

IN THE HIGH COURT OF LESOTHO

In the matter of :

MAHAO RANKHETHOA	1st Applicant
THUSO RANKHETHOA	2nd Applicant

VS

M ^o PATLUOA LETUKA	1st Respondent
THE DEPUTY SHERIFF FOR THE DISTRICT OF LERIBE	2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 29th day of April, 1991

The applicants herein seek to obtain an order :

1. Rescinding and setting aside the default judgment granted earlier in a judgment entered in favour of the then plaintiff Mpatluoa Letuka against the then defendants Mahao Rankhethoa and Thuso Rankhethoa respectively. The applicants also seek an order of retrial in the Civil Trial Number 430 of 1984.
2. Restraining and restricting the 2nd respondent from :
 - (a) Executing and levying writs of execution on applicants.
 - (b) Restraining and restricting selling and disposing of any property executed against the respondents.

The applicants rely on their own affidavits supported by those of Mr. Gabriel N. Mofolo all filed in November 1989.

They also rely on replies contained in their own affidavits including a fresh one of Mrs Adeline N. Mofolo all filed in December 1989.

/Without

Without leave of Court and much long after the respondents had filed their answering affidavits and replies relevant thereto were filed the applicants filed a further affidavit styled "Supporting Affidavit" sworn to by one C. Lechesa describing himself as Chairman of the Board of Transport in the Ministry of Transport and Traffic. This affidavit was filed on 26th March, 1990.

Mr. Mofolo for the applicants argued that if this document i.e. the affidavit of C. Lechesa is not accepted the case for the applicant defendants would be prejudiced. He buttressed his argument by stressing that the element of prejudice will the more keenly be felt because the judgment sought to be rescinded had been given without any oral evidence having been heard in the proceedings.

In reply Dr. Tsotsi submitted that this application was presumably made in terms of Rule 45(1)(c) reading :

"The Court may in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary - (c) an order or judgment granted as a result of a mistake common to the parties".

Mr. Mofolo urged on the Court to consider that because the matter came before Court the plaintiff made a sworn statement that he had a transportation permit to convey goods and passengers. He submitted further that the crux of the matter consists in the plaintiff proving that he has such a permit. If he had it that would be the end of the matter. But if he didn't then the application is well conceived.

Mr. Mofolo pointed out that the plaintiff in fact had no transportation permit. He accordingly submitted that the plaintiff was not entitled to trade as he did. Thus the Court could not support him in what was lacking in his case.

/Relying

Relying on Jones and Buckle 7th Ed. pages 119 and 120, Dr. Tsotsi submitted that a mistake common to the parties occurs where the parties are both mistaken as to the correctness of certain facts. It is not applicable where the mistake is that of one of the parties only.

He went further to show that the grounds upon which the rule allows a judgment to be rescinded in certain cases of error cannot alter the common law to the effect that a non-fraudulent misrepresentation including justus error on the part of the Court is not a ground for setting aside a judgment induced by error. See Herbstein and Van Winsen 3rd Ed 472.

According to Adv. G.N. Mofolo the alleged mistake common to both parties was that on the grounds of the High Court he met Mr. Mpopo of the office of the Attorney for the 1st respondent and he informed him that the Court file in CIV/T/430/84 was missing and the matter would therefore be given a subsequent date.

In his answering affidavit Mr. Mpopo denies these allegations. He states that he did not deal with CIV/T/430/84 and had no information that the file was missing.

It appears to me that there are many disputes of fact in this matter. For instance Mr. Mofolo says that on 3rd March, 1989 the 1st respondent did not appear in the High Court. The 1st respondent supported by his attorney asserts that he and his attorney appeared in Court that day and the matter was heard and finalised in the plaintiff's presence and that of his Counsel.

Indeed my notes taken as evidence of one Ezekiel Mpatluoa Letuka show that if Mpatluoa Letuka is the 1st respondent in this matter he did give evidence before me on 3rd March 1989. It is inconceivable that when he did so he was absent from this Court that day.

Dr. Tsotsi submitted that Mr. Mofolo's allegation

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that he first knew when writs were served that judgment had been entered against the judgment debtors was erroneous because Annexure "C" a letter written to 1st defendant's attorney informed him on 20th April, 1989 that the judgment was entered by default on 3rd March 1989. There is further evidence of Annexure "D" a Notice of Taxation addressed to the applicants' attorneys. This document was filed in Court long before the 1st writ was filed. It is neither here nor there if these things did not come to Advocate Mofolo's notice for they were brought to the applicants' attorneys attention.

I have listened to the arguments and read papers filed and cannot help coming to the conclusion that this application is misconceived. I would therefore dismiss it with costs.

J U D G E

29th April, 1991

For Plaintiff : Dr. Tsotsi
For Defendant : Adv. G.M. Mofolo