1138

THE HIGH COURT OF SWAZILAND

Civil Case No.3032/00

In the matter between:

HANS C. WEINARD **Applicant**

VS

MICHELLE SHEILA **Respondent**

CORAM : **MASUKU J.**

For Applicant : **Mr P. Gwebu**
For Respondent : **Mr S.V. Mdladla**

JUDGEMENT
1st August, 2002

On the 3rd August 2001, a judgement by default was granted by this Court in the amount E51, 114.59 in favour of the above-named Respondent. As against that judgement, the Applicant now applies for an Order in the following terms: -

1. Rescinding the judgement by Default issued against the Applicant's (sic) on the 9th November, 2001 by the above Honourable Court under case No.3032/00.

2. Granting the Applicants (sic) leave to file an appearance to defend the above matter and such other papers as may be necessary within the time limits prescribed.

3. Costs of the suit;

4. Further and/or alternative relief.

It is necessary that I mention that the citation of the parties in this matter, being an interlocutory application ensuing from action proceedings is improper. The proper citation in such and other matters was outlined by Dunn J. in **DUMISA SUGAR CORPORATION LTD VS SWAZILAND SUGAR ASSOCIATION AND ANOTHER CASE NO.1867/97**. The practice therein set out is salutary and must be followed by practitioners in this and other Courts. I shall, for purposes of convenience refer to the parties as Applicant and Respondent, respectively, although the present Applicant was a Defendant and the Respondent the Plaintiff in the aforesaid action.

I also need to point out that the Court file bears no record of any judgement entered on the 9th November 2001. The only default judgement entered in this matter was so entered on the 3rd August 2001 as earlier indicated. I will for purposes of dealing with this matter assume in the Applicant's favour that the date for the judgement as recorded in the Notice of Motion is erroneous.

Facts

On the 1st October 1998, at Ontdekkersroad, Roodepoort, a collision occurred in which the Respondent's vehicle was extensively damaged. The Respondent held the Applicant responsible therefor. A letter of demand was issued to the Applicant by the Respondent's insurers Santam, demanding payment of the sum of E50 768.03. The Applicant referred the said letter to this insurers Impilo Yami Insurance Brokers (Pty) Ltd, who responded to Santam's letter, denying any liability on the Respondent's part as the latter's vehicle was not damaged at all.

The Respondent's attorneys Messrs. Howe and Company then issued a Combined Summons dated 19th September 2001, claiming an amount of E51 114.59, interest and costs. On the 22nd September, 2000, the Applicant's Broker wrote a letter to the Swaziland Royal Insurance Corporation in the following terms: -

"POLICY NO. MA 028261 – H.W. GLASSWORKS

We enclose herewith a copy of letter dated 7th June 1999 advising your office a possible third party claim and however our client rejects liability as their vehicle was never damaged. We do not appear to have received your advises.

We also enclosed herewith copies of letter of demand from the third party's insurers Santam and a copy of our letter dated 07.07.2000 responding to their demand. We now received combined summons from Messrs Howe & Company and the same enclosed for your attention and trust that you will refer this matter to your legal department for their opinion."

It is clear from the foregoing letter that the Applicant, as deposed to in his affidavit, on receipt of the Summons immediately transmitted the same to the Broker, who in turn further transmitted the same to SRIC's legal department for appropriate action. It is now an incontrovertible fact that no action in opposition to the claim was filed by the Applicant's insurer, hence the default judgement.

In the application for rescission, the Applicant proceeded in terms of Rule 42, contending that there was error in the granting of the judgement for the following reasons: -

(a) that he was labouring under the mistaken belief that the matter was being dutifully attended to by his insurers

(b) the Plaintiff's attorneys sought and obtained judgement on the mistaken belief that he (Applicant) did not wish to oppose the action or was deliberately not defending the same.

