CIV/APN/278/88

IN THE HIGH COURT OF LESOTHO

In the matter between:-

METROPOLITAN HOMES TRUST LIFE (PTY) LTD Applicant

and

SIMON MAHASE MAKEPE Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 19th day of March, 1990

This is an application for rescission of the default judgment granted by this Court on the 30th June, 1989 and a prayer for costs as the Court might deem fit.

The original application was set down for hearing on the 14th April, 1989 and it appeared in the weekly roll immediately after the Motion Roll. Mr. Maqutu, attorney for the respondent, was aware that the matter was set down for hearing on that Friday. However, when the matter was called he was no longer in Court. Mr. Mahlakeng, attorney for the applicant, decided to go ahead and applied for a default judgment. After he had addressed

the Court judgment was reserved and on the 30th June, 1989 a default judgment was granted as prayed.

The branch manager of the respondent company has filed an affidavit in which he deposes that he was surprised when he was served with a writ of execution on the 4th September, 1989. He was not aware that the matter was heard on the 14th April, 1989 and that judgment was delivered on the 30th June, 1989. The Notice of set-down was served on the respondent's attorneys on the 5th December, 1988. There is nothing to show that Mr. Maqutu informed his client about the date of the hearing of the matter. He was probably under no obligation to insist that a representative of his client should be in Court when the matter was argued. As this was an application in which no oral evidence was going to be led the attendance of the representative of the respondent was not necessary if Mr. Maqutu felt that he had enough instructions to argue the matter.

It is therefore clear that the applicant cannot be blamed for failure of its branch manager to appear on the 14th April, 1989 when the arguments were to be heard. Only its attorney must be blamed for failing to appear on the 14th April, 1989. There are numerous cases which deal with the negligence of an attorney in failing to do certain things for his client and the circumstances under which the client may be debarred from obtaining the relief he seeks. One of such cases is Rose and Another v. Alpha Secretaries Ltd 1947 (4) S.A. 511 (A.D.) the headnote reads as follows:

> "It is undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief under Rule 12 or to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the Court will consider all the circumstances of the particular case in deciding whether the applicant has shown somehting which justifies the Court in holding in the exercise of its wide judicial discretion, that sufficient cause for granting relief has been shown."

(See also Regal v. African Superslate (PTY) LTD. 1962 (3) S.A. 18 (A.D) at p. 23; Saloojee and another NNO v. Minister of Community Development 1965 (2) S.A. 135 (A.D.) at p. 141).

The applicant's attorney has filed an affidavit in which he deposes that the matter was set down for the 14th April, 1985. It was a highly contested matter and that was a motion day. He was at the High Court and expected respondent's attorney to let him know when he appeared before the judge about the matter. He further deposes that he enquired from the Registrar whether such a contested matter would proceed, but he was informed that it would not. He got the impression that they had agreed with the respondent's attorney that the matter could be postponed to a suitable date. He now realises that he was mistaken and probably took a postponement for granted.

In his submissions Mr. Mahlakeng never attempted to put the blame on the applicant for the non appearance of its attorney. He put the blame on Mr Maqutu because earlier that morning he (Mr. Mac

was in the motion Court but vanished immediately after the motion roll was completed. I am convinced that the applicant cannot be denied the relief it is applying for because its attorney's neglect cannot be imputed to it. It was not even aware that the matter had been set down for the 14th April, 1989. It became aware of the default judgment on the 4th September, 1989 when it was served with a writ of execution; and it took prompt action to have the judgment rescinded. On this ground alone the judgment must be set aside and the matter be re-opened for argument.

The second ground on which Mr. Mahlakeng opposed the application was that it did not comply with Rule 8 (8) of the High Court Rules 1980 in that the address to which correspondence and pleadings were to be addressed was not given. I think that this is a very minor point because an application for rescission of a judgment is not the initial application; the particulars of the parties already appear in the original application. In the instant case the address appears in the Notice of Intention to Oppose dated the 29th September, 1988.

The third ground on which the application was opposed was that the person who made the founding affidavit in the rescission application has no authority to do so and that the power of attorney was filed on the 17th October, 1989 while the application was launched on the 7th September, 1989. In other words on the 19th October, 1989 when the application was argued before me the power of attorney was already in the file. It appointed Mr. Maqutu

as the applicant's agent in the application for the rescission of judgment and stay of execution in case No. CIV/APN/278/88. It further ratified all such actions executed by Mr. Maqutu before the date of signing of the power of attorney in the opposing of application No. CIV/APN/278/88 brought by S.M. MAKEPE.

The power of attorney is dated the 16th October, 1989 and was already before me on the 19th October, 1989. It is very clear from the power of attorney that these proceedings are being brought by the applicant who was the respondent in the original/main application. On the question of ratification I only have to refer to Estate Oosthuizen v. Botha (1) 1940 (2) P.H. A42 in which it was held that it is a principle of our law of agency that ratification may take place at any stage, and that when once it takes place it relates back to the commencement of the act or acts ratified.

In Ashley v. S.A. Prodential, Ltd, 1929 T.P.D. 283 it was sought to obtain a postponement in order to prove ratification. The application was refused. In the present case the evidence of ratification was before the Court, and given in due time.

Mr. Mahlakeng referred to Mall (Cape) (Pty) Ltd v. Merino Ko-operasie Bpk., 1957 (2) S.A. 347 (C.P.D.) whose headnote reads as follows:-

> "When an artifical person, such as a company, commences notice of motion proceedings some evidence must be placed before the Court that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Though the best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution, such form of proof is not necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf."

He submitted that there was no evidence that the branch manager of the applicant, Ashton Petlane, was authorised by the applicant to institute these proceedings because he attached no resolution by the Board of Directors of the applicant to that effect. In my view this submission cannot stand because we now have a power of attorney which is conclusive proof that these proceedings are being brought by the applicant company.

In his affidavit Ashton Petlane avers that he is "duly authorised to make this affidavit". The respondent has given no evidence that this is not the case. In Mall's case - supra - at p. 352 Watermeyer, J. said:

> "I proceed now to consider what the applicant has put before the Court in the present case. de Witt, the secretary of the applicant Society, states in para. 2 of his affidavit: "I am duly authorised to make this affidavit." Mr. Knight, for the applicant, submitted that, although it was not specifically so stated by de Witt, it was clear from para. 2 that it was the applicant Society which had conferred authority upon him. That inference is, I think, irresistible. Mr. Knight submitted next that the use of the word "duly" shows that the authority conferred upon de Witt had been properly conferred i.e. that all the necessary formalities prescribed by the applicant Society's constitution had been complied with. With this submission I am also in agreement."

It seems to me that it is not enough for the respondent to infer from the absence of a resolution annexed to the founding affidavit that there is no authority to institute the proceedings. Something more must be proved especially where the deponent avers that he is duly authorised to make the affidavit.

For the reasons stated above the application is granted as prayed with costs.

J.L. KHEOLA
JUDGE

19th March, 1990.

For Applicant - Mr. Maqūtu
For Respondent - Mr. Mahlakeng