CIV/A/6/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

ELLA-DENISE MARIE GANDOLFO Appellant

V

PHAKISO LEBONA Respondent

J U D G M E N T

Delibered by the Hon. Acting Mr. Justice D. Levy
on the 4th day of August, 1986.

Plaintiff (now Respondent in this appeal) sues Defendant (now Appellant) in the Subordinate Court, Maseru, for ejectment from a house alleged to be the property of the Plaintiff which Plaintiff let to the Defendant at a rental of M650 per month. The Plaintiff alleged that several months' rent were in arrears and that he became entitled to cancel the tenancy which he duly did.

Defendant's plea amounts to a denial that she is in arrears with her rent and she filed a counterclaim for payment of an amount of M5,700.55 allegedly arising out of a partnership between her and the Plaintiff. On the face of the plea there appears to be no connection whatsoever between this claim and the counterclaim. No particulars were sought of Defendant's denial that she was in arrears her rent or of the means by which such rent was paid by the Defendant. In the result the dispute

/between

between the parties remained confined to the question whether the Defendant was, or was not, in arrears with her rent entitling the Plaintiff to cancel the lease.

An application for the stay of the action on the grounds that the counterclaim exceeded the Court's jurisdiction was dismissed with costs. Since the counterclaim, on the pleadings as they stand, plays no part in the plea to Plaintiff's claim, section 30 of the Subordinate Court's Proclamation is not of application and the application was rightly dismissed.

Notice of set down of the trial of the action was given on 19th August 1985 for 23rd August 1985 when an objection to the obviously short notice was dismissed with costs for reasons which I find difficult to understand. In the result however, the action was postponed to 30th August 1985 to meet the convenience of Defendant's counsel and Defendant was ordered to pay the costs of the postponement.

On 30th August 1985, there was no appearance for the Plaintiff, and Defendant's attorney moved for an order postponing the action sine die on the grounds of an irregular set down with costs to Defendant, alternatively dismissing Plaintiff's claim with costs on the grounds of Plaintiff being in default.

The Magistrate refused Defendant's application for dismissal and postponed the case sine die with wasted costs to the Defendant to enable Plaintiff to prepare another Notice of Set Down.

On 30th August 1985, Plaintiff served on Defendant a

/Notice

Notice dated 19th August 1985 setting the matter down for hearing at 8.30 a.m. on 6th September 1985.

On that day the Magistrate recorded that at 8.35 a.m., there being no appearance for the Defendant, he heard the evidence of Plaintiff and granted judgment for Plaintiff ejectment and costs.

Thereafter an urgent application was made ex parte by the Defendant on 11th September 1985 for rescission of the judgment obtained on 6th September 1985. A Rule was issued operating as a temporary interdict against eviction on the strength of affidavits filed by Defendant's attorneys on her behalf which indicate that Defendant's attorney arrived at Court at 8.40 a.m. "to object to the Notice of Set Down" so he says. After some attempt by him to find the file, he went to the Court room where the matter was to have been heard. At the door of the Court room he met Plaintiff's attorney emerging therefrom who informed him that judgment had already been granted. Plaintiff's attorney was then asked to agree to a rescission on the ground that the Notice of Set Down once again was not in order and this request was refused. The Rule that had been issued was discharged by the Magistrate on the 11th September 1985 on the grounds that there had been non-compliance with the Rules of Court requiring Defendant to provide security for costs awarded in the judgment rescission of which was sought and on the further ground that Defendant had failed to show that she had a bona fide defence to the action. This appeal is against that order.

/SECURITY

SECURITY FOR COSTS

Order XXVIII of the Rules of the Subordinate Court provides in Rule 3.3 that such application shall not be set down for hearing until the applicant has paid into Court the amount of the costs awarded against him under thejudgment. Such costs as had been awarded to Plaintiff had not yet been taxed by Plaintiff and the Defendant paid into Court as security an amount assessed by the Clerk of the Court as being the probable amount at which Plaintiff's bill of costs would eventually be taxed.