In argument, Mr Gwebu, in reliance on rescission in terms of Rule 42 stated that the error consisted in the fact that Messrs. Howe & Co were the Applicants attorneys, who defended him in the criminal proceedings arising from the said traffic accident but they proceeded unethically to issue the Summons against him. He contended that had this fact been brought to the Court's attention the Court may not have been disposed to granting the judgement in the Respondent's favour as it did.

The Law Applicable to Rescission

In the case of **LEONARD DLAMINI VS LUCKY DLAMINI CIVIL CASE NO.1644/97** (unreported), Dunn J. stated quite correctly in my view that in our jurisdiction, rescission can be obtained under one or more of the following heads: -

(a) the common law;
(b) Rule 31 (3) (b)
(c) Rule 32 (11); and/or
(d) Rule 42

Rule 42 (1) under which this application was moved reads as follows: -

> *"The Court may, in addition to any other powers it may have,* ***mero motu*** *or upon the application of any party affected rescind, or vary-*
>
> *(a) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgement in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *© an order or judgement granted as the result of a mistake common to the parties.*

The application of this Rule has been the subject of generous comment in this and other jurisdictions. In **BAKOVEN VS G.J. HOWES (PTY) LTD 1992 (2) SA 466** at **471 E – G**, Erasmus J. held the following regarding the application of this Rule: -

> *"Rule 42 (1) (a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgement or order. An order or judgement is 'erroneously granted' when the court commits an 'error' in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record...*

It follows that a Court in deciding whether a judgement was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the common law, the applicant need not show "good cause" in the sense of an explanation for his default and a ***bona fide*** *defence.... Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."*

I whole-heartedly embrace these remarks as reflective of the position in this jurisdiction and are therefor fully applicable. In **NYINGWA VS MOOLMAN N.O. 1993 (2) SA 508 (TK G.D.)** at 510, White J. reasoned as follows regarding the circumstances in which it can be said that a judgement has been erroneously granted: -

"It therefore seems that a judgement has been erroneously granted if there existed at the time of its issue a fact which the Judge was unaware, which would have precluded the granting of the judgement and which would have induced the Judge, if he had been aware of it, not to grant the judgement."

I again find these remarks fully applicable to our Rule 42, which I may say is in *pari materia* with the corresponding South African Rule. See also **POLO DLAMINI VS MARTHA SIPHIWE NSIBANDE** *in re:* **MARTHA SIPHIWE NSIBANDE VS POLO DLAMINI AND TWO OTHERS CASE NO. 1581/00** (unreported); DOMINIC **MUHOHO VS YVONNE SELBEA AND ANOTHER CASE NO. 2743/98** (unreported).

Applying the Law to the facts

Can it be said, in view of the Applicant's depositions that he has succeeded in making out a case under this Rule? I think not. The various reasons advanced by the Applicant for contending that Rule 42 applies, would, on a proper consideration, particularly of the above-cited authorities not hold. Regarding the conflict of interest, it is clear from the record that Howe & Co. immediately withdrew as attorneys of record for the Applicant. The judgement was actually obtained by the Respondent's present attorneys. Although the Affidavit explaining Messrs Howe & Co's handling of this matter was not filed, it does

happen in large firms that the right hand does not know what the left is doing resulting in a member of a firm acting for a client in one matter and another against him in another.

Deplorable and unfortunate as this may be, the main test is what the firm does once it becomes apparent that a conflict has arisen. *In casu,* Howe & Co. took right decision and withdrew. There is no indication that in drafting the summons some information and confidences in respect of which they were repositories in the criminal matter were used in drafting the summons. I am not persuaded, on a full appraisal of the facts that a Judge would have held that an error was committed. It is more difficult to fathom why the reasons appearing as (a) and (b) above were included as a basis for alleging error. They are hopelessly inadequate and do not meet the rigours and the approach set out in the instructive decisions cited above.

On a conspectus of the facts above and the law applicable, it is my finding that the application for rescission under Rule 42 must fail.

That does not however mark the end of the enquiry, following the useful observations of White J. in **NYINGWA VS MOOLMAN** (supra) at page 510 ©. The learned Judge stated the following:-

> *"Although I agree with Mr Locke's submission that the application cannot be brought under Rule 31 (2) (b), I do not believe that this is the end of the matter. That would be too formalistic an approach. This Court must also decide whether the application can succeed under provisions of either Rule 42 (1) (a) or the common law."*

In order to avoid adopting the highly formalistic and fastidious approach, I will, to ensure that justice is done, consider whether the Applicant has made a case under the common law, it being common cause that Rule 31 (3) (b) and Rule 32 (11) are, in light of the facts of the matter in applicable.

Rescission under the common law

According to **LEONARD DLAMINI VS LUCKY DLAMINI** (supra) at page 2 Dunn J. correctly held that an applicant for rescission in terms of the common law must: -

(a) present a reasonable and acceptable explanation for his default; and
(b) show that he has, on the merits, a *bona fide* defence which *prima facie* carries some prospect of success.

Regarding (a) immediately above, the Applicant, in his Founding Affidavit states that on receipt of the Summons, he immediately proceeded to his insurers and handed the same over to them. He was also advised by them that all necessary processes would be attended by them and he believed this would be the position. As mentioned earlier, annexure "C" appears to confirm the Applicant's assertions in this regard.

It is my considered view, regard had to the foregoing that the Applicant has successfully presented a reasonable and acceptable explanation for his default. Any person in the Applicant's position, who enters into an insurance contract would ordinarily expect the insurer, in the absence of a repudiation, when handed a summons to take appropriate action for and on behalf of their insured, including causing the matter to be defended in Court. The Applicant cannot therefor be faulted for reposing his trust and confidence in his Broker as he did.

Regarding (b) i.e. showing that he has a *bona fide* defence, the test was set out with absolute clarity by Brink J. in **GRANT VS PLUMBERS (PTY) LTD 1949 (2) SA 470 (O)**. Although the learned Judge was dealing with rescission in terms of Rule 31, it is my view that the test whether the defence is *bona fide* is the same in both Rule 31 and under the common law.

At page 478, the learned Judge stated the following: -

> *"I am satisfied, however, that applicant has made out a **bona fide** defence to respondent's claim i.e. he has made sufficient allegations in his petition, which if established at the trial would entitle him to succeed in his defence."*

Commenting on the same subject, Erasmus, in his work entitled, "Superior Court Practice", Juta, 1995 at B1 203 – 204 stated the following: -

> *"The requirement that the applicant 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."*

The Applicant's defence *in casu* is simply that although the Particulars of Claim allege a collision between the above parties' vehicles, the Applicant denies that there ever was such a collision as his vehicle was never damaged. A cursory look at certain paragraphs of the Particulars of Claim, particularly 5,5.1 to 5.6 would suggest that there was a collision between the motor vehicles, which, as I have said the Applicant denied. This, standing alone is a triable issue, consisting of a *bona fide* defence.

Paragraph 5.7. of the Particulars of Claim, which appear to run counter to 5.1 to 5.6 records the following of the Applicant: -

> *"He forced the Plaintiff (i.e. Respondent) to take evasive action thereby creating a sudden emergency, which caused the Plaintiff to collide with an embankment next to the road."*

This allegation is again denied by the Respondent. He claims that the accident resulted entirely from the Respondent's fault. This is also a triable issue, not to mention the somewhat ambivalent contents of paragraph 5.1. to 5.6 viewed in contradistinction to 5.7. On the whole, I am of the view that the Applicant has managed to satisfy this leg as well.

In the premises, the default judgement dated 3rd August 2001, be and is hereby set aside. The Applicant be and is hereby granted leave to file his notice to defend within ten (10) days from the date hereof, whereafter the normal provisions of the Rules regarding further pleadings will apply.

Costs

The Applicant was seeking an indulgence and as a result of his default, the Respondent has incurred costs, both for the default judgement and the rescission application. I do not consider the Respondent's opposition to this application as being unreasonable. I accordingly order the Applicant to bear costs of both the default judgement and this application.

T.S. MASUKU
JUDGE