CIV/T/44/82

IN THE HIGH COURT OF LESOTHO

In the Application of .

MOGGIE & DU TOIT Plaintiff

v

P.P. MAKHOZA Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 19th day of January, 1984.

This is an application for rescission of default judgment against the applicant on the 18th day of May 1983.

The applicant deposes that he was advised by counsel that judgment had been entered against him in default of his appearance on the 10th day of May 1983. He avers that he was not in wilful default in as much as his attorneys did not notify him of the said date of trial, namely 10th May 1983. He submits that he has prospects of success in that he does not owe the respondent what it alleges (having been paid) except for a sum of M500.00 (Five Hundred Maloti only). Finally, the applicant avers that if he is allowed to defend this action, he will approach the court for condonation of his late filed plea.

The supporting affidavit is by the applicant's attorney. He says that he did not notify the appellant of the date of trial neither did he write to him in that connection and as

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a result of that omission, on his part, default judgment was entered against the applicant. He avers that the applicant was not in wilful default.

The application is vigorously opposed. It is averred that the applicant had a duty to keep in contact with his attorney and to inquire concerning the progress of the case. However, by not doing so, he was crossly negligent and had a laisser-faire attitude towards the proceedings. After the plea was filed during June 1982 and also after the pre-trial conference was held on 6th December 1982 he must have known that this matter would be heard subsequently. He was or must have been aware of the date or was negligent to enquire. Applicant has therefore created the position in which he now finds himself.

It is averred that the applicant does not specifically say on what date it came to his knowledge that a default judgment had been entered against him. It is significant that he signed his affidavit on the 19th May 1983.

It is further averred that applicant has neglected to aver good reasons why this application should be granted. It is submitted that the applicant's non-attendance at the trial was deliberate or gross negligence bordering on contempt.

It is further averred that the applicant is not supported by his attorney that he had not been notified of the trial date, the latter being vague on this point. On the 10th May 1983 the proceedings commenced late because applicant's counsel was waiting his arrival. Applicant failed to give a reasonable explanation for his default. It would

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appear he was grossly negligent and that the court should not come to his assistance.

It is also averred that applicant's application is not bona fide. He has done everything possible to cause a delay in the prosecution of the claim in this matter. Hence, there is no explanation why he has not paid even the sum of M500.00 (Five Hundred Maloti only) which he admits, on his own version, that he owes the respondent.

The defence of the applicant is not bona fide either, so it is averred, because the version of the respondent is corroborated by the cheques he received from the applicant some of which were dishonoured.

It is denied that the applicant has any prospects of success. The handling of the cheques and undertakings as well as the amount still outstanding on his version, appears inconsistent with his allegation. In any event the judgment could not be rescinded for M500.00 (Five Hundred Maloti only) as he admits is due and payable.

Since the applicant has still to apply for his plea to be filed at some future date, if the present application is granted, there was therefore no plea before court. The default judgment was correctly entered.

The supporting affidavit by the applicant's attorney has been described by the respondent is being unsatisfactory. In it the attorney is too earger to put the entire blame for the entry of a default judgment against the applicant squarely on his shoulders. In so doing he has overlooked

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the finer details which would have definitely indicated to the applicant that the date of trial had been determined such as when the matter was enrolled and steps he took in the preparation of the case, including the pre-trial conference. He does not mention, in his affidavit, what attempts he made to ensure the attendance of the applicant in Court. During the trial, the court was first given the impression that the applicant was nearby. Then there was an about-turn. He had gone to Johannesburg knowing that he had to be present in court to answer a claim. In argument in connection with this application, Mr. Maqutu stated that the applicant had gone overseas. This has not been alleged in any of supporting affidavits to the application In any event, it is incomprehensible to this Court that counsel would come to court and listen to evidence in chief and cross-examine the same witness without even taking the court into confidence as to the whereabouts of the defendant if there were difficulties about that. However, it was with some sadness that the court heard attorney for the applicant being reminded that if the applicant was aggrieved by what had happened, his remedy lay against his attorney. It is true.

On the other hand, it is the duty of the applicant to keep in contact with his attorney(s) and to enquire about the progress of his case. If he does not do so, and adopts the I-don't-care attitude towards the proceedings, he is then grossly negligent. (See Grant v Plumbers (Pty) Ltd., 1949(2) S.A. 470 at 476). Moreover, the applicant does not explain to this court what precisely took place from the time he became aware of the fact that default judgment had been entered against him until he filed his affidavit. There is,

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therefore, no reasonable explanation before the Court for the applicant's default.

The respondent submits that the applicant has no bona fide defence. It is his case that he was given cheques by the applicant some of which were dishonoured. It is not denied by the applicant that cheques were given to the respondent. In his plea it is admitted that at least a cheque for M1,000.00 (A thousand Maloti only) was dishonoured. It was replaced by two cheques of M500.00 (Five Hundred Maloti only). However, one of these was dishonoured. It is on this basis that it alleged that only a sum of M500.00 is due and payable to the respondents. But the goods bought were for a very far larger amount. In any event, there is no defence and there can never be any as to why the amount owing should not be paid, except to say that it has been paid. There is no iota of evidence contained in any affidavit either by his Bookkeeper or Accountant to support the averment by the applicant to the effect that he has paid the sum claimed except the alleged M500.00. The applicant could attach no receipts. (See Sekhobe Sehahle v Fedmark (Matatiele) (Pty) Ltd., & Another, CIV/APN/232/83 dated 19th December, 1983). There is, therefore, no prima facie defence set out.

The applicant, in the court's view, has not placed sufficient evidence before it from which it may be inferred that he has a bona fide defence. Eliciting sympathy from the court in these circumstances is quite a different matter. The applicant in this type of application must show a good cause for default of his appearance. He has

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failed to do neither of these things. (Makalo Khiba v Lesotho Electricity Corporation, 1980 (2) LLR. 392) and the balance of convenience is against allowing this application.

The application is, therefore, dismissed with costs.

J U D G E.

19th January, 1984.

For the Plaintiff - Adv. Rubberheimer

For the Defendant - Adv. Gwentshe.