CIV/T/207/81

IN THE HIGH COURT OF LESOTHO

In the matter of :

TERRENCE CEPHAS MUSIYAMBIRI Plaintiff

V

DAVID SELLO MOLAPO Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 20th day of August, 1982.

This is an application for setting aside a judgment granted by this Court.

A summons was issued on the 6th August 1981 and service thereof was effected personally on the 31st August 1981. Notice of Appearance to defend the action was served on the plaintiff's attorneys on the 14th September 1981. Nothing further was heard from the defendant.

On the 26th January 1982 plaintiff's attorneys served upon the defendant lawyers a notice in terms of Rule 26 i.e. requiring him to deliver his plea within three days of the delivery of the said notice. There was then an exchange of two or three letters, all to the effect that the defendant was still being traced and extension of the time mentioned being also requested. (The letters form annexures to the present papers before court)

On the 15th February 1982 the matter was heard in this Court. Since damages were being claimed, viva voce evidence was led. Although the defence had been served with the notice of set down for the trial, they made no appearance. Judgment,

/as already

as already referred to earlier, was given in favour of the plaintiff.

On the undated application before Court but which on the face of it was served on the plaintiff's attorneys on the 20th April 1982 and that the application itself would be "made on behalf of applicant on 13th day of August 1982," in his affidavit, the defendant does not tell the date when he came to know that judgment had been granted against him. He says that he went to Johannesburg without informing his lawyers.

There are two important things which the defendant has not shown in this application :

Firstly, the defendant has disclosed no defence to the Respondent's allegations. There is nothing which he has alleged which can dispel the idea that his application is not made solely for delaying the respondent's claim.

The respondent has not given a reasonable explanation of his default. Surely he knew that the plaintiff had lodged a claim for damages against him before he "went" to Johannesburg. A reasonable man would have kept constant communication with his lawyers and not behaved as though he could hold the plaintiff at ransom, render him inoperative until he (the defendant) decides to resurface from his hiding place. (See Trant v Plumbers (Pty) Ltd, 1949(2) S.A. 476(0) Khiba v Lesotho Electricity Corporation,, 1980(2) L.L.R. 392. Ntisa & Others v Flee, 1980(2) L.L.R. 533).

The unavoidable conclusion is that the applicant has failed to show a good cause.

Secondly, Counsel for the plaintiff has submitted that this application is faulty as no security for costs has been paid, in terms of Rule 26 (6)(b) of this Court.

/Now

Now Rule 26 (6)(b) reads as follows :

> "The party so applying must furnish security to the satisfaction of the Registrar for the payment to the other party of the costs of the default judgment and of the application for recission of such judment." (My underline).

To my observation the applicant has no choice but to furnish security the amount of which is determinable by the Registrar. The use of the word "must" in my view is used deliberately. It is imperative that the applicant furnishes the security for costs in terms of the above sub-section. (For the word "must" it can substituted the word "shall" and for the meaning of the latter word see s. 14 of Interpretation Act 19 of 1977). The non-satisfaction of this sub-section, if my observation is acceptable, means that the application cannot be entertained by the court until that defect has been corrected; but in very serious cases, such as where the matter is left hanging in the air for an unreasonably long time, the application for recission of default will be dismissed because in such circumstances it would be rightly said that the applicant is employing delaying tactics. In this application the applicant received the respondent's heads of argument on the 24th May 1982 wherein this specific point of payment of security for costs was canvassed but nothing was done in that direction till the 10th June 1982 when the application was struck off the roll. There had been plenty of time within which to rectify the position if the applicant was really serious about the prosecution of his application. After notification that execution was proceeding against the applicant, only then did the applicant pay the security of costs as required by the Rules, and this was during the middle of July 1982, almost three months after the launching of the application. In future the

Registrar will not accept any notice of set down in similar applications where there has been no compliance with Rule 26 (6)(b). The Rules of Court are meant to be obeyed and it will result in disaster if they are not.

In view of the factors discussed above it cannot be said that the applicant came anywhere near discharging the onus on him. He infact even compounded his errors, by not complying with the Rules of this Court which was in itself, disastrous.

The application is dismissed with costs.

JUDGE

For the Applicant : Mr. Modisane
For the Respondent : Mr. Moiloa.