IN THE HIGH *COURT* OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 139/01

In the matter between:

ROBERT RICHARD JAMES KIRK N.O. 1st PLAINTIFF

THOMAS MOORE CARL KIRK N.O. 2nd PLAINTIFF

AND

S.A. NKOSI AND COMPANY DEFENDANT

CORAM SHABANGU AJ

FOR PLAINTIFF MR. G. GODDARD MR.

FOR DEFENDANT

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JUDGEMENT
8th DECEMBER, 2f)04

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The Plaintiffs seeks the rescission of an order granted by the court on 2" June, 2003. The order which the plaintiff seeks to have rescinded was granted by Mr. Justice Stanley Maphalala on an application which the defendant had filed and set down for hearing on Monday 2nd June, 2003. The rule 30 application arose from the main action in which the plaintiffs are suing the defendant in respect of an amount of E41, 000-00 *(forty* one thousand emalangeni) which the plaintiffs claim is an amount to which they are entitled to be indemnified in respect of fees they allegedly paid to the defendant. Their case is that the defendant has drawn and taxed a bill of costs in respect of the work covered by the

fees paid and that because the amount the defendant has collected as a result of the taxed bill is in excess to that which the plaintiffs paid to the defendant, they are entitled to a full reimbursement of their costs. The plaintiffs allege that from the total amount of E50, 767-00 allegedly paid by them to the defendants as legal fees they (the plaintiffs) have only been reimbursed to the extent of E9, 767-00. The defendant disputes the claim. Most of the pretrial procedures have been complied with except that a pre-trial conference as envisaged in rule 37 of the rules of this court had not been held as at 2June, 2003. Inspite of the fact that a pre-trial conference had not be held by 2ndnd June, 2003 the matter had been allocated trial dates and set down by the Plaintiff's on at least two occasions prior to the hearing of the present application. The 2nd June, 2003 was another date which the Registrar had allocated for the trial of the action. The Plaintiff's had also set the matter down for trial on this date. In fact the matter had been allocated and set down for three days from 2nd June, 2003 to 4th June, 2003. The notice allocating the trial dates was signed and issued by the Deputy-Registrar on 26th February, 2003. The Plaintiff's attorney issued a notice of set down of the trial on 16th May 2003. On 20May, 2003 apparently after receipt of the notice of set down the defendant delivered a letter to the Registrar and sent a copy to the plaintiff's attorney, objecting to the allocation and setting down for trial of the matter before the holding of a pre-trial conference as required by rule 37 of the rules of this court. Another such letter was written and sent by the defendant on 28/05/03 to the plaintiffs' attorney and was copied to the Registrar. It was only Friday 30thlh May, 2003 that the Plaintiffs' attorney conceded

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to the removal ot the matter from the roll by a letter of the same date. On the same date the defendant filed and served an application in terms of mle 30 wherein an application was made to set aside the Notice of set down as an irregular proceeding. The defendant denies having received the abovementioned letter wherein the plaintiff's conceded that the matter ought to be removed from the roll of Monday, 2nd June 2003 and at any rate it appears to be undisputed that the fax did not come to the attention of Mr. S.A. Nkosi who was scheduled to attend to the trial. When the matter was called on Monday 2nd-June, 2003 there was no appearance for the plaintiffs. What followed from this is that the defendant moved its application in terms of rule 30 which application was granted together with costs on the attorney and client scale and that such costs were to be taxed

and paid prior to the matter proceeding any further. It is this order of 2n June, 2003 which the plaintiffs seek to have rescinded.

The Plaintiffs have advanced various grounds upon which they claim rescission of the judgement. The first ground upon which the plaintiff claims rescission of the order of 2nd June, 2003, setting aside the notice of set down and granting costs to the defendant, is that the order was erroneously sought and granted in the absence of the plaintiff as contemplated by the provisions of rule 42 (1) (a). The error according to plaintiff's counsel is that the learned judge Mr. Justice Maphalala would not have granted the rule 30 application had he known that an agreement had been reached on Friday 30lh May, 2003 between the plaintiffs' attorney and one Mr. Gwebu to have the matter removed from the roll of Monday 2nd June, 2003. This agreement is denied by Mr. Gwebu and the defendant. The Plaintiffs' sought and obtained a ruling that oral evidence be led oh this issue. From the evidence given on behalf of all parties it appears to be common cause that it was known **or** at least had been communicated on more than **one** occasion to the Plaintiffs' attorney that the trial and the matter was being handled by Mr. S.A. Nkosi. This was so even though Mr. Gwebu would occasionally sign court documents such as notices on Mr. Nkosi's instructions. For example on Friday 30lh May, 2003 Mr. Gwebu was instructed by Mr. S.A. Nkosi to sign the application in terms of rule 30 and ensure that it was served on the plaintiffs' attorney. It also appears to be undisputed that on the Friday of 30lh May, 2003 on which date the fax in which the plaintiffs attorney finally conceded that the matter ought to be removed **front** the roll of Monday 2nd June, 2004, Mr. Nkosi was out of the office for the whole day. Mr Gwebu testified that in light of the fact that the matter and more specifically the trial was being handled by another attorney he could not have reached any agreement with the Plaintiffs' attorney on how the matter was going to be dealt with on the date of trial, that is Monday 2nd June, 2003 and in fact no such agreement was reached to that effect between him and the Plaintiffs' attorney. In any event any such agreement would have to be sanctioned by the defendant himself in accordance with basic practice known and adhered to by all attorneys. Furthermore even if such an agreement was reached the plaintiff's attorney would still be required to attend court particularly so because he had set the matter down for trial. The matter was already

