Hon. Mofokeng J.

CIV/APN/26/83

IN THE HIGH COURT OF LESOTHO

In the Matter of :

JACOB THIPE MANOTO	Applicant
v	
JULIUS RATSIU	1st Respondent
DEPUTY SHERIFF	2nd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 10th day of June, 1983.

On the 31st January, 1983, the applicant filed a notice of motion in which he sought an order of this Court in the following terms :

"(a) Rescinding the default judgment entered against him on the 18th day of August 1975, re-opening the case and giving him leave to file his defence to the action.

(b) Setting aside the warrant of ejectment.

(c) Granting an interim temporary order of stay of execution pending the hearing of this application.

(d) Costs of this application if the Respondents oppose it.

In his founding affidavit, the applicant deposed that in 1968 two adjacent unsurveyed and unnumbered sites, one a residential site and the other a business site, were allocated to him at Lower Thamae village by the Chief of the place, one Moshe Thamae Matsoso. Applicant was issued with certificates of allocation (Form C) for the sites which were subsequently registered in his name in the Deeds Registry on the 13th December, 1973.

2/· On 17th February ....

On 17th February, 1974, the chief, at the instance of the first Respondent herein who is his son-in-law, purported to revoke the allocation of the business site on the ground that it had previously been allocated to the first Respondent. The applicant then approached the High Court for a review of the chief's decision on the ground that in revoking the allocation the chief had acted ultra vires. The application(CIV/APN/50/74) came before Mapetla C.J. who dismissed it on the ground that the chief had acted within his power in revoking the allocation.

Applicant further averred that on 24th September, 1974 and following the decision of the High Court in CIV/APN/50/74, first Respondent issued against him a summons CIV/T/70/74, in which he claimed an order of cancellation of his Title Deed to the business site and ejectment therefrom. Applicant instructed the firm of Du Preez, Liebetrau & Co. to enter an appearance on his behalf and to defend the action. He had, however, never been informed that the case was proceeding to trial nor was his continued occupation of the business site which is still registered in his name seriously challenged. He heard for the first time that judgment in CIV/T/70/74 had been entered against him on 17th January, 1983 when the second Respondent served him with a warrant of ejectment dated 4th February, 1982.

Applicant stated that he was informed that his Attorney of record in CIV/T/70/74 had filed a plea to the first Respondent's declaration denying that the site in question had been allocated to first Respondent and that he was in lawful occupation thereof. However, for reasons unknown to him the defence was withdrawn and default judgment granted against him as well as an order for ejectment and costs. Applicant told the court that he had never instructed his attorney of record to withdraw the defence, he was not in wilful default and had reasonable prospects of success in the action. Wherefore he prayed for an order as aforementioned.

The application was opposed by the first Respondent in whose opposing affidavit he admitted that applicant's allocation to the business site was revoked by Chief Matsoso and that such revocation was upheld by the High Court in CIV/APN/50/74 of which copy of judgment he attached as annexure "JRI". He, however, denied that in revoking the allocation, the chief had acted ultra vires. The site in question had previously been allocated to him and the subsequent allocation to the applicant was lawfully revoked by the chief.

The High Court rightly upheld the decision of the chief and the effect of the High Court judgment was to leave intact his right over that site.

He conceded that following the High Court decision in CIV/APN/50/74, he instituted CIV/T/70/74 against the applicant for cancellation of the latter's Tittle Deed to the business site and his ejectment therefrom. He, however denied that applicant was not informed of the date on which the case was to proceed on trial. On this the first Respondent was supported by Mr. Koornhof of the firm of Du Preez, Libetrau & Co. who in his supporting affidavit confirmed that he was applicant's attorney of record in CIV/T/70/74. He had initially entered, on behalf of the applicant, a notice of appearance to defend the action. He had informed the applicant of the date of his trial and on the 18th August, 1975 when the matter was heard, applicant was at Court with his wife.

Prior to the case being called a sort of pre-trial conference attended by, among others, the applicant and his wife was held. After the conference, he advised the applicant that in view of the fact that it was common cause between the parties that the chief who had allocated the site to the applicant had lawfully revoked such allocation and allocated the site to the first Respondent and since applicant had failed to upset the revocation in CIV/APN/50/74 before Mapetla, C.J. and that on the contrary the court had upheld the revocation and subsequent allocation to first Respondent, he had no defence to first Respondent's action.

Applicant accepted the advice and instructed him to withdraw his defence to the action and requested first Respondent's attorney of record that the ejectment order should

not take effect before the 31st December, 1975. Mr. Koornhof duly made the request which was readily granted by the other side.

When the Court convened, Mr. Koornhof formally, in the presence of Applicant and his wife, informed the presiding judge that he had instructions to withdraw the applicant's defence and proceeded to formally make the application requested by the Applicant. Judgment was thereupon entered by consent.

First Respondent contended, therefore, that applicant had no prospects of success in the action.

Applicant filed a replying affidavit in which he reiterated that the business site in question belonged to him. Both his wife and one Lt. Makebe of the Community Relations Section of the police filed affidavits in support of applicant's contention.

