

CIV\T\838\86

IN THE HIGH COURT OF LESOTHO

in the matter between:-

SECHABA NTSOEU

Plaintiff

and

THAELE SELEKE

Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 9th day of December, 1991.

This is an application for rescission of a default judgment granted on the 23rd February, 1987; on the ground amongst others that the applicant was not served with the summons in the main action.

The return of service by the deputy sheriff shows that the summons was served upon one Phomolo Seleke who is the brother of the applicant\defendant at the address given because the defendant was absent.

In his founding affidavit the applicant

alleges that he has no brother by the name of Phomolo Seleke. He was not living with any of his brothers in January, 1987 being the month it is alleged service was effected in this matter. His failure to enter appearance to defend was not wilful but was due to the fact that he was not aware of the summons in this matter nor was he served with the same.

The applicant avers that he has a bona fide defence in this matter in that none of the legal exceptions have been renounced by him in the acknowledgement of debt. It was not signed by him but by his wife without his authority. He avers that he is not indebted to the respondent in the sum claimed or any portion thereof.

In his answering affidavit the respondent alleges that the applicant is indebted to him because he borrowed a sum of R6 000-00 and even signed an acknowledgement of his indebtedness to him.

The acknowledgement of debt appears on page 8 of the record. It reveals that the applicant acknowledged indebtedness to Mothusi Pawn-shop in

the sum of R6 000-00 which was lent to him on the 30th April, 1986. The applicant undertook to repay the capital together with interest in the sum of R10 800-00 by instalments of R2,800-00 per month with effect from the 30th May, 1986. It is signed by one C M Seleke. It was obviously not signed by the applicant.

The respondent alleges that after the agreement the applicant made some payments in June, July and August, 1986 making a total of R1,950-00. On the 11th November, 1986 the applicant wrote a letter (Annexure "A1" to the answering affidavit) in which he acknowledged that he was indebted to the respondent in the sum of R6 000-00.

On the 23rd February, 1987 when I granted the default judgment in the sum of R14 850-00 and interest at the rate of 11% per annum I was under the impression that the money lent to the applicant was R14 850-00 as the summons clearly state so. The only thing I rejected was payment of interest at the rate of 30% per annum. I thought that was too exorbitant. I was not aware that the sum lent to the applicant was only R6 000-00 and that the interest agreed upon was the sum of R10 800-00.

This agreement appears in the acknowledgment of debt signed by the applicant. The respondent is so greedy that he wanted to charge interest at the rate of 30% having already charged an agreed amount of R10 800-00 which more than doubled the sum of R6 000-00 which the applicant had borrowed. The default judgment was erroneously granted because this Court cannot be used as the means of exploiting people who find themselves in financial difficulties which compel them to borrow money.

As regards the service of the summons I am of the view that there was no compliance with Rule 4 (1) (b) of the High Court Rules 1980 which provides that it shall be proper service if the deputy sheriff leaves a copy of the 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. In his return of service the deputy sheriff does not refer to the age of Phomolo Seleke at all. In his affidavit he refers to Phomolo as a young man. I have no idea as to age of that young man. He could have been under 16 years of age. Why did the

deputy sheriff not just say he was apparently of 16 years of age or older. Or if he can estimate the age he must do so without any hesitation.

The applicant has a bona fide defence because the acknowledgment of debt on page 8 of the record was not signed by the applicant. It also refers to the agreement between Mothusi Pawn-Shop and the applicant. There is no evidence that the respondent is Mothusi Pawn-Shop.

For the reasons stated above I am convinced that the applicant's failure to enter appearance to defend was not wilful and that he has a bona fide defence to the respondent's claim. The application is granted with costs.

J.A. KHEOLA  
JUDGE

9th December, 1991.

For Applicant - Mr. Nathane  
For Respondent - Mr. Monyako.