CIV/T/425/89

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ABRAHAM WEINERMAN Applicant

and

BARCLAYS BANK PLC Respondent

# J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 11th day of December, 1990

This is an application for rescission of a default judgment, made in terms of Rule 45 (1) of the High Court Rules 1980, on the ground that it was erroneously granted. It is alleged that it was granted in the mistaken belief that there had been proper service on the present applicant.

It is common cause that the applicant was a director of a company known as Jeantex (PTY) Limited which was placed under provisional liquidation on the 30th August, 1989. It means that on the day the company was placed under liquidation, the applicant ceased to be its director. Gower says in his Modern Company Law

> "Perhaps the most important rule of all is the principle of company liquidation, namely that on winding up the board of directors becomes functus officio and its powers are assumed by the liquidator. As we have seen, it is those in control who have the power to cause harm, i.e. generally the directors, or someone for whom they are nominees. Their removal is therefore almost invariably an essential preliminary to any remedial action, and this removal automatically occurs on liquidation."
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> (See Attorney-General v. Blumenthal, 1961 (4) S.A. 313).

The summons in the main action was served on the 26th September, 1989 at the applicant's domicilium citandi et executandi mentioned in the summons as 10, Thetsane Industrial Estate, Maseru. Another copy of the summons was served at the business address of the applicant which given to the deputy sheriff as c/o. Jeantex (PTY) Limited, 15 Thetsane Industrial Estate, Maseru. He served the applicant at that address by leaving a copy of the summons with a Mr. Zohar Cohen, a person apparently above the age of 16 years and apparently in charge of the premises in that he was the Manager of Jeantex (PTY) Limited (in provisional liquidation).

The first question to be decided is whether our Rules provide for service of summons at a party's domicilium citandi et executandi. The various methods authorised by our Rules as set out in Rule 4(1) as follows:-

> "(a) By delivering a copy of the process personally to the person to be served: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor or curator of such minor or person under disability.

(b) By leaving a copy of such process at the place of business or residence of the person to be served or of the guardian, tutor or curator aforesaid with the person who is apparently in charge of the premises at the time of delivery and who is apparently of the age of 16 years or older.

Provided that where such place of business or residence is a building other than a hotel or boarding house or hostel, which boarding house is occupied by more than one person or family, "place of business" or "residence" means that portion of the building occupied by the person who is to be served.

(c) By delivering a copy of the process at the place of employment of the person, guardian, tutor or curator to be served to some person apparently of the age of 16 years or older and apparently in authority over the person to be served or over the guardian, tutor or curator of such person."

Sub-rules (d) to (h) deal with services upon companies, partnerships, churches, local authorities and the Government of Lesotho or any Minister of the Government.

It is very clear from the Rules stated above that they do not provide for service at the applicant's domicilium citandi et executandi and the service at that address was therefore contrary to the Rules of this Court. It was null and void.

The second service was at an address alleged to be applicant's place of business. Mr. Edeling, applicant's Counsel, submitted that to the respondent's knowledge, the applicant had no place of business within Lesotho, and was not within Lesotho when the summons was served, and these important facts were withheld

from the Court. The company previously had a place of business, but applicant was merely an employee carrying on the comapny's business. He submitted that a place of employment is not a place of business. In Smith v. Smith, 1947 (1) S.A. 474 (W) the headnote reads as follows:-

> "A person who is employed by another at a certain place has not got his place of business at that place.
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> A return of service on a defendant who had been cited as "a learner miner, No. 11 Shaft, Rand Leases", read as follows: "This is to certify that on 13th December, 1946, after failing to find defendant personally, I handed a copy of the summons to Mr. J.F., Chief Paymaster at Rand Leases G.M. Co., Florida, and at the same time explained the nature and exigency thereof to him."
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> Held, that the service was bad."
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> (See also Lewis v. Tosseau, 1913 T.P.D. 338)

In the present case the applicant was a Director of Jeantex (PTY) Ltd. whose address was at 15, Thetsane Industrial Estate, Maseru. That address was the business place of the company and not of the applicant who had, at the time of the service of the summons, ceased to be its Director. That place could no longer be regarded as the applicant's place of employment because the company was in provisional liquidation and he had ceased to be its employee. It follows that the second service was also bad.

Rule 4 (6) provides, inter alia, that if the person on whom service is to be effected is not within Lesotho the provisions of Rule 5 shall apply. Rule 5 provides for edictal citation. It is

common cause that at the time of service of the summons the applicant was not within Lesotho and that the respondent was aware of this. No reason has been advanced why the respondent did not make an application in terms of Rule 5. The respondent's attorney knew that the applicant no longer had his place of employment at the premises of a company in provisional liquidation and that the Rules do not provide for service at the applicant's domicilium citandi et executandi.

Mr. Edeling submitted that it is the duty of a plaintiff who knows of a fact which may influence the COurt to grant or not to grant an order, to disclose the fact, in any event where there is no appearance for the other party (Schoeman v. Schoeman, 1927 W.L.D. 282 at p. 283). He submitted that it is the applicant's case that the attorney or counsel who moved for the judgment should have disclosed non-compliance withthe Rules to the Court, in compliance with his duty of the utmost good faith to the Court as its officer. I agree with the above submissions but it must be remembered that sometimes an attorney or advocate can make a wrong judgment or can misinterpret a Rule. It is, therefore, necessary that before the client of such attorney or advocate can be punished by an order of costs on the attorney and client scale it must be quite clear that the information was deliberately withheld from the Court. In the present case it seems to me that there is a possibility of a misunderstanding or misinterpretation of the Rules concerned.

The last question is whether having proved that the judgment was erroneously sought and erroneously granted, the applicant still has to satisfy the Court that he has a bona fide defence to the action. In Tshabalala and another v. Peer, 1979 (4) S.A. 27 at p. 30 Eloff, J. said:

> "Counsel drew attention thereto that, unlike other Rules dealing with condonation of procedural intromissions and with rescission which state that relief may be granted "upon good cause shown" (Rule 31 (2) (b) "on good cause shown", Rules 27 (1), 27 (3) and 49 (6)), Rule 42 (1) simply states that "the court may". The Rule accordingly means - so it was contended - that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that that is so, and I think that strength is lent to this view if one considers the Afrikaans text which simply says that:
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> "Die hof het nevewens ander magte wat hy mag he, die reg om ...."

I entirely agree with the learned Judge, Section 42 (1) (a) of the South African Rules is the same with our Rule 45 (1). I shall therefore not deal with the merits of the main action.

In the result the application is granted as prayed with costs.

J.L. KHEOLA
JUDGE

11th December, 1990.

For Applicant - Mr. Edeling
For Respondent - Mr. Fischer.