CIV/APN/232/83
CIV/T/220/82

IN THE HIGH COURT OF LESOTHO

In the Application of :

SEKHOBE SEHAHLE Applicant

v

1. FEDMARK(MATATIELE)(PTY) LTD
2. J. LEHLOKA

} Respondents

J U D G M E N T

Filed by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 19th day of December 1983

The 5th December 1983 was the extended return date for a rule nisi granted to the applicant Sekhobe Sehahle by Kheola AJ calling upon the 1st respondent Fedmark(Matatiele) (Pty)Ltd and 2nd respondent L. Lehloka (the deputy sheriff) to show cause, inter alia, why

(a) a default judgment entered in favour of 1st respondent and plaintiff in Civil Trial 220/1982 not be set aside,

(b) a stay of execution of the goods of the applicant attached in accordance with a writ issued by the 1st respondent and plaintiff in the above trial should not be granted.

The applicant is the owner of a business known as Douglas Store and it was common cause that the 1st respondent/ plaintiff had supplied and delivered goods to the applicant in the course of business dealings. In the civil action above referred to the 1st respondent and plaintiff claimed M3772.92

/in respect

in respect of goods sold and delivered and unpaid for in 1981. It was not seriously challenged that the applicant and defendant did not receive the summons and I have little doubt that he did. Judgment was entered before Rooney J on the 23rd August 1982. The 1st respondent/plaintiff proceeded to execution, applicant/defendant's goods were attached, and a bill of taxation of costs was filed in the normal way.

Over a year after these events the applicant/defendant now swears that he does not in fact owe this sum to the 1st respondent/plaintiff, that not only had he settled all amounts owed but on the contrary had overpaid the 1st respondent/plaintiff M2592.12.

Mr. Koornhof submits that rescission of a default judgment cannot be heard unless security for costs has been furnished to the satisfaction of the Registrar in terms of Rule 27(6)(b) of the High Court Rules and as this had not been done the application is ipso facto incompetent.

Mr. Maqutu submits that his application is based not on Rule 27 but on Rule 45 because the Court has power, mpru motu, to vary or rescind a judgment entered as a result of a "mistake common to both parties". Under this Rule no security need be furnished.

Mr. Koornhof submits there was no error "common to both parties".

The papers submitted by the applicant/defendant disclose that his accountant had told him that when checking his accounts with the 1st respondent/plaintiff he, the accountant, had discovered a mistake in favour of the applicant which makes him a creditor, not a debtor in the sum of M3772.92. The accountant himself however submits no affidavit to this effect and what I have before me are photocopies of bank statements, cheques, and endorsements thereof (on the front and back) and receipts in which the names of two companies

/appear

appear which seem to have been operated by the same management.

It is impossible, without hearing evidence, to grant this application. I accordingly propose to dismiss the application unless :-

(a) The applicant pays into Court the principal amount of the Judgment debt, i.e. without costs, or

(b) Furnishes the Registrar with security in the nature of a bank guarantee for payment of the above sum should it be established that the 1st respondent/plaintiff was right and the applicant/defendant and/or his accountant are wrong.

If the applicant/defendant is able to do either the attachment of applicant's goods will be lifted to enable him to catch the Christmas trade which he says he is anxious to do before he is ruined. In such an event the default judgment will be rescinded and the case will be set down for hearing after a pretrial conference on the present papers forming the pleadings. If not I am prepared to hear viva voce evidence on 17th January 1984 during the Court's vacation. The onus of proof will be on the applicant/defendant.

The applicant to pay the costs of this application.

Will the Registrar please supply a copy of this Judgment to the attorneys of both parties.

CHIEF JUSTICE
19th December 1983

For Applicant : Mr. Maqutu
For Respondent: Mr. Koornhof