CIV/APN/96/84

IN THE HIGH COURT OF LESOTHO

In the Application of :

PHILLIP MOSAE ..... Applicant

and

LESOTHO AGRICULTURAL DEVELOPMENT BANK ..... Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice B.K. Molai
on the 6th day of August, 1986.

This application has already been dismissed with costs and the following are my reasons for the decision.

On 30th April, 1984 the applicant herein filed with the Registrar of this Court an urgent application in which he moved for an order framed in the following terms:

"(1) That a Rule Nisi be and is hereby issued returnable on a date to be determined by the court calling upon the Respondent to show cause, if any, why:-

(a) Execution in CIV/T/284/83 shall not be stayed pending the finalisation of the application for rescission of default judgment.

(2) That default judgment entered in CIV/T/284/83 on the 15th December, 1983 be rescinded.

(3) That prayer 1(a) operates as interim interdict with immediate effect.

(4) That Respondent pay the costs of this application in the event of opposition.

(5) Further and/or alternative relief."

The application was placed before Cotran, C.J. who however, ordered that the papers be served on the Respondent

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in the normal manner, presumably in accordance with the provisions of Rule 27(6)(a) of the High Court Rules 1980. The application was duly served on the Respondent on 30th May, 1984. The Respondent entered appearance to oppose the application. He, however, intimated that he did not wish to file any answering affidavit but would argue the matter on the day it was set down for hearing. We had, therefore, only the applicant's founding affidavit to rely on, for the decision in this matter.

The facts disclosed by the founding affidavit were that on 15th December, 1983, the Respondent obtained a default judgment against the applicant in CIV/T/284/83 apparently for failing to pay his monthly instalments. The applicant had, however, not been served with the summons and the purported return of service did not show to whom the service was effected. A copy of the return of service, annexure 'B' was attached - Consequently, the default judgment was irregularly obtained.

On 3rd February, 1984, the applicant knew for the first time that the default judgment had been obtained against him. He then contacted his lawyer and instructed him to apply for a rescission of the default judgment on the grounds that (a) no service had been effected on him. He was not, therefore, in willful default. (b) He had prospects of success in the main action in that he never entered into an agreement to pay definite instalments per month. He had only been told by a certain Mr. Mashapha, an official of the Respondent, to pay instalments irregularly - Two receipts, annexures "D1" and "D2" reflecting the amounts of M2,370-34 and M50-00 respectively were attached as proof of irregular payments of instalments - Wherefor the applicant prayed for an order as aforesaid.

I have had a look at the copy of the return of service annexure 'B', according to which the Deputy Sheriff had served the summons "on Defendant" on 31st October, 1983. There was no substance, therefore, in the applicant's averment that he had not been served with the summons and the return of service did not show on whom service had been effected.

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It was clear from his founding affidavit that the applicant never filed a notice of appearance to defend CIV/T/284/83. If, notwithstanding service of the summons in CIV/T/284/83, the applicant did not enter appearance to defend the action, it seemed to me he was in willful default and judgment had been correctly entered against him in terms of the provisions of Rule 27(5) of the High Court Rules 1980.

On the question of prospects of success in the main action, the Respondent filed no affidavit to gainsay the applicant's averment that there was no agreement binding him to pay definite instalments per month i.e. he could pay when and if funds permitted and the question of arrears did not, therefore, arise.

I would normally have been prepared to grant rescission on the ground that prospects of success existed in this matter were it not for the fact that it was not disputed in argument, that the applicant had not furnished security in terms of the provisions of sub-rule (6)(b) of Rule 27 of the High Court Rules, supra. The sub-rule reads, in part:

> "6(a) where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a Plaintiff, the defendant or Plaintiff, as the case may be, may within twenty-one days after he has knowledge of such judgment apply to court, on notice to the other party, to set aside such judgment.
>
> (b) the party so applying must furnish security to the satisfaction of the Registrar for the payment to the other party of the costs of the default judgment and of the application for rescission of such judgment."
>
> (My underlining)

I have underscored the word "must" in the above cited subrule 6(b) to indicate my view that the provisions thereof are mandatory and the applicant's failure to comply therewith was fatal to his application for rescission of the default judgment. The applicant could not, therefore, be entitled to the remedy sought under prayer (2) of the notice of

motion. That, in my opinion, disposed of the matter for the other prayers in the notice of motion really depended on the success of the application to rescind the default judgment in CIV/T/284/83.

I accordingly dismissed the application with costs as aforesaid.

B.K. MOLAI
JUDGE

6th August, 1986.

For Applicant : Mr. Kambule
For Respondent : Mr. Koornhoff.