IN THE HIGH COURT OF SWAZILAND

CASE NO.2743/98

IN THE MATTER BETWEEN

DOMINIC MUHOHO	APPLICANT/DEFENDANT
AND YVONNE SEILBEA	1st RESPONDENT/PLAINTIFF
THE DEPUTY SHERIFF - MANZINI	2nd RESPONDENT DISTRICT
CORAM	: MASUKU J.
FOR THE APPLICANT	: MR. N. J. HLOPHE
FOR THE 1st RESPONDENT	: MR M. MABILA

JUDGEMENT 10/9/1999

This matter came before me on the 23rd July, 1999, under a Certificate of Urgency and in which the following Orders were sought: -

1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one.
2. Staying and/or suspending the sale in execution scheduled to take place on the 26th July, 1999 pending the outcome of this application.

3. Directing that a rule nisi issue with immediate and interim effect, returnable on a date to be determined by this Honourable Court calling upon the Respondent to show cause why:

3.1 The judgement granted by this Honourable Court against the Applicant/ Defendant on the 3rd day of March, 1999, in the above matter should not be varied and/or rescinded.

3.2 The Respondent should not be ordered to pay the costs of this matter.

After hearing argument by the Applicant's and the 1st Respondent's representatives, I granted prayers 1,2, and issued a rule nisi in terms of prayers 3.1 and 3.2. The 1st Respondent accordingly joined issue and replying Affidavits were filed by the Applicant. No papers were filed for and on behalf of the 2nd Respondent.

The Applicant, who is a lecturer at the University of Swaziland, states that in or about 1995, he accompanied a fellow lecturer, Beatrice Mukumbaranga to the 1st Respondent, a money lender, to obtain a loan in order to enable her (Mukumbaranga) to fly to her home country Burundi. The 1st Respondent lent and advanced an amount of E4,000.00 to Mukumbaranga on the strength that the 1st Respondent knew the Applicant well and trusted him. The Applicant did not however stand as surety for the said Mukumbaranga.

Mukumbaranga apparently did not return as she was assigned a top government post. She then instructed the Applicant to pay the 1st Respondent a sum of El,000.00, which the Applicant had collected on her behalf. She further requested the Applicant to sell her motor vehicle and use the proceeds to pay the balance to the 1st Respondent, who was informed of this arrangement.

Applicant states that he had difficulty in disposing of the vehicle and this was communicated to the 1st Respondent. The 1st Respondent then issued simple summons against the Applicant in which she claimed payment of the E4,000,00 plus interest and costs. The return of service reflects that service was effected on the Applicant personally on the 21st January, 1999 at the University Faculty of

Science.

No papers in defence to the summons were filed on behalf of the Applicant, resulting in a default judgement being entered in the lst Respondent's favour on the 4th March, 1999. The Applicant states that he was never served with the summons and consequently never knew that default judgement was obtained against him until a Writ of Execution was served on him by the 2nd Responded at the University of Swaziland on the 28th May, 1999. The 2nd Respondent, in pursuance of the said Writ, attached the Applicant's motor vehicle and locked it in the Applicant's garage.

The Applicant then states that immediately after being served with the Writ of Execution, he approached Mr Mnisi from Mngomezulu, Mnisi and Associates with instructions that the default judgement be rescinded and the execution of his property be stayed. It appears that Mr Mnisi did not carry out the Applicant's instructions because the 2nd Respondent advertised a sale of the Applicant's motor vehicle in an issue of the Times of Swaziland, dated 18th June, 1999, This is the advertisement that spurred the Applicant to action and caused him to launch the urgent application for the relief set out hereinabove.

The 1st Respondent, on the other hand denies that she ever lent and advanced the amount in question to the said Beatrice Mukambaranga. She insists that she dealt with the Applicant and expects him to pay, hence the Summons was directed against him. The 1st Respondent then states that there was a witness to the transaction, who is however indisposed and is unable to depose to an affidavit. No Affidavit from the Deputy Sheriff has been attached to controvert the Applicant's allegation that he was never served with the simple summons as alleged in the return of service.

This, being an application for rescission of judgement, can be brought under one or more of the following heads, in terms of Rules 31 (3)(b), 32 (11), 42 or the common law See LEONARD DLAMMI vs LUCKY DLAMINI civ. CASE NO.1644/97 (unreported).

At the hearing of the application, Mr Hlophe informed the Court that the application was moved in terms of the common law. I pause to state, as I did in FIRST NATIONAL BANK (SWD) LIMITED v GLORIA NGCAMPHALALA CASE

NO 1188/98 that it is good practice to state in the Notice of Motion the head under which the application for rescission is made. This will enable the Court and the other side ascertain whether the requirements for obtaining rescission have been satisfied in respect of the relevant head under which the application for rescission is made.

In the LEONARD DLAMINI vs LUCKY DLAMINI case (supra) at page 2, Dunn J. stated that for a party to obtain rescission in terms of the common law he 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.

I turn now to consider whether on the papers, the Applicant has satisfied the requirements for relief sought in terms of the common law.

