

CIVIL CASE NO. 1799/05

In the matter between:

**CARGO CARRIERS SWAZILAND (PTY)**

**APPLICANT**

And

**LUIS TRIGO DE MORAIS**

**1<sup>ST</sup> RESPONDENT**

**BONGANI J.B. MAMBA N.O.**

**2<sup>ND</sup> RESPONDENT**

In re:

**LUIS TRIGO DE MARAIS**

**PLAINTIFF**

And

**CARGO CARRIERS SWAZILAND**

**DEFENDANT**

CORAM : Q.M. MABUZA -AJ  
FOR APPLICANT : MR. DLAMINI  
FOR RESPONDENT : MR. RODRIQUES

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**JUDGMENT 7/12/06**

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[1] On the 7<sup>th</sup> October 2005 the Respondent obtained a default judgment herein. The 1<sup>st</sup> Respondent had issued a combined summons against the applicant dated 20<sup>th</sup> May 2005.

- [2] The 1<sup>st</sup> Respondent claimed payment of the amount of E48,532.00 being in respect of a collision which occurred between his motor vehicle and that of the Applicant.
- [3] This amount is inclusive of assessors fees of E796.00. He also claimed interest on the said amount at the rate of 9% per annum calculated from the date of issue of summons to date of final payment and costs of suit.
- [4] No intention to defend was entered nor was a plea filed, thus leading to the default judgment in which the 1<sup>st</sup> Respondent was granted damages in the amount of E48,532.00, interest thereon at 9% and costs of suit.
- [5] The Applicant has moved an application for the rescission of the default judgment in terms of the provisions of Rule 31 (3) of the Rules of Court.
- [6] The Rule in question provides as follows:
- “A defendant may, within twenty-one days after he has knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of costs of the default judgment and of such application to a maximum of E200.00 set aside such default judgment on such terms as to it seems meet.”
- [7] Masuku J in his judgment in the case of **The African Echo t/a The Times of Swaziland and Another v Thulani Mau Mau**

**Dlamini** case No. 3526/2000 (unreported) page 2 set out the requirements for success in an application under the above sub-rule (per courtesy of Erasmus: Superior Court Practice B 201-202) as follows:

*“(a) He (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence the Court should not come to his assistance.*

*(b) his application must be bona fide and not made with the intention of merely delaying the plaintiff’s claim.*

*(c) He must show that he has a bona fide defence to plaintiff’s claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”*

he above requirements are also set out in the case of *Grant v Plumbers* 1949 (2) SA 470 at 476-477.

[8] The application herein has been launched within the 21 day period as prescribed by the Rules. The applicants have furnished security for costs as required by the Rules.

[9] I now have to consider whether the applicant has met the

requirements mentioned in [7] herein above.

(a) ***Reasonable explanation for default***

[10] The return of service states as follows:

***“It is hereby certified that***

***On the 17<sup>th</sup> June 2005 at 1515 I duly served this process upon the within named defendant Nathi Simelane the Human Resources Manager who is apparently over the age of 16 years and in charge of the premises at the defendants head quarters at Mhlume Cargo Carriers Pty Ltd near Illovo Sugar Mill in the Lubombo District by leaving the copy after exhibiting the original and explaining the exigency of the content thereof”.***

The applicant filed affidavits in support of this application deposed to by Nkosinathi Simelane and a confirmatory affidavit by one Peter Sibandze who have deposed to the fact that they do not have a Nathi Simelane employed by the applicant but a Nkosinathi Simelane. There is not much that turns around this point. In Siswati ... “Nathi” is an abbreviation of Nkosinathi.

[11] The aforesaid deponents have also deposed to the fact that Nkosinathi Simelane is not a Human Resources officer and as such is not a responsible employee within the meaning of Rule 4 (2) (e) of the Rules of Court.

[12] Rule 4 (2) (e) reads as follows:

***“service ... shall be effected in one or other of the following manners:***

***... in the case of a corporation or company by delivering a copy to a responsible person at its registered office or a responsible employee thereof at its principal place of business within Swaziland, or if there is no such person willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law”***

[13] The applicant has complained that service was irregular in that Nkosinathi Simelane is not a responsible employee in terms of the rules. According to the concise oxford dictionary the meaning of responsible is: ***“involving important duties or decisions or control over others; capable of being trusted”***.

