IN THE HIGH COURT OF SWAZILAND

KIRUSH PROPERTY INVESTMENTS

Applicant

And

MASHI IMPORT AND EXPORT (PTY) LIMITED

1st Respondent

NONTOKOZO BRENDA NCONGWANE

2nd Respondent

Civil Case No. 3510/2006

Coram: S.B. MAPHALALA - J

For the Applicant: MR. M. MABUZA

For the Respondents: MR. G. MASUKU

JUDGMENT

31st August 2007

[1] The application before court is for rescinding and/or setting aside the Respondent's order granted on the 30th May 2007 on the ground that it was erroneously granted in the absence of the Applicant and this application has been brought under a Certificate of Urgency.

[2] The brief facts of this matter are that the initial application where the present Applicant was Respondent, was brought to this court as an ***ex parte*** application, where a

rule ***nisi*** was issued and Applicant herein opposed same and filed replying papers to that effect. Thereafter Respondent's attorneys on the 18th February 2007, proceeded to argue the matter on the behalf of the Applicant. The court therein issued comments to be clarified before it could entertain the matter fully on the 18th February 2007. Respondent's attorney then wrote to the Registrar requesting a date to clarify and explain the judge's comments. Apparently, from Respondent's answering affidavit at paragraph 6 the judge's secretary telephoned all concerned parties, which call was never received by the Applicant's attorneys and thus the judge on the 30th May 2007 in chambers granted Respondent the order sought to be rescinded and/or set aside in the present application.

[3] In arguments before me Counsel for the Applicant relied on two decided cases in South Africa in the cases of ***Nyingwe vs Moolman 1993 (2) S.A. 508 and that Bakoven vs G.J Howes (Pty) Ltd 1992 (2) S.A. 466.*** It is further contended for the Applicant that it has a ***bona fide*** defence to the cause of action. That its default for non appearance was not intentional but was occasioned by the non communication to its attorneys of the clarification of the Judge's comments on the 30th May 2007 and further that its attorneys were not served with a Notice of Set-down as an indication that the matter will be proceeding on the 30th May 2007.

[4] On the other hand it is contended for the Respondent that the judgment of the 30th May 2007 entered in favour of Kirush Property Investments was not entered by default as the Applicant (Mashi Import and Export (Pty) Limited) had already filed an Answering affidavit which the court took cognizance of. Hence it is improper to file a rescission application in terms of Rule 31 or 42. Rule 31 covers instances where a party has failed filing a pleading timeously. Whereas Rule 42 pertains to instances where the court has pronounced a judgment in **error** by **mistake** where a party likely to be affected by such judgment was not in attendance. The underlying qualifying factor for a Rule 42 application being **error** or **mistake** on the part of the court.

[5] In my assessment of the arguments by the parties it appears to me that the application for rescission by the Applicant does not fall either under Rule 31 or Rule 42 of the High Court Rules. For the latter Applicant must allege and prove error first in its pleadings and ***in casu*** this has not been done. It is clear to me on the facts of the matter that the court session of the 30 May 2007 was not a hearing of the matter ***de novo*** as pleadings had long been filed and arguments heard. It was just to clarify concerns and questions raised only. On the former Rule 31 does not apply on the facts of the present case as the said Rule covers instances where a party has failed filing a pleading timeously.

[6] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE