

IN THE HIGH COURT OF LESOTHO

In the matter of :

HOUSEN KHAN

Applicant

v

OSMAN SALLY MAHOMED MOOSA

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 18th day of March, 1991

When arguments were concluded on 13th March this Court reserved judgment to the 18th March.

At the hearing of the application for resission of the "default" judgment granted on 18th February, 1991 the respondent's attorney stood to raise a point in limine.

Mr. Buys for the respondent stated that the applicant has adopted a wrong procedure for it is under the wrong impression that the judgment given on 18th February by Kheola J was given by default whereas the matter was decided on the basis that it is a summary judgment.

He submitted that the only proper procedure to have been followed by the applicant would have been by way of noting an appeal.

Arguing that the judgment granted was not by default Mr. Buys pointed out that the defendant/applicant

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had placed an affidavit before Court even though the plaintiff/respondent is entitled to say this affidavit was neither properly served nor properly filed or delivered because no full details or reasons were given for filing it late or for requiring the Court to consider it.

In Meek vs Kruger 1958(3) SA 154 it was stated that

"Whenever in an application for summary judgment the defendant has failed to serve an affidavit on the plaintiff timeously and the Court is called upon to consider whether or not it should allow the defendant to lead oral evidence to show that he has a bona fide defence, the Court should, in exercising its discretion, be disposed to allow the defendant to do so only

(i) if he is able to give sufficient reason for failure to serve the affidavit timeously;

or,

(ii) in special cases".

It is to be noted that the applicant has also sought to have the execution in the main trial stayed. In consideration of this it was argued for the respondent that a separate application for stay ought to have been moved. Indeed this submission is well supported by reference to the Civil Practice of the Superior Courts in South Africa by Herbstein and Van Winsen 3rd Ed. at 309.

"The granting of summary judgment under the present rules is a final definitive judgment and leave is not required to take such a judgment on appeal. A refusal of an application for summary judgment is an interlocutory order".

It would seem that Mr. Nathane's guns are spiked by his maintaining that because judgment in summary proceedings was granted in the absence of the other party then such judgment is necessarily given by default; and

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is at best not definitive being only so if argument was heard from either side. However the above quotation from Van Winsen convinces me differently.

Moreover in Verriljdt vs Honeydew Tractors and Implements (Pty) Ltd 1981(1) SA 787 the Magistrate's order granting summary judgment was reversed because even though the defendant had filed an affidavit fully setting out its bona fides the Magistrate treated the defendant's absence from Court on hearing date as sufficient ground for treating a summary judgment on the same footing as a judgment by default. The Appellate Court felt that the magistrate should have exercised his discretion in favour of the defendant and not treated the matter as if it went by default.

Mr. Buys further relied on the authority of Morris vs Autoquip (Pty) Ltd 1985(4) SA 398; where as in the present matter

- (1) an affidavit had been filed in opposition to an application for summary judgment,
- (2) neither the defendant nor his counsel appeared at the hearing of the application,
- (3) the defendant, relying on his "default" sought rescission of judgment;

the Court gave a ruling that application for rescission was not an appropriate remedy and went further to hold that in such circumstances the Court is obliged nevertheless to consider the opposing affidavit and positively stated that non-appearance is not a "default" for purposes of rescission. In Arend and Another vs Astra Furnishers (Pty) Ltd 1973(1) C.P.D. at 849 the headnote blazes a trail by unequivocally stating that

"Summary judgment is a definitive judgment, and an unsuccessful defendant is entitled as of right to appeal against it."

I am therefore satisfied that it cannot be correct

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that the summary judgment granted in the absence of the defendant/applicant was tantamount to default judgment even though to the unwary it may appear to be so.

I would uphold therefore the point raised in limine. Costs are awarded to the respondent/plaintiff.

J U D G E

18th March, 1991

For Applicant/Defendant : Mr. Malehanye

For Respondent/Plaintiff : Mr. Buys