

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1268/95

In the matter between:

AFRICAN BUSINESS CORPORATION Applicant

and

CONS COM SWAZILAND ARCHITECTS Respondent

CORAM: S.W. Sapire A.C.J.

FOR PLAINTIFF Miss Nxumalo

FOR THE DEFENDANT Mr. S. Nkosi

Judgment

(29/3/96)

This is an application to enter judgment by default. The plaintiff has sued the defendant by issuing and serving a combined summons in which an amount of E268 500.00 is claimed together with interest and costs.

The defendant having been served with the summons failed to enter and appear in defence and by notice dated the 15th August 1995 the plaintiff requested default judgment. Default judgment was duly entered on the 18th August 1995.

Thereafter the defendant applied for rescission of the judgment and after an opposed application was heard judgment was reserved. On the 9th February 1996 the judgment granted on 18th August 1995 was rescinded and in so ordering the court also prescribed that the plea was to be filed within ten days.

2

This application is made because the defendant has not filed a plea within the time prescribed by the court in granting rescission of judgment.

Mr. Nkosi who appears for the plaintiff has argued that this is not a case where a notice of bar is required, while Mr. Flynn who appears for the defendant argues to the contrary.

The dispute is to be resolved by a proper reading of Rules 31 at 26. Rule 31 3(a) provides:

"whenever 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 default judgment and the court may where the claim is for a debt or liquidated demand, without hearing evidence oral or documentary.....grant judgment against the defendant or make such order as to it seems fit."

In terms of Rule 26 if" any party fails to deliver any pleading other than a replication or subsequent pleading within the time laid down in the rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within three days

after the day upon which the notice is delivered. The rule goes on to bar any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may have been agreed upon between the parties shall be in default of filing such pleading and its effect barred.

Where therefore in paragraph 31 3(a) reference is made to a defendant being in default of delivery of a plea, regard must be had to the provisions of Rule 26. A defendant would only be in default of delivery of a plea if the plea has not been delivered within the time allowed by the rules or any extension in terms thereof.

In allowing the application for rescission of the default judgment the court specified a time for the filing of the plea. In so doing and acting in accordance with the rules, the time for filing the plea was extended.

3

Accordingly the defendant would only be in default of the filing of a plea if the requisite notice had been served and time specified therein had elapsed without the plea being filed.

This application is accordingly premature and irregular on that account.

The defendant's failure to file the plea within the time specified by the order of court is not a contempt of court as argued by the plaintiff. Defendant is not obliged to file a plea if he does not wish to do so. If the defendant does not file the plea within the period provided for in the rules despite the filing of a notice of bar judgment will be granted. The rules however enquire that the period specified in the order of court be extended by the giving of notice of bar.

The application is accordingly dismissed with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE