IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 455/94

In the matter between:

LOUIS DUMA NXUMALO APPLICANT/DEFENDANT

AND

FRANCE MLAMBO 1ST RESPONDENT/PLAINTIFF

H.R. LONG (DEPUTY SHERIFF HHOHHO DISTRICT) 2ND RESPONDENT

FOR APPLICANT/DEFENDANT : MR FLYNN
FOR 1ST RESPONDENT/PLAINTIFF: MR FINE

JUDGMENT
4TH NOVEMBER 1994

In this application, the applicant seeks an order rescinding a judgment which was granted against him by default on the 15th July 1994. The application is opposed. It will be convenient to continue to refer to the applicant as the defendant and the first respondent as the plaintiff.

A summons was issued and served on the defendant's wife at the defendant's residence in Mbabane on the 22nd June 1994. The claim against the defendant was for payment of the sum of E15,374.00 together with interest and costs. No intention to defend was filed and judgment was given in favour of the plaintiff as claimed.

Rule 31(3)(b) of the Rules of the High Court provides-

> 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 the 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.

Rule 31 (3)(b) is indentical to the South African Supreme Court Rule 31(2)(b) and the leading south African decisions in applications of this nature have been applied by this court. See **MSIBI v. MLAULA ESTATES (PTY) LTD, MSIBI v. GM KALLA & CO 1970-1976 SLR 345 at 248-349** where Nathan CJ considered the South African decisions. To those decisions may be added **HDS CONSTRUCTION (PTY) LTD v. WAIT 1979(2) SA 298 (E). CHETTY v. LAW SOCIETY TRANSVAAL 1985 (2) SA 756; ZEALAND v. MILBOROUGH 1991 (4) SA 836 (SECLD).** It is abudantly clear from these decisions that an applicant in such applications 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.

The defendant's explanation for his default is that he was unaware of the summons as he was away in the United States of America at the time the summons was served and the default judgment was given.

He states that he left Swaziland on the 17th June 1994 and returned on the 16th August. He states that he learnt of the default judgment during a meeting with the Registrar on the 23rd August 1994. The present application was launched on the 25th August. It was submitted on behalf of the plaintiff that the defentant's explanation was not reasonable. As a businessman, it was argued, the defendant ought to have left arrangements in place to deal with any actions or claims which might be instituted in his absence. It was argued that he could have made contact with his wife during his absence and that he could thereby have been informed of the summons. It is not necessary for me to deal with this arguement save to say that it would have been useful to obtain an affidavit from the defendant's wife dealing, in particular, with the question as to why the summons was not drawn to the defendant's attention immediately upon his return on the 16th August 1994. The defendant has, in my view, given a reasonable and acceptable explanation for his default and the expedition with which he launched this application is indicative of his serious intention to defend the action.

Turning to the defendants defence, all that he has to show at this stage is a **prima facie** defence: he must allege facts which will amount to a good defence if they are ultimately established on trial. See **ZEALAND'S** case **supra 838 H.** The plaintiff's claim arises from a contract for the erection of a dwelling house for the defendant by the plaintiff. The defendant has set out the terms of the contract and avers that there was a breach of material terms of such contract by the plaintiff. The alleged breach related, inter alia, to the time allowed for the completion of the house and the plaintiff's failure to carry out certain work which the plaintiff was obliged to have completed by other workmen. the plaintiff admits that the house was not completed on schedule.

He admits that the defendant engaged workmen to "finish off the construction" but states that this "had nothing to do with me as no complaint was lodged against me by the applicant nor the Engineer Mr Humphrey Ndlangamandla in respect of work not properly done or unfinished." Some argument was directed at the validity of a "Waiver of Builder's Lien" (annexure B to the application) which the plaintiff contends is a forged document. The document has two dates endorsed on it namely 7.11.91 and 25.10.91. The defendant relies on the former date. The plaintiff points out that both dates precede the month during which the building contract was entered into namely December 1991. This does not advance the plaintiff's case. There may have been good reasons for the document being signed at the time/s it was signed. It is not necessary for me to make a decision on its validity, in the application, based on the plaintiff's allegations.

The defendant has, in my view, clearly made out a defence. The default judgment granted against him on the 15th July 1994 is hereby set aside. The costs of the application will, as tendered by Mr Flynn from the bar, be borne by the defendant.

B. DUNN

JUDGE