(i) reasonable and acceptable explanation for default

The Applicant's story is that he was never served with the Simple Summons and the Summons never came to his notice until the issue of the Writ of Execution. The Deputy Sheriffs return of service on the other hand, indicates that there was personal service on the Applicant. There is however no Affidavit by the Deputy Sheriff setting out in greater detail the circumstances of the service as reflected in the return. I am in the circumstances, especially in the light of the Applicant's allegations under oath, prepared to hold on a balance of probability that he was indeed not served. I come to this conclusion because there is nothing to gainsay this in the absence of Deputy Sheriff's affidavit.

There is then the second hurdle to be overcome by the Applicant regarding his actions after being served with a Writ of Execution on the 28th May 1999. The Applicant states that he immediately instructed Messrs. Mngomezulu, Mnisi and Associates to stay execution and to apply for rescission of the default judgement. The Applicant does not state exactly when these instructions were given to the aforesaid attorneys. He only states that he got no assistance from the said firm of attorneys. No indication

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is given as to when he discovered that he was not getting the assistance and the attempts he made, if any to obtain a progress report from his erstwhile attorneys. It is not also stated when the applicant instructed the present attorneys to action the matter.

In the case of FAIZEL LATIFF v SWAZI MILLING (DIVISION OF SWAKI

INVESTMENTS CORP LTD) Appeal Case No. 19/97 the learned Schreiner J.A. stated as follows at page 5:

"It has been said on many occasions that it is not open to a litigant merely to place blame on his attorney for failure to comply with the Rules of Court, There may be cases where a Court will grant relief to a lay litigant if the cause of the default was negligence on the part of his attorney, but generally, this is not so. In FERREIRA vs NTSHINGILA 1990 (4) SA 271 A at 281, FRIEDMAN A. J. A. at D - E said

'Negligence on the part of a litigant's attorney will not necessarily exonerate the litigant:

In view of what appears to me to be a laissez faire approach to the matter by the Applicant, having been served with a Writ of Execution and his failure to demand a progress report from his erstwhile attorneys, I am of the view that the Applicant has failed to set out a reasonable and acceptable explanation for his default. The Applicant is bound by the dereliction of his attorneys.

(ii) bona fide defence which prima facie carries some prospect of success

The Applicant states that the money in question was not lent and advanced to him but was advanced to Beatrice Mukambaranga, whom the Applicant accompanied. In short, the Applicant denies that he owes this amount and states that he never stood as surety for the said Mukambaranga. The Respondent on the other hand insists that the money was lent to the Applicant and states that there was a witness to the transaction who is unable to depose to an affidavit because she is indisposed.

In the circumstances, I have no doubt that the Applicant has, on the papers established a defence which prima facie carries some prospect of success and the

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dispute regarding who was lent and advanced the money can be settled at the trial. It is important to note that with regard to certain allegations made by the Applicant that he gave 1st Respondent El,000.00 from Beatrice and advised 1st Respondent of the impending sale of Mukambaranga's vehicle and the failure to obtain a buyer therefor, the 1st Respondent is content to only say that this is a fabrication, without specifically giving sound answers to the allegations which involve her. 1st Respondent does not specifically deny receiving the amount of El,000.00 and does not specifically deny being advised of the difficulties in selling the Mukambaranga's motor vehicle. A bona fide defence is thus disclosed.
In their work entitled, "The Civil Practice of the Supreme Court of South Africa", 4th Edition, Herbstein and Van Winsen state as follows at page 691.

"It has been held that there is no room for the exercise of a discretion in favour of an applicant for rescission who was in wilful default, but that approach has been questioned and the better view seems to be that wilful default or gross negligence on the part of an applicant will not constitute an absolute bar to the grant of rescission; rather, it is but a factor - albeit a weighty one - to be taken into

account, together with the merits of the defence raised to the plaintiff's claim, in the determination whether good cause for rescission has been shown."

It appears to me that the proper course to follow in this case is to adopt the "better view " and hold that the Applicant's failure to show good cause should not constitute an absolute bar to the relief he seeks. This is in view of the merits of the defence that he has raised and which I have held constitute a bona fide defence which prima facie carries some prospect of success.
IN DE WITTS AUTO BODY REPAIRS (PTY) LTD v FEDGEN INSURANCE C 8 LTD 1994 (4) SA 705 at 709, JONES J. cites a portion of a Judgement he made in ZEALAND v MILBOROUGH 1991 (4) SA 836 (SE) which reads as follows;-

"a measure of flexibility is required in the exercise of the Court's discretion. An apparently good defence may compensate for a poor explanation

(Harms Civil Procedure in Supreme Court 313 K6), and vice versa."

This appears to me to be a course to follow in this case. I therefore adopt the approach by Jones J. and hold that although it appears to me that the explanation by the Applicant is not sufficiently good, the apparently good defence that he has raised compensates for the poor explanation. Justice in this matter requires that the Defendent should be heard in a trial, where all the disputes of fact will be addressed.

In the premises, the judgement dated 5th March, 1999, be and is hereby rescinded and the Applicant is to file his Notice to Defend within five days of this judgement. The Applicant is also ordered to file his plea within fourteen (14) days of the service of the Plaintiff's declaration. I order the applicant to pay the wasted costs of the application.

T.S. MASUKU

JUDGE