CIV/APN/136/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOLISE MOEKETSI	Applicant
vs	
THE CHIEF MAGISTRATE	1st Respondent
THEKO MOFOKA	2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 12th day of July, 1994

This matter came up by way of review to this Court by the Applicant, who was Plaintiff in the Magistrate's Court of Maseru. This file pertaining to the reviewed matter (under case number cc 852/92) was called up to this Court in accordance with Rule 50 of the High Court.

The history of the mater is not complicated. There are few things or rather decisions of the magistrates which are strange to say the least. The main matter is an application for default judgment made by the Defendant who is now the second respondent.

Plaintiff issued summons for damages in the amount of 9,900.00 for a serious assault and other relief consequent upon he assault. Defendant was duly served with summons. He did not efend and a default judgment was entered against him for the elief claimed. Close to two months after the service of summons writ was issued in the sum of M10,258.45. It was on the trength of the writ that 2 (two) tractors, one gas cylinder and wo freezer of the Defendant were attached. About four months ater the messenger of Court proceeded to remove four fridges and ne Isuzu van. The Court Messenger and his assistant were aylaid, but on showing the attackers the writ with which they ere armed the attackers left and let free the messengers to roceed to the Maseru Magistrates' Court premises. The attack as a bad one. I need not burden this judgment with unnecessary etails. It was not clear what day of the week it was but the essenger says in his affidavit that he learned that Her Worship rs Hlajoane has directed that the goods be released to the udgment debtor. There is absolutely no trace of record, notes r minutes of how this was brought about. This was indefensible nd irregular. A Magistrate Court is a Court of record and is ound to give reasons for its decisions. It was on the 26th ebruary 1993 when the messenger removed the goods as aforesaid.

The affidavit of the Plaintiff's Counsel reveals that as at he 2nd December 1992, the judgment debtor had filed an

application for rescission of judgment intended to be moved on the 7th December 1992. It was out of time as he alleges. On the 7th December 1992, the judgment debtor's Counsel moved for postponement of the matter sine die. The minute on the cover of the Court file shows that it was by consent. Mr. Mahlakeng Plaintiff's Attorney says in his affidavit at paragraph 5.2 "The matter thereafter in the limbo until February 1993, when the Court was instructed to remove. There was and there is still no order of Court staying execution." It is only important to mention that besides that in the prayer (b) of the Notice of Application the Applicants asks for "suspending execution of writ" no such order had been obtained. It is equally important to note that the Plaintiff also filed his notice of intention to oppose the Defendant's application for rescission of judgment on the 11th December 1993, which notice was duly served on the Defendant. Indeed up to the 3rd March 1993 the Plaintiff has not filed any affidavits in support of his opposition to the application for default judgment. I need only reproduce the whole of the paragraph six of the Applicant's Counsel affidavit in support, in as much as it seems to encapsulate the case of the Applicant and the grounds of review. Here it follows:

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I have since discovered that after the Court messenger had

removed the property, and after the Court has released the property as more fully appears from the affidavit of Mr. Matlali, Counsel for the Judgment-debtor went to the Chief Magistrate on the 3rd March, 1993 and misrepresented that he has secured consent of the Judgment-Creditor's Counsel to have Judgment rescinded. I respectfully submit that the order granted by His Worship the Chief Magistrate on the 3rd March, 1993 was irregular and the Chief Magistrate erred and/or misdirected himself on the following grounds.

6.1 The application was defective and improperly before Court in that it was brought out of time and without a requisite application for extension of time;

6.2 The application was opposed and it could not have been heard without proper notice to the party.

6.3 Counsel for the judgment-debtor appears to have negotiated the Court into granting a rescission by misrepresentation and in a desperate effort to leave the Court messenger in a dilemma vis-a-vis the obstruction and contempt perpetrated by the Judgment-debtor's agents."

The minute of the magistrate of the 3rd March 1993 reads "By

consent, application of Applicant which has no opposition the application for rescission is granted". But then (to this comedy of errors) there should be explanation to these questions:

(a) Why does it appear that the matter was brought before the magistrate without a notice of set down? There is no explanation.

(b) Why did the Plaintiff/Respondent (in the Court a quo) not file his opposing papers or at least set down the matter with a view to presenting his objections to the application? Mr. Mahlakeng for the Plaintiff/ Respondent says that he was not bound to move or to take steps to prosecute what essentially was his opponent's application. When the circumstances concerning the conduct of the parties are weighed the first one exhibits more absence of fair play, and more absence of good faith than the other. It is interesting to note the reply to the Applicants paragraph 6 by the Respondents' Attorney in his affidavit. It is as follows:

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7.1 Contents of this paragraph as far as they refer to me

are most unfortunate to say the least. I never and could never make such a serious misrepresentation to the court. This is a very serious aspersion on my integrity for which my learned friend owes me an apology.

7.2 It is my humble submission that the application was made and moved timeously and that there was no irregularity for which at least the 2nd respondent and I can be blamed. I deny having misled or negotiated the court into doing anything wrong."

It is clear this reply is merely emotive and answers nothing issuably. It is unable to answer as to the need to have given notice to the other party even by informal means or invitation if it was difficult to issue a formal notice of set down. But in any event how would the court be approached without notice. I cannot accept this approach by the Respondents' Counsel (Applicant/Defendants Counsel in the Court a quo). Notice and service on the opposite party is the bedrock of our civil procedure and the very foundation of natural justice which Counsels can only ignore at their peril. I agree that this granting of rescission of judgment of the 3rd March 1993 was grossly irregular and indefensible. It clearly militates against fair play.

I am not persuaded that the mere filing of an application for rescission of judgment and for suspension of the writ has the effect staying of execution. It is not without merit or wisdom that an applicant for rescission of judgment will usually, outrightly and instantly apply urgently for an order for stay of execution pending his application for rescission of judgment. This the 2nd Rspondent did not do. It is in this ideal circumstances that an applicant will also join the messenger of Court as a Respondent. This application should succeed.

In the premises I would make the following orders:

(a) The default judgment in CC 852/92 between the Applicant and Second Respondent is re-instated unless rescinded in terms of the rules of Court.

(b) The writ of execution in CC 852/92 between the Applicant and the Respondent is reinstated unless stayed in terms of rules of Court.

(c) The respondent shall pay the costs of the Court a quo up to the stage of irregular release of the attached goods. Otherwise additional costs shall be levied for any fresh attachment and removal.

(d) The Respondents shall pay the costs of this application.

T. MONAPATHI
JUDGE

12th July, 1994

For the Applicant : Mr. Mahlakeng

For the 2nd Respondent : Mr. Mpobole