It is right in my view that the Clerk of the Court should not be called upon to assess the likely amount of Plaintiff's costs, and to pay such assessed amount into Court is a non-compliance with the requirements of the Rule which require the amount of Plaintiff's costs, i.e. taxed costs, to be paid into Court. But this does not mean that the remedy of an application for rescission is barred to the Defendant until Plaintiff at his leisure choses to tax his bill of costs by which time the order for ejectment will long ago have been carried into effect. In my view, the proper procedure on this point alone would have been for the Magistrate to have confirmed the Rule ordering a stay of execution until such time as the Plaintiff had taxed his costs and the Defendant given an opportunity of paying that amount into Court. This would oblige the Plaintiff to tax forthwith or agree on a suitable amount to be paid into Court by Defendant. It would also remove a serious lacuna in the Rules of Court. Authority to follow this course flows from Order XXXIII Rule 1 which debars the entry of judgment on the

/grounds

grounds of failure to comply with the Rules and which authorised the Court to order compliance with the Rule within a stated time.

A BONA FIDE DEFENCE

The Defendant has nowhere indicated the nature of her defence to the action in the affidavits filed by her or on her behalf and the Magistrate found that this amounted to a failure to show good cause as required by Order XXVIII Rule 2(1).

This Rule is made applicable to all proceedings for rescission of judgment in terms of Section 21 of Subordinate Courts Proclamation 58 of 1938. A similar provision in the Magistrate's Court Act in South Africa, i.e. Section 36 of Act 32 of 1944 of South Africa, has always been regarded as conferring jurisdiction to rescind a judgment granted in the absence of a party at the trial. See Meer Leather Works Co. v African Sole and Leather Works (Pty) Limited 1948 (1) SA 321 (T).

What amounts to good cause has always been a matter of some difficulty but the requirement generally has been regarded as necessitating the filing of an affidavit on the merits showing that the Defendant has at least a prima facie defence to the action.

No such affidavit has been filed and the Defendant's attorney indicated to Plaintiff's attorney that he intended to rely only on the ground that the Notice of Set Down amounted to short notice in terms of Order XXXIII of Rule 3(2) which requires a party reinstating a trial which has been postponed to set the action down for further

/hearing

hearing on a day not earlier than 7 days after delivery of such Notice.

The Magistrate did not deal with this criticism of the Notice of Set Down, but since it was to be the only point to be argued by Defendant's attorney on the 6th September 1985, a decision on this point would have been decisive of the whole matter as I find it is of this appeal, and I turn now to a consideration of this question.

WAS THE NOTICE OF 30TH AUGUST 1985 SHORT NOTICE?

This Notice was served on 30th August 1985 as a notice of reinstatement for 6th September 1985. Including 30th August 1985 and including Sunday, the 6th September was the 8th day after 30th August. Applying the provisions of Section 49(1) (a) of the Interpretation Act 1977 which excludes the day on which the event happens, the date of Set Down was not earlier than 7 days after delivery of the Notice. Section 49(1) (c) directs that Sunday shall not count only when the time allowed does not exceed 6 days. It is therefore of no application in case.

Section 50 of the Interpretation Act also enjoins that when the days are expressed to be "clear days" or when the term "at least" is used, both the first day and the last shall be excluded.

It was argued on behalf of Appellant that section 50 should be read to contain the phrase "or some such similar term" after the words "at least" It was argued accordingly that the phrase "not earlier than" as contained in Order XXXIII Rule 3(2) is such a similar term.

/However,

However, section 50 is clear and decisive in its terms. The indulgence extended by it in excluding the first day as well as the last day in computing time is limited in its application to cases where only the two phrases stated are used. If the legislature had wished to include all similar phrases, then no doubt it would have done so in appropriate language and I find no justification for reading into section 50 something which is not there and which is not required to be there to make sense of the section or to give it efficacy. Indeed no good ground has been advanced to justify an interpretation by the Court of a phrase into this section which would extend it far beyond its present scope.

I find therefore that service of the Notice of Set Down was not a short service and that the point which Defendant's attorney came to argue that day had to fail. Judgment was properly entered by the Magistrate for eviction and costs and the interdict was properly discharged with costs.

The appeal is dismissed with costs.

D.S. LEVY
ACTING JUDGE.

4th August, 1986.

For Appellant : Mr. Redelinghuys
For Respondent : Mr. Pheko.