

IN THE HIGH COURT OF LESOTHO

In the Application of :

'MATHAKENG KHOSI Applicant

v.

MARY 'MAMOTHIBI KHOSI Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 28th day of April, 1986

The applicant is applying for rescission of a default judgment in CIV/APN/123/85 granted on the 19th August, 1985 . He is also applying for a stay of execution pending the finalisation of this application.

The sequence of events leading up to the granting of the default judgment may be summarized as follows:-

- (a) On the 10th June, 1985 the applicant was served with a Notice of Motion in CIV/APN/123/85;
- (b) On the 18th June, 1985 a Notice of Intention to oppose was served on the respondent's attorneys from Messrs. Mohaleroe, Sello & Co.;
- (c) On the 5th August, 1985 the applicant and Mr. Pitso for the respondent appeared before the Court. The applicant was carrying his file and he applied for a postponement to enable him to get another attorney as Mr. Sello had filed a notice of withdrawal on the 30th June, 1985;
- (d) In the presence of Mr. Pitso and the applicant Cotran, C.J., granted the application and gave the applicant time to find another attorney. The matter was postponed to the 19th August, 1985;

- (e) On the 19th August, 1985 the applicant was not before Court after his name was called three times around the Court premises and a default judgment was granted as prayed.

In an application for rescission of a default judgment the applicant must satisfy the following requirements:

- (1) he must explain to the court's satisfaction the reasons for the default;
- (2) he must persuade the court that the application is not made simply to delay plaintiff's claim;
- (3) he must show a bona fide defence (see Mosongoa Matsoso v. Alice Selebeleng, CIV/APN/285/83 (unreported), Rabby Ramdaries v. Khadebe Mafaesa, CIV/T/56/83 (unreported), Taiwan Construction v. Lesotho National Insurance Co., CIV/APN/101/83 (unreported)).

In his affidavit the applicant does not give any reason why he failed to appear on the 19th August, 1985. He was present on the 8th August, 1985 when the matter was postponed to the 19th August, 1985. Even if on the 19th he had not yet found another attorney it was his duty to come to court and explain his difficulties. All what he says in his affidavit is,

"as I live far from Maseru, the fact of my attorney's withdrawal reached me late and as a result I failed to engage another lawyer timeously to appear on my behalf on the day CIV/APN/123/85 was heard".

The applicant seems to have forgotten that on the 8th August, 1985 he already knew that his attorneys had withdrawn. It is therefore not true that the notice of withdrawal came to him late. I have come to the conclusion that the applicant has failed to explain to the Court's satisfaction the reasons for the default.

Another fatal defect in this application is that the applicant has deliberately, but unwisely, avoided to tell the Court the date on which he had

knowledge that a default judgment had been obtained against him. The date on which he became aware of the judgment is very important because Rule 27 (6) (a) of the High Court Rules 1980 provides that an application for rescission of judgment may be made within twenty-one days after the applicant has had knowledge of such judgment. If the applicant fails to tell the Court the date on which such judgment came to his notice, the Court is entitled to assume that he had knowledge of such judgment on the day it was delivered. In the instant case I shall assume that the applicant became aware of the judgment on the 19th August, 1985. If one counts the number of days from the 19th August, to the 25th September, 1985, one finds thirty two days. In the computation of days Saturdays must be included as provided in Rule 1 of the High Court Rules 1980. I am convinced that the application is hopelessly out of time and that on this ground alone it has to be dismissed.

The applicant has deposed that the immovable property that was declared executable in CIV/APN/123/85 is his mother's property and not his. In that case his mother made an affidavit in which she deposed that she did not own the immovable property at Thaba-Tseka. She said that although the property had been registered in her own name she had never signed any papers for its registration. In her latest affidavit supporting the application for rescission of judgment she is now saying the immovable property at Thaba-Tseka is her own property. She says that she was cheated into making an affidavit in which she purported to disown her property. For the purposes of my decision in this matter it will not be necessary for me to decide whether or not this old lady was cheated. What is clear is that she is an unreliable witness. She has also made an application in CIV/APN/258/85 in which she applies that she should be joined as the second respondent in the present application for rescission of judgment.

It was agreed by both counsel that the two applications be dealt with at the same time. The defences of non-joinder or misjoinder, being

dilatory merely, must be taken in initio litis before issue is joined and cannot be raised for the first time at the trial or on appeal. Thus, for example, a person cannot intervene in the proceedings on the merits and then set up misjoinder (see *The Civil Practice of the Superior Courts in South Africa*, third edition, page 172). The applicant's son (Thakeng) must have informed his mother on the 10th June, 1985 when a Notice of Motion was served on him or immediately thereafter, that an application was being made to declare her property executable. She did not take any action until on the 19th August, 1985 when a default judgment was granted. Now the question is whether it is proper for a person to apply for joinder in the application for rescission of a judgment in which she was not a party. It is an unusual procedure but I do not think that a person who has proved that he or she has a direct and substantial interest in the matter should be denied the right of joinder. It may be that she became aware of the judgment at the rescission stage.

The present applicant ('Mathakeng) may be described as an unreliable witness; however, she has attached a Form C which ex facie is proof of a lawful allocation of the land in question to her. She may as well have a title deed in her own name because the respondent deposed that the property was in fact registered in her (applicant's) name. It has been submitted that as a widow whose son was already a major when the land was allocated to her, that is immaterial because her son is the heir. This is a matter which is highly disputable and requires full argument. Oral evidence must be heard in order to resolve her claim that she was misled into making the affidavit in which she purports to disown her property.

I shall exercise my discretion in favour of the applicant ('Mathakeng) and order as follows:

- (a) As far as she is concerned the judgment in CIV/APN/123/85 is rescinded;

(b) She must file her opposing affidavits within seven (7) days from the date of this judgment;

(c) Costs shall be costs in the cause.

With regard to the applicant (Thakeng) the application is dismissed with costs to the respondent.

J.L. KHEOLA
J U D G E .

28th April, 1986.

For Applicants - Mr Mohau
For Respondent - Mr Maqutu.