IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE No. 1644/97

IN THE MATTER BETWEEN:

LEONARD DLAMINI	APPLICANT
AND	
LUCKY DLAMINI	RESPONDENT
CORAM :	DUNN J.
FOR THE APPLICANT :	MR MDLADLA,
FOR THE RESPONDENT:	MR. S.C. DLAMINI.

JUDGMENT

14th NOVEMBER 1997.

This is an opposed application for rescission of a summary judgment which was granted in favour of the respondent on the 18th July 1997.

A party wishing to rescind a judgment of this court may do so under one of four heads . These are -

1. the common law;
2. Rule 31(3)(b);
3. Rule 32(11); or
4. Rule 42,

In South Africa, rescission may be applied for under the common law, Rule 31(2)(b) or Rule 42. See CHETTY v LAW SOCIETY, TRANSVAAL 1985(2) SA 756 ; NYINGWA v MOOLMAN NO 1993 (2) SA 508 , PROMEDIA DRUKKERS & UITGEWERS (EDMS) BPK v KAIMOWITZ AND OTHERS 1996(4) SA 411. The South African Rules do not have a Rule similar to our Rule 32(11).

The present application does not reflect under which of these heads the application was filed. When the matter was called before me, Mr. Mdladla for the applicant stated that the application was one under Rule 31 (3)(b). Rule 31 deals with default judgments. A judgment granted against a defendant summarily in his absence is not a default judgment in the sense contemplated by Rule 31. See LOUIS JOSS MOTORS (PTY) Ltd v RIHOLM 1971(3) SA 452 at 454 Rule 31(3)(b) does not apply where the judgment sought to be rescinded is a summary judgment .

Under Rule 42(l)(a)the court may mero moto or upon application of any party affected, rescind or vary an order or judgment erroneously sought or granted in the absence of any party affected thereby. The applicant in this case does not seek to rely on any error in the grant of the summary judgment in the sense that there existed at the time of its issue a fact of which the Judge was not aware, 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 . See NYINGWA'S case supra at 510.

Under the common law an applicant in such an application must –

1. present a reasonable and acceptable explanation for his default; and
2. Show that he has, on the merits, a bona fide defence which prima facie carries some prospect of success .

See CHETTY'S case supra at 765A-C.

Rule 32(11) as amended provides as follows-

Any judgment given against a party who does not appear at the hearing of an application under sub-rule (1) or sub-rule (2) may be set aside or varied by the court on such terms as it thinks just.

This sub-rule has not, as far as my research indicates, been the subject of any application to set aside a summary judgment . The Rule is cast in rather wide terms. No guidance is given as to what requirements an applicant is to satisfy in such an application (if indeed application proceedings are contemplated under the sub-rule). The sub-rule makes no provision as to any time limits within which such a judgment may be set aside or varied by the court. This is a departure from the manner in which provision is made for the rescission of a default judgment under Rule 31(3)(b) and the manner in which an applicant under Rule 42(1) is obliged to approach the court (Rule 42(2)). This sub-rule was copied from the English Rules of Court in order to remove the anomaly that, unlike every other judgment in default or even a judgment at trial in the absence of a defendant, a judgment under Rule 32 in the absence of a defendant could not be set aside. See SUPREME COURT PRACTICE 1985 at 159. For a proper application of Rule 32(11) an applicant must give notice of his application to all parties affected thereby. He must in his application satisfy the requirement of showing " good" or " sufficient " cause that is, present a

reasonable and satisfactory explanation for his failure to appear at the hearing of the application and satisfy the court that on the merits he has a bona fide defence which, pritna facie carries some prospect of success. Any delay in bringing an application (relative to the time when an applicant gains knowledge of the summary judgment) must be adequately explained. An application under this sub-rule only applies where the party seeking the rescission did " not appear at the hearing of the application." The sub-rule does not apply where such party was in default of an affidavit resisting summary judgment.

I turn now to consider what is set out in the papers before me The summons was issued and served on the applicant on the 13th June 1997 . A notice of intention to defend was filed by the applicant's attorneys on the 19th June 1997 The applicant states that upon receipt of the summons, he immediately advised his attorneys that he had a bona fide defence to the claim and that he would "give them full details of the defence at a later stage" when his attorneys had time to consult with him.

He states that he then went home looking forward to his attorneys" to write to me a letter and invite me for the consultation." Thereafter his attorneys addressed two letters to him which he states he never received . He states that he was later informed by his attorneys that the first letter dated 1st July 1997 was to inform him to make arrangements with his attorneys in connection with a summary judgment application that had been filed following his notice of intention to defend. The second letter, he states he was advised, was dated the 18th July 1997 informing him that summary judgment had been granted against him. The applicant has taken no steps to ascertain what could have become of the letters at the Post Office or point to which they were addressed for delivery to or collection by him.

Some explanation in this regard would have gone some way in explaining his failure to contact his attorneys. The applicant has further failed to give any indication as to how long he was prepared to sit back, awaiting an invitation to a consultation from his attorneys, in the light of the clear time limits set out in the summons which was served on him.

It is quite clear from the letter written by the applicant's attorneys that they had, as attorneys of record, been served with the notice of the application for summary judgment reflecting the date of the hearing.

The attorneys did what was required of them and dispatched a letter to the applicant advising him of the summary judgment aplication. What happened thereafter was purely of the applicant's own making in failing to ensure that a reliable medium of communication through which he could keep in contact with his attorneys, was in place .

The applicant has failed to satisfy the requirements for relief under Rule 32(11) or the common law

The application is dismissed with costs.

B. DUNN

JUDGE.