[14] In my opinion as a Human Resources officer, Mr. Simelane qualifies as a responsible officer in terms of the above definition. This would explain why the person the deputy sheriff first approached directed him to Mr. Simelane. It may well be that Nkosinathi Simelane received the summons and misplaced it or forgot to bring it to the attention of the applicant and is afraid to admit this oversight for fear of chastisement or reasons best known to him. I find that service of the summons was proper.

[15] I also accept that the summons was never brought to the

attention of the relevant officers of the Applicant such as the managing Director or the financial Manager. As such they had no knowledge of the action being instituted against them. They cannot therefore be said to have been in willful default nor can it be said that the Applicant was grossly negligent.

**(b) His application must be bona fide and not made with the intention of merely delaying the Plaintiff's claim.**

[16] The rescission application was brought within the required time. The amount of the damages granted is also quite substantial. It may very well be that if the Applicant is allowed to defend the matter the amount may be reduced. It is my considered view that the application is bona fide and was not resorted to in order to delay and frustrate the judgment.

**(c) The next inquiry for the court to make is whether the applicant has satisfied the court that on the merits it has a bona fide defence which prima facie carries some prospect of success.**

[17] Mr. Rodriques for the 1<sup>st</sup> Respondent submitted that the Applicant has not proved a bona fide defence. He submitted that the Applicant had only told its version of the occurrence of the accident which in itself raised disputes of fact and was insufficient as a bona fide defence. He further submitted that the Respondent in its particulars of claim had raised the issue of negligence in that the Applicants driver had entered the road when it was unsafe to do so and that the Applicants driver had

driven Applicant's motor vehicle without sufficient illumination on the motor vehicle and trailer attached thereto. Mr. Rodriques further submitted that the Applicant had avoided a response to these material aspects of the 1<sup>st</sup> Respondent's case.

Mr. Rodriques doubted the Applicant's prospects of success because of their failure to respond as indicated above.

[18] In **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 it was held that a Defendant applying for a rescission of judgment **need not deal fully with the merits of his case** but must set out averments which, if established at the trial would entitle him to the relief asked for.

[19] Erasmus at page B1-203-4 states the requirements of establishing a bona fide defence as follows:

*“The requirement that the applicant for rescission must show the existence of a substantial defence **does not mean that he must show a probability of success: it suffices if he shows a prima facie case, or the existence of an issue which is fit for trial.** The applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that the application is not made merely for the purpose of harassing the respondent... if a defendant establishes a bona fide defence against a portion of a plaintiff's claim he is entitled to a rescission of the whole judgment- the sub-rule does not allow setting aside of a part of a*

**default judgment”.**

[20] The Applicants defence is set out at paragraphs 4 -14 of Noah Mlambo’s affidavit and in particular the following paragraphs:

Paragraph 4: **“On the 5<sup>th</sup> September 2002 at about 1830**

**Hours I was driving the Applicant’s bell tractor which was pulling two trailers in my rightful left hand lane towards Big Bend/Manzini from the Lavumisa direction.”**

Paragraph 6: **“I noted that there was a truck filling in fuel at a filling station I was just about to pass which is situated on the right hand side if you are traveling towards Big Bend/Manzini as I was”.**

Paragraph 7: **“The said truck’s trailer overlapped into a significant portion of the lane reserved for motor vehicles travelling towards Lavumisa like the 1<sup>st</sup> Respondent’s”.**

Paragraph 11: **I did not see how the 1<sup>st</sup> respondent’s car rammed into the last trailer pulled by the bell tractor I was driving but I strongly suspect that because the 1<sup>st</sup> respondent appeared to be traveling at**



***excessive speed, he must have failed to apply his brakes to avoid the trailer of the truck which had overlapped into significant part of the lane in which he was traveling towards Lavumisa. He possibly thereafter lost control of his motor vehicle resulting in the accident”.***

[21] The paragraphs that I have outlined set out a bone fide defence which prima facie carries a prospect of success. ***The Applicant need not deal fully with the merits of the case*** and produce evidence that the probabilities are actually in his favour.

[22] In the circumstances I have come to the conclusion that the Applicant has established sufficient cause for setting aside the default judgment granted on the 7/10/06. I order as follows:

- (a) The judgment granted on 7/10/06 is hereby rescinded and set aside.
- (b) The Applicant is hereby granted leave to defend the action herein in accordance with the rules of court.
- (c) The Applicant is ordered to pay the costs of the rescission application.

**Q.M. MABUZA -AJ**

