CIV/A/26/84

IN THE HIGH COURT OF LESOTHO

In the matter of:

LOYISO MPUMLWANA	Appellant
v	
JESSIE RAMAKATANE	1st Respondent
TEBOHO MABOTE	2nd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice
M. P. Mofokeng on the 12th day of December, 1984

This is an appeal against the decision of the learned magistrate wherein he granted a recision of judgment to the Respondents on the 29th day of August, 1984.

The appeal is based on the following grounds:-

(a) That the learned magistrate erred and or misdirected himself when he found that Defendants/Respondents were within their time to enter appearance when in fact the defendants/respondents consented to judgment a fact which the magistrate did not consider in his judgment. The defendants/respondents were entitled to consent to judgment before entering appearance, vide Order X Rule 1(i) (a).

(b) That the decision of the magistrate is against the evidence which shows that defendants/respondents admitted liability all along and actually signed a consent to judgment after having read the summons, and are now delaying the proceedings in order to evade execution which has already been served upon them.

/It would ...

It would appear from the summons that the respondents were sued by the applicant in the subordinate court for a sum of R482.30 and costs, it being alleged that that was the damage caused to the applicant's car as a result of a collision with the 1st respondent's car driven by the 2nd respondent in the cause of his duty.

The messenger of the court served copies of summons according to the return of service on the 5th July, 1984, upon both respondents personally at a given address. In fact, the return of service reads, in part: "You are hereby informed that defendant was on the 5th July, 1984 served with summons thereby delivering/affixing a copy thereby upon 1st and 2nd respondents personally at the address given. They signed consent to judgment." That was the reading of the return of service by the messenger R.T. Nqosa. On the strength of that return, the clerk of the court entered default judgment for the plaintiff with costs.

I have read the judgment of the learned magistrate in the court a quo and have no quarrel with it. However, as far as this appeal is concerned, on the application of the Rules, Order No. 10 dealing with judgment by consent or default states thus in rule sub-rule 6 as inserted by G.N. No. 49 of 1962:

> " Whenever consent to judgment is given by signing the form of consent endorsed on the original summons the messenger effecting serv ice shall satisfy himself that the defendant so consenting understands the purport of the summons and this effect of his so signing". (My underlining)

This is what the messenger in his affidavit says he did. He says on the 5th July, 1984 he arrived at the office of

/---- Speedy

Speedy Taxis where he met the 1st and 2nd Respondents and served them personally with the summons. He says: "Both of them read the summons for about fifteen (15) minutes. When they had finished I asked them to sign my copies of the summons. They took them, read them also for about ten (10) minutes and then signed them on the portion for consent to judgment." It is crystal clear that although it is alleged that the respondents read the summons, the messenger did not satisfy himself in terms of section 1 (6) as quoted above. That is an irregularity and in my view, and if there is any irregularity in the consent, as it was not explained to them what the purpose of the summons was and the effect of signing the consent form, it may result in the consent judgment being set aside.

The 1st respondent denies that he ever signed a consent form. The 2nd respondent agrees that he signed the summons but then says it was at the spot indicated by the messenger. He was not signing a consent form deliberately It is therefore clear that there was no compliance with the provisions of Rule 1 sub-section 6 of Order No. 10. However, of greater moment is the non-compliance with Rule 4 sub-section 4 dealing with the position where claim is for damages. If the request is made for consent to judgment, in such a case then the matter is brought to the attention of the court and the plaintiff shall furnish to the court evidence either oral or by affidavit of the nature and extent of the damages suffered by him and the court shall thereupon assess the amount recoverable by the plaintiff as damages and shall enter judgment accordingly. In this particular case it is not the court which entered the

/judgment ...

judgment, but the clerk of the court. There was, therefore, no valid judgment. The respondents were quite entitled to have entered their notice of appearance to the action when they did.

Now, in an action for damages sustained in a motor car collision, plaintiff must give evidence concerning not only the quantum but the question of the cause of action. It must be determined whether there has been contributory negligence and whether there should be apportionment of damages. These things were not done in the present matter before me. This is the second irregularity both of which, in my view, are serious.

The judgment, therefore, entered against both respondents is irregular in another sense in that the procedures laid down in the Rules of the subordinate courts Proclamation were not complied with. It may be mentioned, in passing, that the respondents satisfied the court a quo on the principles laid down in the case of Lebamang Ntisa & Others v Tankiso Fiee, 1980 (2) L.L.R. p.533 where it was stated by the learned Chief Justice T.S. Cotran:

> " Before the court will exercise the wide discretion it has in application for a recission of judgment there are three essentials that the applicant must discharge:
>
> (1) he must explain to the court's satisfaction the reasons for the default;
>
> (2) he must persuade the court that the application is bona fide and not made with the intention of merely delaying the plaintiff's claim;
>
> (3) he must show a bona fide defence to the plaintiff's claim."

/ In this ...

In this particular case the respondents were not in default as they entered notice to defend on the date on which default judgment was endorsed on the file. However, they had to make an application for a rescission of that judgment which had erroneously been noted against them. They have shown, on their papers, that they have a bona fide defence and their defence of the action was not a frivolous one or made with the intention of delaying the applicant's claim. They had a bona fide defence to the plaintiff's claim. All these matters were canvassed before the learned magistrate in the court a quo.

In the circumstances of this case the court can come to no other conclusion but to dismiss the appeal with costs and it is accordingly so ordered.

J U D G E
12th December,, 1984

For the Appellant : Mr. Kambule
For the Respondents : Mr. Matsau