on the roll for hearing and because of this fact it would not have been appropriate for the attorneys involved to impose their agreement on the court. The proper thing for the parties to do would have been to attend court and request that the matter be removed from the roll. Mr. Gwebu's version is the one most probable having regard to the fact known to the plaintiffs' attorney that the matter was Mr. Nkosi's matter. The plaintiffs' attorney explains that he could not discuss his proposal that the matter be removed from the roll of 2nd June, 2003 because he was not on speaking terms with Mr. Nkosi. Mr. Gwebu himself explains the nature of the relationship between Mr. Nkosi and the plaintiffs' attorney, that is Mr Nhiabatsi as being sour. On a previous occasion namely on 29th July, 2002 the matter could not proceed because Mr. Nkosi had been hospitalised in South Africa. The Plaintiffs' attorney was advised of this fact in a letter dated 16th July, 2002. That letter was handed in during the hearing of the oral evidence as exhibit Rl. The letter which was written and signed by Mr. Gwebu also expressly informs the Plaintiffs' attorney that "Mr Nkosi is personally handling the matter." In the circumstances I am not persuaded that there was an agreement between Mr. Gwebu and Mr. Nhiabatsi in the terms alleged by the latter.

**A** further basis argued by counsel for the plaintiffs in support of the application for rescission is that the application can be granted on the basis of the common law. Mr Goddard who appeared for the plaintiffs' relied upon the leading case of DE WET & OTHERS V. WESTERN BANK LTD 1979 (2) SA 1031 (A) at 1042 wherein the court stated ;

> *"Thus under the common law, the courts of Holland were, generally speaking, empowered to rescind judgements obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the courts. Although no rigid limits were set as to the cause...the courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the courts' discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the court, inter alia, that there was some reasonably satisfactory explanation why the judgement was allowed to go by default. "*

Mi Goddard went on to rely on HDS CONSTRUCTION PTY LTD V. WAIT 1979 (2) SA 298 (E) for what he submitted the courts generally require for sufficient cause, which requirements are that an applicant for rescission under the common law must show;

(1) a reasonable explanation of his default

(2) that his application is made bona fide; and

(3) that he has a bona fide defence which prima facie has some prospect of success.

On the assumption that the requirements for sufficient cause as set out by Mr. Goddard are correct I am unable to find that the plaintiffs have given a reasonable explanation for their default of appearance in court on Monday 2nd June, 2003. Mr Nhlabatsi had set the matter down for trial by a notice of set down dated 16th May, 2003. That notice of set down was served on the defendant on 19th May, 2003 at 09.33 hours. On 20th May, 2003 the defendant objected to the notice of set down on the basis that it was an irregular proceeding because a pre-trial conference had not been held. There was no response from Mr. Nhlabatsi by 28th May, 2003 when once again the defendant sent another letter re-iterating the defendants concerns on the manner the matter had been allocated a trial date and set down by the plaintiffs' attorneys. The Plaintiffs' attorney, that is, Mr Nhlabatsi only responded on 30Ih May, 2003 which was the last court day before the trial date informing the defendant that he had "met with counsel who after considering you letter of 20* May advised that the matter be adjourned or removed from the roll and that a meeting be held with a view to discuss the issues involved." There is nothing in that letter to the effect that Mr. Nhlabatsi would nit attend court or that it would be unnecessary for him to do so, and that Mr. Gwebu would attend court and move an application that the matter be removed from the roll in the absence of Mr. Nhlabatsi the plaintiffs' attorney. The letter of 30* May, 2003 does not even tender or undertake to pay the defendant's wanted costs. This letter does not provide a reasonable explanation for the plaintiffs' default of appearance in court on 2nd June, 2003. However the plaintiff's attorney has stated during oral evidence that there was, as already observed, an agreement between him and Mr. Gwebu not only that the matter would be removed from the roll but also that Mr. Gwebu would attend court on the date of trial and there apply that the matter be removed from the roll in the absence of the plaintiffs and their attorney.

