CIV/T/271/83

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ESSAU KIBA MANDORO — Plaintiff/Respondent

and

LESOTHO EVANGELICAL CHURCH — Defendant/Applicant

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 7th day of July, 1989.

This is an application for rescission of a default judgment which was granted by this Court on the 25th March, 1988 and stay of execution of the aforesaid judgment pending determination of this application.

The history of this case has been a very long one and during that long period there has been a change of attorneys. The summons was lodged in the office of the Registrar on the 9th June, 1983. The plaintiff claimed damages for wrongful dismissal. Notice of Appearance to Defend was filed on the 19th July, 1983. A request for further particulars was made. On 1st November, 1983 further particulars were supplied. On the 14th September, 1984 the defendant made a request for further and better particulars. The plaintiff furnished further and better particulars on the 28th March, 1985.

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It seems that Messrs. Masoabi & Co. who originally appeared for the plaintiff withdrew and Messrs. Ntlhoki & Co. took over. On the 2nd March, 1988 - almost three years after the further and better particulars were supplied - the plaintiff filed a Notice to File Plea in terms of Rule 26 (2) of the High Court Rules 1980. The defendant's attorneys received a copy of Notice to File Plea on the 2nd March, 1988 but took no steps to comply with it. On the 23rd March, 1988 the plaintiff's attorneys set down the matter for hearing on the 25th March, 1988.

I think the Notice of Set Down was irregular in that Rule 27 (3) provides that not less than three days notice shall be given to the defendant of the date of hearing of the application for judgment. In the computation of the number of days the first day must be excluded while the last day must be included. See Section 50 of the Interpretation Act No. 19 of 1977. I had to resort to the Interpretation Act because Rule 1 does not provide whether or not the first day must be included.

The NOtice of Set Down was served upon the attorneys of the defendant but it seems that although a certain Mr. Matlhare from that office was present within the Court premises on the 25th March, 1988 he was either unaware that the matter was to be heard that day or he was in another court when the default judgment was granted.

It is common cause that immediately after the default judgment was granted plaintiff's attorney met Mr. Matlhare and informed him that he had obtained a default judgment. Mr. Matlhare did not do anything about the matter until the 10th May, 1988 when the

defendant was served with a writ of execution. By then Mr. Matlhare had left h this country and Mr. Matsau had left Messrs Mohaleroe, Sello & Co. and was then the new attorney of the defendant. On the 31st May, 1988 Mr. Matsau filed the present application for rescission.

Mr. Ntlhoki submitted that the application is out of time because the defendant's attorney became aware of the default judgment on the 25th March, 1988. I do not agree with that submission because the knowledge referred to in Rule 27 (6) (a) is actual knowledge by the defendant himself. (Basson v. Bester, 1952 (3) S.A. 578). The defendant had acutal knowledge on the 10th May, 1988 when it was served with a writ of execution and was therefore within the prescribed period on the 31st May, 1988 when it lodged the present application.

It is trite law when a defendnat appears to have a judgment set aside he must place before the court sufficient evidence from which it can be inferred that he has a bona fide defence to the action. It is not sufficient for the applicant to content himself with saying that he has a bona fide defence. It is sufficient if he sets out averments which, if established at the trial, would entitle him to the relief asked for. He is not required at this stage to deal with the merits of the case or even to produce evidence that the probabilities are actually in his favour. (Grant v. Plumbers (PTY) LTD 1949 (2) S.A. 470; Curlewis v. Visser, 1964 (1) P.H., F5; Nqoko v. Morreira, 1976 L.L.R. 137).

The defendant's defence is that immediately after the Court of Appeal judgment on the 23rd April, 1982 which held that the dismissal of the plaintiff as a priest in the defendant's church

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was wrongful, it wrote a letter to the plaintiff asking him to come back to work. He refused to do so. Now the issue before this Court is whether or not the plaintiff is entiled to his salary after he declined the offer that he must go back to work.

It is alleged that the plaintiff is now employed full time at the National Teachers Training College. It seems to me that it is very important to decide exactly when the plaintiff left defendant's employment. He is claiming his salary up to June, 1983 but at that time he was already working for the National Teachers Training College and therefore not entitled to earn double salary for the same period. He did a good thing by taking up another employment to mitigate his damages. But he cannot claim his full salary from the defendant while he was already earning another salary.

I am of the opinion that the defendant has a bona fide defence; it may be that the defence is not to the whole claim but to part of it. It is not clear why after the plaintiff completed his studies he decided not to return to the defendant. The mere fact that another priest had been posted at his former station, Cana, could not be taken as an indication that the defendant was no longer willing to take him back. The defendant could transfer him to another station.

I come to the conclusion that the plaintiff has a bona fide defence and that the application is bona fide and was not made with the intention of merely delaying the plaintiff's claim. The applicant/defendant has given a reasonable explanation of his default. The blame must be placed squarely on the defendant's attorneys who failed to file a plea after instructions had been

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given to them to do so. I do not think that the defendant can be blamed for that. There is nothing to show that the defendant was negligent in any way. It was the plaintiff's fault that after further and better particulars were furnished, he waited for almost three years before he started again and filed a Notice to File Plea.

The application is granted as prayed. The costs of this T
application shall be costs in the cause.

The applicant/defendant is ordered to file its plea within twenty-one (21) days from the date of this judgment.

J.L. KHEOLA
JUDGE

7th July, 1989.

For Applicant/Defendant - Mr. Matsau
For Respondent/Plaintiff - Mr. Ntlhoki.