On the papers before Court, it is not realy disputed that after the business site in question had been allocated to first Respondent, the chief re-allocated it to Applicant. When that anomally was brought to his attention, the chief revoked the allocation he had made to the Applicant. The question whether or not the chief could lawfully do that was replied in the affirmative in Thipe Jacob Manoto v. Julius Ratsiu CIV/APN/50/74 (unreported) where Mapetla, C.J. unequivocally held :

> "The chief must have realised that when he purported to allocate the site to the applicant, the site was in fact not available for such allocation as it was at the time still validly allocated to the First Respondent and on that ground and in exercise of powers legally vested in him revoked his allocation to the appellant and correctly so."

The effect of this judgment was the subject of much argument. First Respondent contended that it left in place both the revocation by the chief of his (chief's) allocation

of the site to him (First Respondent). On the other hand the applicant argued that the effect of the judgment was to preserve the status quo ante i.e. to leave intact the purported allocation of the site to the First Respondent as well as the purported revocation of his right thereto for determination in accordance with the land law.

I am unable to subscribe to applicant's argument. In my view, the judgment can mean only one thing, that is, as the site was still validly allocated to the first Respondent at the time the chief purported to allocate it to the applicant, the chief could not lawfully do so for the simple reason that it was not available for allocation. That being so, the effect of the judgment is clearly that the site belongs to the First Respondent and not to the applicant. The applicant did not appeal against that judgment and it must be accepted that it still holds good.

It is common cause that following the decision in CIV/APN/50/74, the first Respondent sued the applicant in CIV/T/70/74 for an order of cancellation of applicant's Title Deed to the business site and ejectment therefrom. An appearance to defend was initially entered on behalf of the applicant but was later withdrawn and judgment granted in favour of the first Respondent. The important question is whether or not the judgment was by consent. First Respondent says it was. Applicant, however, denies and says as he neither knew of the date of or attended the trial the judgment was by default and not by consent.

Mr. Koornhof who represented the applicant in CIV/T/70/74 has filed an affidavit in which he deposes that on the instructions of the applicant who was personally present in Court on the date of hearing, he withdrew the initial appearance to defend and judgment was entered by consent. I can imagine of no good reason why an attorney of Mr. Koornhof's experience should decide to deceive the Court on this point. There is no doubt in my mind that

applicant is not being honest with this Court in his story that he neither knew of the date of, nor attended the trial in CIV/T/70/74. I accordingly reject that story and accept as the truth Mr. Koornhof's version confirmed by the deposition of first Respondent that Applicant knew of the trial date and was in fact present in court when on his own instructions his initial notice of appearance to defend the action was withdrawn by his legal representative and judgment consequently entered by consent.

It follows, therefore, that the question whether or not judgment was entered by consent must be answered in the affirmative.

It has been argued, on behalf of the applicant, that even if the claim in CIV/T/70/74 were unopposed, first Respondent should not have been granted judgment for his claim was not a liquidated debt or a liquidated demand and no evidence was led. In my view this Court is not sitting here as Court of Appeal over its own decisions. If the applicant felt aggrieved by the decision in CIV/T/70/74, his remedy was to appeal, within the time limit stipulated by the Rules, against the decision. He has failed to do so. He cannot now turn round and sort of criticise the decision by saying the first Respondent should not have been granted judgement. By and large, I come to the conclusion that applicant has no prospects of success in the main action and there would be no point in granting the relief sought in prayer (a) of the notice of motion.

It may be mentioned that at the start of arguments, Mr. Mlonzi, for the Applicant, stated after some hesitation that the present application is based on Rule 45(1) (a) which provides :

> "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 judgment erroneously sought or erroneously granted in the absence of any party affected thereby;"

Mr. Sello, for the first Respondent, then said, in that event, he would raise a point in limine that in terms of Rule 45 (1) (a) above, the Court could only consider application for the rescession of judgment granted in the absence of a party. Under Rule 1 of the High Court Rules 1980, the definition of the term "Party" is given as follows :

> " "Party" or any reference to a Plaintiff or other litigant in these Rules shall include his attorney with or without an advocate. as the context may require."

The basis of the application was that judgment in CIV/T/70/74 was granted in the absence of the applicant. It was, however, common cause that his attorney Mr. Koornhof was present when judgment was granted. That being so, it could not be said applicant was absent when judgment was entered and the application should therefore be dismissed. I agree.

However, the application cannot, in my view, be dismissed in toto. It has not been disputed that although judgment in CIV/T/70/75 was granted on 18th August, 1975, the writ of ejectment was only issued in February, 1982, almost seven years after the judgment had been pronounced.

Rule 57(1) provides :

> "After the expiration of three years from the day on which a judgment or order has been pronounced, no writ of execution may be issued pursuant to such judgment or order unless the debtor consents to the execution of a writ or unless the judgment has been revived by the Court.

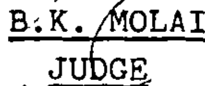
There is no indication that the judgment debtor (applicant in this case) has consented to the execution of the writ nor is there any suggestion that the judgment of 1975 has since the expiration of the three years been

revived by the Court. It follows therefore that the writ issued in 1982 pursuant to a judgment granted in 1975 cannot be executed unless either the judgment debtor has consented to its execution or the court has revived the judgment.

In the result, I order as follows :

1. Prayer (a) of the notice of motion is refused.
2. Prayer (b) is granted
3. Prayer (c) is granted pending compliance with the conditions laid out in Rule 57 (1) of the High Court Rules 1980.

No order as to costs.



B.K. MOLAI
JUDGE

10th June, 1983.

For the Application : Mr. Mlonzi
For the Respondents : Mr. Sello.