I have already expressed my finding on whether such alleged agreement has been proved. Because of the reasons already stated above I am not persuaded that there was such an agreement and for that reason the alleged agreement cannot provide the plaintiffs with a reasonable explanation for their default or non appearance on the day in question. The failure by the plaintiff's attorney to attend court on Monday 2nd June, 2004 cannot be said to have been reasonable under the circumstances, even if there had been an agreement between him and Mr. Gwebu, because the plaintiffs' attorney ought to have realised that any such agreement would at least require the defendants' approval. The application can be disposed of by this point alone.

Furthermore Mr. Goddard has argued that the present application is being made bona fide and that the applicant has a bona fide defence to the rule 30 application which prima facie has some prospects of success. Counsel in developing his argument on this says,that a claim for rescission must be made with the true intention of entering into the principle case. The principal case referred to in the instant is the defendants' application in terms of rule 30. Counsel further argues that there cannot be any other reason for the plaintiffs pursuing this rescission application. I am not satisfied that there can be any bona fides on the part of the plaintiffs in seeking an order setting aside another order which in turn had set aside a notice of set down which had set a matter down on a date which has passed.

Furthermore the plaintiffs say that they have a defence to the rule 30 application which the defendant moved on 2nd June, 2003. First, the fclaintiffs contend that they could have successfully argued that the rule 30 application was procedurally defective. The argument is developed by saying that because rule 30 (2) requires that such an application be on notice and that the length of such notice is the one stated in rule 6 (10) which is seven days. With the greatest of respect to counsel rule 6 (10) has no application to an application to set aside an irregular proceeding in terms of rule 30 of the rules of this court. A rule 30 application being an interlocutary application may be set down in accordance with the provisions of rule 6 (24) of the rules of this court. Secondly, Mr. Goddard submits that the rule 30 application could have been successfully opposed on the basis that it was not supported by an affidavit and therefore did not comply with rule

6(1), and because of this it is argued that the application was defective. Again as I have already stated above rule 6(1) is not applicable to an application to set aside an irregular proceeding brought in terms of rule 30. The applicable rule is rule 6 (24) which rule is applicable to all interlocutary applications and such applications may only be supported by such affidavits as the case may require. If the nature of the case being brought is such that no affidavit is required for the purpose of placing before the court evidence which is not before court, then an affidavit is not necessary. That is consistent with logic, common sense and prevailing practice both in this jurisdiction and in the Republic of South Africa. At page 353 HERBSTEIN AND VAN WINSEN in their "THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA **4TH** edition state;

> *"It is not essential to file affidavits in support of an interlocutory application since 6 (11) provides that such an application may be "supported by such affidavits as the case may require." It has been held that if an interlocutory matter can be decided without affidavits, this an appropriate course and* one sensible conserving costs."*

Rule 11 of the South African rule referred to by the learned authors in the abovequoted passage is identical to our present rule 6 (24). In fact even in this jurisdiction before the ammendment of the rules of this court in August, 1990 the present rule 6 (24) used to be rule 6 (11). In the circumstances and with the greatest of respect to Plaintiffs' counsel the fact that the rule 30 application was not accompanied by an affidavit did not render the application defective.

There is also the complaint that serving the **mil** 30 application on the plaintiffs' correspondent attorneys on Friday 30lh May, 2003 when the application was enrolled for hearing on 2nd June, 2003 which day was the next court day after the date of service of the rule 30 application deprived the plaintiffs' of adequate notice thereof.

Again in commenting on rule 11 (a rule identical to our rule 6 (24) of our rules of court) of the South African uniform rules of court, the learned authors, that is HERBSTEIN AND VAN WINSEN *supra* state;

> *"There is no prescribed form of notice of motion for interlocutary applications. Rule 6 (11) provides that notwithstanding subrules (1) - (10) interlocutary and other applications incidental to pending proceedings may be brought on notice*

*supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a judge. The somewhat cumbersome procedure laid down in rule 6 (5) need not be followed where the parties are already litigating. The practice is to use a short form of notice of motion similar to Form 2, but citing the respondent. It has been held that the applicant is free to allow any period he deems fit between delivery of his application and the hearing of it, but that he bears the risk of the respondent having inadequate opportunity to oppose the application. "*

Regarding the rule 30 application filed by the defendant on 30Ih June, 2003 one has to take into account that the trial was already set down for hearing in less than ten days from 19lh May, 2003 which is the date of service of the notice of set down upon the defendant. The defendants' had communicated as early as 20th May, 2003 their contention that the notice of set down had been irregularly issued by the plaintiffs. The notice of set down itself did not even give the defendant adequate notice of the trial as it gave the defendants' less than ten court days to prepare for trial contrary to what is required by the proviso to rule 56 (1) (a) and rule 56 (1) (b).

Therefore in light of the aforegoing the application for rescission of the order of 2nd June, 2003 is dismissed with costs.

ALEX S. SHABANGU
ACTING JUDGE