IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIV.CASE NO.1243/92

In the matter between:

MATSAPHA KNITWEAR (PTY) LTD Applicant

and

GIRDWOOD GARDENS AND FENCING (PTY) LTD Respondent

C O R A M : DUNN J.
FOR THE APPLICANT : MRS CURRIE
FOR THE RESPONDENT : MR VAN HEERDEN

JUDGMENT

5th March 1993

The applicant (defendant in the main action) seeks an order rescinding a judgment granted in favour of the respondent (plaintiff in the main action), on the 13th November 1992 for payment of the sum of E11,673.00 together with interest and costs. The application is opposed.

The summons commencing action was served on the applicant on the 9th October 1992. The applicant had 10 days within which to file a notice of intention to defend. Rule 19(1) provides -

> Subject to any direction given by the court, the defendant in every civil action shall be allowed at least ten days after service of summons on him (and where he resides more than eighty kilometres from the seat of the court at least fourteen days) within which to deliver a notice of intention to defend, either personally or through his attorney.

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"Deliver" in terms of the interpretation of the Rules means to "serve copies on all parties and file the original with the Registrar".

It is the established practice (a sound a salutary one) for an endorsement to be made on the face of the notice of intention to defend, reflecting that it is to be served on the plaintiff with an acknowledgment by the plaintiff that such notice has been served and the date thereof.

The applicant filed a notice of intention to defend dated 12th October with the Registrar on the 13th October 1992. The notice was not served and bore nor endorsement that it was to be served, on the respondent. The respondent subsequently applied for and was granted default judgment on the 13th November 1992. The applicant learnt of the default judgment on the 19th November when the Deputy Sheriff produced a warrant of execution.

Rule 31(3)(b) reads -

> A defendant may, within twenty-one days after he has had 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 payment of the costs of the default judgment and of such application to a maximum of E200.00 set aside the default judgment on such terms as to it seems fit.

The applicant has paid the E200.00 security for costs.

An applicant in an application for rescission of a judgment granted by default must -

(a) give a reasonable explanation for his default;

(b) show that his application is bona fide and not made with the object of delaying the opposite party's claim;

(c) show that there has not been a reckless or intentional disregard of the Rules of Court;

(d) show that his action is not ill-founded;

(e) show that any prejudice to the opposite party could be compensated for by an appropriate order as to costs.

See MSIBI v. MLAULA ESTATES (PTY) LTD, MSIBI v. GM KALLA & CO. 1970 -1976 SLR 345 and the authorities cited at 348.

Two affidavits have been filed by the applicant. The first affidavit is by Mrs Currie who was instructed by the applicant. Mrs Currie states that on receipt of the respondent's summons she "immediately prepared a notice of intention to defend and instructed the firm's messenger to serve the notice on the plaintiff's attorney and to file same in the High Court". She states at paragraph 6 that she had no knowledge that the Notice was not served on the plaintiff's attorney. She submits at paragraph 7 that the applicant "should not be burdened with a judgment obtained in error because the Notice of intention to defend was not served on the plaintiff's attorney."

Mrs Currie does not state whether or not she checked

/that the

that the Notice was served by the messenger. The messenger has not filed any affidavit setting out what his instructions were and as to why the Notice was not served on the plaintiff. It was clearly the duty of the applicant's attorney to ensure that the notice was served on the plaintiff. The notice should have been checked to ensure that it had been endorsed by both the plaintiff and the Registrar.

The second affidavit is by Lynette Rowberry, the Personnel Manager of the applicant company. She sets out the circumstances under which Mrs Currie was instructed and as to how she learnt of the default judgment on the 19th November 1992. The terms of the contract from which the action arose are set out in Rowberry's affidavit as follows-

> 7. The Respondent entered into an agreement with the applicant company in terms of which the respondent would supply:
>
> 1. Ten silky Oak trees.
>
> 2. Extend a drain to convey rain/storm water from the premises towards the fence.
>
> 3. Regrass the Matsapha factory site.
>
> 4. Complete the work within 30 days.
>
> 5. Maintenance of landscaping - 90 days.

It is averred that the applicant's obligation under the contract was to ensure that the respondent had water and accessibility to the site and to provide one gardener at the end of the contract to assist the respondent during the maintenance period. The applicant alleges at paragraph 10

that the respondent "failed to comply with the terms of the contract, in particular, the respondent failed to regrass the Matsapha factory site in terms of its contract and further failed to extend a drain to convey rain/storm water from the premises to the fence." These allegations relate to part of the respondent's claim. The applicant has not set out any right to repudiate the contract based on the alleged failure by the respondent to comply with the matters complained of. Further, the applicant has not set out the extent of the claim which it states it can resist as a result of the respondent's failure to comply with its obligations. The respondent has replied to these allegations and the dispute between the parties centres on the obligation to ensure the supply and availability of water throughout the contract period by the applicant. There are references to water restrictions imposed by the Town Council and the failure by the applicant to honour an undertaking to provide a borehole during the contract period. These are matters which cannot be properly resolved on the affidavits.

It is with some hesitation based largely on the view I take of the indifferent and casual attitude adopted by the applicant's attorney in dealing with the action in the first instant and in preparing the present application, that I find that this is a proper case in which to grant the relief sought. The case of **ZEALAND v. MILBOROUGH 1991(4) S.A. 835** is authority for the proposition that if an applicant for rescission of a judgment in terms of Rule 31(2)(b) can show a bona fide defence to portion of the judgment, he is entitled to rescission of the whole judgment. My so holding should in no way be construed as condoning the disregard of the Rules and as a departure from the requirement for the exercise of care in the preparation of applications.

The judgment granted on the 13th November 1992 is hereby set aside. The applicant is to pay the costs of this application.

B. DUNN

JUDGE