with his assistance I made certain payments towards liquidation of the judgment debt and costs. In this respect I have already paid amounts in excess of a sum of E13 000.00.*"

[8] There is no acceptable explanation on record to show that the defendant was not in wilful default when judgment was taken against him by default. He has not attached an affidavit of his attorney to explain how this came about. On the contrary, he has launched a scathing attack against the attorney himself, whom he effectively accuses of dereliction of duty. But it will no doubt help to recall

the following apposite remarks of Steyn CJ in the case of **Saloojee and Another, NNO v Minister of Community Development 1965 (2) SA 135 (A)** at 141:-

> "*In Regal v. African Superslate (Pty) Ltd., 1962 (3) S. A. 18 (A.D) at p. 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.*"

[9] Similarly, the defendant has not offered any acceptable explanation why the application for rescission of default judgment was itself only made after 21 months of the judgment. Nor is it sufficient, in my view, for the defendant to contend himself, without more, with the following statement in paragraph 8 of his founding affidavit:-

> " *8 I must state that the judgment was granted at a time when I was in dire financial straits, and eversince then, I have been struggling financially, as a result of which even the payments that I have been making have been made in an irregular manner*."

[10] It is not apparent to me how the defendant would have disbursed a huge amount of E13, 000.00 in part settlement of the judgment debt and yet at the same time find himself in "dire financial straits" to apply for rescission of default judgment if he so wished. As a matter of overwhelming probabilities, I consider that the real reason why he did not apply for rescission was because he accepted the default judgment since he simply had no *bona fide* defence. Indeed, as **Mr. Mlangeni** for the respondent correctly submitted, the only reason why the appellant belatedly decided to bring a rescission application was evidently to nurse his bruised ego. This can be gleaned, from paragraph 9 of his founding affidavit, namely:-

"9. Whilst I was making arrangements to source out funds to liquidate the judgment debt, it came to my attention that the respondent was boasting that I was stupid and that was why even in court my attorney had not defended the matter. This came as a surprise since, I had been advised that the matter had been fully defended and that was why I had no prospects of success on appeal. This occurred towards the end of last year, particularly in the middle of December 2010."

[11] It follows from these considerations that the defendant has failed to satisfy both requirements for rescission of default judgment as fully set out in paragraph [6] above. As **Mr. Mlangeni** correctly submitted, in my view, the application for rescission was made in bad faith. This brings me to the question of costs.

[12] It is not disputed that the plaintiff duly put the defendant on notice as to punitive costs in the matter. In this regard she concluded her opposing affidavit with the following prayer:-

"***WHEREFORE*** *I pray that the application for rescission be dismissed with costs at the punitive scale*."

Similarly, in paragraph 9 of his supporting affidavit **Mr. Mlangeni** pertinently averred as follows:-

"*Whether the Respondent boasted or not, as alleged or at all, it does appear that the reason the Applicant seeks rescission is because he wants to get even with the Respondent for boasting. Unfortunately, courts are averse to being used to settle petty scores.*

This is an additional reason why punitive costs should be entered against the Applicant."

[13] As indicated earlier, the application for rescission of the default judgment in the matter was made in bad faith in the circumstances of this case. This factor alone is enough to attract punitive costs. What is reprehensible is that **Mr. S. C. Simelane** for the defendant played an active part in the matter without so much as an apology to the Court. In doing so, he broke one of the cardinal rules regulating proper ethics in the legal profession, namely, never to unduly attack a learned colleague behind his back as has happened here. As if that was not enough, he sought to mislead this Court in a number of respects, seeking to challenge the fact that the defendant accepted the default judgment in question. This was bad advocacy deserving of censure. It is regrettable to observe that professional standards have taken a nosedive amongst some

legal practitioners in this jurisdiction. It is the duty of this Court to put a stop to this rot. In these circumstances, therefore, this Court put to counsel why he should not be ordered to pay costs *de bonis propriis* as a mark of the Court's displeasure. Predictably, he had no acceptable answer.

[14] The result is that the appeal is dismissed with costs *de bonis propriis* against **Mr. S. C. Simelane**.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

S.A. MOORE
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
JUSTICE OF APPEAL

For Appellant : **Mr S.C. Dlamini**

For Respondent : **Mr T. Mlangeni**