CIV/APN/169/88

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MAMATELA 'NENA Applicant

and

'MALEBOHANG MOTHEPU Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 2nd day of February, 1990

This is an application for the condonation of the applicant's late filing of appeal from the Leribe Magistrate's Court to this Court. The application is being strongly opposed by the respondent on the ground that the application for rescission of the default judgment granted on the 25th September, 1987 was hopelessly out of time, and was properly dismissed by the magistrate.

The facts of this case are common cause and are as follows:-

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On the 15th April, 1987 the respondent issued a summons against the applicant in which she claimed damages for defamation and an amount of M104 which disappeared while the applicant was assaulting the respondent.

On the 12th June, 1987 the applicant filed her plea after she was served with a Notice to file Plea dated the 4th June, 1987.

On the 11th August, 1987 the applicant's attorneys, Messrs. Mohaleroe, Sello & Co., were served with a Notice of Set-Down for the hearing of the matter on the 4th September, 1987. It is not clear from the record why the matter did not proceed on that day.

On the 9th September, 1987 another Notice of Set-Down was posted to the applicant's attorneys per registered post and the number of the registration slip is 48107. The matter was set-down for the 25th September, 1987. The Notice of Set-Down was received by the applicant's attorneys on the 8th October, 1987 i.e. almost two weeks after the date of hearing.

On the 25th September, 1987 the matter was heard and a default judgment was granted for the respondent in the amount of M1,200-00.

On the 8th October, 1987 the applicant's attorneys informed her that a default judgment had been granted against her. In paragraph 2 of her founding affidavit in the application for rescission of the default judgment and stay of execution, the applicant said:

> "The respondent/plaintiff obtained default judgement in the above matter on the 29th (sic) September, 1987 and I only became aware of this on the 8th October, 1987 this being the day my attorney of record received the Notice of Set-Down sent by post." (My underlining)

I must point out that because this was a case in which damages were claimed the court a quo heard oral evidence by the respondent in which she indicated that on the 5th February, 1987 when the applicant defamed and assaulted her she (respondent) was in the company of one Tloka Koloko. On the 27th February, 1987 when the applicant defamed her again she was in the company of one Hlomelang Manama.

On the 17th March, 1988 the application for rescission of judgment was dismissed with costs. No reasons for judgment were given but it is probable that the court a quo was of the opinion that the application was out of time. I say it is probable because just before dismissing the application the court asked the applicant's attorney this question: "Mr. Matlhare, what do you say about the time limit."

It is trite law that in an application for the rescission of a default judgment the applicant must show that his failure to appear was not wilful and that he has a bona fide defence. It is very clear from the applicant's affidavit that her failure to appear was not wilful. The notice of set-down was received long after the case was heard. She cannot be blamed for the negligence of her attorneys who obviously failed to collect their mail from the post office timeously and regularly.

The crucial point was whether she showed that she had a bona fide defence to the claim. In her affidavit she merely says that the respondent has no witnesses to support her allegations and that her allegations are afterthought because at the meeting they held at the chief's place immediately after the alleged defamation and assault no such allegations were made. In my view there was no need for the respondent to call supporting evidence when she applied for a default judgment. Her evidence was enough to prove her claim. However she told the Court the names of people who were present on the two occasions. It is probable that if the matter went to full trial she would have called them.

It was alleged that her defence was a bare denial. I tend to agree with that submission because in her plea the applicant admits that there was "confrontation" between herself and the respondent.

She says that the "confrontation" was on the 4th February and not on the 5th February as alleged by the respondent. To confront a person is to meet or stand facing him, especially in hostility or defiance. The applicant failed to show in detail the nature of the confrontation. It was her duty to explain to the court whether during that confrontation any words were uttered and that would have enabled the court to decide whether or not she has a bona fide defence. I am of the opinion that she failed to show that she had a bona fide defence and on that ground alone the court below was entitled to dismiss her application.

After the dismissal of the application on the 17th March, 1988 the applicant did not file her appeal within thirty days in terms of Order XXIX Rule 2 (1) of the Subordinate Court Rules - High Commissioner's Notice 111 of 1943. It was only on the 23rd May, 1988 that she launched the present application.

No court can allow litigants to break its rules with impunity and on what appears to be regular basis. The applicant became aware of the default judgment on the 8th October, 1987 (according to her own admission shown above) but did nothing until the 3rd December, 1987 when she applied for rescission. She was obviously out of time.

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Again when her application was dismissed on the 17th March, 1988 she did nothing until the 17th May, 1988 when she was served with a writ of execution. She blames her attorney, Mr. Matlhare, for failing to tell her of the result of the application. In the case of Saloojee & another N.N.O. v. Minister of Community Development, 1965 (2) S.A. 135 (A.D.) at p. 141 Steyn, C.J. said;

> "It has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered .... Considerations ad misericordiam should not be allowed to become an invitation to laxity.... If....the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by without so much as directing any reminder or inquiry to his attorney.... and expect to be exonerated of all blame; and if... the explanation offered to this court is patently insufficient, he cannot be heard to claim that the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."

The applicant in the prsent case must have noticed at a very early stage that her attorney was grossly negligent. He was all the time not telling her what was going on and the applicant was well aware of his lack of diligence. I think this is a proper case where a litigant has to suffer the consequences of his/her attorney's negligence. Mr. Matlhare has given no explanation why the appeal was not filed timeously. The

respondent cannot be telling the truth that she was not in court when the application for rescission was heard. In her Notice of application the matter was set down for hearing on the 15th January, 1988. It was postponed to the 17th March, 1988. She showed no interest in the matter if she did not go to court on the 15th January and on the 17th March, 1988. She behaved in a very irresponsible manner amounting to gross negligence on her part.

The applicant does not seem to have been honest with this Court. I have indicated above that in her affidavit in support of her application for rescission she deposed in no uncertain terms that she became aware of the default judgment on the 8th October, 1987. In her present affidavit in support of the condonation proceedings she now says, in paragraph 10, that on or about the 2nd December, 1987 she was informed by her then attorneys for the first time that judgment had been obtained against her by default. She immediately instructed him to apply for rescission.

Mr. Nathane, counsel for the applicant, tried very hard to explain to the Court that the applicant did not mean to say that she became aware of the default judgment on the 8th October, 1987. The words used by the applicant are simple and straightforward and cannot mean any other thing.

The applicant should not be allowed to change her statement of facts whenever she changes her attorneys.

In the result the application is dismissed.

J.L. KHEOLA
JUDGE

2nd February, 1990.

For the Applicant - Mr. Nathane
For the Respondent - Mr. Ramodibeli